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Fenceline Communities and Environmentally Damaging Projects: An Asymptotically Evolving Right To Veto

Ciprian N. Radavoi*

The issue of unwanted facilities siting was discussed for decades by academics, as far as the local community—government dialogue is concerned, in the so-called NIMBY (Not In My Back Yard) and LULU (Locally Unwanted Land Uses) literature; as for the local community-transnational corporation dialogue, it has been more recently analyzed in the stakeholder engagement and the SLO (Social License to Operate) literature, which dissects the emerging transnational corporations' obligation of engaging local communities prior to developing a noxious project. Both frameworks suggest that local communities with some sociological identifier—ethnicity, race, class—have gotten closer to the right to veto a polluting project, but this does not hold for communities defined merely geographically ("fenceline" communities). However, scholars and institutions lately referring to indigenous communities' right to veto often use expressions such as "indigenous communities and other affected groups," indicating a perceived need for expanding this right. Starting from this observation, this Article explores the unclear borders of the right to Free, Prior, and Informed Consent.

 University of International Business and Economics (UIBE), Beijing, China.

I. INTRODUCTION

Environmental protests against noxious project sitings have long been seen in Western democracies, but lately they have become common news even in authoritarian countries like China.[1] The literature analyzes the causes of protests and their solutions from a variety of legal and moral perspectives, but it seems shy in asking, let alone answering, a simple question: has the local community the right to say "no" to a polluting project developed in its vicinity? It surely has the right to be informed, to participate in the environmental decision-making processes, and to judicially challenge a permit. If all these resorts, provided by the constitutional architecture and the internationally assumed obligations of any decent state, fail, the local community may still have hopes to resolve the issue in a private manner as the investors voluntarily undertake, in their corporate social responsibility codes, the obligation to engage communities and obtain their consent. But assuming that both these avenues lead nowhere, and the community stands firm in its position that its neighborhood is closed for a polluting development, is there any right on its side? In other words, communities often have the power to overturn a governmental decision, through mobilization of wide societal forces and through resolute, sometimes violent, physical opposition—but do they have the right to do so? Or, to ask more bluntly: Does the lack of the nonparticipation option turn the right to participate in environmental decision making into an obligation to deliver consent? Does the lack of the veto option turn the right to be consulted by the investor into a masquerade?

While various countries chose distinct legal and political strategies in dealing with the issue, two powerful frameworks have lately witnessed global success, allowing for a universalization of the debate. These are the environmental justice and the indigenous rights movements—and as shown below, both have advanced the power of communities with the respective sociological identifiers to oppose noxious projects affecting

1. *See, e.g.*, *Yanhua Deng & Guobin Yang, Pollution and Protest in China: Environmental Mobilization in Context*, 214 CHINA Q. 321 (2013); Thomas Johnson, *Environmentalism and NIMBYism in China: Promoting a Rules-Based Approach to Public Participation*, 19 ENVTL. POL. 430, 433 (2010) (citation omitted); ANDREW C. MERTHA, CHINA'S WATER WARRIORS: CITIZEN ACTION AND POLICY CHANGE (2008).

their habitat. That leaves behind the question of how to deal with merely geographical communities. Can they also legitimately oppose the anticipated destruction of their environment in the name of competing rights of others? Interestingly, this question is arrived at when following two distinct areas of research: the one on the NIMBY (Not In My Backyard) opposition,[2] having in spotlight attempts of local communities to resist governmental planners' siting of projects deemed locally or regionally necessary, but unwanted locally; and the one on engagement, referring to the soft law obligation of investors, especially in the extractive industry, to negotiate with local communities the terms of the project, including the environmental impacts.

True, there is a significant difference: in the first case, the project is assumedly necessary, e.g., a landfill or an incinerator, so various locations compete in their efforts to keep it away, while in the second case, there is usually only one possible location, so one local community asserts its environmental rights against the wider community's claimed developmental rights and the investor's economic ones. Nevertheless, the identity of actors (local communities), processes (siting of potentially polluting facilities), underlying rights (environmental, developmental), and types of justice concerned (distributive), together with the unclear extent of the existence of a right to withhold consent, plead for adjoining the two cases. This Article attempts to shed some light on the evolution toward a right to communal environmental veto within the boundaries of a statist assumption—that is to say, without reaching the territory of anarchism and its proposals for self-governing, sustainable communities. In fact, this Article purposely avoids taking the discussion into the field of sustainable development, agreeing with authors who have concluded that squeezing environmental concerns, intra- and intergenerational distributive justice and equity, poverty alleviation, and other noble concepts into this master framework rendered it inoperable.[3]

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2. Defined by the *Oxford English Dictionary* as "an attitude ascribed to persons who object to the siting of something they regard as detrimental or hazardous in their own neighborhood, while by implication raising no such objections to similar development elsewhere." *Nimby*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/245895?redirectedfrom=numby#eid (last visited Nov. 23, 2015).

3. *See, e.g.*, David Carruthers, *From Opposition to Orthodoxy: The Remaking of Sustainable Development*, 18 J. THIRD WORLD STUD. 93, 102-03 (2001) (citation omitted); Subhabrata Bobby Banerjee, *Who Sustains Whose Development? Sustainable Development and the Reinvention of Nature*, 24 ORG. STUD. 143, 169 (2003).

II. RACIAL AND INDIGENOUS COMMUNITIES' SPECIAL RIGHT TO VETO

The right to participation in environmental matters is an uncontested human right today. Stipulated for the first time in Principle 10 of the Rio Declaration,[4] it was given solid shape in the following decades in treaties such as the Convention on Access to Information, Public Participation in Decision Making, Access to Justice in Environmental Matters (Aarhus Convention),[5] and the Convention on Biodiversity.[6] Some non-binding documents relevant to the topic are the 2010 United Nations Environment Programme Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters,[7] and the 2011 UN Guiding Principles on Business and Human Rights.[8]

But participation, as several of these documents emphasize, should be meaningful,[9] a desideratum not easily achievable in the case of projects benefitting the whole society, but bringing environmental damage to the local communities where they are sited—such as waste disposal facilities (landfills and incinerators), oil refineries, thermal or nuclear energy plants, extraction projects, factories generating high pollution, large-scale agricultural projects, and even airports. When one is asked to participate in something of which negative impacts clearly outweigh the benefits, "meaningful" means little. In reality, in the siting process, participation rarely goes beyond the middle rungs of Arnstein's participation ladder,[10] i.e., informing and consulting the affected communities, while the lowest rung in Arnstein's ladder (manipulation, for example by co-option of community leaders) is frequent.[11]

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4. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development,* U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I, ¶ 10 (Aug. 12, 1992).

5. Convention on Access to Information, Public Participation in Decision Making, and Justice in Environmental Matters art. 1, June 25, 1998, 2161 U.N.T.S. 447.

6. Convention on Biological Diversity art. 13, June 5, 1992, 1760 U.N.T.S. 79.

7. *See Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, UNITED NATIONS ENV'T PROGRAMME (Feb. 26, 2010), Unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_ENV_INFO_2.pdf.

8. *See* United Nations Office of the High Comm'r for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc HR/PUB/11/04 (2011).

9. The U.N. Guiding Principles speak of corporations' "meaningful consultation with potentially affected groups and other relevant stakeholders." *Id.* at 19.

10. Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 219-20 (1969) (citation omitted).

11. *Id.* at 218 (citation omitted).

With increased resistance to LULUs (Locally Unwanted Land Uses), and operating with generous, but fuzzy, concepts like fairness and participation, governments have to find ways to reconcile conflicting interests among communities—be they local communities, in the case of NIMBYs, or a local community and the whole society in cases of NIABYs (Not In Anyone's Back Yard).[12] Apparently, the administrations in developed countries have not done a good job over the last century in managing the intra-national distribution of environmental harm, disfavoring poor and racial minority neighborhoods, which lack the financial and political resources to challenge environmentally damaging investments. That discrimination, termed environmental racism, has led to the emergence of the environmental justice (EJ) movement,[13] which in the 1980s became in the United States a national action frame for minority and poor communities to mobilize against siting of toxic waste and industries in their vicinity.[14]

Incorporating racism, injustice, and environmentalism in one master frame,[15] EJ proved extremely potent, leading to the adoption of several laws addressing the issue in the Western democracies,[16] and the creation of specialized institutions.[17] The racial minority communities in developed countries thus have improved their capacity to veto a project by activating the powerful master frame of EJ, but this leaves us with the

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12. Not In Anyone's Back Yard, referring to projects that can be located in only one place, such as a mining exploitation, and thus a rejection by the community automatically means the death of the project. The conflict, in this case, is the well-known dilemma of sustainability versus development.

