



VALE COLUMBIA CENTER
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Extractive Industries and Sustainable Development: The Challenges of Implementation

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Background Notes

**Vale Columbia Center on Sustainable International Investment
Columbia Law School/The Earth Institute**

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Preface to the Background Notes

Readers and Conference Participants,

Thank you very much for your interest in the VCC Conference on “Extractive Industries and Sustainable Development: The Challenge of Implementation.” This conference is different from our past conferences, in that we are using a Davos-style, conversational model instead of presentations followed by Q&A. We hope this format will foster discussion that is forward-looking and solution-oriented to the maximum extent possible. In that pursuit, we hoped to limit the discussion of historical background and the presentation of various positions that is often included in conference presentations. However, we understand that such background is important for panelists and participants to understand the context and parameters of the discussion. Therefore, we decided to put the historical background and issue identification into background notes in lieu of presentations at the conference.

This was no easy task! The extractive sector is complex and diverse. Thousands of companies, hundreds of governments, and millions of citizens are affected in some way by these industries. Indeed, we would even say that it is a sector that affects everyone, whether it be living by a mine, using gasoline for a commute, working on a rig, or negotiating a mega-merger of two global extractive companies. Complete coverage of all these areas and a comprehensive discussion of improving their sustainability would be wonderful-- but unfortunately, probably impossible, and certainly well beyond the Center’s capacity.

Thus, we have drafted background notes that provide some historical background and some issue identification in the areas that we know best: law, economics, and policy.¹ This is reflected in the background notes in their current form. Given the vast scope of even those topics, the notes are not comprehensive; those topics alone could take volumes. Moreover, the focus on law, economics, and policy results in other subject matter gaps, including in coverage of vitally important areas for sustainable development, such as: environment and climate change aspects; human rights; gender impacts and equality; indigenous rights; social and community issues; among many, many others. Similarly, the corporate perspective and experience may not be fully reflected in these notes.

Knowing these gaps, we are looking to the panelists and participants to broaden these notes and other aspects of our work in the future. Given the enormous global diversity of extractive projects and development challenges, it is impossible to cover everything in a 2-day conference. However, we look forward to receiving as much input as possible on these notes and the ideas in them. We are sure we are missing more than a few things; but we hope we have put forward at least a few interesting ideas as well. We are very grateful to Diran Ajayi, Todd Arena, Senami Houndete, Kelsey Jack and Zehra Gulay Kavame for their extensive work on these background notes and several of the panelists for their helpful inputs.

We thank you in advance for reading these and for the insight you provide.

Very best,

--The Vale Columbia Center on Sustainable International Investment

¹ You may note that the background notes vary in the use of footnotes and bibliography; this reflects the difference in training from our legal, economic and policy educations. We appreciate your flexibility.

Panel One: Reaching a Better Bargain

I. Problematique

The legal and regulatory framework that governs the relationship between a host-country government and investors in the extractive industries is the backbone of the long-term investor-government relationship. The legal and regulatory framework can include several pieces of domestic legislation (including the constitution, the mining or petroleum code, the tax law) and international treaties (bilateral investment treaties, double taxation treaties), but often, the details of the partnership between a specific investor and a country is enshrined in a separate contract or license. This is one reason why this particular piece of the framework is so important and has been the focus of recent reform efforts in the extractive industries. It is also, however, the part of the framework that is not often available for the public view, despite the fact that in some jurisdictions, it functions as the “law of the project.”

The legal framework, including the contract, can cover myriad issues: fiscal terms, community rights and benefits, health, safety, and environmental obligations, and disclosure of information, among many others.

And yet, where legal and regulatory institutions are not strong, the context described above may be too simple. Other actors may play much more of an influential role than those prescribed by law. For example, cultural and societal institutions play a hugely important, though often less formal, role in reaching “the bargain.” Some countries are formalizing these previously “extra-legal” influences in the drafting and negotiating of contracts, through community consent laws and civil society advisory boards during contract negotiations.

This note explores some of the most significant fiscal, economic and governance issues for reaching better bargains as well as the less formal institutions that are important for reaching a better bargain, both at the macro-level of institutions as well as at the bargaining table itself, and the gaps between those.

Contract versus License Systems

While today it is standard to have specific oil, gas, and mining legislation in most countries, these industries developed globally without relevant legal frameworks in the host countries.²

The increased need for extractive resources concurrent with the industrialization of the United States and Europe resulted in a significant depletion of domestic resources and a need to go to other countries to increase available resources. Early agreements for these resources took the form of “concession contracts” in lieu of legal and regulatory frameworks in host countries.³

There continues to be a range of legal frameworks globally: some countries have detailed domestic legislation (and therefore only brief licenses for individual projects) and others have no extractives legal framework, leaving all terms of the agreement to the contract. The latter is probably rare, as most countries have at some point sought to have their land explored for its extractive potential; but some countries do not have legislation if the country’s resource potential does not justify creating a unique

² Yergin, Daniel. *The Prize: The Epic Quest for Oil, Power, and Money*. New York: Simon & Schuster, 1991.

³ Likosky, Michael. *Contracting and regulatory issues in the oil, gas, and metallic minerals industries*. Transnational Corporations, Volume 18, No.1 (April 2009).

policy regime.⁴ Nonetheless, it can be helpful to think of two different systems, “license and legislation” versus “contract-based” or “concession” systems.⁵

The legal arrangements are, in some respects, different between hydrocarbons and other minerals. Briefly:

Minerals. For the granting of exploration and exploitation rights in the minerals sector, “first come, first served” systems predominate.⁶ Some countries “bundle” the right to explore with the exploitation right,⁷ granting both at the same time, while others require a second process for transforming the exploration right into an exploitation right.⁸ Bidding or auction processes are rare, though some countries allow it in exceptional circumstances,⁹ and commentators have suggested this method as a means to increase government take from the industry.¹⁰ Among countries, there is a range of license and contract-based systems.

Hydrocarbons. Bundling exploration and exploitation rights is much more common in the hydrocarbons sector.¹¹ Bid auctions are also common, but first-come, first-served systems are used, too. As with minerals, there is a range in the legislation versus contract balance from country to country. In Peru, for example, companies bid on exploration and exploitation agreements on only two variables: the royalty rate and the exploration plan. The country uses a model contract that is relatively brief; other rights and obligations are in the legal and regulatory framework. On the other hand, contracts signed in the former Soviet states just after independence are incredibly lengthy, up to 250 pages long, as a result of the absence of legislation.¹²

A debate that continues today is whether and how countries should favor license and legislation schemes. On the one hand, legislation schemes provide one consistent legal framework that applies to all industrial hydrocarbons or mineral activities.¹³ For governments, one framework should be easier to administer: instead of myriad divergent fiscal and health, safety and environmental (HSE) regimes, there would be primarily the legislative regime in place, with some projects falling under previous legal frameworks and old contracts. For companies, there would be a more level playing field; all competitors would be operating under the same framework on key aspects.

But which aspects of this framework can be set in law and which need to be left to contracts? And in what circumstances?

⁴ Tordo, Silvana. *Fiscal Systems for Hydrocarbons: Design Issues*. World Bank Working Paper No. 123 at 7.

⁵ *Id.* Note that some commentators use “contractual” versus “concessionary” to describe these legal arrangements. “Concessionary” systems would correlate to “contractual” and “contractual” to “legislative” in our taxonomy.

⁶ Some countries that use this system, for example, Chile, Democratic Republic of Congo, Mongolia, Mozambique, Peru, and Zambia.

⁷ Chile, Democratic Republic of Congo, Mongolia, Mozambique, and Zambia use this system, among others.

⁸ Peru uses this system, for example.

⁹ Australia, for example.

¹⁰ Jourdan, Paul. *The Utilisation of Mineral Wealth for Development Purposes in South Africa*. Draft (unpublished), 2010. Natural Resource Charter, Precept Four, available at <http://184.106.217.37/content/precepts/precept-4>.

¹¹ Tordo, Silvana. *Fiscal Systems for Hydrocarbons: Design Issues*. World Bank Working Paper No. 123 at 8.

¹² See Kazakhstan and Azerbaijan’s Production Sharing Agreements from the late 1990s, for example.

¹³ Artisanal mining generally needs a separate regime, however a coordinated approach is the goal, as they are interrelated. For this conference, which is primarily focused on the industrial sector, the discussion on this panel will not revolve around those artisanal mining issues; though their importance is undeniable. The conference in no way intends to diminish this by not treating the issue; indeed, it deserves its own conference.

On the other hand, several reasons are cited in factor of a contractual-based system. Some argue that the geology of a country is too diverse to legislate under one framework, though some countries opt to have different provisions for on-shore and off-shore hydrocarbons development,¹⁴ for example, and mineral legislation will have different royalty rates for different types of minerals.¹⁵ However, some countries may not know their geologic base well enough to invest in designing a system to meet its needs.¹⁶

Others argue that country-risk and development level militate in favor of a contractual regime until the country is more stable, has attracted sufficient investment, and has a better sense of its geology. However, this approach would need a host government to exercise restraint in contracting to keep from having hundreds of contracts, all with different legal frameworks along the various categories of issues (fiscal, HSE, etc). One example of the difficulties of relying on contracts would be the Democratic Republic of Congo. Its mining legislation prior to reform in 2003 was very sparse in terms of specific rights and obligations; most was left to contracts. When around 60 contracts were made public shortly after President Kabila was elected, it became apparent that essentially 60 different legal frameworks were in place under those contracts.

This debate of legislation versus contracts has direct implications for contract monitoring and implementation, the subject of the next panel. Policy documents on best practice, such as the Natural Resource Charter, recommend robust legislation and minimal contracts to facilitate better contract implementation by governments.¹⁷

Balancing Fiscal Flexibility and Predictability

The debate about what to fix in law versus contracts is particularly acute in discussions about how to create durable, administrable, and attractive fiscal regimes—a difficult task for the legal framework governing all foreign direct investment (FDI) for host countries. But certain aspects make the extractive industries much more difficult. The dramatic spikes in resource prices and their non-renewability make it hard to know *ex ante* what a contract for a deposit is “worth”; yet, getting that right is critical—once the resources are sold, they cannot be returned. One may see the recurrent renegotiations and changes in fiscal regimes as an attempt by governments to correct for these miscalculations, though some are indeed the result of corrupt and enterprising governments.¹⁸ Companies seek relief through changes to fiscal regimes as well when prices have been in troughs.¹⁹

This raises serious questions about how to balance seemingly opposite and changing dynamics: *How can states ensure fiscal flexibility, allowing the country to benefit when prices rise and bear a reasonable share when they fall, while providing the predictability and profitability that investors seek?*

The classic “balance” of these competing goals is said to be in the mixed royalty/tax system that is the most widely used in oil, gas, and mining fiscal regimes around the world.²⁰ The royalty provides the government with a return for this non-renewable resource that is independent of the profitability of the

¹⁴ For example, Liberia and Nigeria.

¹⁵ See the Code Minière of the Democratic Republic of Congo, for example.

¹⁶ Tordo, Silvana. *Fiscal Systems for Hydrocarbons: Design Issues*. World Bank Working Paper No. 123 at 7.

¹⁷ Natural Resource Charter, Precept Four, available at <http://www.naturalresourcecharter.org/>

¹⁸ Thomas Waelde: Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law, *J World Energy Law Bus* (2008) 1 (1).

¹⁹ See, for example, the US Legislation “Deep Water Royalty Relief Act” which lowered royalties for the oil industry when oil prices were low in the early 1990s.

²⁰ Tordo, Silvana. *Fiscal Systems for Hydrocarbons: Design Issues*. World Bank Working Paper No. 123. Land, Bryan and Johnson, Daniel (1994). *International Petroleum Fiscal Systems and Production Sharing Contracts* (Oklahoma, USA: Penwell Books). Otto, James et al (2000). *Global Mining Taxation Comparative Study* (Golden, Colorado: Colorado School of Mines).

extracting company. The tax provides the government the opportunity to share in the profits of the extraction project. But there are many pitfalls of this system in practice, including that the ratio of royalties to taxes is no simple matter for a country trying to decide how much predictability of revenue it wants versus its overall take from a project. The current system seems to necessarily imply this difficult choice. *Is there a way to move beyond this and ensure companies remain profitable as well?*

Windfall profits taxes have been attempted as one means to ensure countries benefit in high-price booms. *If the recent debacle with Australia's attempt at such a tax is any indication, can other countries replicate such taxes? Are other forms of progressive taxation a better option?*

Has there been too much emphasis on attracting FDI and not enough on its contribution in this sector? Some commentators believe that the World Bank in particular as placing too much emphasis on providing generous incentives to transnational corporations while neglecting its impact on development.²¹

Various means have been employed by states to “claw-back” perceived imbalances in profit-sharing from the extractive industries. contractual systems like the “production sharing agreement,” used primarily in the hydrocarbons sector, was an attempt to re-frame the relationship between governments and companies, making the government partner more active in the wake of this shift. A new dimension is the “sustainable contract.”

Key Elements of Sustainable Contract and Legal Framework

The fiscal arrangements (among others, like land tenure) between investors and governments have always been in these extractive industry contracts and addressed in legal frameworks as well. With the rise of environmental awareness, sustainability, anti-corruption initiatives, poverty reduction, and the transparency movement, many other issues are now considered critical aspects of the country-investor agreements as well. The classic colonial extraction is long gone and the “enclave” model is increasingly seen as archaic and outdated; sustainable investment in the extractive industry has become the goal, but what that actually means remains an open question.

While some of these matters are now clearly accepted as within the realm of the how companies should operate mines and wells (environmental management and clean up), some are still outside the norm and practices vary widely. For example: should contracts determine who should build, operate, and maintain schools, clinics, and *other social infrastructure around a mine site? And if so, what are the tax implications of this? Does it lessen the government's total take? Is reduced government take an acceptable trade-off if people are getting services delivered more quickly and at a better standard? What is the long-term sustainability of such practices? Are there examples of successful corporate to government transfer? When do these decisions tend to be made? During the negotiation process or later in the life of the project? (See the note for Panel Four, which takes up these questions again as issues beyond the contract, in some instances).*

A recent IIED publication on sustainable contracts²² and the ongoing process to develop a Model Mineral Development Agreement suggest many of the same issues for inclusion in extractive industry contracts, or, implicitly, the legal framework. Among these are:

- Local content and/or linkages and employment, training, and technology transfer
- Environmental protection, mitigation, and rehabilitation

²¹ UNCTAD, 2005a. *Economic Development in Africa. Rethinking the Role of Foreign Direct Investment*, United Nations, New York and Geneva.

