

# GOVERNMENTS, INVESTORS AND LOCAL COMMUNITIES: ANALYSIS OF A MULTI-ACTOR INVESTMENT CONTRACT FRAMEWORK

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*The current regime for regulating relationships and activities in international and domestic investment systems involves minimal incorporation of host and impacted local communities in formal legal arrangements. Meanwhile different actors contest the benefits derived from and burdens imposed by, existing legal arrangements. This article presents a contract framework that formally incorporates a wider group of actors in investment arrangements. Focusing on extractive industries, it presents the conceptual framework for a tripartite arrangement that I term ‘multi-actor investment contracts’ — contracts between companies involved in project development, local communities with close ties to projects and the host government(s). While the article offers a critique of existing arrangements, it draws from the analytical opportunities that recent industry–community agreements offer for incorporating local communities as part of formal multi-actor contracts. It applies insights from contract theory as well as constructivist understandings of an interactional approach to legal analysis which adopts a broad vision of the international community to include states, foreign investors, local communities and other actors, each depending on the other but each having agency and acting in an independent capacity. These diverse groups of actors are interconnected and their diversities and points of agreement may be utilised in the proposed multi-actor framework. While the possibilities of broadening the scope of the actors able to formally participate in investment arrangements are immense, there are also challenges. However, as this article demonstrates, harnessing democratic capacities available through alternative arrangements that recognise actors’ shared roles in the investment system may be difficult, but it is possible.*

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## I INTRODUCTION

The world's growing demand for energy and natural resources, coupled with the exhaustion of easily accessible natural resource deposits, means that international oil and mining companies are initiating large projects in remote areas that have been relatively untouched by major industrial activity. These projects involve billions of dollars in capital. Their scope is such that host countries have never seen, let alone attempted to regulate, projects of this magnitude. Many of these projects, particularly pipeline projects, are multijurisdictional.<sup>1</sup>

In 2005, Chevron Nigeria Limited publicised the Global Memorandum of Understanding ('GMOU') in Nigeria's oil and gas industry.<sup>2</sup> A GMOU, in the context of Nigeria's oil and gas industry, is an agreement between an oil and gas company and clusters of host communities in Nigeria's Niger Delta, where the company undertakes to provide benefits identified by the clusters. In 2006 the Shell Petroleum Development Company (Nigeria) ('SPDC') adopted a similar model.<sup>3</sup> These companies adopted the GMOU model partly in response to agitations of local communities in this region. In another adaptation of industry-local community agreements, in Canada, corporations sometimes conclude Impact and Benefit Agreements ('IBAs') with host mining communities.<sup>4</sup> The GMOUs and the IBAs exist under different socio-legal conditions but they illustrate that several types of agreements exist within the investment law regime that transcend the prominent state-investor contract and investment treaty models. These agreements, sometimes generically known as Community Development Agreements ('CDAs'), are the emerging expression of contractual relationships between investors and local communities.<sup>5</sup>

In light of these emerging contract forms, this article addresses the following principal question: what interactional alternatives do democratic engagements with local communities offer for a reform of investment arrangements? This is

<sup>1</sup> Natasha Affolder, 'Why Study Large Projects? Environmental Regulation's Neglected Frontier' (2011) 44 *University of British Columbia Law Review* 521, 526-7.

<sup>2</sup> Chevron, '2012 Corporate Responsibility Report: Chevron in Nigeria' (Report, Chevron, 2012) 16 <[http://www.chevron.com/documents/pdf/2012\\_NigeriaCR\\_Report.pdf](http://www.chevron.com/documents/pdf/2012_NigeriaCR_Report.pdf)>.

<sup>3</sup> Shell, 'Shell in Nigeria: Global Memorandum of Understanding' (Memorandum of Understanding, Shell, April 2012) <<http://s06.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2013notes/gmou-2012.pdf>>.

<sup>4</sup> See the discussion in Part III(B)(4).

<sup>5</sup> Agreements with local communities also form part of (international) environmental law. These environmental agreements are not the focus of this article. This article focuses on agreements directly related to (foreign) investment. For environmental contracting, see, eg, Natasha A Affolder, 'Rethinking Environmental Contracting' (2010) 21 *Journal of Environmental Law and Practice* 155; Natasha Affolder, 'Transnational Conservation Contracts' (2012) 25 *Leiden Journal of International Law* 443.

especially relevant in an investment regime that is dominated by state–investor contracts and investment treaties, with minimal incorporation of local communities in legal arrangements. In responding to the overarching question that drives this article, I present preliminary ideas on a contract framework that could regulate relationships among actors in international and domestic investment regimes. With the turn to contracts that involve local communities, it is necessary to analyse contractual mechanisms that can further public participation in investment law. The article’s specific objective is to present a conceptual framework for analysing investment agreements among governments, investors and local communities. The article is part of an ongoing research project that investigates local communities’ contributions to legal arrangements for foreign investment through their interactions with governments, foreign investors and legal systems. The first article in the project series analysed the impacts of CDAs and other mechanisms on the inflow of foreign direct investment (‘FDI’) to Third World countries.<sup>6</sup> In that article, I argued that CDAs are unlikely to negatively impact investors’ decisions on investing in particular countries. In another paper in the series, I focused on real property rights as leverage for local communities in negotiating contracts with industry actors as well as governments.<sup>7</sup> Another article focused on the regulatory contributions of local community-involved contracts.<sup>8</sup> This article is part of the series.

This article examines the potential contributions and challenges of adopting a contract framework that I term ‘multi-actor investment contracts’. In adopting this term, I refrain from espousing a defined term but opt for a generic term that could capture the essence of different agreements that actors may conclude. This contract framework — which, as discussed later, appears more amenable to extractive industry projects and other large/infrastructure projects that have the potential to significantly impact host communities — proceeds based on the recognition that foreign investment provides positive impacts that may be better achieved through appropriate legal mechanisms. It also recognises and seeks to address negative impacts including human rights abuses, environmental degradation and local tensions that arise as a result of non-cordial relationships between host and impacted communities, investors and sometimes governments.

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<sup>6</sup> Ibiroinke T Odumosu-Ayanu, ‘Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Laws and Industry–Community Agreements’ (2012) 35 *North Carolina Central Law Review* 65.

<sup>7</sup> Ibiroinke T Odumosu-Ayanu, ‘Land, Niger Delta Peoples and Oil and Gas Decision-Making’ (on file with author). In this article, the term ‘governments’ incorporates central and territorial governments that form parts of the organ of the state. References to government in the context of the multi-actor investment contracts discussed in this article flows from the recognition that territorial governments might be parties to these contracts and depending on context and drafting, some multi-actor contracts might be situated (almost entirely) within domestic law regimes. While it is more likely that central governments would be more involved in multi-actor contracts, other levels of government might be involved depending on the structures within specific countries. For example, the ownership and the right to dispose of natural resources could be held by different levels of government within the state. Notwithstanding the references to governments and the domestic components of proposed multi-actor contracts, in the event of international liability, the state would be responsible.

<sup>8</sup> Ibiroinke T Odumosu-Ayanu, ‘Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment’ (2014) 65 *University of New Brunswick Law Journal* 269.

These multi-actor contracts, as conceived in this article, are agreements among local communities hosting or impacted by a particular investment project, foreign investors involved in project development and host government(s). Although there are other relevant actors, this article focuses on a framework that incorporates these three primary actors. The host government possesses legislative and regulatory capacity to determine the legal, economic and even political landscape within its jurisdiction, hence its significance for this framework. Investors provide capital and expertise, physically implement projects in host states and are in constant close contact with local communities. Local communities inhabit the territories where projects are implemented and directly bear both the positive and negative consequences of projects. They possess real property rights and other legal rights, moral entitlements and economic interests that are directly impacted by large projects.

There are other potentially relevant actors that are not included in the multi-actor framework analysed in this article. In fact, for extractive industry projects and other large projects, a host of potentially highly relevant actors, including project funders, development banks and other international institutions may participate. For example, donors like the World Bank (in cases of World Bank-sponsored projects in Third World countries), other development banks and non-governmental organisations are often involved in project financing and development. The World Bank was significantly involved in the Chad–Cameroon pipeline project,<sup>9</sup> the African Development Bank is involved in projects like the Kigali–Bujumbura Oil Pipeline Project and the Ethiopia–Kenya Electrification Interconnection Phase II.<sup>10</sup> In recognition of the multijurisdictional nature of some of these projects and because of the potential contributions of regionalism to effective delivery of multijurisdictional large projects, this article locates its analysis of multi-actor contracts within possibilities offered by regional economic frameworks.<sup>11</sup> Regional frameworks have the potential to respond well to multijurisdictional projects. They hold the promise of being more robust since they are designed for states of similar, but not identical, socio-economic status and may give more thought to furthering peoples' socio-economic wellbeing in addition to investment promotion and protection.

In order to consider more inclusive alternatives or modifications to the prevailing investment treaty and state–investor contract models, it is necessary to critically examine these currently adopted models. Hence, in the next Part, the inquiry focuses on the rationale for a multi-actor framework that directly incorporates local communities in legal arrangements on investment. Following this inquiry, Part III introduces contemporary investment arrangements including relatively seldom-analysed instruments that are becoming increasingly relevant

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<sup>9</sup> See, eg, Annalisa M Leibold, 'Aligning Incentives for Development: The World Bank and the Chad–Cameroon Oil Pipeline' (2011) 36 *Yale Journal of International Law* 167.

<sup>10</sup> African Development Bank, *Project Portfolio* (9 May 2014) <<http://www.afdb.org/en/projects-and-operations/project-portfolio/>>.

<sup>11</sup> International institutions encourage regional economic initiatives. For example, the United Nations Conference on Trade and Development ('UNCTAD') notes that 'strengthened intra-African integration is essential for development': United Nations Conference on Trade and Development, 'Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development' (Report, United Nations, 2009) 1.

in regulating investment relationships. Some of these instruments, including IBAs and GMoUs, directly incorporate host communities as actors. In this Part, these less-discussed instruments, their context-specific application to particular socio-legal conditions and the variations in their contents are discussed. While it offers a critique of the existing arrangements, the presentation of these existing frameworks emphasises the analytical opportunities which industry–community agreements like IBAs offer in terms of incorporating local communities as part of formal legal contracts that define and regulate investment activities and relationships. But this article does not suggest that IBAs, GMoUs and other similar agreements meet the needs of local communities, as they may be regarded as imposition. IBAs and GMoUs are used in this article partly to demonstrate that relevant local communities can be identified and they could participate as parties to investment and investment-related contracts.

Following an analysis of existing legal arrangements, the article turns to a presentation of the components of the multi-actor investment contract framework drawing on relevant aspects of contract law and constructivist understandings of an interactional approach to legal analysis in Part IV.<sup>12</sup> Analysis of a potential multi-actor framework forms the core element of this article. The analysis presents contract options for multi-actor contracts that decision-makers may choose from. Part IV also presents the challenges of adopting multi-actor investment contracts. All through the analysis in this article, examples are drawn mostly from Nigeria and Canada. For regionalisation, the examples mostly rely on the West African experience. Part V presents issues for further research and concludes with a call for praxis.<sup>13</sup>

## II CONTEXT: WHY MULTI-ACTOR CONTRACTS?

It is necessary to question a re-examination of investment law's focus on state–investor contracts and investment treaties, especially since these two legal mechanisms have been the driving forces behind the definition and regulation of relationships in this area of the law. The focus on these types of instruments signifies a focus on specific actors — states and foreign investors. Questioning this focus is particularly necessary with extractive industry projects and large infrastructure projects, especially when these are multijurisdictional projects. The focus of this initial analytical exploration of a multi-actor framework is *inter alia* large, often multijurisdictional projects. These types of projects are visible, involve several directly-affected stakeholders and, for the multijurisdictional projects, involve more than one state actor. They also significantly affect the lives and livelihoods of local communities.

It is not disputed that states are representatives of peoples.<sup>14</sup> In fact, this article draws on the responsibility of states to their peoples in presenting ideas for a multi-actor framework. It is a state's responsibility to ensure that its

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<sup>12</sup> Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010).

<sup>13</sup> For additional research already being conducted, see, eg, Odumosu-Ayanu, 'Multi-Actor Contracts', above n 8; Odumosu-Ayanu, 'Oil and Gas Decision-Making', above n 7.

<sup>14</sup> See generally James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010); Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008).

people's wellbeing is protected by providing, supporting and enforcing legal mechanisms for their legal and socio-economic empowerment. Although states have responsibilities towards their peoples, recent history demonstrates the limitations that states encounter in providing legal and other protections for peoples. Hence sometimes, due to states' lack of capacity, their lack of interest or even conflict of interest, (international) law has extended standing, if not personality, to foreign investors in investment law issues and sometimes to individuals in human rights matters.<sup>15</sup> These recognitions stem from these actors' direct involvement and interests in these areas of the law. Recognition of such direct involvement has also led to the creation of industry–local community agreements like the IBAs and GMoUs. Beyond these industry–local community agreements, governments also conclude agreements with local communities, especially indigenous communities. Between 2010 and 2013 the Government of British Columbia, Canada, concluded some Economic and Community Development Agreements that are mostly revenue sharing agreements with some indigenous nations in the Province of British Columbia.<sup>16</sup> In calling for a more robust engagement among the relevant actors, analysis of a potential multi-actor framework relies on these types of existing contracts that involve communities, investors and governments in different formations, the direct involvements and interests of these actors in extractive industry and other large projects, as well as several other factors.

First among those factors is the demand of local communities all over the world for participation in economic decision-making that impacts upon them.<sup>17</sup> Following the calls for participation, governments have adopted consultation models and impact assessments while corporations now conclude agreements with local communities.<sup>18</sup> The unrest and poverty in many resource-rich areas of

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<sup>15</sup> For foreign investors in international law, see *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*'). For a discussion of human rights and 'activist forces' in the African context, see Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces, and International Institutions* (Cambridge University Press, 2007).

<sup>16</sup> *Economic and Community Development Agreement between Her Majesty the Queen in Right of British Columbia and Stk'emlúpsəmc of the Secwepemc Nation*, signed 24 August 2010; *Economic and Community Development Agreement between Her Majesty the Queen in Right of British Columbia and the McLeod Lake Indian Band*, signed 25 August 2010; *Economic and Community Development Agreement between Her Majesty the Queen in Right of the Province of British Columbia and Nak'azdli First Nation*, signed 12 June 2012; *Economic and Community Development Agreement between Her Majesty the Queen in Right of the Province of British Columbia and the Ktunaxa Nation Council Society*, signed 29 January 2013; *Economic and Community Development Agreement between Lower Similkameen Indian Band & Upper Similkameen Indian Band and Her Majesty the Queen in Right of the Province of British Columbia*, signed 28 March 2013; *Economic and Community Development Agreement between Her Majesty the Queen in Right of the Province of British Columbia and Williams Lake Indian Band*, signed 6 March 2013; *Economic and Community Development Agreement between Her Majesty the Queen in Right of the Province of British Columbia and Soda Creek Indian Band*, signed 5 March 2013. All agreements are available online: *First Nations Negotiations* (2014) Government of British Columbia <[http://www.newrelationship.gov.bc.ca/agreements\\_and\\_leg/economic.html](http://www.newrelationship.gov.bc.ca/agreements_and_leg/economic.html)>.