13. The movement was initiated in 1982, with the massive protests in Warren County (North Carolina) against the siting of a polychlorinated biphenyl (PCB) landfill in an Afro-American neighborhood. *See* Hilda E. Kurtz, *Reflections on the Iconography of Environmental Justice Activism*, 37 AREA 79, 80 (2005).

14. Stella M. Čapek, *The "Environmental Justice" Frame: A Conceptual Discussion and an Application*, 40 SOC. PROBS. 5, 21 (1993).

15. Dorceta E. Taylor, *The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses*, 43 AM. BEHAV. SCIENTIST 508, 514 (2000).

16. In the United States, the basis of all environmental justice policy in federal agencies after 1994 was formed in Executive Order No. 12,898, 3 C.F.R. § 859 (1995). In the European Union, Council Directive 2003/35/EC on Public Participation, 2003 O.J. (L 156) 17 led to the adoption of environmental justice law in Spain. *See* Ley 27/2006, de 18 de julio, Por la que se Regulan los Derechos de Acceso a la Información, de Participación Pública y de Acceso a la Justicia en Materia de Medio Ambiente (B.O.E. 2006, 171) (Spain). After national consultation, the United Kingdom adopted the Clean Neighborhoods and Environment Act 2005, C. 16, §§ 1-111 (United Kingdom).

17. *See, e.g.*, *National Environmental Justice Advisory Council*, EPA (July 2012), http://www3.epa.gov/environmentaljustice/resources/publications/factsheets/fact-sheet-nejac.pdf; *Federal Interagency Working Group on Environmental Justice*, EPA, http://www3.epa.gov/environmental/justice/interagency/index.html (last updated Oct. 21, 2015).

question of what happens with the other local communities: do they also have a right to oppose noxious projects? They have the possibility, by building political alliances, for example, through their representatives in higher levels of local and central administration, but the success of these actions is uncertain because there is no clearly articulated right underlying them: neither in the internal normative net of the state, where environmental participation means at maximum consultation on some characteristics of the project, nor in the international human rights architecture, where the right to a clean environment was not established, at least not in a form enforceable in such cases.

Moreover, the possible advantage of better-off communities is limited to the prior, informal, behind-the-scene stages of opposition to a noxious project. Here, the advantage is confined to the silent activation of power networks; a public, open NIMBY opposition is perceived negatively as a selfish attempt to pass "on harmful projects to poorer, less organized communities,"[18] and would thus receive little support. Once the opposition takes a formal shape—e.g., requests addressed to the administrative organs in charge of planning, or judicial claims—it reaches a class-neutral territory.[19] Administrative requests of halting a project have little chance of success, and judicial claims can only address technical errors in the project, such as a faulty Environmental Impact Assessment (EIA).[20] Once these steps are exhausted and the resistance reaches the highest stage, turning into a social demand, a mere geographical community is in fact disadvantaged over a poor or a racial minority community due to the activation of the EJ master frame.

Indigenous people have recently come even closer to a right to veto a polluting project, given their special status in international law. The foundations of their rights in the Indigenous and Tribal Peoples Convention (also known as ILO Convention 169)[21] mainly referred to prohibiting nonconsensual displacement and were based on self-

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18. Malte P. Benjamins, *International Actors in NIMBY Controversies: Obstacle or Opportunity for Environmental Campaigns?*, 28 CHINA INFO. 338, 344 (2014).

19. Class or race may be factors in the initial stages of siting, where politics or power may play a role. Once the dispute reaches adversarial procedures that are well regulated and managed by the state (administratively or judicially), it is less likely that the decision will be in any way influenced by the characteristics of the community.

20. *See* Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B. C. ENVTL. AFF. L. REV. 601, 619 (2006) (citing 5 U.S.C. §§ 702, 704 (2000)).

21. *Indigenous and Tribal Peoples Convention,* ILO (June 27, 1989), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C169.

determination and communal, informal property rights on their lands.[22] In 2007, an environmental dimension was added: the United Nations Declaration on the Rights of Indigenous People, benefitting from almost unanimous worldwide support after Australia, Canada, New Zealand, and the United States reconsidered their initial rejection, specifically required in article 29/2 that "no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior, and informed consent."[23]

But even in the absence of such an explicit environmental provision, any administrative decision that affects them was conditioned by the existence of the free, prior, and informed consent (FPIC), as stipulated in article 32 of the same document and reaffirmed most recently by heads of state and government at the 2014 World Conference on Indigenous Peoples.[24] With the Inter-American Court of Human Rights' decision in *Kichwa v. Ecuador*[25] confirming the necessity of FPIC in *all* decisions potentially affecting indigenous people,[26] with the African Commission[27] and European human rights documents[28] taking similar approaches, indigenous people now receive significant global support in their quest for self-determination and its particular manifestation of denying consent to an unwanted project, including for environmental concerns.

Although rooted in different moral and legal grounds—fairness and nondiscrimination, in the case of racial minority communities in developed countries, and self-determination and property in the case of indigenous peoples—the two cases have in common a significant impact on the siting decisions of their governments. Both racial minority and indigenous communities can say "NIMBY!" with stronger arguments than a mere geographical community. The common denominator of vulnerability of these communities actually led commentators, as shown

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22. Carol Y. Verbeek, Note, *Free, Prior, Informed Consent: The Key to Self-Determination*, 37 AM.-INDIAN L. REV. 263, 269-73 (2012).

23. G.A. Res. 61/295, at 8 (Oct. 2, 2007).

24. *Id.* at 9.

25. Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

26. Previously, IACtHR was of the opinion that only projects with major impacts need consent, all other ones sufficing consultation. *See* Verbeek, *supra* note 22, at 269 (citing Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 138 (Nov. 28, 2007)).

27. *See Indigenous Peoples in Africa: The Forgotten Peoples?*, AFR. COMM'N ON HUM. & PEOPLE'S RTS. (2006), http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf.

28. *Expert Mechanism on the Rights of Indigenous Peoples, Fifth Session, Statement on Behalf of the European Union,* EUROPEAN UNION (July 9-13, 2012), http://eeas.europa.eu/delegations/un_geneva/documents/eu_statments/human_right/20120711_-indigenous_peoples.pdf.

in the next section, to ask for an extension of the FPIC rights from indigenous groups to all vulnerable communities.[29] This brings us to the already mentioned problem: if all marginalized communities characterize their opposition to noxious projects as a fight for social justice, potentially mobilizing wide societal support, this leaves the non-marginalized communities with the blame of selfishness when they struggle for the same cause.

III. FROM INDIGENOUS TO "OTHER VULNERABLE GROUPS"?

The unclear extent of the community's right to reject a project on environmental grounds was timidly discussed in the scholar community, especially in the literature on the Social License to Operate (SLO).[30] However, there is some degree of confusion on the consequential link between consent and consultation; uncarefully manipulating these terms leads to (intentionally or not) avoiding the essential issue of the community's right to "no," while putting the focus on the right to know. An illustration of the confusion is the parallel presentation by one author[31] of the Philippines' and Canada's public policies imposing duties on corporations in relation to the affected communities. The author presents the cases as similar, when in reality the Philippines conditions issuance of the permits on the community's consent,[32] whereas the Canadian document only requires consultation with the aim of incorporating community grievances into corporate decisions.[33] Another illustration of the confusion is the tricky interpretation of the "C" in the FPIC acronym as sometimes standing for *Consultation*, and other times, especially when indigenous people are concerned, as standing for Consent.[34]

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29. *See, e.g.*, Subhabrata Bobby Banerjee, *Voices of the Governed: Towards a Theory of the Translocal, 18 ORG. 323, 327 (2011); Robert Goodland, Free, Prior and Informed Consent and the World Bank Group*, 4 SUSTAINABLE DEV. L. & POL'Y 66, 69 (2004).