²² Cotula, Lorenzo (2010) *Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments*, Natural Resource Issues No. 20. IIED, London.

- Consultation with local communities and protection of artifacts and practices of social and cultural importance
- Grievance mechanisms for affected citizens
- Giving government more say in its regulatory role, and protecting its right to legislate (i.e. reform of stabilization clauses)

How important are these new “sustainable contract” contract clauses? And what of the provisions that may not be allowed by international law: local content provisions are technically not allowed under TRIMs, yet contracts include them. *What differences, if any, are we seeing when these are addressed in contracts or through CSR and corporate philanthropy through mechanisms like trust funds? Are companies getting tax relief for these efforts? Should they? How should we understand these efforts: are they a part of the “government take” beyond on top of the revenues? Or are they pure philanthropy by the companies?*

Even if all of these “sustainable development” criteria are met and honored in a given extractive project, if the government take is not high enough, has any progress toward poverty reduction and economic development actually been made?

And, even with such “sustainability provisions,” how reasonable is it to think prima facie that it will lead to a more durable deal, if we assume it is correct that deals are renegotiated in response to change of circumstances that are more politically driven (new government for example) or macro-economic, like dramatic change in commodity prices? Does this make conversations about appropriate fiscal regimes and inclusion of renegotiation mechanisms in a contract more relevant to its durability, if not “sustainability” in the social sense?

Corruption in Contracting

A related issue that continues to arise is that of corruption in the contracting process. The extractive industries are unique in this regard because many of contracts are confidential. Governments may therefore use confidentiality as a veil from public scrutiny, according to some. Weak institutions also mean that corrupt public officials can easily avoid scrutiny. Companies also have an incentive to make questionable payments, enjoy favorable fiscal terms, or just turn the other way when something that does not seem quite right appears to be afoot.

There has therefore been a push for more transparency in the revenue streams produced by extractive industries as well as preventing corruption. There are some initiatives which have the potential to have significant impact. The first is the Extract Industries Transparency Initiative (EITI) which seeks to increase transparency in payments from companies to governments; the second is far less new, but remains significant, the United States Foreign Corrupt Practices Act (FCPA) which makes it unlawful for certain classes of persons and entities to make payments to foreign government officials for the purpose of obtaining or retaining business. Responding to the FCPA, the OECD and the UN also have conventions against corruption. Also, in the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act companies are required to make a report payments made to foreign governments for the purpose of the commercial development of oil, natural gas, or minerals.

Though EITI and FCPA are not the topic of this panel, are there indication they are encouraging better and more transparency contracting processes? If not, what is? In Peru, the contracting process for hydrocarbons is open and transparent – bids are publicly chosen in a competitive process and the final contracts are available on PeruPetro’s website.²³ This decision seems to have been made more out of a

²³ See http://www.perupetro.com.pe/wps/wcm/connect/perupetro/site-en/importantinformation/cont_contractsinforce.

desire to attract investors than for pure transparency and public participation concerns. *If that is the case, why do we continue to see so few countries publishing final contracts?*²⁴

Contract Negotiations

Contractual imbalances are often said to have been born by asymmetries in the bargaining power of companies and governments. Governments do not have the subject matter expertise, time, and money to negotiate that companies have. If governments had more of these resources, more sustainable and durable contracts might be concluded.

Others attribute poor contracts to misaligned incentives: government negotiators may have better prospects for lucrative future employment with the company they are negotiating with than in continued public service. Therefore, in the absence of public scrutiny of the final contract to align incentives, some negotiators do not have enough reason to drive a “hard bargain” for their country.

Several initiatives aim at providing legal, economic, environmental, geologic, and other support to countries negotiating contracts (explained further, below). *Is this the most effective route? Would international standards or benchmarks be better? Or regional mining codes and model contracts? Are both needed, and if so how will they work together? And in the absence of contract transparency, how successful will these initiatives actually be at creating better contracts?*

State-Owned Enterprises & State Equity

An older practice than “sustainable contracts” for increasing host-country benefits from natural resource extraction is the creation of national oil and mining companies. *Are there strong indications of success? If not, why not?*

A related issue is state equity shares in these projects. *Is this an attractive option? Or does it create or exacerbate conflicting incentives for governments, such as profitability over social protections? How do such interests affect negotiations, if at all?*

Structure of the Industry

While state-owned enterprises have become increasingly important in the hydrocarbons sector, they are, obviously, not the only players influencing the current state of play in the industry in exploring and developing mines and wells.

There is a range of companies in terms of size, expertise, and desire to see the development of a project. To be a bit simplistic, one could categorize the players into four categories: (1) the mega-companies that primarily develop oil, gas, and mineral resources; (2) mid-size companies that develop but also explore; (3) junior companies that primarily explore but may be involved in early funding of project development; (4) so-called “suitcase” companies that gain rights to concession areas with little intention of developing, but rather selling them on to other investors.

Several potential issues arise in such a context. *With mega-companies interested largely in mega-projects, does that make a difference for countries trying to attract such companies, as that is the stated goal of some countries? How do mega-companies partner with smaller companies and how does that impact their ability to manage the deal, especially if they end up inheriting the contract from these companies? How often is this case? Is it a problem from the perspective of governments and companies? Finally, what of “suitcase companies” –are they playing a helpful role in the industry structure? If so, how and why?*

²⁴ See Revenue Watch Index at http://www.revenuewatch.org/rwindex2010/pdf/RevenueWatchIndex_2010.pdf.

II. Issues and Solutions

This is by no means an exhaustive summary of the initiatives, innovations, and solutions suggested to begin to reach more sustainable and durable bargains. They are just a few highlights that the panel and participants may consider discussing.

→ Legal/ Contract Negotiation Aid Facilities

Three initiatives to provide contract negotiation assistance are in their initial development. It is important to note that thus far, all three are focusing on Africa. The initiatives were led by the (1) African Development Bank, (2) the African Center for Economic Transformation and the Revenue Watch Institute, and (3) UNDP.

All of these initiatives are very new, and information on them remains limited. *Are there successes, challenges, and lessons learned despite these being still very new efforts? How will these initiatives build local capacity and move beyond the consultancy model embedded in much technical assistance to government? Could contract monitoring and implementation (the topic of the next panel) capacity for government and civil society be done in tandem to ensure the long-term viability of contracts?*

One model that has been proposed but yet to be adopted is an Investment Contract Aid Facility that would depend on companies providing funds to an independent escrow account that would be managed under the purview of a well-respected and trusted international organization.²⁵ *Would host country government and companies want such a facility? Would host country populations trust such a facility? Which organizations are of such stature that they could overcome such mistrust? What assurances would companies, governments, and citizens want to participate in or approve of such a project?*

→ Contract Transparency & Contract Database

While several private databases that are pay-for-access exist, citizen oversight is difficult when the costs are prohibitive. Further, some countries may not be able to afford access to such databases as well. *How can contract transparency and a database collecting these contracts that is free and accessible to the general public be promoted?*

→ Model Contracts

The Mining Committee of the International Bar Association is drafting a Model Mining Development Agreement that countries may use as a base for their negotiations. The group conducting the work is reviewing various contracts and selecting various clauses that seem represent the best for a sustainable partnership. At the time of writine, The draft has not yet been finalized but is due to go through consulting period during the end of 2010. *Will governments and companies have the necessary buy-in to use this model? Or any model?*

→ Regional Mining Codes

Some countries have realized that their failure to work together is driving a race to the bottom in contracting instead of a race to the top. Scholars have also shown that the sporadic actions of isolated host States cannot create change.²⁶ In fact, progress in the direction of a general framework of norms has been made with the recent announcement by the Economic Community of West African States (ECOWAS) of a directive to implement a common mining code by the end of 2012.²⁷ This directive

²⁵ Sauvart, Karl. "Fair Contracts for Poor Countries" available at http://www.vcc.columbia.edu/pubs/documents/Sauvant_ICAF_article-25March2008.pdf.

²⁶ Shaxson, Nicholas "Oil, Corruption and the Resource Curse", in *International Affairs*, Volume 83 Issue 6, 2007, pp.1123–1140.

²⁷ MINING JOURNAL (January 2010), "Special Publication: Indaba", January 2010.

would be “designed to contribute to the macro-economic development of member States, promote development and infrastructure at local and regional levels, and ensure fair allocation of minerals income to local communities as well as to member States in enabling the promotion of sustainable development policy.” Its supranational nature would reinforce the bargaining power of host States. Yet the implementation of this new code faces serious challenges, since it will require convincing individual governments to revoke their existing licenses deemed non-compliant with regional legislation. *What perspectives are there for such a code? What is the impact of the African Union’s African Mining vision and how could it be supported so as to give reality and concrete grounds to what still remains a “vision”? What strategies could be supported to foster the rise of universal binding norms?*

More generally, how can these initiatives be strengthened? If the critical issues are what goes into a contract and the law, and how to avoid renegotiations, are these the right ways to go about achieving a better bargain?

Lunch Keynote Address: Breaking the Resource Curse through Transparency—The Cardin-Lugar Provision in the US Dodd-Frank Wall Street Reform and Consumer Protection Act

I. Background

Set up in 2002, the Extractive Industry Transparency Initiative (EITI) framework encompasses twelve principles related to transparency, government accountability, sustainable economic growth, and national sovereignty, and consists of six criteria designed to ensure that governments implementing the EITI comply with these principles. While remaining voluntary, the EITI has progressively been translated into a formalized governance structure through implementing legislation and commitments at the national level, with the creation of a 20-member board and secretariat, the adoption of rules and criteria for the validation of “Candidate” and “Compliant” countries, and the accreditation of private party “validators” authorized to certify a country’s implementation process. In order to be certified as a “Candidate,” a participating country must commit to requiring that extractive companies operating within its territory report the payments they make to the government and to report its receipt of such payments in order to reconcile any disparities. To be recognized as Candidate Country, four indicators have to be met: (1) a firm government announcement; (2) its commitment to work with the private sector and civil society organizations; (3) the appointment of an implementation leader; and (4) an agreed and fully costed work program. The EITI does not always require disaggregated company-by-company reporting by implementing countries; this depends on the decision of multi-stakeholder working groups within each country. In some countries, such as Nigeria and Liberia, disaggregation has been prescribed; in others, governments aggregate yearly figures. This shortcoming tremendously undermines the usefulness of the reconciliation process. Moreover, it has been observed that participating in the EITI validation process does not necessarily guarantee improved transparency and the elimination of corruption, since countries face no real sanctions for shortcomings other than being thrown out of EITI (as has happened to Equatorial Guinea and Sao Tome and Principe) (Firger, 2010).

The EITI has seen enormous growth and acceptance as best international practice in its first eight years: now 34 governments, 42 companies and a number of civil society organizations have pledged to develop a voluntary²⁸ framework to promote transparency of payments and revenues. The rationale behind this initiative is that enhanced corporate and government transparency by enhancing the right to information for citizens will result in a win-win situation, producing a virtuous circle between political institutions and sustainable economic returns for all the stakeholders, including companies. In short, as Terry Lynn Karl writes in *Escaping the Resource Curse*, “Transparency is the first manifestation of what would become a fiscal social contract.”

The Publish What You Pay (PWYP) coalition that was instrumental in setting up the EITI has recently achieved another step with the Cardin-Lugar provision, essentially making the voluntary initiative a mandatory requirement for companies. The Dodd-Frank Wall Street Reform and Consumer Protection Act implemented on July 21, 2010, in Section 1504,²⁹ demands that “each resource extraction issuer is to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.” Therefore, the Act requires both national and foreign resource extraction issuers listed on US stock exchanges to disclose all payments made in the frame of their activity.

²⁸ It is voluntary for a country to join, but once it has joined all companies must report.

²⁹ The section is based on the Cardin-Lugar Energy Security Through Transparency Act (s.1700).

II. What next?

The provision is so new that it is impossible, at this point, to assess successes of its implementation. Instead, we ask, *what will its effects be? How can this landmark achievement maximize its potential?*

→ Boosting impact on existing transparency standards and approaches

How will this new legislation affect EITI? How will the Dodd-Frank Act Disclosure Rules affect the extractive company strategies vis-a-vis transparency? Will companies press for countries to initiate EITI so that government receipts will be more broadly available to check against the Act's disclosure requirements? Can the FCPA and the Cardin-Lugar Amendment work together for better fiscal responsibility by governments and companies? If so, how?

→ Trickle-down impact on home country and host country standards and legislation

There has been some criticism that the United States and American-registered companies could lose in competitiveness when faced with other companies that are not required to disclose. *Will this Act affect national competitiveness, even though it reaches foreign owned companies as well?* One should recall for instance that the same competition attack was made about the FCPA, but America did not lose competitiveness after its passing. Instead, "It generated a virtuous 'race to the top' and allowed U.S. businesses to seize the high ground on international bribery early on, forcing other countries to play an expensive game of catch-up over subsequent decades" (Firger 2010).

If mandatory requirements are implemented such as with the Cardin-Lugar provision, to what extent can such home-country initiatives be effective without an equivalent initiative in host countries that 1) would impose the same standards on the small percentage of extractive industry investors to which the bill currently does not apply; and 2) would address reporting by host countries?

How can the Act impact the national regulations of host countries? We can mention for instance the recent Rwanda Government's plan to adopt a scheme that is supposed to mitigate the impact of the July 2010 United States' "conflict minerals" bill (Frank-Dodd Wall Street Reform Act §1502), which some in the industry called "a de facto embargo." Rwanda plans to cooperate with the ITRI Tin Supply Chain Initiative (iTSCi), a global tin authority, for this scheme helping buyers certify the origin and supply chain of tin and other ores to ensure they were not from conflict zones.

Likewise, how can the Act impact the national regulations of home countries? PWYP is currently engaged with the UK and the EU to pass substantially similar laws, for example, under the argument that these governments don't want to "fall behind" in their best practice measures. However, could the fact that the provision's implementation will likely not take effect, practically, until 2013 play a role in the "ratcheting up" of home country laws to match the ESTTA's high transparency standard?

