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STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM
FOR SUSTAINABLE DEVELOPMENT



A Turn to Responsible Contracting: Harnessing Human Rights to Transform Investment

Office of the High Commissioner for Human Rights (OHCHR)

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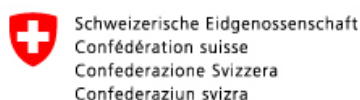
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ABSTRACT

The focus of this paper is on infusing ethical and normative objectives and processes into state-investor contracts and ways human rights, in particular, can be incorporated. It takes, as a starting point, the “Principles for Responsible Contracts – Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations” (the Principles), developed by John Ruggie during his mandate as Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises and examines other model agreements that provide further guidance on how to devise state-investor contracts to address potential human rights impacts.

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LIST OF ABBREVIATIONS

BITs	Bilateral investment treaties (BITs)
CDA	Community Development Agreement
EURODAD	European Network on Debt and Development
IFC	International Finance Corporation
IISD	International Institute for Sustainable Development
MMDA	Model Mine Development Agreement project
OHCHR	Office of the High Commissioner for Human Rights

INTRODUCTION

The investment legal landscape encompasses three levels: international investment treaties, state-investor contracts, and national investment policymaking. Human rights applies in our view to all three levels, when treaties and contracts are negotiated and administered and in national investment policymaking, where human rights should be a mainstream consideration in a wider range of policies and laws that affect investment processes.¹

The focus of this paper, however, is on infusing ethical and normative objectives and processes into state-investor contracts, what we term as a turn to responsible contracting. A state-investor contract can be broadly defined “as a contract made between the state, or an entity of the state, which, for present purposes, may be defined as any organisation created by statute within a state that is given control over an economic activity, and a foreign national or a legal person of foreign nationality.”² State-investor contracts “can cover a wide range of issues, including loan agreements, purchase contracts for supplies or services, contracts of employment, or large infrastructure projects.”³ Contracts can come with not only positive externalities, but also negative ones, which impose costs especially on non-parties.⁴ A turn to responsible contracting tries to address these risks and negative externalities, thus ensuring that the contract delivers in terms of public interest, not purely as a commercial vehicle. This is done through ensuring both certain procedural steps and substantive content in the contract itself.

While this article focuses on state-investor contracts and how human rights in particular can be incorporated in these contracts, this, in turn, clearly conditions and is conditioned by the relationship between contracts and investment treaties, and contracts and domestic investment lawmaking. It would be futile if all the work done to design and administer a responsible contract is undone through treaty clauses or poor domestic law protections. While this will not be studied in depth in this article, we will explore some of these tensions and challenges in designing a responsible contract.

In this respect, we will use as a starting point the Principles for Responsible Contracts – Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations” (the Principles),⁵ developed by John Ruggie during his mandate as Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises. These Principles offer useful guidance to negotiators of state-investor contracts on how to address the potential human rights impacts of their contractual arrangements effectively. In addition, there are other model agreements that provide further guidance on how to transform state-investor contracts.

INCORPORATING HUMAN RIGHTS IN STATE-INVESTOR CONTRACTS

WHY INCORPORATE HUMAN RIGHTS IN CONTRACTS?

The contract is the starting point of establishing a long-term relationship between the state, investor, and community.⁶ Underlying concerns are perpetuated in the system, because commercial parties use “standard form” contracts rather than negotiating tailored provisions. This is what a turn to responsible contract eschews.

For states, human rights are part and parcel of their national, regional, and international obligations, and they have a responsibility to ensure that the contractual arrangements they enter into reflect these larger normative obligations.

For business, there is increasing recognition that human rights violations have the ability to manifest as a significant organisational risk, in legal and reputational terms.⁷ Experience points to the benefits of considering human rights risks as early as possible, before investment projects get underway and before adverse impacts occur. Such benefits extend not only to those whose rights might otherwise be at risk, but also to