30. *See, e.g.*, Bruce Harvey, *Social Development will not Deliver Social License to Operate for the Extractive Sector*, 1 EXTRACTIVE INDUS. & SOC'Y 7 (2014) (analyzing the tendency of SLO to blur appropriate boundaries between government, business, and community); *see also* Ciprian N. Radavoi, *Locating Local Community Interests Between Government's Assurances and Investor's Expectations*, *in* CORPORATE RESPONSIBILITY & SUSTAINABLE DEVELOPMENT: THE NEXUS OF PRIVATE AND PUBLIC INTERESTS 81, 93 (Lez Rayman-Bacchus & Philip R. Walsh, eds., forthcoming Dec. 2015) (discussing the problem of SLO consultancy firms avoiding the issue of consent).

31. Barnali Choudhury, *Aligning Corporate and Community Interests: From Abominable to Symbiotic*, 2014 BYU L. REV. 257, 299.

32. *Id.*

33. *Id.*

34. The World Bank's view is that consultation is required, but does not result in a veto power for indigenous communities. *Indigenous Peoples, Operation Manual*, WORLD BANK, para.

Addressing the confusion, Parsons, Lacey, and Moffat have emphasized the gap between the tangible perception suggested by the term "License" in "Social License to Operate" and the metaphorical conceptualization by managers, as an intangible and unwritten tool governing processes of engagement.[35] They suggest instead that "[a] more robust demonstration would perhaps incorporate the principle of free, prior and informed consent, so that both tangible and intangible elements are present."[36] In fact, as mentioned above, this view is already implemented to some extent in the Philippines, where community consent is an essential legal condition for planners in approving projects that require an EIA.[37]

While Parsons, Lacey, and Moffat base their suggestion on actual unsatisfactory conceptualization of SLO by managers, other authors plead for expansion based on a parallel with the FPIC right achieved by indigenous populations. One approach is to stretch its boundaries in order to accommodate vulnerable categories in general: a former director of the World Bank argues that "FPIC should be applied to all communities, certainly for indigenous peoples, but also the poor in general."[38] Similarly, noting that "[i]t is not just Indigenous communities that are affected by the 'development' curse," Banerjee builds his thesis on internal colonialism in India referring to both indigenous and rural communities affected by extractive projects.[39] Discussing FPIC in mining and forestry, Mahanty and McDermott[40] also have in focus indigenous populations "and other vulnerable local populations."

The issue of expanding the indigenous peoples' right to veto, in particular circumstances, to other vulnerable categories is not only a theoretical inquiry of scholars. The same case is supported by

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1, http://web.worldbank.org (search in search bar for "OP 4.10 Indigenous Peoples"; then follow "Ext Opmanual-OP 4.10-Indigenous Peoples" hyperlink) (last updated Apr. 2013).

35. Richard Parsons, Justine Lacey & Kieren Moffat, *Maintaining Legitimacy of a Contested Practice: How the Minerals Industry Understands Its 'Social License To Operate*,*'* 41 RESOURCES POL'Y 83, 88 (2014).

36. *Id.* at 89.

37. Order To Further Strengthen the Implementation of the Environmental Impact Statement System, Admin. Order No. 96-37 (Dec. 2, 1996) (Phil.), http://www.denr.gov.ph/policy/1996/ENV_DAO_1996-37.pdf; *see also* Lourdes M. Cooper & Jennifer A. Elliott, *Public Participation and Social Acceptability in the Philippine EIA Process*, 2 ENVTL. ASSESSMENT POL'Y & MGMT. 339 (2000).

38. Goodland, *supra* note 29, at 69.

39. Banerjee, *supra* note 29, at 327 (citing ARUNDHATI ROY, POWER POLITICS (2d ed. 2001).

40. Sango Mahanty & Constance L. McDermott, *How Does 'Free, Prior and Informed Consent' (FPIC) Impact Social Equity? Lessons from Mining and Forestry and Their Implications for REDD+*, 35 LAND USE POL'Y 406, 415 (2013).

documents issued by industry organizations—for instance, the World Commission on Dams discusses consent by "indigenous and tribal peoples, women and other vulnerable groups."[41] The United Nations Economic and Social Council, in its Maastricht Declaration on Environmental Democracy, also indirectly supports the case for a veto right to all vulnerable communities by deploring the adoption of noxious projects in spite of objections of the affected people, "in particular that of vulnerable groups, such as children and women, rural communities and the poor."[42]

An even wider perspective excludes any sociological characterization of the community for which the FPIC is discussed. The World Resources Institute, for example, argues:

> Although the right to FPIC is more firmly entrenched for indigenous communities, there is a growing recognition that *all communities* should have a meaningful role in making decisions about projects that directly affect them, *including the ability to refuse to host projects* that do not provide adequate benefits or help them to realize their development aspirations.
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> For nonindigenous communities, the case for FPIC is based on (1) the right to meaningful participation in environmental decision making; (2) the right to control access to their lands and resources; (3) contemporary standards of public participation as a hallmark of legitimate governance; and (4) basic principles of equity and justice.[43]

There is, however, some confusion in many of the scholarly and business perspectives. For example, an industry-led initiative for sustainable development in mining admits the FPIC principle for all affected communities . . . but not really:

> Land use decisions should be arrived at through a process that respects the principle of prior informed consent arrived at through democratic decision-making processes that account for the rights and interests of communities

41. WORLD COMM'N ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 215 (2000).

42. U.N. Econ. & Soc. Council, Maastricht Declaration: Transparency as a Driving Force for Environmental Democracy, ECE/MP.PRTR/2014/2/Add.1 (July 2, 2014).

43. STEVEN HERZ, ANTONIDA VINA & JONATHAN SOHN, WORLD RES. INST., DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT 9-10 (Joan O'Callaghan ed., 2007) (emphasis added) (citing U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, ¶ 10, U.N. Doc. A/Conf. 151/26/Rev.1 (vol. I), annex I (Aug. 12, 1992); Moiwana Vill. v. Suriname, Preliminary Objections, Mertis, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 191 (Nov. 28, 2007)).

> and other stakeholders, *while still allowing for the negotiated use of renewable and non-renewable resources*.[44]

Similarly, in search of a moral and legal ground to expand the FPIC from indigenous to all poor communities, Goodland[45] argues that democracy should be the basis of consent, rather than proneness to suffering. A democratic decision-making process, however, would have the effect of extending the veto rights to all fenceline communities, not only the disadvantaged ones.

While the academic and institutional authors cited above are correct that vulnerable groups need protection from abusive siting of polluting facilities in their environment, one problem is that discussing it in the context of indigenous rights creates confusion. With the indigenous rights' distinct legal and moral base, extending their heavily fought-for FPIC to other vulnerable groups is not only conceptually but also morally and strategically unsustainable; like in other cases when similarity of reasons was not seen as enough for similarity of treatment because a particular category needed special protection,[46] the case for expanding the FPIC should be analyzed in total separation from the indigenous peoples' situation.

The starting point thus should be the environmental justice debate, where the argument is mainly nondiscrimination. But this is stuffed mostly with empirical arguments extracted from the unbalanced noxious siting in disadvantaged communities, as "no single method for assessing environmental justice existed, or [is] ever likely to exist."[47] If contained in the territory of rights and claims, the debate should answer the question: discrimination from what? Because the two main motivators of NIMBY protests are the decrease in property prices and in the environmental quality of communities, it is fair to infer that the rights in the enjoyment of which racial minority and poor communities were discriminated are property and a clean environment.

The focus of this Article is environmental. The next Part argues that the financial aspect in fact can justify the blame of selfishness on the NIMBY protests. Under these circumstances, the real problem of the

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44. THE MMSD ASSURANCE GRP., BREAKING NEW GROUND: MINING, MINERALS AND SUSTAINABLE DEVELOPMENT 25 (2002).

45. Goodland, *supra* note 29.

46. The United Nations recommends the avoidance of the term "refugees" for "environmentally displaced people." *See Climate Change, Natural Disasters and Human Displacement: A UNCHR Perspective*, UNHCR (Oct. 23, 2008), http://www.refworld.org/docid/492bb6b92.html.