Perhaps a cross-border standard among home countries like the OECD Guidelines for Multinational Enterprises would be more efficient and guaranteed to level the playing field. These guidelines are also voluntary for companies, but adhering home countries are committed to ensuring, through monitoring process, that the guidelines are understood and observed by all their companies (Gordon and Pestre, 2002).

Along the same line, President Obama recently stated that while the United States is taking the lead in global efforts to fight corruption with efforts like the Cardin-Lugar provision, other bodies such as the G20 must put corruption high on its agenda.³⁰

*What role could revised international accounting standards, such as the current investigation by the IASB into whether it should revise its IFRS related to extractive activities, play? The coalition that was instrumental in the Cardin-Lugar provision has succeeded in having many similar standards inserted into the IFRS proposal.*³¹

➔ **Risks of Limited Effectiveness of the Cardin- Lugar Provision**

Finally, obstacles to the effectiveness of the Cardin-Lugar provision in ending, for example, corruption and false disclosure have been discussed.

The first issue is related to the fact that the new legislation is grounded in disclosure obligations of the Exchange Act of 1934, which relies upon reasonable shareholders' incentives to police misconduct. The effectiveness of the incentive system of the Act stems from the close fit between investors' motivations and the fiduciary duties owed by firms to shareholders: reasonable shareholders need material and correct information to inform the security purchase decision (Firger, 2010).

Yet, in the case of the new legislation, disclosure requirements are primarily of interest to another kind of stakeholder, the development and anti-corruption advocates that have much less capacity to hold corrupt leaders accountable than self-interested investors. Disclosure of natural resource revenue data are arguably more about developing country governance than managing exposure to financial risk; and some emphasize that the Exchange Act was not designed for such a purpose and neither was the investor protection rationale underlying the securities laws. However, the provision says that corporate shareholders will benefit from such transparency because it will allow them to "assess financial risk, compare payments from country to country, and assess whether such payments help to create a more stable investment climate."

Would the law be deemed more impactful if it was not grounded in the Exchange Act, if it was decoupled from federal securities laws and if it was framed in a more comprehensive strategy addressing the complex governance and development challenges associated with natural resource abundance? And yet, given how difficult reform measures like the Cardin-Lugar provision, would a comprehensive approach have ever been politically feasible?

Moreover, private monitoring does not seem better armed than public policing to face this new task. Indeed, the civil society, individual investors serving as private attorneys general or NGOs are authorized to act as "private attorneys general" under Section 10(b) of the Exchange Act. However, the evidentiary burden is quite high: a material representation, connection between the misrepresentation and the purchase or sale of a security, and as evidence of the plaintiff's injury: reliance upon the misrepresentation, economic loss and loss causation. *Can a private party plausibly come up with sufficient evidence on all those points, or is it just an insurmountable burden?*

Finally, the issue of policing is all the trickier in an international setting. Indeed, it is more difficult to litigate on extraterritorial matters; judicial enforcement is difficult and a country's own nationals are often

³⁰ Remarks by President Obama at the Millennium Development Goals Summit in New York, New York September 22, 2010. Available at <http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york>

³¹<http://www.ifrs.org/Current+Projects/IASB+Projects/Extractive+Activities/Summary.htm>

indifferent to what happens remotely. *Can the new legislation be effective with weak enforcement mechanisms and without effective anti-corruption sanctions? What can be done to remedy these deficiencies?*

Bibliography

Dodd-Frank Wall Street Reform and Consumer Protection Act, Enrolled Final Version, H.R. 4173, United States Government Printing Office.

CLIFFORD CHANCE, Dodd-Frank Wall Street Reform and Consumer Protection Act, Clifford Chance, June 2010.

FIRGER, Daniel, “Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010”, on <http://ssrn.com/abstract=1573385>.

SENN, Mara, and FRANKEL, Rachel (2010), “Wall Street Reform law creates foreign-payment legal hazards”, *Oil and Gas Journal*, July 9, 2010.

Session II : Ensuring Countries and Companies Get What They Bargained for

I. Problematique

Reaching the optimal bargain does not ensure that the mutual obligations and responsibilities will be fully and effectively implemented and monitored during the life-cycle of the investment. Although the aim of contracting is to ensure stability, predictability and efficient business conditions in the long run, only efficient administration, due process of law, and good governance can ensure the long-term enforceability of contractual provisions (Collier, 2007).

The need for mechanisms following the initial contractual process to ensure contract implementation along the project life has recently become a focus of natural resource management initiatives. For instance, EITI is now a well-recognized multi-stakeholder effort to monitor the flow of resource revenues in countries that have joined that initiative. But there is much more to ensuring that companies and countries get what they bargained for than just ensuring complete and transparent revenue flows. Costs of all sorts can accrue in the absence of strong regulatory bodies and public oversight in any country, developed and developing. Even in the US, the deficiencies in the oversight of the health, safety and environmental risks of oil projects and their related royalty collection have resulted in massive public money losses and damages for the population.³² The Deepwater Horizon disaster is only one of the most striking examples in terms of environmental regulation.

II. Issues and Solutions

Encouraging Government Monitoring and Implementation

Host-country contract implementation and monitoring involves, inter alia, (1) government review and approval of company submissions that the contract or law requires, like annual work plans, budgets and environmental management plans; (2) performing timely and complete audits (including financial, forensic, operational, investigative); (3) ensuring that the project is adhering to the legal and regulatory framework, including the relevant labor laws, local content requirements, etc. (4) coordination of the various government agencies tasked with overseeing particular laws and regulations to which the extractive project is subject (environmental protection agencies, ministry of labor, ministry of finance, central banks, etc), including the effective collection of the taxes and royalties; and (5) effective enforcement mechanisms so that there are consequences for non-compliance.

One of the barriers to good resource management in host countries is host governments lack the capacity to perform a number of their responsibilities under the contract in all of the categories listed above: the review and approval of company submissions, audits, independent valuations and modeling, collection of taxes, and legal compliance.

Governments may lack the skills, technology, and experience to approve corporate compliance. For example, in the Democratic Republic of Congo (DRC), a joint venture partner developing the Kamoto mine leased equipment owned by the State-Owned Enterprise, Gecamines, and lease payments were made to the Government. However, the equipment was never appraised for its value against those payments; thus, the country does not know whether it was getting the fair value for the use of its equipment.

This is just one example among many. Feasibility studies and technical reports often require government comment and approval, but a government may lack technical expertise or be too influenced by indirect

³² See the natural resources section of the Project on Government Oversight website for a long list of various monitoring work in the United States: <http://www.pogo.org/investigations/natural-resources/>.

corporate interest to do so. Governments are often unable, and in some instances, unwilling, to calculate whether the taxes received are in line with the contract; they often do not have the capacity to curtail transfer pricing or other tax evasion strategies. Even when companies are paying taxes completely, the government's administration may mean that the tax collection system is incomplete and tax payments are missed. These capacity limitations are often exacerbated at local levels, which are also vulnerable to corruption and buy-offs.

What impedes the contract monitoring and implementation capacity of governments and what are the tools, instruments and methodology that they would need to strengthen their capacity to monitor and implement contracts? Considerable capacity building for governments? Improved and systematized transparency of key documents/processes? Improved access and capacity to audit? Increased parliamentary access to and oversight of contract formation and implementation? Partnership with civil society independent monitoring organizations?

What impedes the contract enforcement capacity of governments and what are the tools, instruments and methodology that they would need to strengthen their capacity to enforce contracts?

For instance, one would suggest that contract monitoring should involve government "integrity institutions" such as anti-corruption commissions, auditor generals, and ombudsmen, as well as government oversight.

→ Integrity institutions

Many governments have ombudsmen, auditor generals, anti-corruption commissions, environmental protection agencies, and independent regulators specific to the extractive sector to oversee governmental implementation of laws, regulations and contracts. *How effective are these institutions? One issue is that these bodies may be controlled by the executive branch in some countries. What can be done to make these institutions more effective? And would an institution expressly tasked with contract oversight and coordinating already existing oversight institutions make sense for countries that are highly dependent on natural resources for their economic development?*

→ Parliament oversight

Increasingly, a number of African legislatures are getting involved in the management and oversight of the extractive industry sector (Bryan and Hofmann, 2007). Now, Nigeria, Sao Tome and Principe and South Africa have passed laws to allow their national assemblies to control accounts and budgets related to the natural resources earnings. In Ghana, Nigeria and South Africa, deputies can even regularly request access to information and hold public hearings on proposed legislation. In Nigeria, Chad, and the DRC, they participate in working groups and commissions to foster new laws for the sector. However, although inherent to democratic functioning, this entitlement is still an exception in the legal landscapes of resource-rich countries and parliamentary oversight is generally solicited in the context of resource expenditure management but not so much for contract implementation and tax collection in particular. *In such a context, which strategies could be developed to remedy those difficulties and promote legislative engagement and oversight in government contract monitoring and implementation mechanisms?*

Achieving Robust Company contract implementation and monitoring

Monitoring and implementation mechanisms need not only better government policies, but active support from companies. Indeed, once contractually bound, the companies have obligations to comply with all the responsibilities under the legal framework. Companies should also put in place mechanisms to monitor and enforce compliance even though the host country system offers weak requirements on those areas. Recent waves of adherence to voluntary standards by companies seem to reveal that the reputational benefits of monitoring supersedes the organizational costs of auditing and monitoring.

There have been several industry-led initiatives to address the needs for mechanisms and standards for self – monitoring. Corporate disclosures and company reporting to monitor contract implementation are a good example of those mining companies are increasingly publishing sustainability reports; according to KPMG, in 2006, 40 out of the world’s 44 largest mining companies issued such documents.

→ **Global Reporting Initiative (GRI)**

The reporting framework mainly used by the industry has been the Global Reporting Initiative (GRI). Others exist such as the European Investment Bank reporting system (Project Completion Report, Project Progress Report, Financial Report from independent auditors) or the Towards Sustainable Mining Framework (Mining Association of Canada, 2009) but as opposed to these other frameworks that focus on a few issues, the GRI one has a hundred indicators covering, among others, governance, product responsibility, eco-efficiency, human rights. In 2003, a study of the World Bank found that GRI was the second most influential global standard on corporate social responsibility practices (Berman & Webb, 2003). However, the effectiveness of this reporting framework has been contested: it has been argued, for instance, that GRI overlooks the essential considerations of sustainability such as the integration of the different geographic scopes and the interaction between the three bottom lines, economic, social and environmental. Even the GRI G3, the last product of GRI has been said to be a “shopping list of issues” (Baker & Savitz, 2008), instead of a structured sustainability indicator system. The new principles called the Bellagio STAMP (SusTainability and Measurement Principles), released this year, in 2010, seem to address some of the GRI limitations and have been widely endorsed by a large group of sustainability assessment experts such as IISD, OECD, UNEP. But they have yet to be adopted by industry.

Can we build a more robust framework that addresses the GRI limitations? And is the Bellagio STAMP that more robust framework? What are the potential organizational costs involved in the implementation of such a system for a company? Would it need Compliance Officers whose duty it is to keep an eye on the implementation of contractual commitments? What if, each national mining association could develop additional national frameworks to complement the limitations of GRI? Just how useful to government and in particular, civil society, are these reports and disclosures? As one commentator has noted, GRI-based reports can “mislead decision-makers concerned with sustainability, or even camouflage unsustainable practices, particularly at the site level” (Fonseca, 2010).

→ **External Verification**

The reporting mechanism calls for external verification to leverage its impact. Thus, the International Council on Mining and Metals (ICMM) developed the Sustainable Development Framework (SDF) that all ICMM member companies are expected to implement. At the core of the SDF, is the requirement to publish independently verified reports on their sustainability performance measured by using the Global Reporting Initiative (GRI) framework and its Mining and Metals Sector Supplement (MMSS). Similarly, the Initiative for Responsible Mining Assurance (IRMA) is a multi-sector effort, launched in Canada in 2006, to develop and establish a voluntary system to independently verify compliance with environmental, human rights and social standards for mining operations.

The issue of external verification to ensure enforceability of voluntary principles is also acute when it comes to environment. Critical tools like Environmental Management Plans or the Environmental Impact Assessments are only recommended by the Equator Principles yet they are fundamental to avoid environmental degradation related to generally disruptive extractive projects. Some countries have made them mandatory; for example, in Namibia there is an Environmental Management Act since 2007 requiring mining developers to conduct a project-specific environmental and social impact assessment report before mine construction starts (Mining Journal, 2010). *Are there strategies to ensure the enforceability of those Equator Principles when they remain voluntary? Or the only real solution is to code these principles into law like in Namibia, and require auditable systems from companies because the*

industry does not have sufficient incentives to police itself? Or how about requiring that all voluntary reporting must be audited externally?

Besides adhering to standards of compliance and to systems of independent verification of compliance, companies are also held responsible for their supply chain. Thus, the OECD Investment Committee and the Development Assistance Committee have jointly undertaken a Pilot Project on Due Diligence in the Mining and Minerals Sector. This work intends to clarify the nature of due diligence in mining operations and mineral supply chain management and develop user-friendly due diligence practical guidance. Its first workshop held in April 2010 prioritized the development of practical guidance for responsible supply chain management of conflict minerals, with particular regard to the Democratic Republic of the Congo.³³ Similarly, the US Congo Conflict Minerals Act (CCMA) of 2009 targets the control of the supply chain. It requires companies to disclose to the SEC their entire chain-of-custody information going down to electronic manufacturers regarding “conflict minerals.” *How to raise awareness among mining companies and actors in the supply chain about the consequences of their actions, including liability risks? How can company establish a chain of custody mineral tracking system and committing to continuous improvement? Could we go further than that? What about for instance exerting formal monitoring or even formal liability toward the supply chain?*

Increase coordination between the divisions in companies/governments

One barrier to better contract implementation may be a lack of coordination between government and company counterparts responsible for the overlapping areas of contract implementation. For instance, companies and countries alike could benefit from shared information between the environmental engineers of the company and the environmental compliance officers in the government; between the infrastructure engineers and planners in the company and the Ministry of Infrastructure in the Government, between the social program coordinators of the company and the health and education technocrats in the Government, etc... If information were shared and policies aligned, both Governments and companies could benefit from more coordinated decisions, increased political will, the technology and know-how from the company, and other synergistic benefits. *Do government and company personnel in charge of the same issues (environmental compliance, exploration) speak directly to each other? If not, why not? How could their respective roles and expertise mutually reinforce each other? What trainings could be designed to help companies better understand the development challenges that many countries face? And vice versa for Governments understanding key business imperatives?*

Involving civil society in neutral third party monitoring

Monitoring contract implementation is key to ensuring compliance both of governments and of companies. Contract monitoring involves not only government “integrity institutions” such as anti-corruption commissions, auditor generals, and ombudsmans, but also multi-stakeholder and civil society monitoring and watchdog groups and initiatives that monitor both government and companies. Crucial to any discussion of monitoring are the barriers any of these efforts would face: *Will government and company fear of slowing down the development of a project impede efforts to have neutral third party monitoring? Given capacity constraints of many of the possibilities below, could isolated but in-depth auditing with stiff penalties for breach be a potential way forward, regardless of which institution carries it out (though a purely CSO-led process would likely not be able to have the kind of access required for such an audit).*

→ Multi-stakeholder initiatives

Multi-stakeholder governance and coordination are currently presented as one of the more effective tools to ensure sound natural resource management in the wake of EITI. (See the Background Note on the

³³ <http://www.oecd.org/dataoecd/28/49/44322951.pdf>

Cardin-Lugar Provision for more background on this issue). Other areas of extractive governance are using the model.

