

Reconsidering Sovereignty, Ownership and Consent in Natural Resource Contracts: From Concepts to Practice



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1 Introduction

A wave of commercial investments in the natural resource sectors has rekindled debates about the place of contracts in the interface between economic governance and control over natural resources. Since the early 2000s, the boom and bust of commodity cycles—and the increasing and then declining pace of investment in the agriculture, mining, oil and gas sectors—have fostered lively discussions over whether host countries received a fair share of economic benefits, over the distribution of those benefits within national economies, and over the social and environmental impacts of commercial activities.

That foreign investment can play a role in the pursuit of sustainable development is widely recognised, including by the policy instrument that underpins the

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internationally agreed Sustainable Development Goals (SDGs).¹ Job creation, the generation of public revenues and improved access to markets and technology are commonly cited vehicles through which investments could advance the SDGs. The natural resource sectors provide sites of investment opportunity, including in many low and middle-income countries. At the same time, large-scale natural resource projects have often been accompanied by reports of social conflict and environmental degradation. Many low and middle-income countries experience a stark contrast between the hopes raised by their natural resource endowments and the everyday reality of deprivation that many people face.²

Contracts have featured prominently in these trends and debates. While licence-based regimes apply in some states and sectors, contracts often provide the legal basis for the implementation of natural resource projects—even more so in low and middle-income countries.³ In addition, contract renegotiations over the past 15 years have been at the centre of many disputes between investors and states. This prominent place of investor-state contracts has underpinned what some scholars have called a “transactional view” of investment relations, whereby legal arrangements are structured, at least in part, around a bargain between the investor and the state.⁴

However, the “transaction” involves complex constellations of both commercial and non-commercial dimensions. In market-based economies, commercial viability provides the foundation of any investment activity. Contracts and contract renegotiations can affect the balance of risks and returns in any investment, and ultimately its profitability. At the same time, public policy issues are typically at stake—from taxation to labour relations, land rights and environmental protection. Recognising the non-commercial dimensions of natural resource contracts can shed new light on established practice: contractual provisions to promote legal stability in investor-state relations have come under scrutiny in the light of considerations, such as human rights, which were rarely factored into conventional analyses.⁵

In addition, contractual developments “on the ground” have questioned traditional approaches that frame investment relations exclusively in terms of bilateral arrangements between investors and states. The need for investors to establish workable relations with local actors has fostered the negotiation of community-investor agreements aimed at channelling benefits to the local economy.⁶ Many companies have come to see these contractual arrangements as a strategy to promote support for the business, while some indigenous movements and non-governmental organisations (NGOs) have appropriated the language of partnerships to advance local claims to natural resources.⁷

¹“Transforming Our World: The 2030 Agenda for Sustainable Development”, United Nations General Assembly Resolution 70/1 of 25 September 2015, UN Doc. A/RES/70/1, e.g. para. 67.

²Ross (2015) and Venables (2016).

³See e.g. CCSI (2015), discussing the mining sector.

⁴Perrone (2017).

⁵Shemberg (2009).

⁶Szabłowski (2010) and Loutit et al. (2016).

⁷Szabłowski (2010).

Taken together, these evolutions have prompted renewed public reflection on multiple aspects of natural resource contracts. Some early explorations focused on specific clauses in investor-state contracts—such as stabilisation clauses,⁸ and environmental provisions.⁹ Over time, the interrelatedness of contractual clauses and the need to consider the role of local actors in investment contracting led to more holistic approaches to understanding both the content of the contract, and its parties and formation process.¹⁰ Significant developments have also occurred through the emergence of authoritative international guidance, including principles for addressing human rights issues in contracting processes,¹¹ learning materials on how to implement the principles,¹² and model contracts for natural resource projects.¹³

It is now clear that addressing the challenges associated with natural resource contracts involves not only ensuring that governments are in a position to get a fair deal in their negotiations with investors,¹⁴ but also reconsidering the fundamental parameters on which contracting rests. Yet these deeper-level parameters are still underexplored. Questions remain, for example, about legal arrangements to ensure that states exercise sovereignty in the interest of their people; about how contracting can operate in multi-layered resource ownership systems, including where socially legitimate resource rights enjoy little recognition under national law; and about who should have the right to manifest their consent, at which stage and under what conditions, in the distribution of decision-making authority that underpins natural resource contracting.

This chapter explores these questions, focusing on the extractive industries and the agriculture sector.¹⁵ It first examines, based on positive law, the foundations of natural resource contracts, focusing on the notions of sovereignty, ownership and consent. This conceptual exploration highlights that, while consent underpins the contract, the legal construction of (state) sovereignty and (resource) ownership sets parameters for the expression of consent—namely, the actors whose consent is required, the processes through which consent is formed and manifested, and the

⁸Amnesty International UK (2003, 2005), Cotula (2008), Shemberg (2009) and Johnson and Volkov (2013).

⁹Tienhaara (2011).

¹⁰Cotula and Tienhaara (2013), Odumosu-Ayanu (2014) and Gathii and Odumosu-Ayanu (2015).

¹¹Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, “Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators”, 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

¹²See e.g. the training modules developed by the United Nations Office of the High Commissioner for Human Rights (OHCHR) on the Principles for Responsible Contracts (www.ohchr.org/EN/Issues/Business/Pages/trainingmodules.aspx). See also Götzmann and Holst Jensen (2014) and Investment and Human Rights Project (2016).

¹³See e.g. the Model Mining Development Agreement released by the Mining Law Committee of the International Bar Association (<http://www.mmdaproject.org/>).

¹⁴Kaul et al. (2009) and Sauvart (2017).

¹⁵Forestry, hydro and genetic resources are outside the scope of this study.

bounds within which consent can lawfully operate. The chapter then distils some practical implications for natural resource contracts, focusing on illustrative issues relating both to the substantive and procedural dimensions of the investor-state contract, and to reframing the contracting process around a wider range of resource right holders and affected actors. The findings provide pointers for piecing together the diverse and possibly conflicting commercial and non-commercial interests that are at stake in natural resource contracts.

2 The Foundations of Natural Resource Contracts

In broad terms, natural resource contracts involve the allocation of resource exploration and/or development rights to an investor, in exchange for considerations such as revenues, employment or infrastructure development. That said there is tremendous diversity in contractual practice. Contract formulations vary extensively, partly reflecting diversity in the relevant sectors (e.g. agriculture, mining and petroleum) and commodities (sugar cane, oil palm and rubber, for example). Diversity of contractual formulations also reflects differences in applicable national law and in the preferences of the contracting parties. The parties themselves vary, though in many jurisdictions the state plays an important role in natural resource contracts.

In addition, there is variation in the role the contract plays in governing natural resource investments: national law can establish a level-playing field for all investments sharing similar characteristics, and some states have moved towards standardised licences and greater reliance on national law, rather than fully negotiated contracts; but negotiated contracts are commonly used in many other countries, particularly low and middle-income ones.¹⁶ In all cases, national and international law shape the foundations upon which any natural resource contract rests. The notions of sovereignty, ownership and consent are particularly important elements of these foundations. The legal contours of those notions affect who has the legal authority to enter into the contract, and through what process. They also affect the terms that those with the authority to conclude the contract can or must agree to.

2.1 *Sovereignty*

Under international law, states have permanent sovereignty over the natural resources located within their jurisdiction. This principle was enshrined in United Nations General Assembly Resolution 1803 of 1962,¹⁷ and as an application of the

¹⁶For trends in the mining sector, for example, see CCSI (2015).

¹⁷General Assembly Resolution 1803 (XVII) of 14 December 1962.

wider principle of territorial sovereignty, it reflects customary international law.¹⁸ The concept of sovereignty is susceptible of multiple legal constructions, and its normative content has long formed the object of ambiguities and contestation.¹⁹ Among other things, there has been debate about the actors with which sovereignty is vested. Inconsistent formulations, even within the same legal instrument, have created interpretive challenges. Key parts of Resolution 1803 refer to undefined “peoples and nations”,²⁰ and international human rights instruments vest with “peoples” the arguably related but distinct right to freely dispose of natural resources.²¹

However, while human rights jurisprudence has consistently applied to peoples, including groups within states, the human right to freely dispose of natural resources,²² international treaties explicitly frame *sovereignty* over natural resources as being the preserve of states.²³ More generally, the “Westphalian” configuration of international law has traditionally connected sovereignty to statehood.²⁴ One way to reconcile these complexities involves recognising that, at one level, sovereignty ultimately resides in the peoples, as explicitly affirmed in numerous national constitutions,²⁵ and is constituted through peoples exercising their right to self-determination; but that states provide the organisational structures through which

¹⁸*Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports (19 December 2005), para. 244.

