

CHAPTER 6

RECONFIGURING INVESTMENT CONTRACTS TO PROMOTE SUSTAINABLE DEVELOPMENT

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A. THE INVESTMENT CONTRACTS AND SUSTAINABLE DEVELOPMENT NEXUS

Policy-makers, international development organizations and scholars alike have emphasized the importance of foreign direct investment (FDI) in reducing the global gap between wealthy and poor nations.¹ In addition to providing capital, investment can bring new technologies and knowledge to the host country and “spillovers” to the domestic sector are expected to ensue. In recent years, there has been growing debate about the importance of investment for “sustainable development”, broadly defined here as the policy imperative to balance economic, environmental, and social considerations so as to meet “the needs of the present without compromising the ability of future generations to meet their own needs.”²

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1. See, e.g., UN, “Monterrey Consensus of the International Conference on Financing for Development” Monterrey (Mexico), March 18–22, 2002, A/CONF.198/11, ch. 1, resolution 1, annex (2003) available at <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> (last visited March 17, 2012), 20–25. See also the series of World Investment Reports produced annually by UNCTAD, available at [http://unctad.org/en/Pages/Publications/WorldInvestmentReports\(1991–2009\).aspx](http://unctad.org/en/Pages/Publications/WorldInvestmentReports(1991–2009).aspx) (last visited March 17, 2012).

2. UN, “Report of the World Commission on environment and development: Our common future,” Annex to UN doc A/42/427, August 4, 1987, IV.1, available at <http://www.un-documents.net/wced-ocf.htm> (last visited October 5, 2011) [hereinafter Bruntland Report].

The notion of sustainable development first became prevalent at the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992, and has become a central concept in efforts to promote poverty reduction and environmental sustainability. FDI was first pointed to as part of achieving sustainable development at the Rio Conference³ and was reinforced at the World Summit on Sustainable Development held in Johannesburg in 2002.⁴ The more recent United Nations Conference on Sustainable Development, held in Rio de Janeiro in June 2012, confirmed the importance of increased flows of investment to developing countries, particularly in sectors considered critical to ensuring a transition to a “green economy”.⁵

However, from a sustainable development perspective, promoting investment is not an end in itself, but a means to an end.⁶ The ultimate goal is to improve local livelihoods while protecting the environment. In other words, the quality of incoming investment is as important as its quantity. Quality is to be assessed based on core characteristics of the investment, rather than corporate social responsibility programs at the fringes. This involves a thorough scrutiny of the social, environmental, and economic considerations at stake in an investment project and an assessment of how and by whom decisions are made about the project. Although much of the literature on sustainable development focuses on national and international law, contracts are a critical piece of the puzzle. Contracts define the terms of an investment project and the way that risks, costs, and benefits linked to that project are distributed. While each investment project typically involves several contracts among multiple players (e.g., investors, host government, lenders, insurers, subcontractors), the focus here is on contracts between investors and host governments (investment contracts).

Discussions of investment contracts have traditionally focused on commercial issues, but in recent years have attracted considerable attention from commentators with a non-commercial perspective. International non-governmental organizations (NGOs) have published challenging reports,⁷

3. See, e.g., UNCED, “Agenda 21: held at Rio de Janeiro from 3 to 14 June 1992,” A/CONF.151/26/REV.1 (April 1993), 33.15, available at <http://www.un.org/esa/dsd/agenda21/index.shtml> (last visited March 17, 2012).

4. UN, “Report of the World Summit on sustainable development: held at Johannesburg, South Africa from August 26 to September 4, 2002,” Sales No. E.03.II.A.1 (New York: United Nations, 2002), available at <http://www.un.org/esa/sustdev> (last visited March 17, 2012). For example, the Plan of Implementation adopted at the Summit contains the following action: “Facilitate greater flows of foreign direct investment so as to support the sustainable development activities, including the development of infrastructure, of developing countries, and enhance the benefits that developing countries can draw from foreign direct investment” (*Id.*, 84).

5. UN, “Future We Want,” Outcome document of the United Nations Conference on Sustainable Development (Rio+20), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E (last visited 18 October 2012), 46 and 56–74.

6. On the relationship between foreign investment and sustainable development, see Lyuba Zarsky, “Introduction: Balancing rights and rewards in investment rules,” in Lyuba Zarsky, ed., *International Investment for Sustainable Development: Balancing Rights and Rewards* (London: Earthscan, 2005), pp. 1–10; Annie Dufey and Maryanne Grieg-Gran, “The linkages between project finance and sustainable development,” in Sheldon Leader and David Ong, eds., *Global Project Finance, Human Rights and Sustainable Development* (Cambridge: Cambridge University Press, 2011), pp. 12–36; and Karl P. Sauvant and Miles Killingsworth, eds., “Special issue: FDI, the global crisis and sustainable recovery,” 20(1) *Transnational Corporations* 1 (2011), available at http://www.unctad.org/en/docs/unctaddiaeia20114a_En.pdf (last visited March 17, 2012).

7. Amnesty International UK, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project* (London: Amnesty International UK, 2003); Amnesty International UK, *Contracting Out of Human Rights: The Chad-Cameroon Pipeline Project* (London: Amnesty International UK, 2005); Global Witness, *Heavy Mittal? A*

academics have produced insightful analyses,⁸ legal practitioners have provided useful contributions on the topic,⁹ and the UN Special Representative to the Secretary-General on Business and Human Rights, Professor John Ruggie, commissioned an important study¹⁰ and produced a set of “Principles on Responsible Contracts.”¹¹ These principles are specifically aimed at the “integration of human rights risk management into contract negotiations.” Contract issues also feature strongly in the Natural Resource Charter, which was drafted by an independent group of experts led by Professor Paul Collier.¹² And in April 2011, the Mining Law Committee of the International Bar Association released a Model Mining Development Agreement that is in many respects a particularly progressive attempt at rethinking mining contracts.¹³

Drawing on all of this important work and focusing on investments in lower and middle-income countries, this chapter aims to develop a conceptual framework for discussing contracts from a sustainable development perspective, and provides pointers for changes in contractual practice to maximize pursuit of sustainable development goals like poverty reduction and environmental sustainability.¹⁴ A sustainable development perspective balances traditional government concerns about getting the best possible economic deal with a wider range of considerations, as reflected in the 1992 Rio Declaration on Environment and Development¹⁵ and in a number of treaties adopted since. Despite its non-binding nature, the Rio Declaration remains “the most significant universally endorsed statement of general rights and obligations

State within a State: The Inequitable Mineral Development Agreement between the Government of Liberia and Mittal Steel Holdings NV (London, 2006).

8. See, e.g., Olivier de Schutter, “Transnational corporations as instruments of human development,” in Philip Alston and Mary Robinson, eds., *Human Rights and Development: Towards Mutual Reinforcement* (New York: Oxford University Press, 2005), pp. 403–44; Sheldon Leader, “Human rights, risks, and new strategies for global investment,” 9(3) *Journal of International Economic Law* 657 (2006).

9. See, e.g., Audley Sheppard and Antony Crockett, “Are stabilization clauses a threat to sustainable development?,” in Marie-Claire Cordonier Segger, Markus W. Gehring, and Andrew Newcombe, eds., *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011), pp. 333–50.

10. Andrea Shemberg, “Stabilization clauses and human rights: A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights” (May 27, 2010), available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf) (last visited March 17, 2012).

11. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, “Principles for responsible contracts: Integrating the management of human rights risks into state-investor contract negotiations: Guidance for negotiators,” UN Doc. A/HRC/17/31/Add.3 (May 25, 2011) [hereinafter Ruggie, “Principles for responsible contracts”].

12. Natural Resource Charter (November 2010), available at <http://www.naturalresourcecharter.org/> (last visited October 5, 2011).

13. Model Mining Development Agreement 1.0 (April 4, 2011) available at <http://www.mmdaproject.org> (last visited February 23, 2012) [hereinafter MMDA].

14. For earlier works on investment contracts from a sustainable development perspective, see Lorenzo Cotula, *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments* (London: International Institute for Environment and Development, 2010), available at <http://pubs.iied.org/17507IIED.html> (last visited March 17, 2012); and Lorenzo Cotula, “Rethinking Investment Contracts through a Sustainable Development Lens,” in Elena Blanco and Jona Razzaque, eds., *Natural Resources and the Green Economy - Redefining the Challenges for People, States and Corporations* (Leiden: Martinus Nijhoff, 2012), pp. 13–36.

15. Rio Declaration on Environment and Development, June 14, 1992, 31 ILM 874 (1992) [hereinafter Rio Declaration].

of states affecting the environment.”¹⁶ Its provisions include restatements of existing customary law, endorsement of new principles of law, and statements of ideals and policy, and they have been explicitly referred to by the International Court of Justice (ICJ).¹⁷

This chapter is divided into four clusters, indicative of important intersections between investment contracts and sustainable development. Covering these clusters comprehensively is beyond the scope of this chapter. Instead, the chapter briefly discusses one specific aspect of each area, as a way of illustrating the implications of the above considerations for contractual practice.

This chapter first discusses the *contracting process*, which includes negotiation to contract management through to project closure. A critical issue is the extent to which affected people have voice in decision-making, and the public at large can hold governments and investors accountable by way of transparency and public scrutiny. These aspects are linked to Principles 1 and 10 of the 1992 Rio Declaration, which state that sustainable development entails putting people at the centre of the development process, and that sustainable development issues are best handled with the participation of all concerned citizens.¹⁸ Certain regions have also adopted binding treaties to establish legal rights of public participation. The most notable example is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which specifically deals with environmental information, although it is restricted in geographic scope to Europe and transitional economies in Central Asia.¹⁹ Institutional and capacity issues are also key to managing a contract (e.g., to collect revenues or periodically review provisions where allowed by the contract) and ensuring monitoring and compliance enforcement.

This chapter then discusses the *economic deal* between the investor and the host country. This aspect involves maximizing economic benefits for the host country and communities, for example, through public revenues, capital contributions, positive linkages with the local economy (e.g., via employment and business opportunities), technology transfer, and infrastructure development. For host countries and communities, getting the best economic deal is a means of realizing the right to development, reaffirmed in Principle 3 of the Rio Declaration, and implementing various provisions of sustainable development declarations and implementation plans calling for developing countries to facilitate foreign investment and enhance the benefits they derive from it.²⁰

The chapter next addresses *social safeguards*. Even a deal that is economically beneficial to the country as a whole (e.g., in terms of gross domestic product or public revenues) may be a poor deal for citizens if local interests are not properly taken into account, for example if local

16. Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2002), p. 82.

17. *Id.* The ICJ referred to the Declaration in its *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports 1996 July 8, 1996, p. 226, available at <http://www.icj-cij.org/docket/files/95/7495.pdf> (last visited March 17, 2012), 29–30. For a more general reference to “sustainable development,” see *Case Concerning the Gabčíkovo-Nagymaros Dam (Hungary/Slovakia)*, *Judgment*, September 25, 1997, available at <http://www.icj-cij.org/docket/files/92/7375.pdf> (last visited March 17, 2012), 140.

18. Rio Declaration, *op. cit.* note 15, Principles 1 and 10.

19. Signed June 25, 1998, entered into force October 30, 2001, available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> (last visited March 23, 2012).

20. See, e.g., UN, “Report of the World Summit on Sustainable Development,” *op. cit.* note 4, 84.

people are arbitrarily dispossessed of their land and do not personally benefit from the deal. Fundamental human rights may be at stake, including the right to food,²¹ the rights of indigenous peoples over their ancestral territories,²² and the right to property.²³ Principle 5 of the Rio Declaration considers poverty eradication as “an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.” Addressing social aspects involves minimizing negative impacts on people’s lives, and ensuring that economic benefits are distributed equitably and used for poverty reduction and broad-based development.