In Namibia, for example, Uranium mining firms are working closely with the government to ensure the sustainable development of Namibia's uranium resources. This will be "for the benefit of its people by ensuring best practice, through the observance of first-world standards of radiological safety, security, occupational health and environmental management". The Chamber of Mines of Namibia (CMN), via its Uranium Stewardship Committee, is playing a leading role in implementing these best-practice standards. Along the same line, with the funds of the main uranium mining companies of the country, the CMN established the Uranium Institute to co-ordinate occupational health, radiological safety and environmental management issues. *Are there areas in which a multi-stakeholder or an international initiative could facilitate contract monitoring and enforcement (as EITI aims to do for revenue collection)? Environmental compliance? Access to documents for auditing purposes? Anti-corruption? Verification of claim of compliance to internationally recognized standards?*

What is the role and responsibilities of each of these stakeholders in these initiatives? For example, what is the role of the civil society when corresponding governments and company departments (such as governmental environmental regulators and in-house environmental engineers) work more closely to ensure a coordinated approach like in Namibia? What are the advantages and shortcomings of multi-stakeholder mechanisms?

➔ **Civil society led efforts**

In countries where governments are not amenable to multi-stakeholder initiatives, civil society may need alternatives to monitoring contracts. Even where governments are open, civil society may still seek to complement these efforts with independent monitoring efforts, particularly in the area of anti-corruption. The intervention of civil society organizations has been demonstrated as one way to mitigate risks of corruption or opportunistic behavior (Auty and Le Billion, 2007).

Civil society monitoring extractive industry contracts is not unprecedented. In the United States, the Project on Government Oversight (PoGo) monitors the domestic extractive industries for corruption, conflict of interest, lost revenues, and environmental compliance. *What can international groups learn from groups like PoGo?*

Similarly, there may be international initiatives in other subject matter areas that could apply to extractive industry contract monitoring. One interesting initiative in this context is the Transparency and Accountability Program (TAP), which strengthens the capacity of Independent Monitoring Organizations (IMOs) in low- and middle-income countries to promote improvements in social sector public spending and better hold their governments accountable for expenditure decisions and actions³⁴. The TAP's rationale is that the international community's efforts to improve public expenditure and budget execution decisions would be more effective if done in collaboration with local independent monitoring organizations³. *Could the international community focus the effort on building IMOs among the different communities impacted by extractive industry investment to hold governments accountable to develop appropriate monitoring capacity? And for civil society organizations generally interested in improved natural resource management?*

³⁴ <http://tap.resultsfordevelopment.org/resources/ground-improving-government-performance-independent-monitoring-organizations>

How about looking at the role of initiatives to promote transparency of documents/processes that would facilitate contract monitoring and enforcement like a common repository (or just public access to) social and environmental impact assessments and feasibility studies? Would increased public access to some of those documents help with the civil society monitoring aspect? Or even with government monitoring? Particularly since some of the “monitors” in government may not have access to some of these key documents?

➔ **Transparency**

One the biggest threshold question is related to the disclosure of contracts. NGOs (Publish What You Pay, Revenue Watch Institute, Transparency International, Oxfam, and Global Witness, and others) help with capacity building for host officials, host legislators, and local NGOs auditors, and keep watch over outcomes. These NGOs are the ones strongly advocating for transparency while giving their technical assistance. *How can contract monitoring and even effective implementation by government be assured when the contract is not publically available? Is contract disclosure the first step to contract monitoring by outside neutral third parties, and even by integrity institutions and various ministries and agencies in governments, who are said to be kept from having access to contracts?*

Bibliography

ADEFULU, Adeoye (2009): “Nigeria: A Critical Review Of Upstream Provisions Of The Federal Government’s Latest Comments On The Petroleum Industry Bill”, Article by Adeoye Adefulu for www.mondaq.com, 27 October 2009.

AUTY, Richard and LE BILLON, Philippe (2007): “Managing Revenues from Natural Resources and Aid”, Chapter 6 in: Brown, Oli et al (eds), in *Trade, Aid and Security, An Agenda for Peace and Development*, London, Earthscan, 2007.

BAKER, M. & SAVITZ, A (2008). GRI: sinking or swimming?
<http://www.ethicalcorp.com/content.asp?ContentID=5755>

BRYAN, Shari, and HOFMANN, Barrie (2007): “Transparency and Accountability in Africa’s Extractive Industries: The Role of the Legislature”, National Democratic Institute for International Affairs, 2007.

CHENE Marie (2010), “Corruption And The Renegotiation of Mining Contracts”, u4.no Helpdesk Transparency International, Anti-Corruption Resource Center, <http://www.u4.no/helpdesk/helpdesk/query.cfm?id=156>.

COLLIER, Paul (2007): “The Natural Resource Trap”, Chapter 3 in *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It*, Oxford, Oxford University Press, 2007.

FIRGER D.M (2010): “Transparency and the natural resource curse: examining the new extraterritorial information forcing rules in the Dodd-Frank Wall Street Reform Act of 2010.”

FONSECA, Alberto (2010): “Requirements And Barriers To Strengthening Sustainability Reporting Among Mining Corporations”, PhD. Thesis, University of Waterloo, Ontario, Canada, 2010.

GORDON, K., PESTRE F., “Moving Towards Healthier Governance in Host Countries: The Contribution of Extractive Industries”, in OECD, 2002.

GLOBAL WITNESS (2004): “Revenue Transparency: A Priority for Good Governance and Energy Security” on: http://www.globalwitness.org/media_library_detail.php/115/en/time_for_transparency, 2004.

GUASCH, J.Luis (2004), *Granting and Renegotiating Infrastructure Concessions: Doing it Right*, WBI Development Studies, Washington, World Bank, 2004.

- HOFFMAN, Scott L. (2008), *The Law and Business of International Project Finance: A Resource For Governments, Sponsors, Lawyers, and Project Participants*, Kluwer Law International, 2008.
- HOGAN, William, STURZENEGGER, Federico, and TAI, Laurence (2007), “Contracts in Natural Resources: a Primer”, on: http://www.hks.harvard.edu/fs/whogan/Populism_Nat_Res/Populism_Agenda_files/HST_Intro_101007.pdf, 2007.
- HOGAN, William, and STURZENEGGER, Federico (2010), eds. *The Natural Resources Trap: Private Investment Without Public Commitment*, MIT Press, June 2010.
- HUMPHREYS Macartan, SACHS Jeffrey and STIGLITZ Joseph. E. (2007), *Escaping the Resource Curse*, New York, Columbia University Press, 2007.
- IMF (2007): *Guide on Resource Revenue Transparency*, 15 May 2007.
- JOHNSTON, Daniel (2008), “Changing the Fiscal Landscape”, *Journal of World Energy Law and Business* 1 (1), 2008, pp. 31-54.
- KARL, Terry Lynn (2007): “Ensuring Fairness. The Case for a Transparent Fiscal Social Contract”, *Chapter 10* in: Humphreys M, J D. Sachs and J. E. Stiglitz (eds.), *Escaping the Resource Curse*, New York, Columbia University Press, 2007.
- KRUGMAN, Paul (1987). “The Narrow Moving Band, the Dutch Disease, and the Competitive Consequences of Mrs. Thatcher.” *Journal of Development Economics* 27 1-2:50, 1987.
- MAINHARDT-GIBBS, Heike (2007), BIC’s Issue Brief, “Transparency of Extractive Industry Contracts: Understanding World Bank Group Influence”, on: www.bicusa.org/proxy/Document.10796.aspx, 2007.
- MINING JOURNAL (January 2010), “Special Publication: Indaba”, January 2010.
- OPEN SOCIETY/Revenue Watch Institute (2005): *Follow the Money. A Guide to Monitoring Budgets and Oil and Gas Revenues*, Open Society Institute, New York.
- ROMZECK, Barbara, and JOHNSTON, Jocelyn (2002), “Effective Contract Implementation and Management: a Preliminary Model”, *Journal of Public Administration Research and Theory*, 12 (3), Oxford University Press, 2002, pp. 423-453.
- SENN, Mara, and FRANKEL, Rachel (2010), “Wall Street Reform law creates foreign-payment legal hazards”, *Oil and Gas Journal*, July 9, 2010.
- SHAXSON, Nicholas (2007): “Oil, Corruption and the Resource Curse”, in *International Affairs*, Volume 83 Issue 6, 2007, pp.1123–1140.
- TRANSPARENCY ACCOUNTABILITY PROGRAM:
<http://www.resultsfordevelopment.org/projects/transparency-and-accountability-program-tap>
- TRANSPARENCY INTERNATIONAL (2010), News 2010, on:
http://www.transparency.org/news_room/in_focus/2010.
- WAEDELDE Thomas (2008), “Rule of Law and the Resource Industries’ Cycles: Acquired Rights versus the Pressure Inherent in the Political Economy of the International Energy and Resource Industries”, *Journal of World Energy Law and Business* 1 (1), Oxford Journals, pp. 55-97, on: <http://jwelb.oxfordjournals.org/content/1/1/55>.
- WISE, Holy and SHTYLLA, Sokol (2007): “The Role of the Extractive Sector in Expanding Economic Opportunity”, Economic Opportunity Series, Corporate Social Responsibility Initiative Report no. 18, Harvard University, Kennedy School of Management, Cambridge, 2007.

Panel III: Limiting Disputes and Better Resolutions

I. Problematique

It used to be the case that if investors undertook the risk to invest in a project overseas, the stability of the investment was at the mercy of the investor's home sovereign to protect—through intervention or through diplomatic channels. During the post-colonial transition, however, these diplomatic channels could not be counted on to provide timely recourse; and, in any event, diplomatic channels are inevitably political and tend to be uncertain, slow and inefficient. Investors wanted something akin to the commercial arbitration system, which was seen as a success following the 1958 “New York Convention” that ensured the enforceability of commercial arbitration awards.³⁵ This is the problem solved by investor-state dispute settlement (ISDS), whereby a nation undertakes to allow private actors to engage it directly without having to go through diplomatic channels or even having to exhaust the remedies available in local courts. This right, granted to private parties, to effectively sue a sovereign state for breaches of “acquired rights” granted in contracts, international investment agreements and principles of customary international law has been called, by both opponents and proponents, the “pulling-down of the state” to the same level as a private party.³⁶

The Modern International Investment and Dispute Settlement Regime

Today, international investment agreements (IIAs)³⁷ typically provide foreign investors the right to resolve disputes with host states through investor-state arbitration. In this regime, investors seek redress in international arbitral tribunals under the auspices of ICSID or *ad hoc* panels utilizing procedural rules, such as UNCITRAL rules. These IIAs, which capital-importing nations concluded and conclude to offer assurance to incentivize wary investors to undertake foreign direct investment (FDI) transactions and operations, have become part of the “common sense” approach most nations follow in order to improve a nation's investment climate.

Proponents of this regime argue that IIAs and the wider dispute settlement regime associated with them are necessary to protect foreign investors who often make significant investments that become profitable only in subsequent years. The investor often has significant sunk costs at the initial stages of the investment; this is particularly true in extractive industries; once these have been made and the project has started to operate, the balance of power tilts in favor of the host state.³⁸ Professor Thomas Wälde therefore noted the importance of protecting investors, stating the need to “provide investors rights that convert agreements with host States from mere political understandings to more legally affected constraints.”³⁹ Critics of the current system argue that IIAs are overly concerned with protecting rights of investors at the

³⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL (1958). Available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf

³⁶ Jorge A. Pérez López, *Algunas consideraciones Acerca de Los Denominados Contratos Ley, 11 DERECHO Y CAMBIO SOCIAL*, §III (2007) (“Nothing impedes the State from submitting to the sphere of private law and laying itself down on a level of parity with the particular contractor when public convenience so requires; in such situations the State may not make use of the exorbitant clauses [making the contract subject to International Public Law] since these are incompatible with the private law.” [translation by author]). Available at <http://www.derechoycambiosocial.com/revista011/contratos%20ley.htm>.

³⁷ The term “IIAs” refers to bilateral investment treaties (BITs), double taxation treaties (DDTs), and free trade agreements with investment chapters (FTAs). In the past 20 years, there has been a substantial increase in IIAs. There are now 5,929 IIAs, including 2,750 BITs, up from 1,000 in 1995. UNCTAD, *World Investment Report 2010* pg 82.

³⁸ Raymond Vernon described this as the *obsolescing bargain mechanism* in *Sovereignty at Bay: The Multinational Spread of U.S Enterprises* (New York Basic Books, 1971, p. 326).