¹⁹Koskenniemi (2005, 2017).

²⁰General Assembly Resolution 1803 (XVII) of 14 December 1962, para. 1. However, the fourth preambular paragraph refers to states.

²¹See e.g. common Article 1(2) of the International Covenant on Civil and Political Rights (New York, 16 December 1966) [hereinafter ICCPR], and of the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) [hereinafter ICESCR], referring to “peoples”; and Article 21 of the African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981) [hereinafter ACHPR], referring to both “peoples” (e.g. Article 21(1)) and “States Parties” (e.g. Article 21(4)). On this “peoples versus states” debate, see Duruigbo (2006), Doyle (2015) and Gilbert and Bernaz (2015).

²²E.g. *The Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v. Nigeria*, 27 October 2001, Communication No. 155/96, African Commission on Human and Peoples’ Rights, paras. 55–58; *Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya*, 25 November 2009, Communication 276/03, African Commission on Human and Peoples’ Rights, paras. 252–268; *African Commission on Human and Peoples’ Rights v. The Republic of Kenya*, 26 May 2017, Judgment, African Court on Human and Peoples’ Rights, paras. 191–201.

²³E.g. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), Article 193; and United Nations Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), Article 3. It has been noted that General Assembly resolutions adopted after Resolution 1803 also tend to refer to “states” or “countries”; see Dam-de Jong (2015).

²⁴See e.g. UN General Assembly Resolution 2625 (XXV) of 24 October 1970, particularly the principle of sovereign equality of states and related provisions.

²⁵See e.g. 1991 Political Constitution of Colombia, Article 3; 1948 Constitution of the Italian Republic (as amended), Article 1; 2010 Constitution of Kenya, Article 1; 1987 Constitution of the Republic of the Philippines, Article II(1).

sovereignty is held and exercised in international legal relations. The right to make laws has long been recognised as a key attribute of sovereignty,²⁶ and states have the right to regulate natural resources within their jurisdiction—including the modalities for allocating resource rights to commercial projects.

Contemporary international law configures state sovereignty as involving both rights and duties. Some such rights and duties reflect concerns about relations that transcend national boundaries, while others primarily regulate the relation between each state and its people. International environmental norms provide examples of the former. Article 3 of the Convention on Biological Diversity—a multilateral treaty ratified by the overwhelming majority of states—places in states both “the sovereign right to exploit their own resources pursuant to their own environmental policies”, and “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.²⁷

While this provision refers to a “responsibility” rather than a “duty”, the International Court of Justice has recognised that a “general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”.²⁸ Another explicit statement of both rights and duties is contained in the United Nations Convention on the Law of the Sea: “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment”.²⁹ In relation to investor-state disputes, arbitral tribunals have also elaborated on the notion that the sovereign right to regulate meets “boundaries” established by international obligations.³⁰

This coexistence of both rights and duties in the contemporary framing of sovereignty is at the centre of relations between states and their people. The range of relevant relations is broad. Firstly, these relations link the state to the universality of its citizens. Centralised resource control has often enabled kleptocratic capture of natural wealth,³¹ in patterns that involve not only “grand” corruption at high political

²⁶Bodin (1992/1593).

²⁷See also the similarly worded Principle 21 of the Stockholm Declaration on the Human Environment (Stockholm, 16 June 1972); and Principle 2 of the Rio Declaration on Environment and Development (Rio de Janeiro, 12 August 1992), which refers to both “environmental and developmental policies”. The principle builds on earlier jurisprudence; see *Trail Smelter Case (United States v. Canada)*, 3 R.I.A.A., 1905 (Perm. Ct. Arb. 1938, 1941).

²⁸*Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, I.C.J. Reports (8 July 1996), para. 29.

²⁹United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), Article 193.

³⁰See e.g. *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, 2 October 2006, ICSID Case No ARB/03/16, para. 423. For a discussion, see Guntrip (2016).

³¹Duruigbo (2006).

levels but also more diffuse networks of rent-seeking and patronage.³² Therefore, one relevant issue concerns the mechanisms whereby citizens can hold authorities to account for the way they manage natural resources.³³ Secondly, resource projects can test relations between states and identifiable groups within the national polity, who are holders of human rights (including the right to freely dispose of natural resources, where applicable) and are affected by project implementation. Tensions in these latter relations have found their way into growing human rights jurisprudence.³⁴

In these regards, General Assembly Resolution 1803 affirms that permanent sovereignty over natural resources “must be exercised in the interest of [...] national development and of the well-being of the people of the State concerned”.³⁵ Similar provisions have featured in subsequent resolutions.³⁶ On one level, this formulation seems coextensive with the affirmation of sovereignty. Written at the time of decolonisation, it signalled a shift away from natural resource policies that primarily responded to the interests of the colonial power: in the post-colonial configuration, national development and the wellbeing of the people in the newly independent state would be the sole criteria for the exercise of sovereignty over natural resources.³⁷ In addition, features of this provision seem inscribed in a logic of deference to sovereign space: the notion of wellbeing is not defined, and—by virtue of their sovereignty—states are well placed to determine their national development priorities and pursue the wellbeing-enhancing strategies that are most relevant to their contexts.

However, the plain language of a provision affirming that sovereignty must be exercised in the interest of the wellbeing of the people signifies more than simply deferring to the development priorities identified by states themselves. That language affirms both a sovereign *right* (to ultimate authority over natural resources) and a sovereign *duty* (to use that authority in the interest of the people). As decolonisation via the exercise of peoples’ right to self-determination underpinned the emergence of a more truly universal system of international law, and as the notion of sovereignty was redeployed from a colonisation tool to a means for emancipation,³⁸ the solemn affirmation of permanent sovereignty over natural resources placed people at centre-stage, and framed sovereignty as involving *ab initio* both rights and duties that, in effect, put states at the service of their people.³⁹

³²Bayart (1993) and Chabal and Daloz (1999).

³³Gilbert and Bernaz (2015).

³⁴Gilbert (2017) and Cotula (2017).

³⁵General Assembly Resolution 1803 (XVII) of 14 December 1962, para. 1.

³⁶Dam-de Jong (2015).

³⁷However, Resolution 1803 also requires states to observe foreign investment agreements; see para. 8 and Desta (2015). On the process that led to the formulation of Resolution 1803, see Schrijver (1997).

³⁸On the historical relationship between sovereignty and imperialism, see Anghie (2004).

³⁹See also Dam-de Jong (2015), Violi (2015) and Gilbert and Bernaz (2015).

The “people”, of course, is not a straightforward concept, whether philosophically or sociologically, given the conceptual complexities of political community and the substantial differentiation of interests, values and aspirations that may exist within that community. What constitutes the “well-being of the people” in any given situation, what policy measures can enhance it most effectively, and how to navigate the often inevitable distributive trade-offs can form the object of intense contestation.⁴⁰ As a matter of legal principle, however, the framing of Resolution 1803 means that a state that deliberately acted against its own people would violate its sovereign duties—even though, in practice, the undefined contours of those duties at first did not establish clear parameters for reviewing the legality of state conduct.

Since the adoption of General Assembly Resolution 1803, extensive developments in international law have brought greater clarity on the rights and duties associated with sovereignty over natural resources, providing more granular disaggregation of the relevant protected interests. Examples include the adoption of numerous human rights treaties and the incremental consolidation of international environmental norms. The relevance of these developments to the legal construction of sovereignty is corroborated by the international instruments that most recently reaffirmed the sovereignty of states over natural resources. For instance, Article 3 of the Convention on Biological Diversity explicitly links sovereignty to the Charter of the United Nations and to the “principles of international law”.⁴¹ The UN Charter inscribes the promotion of human rights among the very objectives of the United Nations⁴²; and while there is debate about what was meant by “principles of international law”, international norms requiring states to use natural resources sustainably have been deemed to qualify.⁴³

By calibrating the interplay of rights and duties, developments in international human rights and environmental norms have reconfigured the parameters of sovereignty. Human rights norms illustrate this. Indeed, states cannot lawfully take measures that breach their international human rights obligations. Further, the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires its states parties to advance the progressive realisation of the rights affirmed in the Covenant “to the maximum of [their] available resources”, which would include natural resources⁴⁴; and the notion of “well-being of the people”, which states are to realise in their exercising sovereignty, must arguably be interpreted in the light of internationally recognised human rights, including economic, social and cultural rights.⁴⁵ In addition, the right to (internal) self-determination that international

⁴⁰Koskenniemi (2011).