Finally, this chapter addresses *environmental considerations*. From a sustainable development perspective, environmental considerations are integral to investment decision-making and activities.²⁴ Since the Rio Conference in 1992, a growing body of international treaties has been adopted to regulate the environmental sustainability of human activities, including the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and the Convention to Combat Desertification.²⁵ The International Court of Justice has also affirmed that the “need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”²⁶ Addressing environmental considerations in investment contracting includes efforts to minimize negative impacts on the environment, for instance water pollution or resource degradation, and to clearly demarcate responsibility for environmental damage and remediation; it also includes steps to actively promote environmental benefits, for instance through investment in low-carbon technologies—an aspect that is at the heart of much recent debate about promoting a “green economy.”

This chapter draws on examples from investment contracts in a variety of sectors, with a primary focus on natural resource investment (including extractive industries, agriculture, and hydropower). We recognize that sustainable development issues vary across different sectors.

21. Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948, art. 25, available at <http://www.un.org/en/documents/udhr/> (last visited March 17, 2012); and The International Covenant on Economic, Social and Cultural Rights, adopted in New York on December 16, 1966, entered into force on January 3, 1976, art. 11, available at <http://www2.ohchr.org/english/law/cescr.htm> (last visited March 17, 2012).

22. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, adopted June 27, 1989, entered into force September 5, 1991, arts. 13–19, available at <http://www2.ohchr.org/english/law/indigenous.htm> (last visited March 17, 2012).

23. Universal Declaration of Human Rights, *op. cit.* note 21, art. 17; African Charter on Human and Peoples’ Rights, adopted by the Assembly of Heads of State and Government of the Organization of African Unity in Nairobi June 27, 1981, entered into force October 21, 1986, art. 14, available at <http://www.unhcr.org/refworld/type,MULTILATERALTREATY,OAU,,3ae6b3630,0.html> (last visited March 17, 2012); American Convention on Human Rights, adopted in San José November 22, 1969, entered into force July 18, 1978, art. 21, available at <http://www.oas.org/juridico/English/treaties/b-32.html> (last visited March 17, 2012); and European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, adopted in Paris March 20, 1952, entered into force May 18, 1954, art. 1, available at <http://www.hri.org/docs/ECHR50.html> (last visited March 17, 2012).

24. See the Rio Declaration, *op. cit.* note 15, Principle 4.

25. United Nations Framework Convention on Climate Change, signed May 9, 1992, entered into force March 21, 1994, 31 ILM 849 (1992); United Nations Convention on Biological Diversity, signed June 5, 1992, entered into force December 29, 1993, 31 ILM 818 (1992); United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, signed June 17, 1994, entered into force December 26, 1996, 33 ILM 1328 (1994).

26. Case Concerning the Gabčíkovo-Nagymaros Dam, *op. cit.* note 17, 140.

For example, while petroleum operations necessarily involve large-scale investment, in agriculture family farmers have proved competitive in many parts of the world, and it should not be assumed that large-scale production is the best method. Diverse industry practices are reflected in differences in contractual practice, so the content and specificity of clauses regulating these issues is particularly important. For example, revenues are typically crucial in extractive industry contracts, but some agriculture contracts involve no or little land fees because employment and infrastructure are often seen as the main benefits.²⁷ Despite industry variations, this chapter argues that it is possible to discern some general recurring challenges across sectors.

In addition to differences across sectors, there is also huge diversity of contractual practice and sustainable development issues within sectors. In agriculture, for instance, contracts for different crops may raise different legal issues, and the economics of projects involving the construction of processing plants are different to projects only involving plantations. Given the great diversity and complexity of contractual arrangements for natural resource investments, the examples used in this chapter are meant to be for illustrative purposes only.

Two final caveats are in order. First, contract analysis is no replacement for empirical assessments of social, environmental, and economic impacts of natural resource investments: well-negotiated contracts may be poorly implemented and produce disappointing results; conversely, an investment may improve livelihoods even if the contract is deficient, though a weak contract means that mechanisms to hold the investor to account are less effective. Second, as will be discussed in the next section, most investment contracts are not publicly disclosed and we are, therefore, basing our arguments and conclusions on a fairly small pool of examples. We have also tried to focus on recent (post-2000) contracts and this shrinks the size of our sample even further. As a result, this chapter presents generalized, preliminary findings intended to primarily spark debate and encourage discussion of the issues raised herein, rather than to deliver a definitive account of the current state of investment contracts.

B. THE CONTRACTING PROCESS: ENABLING SCRUTINY THROUGH TRANSPARENCY

Although it is the content of investment contracts that has direct implications for society and the environment, there is a close connection between content and the process through which contracts are developed. One of the most salient obstacles to sustainable development posed by current contracting practices is a pervasive lack of transparency. Most investment contracts are negotiated confidentially: while some countries require that some aspects of contracting be made public—for example, when tendering is used, the process is often conducted openly—instances also exist where the public may not even be aware that an investment contract is being negotiated. Furthermore, once an investment contract has been signed, it is unlikely to be publicly disclosed in most developing countries. The creation of model agreements by governments in these countries provides some degree of transparency and a limited opportunity for public scrutiny. However, model agreements are only common in the upstream oil and gas sector, and may be substantially altered or ignored altogether in the negotiations of actual contracts.

27. "Infrastructure for resources" deals have also been used in extractive industries, particularly by some Asian operators. Vivien Foster, William Butterfield, Chuan Chen, and Nataliya Pushak, *Building Bridges: China's Growing Role as Infrastructure Financier for Sub-Saharan Africa* (Washington, D.C.: World Bank, 2008).

There may be good reasons to keep initial phases of the negotiation process confidential. For example, it may enable the parties to make mutual concessions without losing face, and thus make it easier for them to reach a compromise in the negotiations. However, a failure to disclose the final agreement is far more difficult to justify. Investors appear to be mainly concerned that competitors may have access to sensitive information in contracts that give them a commercial advantage. Host governments, on the other hand, express concern that future investors might invoke favorable treatment granted in earlier contracts in order to extract better terms than the government would be prepared to offer at that time.²⁸

These are not unreasonable concerns; however, as a guide produced by the International Monetary Fund (IMF) notes, the terms of an investment contract are likely to be “widely known within the industry soon after signing.”²⁹ In some sectors, such as petroleum and gas, contracts are available through expensive subscription services.³⁰ This type of system ensures that investors and elite law firms will have access to a contract, while affected communities, civil society organizations, and possibly even some parts of the government will not. The IMF concludes that:

Little by way of strategic advantage thus seems to be lost through publication of contracts. Indeed, it could be argued that the obligation to publish contracts should in fact strengthen the hand of the government in negotiations, since the obligation to disclose the outcome to the legislature and the general public increases pressure on the government to negotiate a good deal.³¹

We further argue that even if there is a significant strategic advantage associated with keeping investment contracts confidential, it is inappropriate for governments to do so. These agreements do not only represent commercial transactions—they are also tools for public policy. While greater transparency alone will not increase public accountability in contracting processes, it is a pre-condition for public scrutiny of government action, and for citizen participation in public decision making. Citizens have a right to know how their government is managing the natural resources it owns on behalf of the nation.³² Access to information and public participation in decision-making are key pillars in the concept of sustainable development³³ and are enshrined in international conventions³⁴ as well as in the national law of many countries. With specific reference to contracts, the UN Special Representative to the Secretary-General on Business and Human Rights has also recognized the importance of transparency; the tenth Principle on Responsible Contracts states that a “contract’s terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.”³⁵

28. Peter Rosenblum and Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (New York: Revenue Watch Institute, 2009), pp. 17–18, available at <http://www.revenuewatch.org/news/publications/RWI-Contracts-Confidential.pdf> (last visited March 17, 2012), p. 43.

29. IMF, *Guide on Resource Revenue Transparency* (Washington, D.C.: IMF, 2007), p. 17.

30. See, e.g., the website of Barrows Company, available at <http://www.barrowscompany.com> (last visited February 23, 2012).

31. IMF, *Guide on Resource Revenue Transparency*, *op. cit.* note 29.

32. Rosenblum and Maples, *Contracts Confidential*, *op. cit.* note 28, p. 15.

33. Rio Declaration, *op. cit.* note 15, Principle 10.

34. See, e.g., 1998 Aarhus Convention, *op. cit.* note 19. Although, as discussed, the geographic scope of this Convention is restricted to Europe and the Former Soviet Union.

35. Ruggie, Principles for Responsible Contracts, *op. cit.* note 11, Principle 10.

The Inter-American Court of Human Rights has affirmed that access to government-held information is a human right, in a case specifically concerning a civil society request for information, including contracts, relating to a contested investment project. The Inter-American Court noted that the right to freedom of thought and expression, recognized by Article 13 of the American Convention on Human Rights, includes “not only the right and freedom to express one’s own thoughts, but also the right and freedom to *seek, receive and impart* information and ideas of all kinds.”³⁶ Restrictions are only possible, according to the Court, if they are established by law, they are for a purpose allowed by the American Convention, and they are necessary in a democratic society—in other words, justified by and proportional to a compelling public interest.³⁷ The Court found that the refusal by a national Foreign Investment Committee to provide requested information, without written justification, violated Article 13 of the American Convention on Human Rights.³⁸

Transparency also appears to be an emerging norm in international investment law, both in terms of how governments are expected to behave in their relations with investors and in terms of the process of international arbitration itself.³⁹ On the former issue, it is notable that a small number of bilateral investment treaties (BITs) (mostly those based on the 2004 U.S. Model BIT) have clauses on the transparency of host country measures.⁴⁰ Additionally, several tribunals have argued that the fair and equitable treatment standard, found in the majority of BITs, requires governments to act in a transparent manner,⁴¹ although expansive interpretations of this standard remain controversial and contested.⁴² While the transparency requirements in BITs apply

36. *Reyes and Others v. Chile*, 2006 Inter-Am Ct HR (Ser C) No. 151, *judgment* (September 19, 2006) 76–77.

37. *Id.*, 88–91.

38. *Id.*, 94–99.

39. Akira Kotera, “Regulatory transparency,” in Peter Muchlinski, Federico Ortino, and Christoph Schreuer, eds., *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), pp. 617–36; Katia Yannaca-Small, “Fair and equitable treatment standard,” in Katia Yannaca-Small, ed., *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (New York: Oxford University Press, 2010), pp. 385–410; Joachim Delaney and Daniel Barstow Magraw, “Procedural transparency,” in Peter Muchlinski, Federico Ortino, and Christoph Schreuer, eds., *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), pp. 721–88; Andrea J. Menaker, “Piercing the veil of confidentiality: The recent trend towards greater public participation and transparency in investor-state arbitration,” in Katia Yannaca-Small, ed., *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (New York: Oxford University Press, 2010), pp. 129–60.

40. See, e.g., the Treaty between the United States of America and the Oriental Republic of Uruguay concerning the environment and reciprocal protection of investment, signed November 4, 2005, entered into force November 1, 2006, arts. 10 and 11 [hereinafter U.S.-Uruguay BIT] and the Treaty between the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment, signed February 19, 2008, entered into force January 1, 2012, arts. 10 and 11 [hereinafter US-Rwanda BIT], available at <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties/bit-documents> (last visited March 17, 2012). See also UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, Sales No. E.06.II.D.16 (Geneva: United Nations, 2007), pp. 76–80.

