16. Extractive industry for sustainable development? Some reflections on the role of investment contracts in ensuring benefit sharing and community participation in natural resource governance

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1. THE PROBLEMATIC RELATIONSHIP BETWEEN EXTRACTIVE INDUSTRY AND SUSTAINABLE DEVELOPMENT

Contrasting perspectives exist with regard to the benefits of foreign direct investments (FDIs) in the extractive industry sector.

On the one hand, FDIs in the extractive industry are usually associated with positive effects on the state's macroeconomic performance, government revenues, local employment and ultimately on the economic development of the host state.[2] Indeed, FDIs involve a long-term commitment by a foreign company to a business endeavour in a host state, which usually results into long-term capital, knowledge and capacity flows enabling the host state to efficiently develop and exploit its natural resources.[3]

On the other hand, as international governmental and non-governmental organisations have repeatedly highlighted, 'extractive activities tend to leave a strong environmental [and social] footprint', in the areas where they take place.[4] Moreover, it has been observed that often the

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[2] UNCTAD 'Extractive Industries: Optimizing Value Retention in Host Countries' UNCT AD/SUC/2012/1 (2012) 9–14.

[3] Joseph E. Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2008) 23 (3) *Am. U. Int'l L. Rev*. 453; L. Cotula, *Investment Contracts and Sustainable Development: How to make Contracts for Fairer and more Sustainable Natural Resource Investments* (IIED London 2010) 1.

[4] UNCTAD (n 2) 14; UNHRC (Report of the Special Rapporteur on the rights of indigenous peoples) 'Extractive industries operating within or near indigenous territories' (11 July 2011) A/HRC/18/35 para 82; UNCERD 'Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador' (2 June 2003) U.N. Doc. CERD/C/62/CO/2 para 16; Tony Addison and Alan Roe (eds), Extractive Industries. The Management of Resources as a Driver of Sustainable Development. A study prepared by the United Nations University World

extractive industry 'operates as an enclave in the host country with limited linkages to the broader economy' and, consequently, limited benefit to the local community.[5] According to the Special Rapporteur on the rights of Indigenous Peoples, James Anaya, even in countries where the extractive industry is of key importance for the domestic economy,[6] 'benefits [are often] limited in scope and [do] not make up for the problems associated with these projects'.[7] It is complained that FDIs in the extractive industry endanger the ability of the host state to take advantage of its natural resources in a way that is economically, socially and environmentally sustainable.[8] More specifically, from an economic perspective, the Dutch disease theory has shown that the export of huge amounts of primary materials, by increasing the local currency value, could go to the detriment of the development of an efficient manufacturing sector resulting in a loss of jobs or job opportunities.[9]

In the specific scenario of post-conflict settings, '[a] failure to respond to the environmental and natural resource needs of the population can complicate the task of fostering peace and even contribute to conflict relapse'.[10] In these cases, the governance of FDIs may become crucial not only to achieve economic and social growth, but also to ensure a sustainable development of the peacebuilding process, especially when the extractive industry is the only or the main source of revenue and employment for the local population.[11] In line with some of the most important acquisitions of the academic debate on the resource curse, it can be argued

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Institute for Development Economics Research (UNU-WIDER), Oxford: Oxford University Press 2018; The Extractive Industries Transparency Initiative (EITI), 'Progress Report 2016', 7 https://eiti.org/sites/default/files/attachments/progressreport2016.pdf accessed 23 March 2023; The Organization of American States (OAS), 'IACHR Presents Report on Extractive Industries and Human Rights, Guatemala: OMAL – Paz con Dignidad 2016' http://www.oas.org/en/iachr/media_center/PReleases/2016/048.asp accessed 23 March 2023.

[5] UNCTAD (n 2) 1.

[6] As to data concerning resource dependency, see World Bank Data, 'Total natural resources rents (% of GDP)' (2017) https://data.worldbank.org/indicator/NY.GDP.TOTL.RT.ZS accessed 23 March 2023.

[7] UNHRC (n 4) para 52.

[8] UNGA 'Report of the World Commission on Environment and Development: Our Common Future' (4 August 1987) 42nd Session UN Doc A/42/427.

[9] W. Max Corden and J. Peter Neary, 'Booming Sector and De-Industrialisation in a Small Open Economy' (1982) 92 *The Economic Journal* 825; Michael Bruno and John Sachs, 'Energy and Resource Allocation: A Dynamic Model of the "Dutch Disease"' (1982) 49(5) *The Review of Economic Studies* 845; W. Max Corden, 'Booming Sector and Dutch Disease Economics: Survey and Consolidation' (1984) 36(3) *Oxford Economic Papers* 359.

[10] UNEP, *From Conflict to Peace Building. The Role of Natural Resources and the Environment* (United Nations Environment Programme 2009) 5, 19. Concerning the integration of natural resource management and environmental protection into the peacebuilding process, see Chapter 2 in this volume.

[11] Ibid., 20; UNEP, UN Women, PBSO, UNDP, *Women and Natural Resources. Unlocking the Peacebuilding Potential* (UNEP, UN Women, PBSO and UNDP 2013) 23–24; Mats Berdal and Nader Mousavizadeh, 'Investing for Peace: The Private Sector and the Challenges of Peacebuilding' (2010) 52 *Survival Global Politics & Strategy* 37; Tobias Ide, 'The Dark Side of Environmental Peacebuilding' (2020) *World Development* 2, arguing that '[t]he term [environmental peacebuilding] refers to at least five broad sets of (mutually non-exclusive) practices …[including] the management of natural resources and other environmental issues in (often post-civil war) peacebuilding processes'. As to the relationship between extractive industries and armed conflicts and related studies, see Philippe Le Billon and Rosalyn Duffy, 'Conflict Ecologies: Connecting Political Ecology and Peace and Conflict Studies' (2018) 25 *Journal of Political Ecology* 251.

that an economic system excessively relying on the export of primary materials might be more prone to conflicts for multiple reasons.[12] In this regard, it has been held that the endowment of natural resources of a given country constitutes an incentive for political rivalries and internal conflict and that the exploitation of natural resources generates negative externalities due to factors such as the unequal distribution of revenues and the consequences of the extractive activities on the environment.[13] Furthermore, one should consider that exclusive reliance on the exploitation of natural resources will likely weaken the institutions of the state, interrupting the chain of political legitimacy between the government and the population. The flow of huge amounts of money from abroad into the political system will likely expose local institutions to corruption and could result in the adoption of distorted and self-referential policies.[14]

Against this background, groups which are in a position of subalternity, such as indigenous peoples, are those who are most often negatively impacted by extractive investment projects. Already in his 2011 report, James Anaya observed that large-scale development projects in the extractive industry operating near indigenous territories usually entail major violations of 'the collective cultural, social, environmental and economic rights of indigenous peoples'.[15] In a number of cases, resource dependent countries, have faced claims by indigenous groups before the Inter-American Court of Human Rights denouncing, inter alia, 'the environmental degradation caused by foreign companies that have received mining concessions'.[16]

For all of these reasons, it is crucial that FDIs in the extractive sector, and more in general the management of natural resources, are integrated in the peacebuilding process. If not well managed, the endowment of natural resources might turn from a potential tool for reconcilia-

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[12] For an overview of the debate, see: Robert T. Deacon, 'The Political Economy of the Natural Resource Curse: A Survey of Theory and Evidence' (2011) *Foundations and Trends in Microeconomics* 111; Andrew Rosser, 'The Political Economy of the Resource Curse: A Literature Survey' (2006) IDS Working Paper 268, available at: https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/4061 accessed 23 March 2023; Michael L Ross, 'The Political Economy of the Resource Curse' (1999) *World Politics* 297.

[13] Paul Collier and Anke Hoeffler, 'Greed and Grievance in Civil War' (2004) 56 *Oxford Economic Papers* 563; K. Ballentine, H. Nitzschke, 'Beyond Greed and Grievance: Policy Lessons from Studies in the Political Economy of Armed Conflict' (2003) IPA Policy Report, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/6765C3D3477FE91C8525742400689BD7-IPA_ArmedCoflict_Oct03.pdf accessed 23 March 2023.

[14] Macartan Humphreys, 'Natural Resources, Conflict, and Conflict Resolution. Uncovering the Mechanisms' (2005) *Journal of Conflicts Resolution* 508. As to the link between natural resource exploitation and corruption in the context of post-armed conflict and transitional framework, see Chapter 7 in this volume.