³⁹ Thomas Waelde: *Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law*, *J World Energy Law Bus* (2008) 1 (1): 55-97.

expense of the need for legislative flexibility of host States to meet the needs of its citizens and protect legitimate public policy objectives.⁴⁰

The tension between the international investment regime and the public interest is made more pronounced in cases of disputes, when investors are permitted under IIAs to bring claims against the host state to protect the rights of their investment. The increase in the number of IIAs has been accompanied by an increase in the number of known investment arbitration cases, from a handful in 1995 to over 350 in 2009.⁴¹ Today, extractive industry disputes account for 32 of the 128 pending cases at the International Center for Settlement of Investment Disputes (ICSID).⁴² Latin America governments make up 66% of respondents.⁴³

The large number of cases arising from the extractive industry is not surprising. Wälde considers the paradigm case that leads to extractive industry disputes: once the capital has been put down and the project is finally starting to generate revenues, successive government administrations will often find themselves compelled by public pressure to erode the projects' return by imposing changes in law, regulation or policy that aim to access (and often redistribute) the now-available revenue streams. This is especially true in primary commodity booms, when greater-than-projected price swings lead to surplus wealth accruing to primary commodity producing firms. Investor contracts and IIAs effectively stabilize the original obligations of the host country government, protecting the investor from "opportunistic" later changes. To an investor, stabilized agreements preventing the renegotiation of contracts when prices swing upwards may look like a solution to the obsolescing bargain problem. But to host nation officials, citizens, and affected communities, boom price swings look too much like unearned profits, especially when viewed in light of community underdevelopment and the effects of resource exploitation on the environment. Environmental and community development issues can and often do lead to conflicts.⁴⁴

Disputes seem to be, for many extractive industry projects, an unavoidable part of the life-cycle of the contract. Depending on the dispute resolution process, disputes can cause much damage in terms of reputation and profitability, both for the government and for the host country. As a start, therefore, this session asks:

What are the most common causes of disputes in the extractive industries? Are most disputes brought pursuant to contracts or to IIAs? Which are the most common claims brought by investors? Have the outcomes been fair and mutually beneficial to both governments and companies? If not, what have been the objections?

⁴⁰ GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (New York: Oxford University Press, 2007); M. Sornarajah, *A coming crisis: expansionary trends in Invest Treaty Arbitration* in Karl P. Sauvant & Michael Chiswick-Patterson, eds., *APPEALS MECHANISMS IN INTERNATIONAL INVESTMENT DISPUTES* (New York: Oxford University Press, 2008); Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 *Am. Un. Int'l. L. Rev.* 3, 451 (2008).

⁴¹ Karl P. Sauvant, *FDI Protectionism Is on the Rise*, World Bank Policy Research Working Paper 5052 (Sept. 2009).

⁴² Sarah Anderson, Manuel Perez-Rocha, and Rebecca Dreyfus, *Mining for Profits in International Tribunals: How Transnational Corporations Use Trade and Investment Treaties as Powerful Tools in Disputes Over Oil, Mining, and Gas* (April 29, 2010).

⁴³ The distribution of cases is as follows: Latin America-21, Africa 4, Central Asia 3, Eastern Europe 3, North America 11d.

⁴⁴ Recently in Nigeria, the local communities of the Niger Delta demanded a greater share of the oil revenue produced from their land and some of the agitation turned violent. See U. Ukoha, "From 'Pirates' to 'Militants': A historical perspective on anti-state and anti-oil company mobilization among the Ijaw of Warri, Western Niger Delta" (2007) 106(425) *African Affairs* 587. Also, mining in south eastern Ecuador and Peru brought about significant conflict and resistance from the Shuar people living in these areas.

II. Issues and Solutions

➔ The Substantive Rights and Duties of Claimants and Defendants

Many have called for the re-calibration of a regime that, at its inception, was “intentionally unbalanced” in favor of the investor⁴⁵—especially since host states do not have a right under IIAs to bring claims against investors, except in the form of counter-claims. The original subordination of national sovereignty to certain “acquired rights” of investors has given way to a “re-examination in terms of the respective rights of investors and the host states in which they operate.”⁴⁶ The claim that states have consented to the regime and therefore are subject to it is being challenged by a few nations’ voluntarily removing themselves from the ICSID system,⁴⁷ in the very regions most targeted by claims (though the countries removing themselves may not be the ones most likely to have claims brought against them).⁴⁸

At least two notable initiatives stand out as representative: first, the 2005 “Model International Agreement on Investment for Sustainable Development”, created through a consultation process by the International Institute for Sustainable Development (IISD), which aimed to balance the traditional granting of investor rights with investor obligations tied to internationally recognized labor, environmental and human rights standards; and second, the 2006 “Bolivian Government guidelines for a fair trade and cooperation treaty with the US,” which aimed to balance the traditional granting of investor rights with the protection of host state rights to regulate in the public interest, as well as stripping the investor of the right to directly engage the host state. The stripping of the investor’s right to engage the host-state directly usually either accompanies efforts to ensure direct negotiations between governments, especially for investments that “substantially relate to the public interest” (as in the case of the Bolivian Guidelines), or efforts to reinstate direct state-to-state dispute resolution. An example of the latter is the 2004 U.S.-Australia Free Trade Agreement, which does not include investor-state dispute resolution due to the Australian government’s resistance.⁴⁹

Is there indeed an imbalance in the regime, favoring investors? Is a reform of the international investment and arbitration regime desirable? Have host countries ever initiated a counter-claim under an IIA or a direct claim against an investor under a contract? Can either of these initiatives be considered successful—in whole or in part? What are the positive and problematic elements of each?

Also quite contentious are initiatives to reform the arbitration process:

- There has been a sustained general call for increased transparency of international arbitration and dispute settlements. *Is it desirable to have more open access to the public? What of the calls for public hearings, disclosure of documents, more acceptance of amicus briefs and transparent*

⁴⁵ José E. Alvarez, The Evolving Foreign Investment Regime, <http://www.asil.org/ilpost/president/pres080229.html>.

⁴⁶ Id.

⁴⁷ Bolivia denounced the Washington Convention in 2007, thereby withdrawing from ICSID, Ecuador excluded certain claims from the Centre’s jurisdiction and Venezuela’s Supreme Court issued an opinion limiting the reach of the country’s consent to submit to ICSID jurisdiction. See Vincentelli, Ignacio, The Uncertain Future of ICSID in Latin America (February 20, 2009). Available at SSRN: <http://ssrn.com/abstract=1348016>.

⁴⁸ K.D. Tallent, *State Responsibility by the Numbers: Towards an Understanding of the Prevalence of the Latin America Countries in Investment Arbitration*, TDM (June 2010) (“Bolivia, Nicaragua and Honduras (all members of ALBA that have threatened withdrawal from ICSID) are among the few countries in the region that do not exhibit the majority of the characteristics that seemed most likely to be associated with significant participation in arbitration.”), at 39.

⁴⁹ Australia has traditionally been a net-importer of FDI from the U.S., and has since then required investor-state arbitration clauses in FTAs signed with countries to which it is a net-exporter. See Luke R. Nottage & Kate Miles, *'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests*, In L Nottage & R Garnett (eds), INTERNATIONAL ARBITRATION IN AUSTRALIA (Federation Press: Sydney, 2010).

*publication of the awards in cases in which there is a “clear public interest” in the proceedings?*⁵⁰

- There has been a demand for more clarity and coherence in the awards by arbitral tribunals,⁵¹ especially in light of inconsistent decisions arising out of similar or the same set of facts.⁵² *Is this criticism valid? Are there practical solutions to inconsistencies in a system with an unlimited set of arbitral panels?*
- Reaching even further is the demand that arbitration awards are subject to an appeals mechanism. *Have any proposals for an appeals mechanism received traction? Is the need as great as some commentators suggest?*
- There has been much discussion recently about the potential conflict-of-interests of arbitrators. Some view a revolving door between arbitrators and counsel as a systemic problem. ICSID in apparent reaction to this criticism recently amended its Arbitration Rules. The new rule 6 provides for stricter conflict of interest provisions, stating, for example, that arbitrators must disclose “any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party”. The new rules also note that the obligation to disclose circumstances that may affect their independence and impartiality is a continuing one. *Does ICSID’s amendment show that the criticism of the revolving-door is valid? Was ICSID’s measure sufficient? How can more transparency with respect to arbitrators help the system generally?*

➔ Capacity Building for Developing Host Nations

Other ongoing initiatives focus on building the capacity of host states to handle the due diligence necessary to know what they are signing onto, as well as to prepare for an effective defense against expert corporate arbitral counsel.⁵³ As the Vale Columbia Center has noted in the past, “most respondent governments do not have the expertise to defend themselves adequately in such tribunals – they simply do not have the capacity to do so.”⁵⁴ Initiatives such as the Latin American Advisory Facility on Investor-State Disputes are being discussed to correct for this *de facto* imbalance in the international arbitration system. The purpose of the Facility would be to assist countries in actual investor-State disputes, and also to provide capacity building, technical assistance and legal opinions in connection with the prevention and handling of investor-State disputes through arbitration and otherwise.⁵⁵ *Is there a need for such facilities? What would effective ‘capacity building’ look like? Could one conceive of a litigation-risk index to help host countries identify in advance which investors have been most litigious, both with local communities and with states through arbitration?*

Some commentators have urged host states to utilize international arbitration to redress their grievances and bring claims against investors, either under contracts or as a counter-claim in an IIA-based dispute.⁵⁶ *What would need to be done so that host states can bring claims against investors? What claims might a host nation bring against an international investor? What obligations on the part of an investor would a*

⁵⁰ See, e.g., *id.*

⁵¹ For a commentary, see Kurtz, J., *ICSID Annulment Committee Rules on the Relationship between Customary and Treaty Exceptions on Necessity in Situations of Financial Crisis* ASIL Electronic Publication (2007, volume 11 issue 30) available at <http://www.asil.org/insights071220.cfm>

⁵² See *CMS Gas Transmission Company v. Argentine Republic*, ICSID case No. ARB/01/8, Award 12 May, 2005; *LG&E Energy Corp., L&E Capital Corp., LG&E International Inc v. Argentine Republic*, ICSID case No. ARB/02/1, Decision on Liability, 3 October 2006; and *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No ARB/01/ 3, Award, May 22, 2007.

⁵³ See IISD’s Capacity Building Activities, at <http://www.iisd.org/investment/capacity/>.

⁵⁴ Vale Columbia Center Newsletter: September 2010 (Ed.: Lisa Sachs), at <http://www.vcc.columbia.edu/content/vcc-newsletters>.

⁵⁵ *Id.*

⁵⁶ Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT, Vol. 1, No. 1 (2010), pp. 97–122.

host State seek to enforce through arbitration? Why might a host state prefer arbitration to its local courts? Is there a basis for host state jurisdiction before an ICSID tribunal based on equality of access?

→ **Considering Sustainable Development Criteria in ISDS and Arbitration**

As discussed in other sessions of this conference, there are important roles for both government and companies toward ensuring that extractive industry investments not only contribute to sustainable development but, perhaps more importantly, are not deleterious to the environment, to communities, to human rights, and to other fundamental aspects of development (access to water, labor rights, gender equality, etc...). One of the allegedly problematic aspects of the legal framework governing extractive industry investments (laws, IIAs, contracts) is that the legal instruments bind the hands of the government to act in the public interest—or, at least, bind them from doing so without having to compensate the investor for any decrease in profitability. At times, IIAs and contracts appear to be at odds with other governmental obligations, including those enshrined in domestic law and in international human rights conventions. Therefore, this session asks: *Where have we seen tensions between investment arbitrations relating to the extractive industries and social and environmental concerns in the host state? Have we seen cases in which governments are constrained by contract or IIA clauses from promoting the domestic development agenda? Are there any provisions in BITs that could allow for governments to regulate in the public interest without violating the rights of the investor? Could any examples of legislating in the public interest fall within the “essential security” exception in BITs? Could it be conceivable to scale up the use of more recent model BITs (such as the now-defunct Norway model or the IISD model) that expressly consider issues of sustainable development? Could international human rights treaties be considered in the universe of “international law” which is often used to interpret the provisions of treaties and sometimes of contracts? Are there other solutions to ensure that the rights of investors do not displace the rights of the population to development?*

→ **Alternatives to Arbitration**⁵⁷

There are numerous reasons to avoid arbitration. For one, arbitration is no longer an inexpensive alternative to litigation. For most developing countries and small and medium-sized enterprises, the expenses are prohibitive. Of course, the same may be true of resolving disputes in local courts, as litigation in general is expensive and the domestic legal process involve a many tiered appeal process. Arbitration can also damage the reputations of both the host state and the company without any systems in place to arrive at a mutually beneficial outcome. Therefore, this session also considers attempts to prevent disputes before they rise and other methods or dispute resolution models that may be used in the event a dispute is unavoidable.

1) Renegotiation

When there is a change in the circumstances or assumptions that formed the basis of the contract between the investor and the host state, they often refer to a renegotiation clause in the contract; however, these clauses have in many cases led to arbitration because of the difficulty in determining whether there was indeed a “change in circumstances.”⁵⁸ Additionally, even when both parties come to the table, there is often contention over how to determine a new sharing formula in the contract. On the other hand, renegotiations could avoid lengthy and costly litigations, could arrive at mutually beneficial outcomes, and preserve the important relationship and mutual trust between the investor and the host state. *How can renegotiation provisions in contracts be strengthened to provide guidance and clarity in the case of changed circumstances? Can a company build a comparative advantage on promoting renegotiation*

⁵⁷ UNCTAD 2010 Report, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, at http://www.unctad.org/en/docs/diaeia200911_en.pdf. Literature on alternatives to arbitration is limited, and this report is the most comprehensive resource and served as the key reference for this section.

⁵⁸ Sometimes a hardship clause is used; it has also been referred to as a *bouleversement* of the contract.

rather than arbitration? Are there models of successful renegotiations? What type of support would be necessary to companies and countries to arrive at a mutually beneficial outcome?