41. *Metalclad Corporation v. The United Mexican States*, ICSID Case No. Arb(AF)/97/1, *Award*, 40 ILM 36 (2001); *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. Arb(AF)/00/2, *Award*, 43 ILM 133 (2004); *Saluka Investments BV v. The Czech Republic*, *Partial Award*, March 17, 2006, available at <http://italaw.com/documents/Saluka-PartialawardFinal.pdf> (last visited March 17, 2012). See also Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford: Oxford University Press, 2008), pp. 175–77.

42. M. Sornarajah, “Evolution or revolution in international investment arbitration? The descent into normlessness,” in Chester Brown and Kate Miles, eds., *Evolution in Investment Treaty Law and Arbitration*

only to host countries and specifically with regard to their behavior toward investors, rather than toward the general public, Kotera argues that “the basic purpose of transparency has been shifting from mere improvement of investment environments to pursuit of the accountability of all actors concerned.”⁴³

At the same time, the process of investor-state dispute settlement has also been moving towards greater transparency.⁴⁴ Investment tribunals were famously described as “secret trade courts” in an editorial in the *New York Times* in 2004.⁴⁵ Since then, some substantial changes in standard arbitral practice have occurred. Many recent bilateral and regional investment treaties have included provisions on the publication of documents and awards as well as open hearings and procedures for the submission of *amicus curiae* briefs.⁴⁶ The revision of the International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules in 2006 also increased procedural transparency⁴⁷ and debates about potential similar changes to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules are ongoing.⁴⁸ In light of these developments within the greater body of investment law, it is timely to reconsider the continued secrecy surrounding investment contracts.

There are a number of ways to increase transparency in the contracting process. The most obvious first step is to eliminate or severely restrict confidentiality clauses. If a contract includes genuinely sensitive commercial information (for instance, concerning the investor’s cost structures in exploration and development), a confidentiality clause may be included redacting such information before publication. However, confidentiality clauses are not the only issue: many contracts that do not contain such clauses are not in the public domain. Transparency and disclosure of contracts are also a function of the wider governance framework and, therefore, of the national law of the host country.

(Cambridge: Cambridge University Press, 2011), pp. 631–57; Matthew Porterfield, “State practice and the (purported) obligation under customary international law to provide compensation for regulatory expropriations,” 37(1) *North Carolina Journal of International Law and Commercial Regulation* 159 (2011).

43. Kotera, “Regulatory transparency,” *op. cit.* note 39, p. 627.

44. Delaney and Barstow, “Procedural transparency,” *op. cit.* note 42; Menaker, “Piercing the veil of confidentiality,” *op. cit.* note 39.

45. “The secret trade courts,” *New York Times*, September 27, 2004, available at <http://www.nytimes.com/2004/09/27/opinion/27mon3.html> (last visited March 17, 2012).

46. See, e.g., the Dominican Republic-Central America-US Free Trade Agreement, signed August 5, 2004, entered into force 2006, arts. 10.20 and 10.21, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> (last visited March 17, 2012) [hereinafter CAFTA-DR]; Australia-Chile Free Trade Agreement, signed July 30, 2008, entered into force March 6, 2009, arts. 10.20 and 10.22, available at <http://dfat.gov.au/fta/acfta/index.html> (last visited March 17, 2012).

47. The most significant change was to Rule 37, where a second paragraph was added stipulating that, after consulting both parties, a tribunal could allow a non-disputing party to submit a written brief. Rule 32 (Oral Procedure), which determines who may attend hearings, was also slightly modified. See “Rules of Procedure for Arbitration Proceedings (Arbitration Rules)” in *ICSID Convention, Regulations and Rules*, April 2006, available at <http://icsid.worldbank.org> (last visited March 17, 2012).

48. UNCITRAL Working Group II on Arbitration and Conciliation most recently met in February 2012 to discuss transparency in investor-state arbitration. Meeting documents are available at http://www.uncitral.org/uncitral/commission/working_groups/2Arbitration.html (last visited March 17, 2012). Specifically, see UNCITRAL Secretariat, “Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration,” A/CN.9/WG.II/WP.169 (2011).

In some countries, contracts are now publically available. Liberia's experience in this regard is particularly interesting. After more than a decade of conflict, a Comprehensive Peace Agreement was signed in 2003, resulting in the National Transitional Government of Liberia (NTGL), made up of members of the warring factions. Over the course of its tenure, the NTGL signed several large long-term investment contracts, including for mining and agriculture. There were allegations of corruption⁴⁹ and when some of the contracts were leaked to an NGO, many felt that the NTGL had agreed to terms that were not in the best interests of the citizens of Liberia.⁵⁰ In 2006, a democratically elected government took office and made it a priority to renegotiate these contracts.⁵¹ In addition, authorities passed the Liberia Extractive Industries Transparency Initiative Act in 2009, which requires contracts to be made publicly available.⁵² This Act was developed to establish the national process relating to the Extractive Industry Transparency Initiative, but its scope was also broadened to include the agriculture and forestry sectors. Contracts for natural resource investments in Liberia can now be downloaded from an official website.⁵³

Other examples of countries that have published contracts (in the oil and gas sector) include Peru and Timor-Leste.⁵⁴ According to the NGO Revenue Watch, Niger, Sierra Leone, Ghana, the Democratic Republic of Congo, Guinea, and the Kurdistan Regional Government in Iraq have also all passed legislation or taken other steps to ensure contract transparency in some sectors.⁵⁵ For one of these countries, disclosure of extractive industry contracts was a condition of IMF funding.⁵⁶

Advances in contract transparency have also occurred as a result of external pressures and conditions placed on investors. For example, the host government agreements for

49. Anti-corruption police in the Netherlands (the home country of one investor) reportedly began investigations into the award of one of the contracts in 2006; however, the company categorically rejected the allegations and no formal charges have been made. See Dino Mahtani, "Police probe Mittal Liberia deal," *Financial Times*, June 29, 2006, available at <http://www.ft.com/intl/cms/s/0/fc1b7638-070a-11db-81d7-0000779e2340.html#axzz1pQN1wwBd> (last visited March 17, 2012).

50. See, e.g., Global Witness, *Heavy Mittal*, *op. cit.* note 7; Columbia Law School Human Rights Clinic, "Memorandum re: Legal issues in the Mineral Development Agreement between the Government of the Republic of Liberia and Mittal Steel Holdings," (2006) available at www.reports-and-materials.org/Columbia-Law-Clinic-Mittal-Liberia-memo-22-Feb-2006.doc (last visited March 17, 2012).

51. Raja Kaul and Antoine Heuty, with Alvina Norman, *Getting a Better Deal from the Extractive Sector: Concessions Negotiation in Liberia, 2006–2008* (Washington, D.C.: Revenue Watch Institute, 2009), available at <http://www.revenuewatch.org/es/publications/getting-better-deal-extractive-sector-concessions-negotiation-liberia-2006-2008-0> (last visited March 17, 2012); Jolyon Ford and Kyla Tienhaara, "Too little, too late? International oversight of contract negotiations in post-conflict Liberia," 17(3) *International Peacekeeping* 361 (2010).

52. Liberia Extractive Industries Transparency Initiative Act of July 10, 2009 (July 13, 2009), § 5.0, available at <http://www.leiti.org.lr/doc/act.pdf> (last visited March 23, 2012).

53. See <http://www.leiti.org.lr/2content.php?main=65&related=65&pg=mp> (last visited March 23, 2012).

54. See Peru Petro, <http://www.perupetro.com.pe/relaciondecontratos/>; Laò Hamutuk, <http://www.laohamutuk.org/Oil/PSCs/10PSCs.htm> (last visited February 23, 2012).

55. See Patrick Heller, "An emerging norm of contract transparency," Revenue Watch Institute (October 2, 2011), available at <http://www.revenuewatch.org/news/blog/emerging-norm-contract-transparency> (last visited February 23, 2012).

56. Democratic Republic of the Congo: Review of the 2006 Staff-Monitored Program and a New Staff-Monitored Program for 2007—Staff Report; Staff Statement; Statement by the Executive Director for the Democratic Republic of the Congo, September 2007, IMF Country Report No. 07/328 available at <http://www.imf.org/external/pubs/ft/scr/2007/cr07328.pdf> (last visited April 10, 2012), p. 24.

the Baku-Tbilisi-Ceyhan pipeline were made public following civil society campaigns.⁵⁷ The International Finance Corporation (IFC), which is an important source of finance for many investment projects, has included language on contract disclosure in its Policy on Social and Environmental Sustainability, though this is limited to extractive industry projects.⁵⁸ In the United States, recent legislation requires companies to disclose payments to governments when they file for initial public offerings (IPOs) to the Securities and Exchange Commission (SEC). A number of contracts for natural resource investments in lower and middle-income countries have become publicly available through SEC filings, including oil contracts from Ghana.⁵⁹

These are very positive developments and they indicate that contractual transparency is an achievable goal in the short term. However, the number of countries currently engaged in reforming their contracting process is small and the vast majority of extractive industry investment contracts remain confidential. Furthermore, outside of the oil, gas, and mining sectors, there has been very little progress on contractual transparency. This suggests that many governments remain locked into the perspective that investment contracts are commercial rather than public documents and further efforts are required to shift this view.

C. THE ECONOMIC DEAL: MAXIMIZING POSITIVE ECONOMIC LINKAGES

The economic deal embodied in contracts for natural resource investments raises numerous and highly complex issues, including capital contributions, public revenues, income generation via employment and business links, technology transfer, and infrastructure development. Space constraints make it impossible to discuss such a wide range of issues. Public revenues have traditionally been seen as a key economic benefit for the host country, and negotiations on the fiscal regime can account for a significant part of contract development. While recognizing the importance of public revenues for pursuit of sustainable development goals, this section focuses on another, less explored part of the economic deal. A recurring challenge in natural resource investments is that they may create inadequate links with the local economy. Job creation is

57. Abigail S. Reyes, "Protecting the 'freedom of transit petroleum': Transnational lawyers making (up) international law in the Caspian," 24(3) *Berkeley Journal of International Law* 842 (2006).

58. In the 2006 version, this policy required disclosure of "the relevant terms of key agreements" (rather than of the agreements themselves) for "significant" extractive industries projects. Following a revision in 2011, the new formulation is as follows: "IFC will encourage governments and corporations to make extractive industry contracts public, and two years from the date of its Board approval of this policy it will require that, in the case of extractive industries projects it finances, the principal contract with government that sets out the key terms and conditions under which a resource will be exploited, and any significant amendments to that contract, be public. IFC will allow the redaction of commercially sensitive information that is not essential to understand the terms and conditions under which the resource is developed." However, a further provision provides that the IFC "may accept in lieu of contract disclosure, the publication by the client of a summary of the key terms and conditions under which the resource is being developed." This effectively entails reverting to the disclosure of "relevant terms" as per previous requirements. IFC, *Policy on Environmental and Social Sustainability*, January 1, 2012, 50–51, available at http://www1.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES (last visited February 23, 2012).

59. Ian Gary, "Ghana oil contracts disclosed," Governance of Extractive Industries Blog, May 5, 2011, available at <http://goxi.org/profiles/blogs/ghana-oil-contracts-disclosed> (last visited March 17, 2012).

often limited because of the capital-intensive nature of extractive industries and mechanized farming. Opportunities for local businesses may also be few, especially where there is insufficient business capacity. As a result, investments may contribute to the national economy at the macro level (e.g., economic growth, export promotion, foreign reserves), yet have limited impacts on poverty reduction. From a sustainable development perspective, generating ways to maximize positive linkages with the local economy is therefore critical. Investment contracts can play an important role in promoting these linkages, for instance by structuring investments in ways that include local producers and maximize job creation. In other words, contracts can influence the inclusiveness of an investment.