- 1 Cotula, L. “Human Rights should be at the heart of investment policy making”, blog, International Institute for Environment and Development, October 2014. Available at <http://www.iied.org/human-rights-should-be-heart-investment-policy-making> (last visited 11 September 2015).
- 2 UNCTAD. “State Contracts,” UNCTAD Series on Issues in International Investment Agreements, United Nations, New York and Geneva, 2004.
- 3 Ibid. One of the most common forms of state contract is the natural resource exploitation contract, sometimes referred to as a “concession agreement,” though this is not a strict term of art.
- 4 Netter Epstein, Wendy. “Contract Theory and the Failures of Public-Private Contracting.” *Cardozo Law Review*, vol. 34 (2013), 2211.
- 5 Ruggie, J. “Principles for responsible contracts: integrating the management of human rights risks into state-investor contract negotiations: guidance for negotiators,” A/HRC/17/31/Add.3, 25 May 2011. Available at <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>.
- 6 Smaller, C. et al. The IISD Guide to Negotiating Investment Contracts for Farmland and Water, IISD, 2014.
- 7 Whitty, N. Rights as risk: Managing Human Rights and Risk in the UK Prison Sector, Discussion Paper No. 57, LSE, 2010. There is a preoccupation with risk as an all-embracing rationale of governance and a new lens through which to view the world, what one author terms as the “risk management of everything.”

the social and financial viability of the project itself.⁸ Thus, it would be important to make human rights risk management an essential consideration for the project negotiation of the investment contract or agreement that establishes and governs the project.

Apart from a risk lens, business operations can and do affect the public interest and can impact a range of human rights as is well documented, so the contractual vehicle needs to be part of any human rights scrutiny.⁹ Wouters and Hachez argue that investment documents, be they treaties or contracts, should be understood as documents whose purpose is the public interest, and therefore they should not be interpreted in a manner that is contrary to the public good, for example as allowing human rights violations.¹⁰ A similar understanding is endorsed by Leader, who emphasises that state-investor contracts are “framed by civic standards,” and thus that states are limited to contracting within the boundaries of these standards, including human rights law.¹¹ Also, while there is a constant bid to categorise contracts as purely commercial or a private matter, there is no doubt that “(t)he nature of the foreign investment agreement is increasingly taking on a public law character in both developed and developing countries.”¹² The increasing use of pre-entry screening and other administrative controls over the whole process of foreign investment makes the area more one of administrative law than one of pure contract law.¹³ Without delving into the taxonomy of contracts, this article argues that a standard of due diligence applies to all types of state-investor contracts when it affects the public interest and implicates rights.

HOW TO INCORPORATE HUMAN RIGHTS INTO STATE-INVESTOR CONTRACTS?

Turn to responsible contracting

Responsible contracting means incorporating human rights into the life cycle of a state-investor contract at the pre-negotiation stage and extending to the contract negotiation itself. This provides for managing human rights issues arising from the project that can be integrated into the plans for project implementation and project outcomes. It also means making provision for those whose rights are at risk or who have been impacted by the project to raise grievances through legitimate and effective processes even if they are not parties to the contract itself.

Responsible contracting implicates both substantive and procedural rights,¹⁴ including that such agreements should be discussed in open fora, that requirements of public regulation apply, and that the legitimacy of contracts should depend on whether they promote the general welfare.¹⁵ The negotiation process between a host state and a business investor offers a unique opportunity to optimize the full range of benefits to be drawn from the investment while ensuring that

the potential negative impacts on people are avoided or mitigated.¹⁶ To achieve this, state-investor contracts need to reflect the guidance that the international community has now provided on business and human rights.

Principles for responsible contracts

The Principles offer guidance to negotiators of state-investor contracts on how to address the potential human rights impacts of their contractual arrangements effectively. These Principles should be read in conjunction with the Guiding Principles on Business and Human Rights¹⁷ and implemented with due regard to the obligations of states set out in international human rights law.

Ruggie identified long-term investment contracts as important instruments through which states and businesses can affect the human rights impact of an investment project. Research carried out in partnership with the International Finance Corporation (IFC) revealed that contractual clauses that were intended to help investors mitigate the risk of changes in law (stabilisation clauses) can have the effect of limiting the policy space for states that are parties to an

8 See eg. Davis, R. and D. Franks, Costs of Company-Community Conflict in the Extractive Sector, Harvard Kennedy School Corporate Social Responsibility Initiative, 2014. Available at http://www.hks.harvard.edu/mrcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf.

9 See Ruggie, J. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, United Nations publication, Sales No. 13.XIV.5, 25 May 2011.

10 Wouters, J. and N. Hachez, “When Rules and Values Collide: How can a balanced application of investor protection provisions and human rights be ensured?,” *Human Rights & International Legal Discourse*, vol. 3, No. 2 (2009), 316.

11 Leader, S. “Human Rights, Risks, and New Strategies for Global Investment,” *Journal of International Economic Law*, vol. 9, No. 3, 2006, 663-666.