<sup>17</sup> See, eg, Donald N Zillman, Alastair R Lucas and George (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002).

<sup>18</sup> See the discussion below in Part III.

the Third World is also a major impetus for reconsidering the legal mechanisms for engaging with local communities.<sup>19</sup> GMoUs, for example, are partly responses to unrest in the Niger Delta. Chevron has confirmed that the purpose of the GMoUs 'is to bring peace and stability to areas where Chevron operates'.<sup>20</sup> The proposed multi-actor framework is also a response to local communities' calls for participation in decision-making regarding issues that are of immense importance to their lives and livelihoods. While some form of local community participation is already occurring, multi-actor contracts represent an attempt to formalise this participation and ensure that the interests of all stakeholders are properly represented. For example, while environmental pollution in the areas that GMoUs cover is well-known, these agreements focus on the provision of benefits.<sup>21</sup> Without dismissing the importance of these benefits arrangements, providing benefits while simultaneously damaging the environment exposes a weakness of some of the industry–local community agreements.<sup>22</sup>

Secondly, the legacy of colonialism in many areas of the world dictates the need for directing particular attention to natural resource extraction and other large projects. The African Commission on Human and Peoples Rights ('African Commission') notes that the 'origin' of art 21 of the *African Charter on Human and Peoples Rights* ('*African Charter*'),<sup>23</sup> which recognises peoples' rights to 'freely dispose of their wealth and natural resources', can

be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the [African] *Charter* obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.<sup>24</sup>

Suspicion surrounding the exploitation of natural resources stems partly from the plunder of colonialism, the cession of large tracts of land under enormously unequal and highly contested concession contracts and intense corruption of government officials, leading to distrust of both government actors and

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<sup>19</sup> See generally Cyril I Obi, 'Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil-Rich Niger Delta' (2010) 30 *Canadian Journal of Development Studies* 219.

<sup>20</sup> Chevron, *Nigeria: In the Community* (May 2014) <<http://www.chevron.com/countries/nigeria/inthecommunity/>>.

<sup>21</sup> For an outline of some of the environmental and other challenges that Niger Delta peoples face, see African Commission on Human and Peoples' Rights, *Communication No 155/96*, 30<sup>th</sup> sess, Ref ACHPR/COMM/A044/1 (27 October 2001) ('*Social and Economic Rights Action Center and the Center for Economic and Social Rights v Federal Republic of Nigeria*') ('*SERAC v Nigeria*').

<sup>22</sup> See generally Uwafiokun Idemudia and Uwem E Ite, 'Corporate–Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' (2006) 13 *Corporate Social Responsibility and Environmental Management* 194.

<sup>23</sup> *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) ('*African Charter*').

<sup>24</sup> *SERAC v Nigeria*, Ref ACHPR/COMM/A044/1, [56].

industry.<sup>25</sup> All these factors intensify the need to reconsider how the law regulates relationships among governments, investors and host and impacted communities.

Thirdly, the debate regarding the status of peoples and the rights attached to each status has garnered attention since the decolonisation movement of the second half of the 20<sup>th</sup> century.<sup>26</sup> The *African Charter* was adopted in 1981 providing for specific rights of peoples. It has formed the basis for some seminal decisions like the African Commission's decision in *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Federal Republic of Nigeria* ('*SERAC v Nigeria*'), where the Nigerian Government was found in violation of the socio-economic rights of the Ogoni people — a group from whose territory significant quantities of oil and gas is produced in Nigeria. Also relevant is the indigenous status of some of the peoples who live on land that holds significant natural resource wealth. The autonomous and semi self-governing status of some of these peoples is also a major drive for reassessing the agreements that dominate the foreign investment regime.<sup>27</sup> As demonstrated later in this article, Canada's IBAs are partly based on the sui generis nature of the relationship between the Canadian Government and Canada's indigenous peoples. The status of these peoples is an impetus for these IBAs. In parts of the world where indigenous status is being contested, there has been a call for recognition as indigenous peoples.<sup>28</sup> For indigenous and non-indigenous peoples, legal recognition, rights to surface land, fishing rights and other rights, support their demand for participatory rights and recognition beyond the provision of benefits.

A fourth factor is the limitations of some corporate social responsibility ('CSR') initiatives, especially in the Third World.<sup>29</sup> These CSR initiatives are mostly benefits-driven.<sup>30</sup> While the benefits model is potentially beneficial, as Idemudia and Ite note in the context of the Nigerian oil industry, it suffers from serious challenges:

The failure of oil companies to observe the moral minimum or demonstrate that they are doing all they can do within their power to observe this moral minimum has helped to reinforce community perceptions of oil companies as adversaries to be confronted and tamed. This is because no amount of road or bridge construction, provision of electricity or the award of scholarships can compensate for 24 hours of daylight resulting from gas flaring by the oil companies. At this same time, such affirmative duties would not have the same effect on the communities as the observation of negative injunction duties by the oil

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<sup>25</sup> See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

<sup>26</sup> See generally S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2004); Philip Alston (ed), *Peoples' Rights* (Oxford University Press, 2001).

<sup>27</sup> See generally Louis A Knafla and Haijo Westra (eds), *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (UBC Press, 2010).

<sup>28</sup> See, eg, African Commission on Human and Peoples' Rights, *Communication No 276/2003*, 46<sup>th</sup> sess (25 November 2009) ('*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*') (where the African Commission commented, inter alia, on the indigenous status of the Endorois people of Kenya).

<sup>29</sup> See generally Odumosu-Ayanu, 'Foreign Direct Investment Catalysts', above n 6.

<sup>30</sup> *Ibid.*

companies. The issue being raised is that affirmative duties cannot be a substitute for not observing the moral minimum. Affirmative duties are likely to create more added values if negative injunction duties are observed.<sup>31</sup>

A fifth major drive for reconsidering the focus on treaty and state–investor contract regimes and concomitant focus on states and investors flows from the importance that some attach to FDI and its centrality to economic development.<sup>32</sup> Given the insights of critical scholars working in international investment law, the impacts of FDI may be more nuanced than governments and some other actors may be willing to admit.<sup>33</sup> For example, the United Nations Conference on Trade and Development (‘UNCTAD’) has noted that ‘[w]hile oil has played an important role in Nigeria, data show that over 70 per cent of the population lives on less than one dollar a day (this represents a quarter of all Africans living in this condition)’.<sup>34</sup> The importance of a perspective that directly incorporates the poor, including some members of some host communities to foreign investment, cannot be overemphasised. In fact, the experience of Nigeria’s oil and gas sector and the extractive industries in many Third World countries supports a cautious approach, given that they have manifested situations similar to those under a ‘resource curse’ scenario.<sup>35</sup> Irrespective of the position that one takes on the centrality or otherwise of FDI to socio-economic empowerment, given the history and the debate surrounding foreign investment law it is necessary to investigate the utility of a framework that directly incorporates local communities as relevant actors in the foreign investment regime.

The sixth reason for re-examining the prevailing state–investor contract and investment treaty models is to harness democratic values that pervade local and international life and incorporate these into the investment law regime. Harnessing democratic capacities available through adoption of alternative arrangements that do not privilege states and investors, but which recognise their shared central roles in the investment system, is difficult but possible. These democratic possibilities highlight the public law nature of investment regimes, and the struggles with the constant bid to categorise this area as inherently

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<sup>31</sup> Idemudia and Ite, ‘Corporate–Community Relations’, above n 22, 202.

<sup>32</sup> See generally Eric Neumayer and Laura Spess, ‘Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?’ (2005) 33 *World Development* 1567; Mary Hallward-Driemeier, ‘Do Bilateral Investment Treaties Attract FDI? Only a Bit ... And They Could Bite’ (Working Paper No 3121, World Bank, August 2003); Jennifer Tobin and Susan Rose-Ackerman, ‘Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties’ (Research Paper No 293, Yale Law School Centre for Law, Economics and Public Policy, 2 May 2005).

<sup>33</sup> See generally M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3<sup>rd</sup> ed, 2010); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge University Press, 2008); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008).

<sup>34</sup> United Nations Conference on Trade and Development, ‘Investment Policy Review: Nigeria’ (Report, United Nations, 2009) 3 <[http://unctad.org/en/docs/diaepcb20081\\_en.pdf](http://unctad.org/en/docs/diaepcb20081_en.pdf)>.

<sup>35</sup> See generally Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (University of California Press, 1997); George Soros, ‘Foreword’ in Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz (eds), *Escaping the Resource Curse* (Columbia University Press, 2007) xi.

private.<sup>36</sup> Some of this work is being done through the Extractive Industries Transparency Initiative which emphasises a multi-stakeholder process that includes governments, industry and civil society, for ensuring transparency in extractive industries.<sup>37</sup> In light of international acceptance of multi-stakeholder processes, this article presents a framework for multi-stakeholder contracts.

There is a need to accommodate all relevant actors under an enforceable framework that is accessible to all of them. While local communities are sometimes consulted with regard to project development, they do not appear to have definite means of recourse under (international) investment law.<sup>38</sup> The multi-actor framework presented in this article engages the principle of consultation with all relevant actors and goes further from consultation to sustained interaction and eventually contractual rights. While recognising challenges regarding peoples' rights,<sup>39</sup> its purpose is to foster peaceful socio-economic coexistence among actors in projects from the Niger Delta, to Canada's Northwest Territories, to the Amazon.

### III THE CONTEMPORARY FRAMEWORK

#### A Introduction

Commentators on foreign investment law debate the appropriate legal arrangements for addressing foreign investors' and states' interests.<sup>40</sup> Early commentators termed investment contracts 'economic development agreements', eager to elevate them to an international status and situate them out of the domestic domain where states' sovereign powers prevailed.<sup>41</sup> When investment treaties began to proliferate, authors like Andrew Guzman questioned Third World countries' signing of treaties that 'hurt them'.<sup>42</sup> Critiques of international investment law also focus on investment dispute settlement, especially international investment arbitration.<sup>43</sup> Others have argued against the centrality

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<sup>36</sup> Van Harten, above n 33; Amr A Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism' (2000) 41 *Harvard International Law Journal* 419.

<sup>37</sup> Extractive Industries Transparency Initiative, 'The EITI Standard' (Report, EITI International Secretariat, 11 July 2013) <<http://eiti.org/document/standard>>.

<sup>38</sup> On consultation: Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Purich, 2009). The rights that international investment law provide belong to states and foreign investors: Ibronke T Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 *Pennsylvania State International Law Review* 251, 261.

<sup>39</sup> See generally Philip Alston, 'Peoples' Rights: Their Rise and Fall' in Philip Alston, *Peoples' Rights* (Oxford University Press, 2001) 259.

<sup>40</sup> See generally Sornarajah, *The International Law on Foreign Investment*, above n 33.

<sup>41</sup> See, eg, James N Hyde, 'Economic Development Agreements' (1962) 105 *Recueil des Cours* 2671; Timothy B Hansen, 'The Legal Effect Given Stabilization Clauses in Economic Development Agreements' (1988) 28 *Virginia Journal of International Law* 1015; Christopher T Curtis, 'The Legal Security of Economic Development Agreements' (1988) 29 *Harvard International Law Journal* 317; Mansour Al-Saeed, 'Legal Protection of Economic Development Agreements' (2002) 17 *Arab Law Quarterly* 150.

<sup>42</sup> Andrew T Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639.

<sup>43</sup> See generally Van Harten, above n 33.

of FDI to development policy.<sup>44</sup> Still some commentators incorporate sustainable development considerations into the study of and policymaking in investment law, tapping into its more social capacities.<sup>45</sup> Regardless of the focus, the debates relate to means of making the foreign investment regime work better for all actors. They highlight the need for law to continue to reinvent itself in light of the needs of relevant actors.

Developing a framework for incorporating host communities as relevant actors with agency in enforceable multi-actor investment contracts at the points of negotiation, implementation and, if necessary, dispute resolution, is a complex task. Negotiating these agreements may be an even more complex endeavour. It is necessary to precede the analysis with an examination of existing frameworks. The existing arrangements include a state–state mechanism under the investment treaty framework, a state–investor framework through foreign investment contracts and an industry–local communities dimension through initiatives like the IBAs and the GMoUs. The summaries of the existing legal arrangements in this section highlight two of the issues that are addressed in this article. First they demonstrate that foreign investment regimes focus mostly on states and foreign investors. Secondly, they show that advances are being made to incorporate local communities through other arrangements like IBAs in Canada and GMoUs in Nigeria.<sup>46</sup>

## B *Existing Treaties, Contracts and other Legal Arrangements*

### 1 *Investment Treaties*

In the last two decades, investment treaties, especially bilateral investment treaties ('BITs'), have emerged as a major part of the international investment law system.<sup>47</sup> These treaties are concluded among or between states and they define the rights and responsibilities of the state parties to the treaties. In addition, they provide enforceable rights for foreign investors in the states that are parties to the treaties. The dispute settlement framework often gives recourse to international arbitration, making investment treaty arbitration a major area of scholarly discussion in the 21<sup>st</sup> century.<sup>48</sup> Often, BITs (concluded between states) afford foreign investors rights to have recourse to dispute settlement without

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<sup>44</sup> Kevin P Gallagher and Lyuba Zarsky, 'No Miracle Drug: Foreign Direct Investment and Sustainable Development' in Lyuba Zarsky (ed), *International Investment for Sustainable Development: Balancing Rights and Rewards* (Earthscan, 2005) 13.

<sup>45</sup> See, eg, Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, 2009); Howard Mann and Konrad von Moltke, *A Southern Agenda on International Investment?: Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States* (International Institute for Sustainable Development, 2005); Howard Mann et al, *IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook* (International Institute for Sustainable Development, 2<sup>nd</sup> ed, 2006).

<sup>46</sup> Environmental Impact Assessment processes also engage local communities but effectiveness varies across jurisdictions: see generally Rhuks Temltope Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (Routledge, 2013) 32.

<sup>47</sup> See generally Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Law International, 1995).

<sup>48</sup> See generally Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007).

articulating concrete enforceable obligations for these actors. At best, these treaties include clauses that require investors to comply with the laws of the host state.<sup>49</sup> Even where the treaties do not include these clauses, a dispute settlement tribunal might imply that the investor (and the investment) will lose treaty protection if it does not comply with the host state's laws.<sup>50</sup>

Given the wealth of information on investment treaties, much space will not be dedicated to their analysis in this article. These treaties demonstrate that states could articulate rights of non-state actors in instruments to which the latter are not parties. Also investment treaties have become regular features within regional economic organisations. The potential that regionalisation holds for a multi-actor framework is discussed later in this article.