The notion of inclusiveness of the investment model is illustrated by the agricultural sector. Recent years have witnessed rising interest in long-term land leases and concessions in Africa and Asia, for the production of food, biofuels, and timber products.⁶⁰ These investments have proved controversial, as illustrated by lively media debates and NGO campaigns on “land grabbing.”⁶¹ Several plantations established as part of this recent global land rush have failed due to financing difficulties, insufficient soil fertility, or underestimated challenges linked to green-field investments in tropical agriculture.⁶² And even where investments are profitable, many have questioned the extent to which these projects can contribute to poverty reduction. Some of the world’s poorest people are losing the land, water, and natural resources that have supported their livelihoods for generations.⁶³ Employment creation in highly mechanized farms is often limited, and shifts from family farming to large-scale plantations rarely create jobs for all those that were working the land before the project.⁶⁴ This problem is particularly acute given the scarcity of alternative livelihood options in least-developed country contexts. Family farming tends to be more labor intensive, and investment models that support family farming can generate more broad-based employment.⁶⁵

60. For a discussion of quantitative evidence of the scale of land acquisitions, see Lorenzo Cotula, “The international political economy of the global land rush: A critical appraisal of trends, scale, geography and drivers,” *Journal of Peasant Studies* 1–32 (2012).

61. See, e.g., “When others are grabbing their land: Evidence is piling up against acquisitions of farmland in poor countries,” *The Economist*, May 5, 2011, available at http://www.economist.com/node/1864885?story_id=1864885&CFID=163780846&CFTOKEN=70728953 (last visited March 17, 2012); and Damian Carrington and Stefano Valentino, “Biofuels boom in Africa as British firms lead rush on land for plantations,” *The Guardian*, May 31, 2011, available at <http://www.guardian.co.uk/environment/2011/may/31/biofuel-plantations-africa-british-firms?INTCMP=SRCH> (last visited March 17, 2012). See also GRAIN, “Seized: The 2008 landgrab for food and financial security,” (October 24, 2008) available at <http://www.grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security> (last visited March 17, 2012); FIAN, *Land Grabbing in Kenya and Mozambique: A Report on Two Research Missions and a Human Rights Analysis of Land Grabbing* (Heidelberg: FIAN, 2010), available at <http://www.fian.at/assets/StudieLandgrabbinginKeniaMozambiqueFIAN2010.pdf> (last visited March 17, 2012); Oxfam, *Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land* (Oxfam, 2011) available at <http://www.oxfam.org/sites/www.oxfam.org/files/bp151-land-power-rights-acquisitions-220911-en.pdf> (last visited March 17, 2012); and the numerous reports produced by the Oakland Institute and available at <http://www.oaklandinstitute.org/land-rights-issue> (last visited March 17, 2012).

62. See, e.g., Ward Anseeuw, Liz Alden Wily, Lorenzo Cotula, and Michael Taylor, *Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project* (Rome: International Land Coalition, 2012), pp. 32–33, available at <http://www.landcoalition.org/cpl> (last visited March 17, 2012).

63. In Uganda, for example, 20,000 people claim to have been evicted from their land, and a legal case is pending before courts; see Oxfam, *Land and Power*, *op. cit.* note 61, pp. 14–17. Lawsuits linked to large land deals have also been filed in Cameroon, Mali and Tanzania.

64. Tania Li, “Centering Labour in the Land Grab Debate,” 38(2) *Journal of Peasant Studies* 281–298 (2011).

65. Steve Wiggins, Johann Kirsten and Luis Llambi, “The future of small farms,” 38(10) *World Development* 1341 (2010).

There is experience with models of agricultural investment that focus on agro-processing and that source agricultural produce from local farmers, based on direct contracts between investor and farmers. In some of these models, farmer associations own shares in the company they collaborate with, which gives them monetary benefits and greater say in business decisions. For example, a biodiesel processing plant in Mali sources *jatropha* seeds entirely from local farmers organized in a cooperative; the cooperative owns 20 percent of the Malian subsidiary that operates the plant. In Zambia, a company supplies sugar cane to a major national sugar mill through both a plantation estate and contracts with some 160 outgrowers; the outgrowers' cooperative owns 13 percent of the company, while another 25 percent stake is owned by a district-level cane farmer association.⁶⁶ Collaborative models between investors and local farmers can also create important risks, however, for example linked to farmer indebtedness, unfair pricing arrangements and the extent to which local groups genuinely have a voice.

A discussion of different models of agricultural investment goes well beyond purely contractual matters, raising fundamental issues about political choices and about national legal frameworks. However, investor-state contracts can be framed to promote collaborative models where these respond to local aspirations. For example, a Memorandum of Understanding authorizing the investor to carry out a feasibility study could require the study to assess investment models involving collaboration with local farmers, based on local consultation. Data from the feasibility study may then be used to negotiate the inclusion of specific targets in the investment contract with regard to the relative importance of local supply-chain relations, for example based on a percentage of production or on land area. The contract could also set minimum parameters for subsequent agreements concluded between the investor and local farmers. Besides setting a floor for the content of farming agreements, this would enable the government to monitor and enforce compliance—an important advantage given that it is often difficult for farmers to legally enforce their farming agreements. Key parameters would include the obligation to purchase produce from farmers up to specified production levels, subject to quality standards generally considered to be reasonable within the industry, and the price of produce purchased from local farmers, based on minimum internationally pegged reference prices. Finally, where the company provides credit to farmers, the investor-state contract could also define key parameters concerning credit conditions, for example with regard to interest rates or payment deductions and rescheduling, so as to mitigate the risk of farmer indebtedness.⁶⁷

In both agriculture and extractive industries, investment contracts can seek to maximize local employment, processing, and business opportunities through performance requirements. For example, contractual clauses may require the investor to source specified shares of labor, goods, and services from national workers and suppliers. However, these measures are no panacea. Evidence suggests that performance requirements may lead to inefficiencies due to their inherently protectionist nature.⁶⁸ There may be trade-offs between performance requirements and other parts of the economic deal, particularly the fiscal regime. Trade-offs may also arise between performance requirements and promoting higher safety, social, and environmental

66. These examples are based on an ongoing multi-country research project coordinated by the first author, with funding from the Food and Agriculture Organization of the UN.

67. Some recent agricultural concessions from Liberia feature provisions along these lines.

68. Theodore H. Moran, "Enhancing the contribution of FDI to development: A new agenda for the corporate social responsibility community, international labour and civil society, aid donors and multilateral financial institutions," 20(1) *Transnational Corporations* 69 (2011), pp. 76–78.

standards, particularly in countries with limited local business capacity. Finally, the host government's ability to include performance requirements may be restricted by international obligations that the government may have committed to, for example through free trade or investment treaties. For example, the World Trade Organization (WTO) Agreement on Trade-Related Investment Measures (TRIMs) prohibits measures that are inconsistent with state commitments not to discriminate against non-nationals (national treatment) in imports and exports of good, and to remove quantitative trade restrictions. The TRIMs agreement lists examples of prohibited measures and performance requirements concerning trade in goods are prohibited under these norms (while requirements on employment would be outside the scope of the TRIMs agreement for example).⁶⁹

Some investment treaties also contain provisions restricting performance requirements. Unlike for WTO norms, violations would expose the host government to direct legal action by investors. This is the case, for example, in the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).⁷⁰ This agreement includes a chapter on investment that is effectively equivalent to an investment treaty, and Article 10.9 of that chapter prohibits parties from according preference to nationally produced goods or services "in connection with the establishment, acquisition, expansion, management, conduct, operation or sale" of an investment. Published arbitral awards concerning restrictions on performance requirements are still rare, however. One example is *ADF Group Inc. v. United States of America*, where the United States' measures requiring that steel materials for an infrastructure project be sourced domestically were challenged on the basis of Article 1106 of the North American Free Trade Agreement (NAFTA), which prohibits performance requirements. However, the tribunal declined to find in favor of the investor on this point.⁷¹ In another recent NAFTA arbitration, requirements imposed by Canadian authorities for petroleum operators to spend a specified percentage of project revenues on research and development in the local province were found to be in violation of Article 1106 of the NAFTA treaty.⁷²

Where performance requirements are a sensible option, careful contract drafting and effective implementation are critical to making them work in practice. Where an investment does not at first involve local processing, for example, contracts may create incentives for the investor to include local processing at a later stage. For example, some recent contracts for agricultural plantations contain detailed provisions that require the investor to assess the viability of processing locally, that condition contract extension to a specified share of produce being processed in the country within a specified time, and that require the investor to sell a percentage of its produce to processing facilities that may be established in the country by third parties in future. It is worth noting that incentive-based provisions tying performance requirements to financial or other advantages, rather than imposing them, are not necessarily restricted by investment treaties. For example, Article 10.9(3) (a) of CAFTA-DR makes it clear that the prohibition of performance requirements must not

[b]e construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party,

69. Agreement on Trade-Related Investment Measures, signed April 15, 1994, entered into force January 1, 1995, art. 2 and Annex, available at www.wto.org/english/docs_E/legal_E/18-trims.pdf (last visited March 17, 2012).

70. CAFTA-DR, *op. cit.* note 46.

71. *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, *Award*, January 9, 2003, 150–74, available at http://italaw.com/documents/ADF-award_000.pdf (last visited March 17, 2012).

72. *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4. At the time of writing, the award had not yet been published. The discussion of the Tribunal's

on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

Effective performance requirements to maximize local employment opportunities would require that priority for unskilled positions be given to local nationals or even, more specifically, to people adversely affected by the project. In addition, contracts may require that, all else being equal, local nationals be prioritized in recruitment, training opportunities, and promotions for skilled (for example, managerial and technical) positions. Contracts may also set specific-percentage skilled labor targets for local nationals, and establish sliding scales, whereby the local employment percentage targets for skilled positions increase during the duration of the project. In the early stages of the project, local workers may be predominantly in unskilled positions, but ambitious sliding scales coupled with capacity-building requirements can increase the numbers of local employees in technical and managerial positions. For these sliding scales to work, contracts should also include robust on-the-job training requirements, including minimum annual financial commitments, to open up professional development opportunities for the local workforce. Some recent Liberian mining contracts feature provisions along these lines. An example of such provisions is provided below:

The CONCESSIONAIRE shall not import unskilled labor into the Republic. Subject to availability, the CONCESSIONAIRE shall employ qualified Liberian citizens for skilled, technical, administrative and managerial positions in accordance with the schedule attached hereto as Appendix G. The CONCESSIONAIRE shall ensure that, subject to availability, within five (5) years of the Amendment Effective Date, 25% of all senior management positions at the CONCESSIONAIRE are held by Liberian citizens, increasing to 50% within ten (10) years of the Amendment Effective Date. Not later than 365 days after the Amendment Effective Date, the CONCESSIONAIRE shall appoint a Liberian citizen to one of the top three management positions at the CONCESSIONAIRE.⁷³

Investors may resist binding commitments on job quantity and quality, as business imperatives may require leaving flexibility for the company to adjust to changing economic circumstances. However, it may be possible to negotiate a contractual provision whereby the company “declares” that it “envisages” employing a given number of people. This was done, for example, in the contract for a sugarcane processing facility in Mali.⁷⁴ While such a formulation is not mandatory, a figure in the contract can nevertheless provide a useful reference for project monitoring. Regulating labor conditions is also key, for instance with regard to wages, health and safety, or service provision to employees and their dependants (e.g., medical care, housing, or education). It would be prudent for contracts to explicitly require compliance with national law and applicable International Labour Organization (ILO) conventions. Contracts may also require

finding is based on Jarrod Hepburn, “Canada Loses NAFTA Claim; Provincial R&D obligations imposed on US oil companies held to constitute prohibited performance requirements”, *IA Reporter*, June 1, 2012, available at <http://www.iareporter.com/articles/20120601> (last accessed on 18 October 2012). Documents concerning this arbitration are available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/mobil_archive.aspx?lang=en&view=d (last visited March 17, 2012).