12 Sornarajah, M. *The International Law on Foreign Investment*, 3rd edition, Cambridge University Press: Cambridge, 2010, 293-294.

13 *Ibid* at 294. However, there is push back from investors on the idea of administrative law being part of the contract.

14 de Schutter, O. “The host state : improving the monitoring of international investment agreements at the national level,” in Eds. de Schutter, O.; J. Swinnen, and J. Wouters. *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements*, Routledge, 2013, 165.

15 *Ibid*, at 170.

16 Ruggie, J. Keynote Remarks at Association of International Petroleum Negotiators, Spring 2012 Conference, Washington, D.C., 20 April 2012.

17 Ruggie, above n 9. The UN Guiding Principles, unanimously endorsed by the Human Rights Council in 2011, is the authoritative global framework for both states and businesses to prevent and address adverse impacts on human rights linked to business activities. It provides clarity about the necessary legal and policy measures to be taken by states to protect against adverse human rights impacts by business enterprises; the independent responsibility of business enterprises to respect all internationally recognised human rights; and the need to ensure access to effective remedies for victims of business-related abuses.

investment contract to meet their international human rights obligations.¹⁸ There is evidence that such clauses can have a chilling effect on the state's ability to uphold or introduce a regulatory environment that is effective in protecting human rights when there is risk of liability under investment contracts that are subject to binding international arbitration.¹⁹

State-investor contracts and stabilisation clauses contained therein are largely developed in isolation from states' obligations relative to human rights. While recognising that investor rights must be protected from arbitrary and discriminatory acts, Ruggie set out to develop a framework to balance the need for appropriate investor protection with the crucial policy objective of ensuring that projects bring benefits to people while protecting human rights.

The Principles were developed in a three-year multi-stakeholder process, involving state representatives, business enterprises, investors, private and institutional lenders, lawyers, and civil society. They were developed specifically for use by state and business negotiators, but they recognise that management of human rights risks related to an investment project is also of interest to a range of other stakeholders who are not directly involved in the negotiations, such as oversight bodies, civil society organisations, and — importantly — individuals and local communities that may be affected by the project. The Principles are therefore also relevant to these groups and can be used as a tool to advocate for greater transparency and accountability of the contracting parties based on the public interests at stake.²⁰

The Principles cover 10 issues that practitioners and other experts identified as being central to effectively managing human rights risks arising from investment projects governed by state-investor contracts. They should be applied particularly in situations where a project presents large-scale or significant social, economic, or environmental risks or opportunities and/or where the project involves significant depletion of renewable or non-renewable natural resources.

The Principles cover:

1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.
2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.

Supported by adequate expertise: The negotiations should clarify and agree on the respective responsibilities for preventing and mitigating the identified human rights risks before the contract is finalised. Prevention

and mitigation plans should incorporate information and insight gained through engagement with those who may be adversely affected.

3. Project operating standards: The laws, regulations, and standards governing the execution of the project should facilitate the prevention, mitigation, and remediation of any negative human rights impacts throughout the life cycle of the project.

The parties should be aware of any legislative, regulatory, and enforcements gaps, and be prepared to identify whether, and how, such gaps can be overcome. If necessary, the parties should agree to supplement local standards with external standards.

4. Stabilisation clauses: Contractual stabilisation clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the state's bona fide efforts to implement laws, regulations, or policies in a non-discriminatory manner in order to meet its human rights obligations.

One of the key implications of this principle is that stabilisation clauses, if used, should not contemplate economic or other penalties for the state in the event it takes measures that concern the human rights impact of the project.

5. "Additional goods or service provision": Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the state's human rights obligations and the investor's human rights responsibilities.

In some cases, states require investors to provide non-commercial services or infrastructure, such as schools, health-care services, or roads beyond what is essential to carrying out the project. The provision of additional goods or services risks blurring the roles, responsibilities, and levels of accountability for their quality and sustainability between the parties, and the contract should address how these could be carried out in a manner compatible with the state's human rights obligations and the investor's human rights responsibilities.

18 Shemberg, A. Stabilization Clauses and Human Rights, 27 May 2009. Available at <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>.

19 Ibid. See also Cotula, L. Foreign Investment Contracts, August 2007. Available at <http://pubs.iied.org/pdfs/17015IIED.pdf>.