⁴¹See also the identical formulations in Principle 21 of the Stockholm Declaration on the Human Environment (Stockholm, 16 June 1972); and Principle 2 of the Rio Declaration on Environment and Development (Rio de Janeiro, 12 August 1992).

⁴²Charter of the United Nations (San Francisco, 26 June 1945), Articles 1(3) and 55(c).

⁴³Glowka et al. (1994).

⁴⁴ICESCR, Article 2(1). On the place of the ICESCR in international investment law, see Desierto (2015).

⁴⁵Leader (2006).

instruments recognise to indigenous peoples points to a notion of “shared” sovereignty the exercise of which is disaggregated into multiple decision-making sites within a single state.⁴⁶

This brief examination of existing international law highlights that, in exercising permanent sovereignty over natural resources, states have both rights and duties. According to human rights norms, for example, states must: (1) in terms of process, ensure respect for human rights throughout public decision making relevant to the exercise of permanent sovereignty over natural resources, and (2) in substantive terms, ensure that public action upholds human rights, and take steps to maximise the contribution of natural resource development to realising human rights. This interplay of rights and duties has implications for natural resource contracts. The duties set *external* bounds, because states cannot lawfully conclude (or sustain private parties in concluding) contracts in ways that, in terms of content or process, would violate their international obligations. To comply with their duty not to harm the environment outside their jurisdiction, for example, states would have to ensure, through contractual provisions or national legislation, that investors adopt (or do not adopt) specified conducts that have a bearing on environmental impacts. The duties also establish *internal* parameters—that is, they affect “from within” the very purpose of the exercise of sovereign powers. For example, they require states to ensure that natural resource contracting promotes the progressive realisation of economic, social and cultural rights.

2.2 Ownership

While sovereignty refers to political organisation and is inherently centred on the public sphere, issues of ownership are relevant to both privately and publicly held rights to use, manage and transact valuable resources. Patterns in resource ownership have a bearing on natural resource contracting. One reason is that, beyond the great diversity of national law regimes, it is commonly recognised that a contracting party cannot transfer rights that it does not hold.⁴⁷ Put differently, who holds the resource rights, and the substantive content of those rights, will affect the identity of the contracting parties and the nature of the transaction. Unlike sovereignty, resource ownership is primarily governed by national law, and as discussed the enactment of national regulation is an attribute of sovereignty. As a result, legal arrangements can vary significantly in different jurisdictions—more than is possible to do justice to in the limited space available here. Further, while this section refers to ownership as a

⁴⁶*Indigenous Peoples’ Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, Erica-Irene A. Daes*, UN Doc. E/CN.4/Sub.2/2004/30, 13 July 2004, paras. 30, 39–40, 56. See also Wiessner (2008) and Fox-Decent and Dahlgren (2015).

⁴⁷See the Latin maxims *nemo dat quod non habet* and *nemo plus iuris ad alium transferre potest quam ipse habet*.

shorthand, configurations of resource rights can be complex and multi-layered, and they can encompass very diverse tenure set-ups.

In many jurisdictions, national law vests ownership of mineral and petroleum resources with the state. Private (non-state) rights to subsoil resources do exist in some countries. This includes arrangements that legally recognise customary or indigenous rights to subsoil resources, which in some cases have paved the way to joint ventures or partnership agreements between investors and indigenous groups—for example in Canada and South Africa.⁴⁸ In most countries, however, commercial mining and petroleum projects primarily involve licences issued by the state, or contracts with the state or a state-owned entity. Trends in land ownership present greater diversity, and globally there is extensive experience with land-related contracts awarded by non-state actors. In many low and middle-income countries, however, states own a substantial part or even all of the land, or they otherwise hold rights giving them substantial control over public lands that cannot formally be owned or alienated. This trend partly reflects historical legacies, including in the colonial period.⁴⁹ Legal forms vary both within and between jurisdictions, encompassing concepts such as trusteeship, *domaine public de l'état*, *domaine privé de l'état*, and *domaine foncier national*, among others. But in general terms, the state in these jurisdictions has the legal authority to allocate land on behalf of its people, and land-based investments such as agribusiness ventures tend to involve long-term leases or concessions granted by the state.

In these respects, natural resource contracting is connected to the realm of public law, presenting specificities compared to purely private, commercial transactions.⁵⁰ These public law dimensions flow not only from the role of states in managing natural resources, but also from the fact that states perform that role for the benefit of their people rather than as private owners—a circumstance that many national constitutions and laws explicitly affirm,⁵¹ and that is meant to provide the basis for relations of accountability between the authorities and the people in whose interest those authorities are required to act.⁵² In many other countries, however, part or most of the land is owned by actors located outside the sphere of government, ranging from private landowners to traditional authorities. This situation affects contractual

⁴⁸For examples of legal recognition of customary/indigenous mineral rights, see, in South Africa, *Alexkor Ltd v. Richtersveld Community and Others*, Constitutional Court of South Africa (CCT19/03) [2003] ZACC 18; and in Canada, the Nisga'a Final Agreement (British Columbia, 27 April 1999), Articles 3.19–3.20.

⁴⁹See Cotula (2016) for a fuller discussion.

⁵⁰Classifications in terms of public and private law resonate to varying degrees in different jurisdictions. In some civil law countries, public-private law divides can have practical repercussions, for example for the jurisdiction of ordinary and administrative courts; but these dimensions do not operate in the same way in other countries, particularly in the common law tradition.

⁵¹See e.g. the 1945 Constitution of the Republic of Indonesia (as amended), Article 33(3); and Nigeria's Land Use Act 1978, Article 1. See more generally Gathii and Odumosu-Ayanu (2015).

⁵²For an exploration of accountability in the context of agribusiness investments, see Cotula et al. (2017).

arrangements: in jurisdictions where private land ownership is prevalent, land-based investments often involve private-to-private transactions; and where traditional authorities control a significant part of the land (in Ghana or Sierra Leone, for example), many commercial land leases are signed with those authorities.⁵³

Even where the land is owned by non-state actors, the state sometimes plays a role in land contracts. First, eminent domain is widely considered an attribute of sovereignty, and national law typically empowers the government to compulsorily acquire land for a public purpose provided that certain conditions are met. While activating compulsory acquisition for commercial investments raises fundamental questions about the contours of “public purpose”, some national laws expressly allow this,⁵⁴ and in practice states have made extensive use of compulsory acquisition to allocate rights to commercial projects. Second, where non-state actors, rather than government authorities, allocate resource rights directly to investors, separate contractual arrangements may govern relations between the investor and the state, covering issues such as tax incentives or legal stability. As a result, the connections with the sphere of public law are relevant to these situations as well. Contracts concluded by non-state actors can themselves present public law dimensions: depending on applicable law, traditional authorities may owe legally defined responsibilities towards the landowning community,⁵⁵ and their historical socio-political evolution or contemporary legal status may not be fully independent of the administrative apparatus of government.⁵⁶

Ownership, under national law, of the resource at stake does not exhaust the full spectrum of rights and claims relevant to natural resource contacting. A few examples illustrate this point. Firstly, state ownership of subsoil resources may coexist with privately held rights to land and surface resources, which extractive industry contracts can affect. Secondly, even where the land is itself owned or controlled by the state, national law may protect rights to use and manage that land—for example, based on occupation, indigenous or customary rights, or stated-issued land leases. Depending on the context, these rights may be held by small-scale farmers, pastoralists, fisherfolk, forest dwellers or local residents, for example—including groups who qualify as indigenous peoples under international law. While in some national legal systems these use and management rights can pave the way to direct land transactions between right holders and external investors, in others local actors cannot allocate commercial contracts to investors directly,⁵⁷ or else the rights they can allocate would fall short of commercial needs in terms of tenure security, transferability or mortgageability,⁵⁸ so the state plays a key role in the transaction.