73. Amended Mineral Development Agreement among the Government of the Republic of Liberia, Mittal Steel (Liberia) Holdings Limited and Mittal Steel Holdings A.G., signed on December 28, 2008, art. XII(1), available at http://archive-2011.revenuewatch.org/files/RWI_Liberia_Mittal.pdf (last visited March 17, 2012).

74. Convention entre le Gouvernement de la République du Mali, Illovo Group Holdings Limited and Schaffer & Associates International LLC, signed on June 27, 2007, art. 8.2.1 (on file with the authors).

the project to comply with international standards, such as the IFC's Performance Standard 2 on Labor and Working Conditions.⁷⁵ This performance standard sets basic requirements like compliance with national law, fair treatment, and non-discrimination in labor relations, health and safety, and prohibition of use of forced labor. Where reference is made to international standards, it is important that regulatory agencies are properly equipped to monitor and enforce those standards, and that any capacity support needs are properly assessed and factored into the economics of the deal.

In addition to employment, performance requirements can be used to promote local procurement of goods and services, including, for example, construction or transport services. The considerations developed above regarding the trade-distortive nature of these provisions and possible restrictions imposed by trade and investment treaties are particularly relevant to requirements concerning domestic sourcing of goods and services. Where performance requirements are used, the investor will likely want to ensure that the use of local suppliers will not result in lower quality or higher costs. It may be possible though to negotiate provisions that require the investor to give priority to local goods and services if the cost, quality, and/or time of delivery are comparable internationally. It may also be possible to agree that priority be given to local suppliers even if this increases project costs. For example, the contract may require the investor to give preference to national suppliers if their costs are within a certain percentage of alternative suppliers available internationally (for instance, no more than 10 percent above the cost of comparable internationally available suppliers). This percentage can be higher in the initial phase, when local business capacity may be limited, and be reduced over project duration.⁷⁶ Finally, depending on the local business capacity, it may be possible to include specific percentage targets for local goods and services that the project must meet. For example, the agreement regulating a large gas pipeline in West Africa states that "not less than 15% (by value) of the goods and services used in the construction of the Pipeline System will be sourced from Local Businesses."⁷⁷

In the absence of local business capacity to meet the project's demand for goods and services, however, performance requirements remain a dead letter. Taking steps to strengthen local business capacity is therefore critical. Some recent contracts require the investor to restructure procurement over time in order to make local provision of goods and services more feasible and to contribute to strengthening local business capacities in critical service and supply areas. As investment projects often involve long chains of contractors and sub-contractors, best contractual practice clarifies that performance requirements apply to economic activities run by contractors and sub-contractors, and extends reporting requirements to these operators. For example, a recently renegotiated contract for a large rubber plantation in Liberia provides as follows:

[Investor] agrees to include in each contract or work order with its major contractors and other Associates a provision requiring it to adhere to the requirements of this Section [on Use of Liberian

75. IFC, Performance Standard 2: Labor and Working Conditions, January 1, 2012, available at http://www1.ifc.org/wps/wcm/connect/topics_Ext_content/ifc_External_corporate_site/ifc+sustainability+framework/2012+edition/2012-edition#PerformanceStandards (last visited March 17, 2012).

76. See, e.g., the Convention entre le Gouvernement de la République du Mali, Illovo Group Holdings Limited and Schaffer & Associates International LLC, *op. cit.* note 74, art. 21.1.2.

77. International Project Agreement for the West African Gas Pipeline, concluded on May 22, 2003 between Benin, Ghana, Nigeria, and Togo, on the one hand, and the West African Gas Pipeline Company Ltd, on the other, art. 28.3 (on file with the authors).

Products and Services] and to require their sub-contractors to do so, with respect to any activities undertaken in Liberia by such Associates and major contractors (and their sub-contractors), on behalf of [the investor].⁷⁸

It may be possible to negotiate these provisions in even broader terms, particularly by making them applicable to all contractors and sub-contractors, rather than just major ones. This approach would have the benefit of eliminating possible disputes as to what contractors would qualify as major.

D. SOCIAL SAFEGUARDS: PROTECTING LOCAL LAND RIGHTS

Social considerations in investment contracting concern issues as diverse as establishing safeguards in land acquisition, protecting local food security, regulating the conduct of security forces and providing grievance mechanisms. As these issues are often regulated by national and international law, this is an area where linking the contract to wider applicable law is particularly important to fully understand the implications of a deal. This section briefly discusses land acquisition issues, which are often one of the primary sources of conflict in natural resource investments. Some agricultural investments involve the taking of very large areas of land. On-shore extractive industry projects can also involve significant land takings, both temporary (during the construction phase) and permanent. Takings can have devastating impacts on people who depend on natural resources for their livelihoods.

It is common contracting practice to commit the government to make land available to the investor free of third-party rights. For example, a contract for a cross-border oil pipeline in Cameroon states:

The Republic of Cameroon guarantees that such land is not subject to rights which could hinder the exercise of the rights granted to [the investor] by virtue of this Convention. The land shall be made available, including, as the case may be, expropriation, eviction, release and inscription of the land easement [...].⁷⁹

Provisions like these must be read in conjunction with applicable national law. In many lower and middle-income countries, local landholders tend to have weak legal rights to land. A discussion of national law in a few African countries can help illustrate this. In several jurisdictions, the state claims ownership of all land. In Mozambique and Tanzania, all land is owned by public authorities, and private land ownership does not exist.⁸⁰ In other countries, for example

78. Amended and Restated Concession Agreement between the Republic of Liberia and Firestone Liberia, Inc., signed on January 22, 2008, art. 12 (on file with the authors).

79. Convention of Establishment between the Republic of Cameroon and the Cameroon Oil Transportation Company, approved with Law No. 97-16 of August 7, 1997 and signed on March 20, 1998, art. 27.1 (on file with the authors).

80. Under Law No. 20/97 of October 1, 1997 [hereinafter Mozambique's Land Act of 1997], and under Act No. 4 of May 15, 1999 [hereinafter Tanzania's Land Act of 1999] and Act No. 5 of May 15, 1999 [hereinafter Tanzania's Village Land Act of 1999], respectively.

in Mali and Cameroon, private land ownership is allowed.⁸¹ But with a few country exceptions, private land ownership tends not to be widespread in Africa even in jurisdictions where it is formally recognized—particularly in rural areas. This is partly due to the long and cumbersome procedures required to acquire it, particularly land registration formalities.⁸² Because these procedures are not accessible in rural areas, very few rural people hold ownership rights. According to the World Bank, only between 2 to 10 percent of land in Africa was held under formal tenure as of the early 2000s.⁸³ This situation may have changed somewhat given fast-increasing rates of land registration by urban elites⁸⁴ and as a result of the recent global land rush, discussed above,⁸⁵ but titled land is still likely to account for only a small percentage of overall land areas in Africa. Research in a rural municipality in Mali found that while the number of title deeds had increased exponentially between 1996 and 2005,⁸⁶ most titles were held by urban-based civil servants, by the state itself, and by businesses; only 1.5 percent of titles were issued to farmers.⁸⁷ This limited documentation of the land rights of rural people reflects wider trends in the African continent. Because in many jurisdictions all untitled land is owned or otherwise held by the state (in Mali, for instance⁸⁸), governments end up controlling much rural land even where the statute books devote numerous provisions to regulating private ownership.

With much control over land vested in the state and with limited spread of private ownership, local groups and individuals hold various types of land use rights. In practice, many land users gain access to land on the basis of customary tenure systems. But these customary rights often enjoy only limited legal protection under national law. Since the early 1990s, a few countries have passed legislation to strengthen legal protection of local land rights, including customary rights. In Tanzania and Mozambique, legislation grants customary rights the same legal status as state-issued rights.⁸⁹ Legislation in Mali and Mozambique enables the recording of customary rights.⁹⁰ Recognizing the practical difficulties of registering land rights across the national

81. In Cameroon, under Ordinance No. 74-1 of July 6, 1974, available at <http://www.glin.gov/view.action?glinID=193707> (last visited March 17, 2012). In Mali, under Code Domaniale et Foncier (Ordinance No. 00-027/P-RM of March 22, 2000, converted and amended by Law No. 02-008 of February 12, 2002) [hereinafter Mali's Land Code of 2000].

82. Samuel Egbe, "The Concept of Community Forestry under Cameroonian Law," *Journal of African Law* 45: 25-50 (2001), p. 32.

83. Klaus Deininger, *Land Policies for Growth and Poverty Reduction* (Washington D.C.: World Bank, 2003), p. xxi, available at http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000094946_0307250400474 (last visited March 17, 2012).

84. On Mali see Moussa Djiré, "Land Registration in Mali—No land ownership for farmers? Observations from peri-urban Bamako," Drylands Issue Paper No. 144 (London: International Institute for Environment and Development, 2007), pp. 3-6, available at <http://www.iied.org/pubs/display.php?o=12538IIED> (last visited March 17, 2012).

85. See *supra* text accompanying notes 60-65.

86. *Id.*

87. Djiré, Land Registration in Mali, *op. cit.* note 84, pp. 3-6, 13-14.

88. Mali's Land Code of 2000, *op. cit.* note 81; art. 28(b) of the Code includes unregistered lands in the private land estate of the state.

89. Tanzania's Village Land Act of 1999, *op. cit.* note 80, art. 18(1); Mozambique's Land Act of 1997, *op. cit.* note 80, art. 12.

90. Mozambique's Land Act of 1997, *op. cit.* note 80, arts. 13 and 14; and Mali's Land Code of 2000, *op. cit.* note 81, art. 43.

territory, Mozambique's Land Act formally protects customary and good-faith occupancy rights regardless of whether they have been registered or not,⁹¹ though in practice, lack of registration makes land rights less secure. Mozambique's Land Act of 1997 also requires investors to consult local communities before obtaining land leases from the government.⁹² Legislation requires payment of compensation for compulsory takings of customary land rights.⁹³

But even where local and customary rights are legally protected, such protection may be limited or qualified. This may be caused by gaps in legislation. In Mali, for instance, the implementing decree necessary to give effect to aspects of the protection of customary land rights contained in the Land Code has not yet been adopted. But legal provisions can also undermine the security of local rights in more explicit ways. For example, legally protected local rights may only extend to visible productive use,⁹⁴ which frequently does not include some forms of local resource use (e.g., fallow, pastoralism, hunting, and gathering) that are critical to local livelihoods.