20 LSE – Laboratory for Advanced Research on the Global Economy – Investment and Human Rights Project, Connections: State-investor contracts, 2013. Available at <http://blogs.lse.ac.uk/investment-and-human-rights/connections/regulating-investment/state-investor-contracts/> (last visited 11 September 2015).

6. Physical security for the project: Physical security for the project's facilities, installations, or personnel should be provided in a manner consistent with human rights principles and standards.

Some of the most serious human rights abuses in the context of business activity have involved security personnel — local police, armed forces, or private security staff — charged with protecting business installations or operations. Already at the contracting stage parties should identify the human rights risks, as well as the potential criminal and civil liabilities, resulting from the provision of physical security for the project. Protocols and approaches to managing the project's physical security should be agreed at the contracting stage and further developed through its life cycle.

7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.

This principle reflects the fact that effective and ongoing community engagement from the initial stages is now widely recognised as a minimum good practice for successful investment projects. The community engagement plan should be inclusive, with clear lines of responsibility and accountability, and should be initiated as soon as practicable.

8. Project monitoring and compliance: The state should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.

The contract should reflect the state's right to monitor compliance with all relevant standards while at the same time integrating guarantees for business investors against arbitrary interference in the project.

9. Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.

This principle reflects the fact that even with the best contractual provisions and operating standards in place, any major investment project is likely to lead to some concerns and grievances about its perceived adverse impact among those directly affected. These grievances may raise human rights concerns or, if neglected or poorly handled, may lead to escalating tensions and confrontations that in turn may result in adverse human rights impact. The contract should spell out that individuals or communities that allege that they have suffered harm in the context of project activities will have access to an effective grievance mechanism. This should

not prejudice or restrict access to state-based or other non-state-based complaint mechanisms.

10. Transparency/Disclosure of contract terms: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

Disclosure should be made in a manner that is accessible and seen as part of the community engagement plan for the project. Exceptions to disclosure should be time-bound to fit the compelling justifications.

The Principles could be viewed of as part of a shifting international consensus toward a more sustainable development focus for investment treaties²¹ and also as part of norm formation around human rights accountability for corporate actors.²² The Office of the High Commissioner for Human Rights (OHCHR) has developed guidance for negotiators that can aid in using the Principles.²³ The guidance outlines the key implications of the Principles and provides a recommended checklist. Also of note is the work of the Danish Institute for Human Rights, which has created a Guidance and Assessment Tool for Company Negotiators,²⁴ also based on the Principles. The guidance consists of three complementary components that seek to provide practical information and guidance to companies on respecting human rights in state-investor negotiations and contracts.

Apart from the Principles, there are model contracts and agreements that are also very useful in this context and provide additional practical guidance in the form of templates and models.²⁵ One significant example is the Model Mine Development Agreement project (MMDA),²⁶ which entailed a nearly three-year process of research, discussion, and consultation conducted by the Mining Law Committee of the International Bar Association, culminating in 2011. The product of the project, the "MMDA 1.0," is a tool intended to help increase understanding of Mine

21 Mann, H. "Foreign investment contracts and sustainable development: The new foundations begin to emerge," *Investment Treaty News*, IISD, July 12, 2011.

22 Foster, George K. "Investors, states, and stakeholders: power asymmetries in international investment and the stabilizing potential of investment treaties," *Lewis & Clark Law Review*, vol. 17, No. 2 (2013).

23 Guidance for Negotiators, Principles for Responsible Contracts- Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations, United Nations, New York and Geneva, 2015. See training modules created by OHCHR at <http://www.ohchr.org/EN/Issues/Business/Pages/trainingmodules.aspx>.

24 Human Rights and State-Investor contracts, Guidance and Assessment Tool for Company Negotiators, Danish Institute for Human Rights, January 2014

25 International Bar Association, Mining Law Committee, Model Mine Development Agreement, 2011. Available at <http://www.mmdaproject.org/> (last visited 11 September 2015); Smaller, et al., above n 14; EURODAD, Responsible Finance Charter, 2011.

26 See International Bar Association, above n 26.

Development Agreements and aid in improving the level of practice in their negotiation. Mine development agreements are long-term investment agreements for the development of specific ore deposits that are negotiated between national governments, principally in the developing world (particularly Africa), and mining companies. In this model agreement, there are separate sections on protection of human rights and environment and development effectiveness, which includes provisions for employment of local citizens, local community development, local business development, technology transfer, infrastructure development, and local purchasing, which provide examples of specific clauses and chapters that lay out the substantive human rights, environmental, and developmental considerations that should ideally be reflected in a responsible contract. The MMDA also provides a sample of a Community Development Agreement (CDA), which will be discussed later.