[15] UNHRC (n 4) para 23. See also: UNHRC (Report of the Special Rapporteur on the rights of indigenous peoples) 'Impacts of climate change and climate finance on indigenous peoples' rights' (1 November 2017) A/HRC/36/46 para 9; UNHRC (Report of the Special Rapporteur on the rights of indigenous peoples) 'The right of indigenous peoples to autonomy or self-government' (17 July 2019) A/74/149 para 4.

[16] Inter-American Court of Human Rights *Saramaka People v. Suriname* (2007) (Ser. C) No. 172, para 12. See also, Inter-American Court of Human Rights *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001) 79 Ser. C; Inter-American Court of Human Rights *Case of the Indigenous Community Yakye Axa v. Paraguay* (2005) 125 Ser. C; Inter-American Court of Human Rights *Sawhoyamaxa Indigenous Community v. Paraguay* (2006) 146 Ser. C. See also, Lyuba Zarsky and Leonardo Stanley, 'Can Extractive Industries Promote Sustainable Development? A Net Benefits Framework and a Case Study of the Marlin Mine in Guatemala' (2013)22 (2) *Journal of Environment & Development* 131.

tion and development into a factor favouring the trap of economic underdevelopment and the perpetuation of the cycle of conflicts.

Throughout the years, proposals have been elaborated to limit the adverse effects associated with FDIs in the extractive industry and to help states employ their natural resources to achieve sustainable development goals to the benefit of local communities. For example, the United Nations Conference on Trade and Development (UNCTAD) suggested that natural resource rich countries should leverage on the positive impact of their extractive industries and implement measures aimed both at increasing local industry participation and capacity, including local-content performance targets, and ad hoc taxation regimes.[17] The ultimate goal is to 'develop a competitive local supply industry that … fosters broad-based sustainable development'.[18] The Special Rapporteur on the Rights of Indigenous Peoples also emphasised the need to stimulate community participation in natural resource governance through 'good faith consultations with indigenous peoples on extractive activities that would affect them'.[19] More recently, the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas clarified that the sustainable use of natural resources is crucial not only for indigenous peoples, and stressed the need for states to take measures to ensure *'[m]odalities for the fair and equitable sharing of the benefits* … between those exploiting the natural resources and the peasants and other people working in rural areas' (emphasis added).[20]

In light of the need to stimulate the local community's participation and limit the negative externalities of FDIs, host states have increasingly paid attention to the type of FDIs they attract and have adopted policies to maximise the economic and the non-economic benefits of the extractive industry while minimising negative externalities. At the international level, states have negotiated investment agreements containing provisions protecting their ability to regulate in the public interest.[21] At the domestic level, legislation aimed at strengthening the regulation of extractive industries and leaving to the national authorities some leeway to intervene in the public interest has been implemented.[22]

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[17] UNCTAD (n 2) 17, 22. According to UNCTAD, 'the instruments for implementing local content to widen the industry base can be classified into two groups according to their main objective: those aimed at increasing local industry participation and those aimed at building up local industry capacity'. The first group refer to local-content performance targets, regulation and bidding parameters that include local content criteria, ad hoc taxation regimes and usually lead to short-term results.

[18] UNCTAD (n 2) 17.

[19] UNHRC (n 4) para 88.

[20] UNGA 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (30 October 20180) UN Doc A/C.3/73/L.30 Art 5.

[21] Peter Muchlinski, 'Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate. The Issue of National Security' in K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009* (OUP 2009); Jose E. Alvarez, 'The Evolving BIT' (2010) 1 *Transnational Dispute Management*; K.P. Sauvant, 'The Regulatory Framework for Investment: Where Are We Headed?', in Ramamurti, Hashai (eds), *The Future of Foreign Investment and the Multinational Enterprise* (Emerald Group Publishing Limited 2010) 410, 414; UNCTAD, *World Investment Report 2013 'Global Value Chains: Investment and Trade for Development'* (New York and Geneva 2013).

[22] The Angolan legislation, e.g., establishes that all extractive projects that may have an impact on the environment and social balance and harmony of the host state are subject to an environmental impact assessment, which is mandatory to start mining operations. Angolan Mining Code (Law 31/11 of 23 September 2011). According to the International Comparative Legal Guide to Mining Law 2019, a number of states have recently amended or are about to modify their mining law, including the Democratic Republic of Congo, Tanzania and South Africa, the latter is proposing, in particular,

Beside domestic legislation, host states have also started to negotiate investment contracts with ad hoc clauses imposing upon foreign companies local content obligations and to employ part of their revenues for social projects to the benefit of the local community.[23] In addition, a variety of new agreements, including contracts between investors and communities, environmental contracts, human rights deeds and investor-state-local community contracts, have strengthened community participation in an effort to mitigate the adverse impact of extractive industry FDIs on individuals.[24] In principle, these tools are clearly innovative because they openly envisage an active role of the foreign investor in fostering the development of the host country. From a mere object of regulation, the role of the investor is portrayed as that of a partner in the implementation of the development policies of the host country.

Despite this growing awareness of the role of the private sector, however, there still remain strong concerns as to the capacity of these legal instruments to contribute to the sustainable development of the host state, through benefit sharing and community participation.[25] For example, in several cases indigenous communities complain 'that extractive companies carry out consultations as a mere formality in order to expedite their activities within indigenous territories';[26] and that benefit sharing provisions at best offer 'jobs or community development projects that typically pale in economic value in comparison to profits gained by the corporation'.[27] In general terms, one might also question the appropriateness of using a contractual instrument with foreign investors to pursue public policy goals. It goes without saying that the main interest of the private investor is the maximisation of profits and one might take the view that the adoption of specific measures in the general interest should fall within the exclusive prerogatives of state authorities.

Against this background, the present chapter aims to investigate the potential role of investment contracts in fostering 'benefit sharing' and 'community participation' in the extractive industry and, ultimately, sustainable development in the host state. With reference to conflict-affected or fragile settings, the chapter will further investigate whether these contracts may also respond to the *rationale* of promoting economic stability and development, thereby contributing to peacebuilding.[28]

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to increase mandatory local ownership requirements. See, Global Legal Group, 'The International Comparative Legal Guide to Mining Law 2019', 1, 8, https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1490831_1.pdf accessed 23 March 2023.

[23] Cotula (n 3) 45–65.

[24] James Gathii, Ibironke T. Odumosu-Ayanu, 'The Turn to Contractual Responsibility in the Global Extractive Industry' (2015) 1 *BHRJ* 69–94. For a review of other initiatives from the mining industry, see: Sumit K. Lodhia, 'Mining and Sustainable Development' in Sumit K. Lodhia (ed) *Mining and Sustainable Development. Current Issues* (Routledge 2018)1. The author mentions international initiatives, such as the Global Mining Initiative and the Extractive Industries Transparency Initiative, as well as, local projects, such as the Australian Enduring Value Framework, which in her opinion 'indicate the seriousness with which sustainability issues are regarded in the mining industry'.

[25] Zarsky and Stanley (n 16) 131–54.

[26] UNHRC (n 4) para 47.

[27] Ibid., para 4.

[28] The World Bank, 'FY21 List of Fragile and Conflict-affected Situations' (2020) http://pubdocs.worldbank.org/en/888211594267968803/FCSList-FY21.pdf accessed 23 March 2023. The chapter analyses contracts executed by the following fragile and conflicted-affected countries: Libya, DRC, Chad, Iraq, the Republic of Congo and Timor-Leste, and contracts of some post-conflict states: Liberia and Sierra Leone.

The chapter will describe and classify the different categories of contractual provisions such as those imposing upon foreign investors obligations in terms of local content, training of local workers, support for the economic, social and cultural development of the local community, and respect for the environment. Specific attention will be devoted to the question as to whether these provisions are effectively enforceable by the host state in case of breach by the foreign company.

The authors have decided to focus on investment contracts, that is, contracts between states and/or state-owned enterprises and foreign investors, based on two circumstances. Firstly, investment contracts play a critical role in setting the rules for FDIs in the extractive industry and are key instruments of governance, including in conflict-affected or fragile scenarios. Indeed, as opposed to international investment agreements that concern state-to-state relationships and design a general framework for the promotion and protection of FDIs within the states' territories, the investment contract regulates the relationship between the company and the host state and details the reciprocal obligations undertaken by the parties in relation to the specific investment project. Hence, investment contracts are, arguably, the most effective instrument where obligations in terms of benefit sharing and community participation can be implemented.[29] Secondly, a number of investment contracts have recently been made publicly available through the Internet thanks to the Extractive Industry Transparency Initiative (EITI) and the wider debate on the public disclosure of contracts.[30] This allows the authors to carry out a broader and up-to-date analysis on the matter compared to previous scholarship.[31]

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[29] Cotula (n 3) 3–4. As to the application of international legal obligations on fair and equitable benefit sharing in conflict resolution and recovery strategies, see Morgera's chapter elsewhere in this volume.