2) Dispute Prevention Policies

Another alternative approach to arbitration is the use of dispute prevention policies (DPPs) that seek to prevent or reduce disputes between host states and investors before they occur and to de-escalate conflicts from turning into formal investment disputes. The aim of DPPs is to establish an effective early warning mechanism that alerts government authorities about a possible or emerging conflict with an investor and provide time and flexibility for the government to address investor concerns. A recent UNCTAD report highlighted the role a number of DPPs that have been implemented in developing host nations, calling them "information, prevention and specific coordination" reforms.⁵⁹ These reforms suggest that in sectors that are particularly susceptible to disputes (such as extractive industries), host states should ensure that information sharing occurs among agencies related to them (such as between the investment promotion agency and the sector regulator or state company), distribute authority between governmental agencies to guarantee friendly advocates (on behalf of the investor) as well as opposing interests (representing the host state), and allow for amicable pre-dispute administrative review of the dispute -- all the while ensuring that all relevant documents are available (on time) in any administrative and dispute proceedings so as to allow quick assessment of the claim, as well as empower public officials to initiate and execute settlement procedures and payments. A related measure would be to conduct simultaneous dispute-preparedness and government capacity-building initiatives when negotiating IIAs. Similarly, host states could augment their investment promotion "after-care" services by creating an ombudsman, or mediation commission or officer, to serve as a "one-stop-shop" for complaints by investors.⁶⁰ *What are the advantages of such DPPs? How are such DPPs related to the role of governments to monitor and implement the contracts (as discussed in session II)? Are there potential conflicts of interest in these DPPs? What type of capacity building could make these DPPs work in practice?*

3) Political Risk Insurance

Political risk insurance is an additional means by which investors could mitigate risks and thereby reduce the need to resort to arbitration. Rather than asserting claims against sovereigns seeking redress of their grievances, investors could turn to insurers who provide political risk insurance (PRI) to ensure they are made whole. Indeed, banks often require investors to obtain PRI in order to qualify for financing.⁶¹ However, the list of risks covered is often limited to risks such as currency inconvertibility, expropriation and political violence, and is by no means an exhaustive of the risks faced by investors.⁶² Additionally, some claims are only payable after an investor has invoked a dispute resolution mechanism (such as arbitration).⁶³ *Could PRI be expanded or improved to make it a viable alternative to arbitration? What risks could be included in PRI that would sufficiently address the most common risks faced by investors?*

4) Alternative Dispute Resolution

A widely-discussed alternative to formal arbitration is alternative dispute resolution (ADR), which typically involves the intervention of a third party to assist the disputants through negotiation, mediation or conciliation. ADR has many advantages as an alternative form of ISDS, including procedural and substantive flexibility by which third party neutrals are given space for more creative settlements based upon mutual interests of the disputants as opposed to arbitrators who are usually bound by arbitration rules. ADR also affords the possibility of agreements between the host state and investors that go beyond

⁵⁹ UNCTAD 2010 Report, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, at 75.

⁶⁰ *Id.*, at 65-96.

⁶¹ MIGA, *World Investment and Political Risk* (2009), at 47.

⁶² See the OPIC PROGRAM HANDBOOK 1 (2004), available at www.opic.gov/pdf/publications/04_ProgramHandbook.pdf.

⁶³ *Id.*, at 47, 49.

the payment of compensation and are forward looking in addressing a conflict in its entirety, with possible modification of a policy. One drawback of ADR, however, is its non-binding nature on the parties and the realization that the results of mediation or conciliation are not enforceable under any binding international law. *Would ADR be desirable for investment disputes in the extractive industries? What are the challenges? Is there a risk that the 'creative' solutions may not be in the best interest of the population, which is not involved in the ADR? What role could there be for the public or for third parties?*

Session IV - Beyond the Contract and Contracting Parties: the Integration of Extractive Industry Investments into Local Communities and the Regional Economy

I. Problematique

Many large extractive industry (EI) projects take place in poor regions with many development needs but also vast development potential. It is a shared responsibility and in the interests of both investors and governments to optimize the contribution of such projects to the sustainable development of the local, national and regional communities affected by those transformative projects. Failure to meet this challenge can engender political and social opposition which leads to suboptimal development and investor outcomes. National and regional development planning is the focus of session V. This session addresses the roles of large companies, governments, and other stakeholders in promoting integrated sustainable development at the local regional levels, with a focus on situating the transformative investment in the development context. Integrated local level development in the context of extractive industries means mitigation of damages (especially environmental and social), community engagement and consultation, and a multi-sectoral development program that addresses the specific rights, needs and conditions of the local communities in a sustainable manner.

Properly integrating the investment in the local, national and regional communities requires a rigorous understanding of the complex development needs of the communities and countries in terms of economic potential (jobs, technology and training, business development programs, technology transfer, downstream industrial development), environment (climate change, biodiversity, water management, deforestation), and sectoral development at the community level (health, education, agriculture, local infrastructure, water and sanitation). The proliferation of development efforts at the local level in extractive industry communities by myriad groups attests to a desire by industry and government to find new sustainable solutions to the development challenge in the context of extractive industries.

Extractive projects are often located in remote, rural areas where railways, roads, water systems and power grids--core elements of both the EI project and of regional development--are generally underdeveloped. The idea that EI projects could create "resource developmental opportunities" to build this backbone infrastructure for development is at the core of the links between the 'spatial development corridor' framework and discussions of resource-based development. The idea is that a "deepening" of the resource sector through up-, down- and side-stream (aka infrastructure) industrial linkages can, over time, contribute to local development and to a more diversified economy, and a more equitable and politically stable society, with increased human capital and physical infrastructure (Jourdan, 2010).

The potential consequences of overlooking the rights and needs of the community are increasingly well-known. Even in financial terms, community opposition to an extractive industry investment can weigh an investment down (Hoffman, 2008). Even financial rating agencies like Standard & Poor and Fitch outline the importance of "public acceptance" to avoid negative externalities, social costs and the "public backlash" (Standard & Poor, 2000; Fitch, 2001). On the other hand, a company's endeavors to foster a vibrant local economy can have positive impacts on the company's bottom line by reducing the cost of production inputs (see, for example, the case of BP in Trinidad and Tobago, which designed and fabricated the entire offshore platform locally instead of importing it from Louisiana). Indeed, there is therefore a real business case for companies carrying out a mega project to participate actively in the regional development of the communities in which they operate. This participation not only reduces their cost of production and gives them a "social license to operate," but it can also allow firms to overcome resource constraints, governance gaps and institutional weaknesses, increase their market share, and reduce their insurance and security costs (Wyse and Shtylla, 2007). Thus, potential benefits for both parties are large. Yet there are few if any examples of extractive industry investments that have contributed to local and regional development in an integrated, sustainable manner.

II. Issues and Solutions

→ Business Linkages: Local content, Training and Knowledge Transfer

Large companies with millions of dollars of annual procurement provide a significant business opportunity to stimulate the local economy by including local SME companies in their supply chain. The opportunity for development can even be bigger and can go beyond the constitution of a local supply chain provided that governments push for business linkages and that companies set them right.

One approach to promote such linkages is through national legislation. In the case of Namibia, for instance, where mining contributes to 11% of the national GDP, the Chambers of Mines has created a category of “historically-deprived Namibians” (HDNs) to grant them opportunities to participate in the mining industry (*Mining Journal*, March 2010). In order to obtain its 2009 license on the new mine of Trekkopje, the French state-owned nuclear-reactor manufacturing, marketing and uranium mining group Areva had to pledge that 99% of its workforce would be Namibian. Some commentators contend that the benefits of local-content requirements can be enhanced if complimented by technological spillovers, on-the-job training and longer-term investments in vocational training capacity. (Havro & Santiso, 2008). *How effective are such local content clauses? Do their benefits endure past mine closure? Are there examples of particularly successful local content clauses? Can local content provisions be sufficient in themselves or should they be accompanied by requirements related to skills-based or vocational training and technology transfer? Can these clauses be cost-effective for companies as well? Should these provisions allow for flexibility and progressive local content?*

One example of a linkages program that is often cited for successful elements is Mozlink in Mozambique, a joint initiative of Mozal (owned by BHP Billiton) and the IFC. BHP Billiton describes this program as a “supplier development program, which promotes linkages between investment project in the country and local SMEs.” According to the IFC, Mozal had trained and created linkages with 72 companies as of December 2009. The SMEs’ performance in key areas of quality, management, maintenance and safety had improved by 20% on average and their revenue growth was 34% from 2006 to 2009⁶⁴. In South Africa, Anglo-American’s Zimele Program invests in (and provides loans to) local black-owned and managed enterprises to build capacity. It holds minority stakes and influences strategic and managerial direction of the domestic companies through its board representation. Anglo Zimele has invested in roughly 150 enterprises that have employed over 2200 people. The survival rate of these companies is 72% (Whewell, 2008). However, there are questions about the sustainability and long-term impacts of these programs. In the case of Mozal, the project design did not foresee a long-term engagement, and support from the program dropped off after the completion of the course, whereas most of the SMEs needed ongoing support. In both cases, only the potential suppliers of the companies benefited from the programs. *Should either of these programs be considered successful, in whole or in part? Are there other examples of instructive programs? How effective are such business capacity-building programs? What can we learn from these and similar experiences? Would more effective programs broaden beyond the immediate supply-chain of the extractive industry investor? Are there specific sectors of SMEs that are best suited for such programs?*

Some have suggested that joint-ventures with state-owned corporations or local entities are useful vehicles to promote a more significant exchange of technologies and training for local SMEs. The president of the National Mining Society of Chile recently invited Chinese companies to partner with local Chilean mining businesses that have projects but do not have the capital to develop them; he suggested that such joint ventures with local entities would make it easier for Chinese investors to enter Chile, and would benefit the local partners by providing access to new technologies.⁶⁵ *Should host countries encourage such joint-ventures or partnerships with domestic entities? If so, what types of*

⁶⁴ Developing SME through Business Linkages- the Mozlink Experience- IFC

⁶⁵ <http://www.miningweekly.com/article/chile-miners-on-roadshow-in-china-2010-10-20>

policies would usefully promote the most effective linkages? Are there models or examples of successful joint ventures or partnerships?

These joint-ventures have also been promoted as a means to establish industries based on the EI products, co-products, byproducts & waste products that would allow the country to increase the value of its exports, to proceed to import substitution and to hedge against the volatility of primary commodity markets. This is for instance what drove the creation of Botswana's De Beers-State-owned Debswana Diamond Company. This joint venture with DeBeers has allowed Botswana to move up the value chain and sell polished diamonds with great added value while Sierra Leone is submitted to the whims and lower value of the raw diamond market. However Botswana remains a non-diversified economy. *Is downstream industrial development a critical aspect of the successful economic integration of extractive industry investments? Should host governments promote industrial development as a policy? Or is it circumstance-specific? What steps can and should companies and governments take to promote economic diversification and downstream development, if and when desirable? Addressing the financing gap of SMEs is often mentioned as a critical component of successful linkage and training programs. Especially in poor areas, financial service providers often regard SMEs as high-risk and unprofitable due to the high transaction costs involved in assessing creditworthiness and making loans (Jenkins, 2007). As financial services are critical for enabling SMEs to scale up production, upgrade technology, and change or improve products and services, training and capacity building in the absence of access-to-finance solutions would be insufficient. In Kazakhstan, Chevron and Kazakhstan TCO, the joint-venture between Chevron and the Republic of Kazakhstan created a Small Business Development Program, including an access-to-finance component, partnering with local financial institutions. Loans are made out of the bank's own capital, and the bank monitors the performance of its clients and ensures that they make timely repayments. The bank's administrative costs are covered by TCO so that the loans can be provided at a rate lower than the market. How critical is the financing gap for building SMEs? Is the TCO model desirable and/or replicable? Are there alternative means for ensuring financial capital for SMEs? Could supply contracts with the SMEs work as a financing mechanism? What should be the respective roles of companies, governments, banks and other stakeholders in addressing the financing gap?*

➔ **Mitigating the Environmental Impact**

The environmental impacts of extractive industries are vast and varied, and unfortunately, an extensive discussion of these is beyond the scope of this background note. Nevertheless, it is impossible to talk about sustainable development without addressing the very real environmental aspects of sustainable development, especially given the substantial environmental impacts of extractive industries, ranging from the mine itself, through coal-fired power plants used to power the mine, to the dredging of rivers and building of rail lines for transportation, and even the environmental and climate change consequences of the use of the resource, especially oil and coal. All of this often takes places in the context of resource-rich poor countries that are particularly vulnerable to the effects of climate change, as droughts and floods can –and does-- cause widespread famine in a number of these countries. There are some initiatives for companies to help curb the environmental consequences of the extractive activities. For instance, REDD+⁶⁶ is an effort to create financial value for carbon stored in forests, in the context of climate change mitigation activities and international negotiations. Thus, in Mozambique, “South-South REDD: a Brazil-Mozambique Initiative for Zero Deforestation” has been set up as a partnership between the Governments of Brazil and Mozambique, which aims to share experiences for developing a national REDD strategy for Mozambique that would a response to deforestation trends in Mozambique, rural poor dependency on natural resources, and the country's vulnerability to climate change. *Are there studies that show the extensive environmental impacts of extractive industry operations from the initial deforestation and mining through support infrastructure and the end use of the mined resource? What are the most*

⁶⁶ REDD + stand for Reduced Emissions from Deforestation and Forest Degradation *plus* conservation, sustainable management of forests and enhancement of forest carbon stocks

extreme implications for sustainable development? Should off-set programs like REDD be encouraged and/or scaled up? Are there partnerships that stand out as success stories? What role is there for investments in adaptation technologies?

→ Community-based rural integrated development

Leaving absolutely critical debates aside about the standard of community consent that should be used before extractive operations take place, we would like to focus on which methods of community engagement through the life of the mine and which contribute the most to local development. In this session, we would like to explore the potential opportunities for companies and governments (local and national) to take advantage of the substantial capital involved in an extractive industry project to address the development challenges at the community level, even if unrelated to the mining project itself. Especially in poor countries, these projects often take place in the poorest of settings, in which communities are failing to meet even their most basic needs in terms of health, food security, proper hygiene and sanitation, access to clean water, agricultural productivity and local farm-to-market roads. In some cases, companies have tried to address these gaps by building clinics or schools, donating equipment or food supplies, etc. While attempting to broaden the notion of corporate responsibility to the surrounding community, such initiatives are often criticized for undermining the responsibilities of local and national governments in addressing these needs, for not being grounded in a real understanding of the development process, for only serving a small portion of the community, and for distracting from the more consequential and deleterious consequences of the mining project itself. *How can and should companies address the very real development challenges in the communities in which they operate? What is the optimal allocation of roles and responsibilities of companies and governments in meeting the development needs of the community? Given the geographic isolation of some extractive projects, there is often a lack of human and other resources for health and education: is it a justification for host governments not to exercise its prerogative and let companies take care of it? In cases where that may be the best option, how can companies and governments facilitate a transition from company built and operated social programs to government taking those over? By the same token, to what extent should those investments into traditionally state provided services be tax deductible and thus indirectly funded by governments?*

How should companies address the challenges of agriculture in countries in which subsistence agriculture accounts for the vast majority of livelihoods? What types of corporate investments could complement public investments? Information and communication technologies? Physical infrastructure? Social need funds? What forms of community relations and stakeholder engagement could help guide investments in community development for the best outcomes for communities, government, and investors? What models show promise for achievement of these objectives? Is the millennium villages model one of them?