Legislation may also grant governments extensive powers of compulsory acquisition, which permits governments to take land on a compulsory basis to pave the way for commercial projects. Indeed, public purpose requirements tend to be loosely defined. For example, Cameroon's land legislation merely defines public purpose as "public, economic or social utility."⁹⁵ In addition, certain types of private investments are legislatively deemed to be for a public purpose, thereby triggering legislation for the compulsory taking of local resource rights. For instance, petroleum operations are deemed to be for a public purpose in Cameroon and Mali, and mining legislation in the two countries enables the compulsory acquisition of land to implement mining projects.⁹⁶ Contractual provisions are also used to trigger the application of national legislation allowing the government to acquire land on a compulsory basis. For example, the above-mentioned contract for a cross-border oil pipeline in Cameroon explicitly states that works for the construction, operation, and maintenance of the pipeline are for a public purpose.⁹⁷

These provisions reveal a prioritization among different forms of natural resource use, favoring those resource uses that are perceived to be economically more profitable. While a national interest may indeed be at stake in natural resource investments, evidence suggests that recourse to compulsory acquisitions is a widespread practice, even where negotiated settlement with local landholders would appear to be possible. For example, a World Bank study on agricultural investments documented widespread use of eminent domain powers within the global land rush.⁹⁸ Furthermore, local consultation requirements, where they exist (as in Mozambique),

91. Mozambique's Land Act of 1997, *op. cit.* note 80, arts. 13(4) and 14(2).

92. Mozambique's Land Act of 1997, *op. cit.* note 80, art. 13.

93. See, e.g., Mali's Land Code of 2000, *op. cit.* note 81, art. 43.

94. See, e.g., under Tanzania's Village Land Act of 1999, *op. cit.* note 80, art. 29.

95. Ordinance 74-1 of 1974, *op. cit.* note 81, art. 18.

96. Cameroon's Petroleum Code (Law No. 99-013 of December 22, 1999), arts. 53-62; and Cameroon's Mining Code, Law No. 2001-1 of April 16, 2001 available at <http://www.glin.gov/view.action?glinID=192560> (last visited March 23, 2012), §§ 64-69; Mali's Hydrocarbons Law (Law No. 04-037/ of August 2, 2004), art. 36; Mali's Mining Code (Ordinance No. 99-032/P-RM of August 19, 1999), arts. 59-60.

97. Convention of Establishment between the Republic of Cameroon and the Cameroon Oil Transportation Company, *op. cit.* note 79, art. 27.1.

98. Klaus Deininger and Derek Byerlee, with Jonathan Lindsay, Andrew Norton, Harris Selod, and Mercedes Stickler, *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* (Washington, D.C.: World Bank, 2011), available at http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469382&piPK=64165421&menuPK=64166322&entityID=000334955_20110208033706 (last visited March 17, 2012).

rarely require conclusion of binding agreements and their implementation may fall short of expectations.⁹⁹ Compensation is often paid for loss of visible improvements, not for loss of land, with the consequence that payments may be inadequate to restore livelihoods, and that no compensation may be paid for rangelands or for lands set aside for future generations. Loss of resources other than land, such as water and forest resources, is rarely compensable.¹⁰⁰

These prevailing legal contexts make local landholders vulnerable to dispossession, and investors to contestation. The weakness of local rights to land and resources makes it more unlikely that investment will promote inclusive sustainable development. Contestation about the legitimacy of land acquisition can undermine an investor's "social license to operate". Ultimately, it is in the investor's long-term interest to ensure local support for the project. For investment to promote inclusive sustainable development, it must build on the needs and aspirations of local people. Ensuring that local groups have greater control over their resources is a key part of making this happen.

This is not just a case of desirability on policy grounds. Fundamental human rights are at stake. Local land rights constitute "property" as protected by the human right to property. This right is internationally recognized, for instance by Article 17 of the Universal Declaration of Human Rights, Article 21 of the American Convention on Human Rights and Article 14 of the African Charter on Human and Peoples' Rights.¹⁰¹ International legal protection applies even if local resource rights are based on customary systems that have no legal recognition. Indeed, the Inter-American Court of Human Rights and more recently the African Commission on Human and Peoples' Rights have specifically interpreted the right to property as protecting the collective rights customarily held by indigenous and tribal peoples over their ancestral territories—even in the absence of formal titles or legal recognition under national law.¹⁰² Where people depend on land for their food security, local land rights are also protected by the right to adequate food. This right is recognized by Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights.¹⁰³

99. As documented by Simon Norfolk and Christopher Tanner, "Improving Security for the Rural Poor: Mozambique Country Case Study," LEP Working Paper No. 5 (Rome: FAO, 2007), available at <ftp://ftp.fao.org/sd/SDA/SDAR/sard/Mozambiquecase.pdf> (last visited March 17, 2012). See also Isilda Nhantumbo and Alda Salomão, *Biofuels, Land Access and Rural Livelihoods in Mozambique* (London: IIED, 2010), available at <http://pubs.iied.org/12563IIED.html> (last visited March 17, 2012).

100. For an exception, see Cameroon's Forest Code of 1994 (Law No. 94/01 of January 20, 1994), art. 9.

101. *Supra* note 23.

102. See, e.g., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, *judgment*, August 31, 2001, available at <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html> (last visited March 17, 2012); and *Saramaka People v. Suriname*, Inter-American Court of Human Rights, *judgment*, November 28, 2007, available at <http://www.forestpeoples.org/sites/fpp/files/publication/2010/09/surinameiachrsaramakajudgmentnov07eng.pdf> (last visited March 23, 2012). See also the recent case *CEMIRIDE (Centre for Minority Rights Development) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, available at http://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf (last visited March 23, 2012). In the latter case, the African Commission held that "traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title" and is hence protected by the right to property. *Id.*, 209.

103. *Supra* note 21. On the right to food within the context of large-scale agricultural investment, see Report of the Special Rapporteur on the Right to Food, Olivier de Schutter—Addendum, "Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge," December 28, 2009, UN Doc. A/HRC/13/33/Add.2.

In addition, where indigenous and tribal peoples are involved, international treaties require governments to seek the free, prior, and informed consent of these groups. This principle is enshrined, with some qualifications, in the Convention Concerning Indigenous and Tribal Peoples in Independent Countries.¹⁰⁴ The provisions of the Convention have been progressively interpreted in international jurisprudence involving the collective right to property of indigenous or tribal peoples, where international human rights bodies have referred to a requirement of free, prior, and informed consent for projects that would have major impacts.¹⁰⁵ In *Saramaka People v. Suriname*, the Inter-American Court found that the collective right to property of the Saramaka people had been violated because the state had awarded timber and mining concessions without prior consultation of the Saramakas, without Saramakas obtaining a “reasonable benefit” from the natural resource investments and without prior environmental and social impact assessment.¹⁰⁶

The notion of free, prior, and informed consent has been recently applied beyond the context of indigenous and tribal people to protect all people that may be adversely affected by large development projects. For example, the 2009 Mining Directive adopted by the Economic Community of West African States (ECOWAS) requires companies to obtain the free, prior, and informed consent of “local communities” before initiating mining operations.¹⁰⁷ The wording of this provision does not restrict the term “local communities” to indigenous and tribal peoples. The Mining Directive is legally binding, and ECOWAS member states must bring their national legislation into line with the Directive by 2014.¹⁰⁸

Protecting local land rights within natural resource investments raises numerous complex issues. Communities are often quite diverse in their interests, and in some cases affected communities that benefit from employment, infrastructure, and investor-allocated development funds may end up being in a better position than other communities outside of the investment area. However, given the numerous reports of abuses and adverse impacts, robust legal safeguards for local rights are critical. Given the importance of national law in framing land tenure patterns, this would require reconsidering national law as much as contractual practice. While recognizing the need for national law to respond to diverse country contexts, the innovative legislation from countries like Mozambique and Tanzania, discussed above, provides possible pointers for national law reform—including with regard to protecting rights irrespective of formal registration and to granting customary rights the same legal status available to land rights issued by the state. The growing international recognition of the principle of free, prior and informed consent points to the need to integrate this principle within national legal frameworks. Safeguards can also be strengthened through more robust impact assessments, tighter public-purpose requirements, and compensation tied to restoration of local livelihoods.

104. Indigenous and Tribal Peoples Convention, *op. cit.* note 22. Art. 6 of the Convention requires governments to consult indigenous and tribal peoples in the application of the Convention, “with the objective of achieving agreement or consent to the proposed measures.” Art. 15(2) requires local consultation before issuance of natural resource rights in ancestral lands. Art. 16(2) requires free and informed consent for development projects involving relocation of indigenous or tribal, though if consent cannot be obtained this provision requires compliance with procedures under applicable national law.

105. For example, in *Saramaka People v. Suriname*, *op. cit.* note 102, 134; and in *CEMIRIDE v. Kenya*, *op. cit.* note 102, 226.

106. *Saramaka People v. Suriname*, *op. cit.* note 102, 115, 129, 158.

107. Economic Community of West African States, “Directive C/DIR.3/05/09 on the Harmonization of Guiding Principles and Policies in the Mining Sector held at Abuja from 26 to 27 May 2009” (May 27, 2009) available at http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf (last visited March 23, 2012).

108. Economic Community of West African States, *op. cit.* note 107, arts. 16(3) and 22(1).

Investment contracts are a blunt instrument to address these wider policy issues. But in cases where the national legal framework is weak, contracts can play a useful role. Contractual provisions may explicitly provide for negotiated rather than compulsory land acquisition. They may also require compliance with locally negotiated agreements. In relation to the latter, for example, the International Bar Association's Model Mining Development Agreement states:

The State shall, in accordance with Applicable Law, respect and enforce agreements made between the Company, Local Government, traditional or other landowners or occupants and Indigenous and Tribal Populations.¹⁰⁹

Where national law falls short, contracts can also refer to international standards like those developed by the IFC or by industry-based bodies like the Roundtable on Sustainable Biofuels (RSB), irrespective of whether these lenders or industry bodies are involved in the project. The Principles on Responsible Contracts developed by the UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises explicitly mention the possibility of referring to international standards to complement national law where needed to prevent, mitigate, or remediate negative human rights impacts.¹¹⁰ Similarly, the Model Mining Development Agreement released by the International Bar Association in April 2011 states:

Where Applicable Law and regulations on environmental and social impact assessment and management, and pollution prevention are less stringent than the IFC Performance Standards, the Company shall undertake its activities in a manner consistent with the IFC Performance Standards.¹¹¹

Therefore, governments can feel confident insisting that contracts refer to the performance standards outlined in the institutional policies of multilateral lenders, and civil society organizations can feel comfortable to pressure their government to do so. For reference to international standards to be effective, however, it is important to give proper thought to resourcing the host government's capacity to monitor compliance with those standards, as well as to create effective grievance mechanisms for affected people.

As an example, IFC Performance Standard 5 on Involuntary Resettlement requires investors to minimize resettlement and to restore livelihoods to pre-project levels.¹¹² The latter principle may require going significantly beyond compensation requirements under national law, where compensation is usually determined on the basis of the economic value of assets lost. This value may not be enough to restore livelihoods, as assets that are critical to local livelihoods may have low monetary values. With regard to indigenous peoples, IFC Performance Standard 7 requires free, prior, and informed consent.¹¹³ In addition, RSB Principle 12 requires companies to obtain

109. MMDA, *op. cit.* note 13, art. 18.0(c).

110. *Supra* note 11, under the "Key implications" of Principle 3.

111. MMDA, *op. cit.* note 13, art. 10.2. The MMDA also includes detailed provisions on social and environmental impact assessments and management plans (arts. 2.4.2 and 2.4.3).

112. IFC, Performance Standard 5: Land Acquisition and Involuntary Resettlement, January 1, 2012, available at http://www1.ifc.org/wps/wcm/connect/topics_Ext_content/ifc_External_corporate_site/ifc+sustainability+framework/2012+edition/2012-edition#PerformanceStandards (last visited March 17, 2012).