[30] Siri Aas Rustada, Philippe Le Billon, Päivi Lujalac, 'Has the Extractive Industries Transparency Initiative been a Success? Identifying and Evaluating EITI Goals' (2017) 51 *Resources Policy* 151–62. See also, the initiative carried out by resourcecontracts.org. According to the 'About' section of the website https://www.resourcecontracts.org accessed 23 March 2023:

> …Despite the critical role these contracts play in setting the rules for investments in extractive industries, they are often difficult to discover. … This can result in a critical lack of knowledge for governments as they try to negotiate the best terms for their citizens, and can result in missed opportunities to learn from others' past successes or missteps. ResourceContracts.org was developed to fill the knowledge gap by providing searchable contracts in machine-readable format with rich metadata and annotations to provide key insights into each contract;

Rudolf Dolzer, Urusuala Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (OUP 2013) 79.

[31] The authors employed the search-directory of the website 'Resource Contracts' https:// www .resourcecontracts .org accessed 23 March 2023, which contains contracts up to 2022. Existing scholarly works on the matter consider contracts up to 2010, e.g., Cotula (n 3), and 2015, e.g., Gathii and Odumosu-Ayanu (n 24) 69–94. The authors of the present chapter have selected relevant investment contracts based on the resource dependency index of the World Bank and have devoted specific attention in their analysis to investment contracts executed by states with more than 20 per cent dependency on natural resources. Notably, the analysis considers investment contracts of 16 countries with more than 20 per cent natural resource rent of GDP, including: Azerbaijan, Chad, Democratic Republic of Congo (DRC), Republic of Congo, Equatorial Guinea, Guinea, Guyana, Iraq, Liberia, Libya, Mauritania, Mongolia, Papua New Guinea, Sierra Leone, Suriname, Timor Leste (World Bank Data (n 6)). The chapter also analyses a number of contracts of four representative countries having less than 20 per cent natural resource dependency, notably: Ghana (13.1 per cent), Philippines (1.2 per cent), Sao Tome (2.9 per cent), Senegal (3.6 per cent). The analysis involved 53 investment contracts, mostly executed between 2016–2018. The contracts under analysis in the present chapter are executed by the host state

The chapter will be structured as follows: Section 2 will briefly recall what an investment contract is and its importance in the context of the extractive industry. The section will also illustrate what are the types of investment contracts usually employed in the extractive industry. Section 3 will analyse a number of investment contracts highlighting relevant provisions on 'benefit sharing' and 'community participation', in particular those provisions imposing upon the foreign investor obligations in terms of: (a) local content, (b) training of local workers, (c) local economic, social and cultural development and (d) respect of the environment. Section 4 will further investigate whether the above-mentioned provisions on 'local content' and 'community participation' are effectively enforceable vis-à-vis the foreign investor or whether they are just rhetorical instruments with limited practical value. Section 5 will conclude taking position on the rationale and the prospects for implementation of the diverse clauses examined in the preceding sections.

2. INVESTMENT CONTRACTS IN THE EXTRACTIVE INDUSTRY

It is an essential feature of all investment projects that they imply a long-term economic commitment by a foreign investor in a host state, a degree of risk and the capacity of the project to produce economic benefits for the investor and the host state.[32] In this context, the investment contract forms the legal basis of the investment project detailing to what extent and how the commitment, the risk and the economic benefits are shared between the host state and the investor. The investment contract can be executed by the foreign investor directly or indirectly, that is, through a subsidiary company.[33] In case of indirect execution by the investor, the investment contract is signed by the local subsidiary of the foreign investor or by a third-state incorporated holding company. Investment projects increasingly tend to be

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or one of its instrumentalities, on the one hand, and the foreign investor or its local subsidiary or vehicle company, on the other hand.

[32] These characteristics mirror the content of the so called Salini Test. *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, para 52; Rudolf Dolzer, 'The Notion of Investment in Recent Practice', in Steve Charnovitz, Debra P. Steger, Peter Van Den Bossche (eds) *Law in the Service of Human Dignity – Essays in Honour of Florentino Feliciano* (CUP 2005) 267–69.

[33] As to direct investment, see Dolzer and Schreuer (n 30) 80; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award 18 August 2008, paras 182–183; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction 2 June 2010, para 235. These arbitration tribunals applied the specific wording of Art VI (a) of the US-Equador BIT: '[f]or purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an *investment agreement* between that Party and such national or company;' and excluded that an agreement between the host state and a subsidiary of the claimant incorporated in a third state could amount to an 'investment agreement' for the purpose of the treaty.

'channelled through investment vehicles'[34] and investment contracts to be executed indirectly, rather than directly by foreign investors.[35]

With reference to investment contracts in the extractive industry, the UNCTAD has observed that the making of a foreign investment contract with the state is '[o]ne common mode of entry for foreign direct investment' and '[has] played a major role in the foreign direct investment process, especially in developing countries that are dependent upon the exploitation of natural resources for their economic welfare'.[36] According to the arbitral tribunal in the case *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, the:

> [m]ining of minerals [in Venezuela] generally works in the following way. While the minerals belong to the state, a private party is permitted to exploit those minerals when the state grants it a concession, which, through conditions in the concession and mining law and regulations, gives that party a set of rights and obligations.[37]

Investment contracts establish how this set of rights and obligations are distributed between the parties involved in the investment, that is, the host state and the investor. Based on how the relationship between the parties is structured, investment contracts may take different forms.[38]

A 'concession agreement' usually confers on the investor the exclusive right to carry out exploration, development and production operations in relation to petroleum or other natural resources in a given area and for a certain period of time, in exchange for the payment of a certain share of profits or royalties to the state. The state may confer on the investor the right to carry out extractive operations individually or in association with the host state or its national company.[39] The 'licence and exploration permit' type of contract similarly provides for the exclusive right of the investor to carry out exploration and exploitation activities in

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[34] *Burlington v. Equador* (n 33) Dissenting Opinion of Arbitrator Orrego Vicuña, 8 November 2010, para 10: '…such an interpretation … might well … put an end to many kinds of joint-ventures and other forms of investment that are channelled through investment vehicles to the benefit of the host State'.

[35] In the case *Gold Reserve Inc. v Venezuela*, e.g., the arbitration tribunal decided over a case involving a mining concession in Venezuela (Brisas Concession) indirectly held by a Canadian mining company (Gold Reserve Inc.) through its US subsidiary (Gold Reserve Corp.). The latter company owned the Venezuelan company 'Compañia Aurífera Brisas del Cuyuní, C.A.'. that held the Brisas Concession, in the first place. See, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case no ARB(AF)/09/1, Award 22 September 2014; *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006; *Millicom Int. Operations v. Senegal* (hereinafter 'Millicom v. Senegal'), ICSID Case No. ARB/08/20, Decision on Jurisdiction, 16 July 2012; *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005.

[36] UNCTAD, *State Contracts* (New York and Geneva 2004) 1.

[37] *Gold Reserve v. Venezuela* (n 35) para 8.

[38] In the extractive industry, the word 'Mining Contract' is also employed, but it usually refers alternatively to Concession Agreements, license and exploration permit, production or profit-sharing agreement in mining.

[39] Petroleum Agreement between ENI Ghana Exploration & Production Ltd and others, on the one hand, and the Government of the Republic of Ghana and Ghana National Petroleum Corporation, on the other hand, of 2016 ('Ghana/ENI Concession Agreement), Art 2.1: 'the 'Exploration and Development and Production of Petroleum in the Contract Area by GNPC [a Ghanaian State-owned company] in association with Contractor [the investors]'.

a given area against the payment to the state of royalties and fees.[40] By contrast, with the 'production or profit-sharing agreement' the investor provides financial and technical support to the state, which in turn shares a part of the oil produced with the investor.[41] Finally, with 'Joint venture agreements' (JVAs) the state and the investor engage to run a business venture together and establish terms and conditions of their cooperation. The JVA sets the rights and the obligations of each partner in relation to the incorporation of the company, which shall carry out the project.[42] Compared to the other contracts described above, the JVA usually involves a major contribution by the state and requires 'the host country partner to be able to participate in project costs and risks'.[43]

Irrespective of the specific denomination of the contract, however, all these legal instruments may contain clauses on benefit sharing and community participation. They will be subject of specific analysis in the following sections.