47. EDWARDO LAO RHODES, ENVIRONMENTAL JUSTICE IN AMERICA: A NEW PARADIGM 120 (2003).

existence of a right to veto should be limited to the environmentally grounded rejection of an investment when either (1) several locations have been correctly identified as suitable and none is willing to trade off for compensation; or (2) only one location is possible, like in the case of extractive projects, and the community is not willing to accept the trade-off proposed by the investor and/or the authorities. For other situations, like a wrongly selected community—intentionally or not, for racial or whatever reasons—the protests only bring about the discussion of fairness and the legitimacy of a certain administrative act,[48] but not the right to veto.

In Feinberg's famous analysis, rights are valid claims encompassing two distinct dimensions: they are claims to something, and they are claims against someone.[49] The *something* in our case is a clean environment: water, air, and soil. True, these are considered second-class rights in comparison to more fundamental rights,[50] but are at a minimum seen as a precondition of the fundamental right to life,[51] and in any case a precondition for the right to health.[52] The International Covenant on Economic, Social and Cultural Rights provides for the right "to the enjoyment of the highest attainable standard of physical . . . health," and it further defines it as an inclusive right made of "access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions."[53] However weak it may be for the time being,[54] such a right to healthy environmental conditions is the same for all communities found by the government planners as suitable to host the noxious project;

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48. Richard G. Kuhn & Kevin R. Ballard, *Canadian Innovations in Siting Hazardous Waste Management Facilities*, 22 ENVTL. MGMT. 533, 534 (1998). Local opposition functions as a checking factor against incompetent siting decision making.

49. Joel Feinberg, *Duties, Rights, and Claims*, 3 AM. PHIL. Q. 137, 137 (1966).

50. Richard P. Hiskes, *The Right to a Green Future: Human Rights, Environmentalism, and Intergenerational Justice*, 27 HUM. RTS. Q. 1346, 1348 (2005) (quoting Shari Collins-Chobanian, *Beyond Sax and Welfare Interests: A Case for Environmental Rights*, 22 ENVTL. ETHICS 133, 133, 148 (2000)).

51. Collins-Chobanian, *supra* note 51, at 133.

52. *See id.* at 147-48.

53. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/21 (2000), (citing G.A. Res. 2200A (XXI), International Covenant of Economic, Social, and Cultural Rights (Dec. 16, 1966)).

54. Things are changing, as more than ninety countries have included the right to live in a healthy environment in their constitutions. Besides, there is increased nongovernmental international pressure for the recognition of a justiciable human right to a clean environment, in the context of the climate change debate and the sustainable development debate. For example, the influential International Bar Association recently pleaded for it. Int'l Bar Ass'n, *Achieving Justice and Human Rights in an Era of Climate Disruption*, Climate Change Justice and Human Rights Task Force Report 1, 9 (July 2014).

so, it is a solid enough basis for comparatively assessing the said communities' right to reject the project.

As for the "someone" in Feinberg's definition, the claim is against the government that gives a green light to the noxious project.[55] But rights have limitations.[56] In the first case—a competition between suitable locations to avoid hosting the facility—the community's right to a clean environment is limited, assuming that the project development is necessary regionally or nationally, by the similar right of other communities that could potentially host it.[57] In the second case—only one suitable location nationally—the local community rights are limited by the general welfare, an aspect that brings about the utilitarian perspective of the greatest happiness for the greatest number.[58] While the second is not technically a NIMBY, but more a NIABY, the exploration of the veto right is centered on an aggregate environmental right as well, and this is a strong link between the two cases. Both require balancing[59] as constitutional interpretation of their implementation and strength.[60] Some specific issues of each of the two situations are further explored in the following sections.

IV. DISCUSSION I: LOCAL COMMUNITY VS. LOCAL COMMUNITY

A. Property Value vs. Environmental "Rights"

As mentioned above, the two main motivators of the NIMBY protests are financial and environmental concerns.[61] The former is related to property prices, and it appears indeed as fair to expect better-off communities to carry a heavier burden in order to rebalance historical and social injustice. The blame of selfishness attributed to better-off communities seems somewhat justified here, as we talk of an interest rather than a right. So, the conflict is more about fairness.[62] Such would

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55. Feinberg, *supra* note 49.

56. Captured for example in the American Declaration: "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy." American Declaration of the Rights and Duties of Man, 2 May 1948, 9th Conference of American States, Acts and Documents 289, Article XXVIII (1953).

57. *See* Kuhn & Ballard, *supra* note 48, at 536.

58. *See id.* at 535.

59. In Hiskes' view, balancing is the very fundament of the environmental rights construct—"they are rights due us—not because of something in our individual nature—but because of the effects of our relationships with others." Hiskes, *supra* note 50, at 1352.

60. *See id.*

61. *See* Kuhn & Ballard, *supra* note 48, at 543.

62. *See* Maarten Wolsink, *Wind Power Implementation: The Nature of Public Attitudes: Equity and Fairness Instead of "Backyard Motives,"* 11 RENEWABLE & SUSTAINABLE ENERGY REVIEWS 1188, 1203 (2007).

be the case with the siting of a prison, an asylum, or a wind-farm, which may be necessary regionally, but could bring down the real estate prices locally due to associated aesthetic, social, or other nuisances. An imbalanced siting in this perspective, disfavoring well-off neighborhoods, would be consistent with social justice views that "[t]he distribution of . . . wealth created by capitalism [is] unacceptably unequal, and should be changed by appropriate measures."[63] With the property seen as a potential source of income, an unequal burden, protecting disadvantaged neighborhoods would also match Rawls' "difference principle" stating that inequalities of income are justified if they benefit the worst off.[64] Therefore, a protest by the well-off community is inappropriate: "It would be unreasonable . . . to reject a principle because it imposed a burden on you when every alternative principle would impose much greater burdens on others."[65] The burden of a property value decrease, in relative terms, is higher in poor communities—unlike the burden of pollution, which impacts people's health equally. Therefore, it may justify protecting disadvantaged communities in decisions on siting that impact property value. This is not to say that such a view would gather unanimous support—libertarians would be against this sort of "redistributive" siting as it affects liberty by the taking of just holdings—but only that a positive discrimination strictly in allocating nuisance and the subsequent price decline may be acceptable under some theories.[66]

But things are more complicated when it comes to health and the environment, as demonstrated by the fact that communities tend to refuse compensation in cases of polluting projects; the rejection being specifically related to a perception of their "right" to a safe and clean environment.[67] The existence of a right in which the protests are grounded should remove the label of selfishness even for the NIMBYs of well-off, white neighborhoods: rights "can be demanded, claimed, [or] insisted upon, without embarrassment or shame,"[68] and even more, they are in the end "both an expression and a reinforcement of individual selfishness."[69]

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63. BRIAN BARRY, WHY SOCIAL JUSTICE MATTERS 5 (2005).

64. JOHN RAWLS, A THEORY OF JUSTICE 78 (1971).

65. Thomas M. Scanlon, *Contractualism and Utilitarianism*, *in* UTILITARIANISM AND BEYOND 103, 111 (Amartya Sen & Bernard Williams eds., 1982).

66. *Id.*

67. Susana Ferreira & Louise Gallagher, *Protest Responses and Community Attitudes Toward Accepting Compensation To Host Waste Disposal Infrastructure*, 27 LAND USE POL'Y 638, 640 (2010).

68. Feinberg, *supra* note 49, at 143.

69. Joel Feinberg, *The Social Importance of Moral Rights*, 6 PHIL. PERSP. 175, 176 (1992).

B. A Right to Environmental Veto for Each, but Not All, Local Communities?

With more communities competing for keeping the project out of their backyards, all goes back to fair siting.[70] The problem is what, exactly, "fair" means. NIMBY resembles, in a nonacademic perspective, the situation described by the old joke in which the two friends are chased by a bear: "Do you think we can outrun the bear?" "No, but I hope I can outrun you." That is to say, the local communities competing for keeping the polluting project away should clarify who they need to outrun and by which rules.

The issue of whom to outrun is usually not discussed openly, and this is one cause of growing tension in the targeted community.[71] Groups, like individuals, will always tend to form comparative judgments that can lead to frustration and a feeling of injustice, like in the interviews of Ferreira and Gallagher on siting a landfill in various Dublin neighborhoods, quoting a resident of Ringsend: "Why isn't it being built in Killiney or Howth?"[72]

The fact that even compensation can be rejected, as shown by siting deadlocks in the United States and Canada,[73] reinforces the idea that *each* community has a right to veto a polluting project. But not *all* suitable communities have it, because the landfill or the electric plant has to be sited somewhere—and this is the dead end of the discussion in the case of multiple suitable communities, justifying the assertion that the right to veto can only grow asymptotically.