113. IFC, Performance Standard 7: Indigenous Peoples, April 30, 2006, available at http://www1.ifc.org/wps/wcm/connect/topics_Ext_content/ifc_External_corporate_site/ifc+sustainability+framework/2012+edition/2012-edition#PerformanceStandards (last visited March 17, 2012).

the free, prior, and informed consent of people affected by certified biofuel projects. It is important to note that RSB Principle 12 requires free, prior, and informed consent of all landholders, irrespective of whether these qualify as indigenous peoples under international law. Principle 12 means that no compulsory acquisition of land is allowed in RSB-certified projects.¹¹⁴

In addition to ensuring application of international standards, contracts can also provide for specified project benefits to flow to adversely affected people, including those that lost land to the project. It is relatively common for contracts to provide for the establishment of a community development fund, to be financed through a share of project revenues. For example, a renegotiated contract for an agricultural plantation in Liberia establishes a Community Development Fund and requires the investor to contribute yearly payments equivalent to 1 percent of annual gross sales.¹¹⁵ Community development funds may also be established on the basis of a Community Development Agreement concluded directly between the investor and affected communities. The investment contract may require negotiation of a Community Development Agreement,¹¹⁶ and tie investor material non-compliance with the Community Development Agreement to sanctions and grounds of termination under the investor-state contract. Where free, prior, and informed consent is required, the Community Development Agreement may constitute the instrument for manifestation of local consent, provided it is concluded before final decisions about the project are taken—for example, on the basis of a Memorandum of Understanding authorizing the investor to carry out a feasibility study.

E. ENVIRONMENTAL CONSIDERATIONS: ALLOCATING LIABILITY FOR HARM

Investment projects, whether they involve large open pit mines or the planting of trees to sequester carbon, generally have an impact, often significant, on the local environment. A wide range of effects are conceivable, from habitat destruction and biodiversity loss to the production of pollution and toxic waste. Investment projects may additionally impact the regional or global environment, for example through the release of greenhouse gases or chemical effluent that cannot be confined to the local area. Whether foreign investment is more or less environmentally destructive than domestic investment is the subject of a long-running academic debate.¹¹⁷ This section focuses on how the environmental implications of investment projects are dealt with in contracts.

A 1983 report from the (now defunct) United Nations Centre on Transnational Corporations suggested that “[e]nvironmental protection was ignored under the traditional concession agreements and it continues to receive scant attention.”¹¹⁸ Similarly, in a 1994 study, Zhiguo Gao

114. Roundtable on Sustainable Biofuels, Principles and Criteria, available at <http://rsb.epfl.ch/> (last visited March 17, 2012).

115. Investment Agreement between the Republic of Liberia and Liberia Forest Products Inc., approved on May 22, 2008, art. 17.4 (on file with the authors).

116. See, e.g., MMDA, *op. cit.* note 13, art. 22.1.

117. See discussion of the literature on this topic in Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge: Cambridge University Press, 2009), pp. 18–37.

118. UNCTC, “Main Features and Trends in Petroleum and Mining Agreements: A Technical Paper,” Sales No. E.83.II.A.9 (New York: United Nations, 1983), available at <http://unctc.unctad.org/data/e83iia9c.pdf> (last visited March 23, 2012), p. 131.

found that environmental issues had not received much attention in investment contracts in the oil and gas industry.¹¹⁹ Available information suggests that environmental provisions are now far more detailed in investment contracts in the extractive industries, as well as in other sectors, although significant gaps remain.¹²⁰

There are a number of ways that investment contracts deal with environmental issues. Most commonly, there will be a clause that indicates the environmental standards applicable to the investment project. Investment contracts may refer to domestic law, international law, industry “best practices,” and/or a set of project-specific environmental standards.¹²¹ If an investment contract contains a stabilization clause, it may freeze the environmental regulatory regime for the term of the agreement.¹²² Another critical issue that is often dealt with in investment contracts is liability for environmental damage.

Issues of liability for environmental damage can be complex, especially when multiple parties, including state-owned enterprises, are involved in an investment project. Contracts, therefore, should have provisions that explicitly identify who is liable for what and to whom. The issue of “who” depends somewhat on the form of contract, but generally it is the contractor or concessionaire who will be liable, except in cases where fault can be directly attributed to the state or state-owned enterprise. If there is more than one contractor involved in the project, then there will likely be a clause that stipulates that they are jointly and severally liable. There is also the issue of which part of the company (a parent, a subsidiary, or both) signs the contract. If the local subsidiary is the only signatory, it can be difficult for states and third parties to recover damages because the parent company can reduce the resources available to the subsidiary to the point where it is unable to pay any large award.¹²³ Some contracts attempt to deal with this issue by requiring the investor to set up a fund to cover the costs of environmental damage that may occur in the course of operations. For example, in a production sharing contract from Belize, the investor commits to contributing .1 percent of the value of the gross annual production to a fund managed by the government “for the sole purpose of indemnification against any or all environmental damages caused during the petroleum operations.”¹²⁴

Further complications can arise if there has been industrial activity at the site prior to the investment covered by the current contract, because there may be existing environmental

119. Zhiguo Gao, *International Petroleum Contracts: Current Trends and New Directions* (London: Graham and Trotman Ltd., 1994), p. 213.

120. Tienhaara, *Expropriation of Environmental Governance*, *op. cit.* note 117, pp. 116–20; Kyla Tienhaara, “Foreign investment contracts in the oil and gas sector: a survey of environmentally relevant clauses,” 11(3) *Sustainable Development Law and Policy* 15 (2011).

121. Tienhaara, “Foreign investment contracts in the oil and gas sector,” *id.* p. 16.

122. Lorenzo Cotula, “Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses,” 1(2) *Journal of World Energy Law and Business* 158 (2008); Kyla Tienhaara, “Unilateral commitments to investment protection: Does the promise of stability restrict environmental policy development?” 17 *Yearbook of International Environmental Law* 2006 (2008), pp. 139–67; Tienhaara, *Expropriation of Environmental Governance*, *op. cit.* note 117, pp. 97–107.

123. For example, see the discussion about the corporate structure in the 2005 and 2008 contracts for a rubber plantation in Liberia, in Rasmiya Kazimova, Sheldon Leader, and Yuseph Farah, “Analysis of the Amended and Restated Concession Agreement between the Republic of Liberia and Firestone Liberia, Inc. of 2008,” Annex A in SAMFU/Global Witness, *Recommendations for Future Concession Contract Negotiations Drawn from the Amended Firestone Contract (2008)* available at http://www.globalwitness.org/sites/default/files/import/annex_a_report_on_amended_agreement.pdf (last visited March 17, 2012).

124. Production Sharing Agreement for Petroleum Exploration, Development and Production Between Belize and RSM Production Corporation (Area A), signed April 3, 2000, art. 27.3 (on file with the authors).

damage that another investor or the state is liable for. In such cases, a “baseline” environmental assessment can be conducted prior to the commencement of the new project; however, environmental damage is often cumulative and it is therefore difficult to segment it into distinct liability allotments. Conflicts may also arise over the validity of the baseline assessment if care is not taken to allocate the task to a competent and independent third party.

The issue of “what” concerns the types of harms (for example, only death or injury or also pollution or damage to the environment) and the legal form of the liability (fault, strict or absolute). Most of the contracts surveyed adopt a strict liability approach,¹²⁵ as does the Model Mining Development Agreement.¹²⁶ However, some contracts, such as a Cambodian production sharing agreement quoted below, only provide for fault liability:

Where Petroleum Operations cause pollution of the environment in a manner which is inconsistent with Good Petroleum Industry Practices, Contractor shall be responsible for cleaning up, at Contractor’s expense, such pollution and shall be liable for all damage and expense in connection with such pollution to the extent that it results from the negligence, recklessness or wilful misconduct of Contractor or its Subcontractors.¹²⁷

In addition to the fact that this clause only provides for fault liability, its effectiveness is arguably further diminished by the reference to “Good Petroleum Industry Practices” rather than the environmental law of Cambodia or a specific set of international regulatory standards. There is no universally, accepted definition of Good Petroleum Industry Practices or a specific body that the parties can turn to in order to determine whether an investor’s practice meets this standard. There are, in fact, numerous competing petroleum industry bodies, which set independent guidelines. The guidelines are also typically aspirational and vague in nature, making it difficult for anyone to prove that an investor has breached them. For example, members of the American Petroleum Institute pledge “to reduce overall emission and waste generation.”¹²⁸ Furthermore, as Alexandra Wawryk notes, the “actual practices of international oil companies [...] vary from company to company and, for one company, across jurisdictions [...] making it difficult to identify the best practices actually in use.”¹²⁹ If international standards are to be referred to, they should be well defined in the contract.

125. Even in the absence of explicitly listed exceptions within the liability clause, the extremely common “force majeure” clause can provide a defense for non-compliance in certain situations. For example, the MMDA provides a definition of force majeure as “any event or circumstance beyond the reasonable control of the Party asserting Force Majeure, that prevents or delays such Party from fulfilling its obligations or exercising its rights under this Agreement. Such events of Force Majeure shall include: fire, flood, explosion, atmospheric disturbance, lightning, storm, volcanic eruptions, hurricane, tornado, earthquake, landslide or epidemic, war, riot, civil war, blockade, insurrection or civil disturbances, acts of terrorism, strike, lockout or other industrial disturbances, an act of government, including, the issuance or promulgation by a governmental body or entity having jurisdiction, or any court of an order, law, statute, ordinance, rule, regulation or directive, that directly affects the ability of a Party to perform any obligation under this Agreement, other than the obligation to remit payments.” (*op. cit.* note 13, art 31.0, example 1).

126. MMDA, *op. cit.* note 13, art. 37.6.2.

127. Agreement Between The Royal Government of Cambodia, Cambodian National Petroleum Agency, Chevron Overseas Petroleum (Cambodia) Limited, MOECO Cambodia Co. Ltd and Woodside South East Asia Pty. Ltd. (August 15, 2002), art. 20.7(d) (on file with the authors).

128. See American Petroleum Institute, Environmental Principles, available at <http://www.api.org/globalitems/globalheaderpages/about-api/environmental-principles.aspx> (last visited March 17, 2012).

129. Alexandra S. Wawryk, “Adoption of international environmental standards by transnational oil companies: Reducing the impact of oil operations in emerging economies,” 20(4) *Journal of Energy and Natural Resources Law* 402 (2002), p. 431.

To “whom” the investor is liable includes claims of liability by the parties to each other, as well as liability to third parties affected by the investment project. In this latter respect, it is common for contracts to include clauses whereby one party agrees to indemnify the other party for losses suffered as a result of liability claims brought by third parties. Generally, it is the investor that commits to indemnifying the state. For example, a Ghanaian mining lease states:

- (a) Nothing in this Agreement shall exempt the Company from liability for any damage, loss or injury caused to any person, property or interest as a result of the exercise by the Company of any rights or powers granted to it under this Agreement.
- (b) The Company shall at all times indemnify the Government and its officers and agents against all claims and liabilities in respect of any loss suffered by or damage done to third parties arising out of the exercise by the Company of any rights or powers granted to it under this Agreement provided that the Company shall not so indemnify the Government, its officers and agents where the claim or liability arises out of the wrongful or negligent acts of the Government, its officers and agents.¹³⁰

The responsibility may also be reserved, whereby the investor is exempted from liability and the onus of dealing with third-party claims is placed on the state party. For example, an investment contract from Belize concerning the construction and operation of a hydroelectric dam states:

The Government covenants and agrees to waive, or cause to be waived, and indemnify the Producer against any private action under or with respect to, any and all environmental laws, rules or regulations now existing, or created hereafter, to which the Mollejon Project and the New Project may be subject, other than any laws, rules or regulations set forth in the Mollejon Project Compliance Plan and the New Project Compliance Plan, as the case may be, to which the Producer has agreed to be bound.¹³¹

This clause suggests that the taxpayers of Belize would pay for any environmental liability suit concerning a breach of a law or regulation that the investor has not specifically agreed to be bound by through inclusion in the compliance plans developed for the project.