⁵³E.g. Boamah (2014).

⁵⁴See e.g. Tanzania’s Village Land Act 1999, Section 4(2).

⁵⁵E.g. Yeboah and Kakraba-Ampeh (2016), writing about Ghana.

⁵⁶Mamdani (1996) and Ouédraogo (2006).

⁵⁷See e.g. Knight (2010) and Tanner and Bicchieri (2014), writing on Mozambique’s land and surface resource legislation.

⁵⁸See World Bank (2013), which in relation to a commercial agriculture project in Senegal suggested an elaborate scheme of leases and subleases to circumvent such limitations.

Thirdly, small-scale farmers, pastoralists, fisherfolk, forest dwellers or local residents may claim resource rights that are perceived to be socially legitimate at the local level but are not recognised or adequately protected by national law.

In all such situations, investment contracting can affect the claimed or legally recognised resource rights of third-party actors. This circumstance creates specific challenges compared to purely private contracts that transact resource rights between two parties alone, and is often among the root causes of conflicts associated with natural resource projects. International instruments provide guidance on how to navigate these challenges. The Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security (VGGT) are an international soft-law instrument endorsed in 2012 by the Committee on World Food Security, which is the top United Nations body in food security matters. In tying land and natural resources to food security and human rights, the VGGT call on states and investors to respect all “legitimate tenure rights”, including indigenous and customary tenure rights, and including socially legitimate rights that are “not currently protected by law”.⁵⁹ The VGGT provide guidance on handling resource rights issues in investment processes, including through local consultation and partnerships with local tenure right holders.⁶⁰

International human rights instruments also have a bearing on this issue. The close connections between resource rights and human rights are widely recognised.⁶¹ Examples of most obviously relevant human rights include the rights to property, to housing, to food (where people depend on natural resources for their food security), to enjoy one’s own culture (where traditional cultures are connected to land and resources), to freely dispose of natural resources, and to self-determination, as well as indigenous peoples’ rights to their ancestral territories—to name but a few internationally recognised human rights. That said, all human rights are interdependent and interrelated, so the interface between resource rights and human rights encompasses all internationally recognised human rights.⁶² Regional human rights courts have consistently held that international law protects resource claims even if they are customary in nature and not recognised as ownership under national law.⁶³ Human rights jurisprudence has also identified the limits of eminent domain, for example by requiring, in relation to indigenous peoples, that states conduct environmental impact assessments, promote benefit sharing and seek free, prior and informed consent.⁶⁴

⁵⁹Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (11 May 2012), e.g. paras. 3.1, 3.2, 4.4, 5.3, 7.1 and section 12 [hereinafter VGGT]. The VGGT refer to land investments in general terms. In practice, however, they have been primarily applied to the agriculture sector, in line with the institutional mandate of the United Nations bodies that were involved in their development.

⁶⁰VGGT, paras. 9.9, 12.6, 12.7 and 12.9.

⁶¹E.g. VGGT, paras. 1.1, 2.2, 3.2, 3B.1, 3B.4, 4.1, 4.3, 4.8, 4.9, 9.3, 12.4, 12.6, 12.8, 16.7, 16.9.

⁶²VGGT, paras. 4.8.

⁶³See for example the extensive jurisprudence of the Inter-American Court of Human Rights on the human right to collective property, discussed in Cotula (2017).

⁶⁴E.g. *Saramaka People v. Suriname*, Judgment, Inter-American Court of Human Rights (28 November 2007), para. 134.

The upshot is that diverse resource ownership patterns translate into different combinations of public and private elements in natural resource contracting, and considerable variation across sectors and jurisdictions. Privately held resource rights can underpin contracts led by non-state actors, but in many jurisdictions natural resource contracts involve the state or a state-owned entity. Even where the state formally owns the relevant resource under national law, however, authorities are not entirely free to transact resource rights. International instruments create spaces for other resource right holders to have their voices heard in contracting, and—depending on the jurisdiction—national law may establish comparable safeguards. So while resource ownership can enable public authorities to play an important role in contracting, this role coexists with a wider range of relevant resource right holders and affected actors, and it is subject to both internal and external parameters—because authorities must manage the resources in the interest of the people, and because they must come to terms with resource rights protected under national or international law.

2.3 Consent

While rules vary across jurisdictions, a contract is typically binding by virtue of the consent manifested by the parties. In natural resource contracts, consent is connected to issues of sovereignty and ownership. In relation to contracts between investors and states, international arbitral tribunals have clarified that, in expressing its consent to be bound by the contract, a state exercises its sovereignty.⁶⁵ In addition, the right to transact or alienate an asset is widely considered an attribute of ownership,⁶⁶ although restrictions may apply including to publicly owned assets. Conversely, the parameters of sovereignty and ownership limit the manifestation of consent. This is not only because, as discussed, a contracting party cannot transfer resource rights it does not hold. Wide-ranging legal obligations, including under international law, have further knock-on effects on consent.

It is commonly accepted in contract law that external bounds delimit the realm of the parties' consent. In transnational commercial transactions, for example, it is recognised that freedom of contract—that is, freedom to enter into a contract and determine its content—is restricted by the application of “mandatory rules, whether of national, international or supranational origins, which are applicable in accordance with the relevant rules of private international law”.⁶⁷ Over a long-term historical trajectory, national laws in diverse areas such as rentals, labour and

⁶⁵*Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, 19 January 1977, 53 ILR 389, paras. 66–68.

⁶⁶See e.g. Penner (1997).

⁶⁷UNIDROIT Principles of International Commercial Contracts 2016, Article 1.4.

consumer protection have reconfigured the classical notion of freedom of contract,⁶⁸ and often extensive legal requirements shape what the contracting parties can lawfully agree. Comparably, in natural resource contracts the sovereign duties of states affect the range of commitments that states can lawfully consent to, and the safeguards that states must establish for the manifestation of consent in contracts between private parties.

Human rights obligations illustrate this point. Under international law, states have a duty to respect human rights—that is, to refrain from infringing on those rights; as well as a duty to protect human rights from interference by third parties, including business entities in the context of natural resource investments.⁶⁹ Failure to uphold these duties in natural resource investments has been found to violate human rights treaties.⁷⁰ It is worth recalling that businesses, for their part, have the responsibility to respect human rights—that is, “they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.⁷¹ Therefore, expressions of consent for a natural resource contract between a state and a business entity would engage, at the same time, the duties of the state to respect and protect human rights, and the responsibility of businesses to respect those rights. In this context, a state could not lawfully consent to contractual provisions that are inconsistent with its duty to respect and protect human rights. In addition, states must provide the regulatory framework to ensure that any contracts between non-state actors respect human rights.

Besides setting external bounds for the manifestation of consent, the duty of states to exercise sovereignty and manage publicly owned resources in the interest of their people also establishes internal parameters that qualify consent from within. This configuration outlines even more far-reaching qualifications to the classic principle of freedom of contract. In private transactions, freedom of contract is mainly qualified through the external boundaries established by mandatory rules, so in principle the parties can autonomously determine their contracting objectives as long as legal requirements are complied with. In contracts involving the exercise of sovereignty, on the other hand, the manifestation of consent is inherently tied to the pursuit of public policy goals advancing the interest of the people that public authorities represent. For example, the duty of ICESCR states parties to progressively realise

⁶⁸For a classic study, see Atiyah (1979).

⁶⁹Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 March 2011, Principle 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, 10 August 2017, E/C.12/GC/24.

⁷⁰E.g. *The Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v. Nigeria*, 27 October 2001, Communication No. 155/96, African Commission on Human and Peoples’ Rights, paras. 55–58.

⁷¹Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 March 2011, Principle 11. If successful, the ongoing negotiation of a proposed treaty on transnational corporations and other business enterprises with respect to human rights could entail significant normative shifts in this area.

economic, social and cultural rights to the maximum of their available resources, discussed above, requires those states to take steps to maximise the contribution that natural resource development provides to the realisation of human rights.