## 2 (State–Investor) Foreign Investment Contracts

State–investor contracts have been a major mechanism for regulating relationships between states and private investors, especially in the extractive industries.<sup>51</sup> Jason Yackee recently emphasised the legitimacy inherent in the bargain and privity that contracts provide.<sup>52</sup> He notes that '[i]nvestment contracts are not a relic of past practice: they remain commonplace in the modern era, and indeed, investors often continue to insist on obtaining them'.<sup>53</sup> Yackee advocates a 'minimalist system' of international law, which 'would largely abandon

<sup>49</sup> See generally Gabriel Bottini, 'Legality of Investments under ICSID Jurisprudence' in Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 297.

<sup>50</sup> In *Phoenix Action Ltd v Czech Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/5, 15 April 2009) [101], the tribunal noted that 'this condition — the conformity of the establishment of the investment with the national laws — is implicit even when not expressly stated in the relevant BIT [bilateral investment treaty]'. See also *Plama Consortium Limited v Republic of Bulgaria (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/24, 27 August 2008) [138]–[139].

<sup>51</sup> In this article, I refer to foreign investment contracts as state–investor contracts in order to differentiate them from the proposed multi-actor contracts. Some contracts referred to as state–investor contracts in this article may involve central or territorial governments but the language is retained in order to prevent confusion with multi-actor investment contracts. See generally United Nations Conference on Trade and Development, 'State Contracts' (Report, United Nations, 2004) (describing the interaction between state contracts and investment treaties). For analyses of foreign investment contracts and environmental governance, see Kyla Tienhaara, 'Foreign Investment Contracts: Unexplored Mechanisms of Environmental Governance' (Working Paper No 03, Climate and Environmental Governance Network, Regulatory Institutions Network, Australian National University, February 2009); Kyla Tienhaara, 'Environmental Aspects of Host Government Contracts in the Upstream Oil & Gas Sector' (2010) 8(3) *Oil, Gas & Energy Intelligence*.

<sup>52</sup> Jason Webb Yackee, 'Do We Really Need BITs? Toward a Return to Contract in International Investment Law' (2008) 3 *Asian Journal of WTO & International Health Law and Policy* 121. Yackee notes (at 137) that

[m]any investors, and probably the vast majority of all large investors in high-risk sectors, rely primarily on investment contracts to legally secure their investments, *despite the advent of BITs*. BITs are hardly necessary to encourage investment, there is no evidence that investors demand the treaties as a condition to investing, and it is worth seriously considering whether host states might be better served by forgoing the treaties in favor of a regime in which the default terms of bargain provided to investors are relatively mild by today's standards (emphasis in original).

See also Jason Webb Yackee, 'Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality' (2009) 32 *Fordham International Law Journal* 1550.

<sup>53</sup> Yackee, 'Do We Really Need BITs?', above n 52, 133.

universalism at the international level in favor of particularism and diversity at the domestic level'.<sup>54</sup> This involves placing emphasis on foreign investment contracts, having recourse to municipal law as the 'primary source of law' and adopting municipal courts as the 'primary' dispute settlement forum.<sup>55</sup> However, Yackee is of the view that international law would continue to play 'as much of a role as host states (and individual investors) wish it to play'.<sup>56</sup> As a result, municipal law and/or investment contracts may continue to refer to standards of treatment derived under international law and also refer disputes to international tribunals for settlement.<sup>57</sup>

State-investor contracts are rooted in domestic legal systems. Even though there have been efforts to internationalise foreign investment contracts<sup>58</sup> and these contracts have formed the basis for arbitral tribunals' jurisdiction in international arbitral cases,<sup>59</sup> an analysis of these contracts is incomplete without recourse to the domestic legal system of the host state. Governments conclude state-investor contracts, especially when natural resource and large infrastructure projects are involved. These projects are often those with the closest connection to host and impacted communities. Commentators have noted that '[m]ostly, local communities affected by investment projects have no say in the negotiation and implementation of the deals that govern the project. Yet they often suffer negative impacts'.<sup>60</sup> Multi-actor contracts could attempt to remedy the deficit in sustained interaction. This framework differs from Yackee's minimalist international investment law because it argues that investment law should incorporate a wider conception of relevant actors through an enforceable contract mechanism. Although it emphasises domestic law and domestic courts like Yackee does, it does not focus as much on international arbitration. Rather, it relies on regional economic institutions in recognition of the location of projects and recognition of the different levels of resources that contract parties have for interacting at the international level.

Recognising the importance of state-investor contracts and their potential impacts on host communities, the United Nations recently published 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks

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<sup>54</sup> Jason Webb Yackee, 'Toward a Minimalist System of International Investment Law?' (2009) 32 *Suffolk Transnational Law Review* 303, 304.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* 328.

<sup>57</sup> *Ibid.*

<sup>58</sup> See generally M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000) ch 8.

<sup>59</sup> See, eg, *Klöckner Industrie-Anlagen GmbH v Republic of Cameroon (Award)* (1994) 2 ICSID Rep 3; *World Duty Free Co Ltd v The Republic of Kenya (Award)* (ICSID Arbitral Tribunal, Case No ARB/00/7, 4 October 2006). Early ad hoc arbitrations were also mostly conducted on the basis of contracts: see *Petroleum Development Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144; *Ruler of Qatar v International Marine Oil Co Ltd* (1953) 20 ILR 534; *Saudi Arabia v Arabian American Oil Co* (1958) 27 ILR 117; *Sapphire International Petroleum Ltd v National Iranian Oil Co* (1963) 35 ILR 136; *Texaco Overseas Petroleum Co v The Government of the Libyan Arab Republic* (1979) 53 ILR 389.

<sup>60</sup> Dominic Ayine et al, 'Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development' (Briefing Paper No 1, International Institute for Environment and Development, September 2005) 2 <<http://pubs.iied.org/pdfs/16007IIED.pdf>>.

into State–Investor Contract Negotiations’.<sup>61</sup> Additionally, the notion of investment contracts as ‘economic development agreements’ that justify an altruistic perspective on investment appears to be giving way in a few instances to the recognition of ‘the need for a holistic approach to investor–state contracts’.<sup>62</sup> Mann notes that

[t]he notion of a social contribution as a voluntary add on to an otherwise business as usual model is rejected in favour of a fully integrated contracting model where social and economic development within the host community are integral components, based on preliminary human rights and social impact assessments, as well as environmental assessment and management components.<sup>63</sup>

These movements away from ‘business as usual’ provide an impetus for a perspective on investment contracting that this article offers.

### 3 *Global Memoranda of Understanding*

The GMoU is part of a recent generation of agreements that directly incorporate local communities as parties. These agreements, often generically known as CDAs, provide a framework for allocating benefits from projects to local communities.<sup>64</sup> They are mostly concluded between industry actors and local communities. It has been noted that CDAs are formed where some factors are in place.<sup>65</sup> First these agreements are formed where there is a government requirement for their formation,<sup>66</sup> for example, under the *Nigerian Minerals and Mining Act*.<sup>67</sup> Secondly, the agreements could be required where indigenous lands are involved like in the case of some Canadian IBAs, which are discussed in the next subsection.<sup>68</sup> Thirdly, CDAs could be adopted as a means to resolve industry–local community disputes, which is the case in the Niger Delta.<sup>69</sup>

Nigeria’s oil and gas industry partakes in the CDA form of agreement. That oil and gas production has generated intense conflict in Nigeria’s Niger Delta is not a novel observation to make.<sup>70</sup> What is relatively new, at least to this region, is the governance mechanism that some transnational corporations (‘TNCs’) operating in the Niger Delta have adopted. Previously, companies like Chevron Nigeria Limited adopted a community engagement model known as the

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<sup>61</sup> John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie — Addendum, 17<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/17/31/Add.3 (25 May 2011) annex (‘*Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*’).

<sup>62</sup> Howard Mann, ‘Foreign Investment Contracts and Sustainable Development: The New Foundations Begin to Emerge’ (2011) 1(4) *Investment Treaty News* 9, 9.

<sup>63</sup> *Ibid.*

<sup>64</sup> Odumosu-Ayanu, ‘Foreign Direct Investment Catalysts’, above n 6, 82.

<sup>65</sup> David Brereton, John Owen and Julie Kim, ‘Good Practice Note: Community Development Agreements’ (Practice Note, Centre for Social Responsibility in Mining, 2011) 4.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Nigerian Minerals and Mining Act, 2007* (Nigeria) Act No 20, ss 116–17.

<sup>68</sup> Brereton, Owen and Kim, above n 65.

<sup>69</sup> *Ibid.*

<sup>70</sup> See Obi, above n 19.

Memorandum of Understanding ('MOU').<sup>71</sup> The MOU adopted what Stephen Faleti calls the 'patronage approach'.<sup>72</sup> During the era of the MOUs, the TNCs provided 'development projects in return for a commitment by communities to provide a peaceful operating environment'.<sup>73</sup> The MOUs were essentially CSR initiatives in the form of agreements by the oil companies to provide individual communities with benefits like employment, businesses and scholarships. Often, execution of the MOUs was fraught with problems and accusations that 'oil companies were giving contracts to local leaders to buy their silence'<sup>74</sup> as well as a perception that oil companies adopted 'divide and rule' methods.<sup>75</sup> It has been noted that it was 'difficult for oil companies working in the Niger Delta area to provide coherent evidence of direct impact on local livelihoods because most spending were [sic] tailored to strengthening the patronage networks within host communities'.<sup>76</sup>

Under the new GMoU framework, Chevron<sup>77</sup> concludes agreements with identified communities organised into clusters.<sup>78</sup> The process involves some input by NGOs and, sometimes, the government.<sup>79</sup> Like the MOUs, the GMoUs are essentially CSR agreements where the corporations provide development funding to host communities. In return, the communities provide 'guarantees of uninterrupted operations'.<sup>80</sup> GMoUs are effectively part of the 'social license to operate' debate.<sup>81</sup> Also, like the MOUs, Chevron's GMoUs seek to address resource conflicts in the Niger Delta. However, unlike the MOUs that adopted

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<sup>71</sup> Stephen A Faleti, 'Challenges of Chevron's GMOU Implementation in Itsekiri Communities of Western Niger Delta' (Paper, Peace & Conflict Studies Programme, University of Ibadan, 28 December 2010) 11–12 <[http://www.ifra-nigeria.org/IMG/pdf/Stephen\\_FALETI\\_-\\_Challenges\\_of\\_Chevron\\_GMOU\\_Implementation\\_in\\_Itsekiri\\_Communities\\_of\\_Western\\_Niger\\_Delta.pdf](http://www.ifra-nigeria.org/IMG/pdf/Stephen_FALETI_-_Challenges_of_Chevron_GMOU_Implementation_in_Itsekiri_Communities_of_Western_Niger_Delta.pdf)>.

<sup>72</sup> Ibid 12.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid 12.

<sup>75</sup> Ibid 13.

<sup>76</sup> Ibid.

<sup>77</sup> For a review of Chevron's GMoUs, see Facilitation Team, 'GMOU Participatory Stakeholder Evaluation: A Joint Evaluation of the Global Memoranda of Understanding between Chevron, Community Organizations and State Governments in the Niger Delta' (Report, Consensus Building Institute, Search for Common Ground and Research Triangle Institute, October 2008).

<sup>78</sup> Shell also adopts a GMoU model where agreements are concluded with groups of communities instead of with single communities: Uwafiokun Idemudia, 'Corporate Partnerships and Community Development in the Nigerian Oil Industry: Strengths and Limitations' (Paper No 2, Markets Business and Regulation Programme, United Nations Research Institute for Social Development, March 2007) 10.

<sup>79</sup> For example, under the Shell GMoU model, Draper notes that Shell 'formally involved the relevant state governments to engage with communities under each cluster to identify the 10 Community Trust members': Tracey Draper, 'SPDC's Global Memorandum of Understanding' in *Shell in the Niger Delta: A Framework for Change — Five Case Studies from Civil Society* (Report, Ecumenical Council for Corporate Responsibility, February 2010) 65, 69.

<sup>80</sup> Faleti, above n 71, 25. Describing Chevron's 'instrumental social engagement', Faleti notes (at 26) that

[a]ctivities that led to the design of the GMOU framework, the establishment of RDCs and other structures that support or regulate it were therefore consciously designed to achieve a key corporate objective — create safe space within which to operate profitably by deflecting pressures away from its operations.

<sup>81</sup> Idemudia, 'Corporate Partnerships', above n 78, iii.

the practice of dealing directly with communities, the Chevron GMoUs create Regional Development Councils ('RDCs'),<sup>82</sup> which represent clusters of host communities working under an organisational umbrella. Community consultations are effectively transferred to the RDCs. The RDCs are responsible for 'the design, planning and execution of community development programmes'.<sup>83</sup> The RDCs also work with non-government organisations ('NGOs'), some of whom Chevron commissioned to conduct 'Sustainable Livelihood Assessments'.<sup>84</sup>

These GMoUs are far-reaching in terms of geographical coverage.<sup>85</sup> For example, by 2010, the Shell Petroleum Development Company (Nigeria) had concluded GMoUs with 24 clusters that covered 244 communities, representing about 25 per cent of SPDC's business operations in the Niger Delta.<sup>86</sup> In spite of the adoption of the GMoU framework, problems remain. These include factions within communities; the alleged absence of environmental issues from the scope of the GMoUs; the perception of the GMoUs as an imposition on communities; the classification of communities as host and/or impacted communities; and the departure from existing 'community governance' structures in adopting the RDC model.<sup>87</sup>

Although GMoUs suffer from shortcomings,<sup>88</sup> they provide an avenue for measuring the feasibility of concluding multi-actor contracts with diverse communities. While the contributions of their contents and process to social engagement are contested, they demonstrate that the challenge of identifying relevant communities is not an insurmountable impediment to negotiating and contracting with these communities within a larger tripartite framework that involves the government as well as investors and host communities. Although the process of identifying the communities is certainly not perfect and has been criticised,<sup>89</sup> the GMoUs demonstrate that such identification, organisation and contracting is achievable.

#### 4 *Impact and Benefit Agreements*

Industry–community agreements are not limited to the Third World. Developed countries like Canada adopt this framework through IBAs.<sup>90</sup> Without necessarily suggesting the adoption of the IBA model on a global level because of its context-specific nature and the dynamics of the legal arrangements in Canada, this article draws lessons from the use of IBAs in mining projects in the Canadian North. In conjunction with GMoUs, IBAs serve as a catalyst for this article's focus on a related but different phenomenon of multi-actor contracts.