A (conflict of) rights perspective is not necessarily helpful in the case, due to the multiple competing theoretical perspectives. Adepts of the interest theory of rights see the group right either as an aggregation of individuals' interests that as such would be not enough to justify a claim ("collective rights"—held as a group, in an example provided by Jones,[74] by the residents of one neighborhood affected by pollution that is not health-threatening), or a moral standing of a community itself, which

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70. *See, e.g.*, Bruno S. Frey & Felix Oberholzer-Gee, *Fair Siting Procedures: An Empirical Analysis of Their Importance and Characteristics*, 15 J. POL'Y ANALYSIS & MGMT. 353 (1996).

71. *See* Ferreira & Gallagher, *supra* note 67, at 638.

72. *Id.* at 640.

73. "[V]irtually no new hazardous waste treatment or disposal facilities have been opened in either nation since the mid-1980s." BARRY G. RABE, BEYOND NIMBY: HAZARDOUS WASTE SITING IN CANADA AND THE UNITED STATES 2 (1994) (citation omitted).

74. Peter Jones, *Human Rights, Groups Rights, and People's Rights*, 21 HUM. RTS. Q. 80, 85, 88 (1999).

Jones calls "'corporate' conception of group rights."[75] But the existence of a moral standing is significant only in the case of the interest theory of rights; other authors, relying on the foundational analysis of Hohfeld,[76] distinguish between claim, liberty, immunity, and power rights; a right's value differs according to which of these elements it has at its core, but regardless of this aspect, all rights have in common that they put the right-holder in a privileged position of dominion over some second party.[77] The dominion theory of rights, thus, has the advantage of leaving aside the moral significance of a right, which was one reason for questioning the capability of groups of having rights. At the other end, social-democratic approaches play the moral side even harder, leaning the balance of rights toward vulnerable categories; in this perspective, unlike liberal approaches that see rights violations as consequences of conscious actions of others (e.g., the government), social-democrat authors, like Donnelly[78] or Shue,[79] see violations as a result of systemic societal imbalances.

This very brief account of some group rights theories shows the difficulty of identifying a set of normative (as opposed to procedural) lines guiding the process of arbitration between communities rejecting a project that, in the end, one of them must host. In the interest theory, all targeted communities have an equal interest.[80] *Ceteris paribus*, should we account for their collective right by simply counting the number of residents, if we see the group right as a collective right? Or should we move further down and allow a democratic decision *within* each community (as in fact, many will want the project in spite of the environmental damage, for example for job opportunities)—and then again democratically select the community with the highest percentage of positive votes? Or should we accept the existence of a corporate right of the communities with a strong sociological identifier—which would give them a stronger standing? In a dominion perspective, various communities would rely on different Hohfeldian elements, from liberty

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75. *Id.* at 86.

76. Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, at 710, 710 (Yale L. Sch. Faculty Scholarship Ser. 4378, 1917).

77. CARL WELLMAN, A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS, AND MORALS 96 (1985).

78. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 14 (2d ed. 2003).

79. *See* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 17 (2d ed. 1996).

80. Jones, *supra* note 74 at 83 (quoting JASON RAZ, THE MORALITY OF FREEDOM 166 (1986)).

in the case of marginalized communities, to power in the case of influential neighborhoods.[81]

With such a variety of normative viewpoints, the solution lies in procedures—that is to say, a clear set of stipulations on what counts in the selection, and to what extent. To put it in Rawls' perspective, we only need "pure background procedural justice" to determine entitlements in distribution.[82] A solution recently suggested is that a two-step process should be employed: first, a list of the most appropriate technical locations should be drafted, and second, the location leading to least nuisance should be selected from that list.[83] The problem is that, in real life, with the high degree of government distrust found even in democratic societies, it is almost impossible to convince communities that their neighborhood is indeed the most suitable location.[84]

Without clear procedural prescriptions, society tends to intervene—see the environmental justice campaign. This, as said, creates new imbalances in its attempt to rebalance historic wrongs: with the Damocles' sword of the environmental justice frame over their head, with the political rules of environmental justice already in place, and with the media eager for discrimination stories, decision makers in the administration will most likely avoid siting in racial minority communities, unless the community itself accepts, and is willing to trade environmental harm for the benefits it brings (jobs, improved infrastructure, lower taxes in the area, etc.).[85]

When it comes to non-environmental NIMBY protests, the national solutions vary; see, for instance, the opposite solutions adopted by two neighboring countries in Scandinavia: in decisions on introducing wind power technology, Denmark allows affected communities to have a say only at the regional level, while Sweden allows debate at the local level.[86]

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81. *See* WELLMAN, *supra* note 77.

82. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 50, 51 (Erin Kelly ed., 2001).

83. Celalettin Simsek et al., *An Improved Landfill Site Screening Procedure Under NIMBY Syndrome Constraints*, 132 LANDSCAPE & URB. PLAN. 1, 2 (2014).

84. Ferreira & Gallagher *supra* note 67, at 641 (citing Nguyen Quang Tuan & Virginia W. MacLaren, *Community Concerns About Landfills: A Case Study of Hanoi, Vietnam*, 48 J. ENVTL. PLAN. & MGMT. 809 (2005).

85. In fact, a race-to-bottom of communities willing to trade for compensation could be more likely than a deadlock of uncompromising communities, but this is unimportant from this Article's perspective.

86. Patrik Söderholm, et al., *Policy Effectiveness and the Diffusion of Carbon-Free Energy Technology: The Case of Wind Power*, *in* FROM KYOTO TO THE TOWN HALL: MAKING INTERNATIONAL AND NATIONAL CLIMATE POLICY WORK AT THE LOCAL LEVEL 79, 91-92 (Lennart J. Lundqvist & Anders Biel eds., 2007).

But with environmental opposition, universal rights are at stake,[87] which justifies the universalization of the debate. One possible solution—given that the project is necessary but no community is happy to host it—may be a tender among communities interested in negotiating their acceptance. The tender could be preceded, in each community, by referenda organized by the developer, who is supposed to offer incentives of all sorts for a "yes" vote.[88] The whole process, according to the matching principle, should be coordinated at the regional administration level, because for this case that is the level encompassing both costs and benefits of the unwanted land use.[89]

This process would in fact be advantageous to vulnerable communities as well, as they often provide their acceptance for compensations that are less than fair.[90] If the tender is unsuccessful, a process of arbitration among communities could be imagined, with the loser being awarded the highest compensation offered during the tender stage. A demonstrable high environmental awareness prior to planning should weigh heavily in favor of a community withholding consent. This two-step selection process does not answer the question of the community's right to veto, but it enhances the right to participation and it eliminates the danger of both negative and positive discrimination of vulnerable communities.

V. DISCUSSION II: LOCAL COMMUNITY VS. NATIONAL COMMUNITY

A. A Constitutional and Administrative Perspective

The situation of multiple possible locations and the solution suggested in the end of the previous section bring about a combination of all three principles informing social integration: "hierarchical control" (by local authorities in selecting the suitable locations, organizing the process of negotiation and, if necessary, arbitration); "exchange, or coordination in the form of transactions" (the compensation); and "solidarity or normative integration" (by putting all suitable communities

87. As the U.N. Commission on Human Rights agreed in 2001, "everyone has the right to live in a world free from toxic pollution and environmental degradation." Press Release, Environment Programme, Living in a Pollution-Free World a Basic Human Right, U.N. Press Release 01/44 (Apr. 27, 2001).

88. This solution was suggested in Robert Cameron Mitchell & Richard T. Carson, *Property Rights, Protest, and the Siting of Hazardous Waste Facilities*, 76 AM. ECON. REV. 285, 285 (1986).

89. *See* Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 66 (1996).