In November 2014, the International Institute for Sustainable Development (IISD) created a Guide to Negotiating Investment Contracts for Farmland and Water, relying on the MMDA model. It noted that the investment contract should identify the key elements of the fiscal and economic bargains related to the investment. It should also set out the key sustainable development elements: economic, environmental, social, and human rights.

In 2011, the European Network on Debt and Development (EURODAD) developed a Responsible Finance Charter with of goal of going beyond a do-no-harm approach by outlining standards to ensure that lending and investments actively deliver positive development outcomes.²⁷ This includes changes to loan and investment contracts and covers standards that should apply to external lending and foreign investments in developing countries that have a developmental purpose. Interestingly, this model charter contains a clause termed "Equality of Treatment," which stipulates that the investment contract must address the interests of all parties to the contract and of affected communities if they are not party to the contract. It also contains provisions on "Applicable national and international law," which state that the contract shall be governed by and construed in accordance with applicable national law and the international treaties to which the country is party, including human rights treaties. This Charter along with the MMDA and the IISD framework clearly shows how the Principles are reflected and can be embodied in the contract through specific clauses and chapters, including outlining the applicable law that should govern the contract.

Designing a responsible contract is not a mechanical process

While the Principles lay out in detail how a contract should be designed, it is important to keep in mind that this should not be a mechanical process. The participatory elements of the Principles must be kept in the fore, ensuring dialogue processes, such as stakeholder dialogues or internal company risk workshops. Organisations may often adopt a human

rights policy or turn to responsible contracting for reasons of legal mandate or practical benefit, or for managerial or reputational worth. However, if approached in a non-mechanical way, "this can, in turn compel other behaviour and cultural changes, including internal acceptance of the validity of human rights norms..."²⁸

In the MMDA, it is noted that the model agreement is not a substitute for informed negotiation, reiterating the human and not merely mechanical process of designing a contract. In the case of mining agreements, these concerns are really about "imbalance of resources and capacity of the parties who negotiate the agreements." These Principles and other guidance documents may not fully redress these larger issues of capacity and balance in negotiating contracts, but they do attempt at least to remind contracting parties of their ethical responsibilities in the process.

CHALLENGES AND OPPORTUNITIES IN RESPONSIBLE CONTRACTING

GENERAL

When contracts incorporate human rights, "this interaction is potentially bi-directional, where the contract has a noticeable impact on the deployment of human rights standards in host countries, and, in turn, human rights standards have an impact on the principles regulating these contracts."²⁹

However, a contract has its limits as a vehicle, and "serious challenges remain in terms of the effectiveness of human rights-related contractual commitments"³⁰ in fulfilling the corporate responsibility to respect human rights.³¹ At the

27 | EURODAD, Responsible Finance Charter, 2011

28 | Taylor, M.B., L. Zandvliet, and Mitra Forouhar. "Due Diligence for Human Rights : A Risk-Based Approach," Corporate Social Responsibility Initiative Working Paper No.53, Cambridge: MA, 2009.

29 | Farah, Y. "Improving accountability through the contractualization of human rights," *The Business and Human Rights Review*, Issue 2, 2013.

30 | Ibid.

31 | See Ruggie, above n 9.

same time, a contract can present unique opportunities for protection of human rights and in terms of interpretation and legal enforcement. Given the public interest and public policy considerations raised by a contract, enforcing human rights-related clauses or ensuring physical security for third parties, community engagement, and putting in place grievance mechanisms are no longer optional or merely desirable. They are part and parcel of creating a durable, sustainable business in the very real context of business impact on communities and environment.