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<sup>82</sup> Shell's GMoUs create community trusts and cluster development boards: Draper, above n 79, 68.

<sup>83</sup> Faleti, above n 71, 20.

<sup>84</sup> Ibid. Shell also conducted Sustainable Livelihood Assessments: see Draper, above n 79, 69.

<sup>85</sup> See, eg, Shell, above n 3.

<sup>86</sup> Ibid.

<sup>87</sup> For a discussion of these problems, see especially Faleti, above n 71, 21–4.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid 24–5.

<sup>90</sup> See the discussion in this Part.

These IBAs, which are known by different terminologies,<sup>91</sup> create sometimes confidential contractual relationships between mining companies and mostly Aboriginal communities.<sup>92</sup> Although they are not without their limitations,<sup>93</sup> IBAs offer benefits in the form of training, employment, business opportunities and include other related provisions on financial issues and environmental protection.<sup>94</sup> These agreements have gained currency partly because of Aboriginal land rights,<sup>95</sup> governments' legal and policy requirements<sup>96</sup> or investors' initiative.<sup>97</sup>

IBAs have been described as 'privately negotiated agreements, typically between extractive industries and community organisations, in which government is relegated to an external observational role'.<sup>98</sup> They are mostly negotiated without 'government oversight'.<sup>99</sup> However, a few IBAs have been concluded between Aboriginal communities and governments.<sup>100</sup> Each agreement is negotiated on a case-by-case basis and given IBAs' recent emergence as a relevant instrument in Canada's extractive industries, it is quite early to give a definitive description of these agreements.<sup>101</sup> Although IBAs are not always compulsory, they are required in instruments like the *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*<sup>102</sup> and 'they are increasingly becoming part of a standard

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<sup>91</sup> Janet Keeping, 'Thinking about Benefits Agreements: An Analytical Framework' (Northern Minerals Program Working Paper No 4, Canadian Arctic Resources Committee, April 1998) 2–5.

<sup>92</sup> See generally Irene Sosa and Karyn Keenan, 'Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada' (Report, Canadian Environmental Law Association, October 2001).

<sup>93</sup> Lindsay Galbraith, Ben Bradshaw and Murray B Rutherford, 'Towards a New Supraregulatory Approach to Environmental Assessment in Northern Canada' (2007) 25 *Impact Assessment and Project Appraisal* 27.

<sup>94</sup> Sosa and Keenan, above n 92, 9–17; Courtney Fidler and Michael Hitch, 'Impact Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice' (2007) 35(2) *Environments Journal* 49, 61.

<sup>95</sup> Steven A Kennett, 'Issues and Options for a Policy on Impact and Benefits Agreements' (Discussion Paper, Mineral Resources Directorate, Department of Indian Affairs and Northern Development, Canadian Institute of Resources Law, 27 May 1999).

<sup>96</sup> Janet Keeping, 'The Legal and Constitutional Basis for Benefits Agreements: A Summary' (1999–2000) 25(4) *Northern Perspectives* <<http://www.carc.org/pubs/v25no4/3.htm>>.

<sup>97</sup> Sosa and Keenan, above n 92; Sandra Gogal, Richard Riegert and JoAnn Jamieson, 'Aboriginal Impact and Benefit Agreements: Practical Considerations' (2005) 43 *Alberta Law Review* 129.

<sup>98</sup> Ken J Caine and Naomi Krogman, 'Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North' (2010) 23 *Organization & Environment* 76, 77.

<sup>99</sup> *Ibid* 79. See also Fidler and Hitch, above n 94, 51 (noting that IBAs operate 'outside the regulatory environmental regime without government presence').

<sup>100</sup> See, eg, *Inuit Impact and Benefit Agreement for National Wildlife Areas and Migratory Bird Sanctuaries in the Nunavut Settlement Area between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*.

<sup>101</sup> Fidler and Hitch note that IBAs emerged 'over the last three decades': Fidler and Hitch, above n 94, 66.

<sup>102</sup> *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, signed 25 May 1993 ('*Nunavut Land Claims Agreement*'). See Sosa and Keenan, above n 92, 7 (noting that the *Nunavut Land Claims Agreement* requires the negotiation of an IBA between the local community and the corporation involved).

package of agreements negotiated between an industrial proponent and a representative aboriginal organization'.<sup>103</sup>

IBAs are often recognised as part of the consultation process with Aboriginal communities. Courtney Fidler and Michael Hitch note that consultation with Aboriginal peoples in mining projects can occur in three different (but often 'overlapping') forms.<sup>104</sup> First is the Crown's legal obligation,<sup>105</sup> the second involves statutory compliance with environmental assessment legislation and the third involves negotiated agreements like IBAs. Fidler and Hitch refer to this third category as 'voluntary business initiatives'.<sup>106</sup> However, the generally voluntary nature of IBAs could be questioned on the basis that while IBAs may not technically be compulsory in all cases, they are sometimes required.<sup>107</sup>

By being parties to IBAs, Aboriginal communities accept restrictions on their legally recognised rights in exchange for promises of economic benefits and the mitigation of the negative impacts of the projects on the communities.<sup>108</sup> IBAs also 'align with corporate interests and operate on a business model whereby proponents complete IBAs to minimize risk and potential downstream project delays (i.e. costly litigation) and, in doing so, improve relationships with local residents and enhance their business reputation'.<sup>109</sup> Sometimes, the agreements are concluded after the investor has committed some resources to the project,<sup>110</sup> making the industry proponent particularly interested in fostering cordial relationships with the community. Some commentators suggest that it appears that Aboriginal communities view the continuation of the projects as 'inevitable' and as a result seek to garner benefits from the projects through IBAs.<sup>111</sup> The enforceability of IBAs varies across agreements. For example, *The Mary River Project Inuit Impact and Benefit Agreement* includes provisions on negotiation, mediation and binding arbitration.<sup>112</sup> The *Collaboration Agreement between the Northern Village of Pinehouse and Kineepik Metis Local Inc and Cameco Corporation and Areva Resources Canada Inc* also includes an article on dispute resolution that contemplates 'mutual agreement', non-binding mediation, arbitration and recourse to courts for 'interim judicial relief in the nature of an injunction or other equitable relief' pending arbitration.<sup>113</sup>

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<sup>103</sup> Fidler and Hitch, above n 94, 50.

<sup>104</sup> Ibid 55.

<sup>105</sup> Ibid; *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

<sup>106</sup> Fidler and Hitch, above n 94, 55 (emphasis in original).

<sup>107</sup> See generally Affolder, 'Rethinking Environmental Contracting', above n 5 (describing the experience with the Ekati mine in Canada).

<sup>108</sup> Caine and Krogman, above n 98, 80. See also Fidler and Hitch, above n 94, 50. For arguments regarding the potential benefits of 'appropriately constructed IBAs for industry and Aboriginal communities', see Dwight Newman, *Natural Resource Jurisdiction in Canada* (LexisNexis, 2013) 99–101.

<sup>109</sup> Fidler and Hitch, above n 94, 57.

<sup>110</sup> Caine and Krogman, above n 98, 85.

<sup>111</sup> Ibid.

<sup>112</sup> *The Mary River Project Inuit Impact and Benefit Agreement between Qikiqtani Inuit Association and Baffinland Iron Mines Corporation (Entered Into Pursuant to Art 26 of the Nunavut Land Claims Agreement)*, signed 2013, arts 2.7, 21.

<sup>113</sup> *Collaboration Agreement between the Northern Village of Pinehouse and Kineepik Metis Local Inc and Cameco Corporation and Areva Resources Canada Inc* (signed and entered into force 12 December 2012) art 7.

While the potential benefits of IBAs have been noted, commentators observe that negotiations of these agreements may overly benefit industry participants, calling for an analysis of the power dynamics that exist in the negotiation of these agreements.<sup>114</sup> It has been noted that IBAs are characterised by weak implementation mechanisms.<sup>115</sup> Some commentators also raise concerns about the confidentiality clauses in some agreements.<sup>116</sup> The absence of the Canadian Crown from most agreements, especially in light of the Government's duty to consult Aboriginal peoples, has also been a cause for concern for some commentators.<sup>117</sup> One report notes, regarding the issue of consent, that

[f]ar from being examples of free, prior and informed consent which includes the rights of communities to say 'no' to a development, Impact Benefit Agreements involve community consent to accrue certain benefits from a development which they might fundamentally disagree with, and to try to mitigate impacts. They are one means for Indigenous Peoples to try to protect their land as best as possible given a development going ahead.<sup>118</sup>

These concerns are aspects of the IBA model that this article investigates in analysing the proposed multi-actor agreement contracts. The article also draws from the usefulness of the IBA model of negotiating agreements with communities. Though the model is useful, the contents of the agreements require further investigation. While it is beyond the scope of this article, there is need for further research on IBAs and their potential benefits, as there may be some potential for balanced agreements that could foster mutual cooperation of industry and Aboriginal communities. The need for such research is highlighted in the concluding Part of this article. It suffices to note here that the IBA model of forming agreements with host communities is relevant to a multi-actor contract framework that seeks to incorporate local communities in a terrain that has traditionally been dominated first by states and, since the decolonisation era, by states and foreign investors.

## 5 *Other Regulatory Arrangements*

Host state domestic law is a prevalent source of obligations for most foreign investment projects. Domestic statutes, regulations and judicial decisions often provide direction regarding licences and leases, environmental protection, human rights protection, taxation obligations and other laws. However, state–investor contracts may limit the applicability of domestic law through the incorporation of stabilisation clauses that prevent changes in the law from applying to the investment project that is the subject of the contract, sometimes in order to preserve the economic equilibrium of the project.<sup>119</sup>

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<sup>114</sup> Caine and Krogman, above n 98, 78.

<sup>115</sup> Ibid 84.

<sup>116</sup> Ibid 85.

<sup>117</sup> Fidler and Hitch, above n 94, 52.

<sup>118</sup> Viviane Weitzner, “‘Dealing Full Force’: Lutsel K’e Dene First Nation’s Experience Negotiating with Mining Companies’ (Case Study, The North-South Institute and Lutsel K’e Dene First Nation, 4 January 2006) 30.

<sup>119</sup> For types of stabilisation clauses, see Tienhaara, ‘Foreign Investment Contracts’, above n 51, 8–10.

Soft laws regulating foreign investment in host states are also relevant regulatory arrangements in international law. The international community has been unable to reach consensus regarding obligations of foreign investors in host states. Rather, obligations have appeared in soft law instruments like the *United Nations Global Compact*,<sup>120</sup> the *Draft United Nations Code of Conduct on Transnational Corporations*<sup>121</sup> and the Organisation for Economic Co-operation and Development's ('OECD') *Guidelines for Multinational Enterprises*, which has a grievance mechanism.<sup>122</sup>

Partly because of the difficulty that local communities sometimes encounter in seeking redress for harms resulting from investment projects, home state laws have emerged as an important option for governing foreign investment activities. Flowing from principles of state responsibility, it is often asserted that the home states of foreign investors have an obligation to regulate their nationals investing abroad.<sup>123</sup> Such arguments could be based on universal jurisdiction to address violations of *jus cogens* principles of international law<sup>124</sup> or upon statutes like the United States' *Alien Tort Claims Act*.<sup>125</sup> However, establishing the home state's jurisdiction in these cases is sometimes an onerous endeavour.<sup>126</sup>

### C Limitations of the Current Arrangements

Of all the existing mechanisms discussed above, state–investor contracts, domestic laws and investment treaties are the most prevalent legal instruments that define and regulate foreign investment relationships. These methods of legal engagement are of somewhat universal application, although the contents, focus and effectiveness of each would depend on the particular parties and jurisdiction. IBAs and GMoUs are specific to some jurisdictions and have been mostly adopted in mining and oil and gas investment projects. Despite their varied focus and different composition of parties, all of these mechanisms contribute to governance in the foreign investment regime. However, all have limitations.

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<sup>120</sup> The United Nations Global Compact ('Global Compact') website states that '[t]he UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption': United Nations Global Compact, *About Us* (22 April 2013) <<http://unglobalcompact.org/AboutTheGC/index.html>>. For the Global Compact's ten principles, see United Nations Global Compact, *The Ten Principles* <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>>.

<sup>121</sup> Commission on Transnational Corporations, *Report on the Special Session*, UN ESCOR, Supp No 7, UN Doc E/1983/17/Rev.1 (21 May 1983) annex II ('*Draft United Nations Code of Conduct on Transnational Corporations*').

<sup>122</sup> Organisation for Economic Co-Operation and Development, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, first published 1976, 2011 ed) ('*OECD Guidelines*'). For information about the implementation of the *OECD Guidelines*, including the National Contact Points, see Organisation for Economic Co-Operation and Development, *The Guidelines in Action* (2014) <<http://mneguidelines.oecd.org/implementation/>>.

<sup>123</sup> Sornarajah, *The International Law on Foreign Investment*, above n 33, 144–71.

<sup>124</sup> See, eg, *Doe v UNOCAL*, 963 F Supp 880 (9<sup>th</sup> Cir, 1997).

<sup>125</sup> *Alien Torts Claims Act*, 28 USC § 1350.

<sup>126</sup> See Sara L Seck, 'Home State Responsibility and Local Communities: The Case of Global Mining' (2008) 11 *Yale Human Rights and Development Law Journal* 177.

First, investment treaties have traditionally been limited in their scope.<sup>127</sup> By virtue of international law, treaties are concluded between states. If investment treaties had determined the rights and obligations of the state parties to the treaties without more, commentators may not have been as critical as they have been. However, these treaties confer enforceable rights on foreign investors who are not parties to the treaties.<sup>128</sup> In addition, the treaties mostly do not impose obligations on these investors. Further, they mostly do not provide enforceable rights for host communities who are equally important actors. While modern versions of these treaties have begun to incorporate human rights and environmental protection clauses within their purview,<sup>129</sup> they do not provide enforceable rights for host communities like they do for foreign investors.

Secondly, the domestic agreements — state–investor contracts, IBAs and GMOUs — exclude an important actor as party to the agreements. The typical investment contract is concluded between the state and the investor; the typical IBAs and GMOUs are concluded between investors and host communities. These agreements do not envisage robust interactions among all the relevant actors. They also sometimes do not address responsibility towards all relevant actors. Environmental damage and other damage to peoples’ property are often addressed by communities using a number of legal principles in lengthy court battles and by governments having recourse to sanctions provided in environmental regulation.<sup>130</sup> Peoples’ ability to hold the government responsible for the failure to regulate (properly) is somewhat problematic. Human rights protection is an obligation of states but human rights violations may occur based on the acts or omissions of any of the actors.<sup>131</sup> Rights and obligations are placed in carefully packaged boxes, whereas the reality suggests constant exchanges and interaction that the current regime does not comprehensively address.