This duty of states to act in the interest of the people also has implications for the actors and processes involved in the formation and expression of consent. In investor-state contracts, national law may establish channels for parliament and citizens to influence public decisions underpinning the state's consent. Process-related parameters relevant to investor-state contracts are also established by international human rights law, including via political rights such as the right to vote and freedom of expression and association, and the rights of consultation and participation pertaining to indigenous peoples. These parameters disqualify possible manipulations of the framing delineated in General Assembly Resolution 1803, because public authorities cannot claim to advance the "well-being of the people" on the basis of paternalistic visions that take little account of the concerns and aspirations of those whose interests they are meant to pursue.

Besides framing the formation and manifestation of a state's consent in investor-state contracts, the parameters of sovereignty and ownership—including the links that connect resource rights to human rights—provide the normative basis for multi-actor processes whereby the contract rests, at least in part, on the consent of relevant resource right holders. In this context, the notion of consent has been deployed to advance interests not associated with state sovereignty that, in legal terms, may—or may not—involve formal resource ownership.

Free, prior and informed consent (FPIC) is a case in point. It features prominently in international instruments concerning indigenous peoples.⁷² While the specifics vary depending on the instrument and the issue, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) calls on states to recognise the rights to the land, territories and resources that indigenous peoples own, occupy, use or possess⁷³; and to consult indigenous peoples "in good faith" and "in order to obtain their free, prior and informed consent" before adopting measures or approving projects that may affect those peoples or their lands, territories or resources.⁷⁴ The International Labour Organisation's Convention No. 169 contains broadly comparable provisions.⁷⁵ Further, the UNDRIP provides more stringent parameters of consent for situations that involve relocating indigenous peoples.⁷⁶

⁷²Particularly the United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, G.A. Res. 61/295, Articles 19 and 32(2) [hereinafter UNDRIP]; and Convention No. 169 of the International Labour Organisation Concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989), Article 6 [hereinafter ILO Convention 169].

⁷³UNDRIP, Article 26.

⁷⁴UNDRIP, Articles 19 and (using slightly different wording) 32(2).

⁷⁵E.g. Articles 6 and 13–19 of ILO Convention 169. There are some significant differences, however. For comparative analysis of the UNDRIP and ILO Convention 169, see Rombouts (2017).

⁷⁶Article 10 of the UNDRIP provides: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

The notion of FPIC has also been developed in international human rights jurisprudence. In cases concerning commercial or development projects in the ancestral territories of indigenous or tribal peoples, the Inter-American Court of Human Rights has cited the UNDRIP and/or Convention 169 to configure FPIC as one element of the human right to collective property.⁷⁷ Although some judgments have referred more generally to the “right to consultation” rather than specifically to FPIC,⁷⁸ the Inter-American Court has clarified that consultation must be in good faith and “with the aim of reaching an agreement or obtaining consent”.⁷⁹ Further, the Inter-American Court of Human Rights has deemed this duty to consult indigenous peoples to be a general principle of international law, applicable irrespective of any treaty obligations.⁸⁰

These international norms have implications for natural resource contracts, because FPIC can affect the contracting process, and because FPIC exercises may themselves lead to partnership agreements.⁸¹ It must be noted that FPIC has been at the centre of intense debates, partly owing to concerns that its application might undermine the ability of states to award resource concessions they deem necessary to promote national development. Different positions in these debates are reflected in diverse interpretations of what FPIC means in practice, ranging from a full-fledged “right to veto” (often advanced by indigenous movements and NGOs) to bureaucratic or box-ticking consultation exercises (often in the perspectives of governments and businesses, respectively).⁸² In terms of positive law, jurists have noted that the duty to consult in good faith in order to obtain consent establishes “more than a mere right to be informed and heard but less than the right of veto”⁸³; though as discussed the UNDRIP sets more stringent FPIC requirements for cases involving relocation. Rather than undermining the exercise of sovereign powers, FPIC seems consistent with a pluralist construction of sovereignty that rests on both rights and duties and recognises spaces for decentralised exercise of public authority.⁸⁴

⁷⁷*Saramaka People v. Suriname*, Judgment, Inter-American Court of Human Rights (28 November 2007) para. 134. The African Commission on Human and Peoples’ Rights followed this jurisprudential approach in *Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya*, supra, paras. 226–228.

⁷⁸For example, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-American Court of Human Rights (27 June 2012), e.g. paras. 160, 163–167.

⁷⁹*Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-American Court of Human Rights (27 June 2012), para. 185.

⁸⁰*Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-American Court of Human Rights (27 June 2012), para. 164.

⁸¹Anaya (2013).

⁸²Anaya and Puig (2016).

⁸³Anaya and Puig (2016), p. 2. See also Rombouts (2017).

⁸⁴See also Doyle (2015) and Fox-Decent and Dahlman (2015).

3 From Concepts to Practice: Illustrative Issues

3.1 *Investor-State Contracts*

The configuration of the legal categories that underpin natural resource contracts—sovereignty, ownership and consent—has important practical implications. Some relate to the procedural and substantive dimensions of investor-state contracts. Others concern reframing the contracting process around a wider range of actors, including holders of legitimate tenure rights and people affected by project implementation. This section examines investor-state contracts, while the subsequent section explores community-investor and multi-actor contracts. Due to space constraints, the aim is to illustrate the issues rather than to discuss them comprehensively or in depth. Three examples illustrate implications for investor-state contracting processes. They concern issues of transparency, parliamentary approval and local consultation. The implications affect contractual practice, the wider governance frameworks it fits in, or the interpretation of general norms as they apply to contracting. Examples to illustrate content-related implications in investor-state contracts include stabilisation clauses and third-party rights.

Starting with transparency issues, there have long been concerns that opacity in contracting and non-disclosure of contracts create the breeding ground for corruption and deals that do not maximise the public interest.⁸⁵ These concerns have fuelled calls for transparency of contracts and contracting,⁸⁶ where transparency is considered a pre-condition for citizens to hold authorities to account for the way they manage collective resources. Human right law affirms this connection between transparency and political rights, with international jurisprudence having linked public access to investor-state contracts to freedom of thought and expression.⁸⁷ While empirical questions remain as to whether and how transparency translates into accountability, and while opinion is often divided on how to reconcile multiple commercial and non-commercial interests, there is substantial support for the proposition that, compared to purely commercial transactions, investor-state contracts should entail a different balance between transparency and confidentiality.

This support is reflected, for example, in authoritative international guidance providing for transparency and disclosure,⁸⁸ national laws mandating contract

⁸⁵Ayine et al. (2005) and Rosenblum and Maples (2009).

⁸⁶Rosenblum and Maples (2009), stating that “citizens have a right a right to know” how the government manages publicly owned resources (p. 15).

⁸⁷*Claude Reyes and Others v. Chile*, Judgment, Inter-American Court of Human Rights, 19 September 2006.

⁸⁸E.g. Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, 25 May 2011, UN Doc. A/HRC/17/31/Add.3, Principle 10. See also EITI (2016), Section 2.4(a).

disclosure,⁸⁹ and growing initiatives to facilitate public access to contracts.⁹⁰ A significant number of extractive industry contracts are now publicly available, though many others are not and progress has been more limited in other sectors including agribusiness.⁹¹ The public law dimensions involved in natural resource contracting, and the fact that authorities must act in the interest of their people, arguably strengthen the case for transparency and accountability,⁹² and for deepening the (still tentative) transition towards normalising disclosure.

The second process-related example concerns the place of parliamentary approval in natural resource contracting. To ensure that states exercise their sovereignty and (where relevant) resource ownership in the interest of the people, some national constitutions establish safeguards for the expression of consent in investor-state contracts. In some jurisdictions, the constitution requires parliamentary approval as a condition for the state to perfect its consent.⁹³ There are questions about the difference these mechanisms can make in practice,⁹⁴ and the relevance of these requirements depends on the overall constitutional set up—particularly the nature of the relationship between the executive and the legislature. Where requirements do apply, complex legal issues can arise if the government concludes contracts without parliamentary approval. With regard to *treaties*, under international law a state cannot “invoke the fact that its consent to be bound by a treaty was expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance”.⁹⁵

An analogy may be drawn with *contracts*, and an argument may be made that constitutional requirements for parliamentary approval are rules “of fundamental importance” that an investor acting with due diligence should be aware of. However, some investor-state arbitral tribunals have deemed contracts to have effect despite the absence of the required parliamentary approval, holding that states were estopped from challenging in the arbitration the validity of contracts they had until then treated as valid.⁹⁶ Such interpretations could undermine the effectiveness of constitutional arrangements aimed at aligning a state’s manifestation of consent with pursuit of public policy goals that connect natural resource development to enhancing the “well-being of the people” (in the language of Resolution 1803). Giving effect to

⁸⁹E.g. Liberia Extractive Industries Transparency Initiative Act 2009, Article 5.