Contracts are based on consent of parties and are negotiated. For rights to work well in their new contractual context, they must retain their ethical and normative roots, keeping the Principles and other guidance in mind. Rights cannot become substantially alienable or derogable rather than mandatory.³² This could seem at odds with the very nature of a contract, which is largely transactional. "The human rights obligation may be understood as less pressing or mandatory when applied in the private context."³³ The problem may also be with the acceptable industry standards and whether they are adjusted up and down in accordance with commercial pressures.³⁴ As Farah notes, "one way of averting such an undesirable result is by subjecting the human rights undertakings in a contract to international law as a concurrent body of law existing side by side and at times corrective of the law governing the contract."³⁵

Questions also arise in terms of how contractual remedies and clauses are interpreted. For example, under English contract law, the award of damages is the common and primary remedy for breach of a contract, while in large investment projects circumstances may favour or require specific performance of the contractual obligation in order to avert or mitigate the adverse human rights impact, rather than damages.³⁶ Contractual remedies should ideally be interpreted according to the elements in the Principles such that governments fulfil their human rights obligations, this could also be done through placing in the contract a clause on the applicable national and international law, such as in the Responsible Finance Charter, where it states that the contract shall be governed by applicable national law and the international treaties to which the country is party, including human rights treaties.

Authors, such as Epstein, have also observed that another way to ensure proper interpretation is through including mandatory clauses in the contracts. It is not as though contracts have no familiarity with mandatory rules. There are instances in contracts where mandatory rules are necessary and common, such as the duty of good faith and fair dealing, which is equivalent to a prohibition on opportunistic behaviour.³⁷ For example, a duty to act in the furtherance of the public interest could take the form of a mandatory rule in contracts.³⁸ This would ensure that when any interpretation is at stake, the mandatory rule would provide a public law lens to interpret the provisions of the contract.

A contract has fixity about it even if it is a starting point for the relationship between state and investor. Human rights risks may change over time as the business enterprise's operations and operating contexts evolve. Thus, the often legitimate need for contractual certainty in any economic order may be superseded by a legitimate demand to respond to changes that affect the human rights of individuals,³⁹ and this can be ensured through ongoing due diligence and review clauses that allow for renegotiation or updating of the contract.⁴⁰

Another tension with responsible contracting is that it runs the "risk" of driving business out of the public system of international law and into the less transparent, accountable, and legitimate realms of private regulation and non-legal dispute settlement.⁴¹ This would be especially the case with commercial arbitration or treaty-based arbitration where arbitrators would interpret the responsible contract.

PROTECTION OF THIRD PARTIES AND STATE-INVESTOR CONTRACTS

State-investor contracts, even with a turn to responsible contracting are still focused on states and investors. An integral part of responsible contracting, however, is the attention paid to affected communities, service recipients, and host communities in general.⁴² Sources on the topic tend to identify the following approaches to protecting third-party rights and limiting the ability of an investment contract to infringe upon human rights. One approach includes human

- 32 Collins, H. "On the (In)compatibility of Human Rights Discourse and Private Law," LSE Law, Society and Economy Working Papers 7/2012,13-14.
- 33 Farah, above n. 31.
- 34 Ibid.
- 35 Ibid. See also MMDA and other model agreements, above n 26.
- 36 Farah, above n 31.
- 37 Epstein, above n 5, at 2211.
- 38 Ibid.
- 39 Farah, above n 31.
- 40 Ruggie, above n 6, Principle 18 and commentary.
- 41 Jacobs, M. "International Investment Agreements and Human Rights," INEF Research Paper Series, 03/2010.
- 42 Ruggie, above n. 6. Principle 7 on community engagement, Principle 5 on additional services, Principle 6 on physical security, Principle 9 on grievance mechanisms, Principle 9 on monitoring and compliance and Principle 10, which addresses the issue of transparency and disclosure of contract terms. All these elements both directly and indirectly focus on what is often rendered invisible in a contract or a treaty, the human dimension.

rights protections in investment treaties and in arbitrations in order to mitigate any ways that contracts might damage those rights. A second set of commentators focus on ways that human rights, and third party rights generally, can be protected in the process and language of the state-investor contract itself. Among the process considerations, these authors recommend transparency,⁴³ stakeholder inclusion from very early on in the investment process,⁴⁴ and national law that provides for community-based or informal property rights systems⁴⁵ and that requires environmental and social impact assessments.⁴⁶

Specific provisions within the contract itself that can maximise third-party and human rights protections, include incorporating international standards into the contract,⁴⁷ and, for example, compensation regimes for land acquisitions.⁴⁸ However, it should be noted that it may be difficult for third-party beneficiaries to enforce these clauses.⁴⁹ “Under an investor-host state agreement, one possibility could be the inclusion of an express undertaking in the contract, stipulating that third-party beneficiaries will be able to enforce the terms of the contract.”⁵⁰ Also, if combined with a mandatory provision, such as a duty to act in the public interest, members of the public for whose benefit a service was being provided, and who are harmed when service provision is poor, should be permitted to sue as third-party beneficiaries for breach of the duty.⁵¹ However, “it would be wishful thinking that investors would accede to such a contractual regime which could make them potentially accountable to a large number of claimants.”⁵²