→ Resource-for-infrastructure financing

Infrastructure is the backbone of development, and yet it remains sorely underfinanced all over the developing world. In Africa, the funding gap for infrastructure alone has been assessed to be \$31bn a year (Africa Infrastructure Country Diagnostic, 2010). The massive funding gap in infrastructure has led to the emergence of so-called “Resource-for-infrastructure” deals, whereby companies agree to finance infrastructure (mostly hydropower projects, railroads, and backbone infrastructure with ICT equipment) in exchange for the rights to natural resource exploitation and/or contracts. (World Bank, 2009). Some of the most well-known deals have been between the China Export-Import (Ex-Im) Bank and countries which cannot provide adequate financial guarantees to back their loan commitments. Under this approach, the country’s resources serve as collateral to expand production, rationalize transport, and make export more efficient via “resource backed finance” (Vandaele, 2008). For instance, in April 2008, two Chinese state-owned enterprises – China Railway Engineering Company (CREC) and Sinohydro – formed a joint venture with Gecamines, the Congolese state-owned mining company, (Whewell, 2008) to develop

copper, cobalt, and nickel mines, the profits of which will repay the first \$3 billion tranche of a \$9 billion loan from China's Exim Bank to build a 2,400 miles of roads, 2,000 miles of railway, 32 hospitals, 145 health centers, and two universities. China Ex-Im bank loans are granted directly to CREC and Sinohydro to complete the infrastructure investments. *What are the advantages and drawbacks of "resource for infrastructure" contracts? How can governments ensure they are getting a fair value for their resources under such schemes, where auditing and valuation may be much more difficult? Can these "resource for infrastructure" deals include technology transfer in infrastructure building to host countries? Could these "resource for infrastructure" deals be structured to ensure third-party (public) access to the infrastructure, at subsidized rates in the case of local use?* For instance, in Liberia, where the infrastructure investment plans of concessionaires amount to about forty times recent annual public spending on the deficient infrastructure of the country, the government is considering requiring third party access to privately develop infrastructure whose concession would be awarded separately from mining project concessions

Chinese infrastructure financing can also be seen in Central Asia. China is looking to Central Asia as a rich natural resource reservoir to fuel its booming economy: oil pipelines from the Caspian Sea across Kazakhstan, the recently opened gas pipeline from Turkmenistan via Uzbekistan and Kazakhstan, and other planned roads and railways across Russia and down to the deep sea port of Gwadar in Pakistan⁶⁷ are all part of China's effort to turn central Asia into a transit corridor for much-needed resources. *Is this a unique opportunity for these landlocked Central Asia to finally get connectivity and access? Is China seizing opportunities that no other donor or commercial enterprise wanted? Is, thus, China financing playing a useful role in promoting regional integration? Is the China model working because of the oft-cited "no conditionalities" approach used?*

➔ **Partnerships and Coordination to Achieve Economies of Scale**

Companies in the extractive industries often work together through consortium agreements or joint ventures to take advantage of economies scale when making massive investments. Often, the consortium will work collectively on developing the necessary infrastructure, training programs and social investment programs. However, when companies do not share a common interest in projects, they have more difficulty to share their business processes to harmonize their community investment. For instance, Chevron and Shell work in parallel on developing governance structure for community development in the Niger Delta. On the contrary, in Luanda, Angola, BP, Sonangol, ExxonMobil, Chevron, and Total have launched a business support center, Centro Apolo Empresarial, that has allowed the training of 547 SME participants and provided consulting services of more than \$ 330,000 (Wise and Shtylla, 2007). Although the advantages of collaboration are obvious in terms of enlarging the benefits accruing to many companies and many communities beyond those in the immediate mine site, there is no established mechanism of coordination of efforts and approaches. *Would it be desirable when it comes to building local technical development and analytical capacity to service the EI's needs at regional and national level? What kinds of mechanisms should be envisioned? Could development partners play the roles of conveners in such a model? To what extent the lack of coordination mechanisms of companies' intervention impedes an integrated regional development?*

When it comes to financing and designing infrastructure, the need for cooperation seems even more acute. The complexity, size and regional scale of an infrastructure project generally requires several actors that need to coordinate in order for the all the links of the value chain to be implemented, from the feasibility study to the facility operation and maintenance. The lack of robust partnership mechanisms, being between companies, between private sector and public sector or between governments impedes the realization of large projects in infrastructure that are however often necessary to the exploitation of the mine or the oil field. *What challenges have governments and companies encountered in the promotion of*

⁶⁷ <http://www.thejakartaglobe.com/opinion/east-and-west-must-share-new-silk-road/392647>

regional trade, infrastructure and development frameworks? Being among the main users and financiers of these infrastructure networks, could extractive companies play a catalyst role in those initiatives enhancing multi-stakeholder and cross-border collaboration in infrastructure projects, such as the Program for Infrastructure Development in Africa set up by the African Union or the Infrastructure Consortium for Africa, set up by the donors' community?

There are also many other stakeholders that could play a useful role in maximizing the contribution of extractive industry investments to local and regional development. *Which partners could usefully help companies and countries identify priority development constraints/needs in the region? Could regional studies/plans be useful in this respect to coordinate the inputs of various stakeholders? What role for universities and other institutions such as vocational schools? How can local and national development initiatives be better integrated to improve the impact of social and environmental investments at the community and regional level? How can or should a company identify and select local partners for implementation? What can we learn from successful partnerships in the past and how can such models be expanded, improved or scaled-up to realize more substantial and sustainable development outcomes?*

Bibliography

BJERRE, Carl S. (2002): "Project Finance, Securitization and Consensuality", 12 *Duke Journal of Comparative and International Law*, 411, 2002.

BROOME, Lissa L. (2002), "Framing the Inquiry: The Social Impact of Project Finance", *Duke Journal of Comparative and International Law*, Vol.12, 2002.

FITCH (2001), *Reemergence of Infrastructure Finance in Emerging Markets*, Fitch, 2001.

GRIMSEY, Darrin and LEWIS, Mervyn (2002), "Evaluating the risks of Public Private Partnerships for Infrastructure Projects", 20 *International Journal of Project Management* 107, 108, 2002.

Havro G, & Santiso J. 2008: "To Benefit from Plenty: Lessons from Chile and Norway", OECD Development Centre, Policy Brief No.37, 2008.

HOFFMAN, Scott L. (2008), *The Law and Business of International Project Finance: A Resource For Governments, Sponsors, Lawyers, and Project Participants*, Kluwer Law International, 2008.

JENKINS, Beth, et. Al. (2007), *Business Linkages: Lessons, Opportunities, and Challenges*, IFC, International Business Leaders Forum, and the Kennedy School of Government, Harvard University, 2007, p. 17

JIANG, Wenran (2009), "China Investment in Congo: A Chinese 'Marshall Plan' or business?" *CongoTimes*. available at <http://africa.kongotimes.info>. visited June 5, 2009.

JOURDAN, Paul (2010), "The Optimisation the Developmental Impact of South Africa's Mineral Assets for Building a Democratic Developmental State"

KARL, Terry Lynn (2007): "Ensuring Fairness. The Case for a Transparent Fiscal Social Contract", Chapter 10 in: Humphreys M, et. al. (eds.), *Escaping the Resource Curse*, New York, Columbia University Press, 2007.

LOUTHEAN, Ross (2010): "Australian miners should take a stronger social approach in Africa", *Mineweb.com*, 2 September 2010.

MINING JOURNAL (January 2010), "Special Publication: Indaba", January 2010.

MINING JOURNAL (March 2010), "Special Publication: Namibia, Uranium Focus", March 2010.

Moran, Theodore H. (2010), *Chinese Strategy to Secure Natural Resources: Risks, Dangers, Opportunities*, Peterson Institute for International Economics, August 26, 1010

NEWMONT, Ahafo Signs Social Responsibility Agreement, on: <http://www.newmont.com/africa/ahafo-ghana/news-events/ahafo-signs-social>.

SEN, Amartya, *Development as Freedom* 14, 1999.

SHAXSON, Nicholas (2007): "Oil, Corruption and the Resource Curse", in *International Affairs*, Volume 83 Issue 6, 2007, pp.1123–1140.

STANDARD & POOR (2000): *Infrastructure Finance: Project Finance, Utilities and Concessions* 20, Standard & Poor, 2000.

USAID: ALLIANCE INDUSTRY GUIDE: EXTRACTIVES SECTOR, March 2010

VANDAELE, John (2008), "Development: China Outdoes Europeans in Congo", *Ipnews*. February 8, 2008.

WARNER, Michael (2004), "Levers and Pulleys. Extractive Industry and Local Economic Development. Incentivising Innovation by Lead Contractors through Contract Tendering", ODI Business and Development Briefing Note # 3, 2004, on: <http://www.odi.org.uk/resources/download/591.pdf>

WARNER, Michael (2007), "Incentivising Local Economic Development in the Extractive Industry Sector through Transaction Chain Analysis", ODI Business and Development Briefing Note # 8, July 2007, on: <http://www.odi.org.uk/resources/download/592.pdf> WEIDNER, Helmut (2010), "Politisierung als Prozess und Ergebnis", in Michael Zürn und Matthias Ecker-Ehrhardt (eds.), *Gesellschaftliche Politisierung und internationale Institutionen*, Frankfurt, Suhrkamp, 2010.

WHEWELL, Tim (2008), "China to seal \$9bn DR Congo deal", *BBC Newsnight*, April 14, 2008.

WISE, Holy and SHTYLLA, Sokol (2007): "The Role of the Extractive Sector in Expanding Economic Opportunity", Economic Opportunity Series, Corporate Social Responsibility Initiative Report no. 18, Harvard University, Kennedy School of Management, Cambridge, 2007.

WORLD BANK (2009): *Building Bridges, China's Growing Role as Infrastructure Financier for Africa*, by Vivien Foster, William Butterfield, Chuan Chen and Nataliya Pushak, World Bank, PPIAF, Trends and Policy Options No.5.

ZIMNY Z. (2006): *FDI AND TNC ACTIVITIES IN EXTRACTIVE INDUSTRIES: A LITERATURE SURVEY*, prepared for UNCTAD, Geneva

Panel V: National planning for the optimal benefit of extractive resources

I. Problematique

Large investments in natural resource extraction can contribute significantly to sustainable development, through revenue generation, infrastructure development, and technology and capital transfer, among other channels; however, the manner and extent to which these benefits actually accrue to host countries depend heavily on the policies and practices of host countries and extractive companies. The well-known “resource curse” can become a reality, in which the benefits of the mining sector are squandered through overvalued exchange rates and mismanagement of the revenues. Even in the absence of fiscal mismanagement or poor governance, there can be missed opportunities for leveraging large investments in extractive industries to maximize the development impact of the investments for current and future generations.

This session considers the respective roles of the marketplace (including private investors), host governments and civil society in avoiding the pitfalls of the ‘resource curse.’ Avoiding the resource curse is a shared priority for governments and companies, both of which benefit from advances in development and a prosperous population over the long term. The challenge, therefore, is to determine the proper development framework for the market, the government, and civil society, that to turn resource wealth into effective and sustained economic development. Taking into account the reality of resource depletion puts an added premium on finding the right policies to maximize the development impacts.

II. Issues and Solutions

→ Market-led Development vs. the Role of National Planning

For decades, developing countries have been advised that allowing- or encouraging- foreign investment in their natural resource sectors would yield long-term economic growth, including fiscal revenues, employment, infrastructure development and other development benefits. The rationale was that foreign investors would bring the necessary capital, technological know-how, sophisticated management systems, and access to markets to the developing countries, with direct and indirect spillover benefits to the host-country economy. For just as long, however, there has been a public debate about the optimal roles of industry and government in driving resource-based growth.

On one side of the spectrum, there have been advocates of the proposition that market forces, and the presence of sophisticated private investors, in natural resource extraction will have a natural multiplier effect on an economy, generating employment, infrastructure, and other benefits to host-communities and host-countries. Proponents of market-led growth point to the fact that large-scale investments will attract further foreign direct investments in key supporting sectors, including infrastructure, ports, downstream industry, telecommunications and other sectors, and will thereby multiply the economic benefit of investments in resource extraction. Host governments are advised to improve the indicators of the quality of the business environment (e.g. the World Bank’s “ease of doing business”) to allow the benefits of industry-led development to take their course. This free-market thinking has been reflected in many policy documents prepared by or for the IMF and World Bank; these policy papers tend to assume the multiplier effects of extractive industry projects without a supportive policy environment beyond a friendly business environment. (Slack in Richards, p. 79). As a result, the IFIs support large-scale extractive industry projects in developing countries (including equity stakes, in the case of the World Bank’s International Financial Corporation), envisaging a range of market-led benefits to the host government and population, but without the need for a more complex supportive environment of policy and regulation.

On the other hand, many others have argued that avoiding the resource curse and maximizing development outcomes of investments in resource extraction requires a strong public sector and long-term government planning that specifically addresses the resource base and how its extraction and development will factor into the country's long-term development objectives. Several reasons are advanced for the benefits of long-term planning. First, given the inherent instability of resource prices as well as the eventual depletion of the resource, a national macroeconomic strategy and budgetary framework is necessary to preserve both short-term stability and long-term solvency in an economy heavily dependent on commodity exports. Second, public planning can help to avoid 'Dutch Disease,' by using revenues from the resource economy to support a supply-side response of both non-tradable sectors—such as education, health, and social security—as well as non-resource export sectors – such as agriculture – through public investments in business development, infrastructure, and technical training. Third, medium- and long-term public investment programs can complement private-sector investments, thereby maximizing the benefits accruing to the host country and even increasing the profitability of the private investments. For instance, a public investment framework that includes strategic investments in key infrastructure, education and training, and human capital can facilitate private investment not only in the extractive sector but in complementary sectors as well.