⁹⁰ResourceContracts.org and OpenLandContracts.org.

⁹¹Webb et al. (2017).

⁹²Miranda (2007).

⁹³See e.g. Article 181(5) of the 1992 Constitution of the Republic of Ghana, and Article 71 of the 2010 Constitution of the Republic of Kenya.

⁹⁴Depending on the context, for example, the government may structurally enjoy the support of the parliamentary majority, and members of parliament may lack the time and expertise needed to perform this role effectively.

⁹⁵Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), Article 46(1).

⁹⁶See e.g. *Bankswitch Ghana Ltd. (Ghana) v. The Republic of Ghana*, Award Save as to Costs, 11 April 2014, UNCITRAL, particularly paras. 11.71–11.97.

the conceptual configuration of sovereignty, ownership and consent, outlined above, may require a different balance between investment protection and procedural propriety—expecting investors to identify any parliamentary approval requirements as part of due diligence processes and to bear the consequences of fundamental procedural defects.

The third process-related example concerns local consultation or FPIC requirements. These have implications for the structuring of contracting processes, for instance with regard to the sequencing of key decisions and contractual instruments. They also raise questions about the validity of contracts concluded in violation of applicable consultation or FPIC requirements, and about the legal value of representations government officials make during the negotiations. This latter point can illustrate the issues. Government representations could involve assurances to the investor that the land is free of encumbrances, or promises that the necessary permits will be issued. Interpreting fair and equitable treatment provisions contained in many international investment treaties, investor-state arbitral tribunals have considered that government representations can create “legitimate expectations” on the part of the investor, and that subsequent state conduct frustrating those expectations can violate the investment treaty.⁹⁷

One question is whether government representations made before consulting affected resource right holders, and thus potentially in violation of applicable consultation or FPIC requirements, can create legitimate expectations. As discussed, international human rights instruments shape the parameters of state sovereignty and resource ownership, and authorities cannot lawfully take measures that violate human rights. Arbitral tribunals have held that the protection of human rights provides relevant context to frame the investor’s expectations.⁹⁸ There is therefore a compelling argument that investors’ expectations should not be considered legitimate if, in making the representations, authorities breached their duty to respect and protect human rights.⁹⁹ Businesses have a responsibility to respect human rights, including by conducting human rights due diligence,¹⁰⁰ and this arguably requires investors to ensure that their expectations are premised on respect for human rights.

With regard to the substantive content of contractual provisions, one issue is that the investor-state contract involves a bilateral relationship between two parties but the state has duties vis-à-vis third-party holders of (human, resource) rights. These rights/duties limit what states can lawfully agree to when concluding the contract.¹⁰¹ This is partly reflected in the Guiding Principles on Business and Human Rights:

⁹⁷*International Thunderbird Gaming Corp. v. The United Mexican States*, Award, 26 January 2006, UNCITRAL, paragraph 147.

⁹⁸*Urbaser S.A. and Corsorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, Award, 8 December 2016, ICSID Case No. ARB/07/26, paras. 622–624.

⁹⁹Cotula (2016) and Cordes et al. (2017).

¹⁰⁰Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 March Principles 11, 13 and 15.

¹⁰¹Leader (2006).

Principle 9 affirms that “states should maintain adequate domestic policy space to meet their human rights obligations” when negotiating investor-state contracts.¹⁰² This principle articulates, from a human rights perspective, the external parameters of consent, by guiding states not to agree to provisions that would unduly restrict their ability to advance human rights. In line with their non-binding nature, the Guiding Principles frame this provision in non-mandatory terms. As discussed, however, binding human rights law has reconfigured the legal contours of state sovereignty and resource ownership, with implications for the bounds of consent. An annex to the Guiding Principles contains Principles for Responsible Contracts that provide more detailed guidance on specific contractual issues.¹⁰³

Stabilisation clauses illustrate this point. Broadly speaking, these clauses aim to shelter investments from adverse changes in law that could undermine the investors’ rights or returns. There is great diversity in formulations. Some clauses purport to “freeze” applicable law to the norms in force at a specified time, excluding the application of subsequent legislation. On the other hand, so-called economic equilibrium clauses link adverse changes in law to requirements that the government restore the contract’s economic equilibrium—for example, and depending on the wording, via contract renegotiation or possibly payment of compensation. Hybrid clauses combine freezing and economic equilibrium elements.¹⁰⁴

Over the years, activists and jurists have raised concerns that a mechanical application of stabilisation clauses could constrain the implementation of deserving social, environmental or economic measures, including steps to realise human rights.¹⁰⁵ More stringent rules on community consultation, labour relations, health and safety, and environmental protection—to name but a few potentially relevant examples—could adversely affect investments and trigger the application of stabilisation clauses. The concern is that states may have to exempt projects from the new measures; or else that, if states must bear the costs those measures cause, they may be discouraged from acting in the first place, particularly where public finances are under strain.¹⁰⁶ As a result, people affected by the social and environmental impacts of natural resource investments could remain subject to obsolete (“stabilised”) rules over often long contract durations.

The parameters of sovereignty, ownership and consent have a bearing on these issues. As the sovereign right of states to enter into contracts is qualified by their duty

¹⁰²Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 March 2011, Principles 11, 13 and 15.

¹⁰³Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

¹⁰⁴Shemberg (2009) and Cameron (2010). More generally, see also Wälde and N’Di (1996) and Johnson and Volkov (2013). On the different issues raised by the stabilisation clauses found (arguably more rarely) in investment treaties, see Gazzini (2017).

¹⁰⁵See e.g. Amnesty International UK (2003, 2005). On the environmental dimensions, see Tienhaara (2006), Cotula (2008) and Viñuales (2012).

¹⁰⁶Amnesty International UK (2005).

to respect and protect human rights, any stabilisation commitments would need to be drafted (or interpreted, if drafting was not explicit) as only covering issues that the state can lawfully transact. Measures that states adopt to comply with their human rights obligations would lie outside the scope of any stabilisation clauses.¹⁰⁷ The Principles for Responsible Contracts provide broadly consistent guidance with regard to the drafting of stabilisation clauses. According to Principle 4:

Contractual stabilization 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.¹⁰⁸

The commentary to this principle clarifies that areas such as “labour, health, safety, the environment, or other legal measures that serve to meet the State’s human rights obligations” should be excluded from the scope of freezing clauses, and that economic equilibrium clauses should not contemplate financial repercussions for human rights measures.¹⁰⁹ To be clear, this guidance does not suggest that stabilisation clauses formulated within such bounds would be desirable or well advised.¹¹⁰ Investors and states may have different interests, with investors typically favouring stability, and states potentially being wary of arrangements that could affect their ability to regulate over time. However, the point made here is about legally inscribed limitations rather than judgments of policy opportunity: stabilisation clauses that purport to limit the right and duty of a state to comply with its human rights obligations would be at odds with international law; and a state’s sovereign right lawfully to conclude contracts would not extend to clauses that conflict with international obligations. Depending on the jurisdiction, additional doubts may arise about the legality of stabilisation clauses—particularly those of the freezing kind—under constitutional law.

Besides delimiting the external bounds of what a state can lawfully agree to, the interplay of sovereignty, ownership and consent also influences the internal parameters of investment contracting. These parameters proceed from the duty of states to ensure that natural resource development benefits their people, which in turn stems from Resolution 1803 and the ICESCR, and—depending on the jurisdiction—from any national legislation requiring authorities to manage resources in people’s interest. Natural resource contracts often involve complex policy choices, and wide political discretion, on how best to advance the public interest in diverse situations. For example, some states may favour contractual clauses that promote business,

¹⁰⁷Leader (2006) and Cotula (2008).

¹⁰⁸Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, 25 May 2011, UN Doc. A/HRC/17/31/Add.3, Principle 4.

¹⁰⁹Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, 25 May 2011, UN Doc. A/HRC/17/31/Add.3. Principles for Responsible Contracts, Key implications of Principle 4.