Thirdly, while IBAs and GMOUs provide some promise of directly engaging host communities through contract, the scope of these agreements is limited. They often do not serve the robust interactional function that this article envisages for multi-actor contracts. While CDAs, to adopt the generic term, may sometimes involve governments as parties based on case-by-case decisions,<sup>132</sup> they remain mostly development/benefits agreements. For their part, IBAs are mostly concluded after the project has been commissioned, excluding Canada’s Aboriginal communities from having a contractual voice at the time of negotiating the parameters of the project. However, based on the government’s duty to consult, these communities would likely have been consulted regarding

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<sup>127</sup> For a discussion of the scope of investment treaties, see Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010).

<sup>128</sup> See the discussion in Part III(B)(1).

<sup>129</sup> Tienhaara, *The Expropriation of Environmental Governance*, above n 45, 83–94.

<sup>130</sup> See, eg, *Gbemre v Shell Petroleum Development Company Nigeria Ltd* [2005] African Human Rights Law Reports 151 (Federal High Court of Nigeria).

<sup>131</sup> See John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie — *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 17<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex (‘*Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*’).

<sup>132</sup> Brereton, Owen and Kim, above n 65, 28–30.

the project, but the scope of consultation is limited.<sup>133</sup> Also, IBAs appear specific to the status of Canada's Aboriginal peoples under Canadian law. GMoUs are even less applicable to pre-project negotiations. They are mostly dependent on the will and largesse of the corporations. It is early, though, in the life of GMoUs to make generalisations regarding their effectiveness. Confidentiality clauses also make it difficult to access the agreements. While GMoUs are a form of (quasi) contractual CSR mechanism (which alone does not address the concerns of host communities), the enforceability of these agreements remains in question.

The existing mechanisms discussed above do not provide avenues for robust interactions among governments, investors and local communities. Multi-actor contracts would respond to this limitation. However, in analysing a multi-actor contract framework, this article does not suggest that such a framework does not have limitations. The framework's potential challenges are discussed at Part IV(D). But first, I present the scope and potential contributions of the multi-actor framework.

#### IV INTRODUCTION TO THE MULTI-ACTOR INVESTMENT CONTRACT FRAMEWORK

##### A Contextual Background

###### 1 Contract Options

The discussion in this Part of the article rests on two premises. The first premise, which was explored earlier, is that local community participation in investment arrangements is insufficient and should be encouraged.<sup>134</sup> This is not a new insight but a necessary starting point for the analysis on which this article focuses. The second premise is that even though the proposed framework is contract and negotiation based, legislation is and will remain important. Ideally, legislation should respond to challenges presented by local community-impacting FDI, but it has been insufficient to capture all the exigencies of particular investment projects. Also, enforcement of legislation is sometimes challenging. Contracts permit participation in decision-making in a manner that legislation does not for both investors and local communities. In addition, legislation cannot necessarily anticipate all challenges that may arise with a particular investment project; hence contracts have been central to investment law. As Dolzer and Schreuer note in the context of state–investor contracts,

[g]eneral legislation of the host country may not sufficiently address the nature of the project and the kind of interests concerned. The legal setting of each investment needs to be adjusted to the specifics and the complexity of each investment.<sup>135</sup>

Similar considerations apply to local communities and multi-actor contracts. In spite of the limitations of legislation, it remains important and will provide much

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<sup>133</sup> See generally Newman, *Duty to Consult*, above n 38.

<sup>134</sup> Zillman, Lucas and Pring, above n 17.

<sup>135</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) 72.

needed legal background for multi-actor contracts by defining the scope and parameters of these contracts.

Multi-actor investment contracts would directly incorporate local communities and treat them as communities of people who share goals and aspirations with regard to particular investment projects. The contracts are based on a tripartite framework that incorporates the interests of the three most directly affected actors: host governments; host and impacted communities; and foreign investors. Even though the framework is contractual in nature, it is conceived partly as a regulatory tool.<sup>136</sup> It embraces themes from state–investor contracts, GMoUs and IBAs. While the agreements would be domestically located, they are not exclusively regulated by domestic law. They involve transnational considerations, given the involvement of foreign investors and the multijurisdictional nature of some projects. In fact, multi-actor contracts may be better suited to multijurisdictional projects because of the diverse actors involved in such projects and the focus on regionalisation in the multi-actor framework. International law also assumes a significant position given the proposed regionalisation of the contracts and the reliance on regional treaties for the contracts' success. Regionalisation in the context of this tripartite framework is discussed later in this part of the article.

Multi-actor investment contracts will allow governments, investors and host communities to participate as parties to contracts that define the relationship among the actors. They transform consultation of local communities to these communities' contractual ability to effectively engage with projects that impact them directly. These tripartite contracts, with a focus on a wider group of actors and a regional component, engage the concept of community. However, given that defining community is a vexing endeavour,<sup>137</sup> the term is used in a manner that envisages negotiation of interests without the erasure of difference.<sup>138</sup> Introducing a peoples' dimension allows an exploration of the 'productive tensions between emancipatory ideas of democracy and the current state-based structure of the international community'.<sup>139</sup> Hence, the framework explores the representation and participation of peoples in investment law while simultaneously questioning the legitimacy of the current system.<sup>140</sup> It proposes the admission of peoples 'on their own terms',<sup>141</sup> but recognises that negotiating interests, rights and obligations between peoples, governments and investors is inescapable. It also challenges the hegemony of the state as the major actor (in

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<sup>136</sup> Odumosu-Ayanu, 'Multi-Actor Contracts', above n 8.

<sup>137</sup> George A Hillery, 'Definitions of Community: Areas of Agreement' (1955) 20 *Rural Sociology* 111; Iris Marion Young, 'The Ideal of Community and the Politics of Difference' in Linda J Nicholson (ed), *Feminism/Postmodernism* (Routledge, 1990) 300.

<sup>138</sup> Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 *Social and Legal Studies* 337.

<sup>139</sup> *Ibid* 338.

<sup>140</sup> See generally Daniel M Bodansky, 'The Concept of Legitimacy in International Law' (Research Paper No 07–013, University of Georgia School of Law Research Paper Series, November 2007).

<sup>141</sup> Dianne Otto, above n 138, 354.

addition to international organisations like the World Bank and International Monetary Fund) that defines the economic orders that impact peoples' lives.<sup>142</sup>

The multi-actor contract framework envisages the conclusion of negotiated contracts that determine the rights and obligations of the parties before the onset of a project.<sup>143</sup> Before turning attention to these negotiated multi-actor contracts, some state–investor contracts that provide benefits for local communities are useful and must be acknowledged. I refer to these types of contracts as instances of ‘participation without privity’ for local communities.<sup>144</sup> However, participation without privity does not capture the essence of multi-actor contracts discussed in this article. Nevertheless, these state–investor contracts could incorporate non-parties in a manner that potentially allows the non-parties to enforce rights conferred upon them in a contract. Hence, state–investor contracts may include benefits and rights for local communities that local communities may be able to enforce, even in the absence of privity. However, in parts of the common law world, local communities may be unable to enforce such contracts on the basis of privity of contract rules that prevent third party beneficiaries from enforcing contracts.<sup>145</sup> There are now several exceptions to the privity rule that prevailed in parts of the common law world.<sup>146</sup> Also, in places like Queensland and Western Australia in Australia, New Brunswick in Canada, New Zealand and the United Kingdom, there are (sometimes limited) legislative provisions that permit third party beneficiaries to enforce benefits that parties to a contract confer on such third parties.<sup>147</sup> One of the considerations included in some of these statutes, for example, the *Contracts (Rights of Third Parties) Act 1999* (UK) and decisions of some courts, like the Supreme Court of Canada, relate to the timing and ability of contract parties to modify contracts in a manner that affects the rights of third party beneficiaries.<sup>148</sup>

A relevant third party beneficiary clause in state–investor contracts is the compensation clause. For example, a version of the *West African Gas Pipeline Project International Project Agreement* states in part at cl 20.3 that the West African Gas Pipeline Company

shall pay to any affected legitimate land owners or lawful occupiers of land entered in accordance with this Clause fair compensation for disturbance or

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<sup>142</sup> See generally Ibrionke Tinuola Odumosu, *ICSID, Third World Peoples and the Re-Construction of the Investment Dispute Settlement System* (PhD Thesis, University of British Columbia, 2010).

<sup>143</sup> Addressing these issues before the onset of projects might obviate concerns regarding state liability in international investment law as negotiations would occur in the pre-project phase.

<sup>144</sup> The term ‘participation without privity’ draws from Jan Paulsson’s ‘arbitration without privity’: Jan Paulsson, ‘Arbitration without Privity’ (1995) 10 *ICSID Review* 232. See also Ibrionke T Odumosu, ‘The Antinomies of the (Continued) Relevance of ICSID to the Third World’ (2007) 8 *San Diego International Law Journal* 345.

<sup>145</sup> See generally *Tweddle v Atkinson* (1861) 1 B & S 393; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

<sup>146</sup> See generally John D McCamus, *The Law of Contracts* (Irwin Law, 2<sup>nd</sup> ed, 2012) 303–32.

<sup>147</sup> See, eg, *Property Law Act 1974* (Qld) s 13; *Property Law Act 1969* (WA) s 11; *Law Reform Act*, RSNB 2011, c 184, s 4; *Contracts (Privity) Act 1982* (NZ); *Contracts (Rights of Third Parties) Act 1999* (UK) c 31.

<sup>148</sup> *Contracts (Rights of Third Parties) Act 1999* (UK) c 31, s 2. See, eg, *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd* [1999] 3 SCR 108.

damage caused by the activities of the Company or the Project Contractors on such land.<sup>149</sup>

However, in reliance on an exception in the *Contracts (Rights of Third Parties) Act 1999*, cl 52 of the *Agreement* prevents any ‘person who is not a party’ to the agreement from enforcing its terms.

Participation without privity does not generally implicate issues of offer, acceptance or consideration from the perspective of the local communities. Local communities do not need to give anything as consideration in exchange for the benefits that they receive under the contracts. Also, they typically should not acquire obligations on the basis of this type of contract. The main challenge is the enforceability of the contracts by local communities and clarity of language that confers third party beneficiary status on local communities. The absence of negotiation and local community input is also a significant limitation of this approach, although it is possible to adopt a contract with third party beneficiaries and include those beneficiaries in the negotiation process without including them as parties. In spite of these limitations, a major benefit of this type of contract is that it can be adopted easily without much change in current state–investor contract negotiation processes.

This article focuses on negotiated multi-actor contracts. Here, the parties — governments, investors and local communities — would negotiate their rights and obligations as well as the scope of the contracts. Two questions are raised but not answered in this article. The first relates to the nature of these contracts and it is presented as a question for further research in Part V of this article. There are at least two viable options in this regard. Under the direction of enabling legislation, the parties could be required to convert the foundational contracts that drive investor–state relations into multi-actor contracts or they could complete supplemental contracts that incorporate the foundational contracts by reference. In either case, a multi-actor framework would require that these agreements should be concluded before the onset of a project. Admittedly, the first option — converting foundational state–investor contracts to multi-actor contracts — would probably meet with more resistance from governments and industry. The second option would likely be more acceptable from their perspective. This latter option would identify specific issues that directly affect local communities (including access to land, compensation for disturbance, specific environmental and human rights standards, etc) for negotiation before the formation of the foundational contracts (the concession, etc) and incorporate these into the foundational state–investor contracts while also adopting the terms of the foundational contracts by reference. The viability of either of the options presented here will be considered in further research.

Completing multi-actor contracts prior to the onset of projects raises the second issue, which is whether these negotiated contracts would amount to a

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<sup>149</sup> *West African Gas Pipeline Project International Project Agreement (22 May 2003) between the Republic of Benin, the Republic of Ghana, the Federal Republic of Nigeria, the Republic of Togo and the West African Gas Pipeline Company Limited*, signed 22 May 2003 (‘WAGP IPA’).

veto on the part of local communities.<sup>150</sup> A complete discussion of this issue is beyond the scope of this article. Application of ‘free prior and informed consent’ (‘FPIC’) depends partly on whether the involved communities are indigenous communities.<sup>151</sup> There is also no consensus on domestic responses to the FPIC debate. For example, some African countries challenge the indigenous status of their peoples while Canada has only proceeded as far as the duty to consult indigenous peoples.<sup>152</sup> Regardless of the domestic responses to FPIC, given that the multi-actor framework is based on contract, which is based on consent, multi-actor contracts are unlikely to respond to situations where local communities express complete disagreement with a project.<sup>153</sup> Resolution of these disagreements must occur outside a contract framework. A multi-actor contract is most useful where the parties are at least agreed on the basic premise that a project may proceed.

Negotiated multi-actor contracts raise some core contract law issues including consideration, reciprocity and enforceability. At common law, the first factor, consideration, incorporates the bargain element. Contracts typically involve exchanges. What would local communities exchange for benefits that they receive under a contract mechanism? The consideration issue is simultaneously thorny and simple. It is thorny because it involves the danger that communities may bargain away some of their fundamental resources and rights through contract. It is simple because even in the absence of contracts, local communities always provide resources when extractive industry or large infrastructure projects are undertaken and those resources are land or access to land. However,

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<sup>150</sup> On consultation and consent of indigenous peoples, arts 19 and 32(2) of the *United Nations Declaration on the Rights of Indigenous Peoples* provide for free, prior and informed consent (‘FPIC’). Article 32(2) states that

[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

*United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007). See also James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples*, UN GAOR, 24<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/24/41 (1 July 2013) (‘*Anaya Report on Extractive Industries and Indigenous Peoples*’). The FPIC concept is highly debated. In its 2009 Corporate Responsibility Report, Talisman Energy noted that it would commission a report that investigates the costs and benefits of adopting FPIC in communities that are impacted by its operations: Talisman Energy, ‘2009 Corporate Responsibility Report: Safe, Profitable Growth’ (Report, Talisman Energy, 2009) 14. For the report: Amy K Lehr and Gare A Smith, ‘Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges’ (Report, Foley Hoag, 1 July 2010). For Talisman Energy’s Global Community Relations Policy where it defines FPIC for its operations: Talisman Energy, ‘Global Community Relations Policy’ (Policy, 9 December 2010).

<sup>151</sup> See generally David Szablowski, ‘Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice’ (2010) 30 *Canadian Journal of Development Studies* 111.

<sup>152</sup> See Odumosu-Ayanu, ‘Oil and Gas Decision-Making’, above n 7.