90. *See* Ferreira & Gallagher, *supra* note 67.

on equal footing).[91] But a situation of the sort encountered in the extractive industries, where the location is a must, presupposes either an application of the authority principle, in the government—local community nexus, or of the exchange principle, in the process of community engagement by investors. Although a protest against siting is not a NIMBY one in this case, the situation is highly similar because the underlying claim is the same (to clean water, air, and soil) and the right to withhold consent is equally unclear.

While new layers of governance have emerged with globalization and all that the engagement process may suggest is a diminution of governments' roles in allocating goods (including negative ones like the environmental harm), the government, and not the corporation, is still the one to which a community should address the "no" to an environmentally polluting project, if such a right was to exist; overstressing the erosion of state powers does not reflect the existing reality.[92] For the moment, a right to environmental veto exists, in the community-state relation, only for indigenous populations and, to a lesser extent, to racial minority communities, as shown above. For other affected communities, the general welfare of the nation and its right to development supposedly make environmental opposition unsustainable, as long as the country's environmental laws are respected in the process.[93] But this assertion is vulnerable to several counterarguments.

First, even admitting the utilitarianist distributive principle of the highest welfare for the highest number, it is doubtful that a particular extractive project will maximize national or regional welfare. In developed countries, the project's contribution may be minor in comparison to the already-existent wealth; moreover, if we speak of rights-based welfare rather than goods-based welfare, other local communities may appreciate an increased local empowerment (a right to veto) in environmental protection more than an insignificant budgetary contribution of a mining project. As for the developing countries, most often the funds obtained by the government are not destined to increase the people's level of life in any way.

Second, and still in a utilitarian perspective, maximization of welfare should more logically be seen in a qualitative rather than quantitative perspective, as very well explained by one author in the context of opposition to fracking:

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91. Alberto Martinelli, *Markets, Governments, Communities and Global Governance*, 18 INT'L SOC. 291, 296 (2003).

92. *See id.* at 304.

93. *See id.* at 299.

> [B]y enabling locals to frustrate the will of the broader majority, do local vetoes yield a policy that fails to maximize utility or welfare? Not necessarily. *If* our goal is to maximize collective utility, a policy that makes *N* people happy may produce lower levels of utility than a policy that makes *N/2* people deliriously happy. By this logic, providing locals with a veto option may indeed maximize utility if we take preference intensities into account. By letting locals decide, we allocate the decision to those who care the most and who experience most of the impacts of fracking.[94]

Third, denying local communities veto rights would annul the very difference between democratic and authoritarian governance. China delivers impressive growth figures partially on the expense of its environment, a trade-off that was imposed on its citizens,[95] while for communities in liberal democracies, the trade-off—compensation of all sorts, in exchange for alteration of its environmental quality—is supposed to be voluntary if we offer environmental participation. If the community cannot say no, the whole participation thing is only a masquerade. It may be too much to assign the whole nation a right for the opposite trade-off, i.e., to renounce development for a clean environment (although countries like Bhutan seem to show the opposite), but at least local communities, once they were given a say, should be afforded the liberty of saying, "no, thank you," without being pointed at as anarchic national development saboteurs.

Fourth, there is no reason to feel compelled by the utilitarian paradigm, at least not in the form that took shape some two centuries ago. We surely have distributive duties to co-citizens, and the state is there to manage them, but we have at least negative distributive duties to the billions beyond our borders as well: to not maximize their lack of well-being. The global environmental crisis has reached a level that is threatening the planet's existence, but the mentality of human individuals, the inefficient international talk, and more generally the structure of human life nowadays make solving the problem of getting humankind out of the crisis impossible;[96] for some authors, the environmental problem lies exactly in the overemphasis on the (selfish) individual,

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94. David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 389 (2014).

95. *See* Junjie Zhang, *Is Environmentally Sustainable Economic Growth Possible in China?*, DIPLOMAT (Jan. 10, 2013), http://www.thediplomat.com/2013/01/is-environmentally-sustainable-economic-growth-possible-in-china/.

96. *See, e.g.*, Ioannis A. Kaskarelis, *Environmental Protection Impossibilities*, 29 HUMANOMICS 220 (2013).

specific to the Western philosophical tradition.[97] Sustainability, it is reminded, is a matter of community rather than the individual[98]; but if so, the unit of fenceline community, defined as the group living within a distance from an industrial project short enough to perceive the associated pollution, may be the most suitable community to bring a real contribution to environmental protection. It is big enough to absorb self-interested pressures from within, but small enough to allow democratic deliberation and to not permit behind-the-doors arrangements. This in fact is the underlying rationale of proposed[99] radical transformations toward anarchist, self-governed sustainable communities; because my analysis discusses the extension of the FPIC right *within* the boundaries of governance—with more or less state weight in the process—the anarchist solutions are in fact the axis toward which this right asymptotically evolves.

In the real contemporary constitutional and administrative arrangements, communities cannot rightfully withhold consent to a polluting project; they can at a maximum negotiate better conditions, be they jobs, convenient compensation, relocation, reduced local taxes, etc. Environmental governance, i.e., collective decision in environmental matters with the state as a non-coercive actor, is more an ideal—and ecological democracy a utopia. If the pollution associated with a certain project is at a level affecting basic rights—life, security, subsistence—then "those who deny [these] rights can have no complaint when their denial . . . is resisted,"[100] but otherwise, the issue of obedience is more complex:[101] is rejection by the local community of a mildly polluting project destructive disobedience, in that it selfishly pursues a target incongruent with the wider group's targets? Or, on the contrary, could the environmental protests be labeled as constructive disobedience, in that they serve the whole nation, for example by showing the way to other communities?

In the end, the problem in the governance perspective may be that siting noxious industries against local environmental opposition has not emerged as a real governance issue, with an associated issue regime. It is

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97. *See* Nathan Pelletier, *Environmental Sustainability as the First Principle of Distributive Justice: Towards an Ecological Communitarian Normative Foundation for Ecological Economics*, 69 ECOLOGICAL ECON. 1887, 1888 (2010).

98. In the case of landfills for example, studies indicate that 6km is the upper range for externality impacts. Ferreira & Gallagher, *supra* note 67.

99. ANDREW DOBSON, GREEN POLITICAL THOUGHT 123-28 (4th ed. 2007).

100. SHUE, *supra* note 79, at 14.

101. *See, e.g.*, Stefano Passini & Davide Morselli, *Authority Relationships Between Obedience and Disobedience*, 27 NEW IDEAS PSYCHOL. 96 (2009).

dealt with within the larger issue regime of the environment generally—although as Rosenau[102] has noted, smaller issues can and should constitute separate issue regimes, governed at least with some rudimentary institutional mechanisms. The environmental participation, as shown before, cannot stand as a mechanism of issue control, as it would require access to the highest rung of the participation ladder.[103] The debate thus is left to the distributive justice field, with its complicated issues of who needs to get what in society, and of the welfare rights' (if any) nature. Even worse, for the last decades the issue has been dispersed into the sustainable development debate—"the interconnection of everything,"[104] which further diminished the chances of contouring an issue regime for the issue of environmental consent.

B. A Normative Perspective

The governance perspective discussed above relies on the *community's perception of governmental demands' legitimacy*: the community disobeys a siting request seen as illegitimate, obeying instead common values it sees as communal rights.[105] In a normative perspective, with "normative" here referring to the ethical prescriptions informing the managers' behavior in performing their corporate duties, it is the *corporation's perception of the community demands' legitimacy* that informs the debate.[106] But for the aim of this Article, i.e., to expose the confusion on the extent of a right to communal environmental veto, the normative debate is just as relevant as the governance one; the only difference is that a possible right to veto is being offered to communities by corporations themselves, whereas in the governance perspectives it was brought about by incremental evolutions in several juxtaposed branches of law.

It is a fact that opposition to multinational corporations and the environmental destruction that comes with some investment projects shifted in the 1990s from host country to local community.[107] While the governance theory explains this phenomenon as just an inevitable

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102. James N. Rosenau, *Governance in the Twenty-First Century*, 1 GLOBAL GOVERNANCE 13, 30 (1995).

103. *See* Arnstein, *supra* note 10, at 223-24 (citation omitted).

104. David G. Victor, *Recovering Sustainable Development*, 85 FOREIGN AFF. 91, 91-92 (2006).

105. Passini & Morselli, *supra* note 101, at 99.

106. John Douglas Bishop, *A Framework for Discussing Normative Theories of Business Ethics*, 10 BUS. ETHICS Q. 563, 573 (2000).