¹¹⁰See the wording “if used” in Principle 4.

employment and/or training opportunities for local actors, or that require investors to finance public infrastructure. At scale and depending on the circumstances, however, these provisions might affect the fiscal take. Other states may prefer to maximise public revenues instead, and use these revenues to sustain public services or promote inclusive development without delegating these functions to private sector operators. States can legitimately make different policy choices on such issues and trade-offs.

However, state conduct deliberately awarding commercial resource rights in the absence of any reasonably commensurate benefits being generated and earmarked to advancing human rights could come under scrutiny against the obligation of ICESCR states parties to progressively realise economic, social and cultural rights to the maximum of their available resources. There are also questions about legal arrangements that could facilitate more active roles for the people in whose interest authorities conclude the contract: insofar as any policy choices made involve contractual provisions that benefit third parties, one issue is whether those third parties can play any role in monitoring and enforcement. Examples of relevant investor-state contract provisions include requirements for the investor to finance local development funds, or to apply specified standards of compensation for land acquisition. In these cases, third parties such as relevant resource right holders and people affected by project implementation may benefit from contract compliance, yet they are often outside of the investor-state negotiation and contract.

It is accepted that contracts can create rights for third parties, depending on their circumstances and formulation.¹¹¹ Some scholars have argued for harnessing the “third party beneficiary principle”, as it applies in some jurisdictions, to enable third parties to access legal remedies for investor-state contract provisions that create rights for them.¹¹² A pre-condition for this arrangement to work is that third parties know about the relevant clauses, which compounds the case for transparency. Applicable contract law has a bearing on third-party rights, and analytical work remains to be done to assess how third-party rights might work in diverse national legal frameworks. In more general terms, however, these exploratory reflections illustrate how (re)configuring the conceptual foundations based on positive law has wide-ranging practical implications for investor-state contracts and their governance frameworks—strengthening the case for transparency and for taking parliamentary approval requirements seriously; installing FPIC in contracting processes; restricting the bounds of “legitimate expectations” and any stabilisation clauses; and developing arrangements to ensure natural resource development advances economic, social and cultural rights.

¹¹¹In relation to transnational commercial transactions, for example, Articles 5.2.1–5.2.6 of the UNIDROIT Principles of International Commercial Contracts cover third-party arrangements.

¹¹²Gathii (2014). See also OHCHR (2015).

3.2 *Community-Investor and Multi-Actor Contracts*

The conceptual discussion highlighted that, under international law, the state represents its people and exercises sovereignty over natural resources. While in many jurisdictions land is privately owned, national laws tend to vest ownership of subsoil resources with the state for the benefit of the people. In many jurisdictions, the state also owns or control part or all of the land. National law typically empowers authorities to award commercial concessions. As a result, the state often plays an important role in natural resource contracting, though the extent and nature of this role vary across countries and sectors. This account emphasises the bilateral relationship between the investor and the state, with the investor being deemed to advance commercial interests (while upholding their responsibility to respect human rights), and the state to bear the public interest of its people (including those most directly affected by the project, and citizens at large).

More pluralist accounts of political organisation point to the complexities affecting the contours and operation of the state in real-life socio-political settings. Political economy factors can create misalignments between state action and the aspirations of the diverse constituencies the state is meant to represent. The distributive dimensions of natural resource investments compound these challenges: public revenues may accrue to the national level and their use may advance the priorities of those in power; while a disproportionate share of adverse impacts such as land acquisition and environmental degradation are felt at the local level. In effect, significant costs are borne by actors excluded from the investor-state contract.¹¹³ These actors may have limited ability to influence the state's negotiating position. Partly reflecting these structural issues, many resource projects have triggered disputes between states and affected people. Human rights jurisprudence provides several examples of litigation originating from the contested award of natural resource concessions.¹¹⁴ Reconfiguring the procedural and substantive parameters of the investor-state contract can go some way towards addressing these problems; but the challenge does question the bilateral (investor-state) framing of natural resource contracts.

Ultimately, investors need local support if their ventures are to thrive in the longer term. Coupled with local actors' advocacy for shifts in project approaches, this need has underpinned growing experience with community-investor contracts—a practice now documented in many countries from North and South America, Africa, Central Asia, Southeast Asia and Oceania.¹¹⁵ The terminology used to describe these agreements varies (e.g. community development agreements, social responsibility agreements, partnership agreements), as does their content. Some scholars have discerned an ongoing transition from a narrow emphasis on social infrastructure (schools, health facilities) to more comprehensive agreements also encompassing employment and

¹¹³Gathii (2014).

¹¹⁴For a discussion, see Cotula (2017).

¹¹⁵O'Faircheallaigh (2013), writing on the mining sector.

training, revenue sharing or joint venture arrangements, and/or continued community access to resources insofar not inconsistent with commercial activities.¹¹⁶ However, research suggests that any such transition is not linear, and highlights the limitations of contractual practices often characterised by weak and unspecific formulations.¹¹⁷ Further, empirical studies have documented shortcomings in the operationalisation of seemingly promising partnership models, for example pointing to inadequate consultation, limited effectiveness of board representation and/or lack of dividend payments in agriculture-related community-investor joint ventures.¹¹⁸

A relation exists between community-investor agreements and the configuration of sovereignty, ownership and consent. By aiming to ensure that people affected by resource projects participate in decision making and in the socio-economic benefits those projects generate, community-investor agreements offer one vehicle for states to exercise sovereignty over natural resources in the interest of the people, as required by General Assembly Resolution 1803, and ensure compliance with human rights norms. Alternative or complementary models are available, such as institutionalised vehicles for political participation, and legislation that uniformly regulates the distribution of socio-economic benefits created by all relevant investments.

In addition, community-investor agreements respond to resource ownership patterns. Recognising all socially legitimate tenure rights, as called for by the VGGT, provides local actors with a direct stake in contracting processes—because resource transactions should inevitably engage the actors whose resources are transacted. Where local groups own lands or resources, community-investor agreements can provide the main source of the investor’s tenure rights, for instance in the form of land lease or joint venture arrangements.¹¹⁹ For state-owned resources, local resource use rights or claims can provide the basis for the negotiation of community-investor agreements that, while not conferring commercial resource rights to investors directly, regulate other aspects of the relationship.

Multiple legal instruments sustain the relevance of community-investor agreements even if local actors lack formal resource ownership rights. National law may require investors to negotiate community-investor agreements as a condition for the state to award commercial concessions. International soft-law instruments such as the VGGT call for partnerships with affected resource right holders.¹²⁰ And regional human rights institutions have emphasised benefit sharing when interpreting the human right to collective property in connection with customary rights to natural resources.¹²¹ While such national and international instruments

¹¹⁶O’Faircheallaigh (2013).

¹¹⁷Loutit et al. (2016).

¹¹⁸E.g. Majid Cooke et al. (2011), Lahiff et al. (2012) and Djiré et al. (2013).

¹¹⁹E.g. Boamah (2014), writing on Ghana’s agricultural sector.

¹²⁰E.g. VGGT paras. 12.6, 12.9, 12.10, 12.14.

¹²¹E.g. *Saramaka People v. Suriname*, Judgment, Inter-American Court of Human Rights (28 November 2007), para. 134. See also Morgera (2016).

decouple community-investor agreements from outright resource ownership, evidence suggests that ownership can give local actors real leverage. In Australia and Canada, the more effective community-investor partnerships often seem tied to developments in native title (Australia) and land claims (Canada).¹²²

The links with the notion of consent are also apparent. By providing a channel for local actors to express their consent to the project, the negotiation of a community-investor agreement could constitute an element of FPIC processes. A landmark report by the then UN Special Rapporteur on the Rights of Indigenous Peoples identified natural resource development by indigenous peoples themselves as the first-best option; but should this option not be available owing to the significant capital and know-how requirements, the report called for FPIC-based partnership agreements between businesses and indigenous peoples.¹²³ However, a community-investor agreement does not, in itself, signal FPIC: depending on the wording, local actors may be consenting to receiving certain benefits from a project they oppose but cannot do anything about,¹²⁴ and some community-investor agreements were concluded after the project was initiated (against requirements for consent to be *prior*).¹²⁵

Community-investor agreements raise significant practical challenges. Three deserve particular attention. The first concerns the notion of “community”. Contractual practice often uses this term (e.g. “community development agreement”) and some national laws define it.¹²⁶ However, the notion raises difficult legal and philosophical questions, including about how to piece together multiple collective and individual interests. Further, groups vary considerably: “communities” can refer to an indigenous people, a number of indigenous peoples or groups within an indigenous people; or it can describe local residents united by geographic proximity and the impact of an investment who do not necessarily see the group as a stable source of social identity. This diversity has legal implications, reflected for example in the specific rights of indigenous peoples under international law.