<sup>153</sup> James Anaya notes that ‘[s]tates should not insist, or allow companies to insist, that indigenous peoples engage in consultations about proposed extractive projects to which they have clearly expressed opposition’: *Anaya Report on Extractive Industries and Indigenous Peoples*, UN Doc A/HRC/24/41, [25].

land as consideration may become complicated in cases where governments argue that they have the right to ‘take’ land, especially when dealing with non-indigenous peoples and, as a result, such land may not amount to sufficient consideration.<sup>154</sup> The common law of contracts recognises exceptions to the pre-existing duty as consideration rule, assuming that giving up land if the government decides to ‘take’ land is a pre-existing duty of local communities.<sup>155</sup>

Secondly, reciprocity is fundamental to contracts. Subject to the provisions of contracts, general terms of contracts are applicable to all the parties and the terms of contracts may be enforced by and against all the parties. However, contracts are also based on consent or promise<sup>156</sup> and any inequality of bargaining power that may be aggravated by the requirements of reciprocity are tempered by other contract principles. If a party to a contract can demonstrate that the contract is based on exploitation, misrepresentation, undue influence, duress and other vitiating factors, the contract could be declared void or voidable based on the applicable law.<sup>157</sup>

Thirdly, enforceability is central to contracts. Given that states and investors have enforced state–investor contracts for a long time, the question turns to the enforceability of local community obligations under multi-actor contracts. But first, it is necessary to determine the nature of the obligations, if any, that local communities would assume under these contracts, as obligations determine the nature of enforcement and remedies. Guidance may be sought from existing local community contracts with governments and with investors.<sup>158</sup> The nature of remedies, including damages and specific performance, requires further research. Enforceability would probably merit an entire article that would address issues like community obligations and security in the case of enforcement. One of the major challenges here is using community property as security in dispute settlement. These issues must be carefully addressed.

In sum, while contracts are helpful, they are not perfect. The dominant view of the law of contracts applicable transnationally is one that is situated within a capitalist neoliberal framework that some local communities challenge.<sup>159</sup> Hence, a fundamental challenge is that local communities are compelled to engage in the language of the ‘oppressor’, to borrow language from Naeem Inayatullah and David Blaney.<sup>160</sup> Perhaps every form of local community engagement with the dominant culture and economy involves communication

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<sup>154</sup> On land as negotiating leverage, see Odumosu-Ayanu, ‘Oil and Gas Decision-Making’, above n 7.

<sup>155</sup> For the exceptions applicable to the pre-existing duty rule under Canadian common law of contract, see McCamus, above n 146, 243–57.

<sup>156</sup> See, eg, Charles Fried, *Contracts as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981); Randy E Barnett, ‘A Consent Theory of Contract’ (1986) 86 *Columbia Law Review* 269; Randy E Barnett, ‘Contract is Not Promise; Contract is Consent’ (2012) 45 *Suffolk University Law Review* 647; Lawrence Kalevitch, ‘Gaps in Contracts: A Critique of Consent Theory’ (1993) 54 *Montana Law Review* 169.

<sup>157</sup> For a discussion of vitiating factors in the Canadian common law of contract, see McCamus, above n 146, chs 10–14.

<sup>158</sup> See the discussion in Part III.

<sup>159</sup> See generally B Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press, 2003).

<sup>160</sup> Naeem Inayatullah and David L Blaney, *International Relations and the Problem of Difference* (Routledge, 2004) 220.

which is done on the basis of the legal culture of the dominant. Communities have engaged in this manner for centuries since the colonisation of African, American and Asian peoples by Europeans. In the absence of viable alternatives, local communities continue to negotiate the borders and push the boundaries of a pervasive capitalist system. History demonstrates that where appropriately marshalled, this ‘mastery’ of the language of the dominant has yielded some positive engagements for communities.<sup>161</sup>

## 2 *An Interactional Perspective on Multi-Actor Contracts*

Alternative proposals for regulating the international economic order are not new. Authors enunciated alternative ideas in the early postcolonial era of the 1960s and 1970s<sup>162</sup> and contemporary scholars working in critical legal traditions continue to espouse alternative ideas.<sup>163</sup> These scholars assess the impacts of the international legal order on countries’ — especially Third World countries’ — ability to achieve their aspirations. In particular, these critical perspectives criticise neoliberal economic policies on foreign investment as being unable to capture competing interests.<sup>164</sup> They also suggest that the adoption of private processes for adjudicating inherently public interests is insufficient.<sup>165</sup> In addition, scholars working in these critical traditions recognise that identities and structures are socially contingent and dependent on variables like history and law.

These critical perspectives have informed the views of scholars that have recognised the politics inherent in the international law on foreign investment — especially investment arbitration<sup>166</sup> — and have sought to write peoples’ struggles into foreign investment law.<sup>167</sup> An expression of peoples’ struggles, for example, those emanating from socio-economic crises, that has

<sup>161</sup> The use of ‘mastery’ is borrowed from Inayatullah and Blaney: *ibid.* Indigenous peoples have actively engaged at the United Nations including in the negotiations of the text of the *United Nations Declaration on the Rights of Indigenous Peoples*. On the history of the Third World’s engagement with international law, see generally Anghie, *Imperialism*, above n 25.

<sup>162</sup> See, eg, R P Anand, *New States and International Law* (Vikas, 1972); R P Anand, ‘Role of the “New” Asian-African Countries in the Present International Legal Order’ (1962) 56 *American Journal of International Law* 383; Georges M Abi-Saab, ‘The Newly Independent States and the Rules of International Law: An Outline’ (1962) 8 *Howard Law Journal* 95; T O Elias, *Africa and the Development of International Law* (AW Sijthoff, 1972); Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier, 1979); U O Umozurike, *International Law and Colonialism in Africa* (Nwamife, 1979).

<sup>163</sup> See generally Anghie, *Imperialism*, above n 25; Rajagopal, *International Law from Below*, above n 159; James Thuo Gathii, ‘Imperialism, Colonialism, and International Law’ (2007) 54 *Buffalo Law Review* 1013; James Thuo Gathii, ‘International Law and Eurocentricity’ (1998) 9 *European Journal of International Law* 184; B S Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Sage Publications, 1993); Karin Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’ (1998) 16 *Wisconsin International Law Journal* 353.

<sup>164</sup> M Sornarajah, ‘Economic Neo-Liberalism and the International Law on Foreign Investment’ in Antony Anghie et al (eds), *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff, 2003) 173.

<sup>165</sup> See generally Van Harten, above n 33.

<sup>166</sup> See, eg, Schneiderman, above n 33.

<sup>167</sup> See generally Ladan Mehranvar, *Constructing and Contesting Hegemony: Counter-Hegemonic Resistance to the International Investment Law Regime* (LLM Thesis, University of Toronto, 2009); Odumosu, *ICSID, Third World Peoples and Investment Dispute Settlement*, above n 142; Odumosu, ‘Law and Politics’, above n 38.

been recognised in other disciplines<sup>168</sup> is being incorporated into legal literature.<sup>169</sup> These works allow thorough analyses of the contributions of local communities to legal arrangements on foreign investment — and not only how the law impacts on these peoples.

Specifically, the multi-actor framework presented in this article relies on the interactional theory of international law developed by Jutta Brunnée and Stephen Toope.<sup>170</sup> An international perspective is important because even though multi-actor investment contracts are situated domestically, they would also exist within a regional framework supported by treaty and would engage global capital, which continually seeks to internationalise foreign investment relationships. The

interactional theory of law is a (social) conception of law, which views law as rules generated from and sustained by human conduct, instead of already laid down rules that regulate such conduct. It emphasises the origins of law and theorises about how such origins shape the nature of legal norms that are generated.<sup>171</sup>

It is based on a combined international relations ('IR')/international law approach, specifically an intersection between international law and constructivist IR theory.<sup>172</sup> Constructivist IR theory encourages a focus on the sociological backgrounds to law, including sustained attention to the diverse actors that affect and are affected by an area of law or international relations.<sup>173</sup>

The interactional account that forms the intellectual underpinning for this work<sup>174</sup> is a modified approach that draws from the work of scholars working in

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<sup>168</sup> Elizabeth Borland and Barbara Sutton, 'Quotidian Disruption and Women's Activism in Times of Crisis, Argentina 2002–2003' (2007) 21 *Gender & Society* 700; Nicolas Inigo Carrera and Maria Celia Cotarelo, 'Social Struggles in Present Day Argentina' (2003) 22 *Bulletin of Latin American Research* 201; Carlos M Vilas, 'Neoliberal Meltdown and Social Protest: Argentina 2001–2002' in Richard A Dello Buono and José Bell Lara (eds), *Imperialism, Neoliberalism and Social Struggles in Latin America* (Brill, 2007) 119.

<sup>169</sup> Rajagopal, *International Law from Below*, above n 159; Balakrishnan Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions' (2000) 41 *Harvard International Law Journal* 529; Obiora Chinedu Okafor, 'Poverty, Agency and Resistance in the Future of International Law: An African Perspective' (2006) 27 *Third World Quarterly* 799; Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2006).

<sup>170</sup> Brunnée and Toope, *Legitimacy and Legality in International Law*, above n 12; Jutta Brunnée and Stephen J Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 19.

<sup>171</sup> Odumosu, *ICSID, Third World Peoples and Investment Dispute Settlement*, above n 142, 53.

<sup>172</sup> See generally Kenneth W Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 *Yale Journal of International Law* 335; Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205; Robert O Keohane, 'International Relations and International Law: Two Optics' (1997) 38 *Harvard International Law Journal* 487.

<sup>173</sup> For a brilliant analysis of the tenets of constructivist international relations perspectives, see Christian Reus-Smit, 'Constructivism' in Scott Burchill et al (eds), *Theories of International Relations* (Palgrave Macmillan, 3<sup>rd</sup> ed, 2005) 108.

<sup>174</sup> It is part of an interactional perspective analysed in earlier work of mine: Odumosu, *ICSID, Third World Peoples and Investment Dispute Settlement*, above n 142, 36–74.

the Third World Approaches to International Law ('TWAAIL') tradition,<sup>175</sup> the domestic legal theory of Lon L Fuller and the work of constructivist IR scholars, especially those who examine the functioning of norms in the international community.<sup>176</sup> Specifically, four components — identity, power, ideas and method — may be derived from a modified critical interactional perspective applied specifically to foreign investment law.<sup>177</sup> A complete discussion of these components is beyond the scope of this article.<sup>178</sup> The interactional perspective allows the adoption of a broad vision of community that includes states, foreign investors, local communities, civil society groups and other actors, each depending on the other but each having agency and acting in its own independent capacity. In Brunnée and Toope's words:

law is not a product that is manufactured in centralised hierarchical systems and merely distributed to social actors for consumption. Citizens in domestic systems, and states and other actors at the international level are not consumers; they are active agents in the continuing enterprise of lawmaking.<sup>179</sup>

The identities, agency and diversity of actors are crucial to this multi-actor framework. Early international investment law proceeded based on a narrow view of the relevant actors in this area. In the 19<sup>th</sup> and 20<sup>th</sup> centuries, matters of investment were more state-centric.<sup>180</sup> By the mid-20<sup>th</sup> century, international law had recognised the agency of foreign investors and they were allowed to initiate claims to settle disputes with states in international tribunals.<sup>181</sup> Although there has been some debate regarding the inclusion of other actors in the investment law framework, it remains at the stage of emerging norms.<sup>182</sup> In practical terms, relevant communities have been identified and have participated as parties to investment-related contracts. As discussed earlier, IBAs involving host communities exist in Canada, although these appear to be based on legal arrangements that are particular to Canada. Foreign investors have advanced the GMoU model in Nigeria and this does not stem from *sui generis* legal rights accorded to the people of the Niger Delta compared to other Nigerian communities. Rather, it flows from the proximity of these communities to projects. The identity of communities as direct bearers of project risks and

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<sup>175</sup> For some of TWAAIL's principal arguments, see, eg, Makau Mutua, 'What is TWAAIL?' (2000) 94 *Proceedings of the Annual Meeting of the American Society of International Law* 31; James Thuo Gathii, 'Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory' (2000) 41 *Harvard International Law Journal* 263; B S Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie et al (eds), *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff, 2003) 47.

<sup>176</sup> Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.

<sup>177</sup> For a complete discussion, see Odumosu, *ICSID, Third World Peoples and Investment Dispute Settlement*, above n 142, 53–77.

<sup>178</sup> *Ibid.*

<sup>179</sup> Brunnée and Toope, *Legitimacy and Legality in International Law*, above n 12, 55.

<sup>180</sup> Sornarajah, *The International Law on Foreign Investment*, above n 33, 19–21.

<sup>181</sup> Arthur Nussbaum, 'The Arbitration between the Lena Goldfields, Ltd and the Soviet Government' (1950) 36 *Cornell Law Quarterly* 31. The *ICSID Convention* institutionalised investor–state arbitration.

<sup>182</sup> Odumosu, 'Law and Politics', above n 38. See also Ibronke T Odumosu, 'Locating Third World Resistance in the International Law on Foreign Investment' (2007) 9 *International Community Law Review* 427.

benefits, as well as their relationship with land upon which projects are implemented, make them essential stakeholders. International investment law now recognises the agency of investors as important non-state actors. In addition, regional dispute settlement bodies grant limited access to individuals and groups of people.<sup>183</sup> Essentially, law recognises the agency of peoples if the communities and individuals are able to appropriate the resources that this recognition provides.

Power relations and management of diverse exertions of power are also essential. Power differentials exist among actors in any community. Even where an actor has capacity to contract, power relations often define the extent to which interaction might engender reciprocity and the extent to which an actor might contribute to the development of the law. A social conception of power emphasises power's importance in social construction.<sup>184</sup> Power relations affect the identity and capacities of actors and they also impact upon the ideas that determine the contents of legal rules. Appropriate attention to power relations and the adoption of mechanisms to deal with negative manifestations of power are necessary in order to ensure successful implementation of multi-actor investment contracts. This is essential because they involve a tripartite relationship among actors that wield varying degrees of ideational, moral, material and legal power. The existence of power differentials does not suggest that one actor exerts all different types of power all the time. Host communities may wield moral power and large corporations may be able to exert material power, while the state has legal resources at its disposal. Depending on the jurisdiction and applicable legal rules, communities may also use real property rights as leverage. Hence, all actors wield some kind of power but the achievement of common objectives in this area would depend on the ability to deal with these power relations.

It is important to emphasise that an interactional approach may not always facilitate positive results. This is especially so when interactions occur where actors have non-cordial relationships, material power exertion prevails and where inadequate information is pervasive. Additionally, law has not always provided positive spaces of interaction for all relevant actor groups. However, this article relies on law's emancipatory capacities, for law retains the ability to provide resources for interactional possibilities that could change actor relations if the actors are able to harness these resources. The politics of these interactions are, however, not lost in the analysis, for in spite of law's emancipatory capacities, many of the issues discussed in this article are determined in the realm of politics.

### B *The Multi-Actor Framework and Regionalisation*

Regionalisation is an essential component of the multi-actor investment contract framework. Given the diverse interests represented and the turn to regionalisation in order to regulate the affairs of actors in a globalised world, regionalising multi-actor contracts has the potential to ensure that all the actors

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<sup>183</sup> See the discussion below in Part IV(C).