107. *See* David Harvey, *A Conversation with David Harvey*, LOGOS, http://logosjournal.com/issue_5.1/harvey.htm (last visited Nov. 3, 2015).

consequence of globalization, whereby state legitimacy and integrity has weakened,[108] the governmentality theory on the contrary sees it as a state technique to evade the duty of addressing social injustice by transferring responsibilities onto local communities.[109] But regardless of the existence of a state intent in transferring responsibilities downward, the fact is that today, multilevel governance is a reality, so corporations and communities are supposed to resolve by direct negotiations all sorts of issues that previously involved government authority, including the siting of investment projects posing high risks to the environment.

Consequently, a sudden enthusiasm for putting the local community on a pedestal swept the corporate world starting from the 1990s. All major corporations' social responsibility codes now mention community as a major stakeholder that needs to be consulted prior to and during the project development;[110] so do the major lenders' guidelines,[111] and so do the investors' home countries' governments.[112] The mining industry went as far as requiring an SLO, without which exploitations cannot begin or carry on.

The academic research kept pace with this corporate appetence for engaging communities, so the engagement literature grew exponentially from the end of the 1990s.[113] Both the engagement soft-law and the subsequent academic literature approached the issue from normative and regulatory perspectives, providing moral grounds and procedural rules for the process.[114] The latter are limited however to consultation and

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108. *See* Mary Daly, *Governance and Social Policy*, 32 J. SOC. POL'Y 113, 123 (2003).

109. *See* Samuel Hickey & Gilles Mohan, *Towards Participation as Transformation: Critical Themes and Challenges*, *in* PARTICIPATION: FROM TYRANNY TO TRANSFORMATION? 13 (Samuel Hickey & Giles Mohan eds., 2004) (citation omitted).

110. *See, e.g.*, *In Our Nature*, 2014 SUSTAINABILITY OVERVIEW (Int'l Paper, Memphis, Tenn.), 2015, at 11, http://www.internationalpaper.com/documents/EN/Sustainability/Sustainability_Overv.pdf; *Sustainability Report 2014*, SHELL 18 (2014), http://reports.shell.com/sustainability-report/2014/servicepages/downloads/files/entire_shell_sr14.pdf.

111. *See, e.g.*, *Supporting Communities*, BANK AM. http://www.about.bankofamerica.com/en-us/global-impact/supporting-communities.html#fbid=6YKmAR5Scaz (last visited Oct. 29, 2015).

112. See the environmental chapters in the OECD Guidelines for Multinational Enterprises and China's Guidelines for Environmental Protection in Foreign Investment Cooperation. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 42-46 (2011), http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en; *Notification of the Ministry of Commerce and the Ministry of Environmental Protection on Issuing the Guidelines for Environmental Protection in Foreign Investment and Cooperation*, MINISTRY COM., P.R.C. art. 15 (Mar. 2013), http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml.

113. *See, e.g.*, Frances Bowen, Aloysius Newenham–Kahindi & Irene Herremans, *When Suits Meet Roots: The Antecedents and Consequences of Community Engagement Strategy*, 95 J. BUS. ETHICS 297 (2010).

114. *See id.* at 298.

negotiation, not addressing the issue of consent, but in the simple and powerful words of a Canadian community member, "What we should be deciding is whether we want projects of this kind in the first place before we have environmental hearings."[115] The corporate solution to the thorny issue of community consent was often to imply it, a practice denounced by some researchers in the field of stakeholder theory,[116] but without addressing the core of the problem: what are the acceptable justifications and legal consequences of the lack of express consent? We may say therefore that while the existence of consent in government-local community relations meets the potential dead end of other communities' rights, in the investor-community dialogue it has no dead ends; the road simply disappears at some point in the mist.

The stakeholder theories (SHTs) gained quasi-unanimous recognition in the last decades as the best tool to identify who a firm's stakeholders[117] are, determine what types of influences they exert, and recommend how firms should respond to those influences.[118] While most SHTs are strategic or instrumental, there are also normative SHTs[119] asserting that "business enterprises have a moral obligation to consider the interests of all stakeholders regardless of whether or not this is instrumentally to the benefit of the firm or its owners."[120] In a strategic or instrumental view, the attention given to stakeholders is allocated mainly following their power and urgency, rather than their legitimacy (these being the three factors informing stakeholder identification and salience according to Mitchell, Agle, and Wood).[121] There is no doubt that local communities are today essentially stakeholders;[122] with the engagement

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115. Michael Gismondi, *Sociology and Environmental Impact Assessment*, 22 CANADIAN J. SOC. 457, 459 (1997).

116. *See* Harry J. Van Buren, III, *If Fairness Is the Problem, Is Consent the Solution? Integrating ISCT and Stakeholder Theory*, 11 BUS. ETHICS Q. 481, 490 (2001).

117. In the classical definition, any group or individual that "can affect or is affected by the achievement of an organization's objectives." R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (1984).

118. Timothy J. Rowley, *Moving Beyond Dyadic Ties: A Network Theory of Stakeholder Influences*, 22 ACAD. MGMT. REV. 887, 890 (1997).

119. In fact, all stakeholder theories require a normative philosophical foundation; instrumental SHT are only strategic means to achieve the shareholder interests and therefore do not differ from shareholder theories. *See* Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 72 (1995).

120. Bishop, *supra* note 106, at 573.

121. *See* Ronald K. Mitchell, Bradley R. Agle & Donna J. Wood, *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACAD. MGMT. REV. 853, 870 (1997).

122. Amnon Boehm, *The Participation of Businesses in Community Decision Making*, 44 BUS. & SOC'Y 144, 168 (2005).

and the self-assumed obligation, by the mining industry, of obtaining the SLO, local communities may have even become a primary stakeholder in Carroll's classification, i.e., it has a formal relation with the firm.[123] In Mitchell, Agle, and Wood's classification, I see the local community as a claimant stakeholder (high in legitimacy, which is invariable across local communities) rather than an influencer (high in power); power varies across communities and may explain higher attention given to well-off communities, but power variation is irrelevant to the existence of a legitimate claim and the subsequent right of all communities to veto a polluting project.

The communities' claims of legitimacy are uncontested in the stakeholder literature at least when it comes to basic rights, among which one author sees the right to a clean environment.[124] This right becomes the community's stake in a potentially polluting business, enough to give it a top position in any hierarchy of stakeholders' claims and to trigger an equally high corresponding duty from the firm.[125] The problem here is whether such a stake should really be negotiated; not all authors agree that the local community is the right moral forum to decide what is good for its environment. Orts and Strudler for instance argue that SHTs do not provide managers guidance on how to value the environment, including nonhuman species or aesthetic values like an undisturbed environment, and that other legal and moral theories should be applied.[126] But moving the debate in a philosophical field is of little help in the private and very practical process of engagement; nature, in this case, is instrumentally viewed by both actors involved in the process, so there is no reason to assign to only one of them the right to tell the good from wrong when it comes to its use.

If the community has the right to place its stake on the table, the rules are however dictated by the creators of the engagement game, and it seems that its right is in reality an obligation: whether it wants the trade-off or not, the community needs to negotiate. Moreover, the corporation has a stringent need to obtain consent; otherwise, it will need to turn to the government to impose the project, with the embarrassing consequence that the whole engagement issue will be pointed to as just

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123. *See* ARCHIE B. CARROLL & ANN K. BUCHHOLTZ, BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT 431 (4th ed. 2000).

124. Kevin Gibson, *The Moral Basis of Stakeholder Theory*, 26 J. BUS. ETHICS 245, 250 (2000) (citing R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (1984)).

125. *See id.* (citation omitted).

126. Eric W. Orts & Alan Strudler, *The Ethical and Environmental Limits of Stakeholder Theory*, 12 BUS. ETHICS Q. 215, 216 (2002).

self-serving rhetoric. Power asymmetries and the pressure of obtaining consent by all means raise the risk of corporate unfair play, and that is why many theorists have shown concern with this aspect. Freeman,[127] for instance, pleads for engagement that enables all parties to genuinely advocate their interests, while Dawkins [128] speaks of good faith stakeholder engagement as acknowledging power asymmetries and providing mechanisms that diminish those disparities. Van Buren[129] argues for the necessity of express (as opposed to implied) local community consent as a guarantee of procedural fairness, but without discussing the right to withhold consent and the consequences of exercising this right. Although the prime manifestation of good faith in negotiations is to accept a "no," the stakeholder literature only focuses on ways to guarantee the fairness of the local community's "yes."