The other problem is enforcement of Principle 9 and the need for a responsible contract to include a third-party grievance mechanism.⁵³ “Effective grievance mechanisms for external stakeholders [are] rare,”⁵⁴ and studies have suggested that successful grievance mechanisms were those that were more formalised and that were subject to external monitoring.⁵⁵

A way to better protect third parties is to make local stakeholders actually party to a contract, either by requiring a separate agreement with the local community, generally known as a CDA or by executing the state-investor contract as a multi-party contract, not as a side agreement, as proposed by Odumosu-Ayanu.⁵⁶ “Negotiating these agreements may be an even more complex endeavour.”⁵⁷ Some challenges that she identifies include power imbalances between the parties, the relationship between contracts and existing laws, corruption and ineffectiveness, problems associated with forcing local communities to participate in the international system, and the potential impact on the broader public interest.⁵⁸

43 Cotula, L. Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments, International Institute for Environment and Development, 2010, 85-88; Rosenblum, P. and S. Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries*, Revenue Watch Institute, 2009; International Institute for Sustainable Development, World Bank, and United Nations Conference on Trade and Development, *Investment Contracts for Agriculture: Maximising Gains and Minimising Risks*, World Bank Agriculture Global Practice Discussion Papers, World Bank Group report number 94895-GLB, 2015.

44 World Bank and United Nations Conference on Trade and Development. *The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments: Implications for Corporate Performance and Impact on Local Communities*, World Bank Agriculture and Environmental Services Discussion Papers, World Bank Report Number 86175-GLB, 2014, 7.

45 Cotula, above n 45, at 14.

46 Ibid at 51-54; IISD, World Bank and UNCTAD, above n 45; World Bank and UNCTAD, above n 46, at 15.

47 Cotula above n 45, at 15-16, 32, 49-50 IISD, World Bank and UNCTAD, above n 45; World Bank and UNCTAD, above n 46, at 10.

48 Cotula above n 45, at 58-60; IISD, World Bank and UNCTAD, above n 45; World Bank and UNCTAD, above n 46, at 15.

49 Odumosu-Ayanu, I. “Governments, Investors and Local Communities: Analysis of a multi-actor investment contract framework,” *Melbourne Journal of International Law*, vol. 15, no. 2 (2014), 24.

50 Farah, above n 31.

51 Epstein, above n 5, at 2211.

52 Farah, above n 31.

53 See eg. Cotula, above n 45, at 65.

54 World Bank and UNCTAD, above n 46, at 9.

55 Ibid.

56 Odumosu-Ayanu, above n 51, at 23; Multi-actor investment contracts would directly incorporate local communities and treat them as communities of people who share goals and aspirations with respect 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.

57 Ibid, at 11.

58 Ibid, at 36-38.

POLICY IMPLICATIONS OF RESPONSIBLE CONTRACTING AND ITS INTERFACE WITH INVESTMENT TREATIES AND DOMESTIC INVESTMENT POLICYMAKING

Responsible contracting is one way investment actors reorient from a purely commercial outlook and recognise and manage their impacts on communities and the environment. This is an acknowledgement of human rights as risk and that these contracts implicate rights and are in the public interest. With these considerations in mind and using the Principles and other model agreements as guidance, states and investors can begin to reshape their contractual arrangements.

This is by no means a simple exercise, and negotiations can be difficult and challenging even without these Principles to consider. However, through incorporating this into business practice and procedures and into the way governments view their transactions with businesses, responsible contracting can begin to reap rewards for all parties concerned. Third parties, as mentioned above, should be foregrounded in this exercise, and more efforts should be made both to protect them within the contract as third parties or through exploring CDAs and multi-actor contractual models.