<sup>184</sup> For a constructivist international relations perspective on power, see Michael Barnett and Raymond Duvall, 'Power in International Politics' (2005) 59 *International Organization* 39.

garner benefits from the contracts.<sup>185</sup> Foreign investment contracts are often internationalised by providing for international forms of dispute settlement and by including international law as the applicable law or one of the applicable laws.<sup>186</sup> Investment treaties also internationalise foreign investment relationships with support from states. In essence, international components of investment arrangements have become regular features of the investment regime.<sup>187</sup> As a result, the multi-actor framework incorporates both international and domestic elements in recognition of the relevance of both systems, with regionalisation informing the international dimension of the multi-actor framework.

Two features — general administrative oversight and dispute settlement — are essential to regionalising multi-actor contracts. First, general administrative oversight by regional institutions will be necessary. It might be important to register the contracts with regional economic organisations. This would allow transparency and make it possible to determine which contracts are being concluded and with whom. While some of the provisions of these contracts may remain confidential where necessary, registration with regional organisations will make it possible to determine the existence of contracts. Regional economic organisations may not currently possess the capacity to register these kinds of contracts. However, including such registration as a responsibility of regional economic organisations should not be an onerous endeavour. Secondly, settling disputes that arise from multi-actor contracts through regional organisations, in addition to domestic dispute settlement, would foster regionalisation of the contracts. Since dispute settlement is discussed below, it suffices to note here that settling disputes through regional economic organisations could foster the eventual development of regional customary international law on these multi-actor contracts.<sup>188</sup>

Generally, regionalisation offers prospects of a more balanced system. It fosters an environment where all actors constitute an important part (if only one part) of an interactional system that relies on the others for success. It also fosters a system based on the rule of law with oversight by an external body. Regional economic organisations are invested in investment promotion and protection. As a result, regionalisation offers some neutrality, for example, in dispute settlement. Foreign investors sometimes express discomfort with local courts — especially in Third World countries — and the constant drive to

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<sup>185</sup> For Africa's regional economic communities, see generally Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press, 2011); James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press, 2011).

<sup>186</sup> See generally Odumosu, 'Antinomies', above n 144.

<sup>187</sup> See generally Dolzer and Schreuer, *Principles of International Investment Law*, above n 135.

<sup>188</sup> For a discussion of an emerging regional custom in the African context: Ndiva Kofele Kale, 'Participatory Rights in Africa: A Brief Overview of an Emerging Regional Custom' (2008) 55 *Netherlands International Law Review* 233. See especially at 250–5, where the author discusses the International Court of Justice cases on the emergence of regional or special custom.

internationalise investment contracts through international arbitration clauses reflects this discomfort.<sup>189</sup>

Limiting the legal context for these contracts to the region in which the investment project is situated could also provide some familiarity for local communities that may not possess the resources and expertise to interact in a broader international system, given that they have not had substantial direct interaction within the system. Additionally, they may be simply unwilling to participate in such broad internationalisation initiatives.

Also, regions are important sites for engagement and interaction. Regionalisation may contribute to standardisation among countries with some similarities — people, languages, economies, cultures, religion and history. However, because huge diversities remain, even within countries, each contract would have to be tailored to specific local conditions. Regionalisation would also allow adaptation specific to each region, for one size truly does not fit all.<sup>190</sup>

Regionalisation may be most useful where an investment project transcends national boundaries, involves both local and foreign investors, has a major input from states, has the potential to directly impact local communities (for example the need to relocate people within these communities) and has a large public interest component. Examples include projects like the Chad–Cameroon pipeline project,<sup>191</sup> the West African Gas Pipeline project<sup>192</sup> and the Baku–Tbilisi–Ceyhan Pipeline Project.<sup>193</sup> Affolder has noted that a

<sup>189</sup> See, eg, the *Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Decree No 39 of 1990* (Nigeria), as amended by the *Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Decree No 113 of 1993* (Nigeria). This is essentially a contract that was given the force of legislation in Nigeria. But see the *Australia–United States Free Trade Agreement*, which suggests comfort with local courts at least for Australia and the United States: *Australia–United States Free Trade Agreement*, opened for signature 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

<sup>190</sup> Not every economic organisation would qualify as a regional economic organisation in this context. For example, the Asia Pacific Economic Forum includes several diverse states and may not readily serve the purpose for which regionalisation is being suggested in this article. The Association of Southeast Asian Nations (‘ASEAN’) might be better suited for this purpose: *ASEAN Member States* (2014) Association of Southeast Asian Nations <<http://www.asean.org/asean/asean-member-states>>.

<sup>191</sup> The Chad–Cameroon Oil Pipeline Project generated a number of documents. Some of these documents are available online: *Chad–Cameroon Pipeline: Documents and Reports* (2014) World Bank <[http://web.worldbank.org/archive/website01210/WEB/0\\_\\_CON-3.HTM](http://web.worldbank.org/archive/website01210/WEB/0__CON-3.HTM)>; *Sub-Saharan Africa: Chad–Cameroon Pipeline Project* (2014) International Finance Corporation <[http://www.ifc.org/wps/wcm/connect/region\\_\\_ext\\_content/regions/sub-sahara+n+africa/investments/chadcameroon](http://www.ifc.org/wps/wcm/connect/region__ext_content/regions/sub-sahara+n+africa/investments/chadcameroon)>; *Chad/Cameroon Development Project*, Esso Exploration and Production Chad Inc <[http://www.esso.com/Chad-English/PA/TD\\_HomePage.aspx](http://www.esso.com/Chad-English/PA/TD_HomePage.aspx)>.

<sup>192</sup> The West African Gas Pipeline Project is regulated by several agreements including the *WAGP IPA*. The *WAGP IPA* lends itself to regional oversight as it mentions the Economic Community of West African States (‘ECOWAS’) — the regional economic community in West Africa — several times and is also witnessed by an ECOWAS official. Companies including Chevron, Shell and others own the West African Gas Pipeline Company. See *West African Gas Pipeline Company, Company Profile* <[http://www.wagpco.com/index.php?option=com\\_content&view=article&id=46&Itemid=78&lang=en](http://www.wagpco.com/index.php?option=com_content&view=article&id=46&Itemid=78&lang=en)>.

<sup>193</sup> The Baku–Tbilisi–Ceyhan Pipeline project is a project involving the Azerbaijan Republic, Georgia and the Republic of Turkey, as well as the Baku–Tbilisi–Ceyhan Pipeline Company.

typical large project may involve fifteen or more contracting parties from a number of different countries, tied together through over forty major contracts. For example, the financing piece alone for the Baku–Tbilisi–Ceyhan pipeline required 208 finance documents and more than 17,000 signatures from 78 parties.<sup>194</sup>

The Baku–Tbilisi–Ceyhan Pipeline Project also involved agreements among the governments.<sup>195</sup> Engaging these multijurisdictional projects within a regional framework, where possible, would be a useful endeavour.

In spite of the potential benefits, regionalisation has limitations. Foremost among them is that in order to regionalise multi-actor contracts, states would need to establish or amend some existing frameworks. This includes registration processes for contracts within regional organisations and expanding jurisdiction and access to regional courts and tribunals. In order to successfully incorporate multi-actor contracts into a regional framework, the need for some reorientation of regional organisations might be necessary. States in regional economic organisations, especially among Third World countries, are sometimes complicit in concluding agreements identical to those concluded elsewhere without substantial consideration of the impacts of these agreements on their particular socio-economic aspirations and wellbeing. For example, the Economic Community of West African States (‘ECOWAS’) *Energy Protocol*<sup>196</sup> is a substantial reproduction of the *Energy Charter Treaty*<sup>197</sup> — two agreements based on different socio-economic environments.<sup>198</sup> Nevertheless, the ECOWAS has initiated the process of developing investment treaties that may be more reflective of the West African position.<sup>199</sup> While regionalisation holds some promise, there is also some work to be done before its full benefits can be realised. The process of engaging in this work is itself part of incorporating a fully interactional framework into a changing investment law regime.

### C *Dispute Settlement in a Multi-Actor Contract Framework*

Dispute settlement has traditionally been a contentious aspect of the foreign investment regime.<sup>200</sup> From gunboat diplomacy during the colonial era to international arbitration during the postcolonial and contemporary eras,

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<sup>194</sup> Affolder, ‘Why Study Large Projects?’ above n 1, 526.

<sup>195</sup> See, eg, *Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku–Tbilisi–Ceyhan Main Export Pipeline* (signed and entered into force 18 November 1999); *Agreement between the Republic of Turkey and the Azerbaijan Republic concerning the Delivery of Azerbaijan Natural Gas to the Republic of Turkey* (signed and entered into force 12 March 2001).

<sup>196</sup> *Economic Community of West African States Energy Protocol A/P4/1/03*, opened for signature 31 January 2003 (not yet in force).

<sup>197</sup> *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998).

<sup>198</sup> See Ibrinke Odumosu, ‘The Settlement of Investor–State Oil and Gas Disputes in Africa’ in Francis N Botchway (ed), *Natural Resource Investment and Africa’s Development* (Edward Elgar, 2011) 395.

<sup>199</sup> See generally Ibrinke T Odumosu-Ayanu, ‘South–South Investment Treaties, Transnational Capital and African Peoples’ (2013) 21 *African Journal of International & Comparative Law* 172.

<sup>200</sup> See generally Sornarajah, *Settlement of Foreign Investment Disputes*, above n 58.

investment dispute settlement has always managed to create animated discussion.<sup>201</sup>

Dispute settlement mechanisms for multi-actor contracts would be located in local and regional institutions, with a choice for parties to adopt either. Providing recourse to local and regional means of dispute settlement may help to temper power relationships between investors and the state (in its use of legislative power) on the one hand and between local communities (regarding availability of resources) and the other actors on the other hand.

Situating multi-actor contracts within local contexts will be a central feature of this framework. Hence, local dispute settlement would be a necessary component. Sornarajah has eloquently argued for domestic settlement of investment disputes that implicate the public interest.<sup>202</sup> Local dispute settlement is important for local communities for whom regional dispute settlement may be more expensive and distant. Local dispute settlement might also be beneficial for foreign investors where there is confidence in the local judicial system.

Regional dispute settlement would be available to investors that prefer to settle disputes outside domestic systems. Multiple bodies within regions may potentially possess jurisdiction to settle these disputes. Many regions have courts and other tribunals.<sup>203</sup> In the case of the ECOWAS, there is the ECOWAS Community Court of Justice ('the Court'). However, regional courts do not necessarily have jurisdiction to hear matters arising from investment or other economic agreements or related matters arising from these agreements. Also, all the relevant actors do not always have standing before the courts or other regional dispute settlement institutions. The list of persons with access to the Court in art 4 of the *Supplementary Protocol of the ECOWAS Court of Justice*<sup>204</sup> ('*Supplementary Protocol*') appears restrictive. Article 3(6) of the *Supplementary Protocol*, which substitutes art 9 of the *Protocol relating to the Community Court of Justice*,<sup>205</sup> is helpful with regards to the discussion in this article. It states that '[t]he Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement'. This section, which permits contractual choice of forum, has been the basis of jurisdiction in the private dispute submitted to the Court in *Petrostar (Nigeria) Ltd v Blackberry Nigeria Ltd*.<sup>206</sup>

States may have to revisit the issue of jurisdiction and access to regional courts and tribunals as well as the expertise of judges. This should not be difficult depending on the requirements for amendments. For example, the ECOWAS adopted a Protocol to expand the jurisdiction of the ECOWAS

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<sup>201</sup> For eras of investment dispute settlement: Odumosu, 'Law and Politics', above n 38.

<sup>202</sup> Sornarajah, *The Settlement of Foreign Investment Disputes*, above n 58, 174.

<sup>203</sup> See generally Oppong, above n 185.

<sup>204</sup> *Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of Said Protocol* (signed and entered into force 19 January 2005) art 4.

<sup>205</sup> *Protocol A/P.1/7/91 on the Community Court of Justice*, 6 July 1991.

<sup>206</sup> *Petrostar (Nigeria) Ltd v Blackberry Nigeria Ltd* (Judgement No ECW/CCJ/JUD/05/11, 18 March 2011) (Community Court of Justice of the Economic Community of West African States).

Community Court of Justice and could do so again.<sup>207</sup> Similarly, the African Court on Human and Peoples' Rights was instituted following realisation that such a dispute settlement forum is needed.<sup>208</sup> Also, given that these are regional institutions and not large multilateral international organisations, achieving consensus or the majority necessary for making changes should not be overly arduous. Commentators have argued for the establishment of an international investment court<sup>209</sup> following criticisms of international investment arbitration. While the establishment of such a court might be more difficult considering the level of multilateralism involved, the same cannot be said of amending the provisions related to access, jurisdiction and expertise of judges in regional tribunals.

#### D *Potential Difficulties of Adopting a Multi-Actor Contract Framework*

Although a multi-actor contract framework holds many promises, like other interactional models, it is not free from difficulties. It presents challenges but these are surmountable. This section highlights some of those challenges and presents responses to each of them.

First, multi-actor contracts would involve negotiation among actors with diverse interests and different levels of resources, creating the potential for unhealthy power relationships. This situation already exists in state–investor contracts, in GMoUs and IBAs and in some investment treaties. Inequality in negotiating power is an unavoidable reality of many contracts. In order to respond to this challenge, developing negotiation skills and developing expertise would be important for all the parties involved. Host communities may lack the capacity to negotiate effectively and may require government resources to develop this capacity. Mechanisms that ensure adequate provision of relevant information would also be necessary to address information asymmetry. It is also necessary to develop stable mechanisms for local and regional dispute settlement. Regional oversight may help to mitigate the challenges that diversity in experience, availability of information and unhealthy exertions of power may present.

A second challenge is the relationship between these contracts and existing laws. At a minimum, multi-actor contracts should not reduce the rights and obligations that the parties already hold under the law, except when/if the parties explicitly agree to waive some of their pre-existing entitlements. Neither should an argument that the law (statutes) should cater to peoples' needs, obviating the necessity for contractual arrangements stand. While the law should protect all actors, they should be able to make contractual arrangements that give direct recourse to relevant forms of dispute settlement. Statutes, investment treaties and other generally applicable legal arrangements exist, yet investors and other actors

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<sup>207</sup> *Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of Said Protocol* (signed and entered into force 19 January 2005) art 3.

<sup>208</sup> Nsongurua J Udombana, 'Toward the African Court on Human and Peoples' Rights: Better Late than Never' (2000) 3 *Yale Human Rights and Development Law Journal* 45.