In addition to specific liability provisions, the dispute settlement clause of the contract may also impact how issues of environmental liability are resolved. Many contracts for large natural resource investments provide access to investor-state arbitration. In some cases, the liability clause may require that disputes over environmental damage be resolved in arbitration. For example, a 2005 concession agreement for a rubber plantation in Liberia, later renegotiated, stated the following:

Any assertion or claim by Government that [the company] may be subject to civil or criminal penalties or to mandatory mitigation measures for a violation either of this Agreement or of any other Law relating to protection and preservation of the environment or restitution of harm to the

130. Mining Lease between the Government of the Republic of Ghana and Bogoso Gold Ltd., signed June 29, 2001, art. 10 (on file with the authors).

131. Third Master Agreement between Government of Belize, C.A. and Belize Electric Company Ltd and Belize Electricity Ltd., signed November 21, 2001, art. 7.1 (on file with the authors).

environment shall be determined by the terms of this Agreement and of any other Law, provided that where [the company] disputes that such violations have occurred, the provisions of Section 27 [on arbitration] of this Agreement shall apply.¹³²

Even if a contract does not contain language specific to environmental liability, an investor may claim that arbitration is the appropriate forum to decide any dispute related to the investment project. For example, after the Indonesian Ministry of Environment filed a civil lawsuit against an American mining firm in the South Jakarta District Court in 2005, seeking US\$133.6 million in damages for the investor's alleged pollution of an inlet, the investor reportedly argued that the case should be settled in international arbitration in accordance with its Contract of Work.¹³³ Authorities insisted that the dispute resolution clause in the contract was only applicable in business disputes and not in a case of breach of domestic environmental law. Nevertheless, the court reportedly decided in favor of the investor's interpretation of the contract.¹³⁴ The Ministry would have needed the support of the rest of the government and additional resources to pursue the case in arbitration; it is understood that the government chose instead to reach a settlement with the company.¹³⁵

Two pending investor-state arbitrations are also worth mentioning. Although they have been brought to arbitration under the dispute settlement provisions in investment treaties, they are wrapped up in issues of contractual liability for environmental damage. The first case is *Chevron v. Ecuador*,¹³⁶ a dispute that arose out of a class-action lawsuit brought against the investor first in the U.S. and then in a local court in Lago Agrio, Ecuador. The Lago Agrio case resulted in a judgment against Chevron for some \$18 billion in damages related to pollution allegedly caused by Texaco (which merged with Chevron in 2001) when it operated in the Ecuadorian Amazon from the 1960s to the early 1990s.¹³⁷ The judgment was upheld by an Ecuadorean appellate court.¹³⁸ In the arbitration, Chevron is arguing that the case was not adjudicated fairly and that the company was released from liability through a remediation agreement.

132. Concession Agreement between The Republic of Liberia and Firestone Natural Rubber Company, LLC and Firestone Plantations Company, signed January 28, 2005, art. 15(g) (on file with authors).

133. "Govt, Newmont seek amicable deal," *The Jakarta Post*, July 9, 2005, available at <http://www.accessmylibrary.com/article-1G1-134064423/govt-newmont-seek-amicable.html> (last visited March 23, 2012); "Newmont to submit case to international arbitration," Newmont News Release, March 9, 2005, available at <http://www.newmont.com>.

134. "Court dismisses civil suit against Newmont," *The Jakarta Post*, November 16, 2005, available at <http://www.accessmylibrary.com/article-1G1-138798264/court-dismisses-civil-suit.html> (last visited March 17, 2012).

135. ID Nugroho, "Indonesia: Rachmat says \$30 million Newmont deal no slap in the face," *The Jakarta Post*, February 19, 2006, available at <http://corpwatch.org/article.php?id=13284> (last visited March 23, 2012).

136. *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, Claimants' Notice of Arbitration*, September 23, 2009, available at <http://italaw.com/documents/EcuadorBITEn.pdf> (last visited March 17, 2012).

137. An English translation of the judgment in *Aguinda v. ChevronTexaco*, Case No. 2003-0002 dated February 28, 2011, is available at <http://chevrontoxico.com/assets/docs/2011-02-14-judgment-Aguinda-v-ChevronTexaco.pdf> (last visited March 17, 2012).

138. Victor Gomez "Ecuador court upholds \$18 billion ruling against Chevron," *Reuters*, January 3, 2012, available at <http://www.reuters.com/article/2012/01/04/us-ecuador-chevron-idUSTRE8021VS20120104> (last visited March 17, 2012).

The second case of note is *Renco Group v. Peru*.¹³⁹ A subsidiary of the claimant took on commitments to clean up the area around a metal smelter that it purchased in 1997. The area (in La Oroya, Peru) is considered one of the most polluted sites in the world.¹⁴⁰ The investor reportedly failed to meet its remediation commitments and eventually several class-action lawsuits were launched against the company in the U.S.¹⁴¹ In the ongoing arbitration, the claimant argues that Peru should assume liability in the class-action cases.

From a sustainable development perspective, resolving environmental liability disputes such as these in international arbitration is not ideal. First of all, hearings are typically held far away from local communities in major cities such as London, Paris, and Washington, D.C. They are also often closed to the public. As noted above, there have been improvements in this area in recent years.¹⁴² However, most of the progress made has been under specific investment treaties; without comparable provisions on open proceedings in the contractual arbitration clauses, there is no guarantee of transparency. Arbitrators are also typically experts on international investment law, rather than on environmental regulation. Finally, there are also serious capacity issues for developing countries; international arbitration is expensive and complex.¹⁴³ This situation raises concerns about the extent to which effective dispute settlement and enforcement mechanisms assist contractual provisions aimed at regulating the environmental liabilities associated with investment contracts.

In terms of potential alternatives to arbitration (or local courts, which in many countries are viewed negatively by foreign investors), the Model Mining Development Agreement provides for mediation of environmental disputes by an "Environmental Management Panel."¹⁴⁴ If the dispute is not resolved through mediation within 90 days, it may then be submitted to arbitration. Whether this alternative is viable would depend, to a great extent, on the make-up of such a panel (which is not explored in the Model) as well as its standards of transparency and accountability.

CONCLUSIONS

This chapter illustrates the complex relations between investment contracts and sustainable development. Several aspects of investment contracting have direct bearing on the extent to which an investment pursues, or undermines, sustainable development goals like poverty reduction and environmental sustainability. The terms of contracts can affect not only the amount of direct income that a country will gain from leasing land or allowing the extraction of its

139. The Renco Group, Inc. v. The Republic of Peru, *Claimant's Notice of Intent to Commence Arbitration*, December 29, 2010, available at http://italaw.com/documents/RencoGroupVPeru_NOI.pdf (last visited March 17, 2012).

140. Blacksmith Institute, *The World's Most Polluted Places: The Top Ten* (New York: Blacksmith Institute, 2006), available at <http://www.blacksmithinstitute.org/top10/10worst2.pdf> (last visited March 17, 2012), p. 8.

141. A.O.A. et al v. Doe Run Resources Corporation et al, US District Court of Missouri Eastern Division (2011 WL 2553259).

142. See *supra* text accompanying notes 44–48.

143. Eric Gottwald, "Leveling the playing field: Is it time for a legal assistance center for developing nations in investment treaty arbitration?" 22 *American University International Law Review* 237 (2007).

144. MMDA, *op. cit.* note 13, art. 2.4.2 (Example 3).

resources, but also the value of an investment project in terms of employment and business opportunities, the extent to which local people have control over decision making, and safeguards for the environment. For example, although national law is critical in defining opportunities for affected groups to have a voice and in establishing safeguards for local land rights, contracts can play an important role in either expediting or mitigating disruption caused to the local population. Furthermore, contracts will often determine the extent of an investor's liability for any environmental damage that an investment project causes as well as the forum in which any dispute about environmental issues will be heard. While this article has dealt with process, economic, social, and environmental issues in separate sections for sake of clarity, these aspects are closely inter-related. For example, greater transparency, participation and scrutiny in the contracting process can go a long way towards protecting local land rights. And compared to large-scale plantations, models of agricultural investment that involve sourcing agricultural produce from local farmers would limit the extent of land acquisition associated with project implementation. Getting the terms of contracts right, from a sustainable development perspective, requires a careful balancing of all these issues along with more conventional concerns about government revenue. This balancing act is central to the concept of sustainable development. In practice, balancing social, environmental and economic considerations is often complex, not least because there is no consensus on how to address important trade-offs, and because the balancing act is inherently context-specific and evolves over time.

The multiple economic, social, and environmental issues at stake in contracts for natural resource investments suggest that these contracts are public policy documents, rather than just commercial deals. This consideration has important implications. First of all, investment contracts should be publicly disclosed and freely available for public scrutiny. Transparency is not only a good in itself to fulfill the right of citizens to know about the way their government manages the resources it holds on their behalf, but also a way to promote contracts that more effectively promote sustainable development. Arguably, transparency would also signal to the "right" types of investors. The fact that most investment contracts are not disclosed and that resistance to transparency remains in many quarters suggests that a purely commercial perspective remains dominant in government and investor circles. A shift in legal thinking and discourse on the basic nature of these agreements is necessary.

In addition, the content of investment contracts can be reconsidered in important ways. This chapter has provided examples in three areas—positive linkages with the local economy, safeguards for local land rights and environmental liability—to illustrate the economic, social, and environmental considerations that need to be thought through in contracting processes. In all three areas, great diversity of existing contractual practice provides opportunities to bring about significant improvements by building on, and pushing the boundaries of, best practices. Similar considerations may be developed with regard to a range of other economic, social, and environmental issues that could not be covered in this chapter due to space constraints. Water abstraction or food security issues in investment for irrigated agriculture are just two examples of important social issues that present equally strong potential for improvement through learning from existing best contractual practice.

There are signs of movement in the right direction. Contractual transparency appears to be increasing, primarily through the efforts of NGOs but also as a result of international financial institutions and many governments taking transparency seriously. The Principles on Responsible Contracts are likely to prove influential. They provide important pointers on both transparency and contract content. However, it is perhaps the Model Mining Development Agreement that is the most significant sign of progress—not necessarily because of its content, but because it was developed within a mainstream legal organization.

These initiatives suggest that there are reasons for optimism, but further efforts to develop international guidance on other issues/sectors are welcome. Many investment issues will be country and project-specific and will require carefully tailored contracts, meaning governments cannot rely solely on generic model agreements or general principles. Furthermore, as was emphasized in the section on land acquisition,¹⁴⁵ reform in national legislation is often needed as much as changes in contracting practice. Strengthening the capacity of government to manage investment flows and to negotiate and monitor contracts, and the capacity of civil society, media, and parliaments to effectively scrutinize public action, are crucial in ensuring that sustainable development objectives are met.

The need for increased capacity is not limited to the realm of contract negotiations. The effort expended by a government to negotiate contract terms will likely be wasted in the absence of mechanisms aimed at monitoring and enforcement. These mechanisms require well-thought-out contract provisions (e.g., reporting requirements for the investor and its sub-contractors), but also a range of other factors, including: a properly staffed and clearly mandated government agency responsible for monitoring compliance; established channels that enable dialogue between the investor, the government, and other stakeholders; credible financial and other penalties in case of investor non-compliance; contract termination for material breaches of particularly important obligations.

Although the chapter has emphasized the important role of investment contracts in shaping the sustainable development outcomes of investment, we would like to close with a note of caution about the risk of overstating the importance of contracts. A good contract is no substitute for well-designed national legislation. Nor does it ensure that the decision to allow the investment to go forward in the first place was sound. To ensure that investment contributes to sustainable development, host countries need to develop an inclusive, strategic vision for development of the relevant sector, which would inform decision-making about individual investment projects; to establish policies that promote the right types of investment; to create governance frameworks to regulate investment, including international treaties and national law; to establish effective institutional machineries to manage investments; and to ensure that the right checks and balances are in place. Reconsidering contracts is a key building block of such a comprehensive strategy.

145. *Supra* Part D.