It is fitting that we now take stock of the development successes and failures of resource-rich countries and examine the following questions: *Is free-market development effective for meeting the development challenges of host governments? Is there a role for national development planning, and if so, what special considerations should resource-rich countries take into account? Can there be a mutually beneficial constructive engagement between the public and private sector in development planning related to the resource sector?*

A major challenge for those who favor strategic resource-based development planning is the reality is that many developing country governments lack the technical expertise and tools to undertake a rigorous assessment of the public investment gaps of the country, especially at sub-national or supra-national (regional) levels, or to prepare a costed public investment program to address those needs in the near and medium-terms. Furthermore, a long-term development strategy should include a proper financial modeling of revenue flows and resource deposits and a modeling of the domestic needs for the resource itself (whether oil, coal, minerals or metals) over time, both of which require sophisticated and expensive technologies employed by the highly-skilled engineers of the private sector.

Furthermore, in most cases, there is no coordinated dialogue (among private investors, government, development partners, civil society, and other stakeholders) about how to maximize the synergies between the private sector's infrastructure and human capital needs and plans and the country's development needs. Investors and governments have shared interests in building roads, rail, ports, power grids, and telecommunications networks, as well as in building capacity in governance and in vocational skills. Historically, these synergies have not been appreciated or considered: railways have been built that are used simply to transport the resource to the ports without passenger or cargo capacity; power has been generated for mining and production activities with the surplus sold into regional power pools without considering the possible expansion of local grids; pipelines have been built through countries without offloading capabilities; etc. If companies and governments consider the potential public use or expansion of the private sector's planned investments at the design phase, and how the infrastructure can be expanded or built to meet local, national and regional needs over time, then "the incremental capital cost could be minimal" (McPhail in Richards, p. 72).

Some additional questions to consider, therefore, include: *Are there examples of successful resource-based national development planning? What tools or guidelines could be useful for governments during the planning phase? Are there models for proper needs assessments at the local, sub-national and national levels? Could technical training and/or technology transfer help governments to model national*

resource needs, resource deposits and projected revenue flows? How can coordination between public investment plans/needs and companies' project development plans/needs be improved? Are there successful examples of such coordination? Who would be well placed to facilitate this public-private dialogue? What role is there for civil society and other development partners?

Finally, there may be large gains in making a regional (trans-national) assessment of shared development objectives and challenges, including an assessment of the regional positive and negative impacts of massive extractive-industry investments. Countries and companies would benefit from regional assessments to identify the strategic opportunities for industry-led and coordinated public-sector growth initiatives to meet the mutual needs of industry and government and to maximize the impact of the investments for long-term sustained development. *How could such regional planning be facilitated? What would be the proper forum? Which stakeholders should be involved? Which key areas should be prioritized for regional solutions?*

➔ **Allocating resource revenues: the use of cash transfers, subsidies and resource funds**

One of the most critical policy decisions for governments of resource-rich countries is how to allocate the resource revenues. There are at least two major considerations that countries are faced with in determining how to allocate resource revenues: 1) how the revenues will be allocated geographically, and 2) whether to transfer the revenues directly to the population, to add the revenues to the consolidated fund, or to create a special resource fund, administered according to its own rules.

Geographically, governments must decide whether any and/or how much of the resource revenues should be allocated directly to the local region (community or state) where the resources originated (as opposed to a national account), based on the theory that the community 'owns' the resources and was most impacted by the extraction of the resources. For instance, in Nigeria, 13% of national oil revenues are re-directed to the oil-producing regions to be managed at the sub-national level. In Peru, under the "canon minero," 50 percent of the taxes and royalties collected by the Government from extractive industries are transferred to the provinces where non-renewable resources are extracted. However, in some resource-rich poor countries, the resource revenues comprise a substantial percentage of the country's revenues, and allocating a high percentage of the revenues to select sub-national administrations risks creating intra-national inequality. Furthermore, as discussed above, sub-national administrations may lack the technical expertise and administrative capacity (or authority) to compliment the private investments with strategic public investments, especially if the optimal public investments include national infrastructure (ports, roads, power plants, universities, etc.) Thus, if resources are allocated locally, they might remain under the management authority of the national government even for the implementation of local projects. One could imagine that the optimal allocation and management of revenues between national and sub-national governments would therefore depend on the local impacts of the extractive activities, the capacity of the sub-national governments, the extent to which the budgeting process is decentralized, and the wealth disparities among the population.

In addition to the geographic distribution, another critical and controversial allocation question is that of how the revenues should be spent or invested. There are a number of (sometimes competing) priorities facing policymakers in determining how revenues should be allocated: 1) the population of the host country should benefit from the extraction of resources owned by the state, either directly or as beneficiaries of a public investment program; 2) since resource prices and markets are highly volatile, revenues from extraction should be used to smooth consumption and ensure fiscal stability in the short and long terms; and 3) since the resources are non-renewable, the benefits of resource extraction should extend to future generations.

Populations can benefit from resource revenues in at least two central ways: through direct cash transfers (conditional or otherwise) or through public investment programs, such as social security, health,

education and other infrastructure and human capital investments. Proponents of cash transfers argue that the resource belonged to the population, and therefore the population should receive the revenues directly from its extraction. Cash transfer programs can be in the form of direct payments, equity shares in the extractive venture, or through conditional cash transfer programs, such as in Bolivia.⁶⁸ Proponents of public investment programs in lieu of direct transfers point to the risk of Dutch disease, which results from over-consumption of non-traded goods. Furthermore, they argue against the fairness of transferring the benefits of a depleting resource only to the current generation without saving or investing for future generations. Finally, and perhaps most importantly, they stress the high productivity of public investments in low-income countries, namely that turning the physical assets of the resource into long-lived infrastructure or human capital assets will yield development dividends not only for many years but also very high economic and social returns, including improved productivity in the non-commodity export sectors, thereby avoiding the Dutch disease altogether.

To address both inter-temporal priorities—of smoothing consumption and of ensuring that the benefits accrue to future generations—there is a strong movement toward the use of ‘resource funds,’ whereby resource revenues are accumulated in an account, separate from the country’s other public revenues, and invested according to specific rules governing the fund. For example, Trinidad and Tobago established a Heritage and Stabilization Fund (HSF) with the dual goals of preserving the oil revenues for future generations and protecting revenues from fluctuations in oil prices. While the fund has been steadily accumulating resources, they are not spent on funding the Government’s strategic development plan. In many cases, such funds are invested in low-risk bonds and markets, to offset the volatility of the resource prices and ensure a steady return over the long-term.

Other funds, such as those in Botswana, Timor-Leste, and Ecuador, allow withdrawals according to different formulas to fund public sector investments. In such cases where resource funds are used for some percentage of public financing, the law governing the fund typically specifies the rate at which the funds may be withdrawn into the national budget or for national projects. One common formula is based on a calculation known as the “Estimated Sustainable Income,” or ESI. The ESI, based on projected revenue flows from known resource deposits, quantifies a rate of withdrawal that will not deplete the fund over time. As a result, it is typically low (for e.g., it is 3% of the value of the petroleum fund in Timor-Leste) so that the fund continues to grow over time.

There is a growing contingent of economists and development practitioners advocating for changing the standard rule to allow for greater use of resource revenues to fund strategic public investments. These advocates favor a greater allocation of resource revenues into public investments in the economy, in order to boost living standards, non-oil GNP per capita, and productivity. Specifically, they recommend that revenues generated by extractive industry investments be strategically invested in key public goods that are critical for achieving the millennium development goals (MDGs), including physical capital (infrastructure, connectivity, and energy) and human capital (education, food security, and health). The proponents of increased public investment note that these investments are not the excessive ‘consumption’ that should be avoided, as these public investments are in fact reallocating the natural resource assets into physical assets (infrastructure) and human capital (a more skilled workforce) that can have a real rate of return greater than the low-yield bonds in which many resource funds are invested, and that can avoid the Dutch Disease by promoting exports in non-commodity sectors.

There have been attempts in some countries to earmark resource revenues for specific public investment purposes, either through a transparent, earmarked budgeting process or through the creation of sub-funds

⁶⁸ In Bolivia, two conditional cash transfer programs have been developed with hydrocarbon revenue: Bono Juancito Pinto (to incentivize primary school enrollment and completion) and Bono Juana Azurduy (to incentivize uninsured new mothers to seek medical care during and after pregnancy).

within the resource fund that are specifically targeted for key public-sector investments. This has been more successful in some cases than in others. In Chad, the World Bank supported a petroleum revenue management law that specifically earmarked petroleum revenues for investments in health, education and other sectors. However, shortly after the law was passed, parliament controversially changed the law, increasing access to the revenues for discretionary use. In Botswana, however, mineral revenues have been consistently reinvested in infrastructure and human capital development in accordance with the Government's National Development Plans, and is widely considered an example of successful resource management.

What rules should govern the allocation of resource revenues to public investment? How should the use of resources for public investments be monitored and evaluated?

Countries often get conflicting recommendations from their international partners about the optimal allocation of their resource revenues, so the questions raised by this Session include:

Are there distillable lessons about the benefits and challenges of sub-national management of resource revenues? Is there an optimal formula for determining the proportion of revenues to be managed nationally versus sub-nationally? Are there successful examples of conditional (or non-conditional) cash transfer programs? What role can resource funds play in long-term development planning? What rules or formulas should govern the allocation of resource revenues to public investment? How should the use of resources for public investments be monitored and evaluated? What lessons have been learned from past experiences with natural resource funds? How should the competing interests of stabilization, saving and public investment be balanced? Can we assign a rate of return on public investments?

➔ **Limiting corruption and supporting the development process**

Session II of this Conference addressed how multi-stakeholder groups can usefully monitor contract implementation to ensure that both companies and governments are fulfilling their responsibilities under the contract. This Session similarly addresses the question of how multi-stakeholder groups can monitor and support the national development planning process and the allocation of resource revenues.

One of the greatest criticisms of either market-led or government-led development, from both ends of the spectrum, is that personal and institutional interests, limited institutional capacity, and the complexity of the development challenge mean that even well articulated policies (corporate or public) do not necessarily translate to positive outcomes. In the worst case, of course, systemic corruption (or even the corruption of a few leaders) undermines any well-designed law, policy or national development plan. Short-term interests and personal gain trump national development opportunities or visions. However, even in the absence of corruption or fiscal mismanagement, effective national planning and revenue management can be undermined by the complexity of the processes, the multiple players involved in public financial management (including tax collection, revenue management, budgeting, and spending), poor data accessibility and reliability, the lack of coordination within a cabinet or between the cabinet and other stakeholders (including the private sector, civil society and development partners), the lack of transparency over key documents and processes, and other challenges (de Ferranti et. al., p.2).

Any effective allocation of resource revenues requires stakeholder representation in the national planning process and in the management of the resource funds, as well as transparency and accountability mechanisms to allow the public to track the resource spending and monitor its contribution to the development. These multi-stakeholder initiatives and transparency mechanisms have been well-conceived and are in various stages of implementation for the revenue *collection* process, through EITI, Publish What You Pay and home-grown oversight commissions that monitor and publicize the payments of governments and the revenues of governments. At a country level, some countries have designed processes that allow for the population and civil society to track the *spending* of the resource revenues. The International Budget Project, for instance, has worked since 1997 to promote budget transparency

and accountability in low and middle-income countries. There has been some discussion among multilateral stakeholder groups, including EITI++ and the Public What You Pay networks to track the spending of governments on a regional or international basis, though no mechanism has yet materialized.

Thus, this session asks the following: *What role can civil society and other stakeholders play in national development planning and the constructive coordination of public and private partners? What tools and processes of oversight, accountability and stakeholder engagement should guide the revenue management and allocation? How can we limit political influence in these processes? Could one envision a useful and effective Publish What You Spend initiative?*

Bibliography

ASFAHA, S., “National revenue funds: their efficacy for fiscal stability and inter-generational equity,” International Institute for Sustainable Development (August 2007), available at: http://www.iisd.org/pdf/2007/trade_price_nat_rev_funds.pdf.

DE FERRANTI et. al., “Enhancing development through better use of public resources: how independent watchdog groups can help,” The Brookings Institution, Policy Brief 157 (September 2006).

HUMPHREYS, M., SACHS, J. and STIGLITZ, J., *Escaping the Resource Curse* (New York: Columbia University Press, 2007).

JAMESON BOEX L.F, et al., “Multi-year budgeting: a review of international practices and lessons for developing and transitional economies,” *Public Budgeting & Finance* (Summer 2000), pp. 91 – 112.

LANGE, G.-M. and WRIGHT, M., “Sustainable development in mineral economies: the example of Botswana: reinvestment of mineral revenues increased growth in Botswana,” Centre for Environmental Economics and Policy in Africa Discussion Paper Series (March 2002), available at: <http://www.eldis.org/assets/Docs/16778.html>.

PALLEY, T., “Combating the Natural Resource Curse with Citizen Revenue Distribution funds.” Foreign policy in Focus: i-12 (2003).

RICHARDS, J.P., ed., *Mining, Society and a Sustainable World* (Springer, 2009).

SACHS, J.D and WARNER, A., “The Curse of Natural Resources” *European Economic Review* 45: 821-38 (2001).

UN Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (New York: Earthscan, 2005).

Panel VI: Integrated implementation: moving to specific next steps

This last panel will focus on synthesizing lessons learned from the previous panels and generating specific next steps toward the implementation of an integrated development approach for governments and companies.

It will deal with the challenging solutions of designing a comprehensive framework for extractive industries committed to sustainable development and of measuring success of an integrated development strategy on both the company and government sides.

What does it mean to be comprehensive in this context? Is it desirable? Feasible?

What might a comprehensive approach look like? Would it necessarily be too abstract in order for it to be implemented under real life circumstances?

If not, in what areas and along which lines could it be comprehensive? Project size? Company size? Commodity type? Region?

What models of comprehensive frameworks exist? What are the strengths and weaknesses?

Is it possible to incentivize a convergence of thinking around a comprehensive framework? Is there evidence that is beginning to happen?