<sup>209</sup> For discussion regarding an Investment Arbitration Appellate Court, see, eg, Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521.

negotiate additional protections in contracts. The same standard, if beneficial, should apply to local communities as relevant actors in the investment regime. Essentially, the extent to which the agreements may erode and/or add to guarantees provided in existing law may be a subject of intense negotiations. Nevertheless, multi-actor contracts should provide enforceable contractual guarantees to all actors that some existing laws essential to the wellbeing of the actors and other people and groups, like environmental protection, would be respected.

Thirdly, there is the potential challenge of corruption and ineffectiveness in some states. Corruption stands as both an impetus for multi-actor contracts and as a challenge. In a corrupt state, a framework that permits communities to negotiate their relationship with extractive industry actors and governments — and also provides enforceable rights in this regard — has the potential to mitigate the negative tendencies of government officials that do not represent the interests of peoples. Even in states that are not necessarily regarded as corrupt, government interests may align with natural resource extraction and infrastructure development even under conditions that may not necessarily reflect the interests of the communities directly impacted by these projects. Hence corruption and governments' conflict of interest lend themselves to arguments in favour of multi-actor contracts. However, they also pose challenges. A corrupt, ineffective or conflicted central government may make it difficult to reach appropriate agreements. Such governments may also make negotiation and implementation difficult. A potential mitigating factor in this regard is the location of these contracts within the jurisdiction and competence of regional economic organisations.

Fourthly, one may ask whether multi-actor investment contracts would effectively coopt local communities into a system that they are not comfortable with. Some could argue that being parties to a multi-actor investment contract makes local communities part of a larger system that they sometimes resist. Others could also argue that by being parties to these contracts local communities would be coopted and would no longer be able to act as a voice of resistance. If part of the purpose of communities' resistance towards unfavourable policies and projects is so that they can assert their agency and secure more acceptable living conditions, then being parties to multi-actor investment contracts might afford them the opportunity to achieve these goals. However, a healthy ambivalence and scepticism might be useful. It would signal to the other actors that local communities retain their strategies of resistance and would adopt those where necessary. In addition, local communities, like the other actors, do not have to conclude these contracts where they do not consent, for the very essence of multi-actor contracts is to provide contractual means of negotiating terms and the opportunity to refuse to conclude contracts if the terms are unacceptable.

Fifthly, it is necessary to consider whether some of the decisions made through multi-actor contracts might not be socially optimal at local or national levels and might not reflect the broader public interest. The interactions between the interests of host and impacted communities and the larger public interest must be the subject of further research. Many of the communities have clear visions for themselves and have been involved in extensive negotiation — both

with governments and investors — on other issues.<sup>210</sup> In terms of the broader public interest, the government is viewed as a major party to multi-actor contracts and part of its role is to ensure that the broader public interest is accounted for.

The challenges outlined above demonstrate that for this framework to take effect, the initiative and direction would depend on states acting individually and as regional organisations. A lot would depend on the political will of the states and their willingness to adopt a framework that has the potential to ensure positive outcomes for all parties involved. Some of the outlined challenges would also benefit from further research based on case studies.

In spite of the challenges of a multi-actor framework, as noted earlier, the framework holds a lot of promise. As argued throughout this article, multi-actor contracts have the potential to integrate the main stakeholders within one framework. It addresses democratic deficits in investment law and allows actors to negotiate interests, benefits and obligations. Multi-actor contracts would facilitate cordial relationships as well as responsibilities on the part of all the actors. These stronger relationships will contribute to sustainable exploitation of resources and responsible management of project development. In order to further establish the potential contributions of this framework, some further studies are necessary.

## V CONCLUSION: ISSUES FOR FURTHER RESEARCH

It is neither possible nor meaningful to attempt to answer all relevant questions that may arise from a multi-actor framework in one article. As a result, this article leaves some questions unanswered. These issues will be addressed as further research is conducted on the ramifications of the multi-actor framework. Essentially, this section is a call for praxis. Many of the issues raised in this section can only be determined with further research and case studies of the subject.

First, the content of multi-actor investment contracts is an important issue.<sup>211</sup> Which issues would the contracts address?<sup>212</sup> What would parties be willing to include in their contracts? Should there be legislatively mandated contents? As conceived in this article, both the governments and investors will have obligations flowing from the contracts. Local communities may also have obligations to negotiate in good faith and contribute to peaceful co-existence as

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<sup>210</sup> See generally Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (University of Toronto Press, 2014).

<sup>211</sup> Professor Sornarajah outlines the following obligations of transnational corporations: ‘the obligation not to interfere in domestic politics’, human rights obligations, obligations related to environmental norms and the obligation to promote economic development (or at least not to hinder development through their conduct): Sornarajah, *The International Law on Foreign Investment*, above n 33, 148–54. Contracts and investment treaties also outline state obligations. The rights and obligations to be acquired under multi-actor investment contracts would stem from negotiations among the parties.

<sup>212</sup> Human rights protection, a debated issue that all the relevant actors have turned their attention to, is perhaps a relevant addition. How would this concern be presented in multi-actor contracts? See, eg, ‘Baku–Tbilisi–Ceyhan Pipeline Company Human Rights Undertaking’ (Undertaking Made as a Deed, 22 September 2003). This undertaking was signed after the relevant operating agreements were concluded. For a critique of this undertaking, part of which concerns its nature as a unilateral deed, see Tienhaara, *The Expropriation of Environmental Governance*, above n 45, 118.

long as the contract is not violated. A component of further research on this issue involves questions regarding the nature of multi-actor contracts. How beneficial is it to convert foundational state–investor contracts to multi-actor contracts? If a tripartite foundational investment contract is not beneficial, what other options are available for contracts formed prior to the onset of projects that incorporate and are incorporated into foundational investment contracts?

Among other available resources, this research will examine existing environmental agreements and the different models that have been adopted. For example, during the negotiation of the environmental agreement for Canada's Ekati mine, Aboriginal communities participated in negotiation.<sup>213</sup> Eventually, they were not parties to the agreement which was concluded between the Government of Canada; the Government of the Northwest Territories, where the mine is located; and BHP Diamonds Inc, the project proponent.<sup>214</sup> Instead, the Aboriginal communities became parties to an implementation protocol for the agreement.<sup>215</sup> Later Canadian environmental agreements like De Beers Canada Mining Inc's Snap Lake Diamond Project's environmental agreement<sup>216</sup> and the Diavik Mines Project's environmental agreement<sup>217</sup> departed from this format.<sup>218</sup> In these two latter agreements, Aboriginal communities were signatories to the main environmental agreements. These examples reflect different models of environmental agreements. Studies of the successes and challenges of environmental agreements will inform further research on multi-actor investment contract models. While informative, studies of environmental agreements may not be determinative as multi-actor investment contracts will address a wider variety of issues and would be formed prior to the onset of projects. Essentially, further research will examine the extent to which multi-actor investment contracts can handle complexity especially given that extractive industry projects and other large/infrastructure projects involve multiple complex agreements.

A second relevant issue involves the interaction between multi-actor investment contracts and the existing laws on issues that they address. This includes their interaction with human rights treaties and legislation, environmental treaties and legislation, real property laws and domestic laws regarding consultation of local communities. While these relationships may not be entirely clear, a starting point could be that these contracts should not contradict some existing laws, although they may add to or clarify the laws for

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<sup>213</sup> Affolder, 'Rethinking Environmental Contracting', above n 5, 156.

<sup>214</sup> Ibid. See also *Environmental Agreement Dated as of January 6, 1997 between Her Majesty the Queen in Right of Canada and the Government of the Northwest Territories and BHP Diamond Inc* (signed and entered into force 6 January 1997).

<sup>215</sup> Canadian Institute of Resources Law, University of Calgary, 'Independent Review of the BHP Diamond Mine Process' (Report, Mineral Resources Directorate, Department of Indian Affairs and Northern Development, University of Calgary, 30 June 1997) 19–20.

<sup>216</sup> See *Environmental Agreement between Her Majesty the Queen in Right of Canada and the Government of the Northwest Territories and De Beers Canada Mining Inc and Dogrib Treaty 11 Council and Lutsel K'E Dene Band and Yellowknives Dene First Nation and North Slave Métis Alliance* (2004) <<http://www.slema.ca/wp-content/uploads/2011/02/De-Beers-Final-Environmental-Agreement-PDF1.pdf>>.

<sup>217</sup> *Environmental Agreement between Her Majesty the Queen in Right of Canada and the Government of the Northwest Territories and Diavik Diamond Mines Inc and Dogrib Treaty 11 Council and Lutsel K'E Dene Band and Yellowknives Dene First Nation and North Slave Metis Alliance and Kitikmeot Inuit Association*, signed 8 March 2000.

<sup>218</sup> Affolder, 'Rethinking Environmental Contracting', above n 5, 169.

the parties to the contracts. What then is the justification for including rights and obligations under contract if general law has already provided for these rights and obligations? A major justification is providing a response to the problem of extraterritoriality that has plagued claimants in extractive industry projects.<sup>219</sup> While laws exist, claimants still face challenges in enforcing their claims. In arguing for home state regulation in extra-territorial contexts, scholars argue that it often only creates 'concurrent' and not 'conflicting' jurisdiction.<sup>220</sup> The same can be argued for multi-actor contracts. Arguments for home state regulation were borne partly out of the concerns of inadequate regulation of the activities of foreign companies. Again a similar argument applies to this contract framework. But beyond these, the multi-actor framework sets itself apart in seeking direct interaction among relevant stakeholders, not only at dispute settlement phases, but in project design and execution phases where rights and obligations can be negotiated. As well, these contracts will provide direct recourse to dispute settlement forums without having to deal with issues of justiciability, standing and access to courts and tribunals.

An example may better illustrate the relevance of multi-actor contracts in light of existing law and the interaction between both. Under many international human rights treaties, states hold the duty to protect people from human rights violations. The celebrated African Commission on Human and Peoples' Rights case of *SERAC v Nigeria* demonstrates some existing limitations. In accordance with the mandate of the African Commission, the Commission made recommendations to the government even though the dispute had a clear connection with industry actors. What could have been presented inter alia as an investment-related dispute between the Ogonis, an oil consortium that included Shell and the Nigerian government was argued as a human rights dispute for which only the government was legally responsible before the African Commission. The applicants faced the challenge of operating within a legal system that could not effectively respond to the dispute that had ensued. The case is a classic example of a dispute that involved all the three actors that this article focuses on and the dispute could have been better addressed if a multi-actor framework was in effect.

Part of the discussion of the interaction between multi-actor investment contracts and existing law is the relevance of property rights and land ownership issues. In many countries, the government holds title to natural resources although individuals may have title to surface land.<sup>221</sup> Investors are granted licences and leases to operate on these lands. How would the ownership rules, property rights and licenses and leases granted to investors that exploit natural resources inform the parties' roles in multi-actor investment contracts?<sup>222</sup> These questions also implicate the status of relevant communities as indigenous peoples or other local communities. A community's relationship with existing law and land could flow directly from their status as indigenous peoples or otherwise. For indigenous peoples, unique legal relationships and land titles as

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<sup>219</sup> Seck, above n 126.

<sup>220</sup> Ibid.

<sup>221</sup> See, eg, *Petroleum Act* (Nigeria) Cap 350 LFN 1990, art 1 (vesting ownership of petroleum in the state).

<sup>222</sup> See Odumosu-Ayanu, 'Oil and Gas Decision-Making', above n 7.

well as international law relating to indigenous peoples may foster the conclusion of the kind of contracts analysed in this article. In the case of other local communities, negotiating leverage may not be as easily attained based on existing laws.<sup>223</sup> Hence, there is a need to analyse multi-actor contracts' relationship with existing law based on the identity of the communities involved.

Thirdly, country and region-specific case studies are necessary to determine the exact coverage of these contracts. As suggested, this framework may be better suited to large, project-based investments and those that have traditionally been the subject of foreign investment contracts. These projects have traditionally been the focus of protests, unrest and significant agitation in the host and impacted communities. Specific case studies are also necessary in order to determine how much may (not) be standardised in setting out a general framework for these contracts. Detailed studies of IBAs, GMoUs and other similar agreements would contribute to this analysis, as such studies would explore the challenges that these documents have raised as well as their contributions. The resistance to some of these agreements and the unacceptable nature of some of their contents to some local communities will inform such study and provide lessons for framing the process for, and contents of, multi-actor contracts.

Fourthly, as noted earlier, there are other relevant actors not included as part of the multi-actor investment contract framework analysed in this article. One group is the development banks that have been severally referenced in this article. What role will these other actors play? Clearly, there might be a need to involve development banks like the Asian Development Bank, the African Development Bank and the World Bank given that they serve as part funders for some extractive industry projects and other large projects.<sup>224</sup> The World Bank, for example, is already involved with CDAs and, if necessary and acceptable to the relevant actors, extending such involvement to the kind of multi-actor contracts analysed in this article should not be difficult.<sup>225</sup>

Finally, it is important to rigorously analyse the relevant actors' roles as bearers of obligations and rights. In addition to the rights and obligations of governments and foreign investors, it might be more feasible to delimit the rights and responsibilities of communities rather than of individuals. Ascribing rights and obligations must be based on careful assessment of the socio-legal contexts in which these contracts will be situated. International law's ambivalent relationship with peoples' rights might be a relevant background for commencing debate on this issue. As part of this question, it is necessary to determine whether all actors that are parties to the contracts would assume both rights and obligations.<sup>226</sup> The need for further pointed and specific research

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<sup>223</sup> Ibid.

<sup>224</sup> See generally David Szablowski, *Transnational Law and Local Struggles: Mining Communities and the World Bank* (Hart, 2007).

<sup>225</sup> See, eg, James M Otto, 'Community Development Agreement: Model Regulations and Example Guidelines' (Final Report, World Bank, June 2010); World Bank Sustainable Energy — Oil, Gas, and Mining Unit, 'Mining Community Development Agreements: Source Book' (Report, World Bank, March 2012).

<sup>226</sup> Uwafiokun Idemudia, 'Oil Companies and Sustainable Community Development in the Niger Delta, Nigeria: The Issue of Reciprocal Responsibility and Its Implications for Corporate Citizenship Theory and Practice' (2011) *Sustainable Development* 177, 182.

cannot be over-emphasised. It is only with such research that the scope and potential contributions of the multi-actor framework analysed in this article can be determined.

There is much work to be done in setting out the parameters of multi-actor investment contracts. This article has outlined a conceptual framework for this alternative means of ordering in the foreign investment regime. It examined existing legal arrangements and in analysing the interactional approach, it discussed the existing arrangements' shortcomings as robust methods of interaction. It suggests that a multi-actor contract approach to foreign investment has the potential to capture the perspectives of a wider gamut of actors who are not adequately represented under the current legal regime. Given that the multi-actor investment contract framework is a contract framework, it is based on the voluntary consent of the relevant parties. As a result, no party, especially local communities, should be compelled to agree to terms or projects that they consider unfavourable. Consent and reciprocity are the essence of this framework.