A discussion on good faith should of course refer to community as well—there is no procedural good faith if, for instance, the negotiations are not undertaken with intent to reach agreement. Because the existence of good faith in this manifestation (sincere intent to agree) and in others (refraining from misleading, being transparent) can be deducted from the parties' behavior, Dawkins had the idea of non-binding arbitration as a solution for stalled corporation-community negotiations.[130] Inspired by the use of arbitration in labor conflicts (trade unions being stakeholders), he suggests the expanded use of this solution for all stakeholder engagement:

> When the actors are not successful in their engagement through negotiation, they should accept the account and/or recommendations of a third-party neutral, which is a very strong evidence of good faith. . . . Third-party neutrals can also serve as arbitrators that make non-binding recommendations. In this instance, the corporation and the stakeholder present their positions to a mutually accepted person or tribunal that studies the issue and renders a public report of conclusions and recommendations for settling the differences, such that the public is informed and can bring pressure for a resolution. Since non-binding arbitration carries no legal weight, the parties retain their right to take other actions as they see fit.[131]

In fact, the forum for community—investor environmental arbitration already exists: in 2001, the Permanent Court of Arbitration adopted the

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127. *See* R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 BUS. ETHICS Q. 409, 416 (1994).

128. Cedric E. Dawkins, *The Principle of Good Faith: Toward Substantive Stakeholder Engagement*, 121 J. BUS. ETHICS 283, 284 (2014).

129. *See* Van Buren, *supra* note 116, at 490.

130. Dawkins, *supra* note 128, at 290.

131. *Id.* at 290-91.

Rules for arbitration of environmental disputes[132]—the first mechanism to allow broad standing for non-state entities. The rules are construed in such a broad manner that they appear procedurally suitable to any conceivable environment-related dispute, including the type I suggest. What is missing is an agreement on the applicable norms and, most importantly, the investor's consent. Of course, establishing jurisdiction *ratione materiae* (what is the exact kind of disputes that are arbitrable) and *ratione personae* (who exactly is the community) would require legal creativity and flexibility, but altogether the solution is not inconceivable.

From the perspective of the right to withhold consent, this procedure may at first sight bring more confusion: once the community engages in a process that may culminate with arbitration, its consent will be implied, and only the terms will remain to be negotiated.[133] But once this drawback is managed, arbitration can be conceived as a solution to assess the fairness of a community veto—perhaps by weighing historic environmental injustice, by evaluating the genuinely environmental nature of the protest, and by reference to some Indicators of Sustainable Development, seen by some as "an indicator of the motivation of people . . . to measure the well-being of their communities along additional axes besides economic wealth."[134] Negotiation and mediation were frequently shown to dramatically favor corporations, which intimidate, unduly influence, or manipulate local representatives;[135] arbitration will level the playing field, and anyway it will rarely be used in practice, as corporations will struggle to avoid this source of financial and reputational damage. But when used, it will benefit corporations as well by securing unchallengeable deals and by avoiding more damaging outcomes like street protests.

In short, a "no" delivered in class arbitration will indicate a profound opposition and not a mere unreasonable stubbornness, while a "yes" will set the foundations for long-term stability in corporate—local community relations. Besides, the business can always resort to governmental support for the imposition of a project even after being given a "no" in a nonbinding arbitration. It is often the case that the "no"

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132. *See Permanent Court of Arbitration (PCA): Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*, 41 INT'L LEGAL MATERIALS 202 (2002).

133. *See id.* at 205.

134. *See* Clark A Miller, *New Civic Epistemologies of Quantification: Making Sense of Indicators of Local and Global Sustainability*, 30 SCI. TECH. & HUM. VALUES 403, 417 (2005).

135. It was suggested for instance that environmentally concerned communities become hostages of the corporations seeking consent, and end up embracing their views due to the Stockholm Syndrome. BARRY COMMONER, MAKING PEACE WITH THE PLANET 177 (1990).

is delivered by violent protests, so things should not be different with arbitration. The advantage of the latter is that the governments, in taking their final decision, cannot blame the protest on some turbulent elements in the community or the instigative actions of environmentalist groups,[136] because arbitral procedures require mass adherence of the concerned population.

VI. CONCLUSION

Several evolutions point to the necessity of a debate over the scope and the extent of FPIC. First, it is unclear whether the upper rung of environmental participation, which is citizens' control, can equate refusal of the project by a community in certain circumstances. If not, it is doubtful that participation is indeed "the right of rights," as termed by Waldron.[137] Second, the success of the indigenous peoples' rights and EJ movements in developed countries (leading to a de facto right of veto only for ethnic and racial minority communities) raises the question of what happens to the other vulnerable communities, a confusion reflected in the numerous references in the academic and technical literature to the FPIC as pertaining to "indigenous and other vulnerable groups" or even broader: "other affected groups."[138] From here, and given the environmental basis of the community's opposition, I raise the question of the faith of all other communities lacking a sociological identifier: if the NIMBY-ism based on property decline brings a justifiable (under some theories) blame of selfishness to these communities, the NIMBY-ism based on environmental concerns is humanely, morally, and even legally more understandable. Finally, the SLO concept advanced by companies themselves, and the engagement process in general, is meaningless without a right to veto.

In addition, the two parallel arenas of community participation (alongside government planners and corporate investors, respectively) require clarification of their consequentiality link, if any. For now, the dispute over venue-shifting by local communities, with the intent of finding the friendliest forum for their environmental opposition to industrial development, was researched with regard to shifting from the

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136. As the tribunal did in *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Arbitration Award ¶ 144 (May 29, 2003), http://www.icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docid=DC4872_Sp&caseId=C3785.

137. *See* Jeremy Waldron, *Participation: The Right of Rights*, *in* 98 PROC. ARISTOTELIAN SOC'Y 307 (1998).

138. *See, e.g.*, Banerjee, *supra* note 29, at 327; Goodland, *supra* note 29, at 69.

legislative arena to courts,[139] but not with regard to shifting from state to market.

In both state and market, we seem to witness an asymptotic evolution toward a generalized right to veto: it continually advances toward a general recognition, while at the same time it cannot ever be fully accepted. In the case of NIMBYs, the axis toward which this asymptote evolves is the accepted necessity of the project, while in cases of NIABYs, the axis is the border between a statist assumption and the anarchist philosophy. This Article points at this factual evolution, of which clarification is avoided in academia for now, maps the surrounding theoretical territory, and underlines the link between the two situations that require clarification as far as the environmental FPIC for all fenceline communities is concerned: (1) a choice has to be made among several suitable locations, and (2) only one possible location exists. Although the growing recognition of a veto right is discussed in different frameworks for these two cases, their common denominators (local community as actor, the siting as issue, the environmental claims as rights, and the distributive justice principles as norms) justify adjoining them.

This Article then addresses the second situation from the perspective of the veto's recipient, state vs. corporation, and notes that debates in both political philosophy and business ethics left the problem unresolved. The two theoretical perspectives are strongly interlinked: while political philosophy discusses just distribution of *states' benefits and burdens*, business ethics deals with just distribution of *firms' benefits and burdens*. Therefore, I find it highly relevant that both fields acknowledge instances of local communities' refusing industrial progress based on environmental concerns, but none inquire into the shape and limits of such a right to veto.

The aim of this analysis is only to underline these confusing evolutions, put them in context, and suggest that all cases of environmental local opposition to industrial projects may accommodate some sort of arbitration between communities suitable for hosting a certain project or between investors and fenceline communities.

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139. *See* Gregg Flynn, *Court Decisions, NIMBY Claims, and the Siting of Unwanted Facilities: Policy Frames and the Impact of Judicialization in Locating a Landfill for Toronto's Solid Waste*, 37 CANADIAN PUB. POL'Y 381, 385 (2011) (citing Frank R. Baumgartner & Bryan D. Jones, *Agenda Dynamics and Policy Subsystems*, 53 J. POL. 1044 (1991)).