3. THE ROLE OF BENEFIT SHARING AND COMMUNITY PARTICIPATION PROVISIONS IN INVESTMENT CONTRACTS

Sharing the costs, risks and benefits deriving from an investment project is at the basis of the decision of any host state and investor to embark on an investment relationship and to execute an investment contract, in the first place. This is particularly true for the extractive industry where the costs of inception of an investment project can be very significant and the impact of the hold-up problem quite penetrating.[44] In addition, investment projects in the extractive sector typically generate not only high profits, but also negative externalities that the investment contract may regulate.

In the logic of investment contracts, benefits to the local community may derive from the payment by the investor of profits and/or royalties, taxes and fees to the host state in exchange

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[40] *Contrato para la Extracción de Hidrocarburos bajo la Modalidad de* Licencia between the Mexican Comisión Nacional de Hidrocaburos and Calicanto Oil Gas S.A.P.I. de C.V. (10 May 2016), *Clàusola 15.2*.

[41] For instance, under the Exploration and Production Contract between the state of Mauritania and Kosmos Energy Mauritania, a company incorporated under the law of the Cayman Islands, of 2016 (hereinafter 'Mauritania/Kosmos E&P Contract') the investor engages to supply to the State of Mauritania all the financial and technical means necessary for the proper functioning of the petroleum operations; in turn, the investor is entitled to recover 'Petroleum Costs' by retaining a share of the production. See, Mauritania/Kosmos E&P Contract, Art 10.

[42] For example, the 'Contrat de Partenariat' in place between the 'Societé de Developpment Industriel et Miniere du Congo' and the UK company Shining Mining Co. Ltd. establishes that the parties shall incorporate a company (Société conjointe) to carry out a project for '*la conception, la rehabilitation, le Développment, la Recherche, l'Exploitation et les Opération Minères relatifs aux Mines*'. *Contrat de Partenariat* between *Société de Developpment Industriel et Miniere du Congo* (Democratic Republic of the Congo) and Shining Mining Co. Ltd. (December 2017) (hereinafter 'DRC/Shining JVA'), Art 2.

[43] Cotula (n 3) 29.

[44] See, for instance, Lise Johnsons, Lisa Sachs and Jesse Coleman, 'International Investment Agreements, 2014: A Review of Trends and New Approaches', in Andrea K. Bjorklund (ed.) *Yearbook on International Investment Law and Policy -2014–2015* (OUP 2016) 36; Cotula (n 3) 21–22; Raymond Vernon, *Sovereignty at Bay: the Multinational Spread of U.S. Enterprises* (Basic Books 1971); Oliver Hart, *Firms, Contracts and Financial Structure* (OUP 1995).

for the right conferred on the investor to carry out exploration and/or exploitation activities, as in the cases of concession agreements and licence and exploration permits. The state, in turn, should employ these resources to invest in infrastructures and services for local enterprises and citizens. Benefits for the local communities may also derive indirectly from the creation of employment and business opportunities that may naturally flow from investment operations. In theoretical terms, state authorities should always be able to benefit their citizens and/or compensate local communities affected by the investment through the adoption of effective redistributive policies. One could argue that the host state should first of all maximise the profits deriving from the investment and then focus on the adoption of appropriate policies at the national level to spread the benefit of the investment and attenuate its effects. The analysis of the text of investment contracts, however, shows that specific clauses are often introduced by the host state directly into the investment contract to maximise local community participation, for example, through employment and training, and also to enhance the benefits deriving from the investment in terms of technology and knowledge transfer.[45] Social and environmental protection and promotion are also considered by investment contracts with clauses introducing specific financial commitments for the benefit of the local community as ancillary obligations of the investor.

It is of interest in this respect that the tension between high rentability and negative externalities, typical of FDIs in the extractive industry, is explicitly mirrored in the text of the investment contracts and more specifically in their preambles.[46] The latter often contain language that recall the absolute sovereignty of state authorities over their natural resources, which at times seem to evoke the principle of permanent sovereignty over natural resources and the responsibilities of the state towards the people under its jurisdiction. In strictly theoretical terms, there should be no need to introduce any reference to issues of sovereignty, which are essentially relevant at the inter-state level, in a contractual instrument. This language, however, probably signals the fact that state authorities are aware that when they commit the natural resources of the country to the exploitation by a foreign actor with long-term contractual engagements they are entering a politically delicate realm. In describing the *rationale* for entering into an investment contract, for instance, a number of states thus deem it appropriate to clarify that natural resources belong to the people and that state authorities hold natural

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[45] Cotula (n 3) 33 ss. Cotula describes a series of tools, including: public revenues tools, safeguards concerning the fiscal regime, revenue management, non-fiscal economic benefits and local content clauses.

[46] See e.g., the preamble of the *Convention Minière* between the Republic of Guinea and Chalco Hong Kong Ltd. and Chalco Guinea Company S.A. La Société Portuaire of 2018 ('Guinea/Chalco HG Convention'):

> (A) ATTENDU QUE … les substances minérales ou fossiles contenues dans le sous-sol ou existant en surface, ainsi que les eaux souterraines et les gîtes géothermiques sont, sur le territoire de la République de Guinée ainsi que dans sa zone économique exclusive, la propriété de plein droit de l'Etat … *(O) ATTENDU QUE les Parties souhaitent que la présente Convention soit conclue et exécutée dans un esprit de partenariat, fondé sur …la répartition équitable des profits générés par l'activité minière entre les actionnaires des Sociétés de Projet et l'État, ainsi que la contribution du Projet au développement des populations avoisinantes, des collectivités locales et des employés ; (P) ATTENDU QUE les Parties souhaitent également que les activités minières ayant lieu sur le territoire de l'État prennent en compte la nécessaire préservation de l'environnement, des cultures et des Communautés Locales …*

resources in trust for them.[47] According to the rhetoric of the preambles, the business partnership with the foreign investor is conceived of by the state as an instrument to increase its capacity to exploit its natural resources and to foster the country's development. Some texts specify that any economic benefit deriving therefrom shall be shared not only between the state authorities and the investor, but also with the population.[48]

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[47] Ghana/ENI Concession Agreement (n 39) 'Witnesses that' no. 1: '[a]ll Petroleum existing in its natural state within Ghana is the property of the Republic of Ghana and held in trust by the State on behalf of People of Ghana'; Production Sharing Contract between the Republic of Sao Tome and Principe and the company Equator Exploration STP Block 12 Ltd of 2016 ('Sao Tome/Equator Exploration Contract'), Whereas A: '[a]ll Petroleum existing within the Territory of Sao Tome and Principe, as set forth in the Petroleum Law, is natural resources exclusively owned by the State'; Agreement on the joint development and production sharing between Azerbaijan State oil company and Azerbaijan ACG Ltd, BP Exploration (Caspian Sea) ltd, Chevron Khazar Ltd. and others of 2017 ('Azerbaijan/BP Exploration Agreement'), Whereas n. 1: 'in accordance with the Constitution of the Republic of Azerbaijan … ownership of all Petroleum existing in its natural state in underground or subsurface strata in the State is vested in the State;' Production and Sharing Agreement between Equatorial Guinea and Guinea Equatorial de Petroleos and Kosmos Energy Equatorial Guinea of 2017 ('Equatorial Guinea/Kosmos Energy P&S Agreement'), Whereas n. 1: 'all Hydrocarbons existing within the territory of the Republic of Equatorial Guinea, as set forth in the Hydrocarbons Law, are national resources owned exclusively by the State;' Production Sharing Contract Block 45 Offshore Suriname of 2011 ('PSC Block 45 Suriname'), Whereas n. 1: '…all Petroleum existing in the territory of the Republic of Suriname, including Petroleum existing offshore, is the property of the Republic of Suriname, and the Republic of Suriname holds exclusive sovereign rights with regard to the exploration and exploitation for all Petroleum existing in this area; …'

[48] See, for instance, the preamble of the *Convention de Base portant sur la Raffinerie d'Alumine de Debele et la Mine de Bauxite de Garafiri* between the Republic of Guinea and Société des Bauxites de Guinée S.A. SBG Bauxite and Alumina N.V. of 2018 ('Guinea/Bauxite Convention'):