The relationship between state-investor contracts and domestic investment policymaking is important in terms of its policy implications. "Domestic law is the foundation for any potential investment and should govern most of the issues arising, including the legal instrument to be used, such as a lease, licence, or permit."⁵⁹ Of course, the contract itself is part of domestic law, but here we refer to its relationship with the larger body of laws and policies, which include laws and regulations related to the admission of foreign investors, incentives for foreign direct investment, taxation, land laws, water rights and rates, labour laws, requirements for community consultation, and an array of laws related to the potential impacts of the investment on the environment and surrounding community. Thus, the contract may include standards that go beyond those required under national

law, as applicable national laws can vary substantially. In specific contexts, contracts can bridge the gaps in terms of enforcement and accountability especially "where domestic laws are weak or not adequately enforced..."⁶⁰ In this article, we posit that contracts should be treated not as a substitute for national laws and policies, but as a supplement when "the host state lacks a modern legal framework and/or institutional capacity necessary to regulate properly the environmental and social impacts of large-scale projects."⁶¹ Where domestic law is weak or not adequately enforced, investment contracts have the potential to do not only the most good, by providing additional protections, but also the most harm, if they seek to exploit and enshrine the weakness of domestic law. Ideally, responsible contracts should supplement and then provide a springboard for better protection at the domestic level and harmonisation of what are often fragmented domestic policies, including on land and resources, which can adversely affect third parties and impact human rights and the environment.⁶²

While this article has focused on state-investor contracts and infusing ethical objectives and processes into its design and implementation, the relationship of contracts to bilateral investment treaties (BITs) is also important. In the conclusion of investment treaties, governments should refrain from making commitments that will make it impossible for them to comply with requirements that apply at the level of the individual investment project.⁶³ "Specific investment projects should contribute to human development and to the fulfilment of human rights and this should not be preempted by obligations imposed under investment treaties."⁶⁴ Discussions about state-investor contracts and investment treaties have also revolved around the question of umbrella clauses. Under an umbrella clause, the host country usually assumes the responsibility to respect other obligations it has with respect to investments of investors of the other contracting party. They are not a prominent feature of BITs now, but investment disputes have emerged in relation to these clauses with arbitral rulings split on whether umbrella clauses raise any contractual breach by the host nation to the level of international investment agreement protection. Some BITs also qualify the umbrella clause or add restrictions so as to not subject contracts to arbitration under the treaty or exclude certain disputes. Commentators have

59 | Smaller et al., above n 14.

60 | Ibid.

61 | Lindsay, R. et al., "Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles," *Journal of World Energy Law and Business*, vol. 6, No. 2, 2013, 50.

62 | This should include oversight by administrative agencies, greater contract transparency on the link between contracts and other government policies and ensuring that the proposed investment fits into overall national investment strategies and other policies.

63 | De Schutter, above n 15, at 163.

64 | Ibid, at 164.

also suggested other approaches to avoid arbitration for breaches of contracts that range from efforts to ensure that domestic courts or negotiations are the first choice prior to arbitration,⁶⁵ to choice of law clauses in state-investor contracts, not to avoid arbitration, but to require arbiters to consider the state's legal obligations outside of the narrow investment law context.⁶⁶

In this article, we are not arguing for or against any particular mode of dispute settlement in the case of a breach of a responsible contract, and this discussion, while important, is really out of the scope of the article. However, we do argue that some policy considerations should be kept in mind. The treaty should enable and not create constraints for the negotiation, conclusion, and implementation of responsible contracts and any dispute settlement arising from contract breaches. Choice of law clauses or applicable law in contracts should be respected. Another consideration relates to protecting third parties as they presently do not have rights under a BIT or access to arbitral tribunals except as *amicus curiae*; in such cases, domestic remedies may require strengthening or more viable options may need to be found.

CONCLUSION

Contracts cannot provide a comprehensive mechanism for “protecting” human rights.⁶⁷ Nevertheless, the importance of state-investor contracts within the investment legal landscape makes it an imperative object for human rights analysis. This article has pointed out the need for responsible contracting, and there is existing guidance through the Principles that leads the way. A fully integrated contracting model would allow human rights to be integral components, not add-ons, where benefits would not accrue by accident but by design. This model would also better protect third parties.⁶⁸ In sum, through a turn to responsible contracting, we can begin to attempt to address serious democratic deficits in investment law.

65 | Salacuse, J. W. *The Law of Investment Treaties*, Oxford University Press, 2010, 65-68; Cotula, above n 45, at 75; IISD, World Bank and UNCTAD, above n 45, at 4.

66 | Prislán, Vid. “Non-investment obligations in investment treaty arbitration: toward a greater role for states?” in *Investment Law Within International Law: Integrationist Perspectives*, Ed. Baetens, Freya. Cambridge University Press, 2013, 455-457.

67 | Farah, above n 31.

68 | Mann, above n 23.

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