In addition, social realities do not always fit legal categories: collective identities may present fluid boundaries and evolve over time, and communities may host divided opinions and social differentiation including based on wealth, gender, age or ethnicity. Questions arise about the representativeness and accountability of local leaders, and mechanisms for selecting community representatives vary greatly—from mobilising traditional leaders to establishing new bodies such as

¹²²O’Faircheallaigh (2010).

¹²³Anaya (2013).

¹²⁴Odumosu-Ayanu (2015). However, some agreements explicitly affirm that the community supports the project (O’Faircheallaigh 2010).

¹²⁵Gathii and Odumosu-Ayanu (2015).

¹²⁶Examples include, in Mozambique, the Land Act 1997, Article 1(1) (defining “local community”); and in the Philippines, the Indigenous Peoples’ Rights Act 1997, Article 3(h) (defining “indigenous cultural communities”).

elected committees, associations or cooperatives.¹²⁷ Potential divides have also been identified between the communities negotiating partnership agreements and the lawyers advising them.¹²⁸ Meaningful community-investor agreements rest on addressing such difficult issues about “community” and its representation. This may require significant investment in time and resources ahead of actual community consultations or negotiations. These dimensions concern the realm of practice more than law, but—in interrogating the nature of the actors expressing consent, and the process for doing so—they do raise issues about the legal frameworks governing social organisation and contracting processes.

The second set of challenges concerns the reality of developing community-investor agreements in contexts that typically involve significant imbalances in negotiating power.¹²⁹ These are likely to depend on factors affecting communities (such as social cohesion, strength of local organisations, quality of local leadership, technical and financial resources) and external forces (e.g. investor corporate policies, time pressures), but local actors are often at a disadvantage.¹³⁰ As a result, community members may experience frustrations, divisions and stress, and they may ultimately not obtain the terms they seek.¹³¹ As has been pointed out for relations among states, the voluntarism inherent in the notion of consent belies the restricted freedom of action that can exist “when choices are between lesser evils”, leading critical commentators to draw a distinction between tactical consent and genuine approval.¹³² Again, these considerations concern practical rather than doctrinal issues, but they can entail legal reverberations. Communities may be exposed not only to unfavourable and even exploitative arrangements, but also to legal risks and possibly financial liabilities flowing from their being a party to the contract—particularly in community-investor contracts that encompass commercial dimensions, such as land leases or joint venture agreements.

These issues would require careful thinking through, especially where imbalances in negotiating power or in available legal and technical support place the community at a disadvantage. It is worth noting that, in relation to some other types of contractual negotiations involving significant power asymmetries (e.g. labour or consumer contracts), juridical configurations have historically tended to move away from an exclusive reliance on consent as the foundation of the contract, with regulation setting mandatory parameters that favour the weaker contracting party. Recent “modern slavery” legislation has also restricted the relevance of consent when determining if a person is held in slavery or required to perform compulsory labour.¹³³ These trends raise questions about the role that national and international

¹²⁷O’Faircheallaigh (2013).

¹²⁸Desai (2013).

¹²⁹O’Faircheallaigh (2013).

¹³⁰O’Faircheallaigh (2013) and Szoke-Burke and Cordes (forthcoming).

¹³¹Szoke-Burke and Cordes (forthcoming).

¹³²Salomon (2008), p. 42.

¹³³See for example the United Kingdom’s Modern Slavery Act 2015, Sections 1(5) and 2(2).

law can play in establishing the conditions for meaningful consent and possibly minimum substantive standards for any community-investor agreements.

The third set of issues concerns the place of the community-investor agreement in natural resource contracting, and particularly its relation to the investor-state contract. These dimensions can affect the relevance and legal bite of any community-investor agreement. In some cases, the community-investor and investor-state contracts appear to be entirely separate agreements, without effective mechanisms linking the two—an arrangement that can create problems during implementation. At the other end of the spectrum lie tripartite contracts, or tripartite transactions involving coordinated bundles of bilateral contracts, that bring together the government, the investor and communities within a single, multi-party contractual framework.¹³⁴ Yet other approaches involve separate community-investor and investor-state agreements, but link these agreements in procedural and/or substantive terms.

A few examples can illustrate the reverberations of these issues for the effectiveness of contracts in addressing community-investor relations. The interface between community-investor and investor-state contracts can affect sanctions for investor non-compliance with the community-investor agreement—including whether the state can terminate the investor-state contract for material breaches of the community-investor agreement. Process-related questions concern the sequencing between the two contracts: concluding the investor-state agreement first could limit options for the community-investor negotiation and undermine its usefulness for FPIC, which requires *prior* consent; but it could also provide one avenue for setting minimum parameters (e.g. on the terms of an outgrower scheme, were relevant to an agribusiness venture) that might help communities in their negotiation with the investor. Addressing these questions may require step-by-step contracting—whereby an initial investor-state contract outlines key specifics but keeps options open to enable FPIC and impact assessments; and a fuller investor-state contract is informed by the outcomes of those local processes including any community-investor agreements.

For all three sets of challenges, contractual and regulatory practice is yet to settle, and legal scholarship is still in its infancy. The effectiveness of community-investor agreements vis-à-vis other forms of regulation, including taxation-based benefit-sharing arrangements governed by national legislation, is yet to be rigorously assessed. Conceptually, however, trends towards multi-actor contracting align with a configuration of sovereignty, ownership and consent that recognises the interplay of both rights and duties in the construction of these legal categories.

¹³⁴Odumosu-Ayanu (2014) and Gathii and Odumosu-Ayanu (2015).

4 Conclusion

This study has explored how legal concepts can help to reframe contractual practice. The investigation highlighted the role that, in a “Westphalian” system, states tend to play as the organisational vehicles for holding and exercising sovereignty and, in many jurisdictions, resource ownership. At the same time, international legal instruments place people at the centre of concerns about sovereignty. The obligations that these instruments create—including via strong connections between human and resource rights—have redesigned the contours of state sovereignty. Depending on the jurisdiction, national law may vest important resource rights with non-state actors and set up arrangements to ensure that states manage publicly owned resources in the interest of the people. This overall configuration establishes both internal and external parameters for lawful state conduct, including the formation and manifestation of state consent in natural resource contracting. It also underpins more pluralist approaches whereby contracting rests, at least in part, on the consent of a wider range of resource right holders and affected actors.

Focusing on illustrative issues, the study then distilled the practical implications of this analysis. It found these implications to be wide-ranging—from the substantive content of contracts to their parties and formation process. Some such implications affect the substantive or procedural dimensions of investor-state contracts, or the framing and interpretation of the norms applicable to these contracts; while others set the scene for multi-actor contracting that involves not only investors and states but also actors affected by the investment. Each of these arenas has already experienced developments in contractual practice, including shifts towards greater contract transparency and growing experience with community-investor agreements; but the conceptual configuration of sovereignty, ownership and consent provides a more systemic foundation for addressing interrelated issues that have often been handled in isolation.

These findings underpin forward-looking agendas for both research and action. The still fluid nature of some areas of contractual practice, particularly in relation to multi-actor contracting, creates opportunities for action to develop new approaches. At the same time, difficult practical and conceptual questions remain—for example, on the conditions that need to be in place, where negotiating power is very imbalanced, for consent to meaningfully provide the normative foundation of the contract. Therefore, continuing analysis can helpfully inform the action, which could in turn generate lessons for both contractual practice and research agendas. In taking forward this work, the location of natural resource contracting at the interface between national and international law; the combined operation of diverse sectoral and cross-sectoral (e.g. human rights, environmental) norms; and the complex relations between the normative and the experienced—all point to the value of interdisciplinary approaches that cut across traditional boundaries between research and practice, and between academic disciplines.

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