> *Attendu Que: … 10. Les Parties désirent une gestion transparente des investissements en République de Guinée en vue de la recherche, du développement et de l'exploitation efficace à grande échelle des ressources minérales de l'État afin de promouvoir et contribuer au développement économique durable de l'État et au bien-être de ses citoyens et à son patrimoine.*

Petroleum Agreement between the Government of Guyana and Tullow Guyana BV (the Netherlands) and Eco (Atlantic) Guyana Inc. (Guyana) of 14 January 2016 ('Guyana/Tullow Petroleum Agreement'), Whereas 1 and 2:

> [b]y virtue of the Petroleum (Production) Act, …Petroleum existing in its natural conditions in strata in Guyana is vested in the State… The Guyana Geology and Mines Commission … has been seized with the responsibility, inter alia, of planning and securing the development, exploitation and management of Petroleum… so as to ensure for the people of Guyana the maximum benefits therefrom…;

the Production and Sharing Contract Bina Bawi Block between the Kurdistan Regional Government of Iraq and Hawler Energy Ltd and others of 2008 ('Kurdistan/Hawler P&S Contract'), Whereas n. 1: '[t]he Government wishes to develop the petroleum wealth of the Kurdistan Region (as defined in this Contract) in a way that achieves the highest benefit to the people of the Kurdistan Region and all of Iraq, …'; the Production and Sharing Contract Model of the Republic of Liberia of 2013 ('P&S Contract Model Liberia'), Whereas n. 1: 'the discovery and exploitation of petroleum are important for the interest and the economic development of the country and its people'; Timor Leste Onshore Production Sharing Contract Model of 2014 ('Timor Leste PSC Model'), Whereas A, B, C:

> [t]he Republic Democratic of Timor Leste is the sole owner of all natural resources within the Territory and offshore area and has the right to develop, extract, exploit and utilize the natural resources in the interest of the people of all the national groups … the Ministry has the power to conclude Petroleum Contracts for the benefit of the people and, amongst other, for the sustainable development of Timor-Leste.

In some cases, the need to consider the interests and the traditional culture of local communities is also explicitly mentioned.[49]

Bearing in mind these considerations, the following sections will analyse, through specific examples, benefit sharing and community participation clauses included in investment contracts in the extractive industry. The clauses are classified into four different categories depending on the object of the relevant obligations: (i) local employment, (ii) training, (iii) obligations to sustain local economic, social and cultural development, (iv) environmental clauses.

3.1 Local Employment

Local employment obligations aim to create positive synergy and spill-overs between the foreign investor and the host state ensuring that the investment project regulated by the contract strengthens local workers' capacities and knowledge in the extractive industry. These provisions tend to regulate the employment process to avoid the investor hiring only foreign workers temporarily seconded in the host state or that the employment of local workers only revolves around non-professional and/or routinary tasks.[50] Local content clauses may feature different degrees of institutionalisation and may range from broad formulations, often amounting to no more than a declaration of principles, to very specific provisions even detailing the number of workers to be hired by the foreign investor and the location from where they shall be hired. The analysis of the contracts reveals the existence of at least three regulatory models, the first two being more common, compared to the third: (a) undetermined clauses attributing discretion to the investor; (b) specific clauses setting detailed employment obligations upon the investor, with different degrees of impact in terms of benefit sharing and community participation; (c) clauses setting up veritable control mechanisms on behalf of the state.

To the first category belongs the Ghana/ENI Concession Agreement whose Article 21.3 states that: '[w]here qualified Ghanaian personnel are available for employment in the conduct of Petroleum Operations, [the investor] shall ensure that in the engagement of personnel it shall *as far as reasonably possible* provide opportunities for the employment of such personnel (emphasis added)'.[51] The employment of Ghanaian personnel is granted through the obligation of the investor to submit '*from time to time*' to the Ghana National Petroleum Corporation (GNPC) an employment plan stating 'the *reasonably foreseeable number of persons* and the required professions and technical capabilities' needed in order to allow GNPC to provide the investor the workers to be engaged in the Petroleum Operations. The obligation of the foreign investor is anchored to the criterium of 'reasonableness,' thus Ghanaian workers shall be engaged by the investor only 'as far as reasonably possible' and for a 'reasonably foreseeable number of persons'. This criterium gives the foreign investor a significant degree of discretion

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[49] See Guinea/Chalco HG Convention (n 46) Attendue Que (O) and (P); see also, Mining Development Contract Papua New Guinea/Ramu Nicke of 2000, Whereas H:

> [t]he State wishes … to ensure that the development of any commercial mineral deposits and associated processing facilities will secure the maximum benefit for, and adequately contribute to the advancement and the social economic welfare of the People of Papua New Guinea, including the people in the vicinity of the Joint Venturers' operations, in a manner consistent with their needs and the protection of the environment.

[50] UNCTAD 'World Investment Report 2001' (New York and Geneva 2001) xxi–xxv.

[51] Ghana/ENI Concession Agreement (n 39) Art 21.3.

in making its choices – for example, reasonableness may authorise the foreign investor not to hire local workers when foreign personnel features more appropriate skills and knowledge – and makes it very difficult for the state to challenge the investor's decision.[52]

Into the second category falls the Timor-Leste/ENI P&S Contract, which not only features a general declaration of principle, stating that: '[t]he Contractor shall take *reasonable steps* to comply with the proposals … in respect of training, employment … and shall … give preference in employment in Petroleum Operations to nationals and permanent residents of Timor Leste (emphasis added),' but also features a specific engagement-proposal by the investor indicating the number of workers to be hired and trained; thus, the investor is engaged to '[p]rovide six months of Dili-based training in English, IT, HSF and Petroleum Geoscience and Engineering to ten (10) qualified Timorese graduates, secondment to (5) five qualified Timorese graduates … and additional secondment to (5) five qualified Timorese graduates in the event that one or more contingent wells is drilled'.[53] Although this type of contract provides for specific engagements as to the number of employees to be hired and trained locally, the effectiveness of the clause may still be limited, if the number of local workers represents a small portion compared to the whole number of workers employed in the extractive activities by the foreign investor.[54] In this regard, contracts establishing the percentage of local workers to be hired could be more effective in achieving benefit sharing and community participation, as they allow the local employment curve to follow the economic development of the project. For example, the Azerbaijan/BP Exploration Agreement features a veritable 'Nationalisation Program' establishing that the overall target of manning levels of Azerbaijani citizen employ-

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[52] See also, the 2006 Libyan Exploration and Production Sharing Model Agreement, Art 5.7.1, which also leaves a certain degree of discretion to the foreign company: '[o]perator shall hire Libyan nationals to carry out Petroleum Operations in the Contract Area. Except that in cases where specialized technical personnel or key management positions are required and not available among Libyan personnel, Operator may hire non-Libyan nationals to carry out such Petroleum Operations'. Similarly, the Sierra Leone Petroleum Model Licence of 2012, Art 21.2: 'Licensee shall be required to employ Sierra Leone citizens in all categories and functions, except if there are no Sierra Leone citizens in the national market with the required qualifications and experience, under terms to be regulated'; the Concession Agreement Ndiouck Wakali Ginde involving the State of Senegal and the company Maoatgé Ndiouck of 2016 ('Senegal/Ndiouck Mining Concession'), Art 7.1: '*[l]'Entreprise Mapathé NDIOUCK favorisera la création et l'offre d'emplois en direction des communautés locales afin de donner au projet un impact social positif;'* Chad's *Permit d'Exploitation d'Or à la société Manajem Company Ltd Sarl* of 2016 ('Chad/Manajem Exploitation Permit'), Art 6: '*La main d'œuvre doit être constituée en priorité par le habitants des villages environnants immédiats*;' Convention d'exploitation minière relative au gisement de fer du Mont Nabemba entre la République du Congo et la société Congo Iron s.a. of 2016 ('Congo/Congo Iron SA Convention'), Art 20; Kurdistan/Hawler P&S Contract (n 48) Art 23.1; P&S Contract Model Liberia (n 48) Art 29.1; PSC Block 45 Suriname (n 47) Art 31.3.1.

[53] Production and Sharing Contract for the Joint Petroleum Development Area between the Timor-Leste *Autoridade Nacional do Petroleo* and ENI JPDA of 2013 ('Timor-Leste/ENI P&S Contract'), Art 5.4 and Annex D.

[54] According to the Italian company's website, ENI operates in 66 countries around the world with a total number of 31,321 employees, 10,243 hired outside Italy. The overall portion of foreign workers out of the total amount of workers hired by ENI is one-third. In light of these figures, the number of Timor-Leste workers hired under the Timor-Leste/ENI P&S Contract (20) may appear quite small if compared to the total amount of foreign workers (10,243) hired by the Italian company worldwide. However, it should be considered that the Timor-Leste/ENI P&S Contract only refers to one project, but in each country there could be several projects in place. See ENI website, available at https://www.eni.com/en-IT/about-us.html accessed 23 March 2023.

ees, to be maintained during the whole term of the Agreement, are 90 per cent for professionals and 95 per cent for non-professionals.[55] In any case, all contracts detailing specific quotas or percentages for the engagement of local workers have the advantage of making it easier for the state to check and, if the case may be, enforce the local content obligations vis-à-vis the investor.[56]

The Mining Development Contract between Papua New Guinea and Ramu Nickel Ltd. and Orogen Minerals (Ramu) Ltd. ('Mining Development Contract Papua New Guinea/Ramu Nickel') even indicates the 'geographical' priority to be given to the employment of workers stating that 'priority in employment will be given …, firstly to the residents of the Usino – Bundi and Rai Coast Districts, then to other Madang Province residents, and then of residents of Papua New Guinea'.[57] Any alteration to the training and localisation programme can be implemented by the investor only with the consent of the state and with a view to securing the maximum benefits to Papua New Guineans. In this case, the state retains a significant degree of control, as changes to the training and localisation programme are admitted only with the state's consent; in case of disputed alterations, the investor can submit the issue to arbitration.[58]

Some agreements formulate local-content clauses in terms of quality, rather than quantity and establish that the local workers hired by the foreign investor shall cover specialised positions. For example, the Sao Tome/Equator Exploration Contract states that the investor 'shall recruit and train nationals from Sao Tome and Principe for … specialized positions, such that the number of expatriate staff shall be kept to a minimum'.[59] In addition, the contract states that 'national personnel from Sao Tome and Principe' cannot be discriminated 'with regard to salaries and other benefits' vis-à-vis foreign employees and that the investor can disengage local workers only with the prior written approval of the National Petroleum Agency, giving to the host state a sort of veto power.[60]

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[55] Azerbaijan/BP Exploration Agreement (n 47) Art 6.7 (b) (vi).

[56] See also, Art 13.1 of the Mineral Production Sharing Agreement between the Philippines and the Mount Sinai Mining Exploration and Development Corp. of 2011 ('Philippines/Mt. Sinai Corp. P&S Agreement'); Art 23.2 of the Equatorial Guinea/Kosmos Energy P&S Agreement (n 47); Arts 19.2.2. and 19.3 of the Guinea/Bauxite Convention (n 48); Art 18.1 (c) of the Production and Sharing Contract between the Petroleum Authority of Mongolia and DWM Petroleum AG of 2009 ('Mongolia/DWM P&S Contract'): '[t]he contractor has the right to employ its foreign personnel in special professional vacancies and key positions upon the approval of the authorised organization *within the quota* approved by the Government of Mongolia (emphasis added)'.

[57] Mining Development Contract Papua New Guinea/Ramu Nicke (n 49) Art 15.1.

[58] Ibid., Arts 15.2, 15.3.

[59] Sao Tome/Equator Exploration Contract (n 47) Art 14.3. According to the contract, qualified nationals from Sao Tome and Principe shall be employed in both non-specialised and specialised positions, as well as, in key positions. The investor can employ non-nationals of Sao Tome and Principe in specialised positions only where qualified individuals from Sao Tome and Principe are not available and only provided it engages to train Sao Tome and Principe workers to keep foreign workers at a minimum.

[60] Ibid., Art 14.6:

> No Sao-Tomean employed shall be disengaged without the prior written approval of the National Petroleum Agency except in the case of gross misconduct by such employee, in which case only prior notice to the National Petroleum Agency will be required. Gross misconduct for the purposes of this Clause shall mean a specific act of very serious wrongdoing and improper behavior which has been investigated and proved by documentary evidence.

See also, Sierra Leone Petroleum Model Licence 2012 (n 52) Art 21.3.

As to the third category concerning clauses setting up veritable control mechanisms, of notice is the Guyana/Esso Petroleum Agreement. This contract sets up a sophisticated monitoring system aimed to achieve an increasing degree of local engagement. Notably, the Guyana/Esso Petroleum Agreement features: (i) the investor's obligation to submit to the Minister having responsibility for Petroleum or, where there is no such Minister, to the President a yearly plan 'for the utilisation of qualified Guyanese personnel for the upcoming year', (ii) half yearly reports 'outlining its achievements in utilising qualified Guyanese personnel', and (iii) the obligation of the investor 'to make appropriate adjustments to the yearly plan to better accomplish the goal of increasing the number of qualified Guyanese personnel'.[61]

It is evident that the effectiveness of local employment obligations in achieving sustainable development significantly depends on the capacity of the state to negotiate detailed provisions and appropriate reporting/monitoring process, on the one hand; and to involve local workers in qualified jobs, on the other hand.

Detailed provisions and the existence of a monitoring process facilitate the state's task to assess whether a given investment project is successful in increasing employment and local community economic benefits in the short run, and eventually to engage the investor's responsibility in case the latter fails to comply with its obligations.[62] In addition, the quality of the position held by local workers is likely to support the host state's development in the long run by building national and local skills.

3.2 Training Obligations

Building local knowledge and skills depends not only on the circumstance that local workers are effectively employed and made part of the production process of the investor, but also on the participation of local workers to ad hoc training activities and education programmes. Thus, beside local employment obligations, states tend to require foreign investors to undertake specific training obligations of local personnel, based on the understanding that a real change in the long-term development of the host state is only likely to be achieved by building local knowledge and skills and hence through the 'empowerment' of local workers.[63]

Training may take place 'on-the-job', through ad hoc training courses, and/or high-level education programmes. With the exception of on-the-job training, which is always carried out by the investor, the training can be (a) sponsored by the investor and carried out by the state, (b) both financed and carried out by the investor or (c) a combination of a) and b) solutions.

To the first category belongs Article 21 of the above-mentioned Ghana/ENI Concession Agreement, which provides that the investor shall contribute to the state programme to train

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[61] Guyana/Esso Petroleum Agreement, Art 19.4. Similar provisions are featured in the Guyana/Tullow Petroleum Agreement (n 48) Art 18 and Art 19.

[62] The capacity of the state to effectively follow up on these obligations often depend on whether the contractual clauses fall within a more comprehensive domestic framework on local content. See, CCSI, Local Content Laws & Contractual Provisions, available at http://ccsi.columbia.edu/work/projects/local-content-laws-contractual-provisions/ accessed 23 March 2023.

[63] Equatorial Guinea/Kosmos Energy P&S Agreement (n 47) Art 23.2: '[t]he Operator shall *empower or contribute to the training* of the aforementioned personnel so that they acquire the competences and skills required to fill any vacancy, including the supervision positions, related to Petroleum Operations (emphasis added)'.

Ghanaian personnel by paying an amount of USD 2 million per year (for a period of 25 years).[64] In addition, upon request by the state, the investor shall provide on-the-job training, continuing education and short industry courses to local workers.[65] Similarly, the Guyana/Esso Petroleum Agreement establishes that the investor shall pay to the state an amount of USD 300,000 per year, so as the state can:

> (a) [to] provide Guyanese personnel …with *on-the-job training* in Contractor's operations in Guyana and overseas and/or practical training at institutions abroad;
> (b) [to] send qualified Guyanese personnel … on *courses at universities, colleges or other training institutions*;
> (c) [to] send Guyanese personnel … to conferences and seminars related to the petroleum industry;
> (d) [to] purchase for the Government advanced technical books, professional publications, scientific instruments or other equipment required by the Government (emphasis added).[66]

As opposed to the Ghana/ENI Concession Agreement, however, the Guyana/Esso Petroleum Agreement specifies what type of training shall be performed by the government of Guyana with the funds provided for by the foreign investor and gives the foreign investor the right to monitor how the state employs the resources.[67] A representative example of the second category is Article 13.1 of the Philippines/Mt. Sinai Corp. P&S Agreement: '[t]he Contractor … shall, in consultation and with consent of the Government, prepare and undertake an extensive training programme suitable to Filipino nationals in all levels of employment'.[68] The state's role, in this case, is limited to a right to be consulted and to provide consent to the programme, although it is not clear from the formulation of the clause whether the consent of the state refers only to the authorisation to the investor to prepare and undertake the programme or whether it also extends to content of the programme. In any case, what emerges clearly is that

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[64] Ghana/ENI Concession Agreement (n 39) Art 21.1, lett. a). See also, Timor Leste PSC Model (n 48) Art 7.5; the agreement between the Democrat Republic of Congo (DRC) and the group PERENCO (Muanda International Oil Company Ltd and Societé de Recherche et Exploitation Petroliere du Litoral Congolaise), Avenant no. 8 at the Convention dated 9 August 1969 ('DRC/PERENCO Avenant 8'), Art 3.7; Mongolia/DWM P&S Contract (n 55) Art 10.2; Sierra Leone Petroleum Model Licence 2012 (n 52) Art 21.1; Equatorial Guinea/Kosmos Energy P&S Agreement (n 47) Art 23.6; P&S Contract Model Liberia (n 48) Art 29.2.

[65] Ghana/ENI Concession Agreement (n 39) Art 21.4. See also, Sao Tome/Equator Exploration Contract (n 47) Art 14.7 and 14.6; PSC Block 45 Suriname (n 47) Art 32.1.2.

[66] Guyana/Esso Petroleum Agreement (n 61) Art 19.3. See also, Guyana/Tullow Petroleum Agreement (n 48) Arts 18 and 19.

[67] Guyana/Esso Petroleum Agreement (n 61) Art 19.3: 'Payment … shall be paid directly into bank accounts held and controlled by the Government. Contractor shall verify such bank accounts and the Minister agrees to cooperate, assist and provide Contractor any information it requires to conduct such verification.'

[68] Philippines/Mt. Sinai Corp. P&S Agreement (n 52) Art 13.1. The Senegal/Ndiouck Mining Concession (n 52) also falls into the second category. Indeed, Art 7.2 of the Concession states: *'[l]'Entreprise … s'efforcera également à favoriser le transfert de connaissance et de technologie au profit du personnel sénégalais affecté aux opérations minières, par la mise en œuvre de programmes de formation adapté'*. See also, *Contrat de Recherche et de Partage de Production d'hydrocarbures* between Senegal and Total E & P Senegal and others of 2017 ('Senegal/Total P&S'), Art 19; Azerbaijan/BP Exploration Agreement (n 47) Art 6.8; Guinea/Bauxite Convention (n 48) Arts 19.5, 19.6; Kurdistan/Hawler P&S Contract (n 48) Arts 23.4–23.7; Mauritania/Kosmos E&P Contract (n 41) Art 12; Libyan Exploration and Production Sharing Model Agreement (n 52) Art 5.7.2; Mining Development Contract Papua New Guinea/Ramu Nicke (n 49) Art 15.4.

the programme shall reach specific 'targets of Filipinization' that the host state has identified with reference to the level of qualification and the type of job: 'Year 1 Unskilled 100% Skilled 100% Clerical 100% Professional 75% Management 75% ...'.[69] Through this mechanism, training and local employment provisions reinforce each other: training reduces skill gaps and allows a higher level of local workers participation into the extractive activities; in turn, the acquisition of qualified experience by local workers enhances the development of the local industry and helps spreading the benefits to other areas. In addition, the state can monitor the results of the training activities through their impact on the employment rate.

The Congo/Congo Iron SA Convention provides for a combined solution. Indeed, according to Article 20.2, the training of Congolese workers employed in the mining activities shall be financed and carried out by the investor, while the training of the state's employees (i.e., *agents du ministère des mines et de la géologie, inspecteurs et superviseurs miniers*) shall be financed by the investor, but carried out by the state.[70]

In many cases, training obligations are principally allocated to the investor, because the investor possesses the capacity to offer specialised knowledge to local workers and can effectively combine training and education with active involvement within the company's activities. However, in these cases, the training obligations undertaken by the investor 'may require trade-offs in other parts of the contract'.[71] Indeed, the costs incurred by the investor for training programmes are often considered as 'petroleum costs' (*et similia*) and their amount is subtracted from the basis of calculation of the state's profits.[72]

This means that states accept lowering their share of profits in exchange for the investor's obligation to undertake or finance training programmes. It might be questioned why states do not prefer to retain major profits and undertake training activities in the first place. An answer could be that investors are better equipped to offer specialised training for the extractive industry. Another hypothesis, however, could be that many host states still lack the capacity to convey and effectively manage resources for training purposes and they prefer to leave such issues to the investor. Finally, one might argue that in some cases the insertion of these clauses in the investment contracts is the consequence of a demand by the investor and the state simply lacks the leverage to oppose it. In this regard, it is worth observing that in some cases, such as the Guyana/Esso Petroleum Agreement, it is the investor that monitors how the state employs the resources for training purposes.[73]

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[69] Philippines/Mt. Sinai Corp. P&S Agreement (n 56) Art 13.1.

[70] Congo/Congo Iron SA Convention (n 52) Art 20.2.

[71] Cotula (n 3) 45. See also, Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims again the State' 56 (2) *The International and Comparative Law Quarterly* (2007) 382.

[72] Philippines/Mt. Sinai Corp. P&S Agreement (n 56) Art 13.2; Kurdistan/Hawler P&S Contract (n 48) Art 23.7; Azerbaijan/BP Exploration Agreement (n 47) Art 6.8. See also, Senegal/Total P&S (n 68) Art 19; Ghana/ENI Concession Agreement (n 39) Art 21.1; Sao Tome/Equator Exploration Contract (n 47) Art 14.9; Guyana/Esso Petroleum Agreement (n 61) Annex C, Art 3.1, lett. i). *Contra*, Mauritania/Kosmos E&P Contract (n 41) Art 12.2.

[73] Guyana/Esso Petroleum Agreement (n 61) Art 19.3.

3.3 Obligations to Sustain Local Economic, Social and Cultural Development

As observed above, states are becoming increasingly cautious as to the type of FDIs they attract and they pay greater attention as to how foreign companies carry on exploration and extractive operations. Many states have adopted ad hoc provisions in their investment contracts with the aim of minimising negative externalities and maximising the benefit that could derive to the local communities. For example, the Timor Leste Model Product Sharing Contract of 2014 ('Timor Leste PSC Model') expressly states that:

> [t]he Contractor shall carry on Petroleum Operations, and shall procure that they are carried on, diligently and in accordance with the Act, Applicable Law, this Contract and Industry Best Practice. In particular, the Contractor shall carry on Petroleum Operations, and procure that they are carried on, in such a manner as is required by paragraph 7.1(a) to: (i) protect the environment and potentially affected local communities based on sustainable development and ensure that Petroleum Operations result in minimum of ecological damage or destruction or detrimental social impact … (xi) minimise interference with pre-existing rights and activities, including the rights of potentially affected local communities, navigation, fishing and other lawful offshore activities.[74]

In addition, a number of investment contracts provide for the obligation of the investor to contribute to the economic, social and cultural development of the local community, through ad hoc funds and/or the creation of ad hoc projects.[75] The significance and effectiveness of these financial measures mostly depend on the amount of the capital involved and on the type of activities implemented.

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[74] Timor Leste PSC Model (n 48) Arts 7.1, (a)–(b), (i), (xi) and 7.3. See also, Chad/Manajem Exploitation Permit (n 52) Art 5:

> [l]es activités de la société MANAJEM COMPANY LTD, ARL seront conduites de manière à respecter les règles de sécurité et d' hygiènê e pour les travailleurs et en assurant la protection de l'environnement physique, les populations locales, les us et coutumes ancestrales, en contenant la pollution sous toutes ses formes dans les normes acceptables ou prévues par le Code Minier et la Législation sur l 'Environnement;

Philippines/Mt. Sinai Corp. P&S Agreement (n 56) Art 11.1, lett. k), the Contractor shall 'recognize and respect the rights, customs and traditions of indigenous cultural communities over their ancestral lands…'.

[75] DRC/PERENCO Avenant 8 (n 64) Art 3.8; Equatorial Guinea/Kosmos Energy P&S Agreement (n 47) Art 23.5; P&S Contract Model Liberia (n 48) Art 29.3; Congo/Congo Iron SA Convention (n 52) Art 20.3.1; Senegal/Total P&S (n 67) Art 19.5; Guinea/Bauxite Convention (n 48) Art 20.1.4; Guyana/Esso Petroleum Agreement (n 61) Art 28.7; Senegal/Ndiouck Mining Concession (n 52) Art 7; Sao Tome/Equator Exploration contract (n 47) Art 2.5; Philippines/Mt. Sinai Corp. P&S Agreement (n 56) Art 11.1, lett. k); PSC Block 45 Suriname (n 47) Art 32.1.1. See also, Kurdistan/Hawler P&S Contract (n 48) Art 32.2, which provides for the payment of a 'capacity building bonus' by the investor to the government; the Azerbaijan/BP Exploration Agreement (n 47) Art 29; Mauritania/Kosmos E&P Contract (n 41) Art 13.

In some contracts, the amount of the contribution is undefined and it is up to the parties to find an agreement on the issue in the future.[76] Other contracts state that the investor is called to contribute to the social development of the local community affected by the investment activities only '*dans la mesure du possible*', thus leaving to the discretion of the investor the decision as to whether and to what extent it is willing to contribute.[77] To the contrary, in some other cases, the amount of the contribution is clearly set by the contract with the indication of a precise sum.[78]

Sometimes, the amount of the contribution is anchored to the turnover that will be realised by the investor during the term of the contract. This is the case of investment contracts executed by the State of Guinea.[79] For example, Article 20 of the *Convention de Base portant sur la Raffinerie d'Alumine de Debele et la Mine de Bauxite de Garafiri* between the Republic of Guinea and Société des Bauxites de Guinée S.A. SBG Bauxite and Alumina N.V. of 2018 ('Guinea/Bauxite Convention'), states that the investor shall pay yearly to the benefit of the local community an amount corresponding to 0.5 per cent of the Company's turnover in the previous fiscal year.[80] In this case, the benefit deriving to the local community is proportional to the profits made by the investor and to the natural resources available.

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[76] Congo/Congo Iron SA Convention (n 52) Art 20.3.1:
[the investor] contribuera annuellement à un fonds constitué sous forme d'association ou de fondation à but non lucratif dont l'objet est de favoriser le développement économique, social et culturel des communautés locales qui sont impactées par les Opérations Minières … à hauteur d'un montant annuel qui sera à déterminer d'accord parties.

[77] Senegal/Ndiouck Mining Concession (n 52) Art 7.3: *'[l]'Entreprise Mapathé NDIOUCK en concertation avec les autorités et élus locaux s'attachera à développer, dans la mesure du possible, d'autres opportunités d'amélioration de l'environnement social des populations vivant dans la zone du périmètre de recherche'.*

[78] Senegal/Total P&S (n 68) Art 19.5:
[the investors] s'engage à contribuer à l'amélioration des conditions de vie des populations en allouant une subvention non recouvrable pour des actions sociales … pour un montant minimum de: cent cinquante mille Dollars ($ 150 000) par Année Contractuelle pour la période de recherche (période d'exploration); à compter de l'octroi d'un Périmètre d'Exploitation, deux cent mille Dollars ($ 200 000) par Année Contractuelle.

[79] Guinea/Bauxite Convention (n 48) Art 20.1.4 and Guinea/Chalco HG Convention (n 46) Art 25. See also, Philippines/Mt. Sinai Corp. P&S Agreement (n 56) Art 11.1, lett. k): the Contractor shall '… allocate royalty payment of not less than one percent (1%) of the value of the gross output of minerals sold' for the development of the local community; Sao Tome/Equator Exploration Contract (n 47) Art 2.5: '[t]he Contractor commits to undertake social projects during each phase of the Exploration Period … If Petroleum is produced from the Contract Area, the Contractor shall undertake additional social projects'.

[80] Guinea/Bauxite Convention (n 48) Art 20.1.4: '*verser annuellement au bénéfice de la communauté locale un montant correspondant à 0,5% du chiffre d'affaires de la Société au cours de l'exercice fiscal precedent*'.

As to the projects to be undertaken with the relevant funds, they may be decided in agreement by the investor and the state;[81] or they may need the approval of the investor, who can even reject specific projects.[82]

Sometimes the contracts establish the type of project to be implemented. For instance, the Equatorial Guinea/Kosmos Energy P&S Agreement states that '…the Contractor shall commit one hundred thousand Dollars … per Calendar Year … to cooperate with non-governmental organizations in charitable works to develop society, sport activities and health programs to fight and prevent disease, as well as other non-profit related activities'.[83] In other cases, the contracts only set the areas that the social projects shall sustain. For example, Article 32 of the Production Sharing Contract for Block 45 Offshore Suriname states that the investor shall allocate funds for training or to provide programmes of corporate social responsibility. The latter shall 'support community-based development in areas like environment, health, education, culture and sports'.[84]

As opposed to the training of local workers, the expenditure undertaken by the investor pursuant to the environmental, social and cultural programmes are more likely not to be recoverable as petroleum cost, *et similia*,[85] and sometimes they may even not be deductible for tax purposes.[86] This probably means that these obligations are truly conceived of by the parties as a form of redress for the negative externalities generated by the exploitation of the resource. In

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[81] Congo/Congo Iron SA Convention (n 52) Arts 20.3.2, 20.3.3. This contract provides for the creation of a '*comité de gestion*', made up of ten members: five appointed by the investor and five appointed by the state. The Sao Tome/Equator Exploration Contract (n 47) Art 2.5 provides that the social projects shall be determined by agreement between the Contractor and the Sao Tome National Petroleum Agency. Failing such agreement, the Contractor and the National Petroleum Agency shall each submit a proposal to an expert appointed by the World Bank and such expert shall determine which of the two proposals shall be implemented. The Contractor shall be responsible for the implementation of all agreed or chosen social projects, which shall be undertaken using all reasonable skill and care. See also, Senegal/Ndiouck Mining Concession (n 52) Art 7.3 and the Philippines/Mt. Sinai Corp. P&S Agreement (n 56) Art 11.1, lett. k) establishes that the investor shall 'coordinate with proper authorities in the development of the host and neighboring communities in accordance with the SDMP and to promote the general welfare of the inhabitants living therein. Where traditional self-sustaining income and the community activities are identified to be present, the Contractor shall assist in the preservation and/or enhancement of such activities;' DRC/PERENCO Avenant 8 (n 64) Art 3.8.

[82] The Guyana/Esso Petroleum Agreement (n 61) Art 28.7 establishes 'a program of financial support for environmental and social projects' to be funded by the investor. According to the programme, the investor shall pay the amount of USD 300,000.00 per year for the realisation of specific projects, to be agreed upon by the state and the investor. The investor, however, is entitled to refuse to fund such projects that may give rise to liability, including under anti-corruption laws, in particular the Foreign Corrupt Practices Act of the United States of America.

[83] Equatorial Guinea/Kosmos Energy P&S Agreement (n 47) Art 23.5.

[84] PSC Block 45 Suriname (n 47) Art 32.1.1.

[85] For example, Senegal/Total P&S (n 68) Art 19.5; Guyana/Esso Petroleum Agreement (n 61) Art 28.7; Sao Tome/Equator Exploration contract (n 47) Art 2.6 and PSC Block 45 Suriname (n 47) Art 32.1.1; expressly provide that costs sustained for economic, social and cultural development are not recoverable as petroleum cost. The Philippines/Mt. Sinai Corp. P&S Agreement (n 56) Art 11.1, lett. k); Senegal/Ndiouck Mining Concession (n 52) Art 7; Guinea/Bauxite Convention (n 48) Art 20.1.4; Congo/Congo Iron SA Convention (n 52) Art 20.3.1; DRC/PERENCO Avenant 8 (n 64) Art 3.8 are silent. *Contra:* Equatorial Guinea/Kosmos Energy P&S Agreement (n 47) Art 23.5; P&S Contract Model Liberia (n 48) Art 29.3.

[86] Sao Tome/Equator Exploration contract (n 43) Art 2.6.

these cases, the investor is the solely responsible for the costs, which are not subtracted from the basis of calculation of the state's profits and do not lower the revenues of the state (nor increase those of the investor).

3.4 Environmental Clauses

With a view to favouring the protection of the environment during the investment operations thereby attenuating the risk of negative externalities, investment contracts usually request the investor to comply with a detailed set of obligations, including: the obligation to respect applicable environmental norms and standards, the obligation to carry out an environmental impact study at the beginning of the operations, the performance of continuing monitoring and reporting to the state, the recovery of the area after the extractive operations took place and in case of accident.[87] These obligations are meant to favour benefit sharing and community participation by preventing negative externalities that may disrupt the local community capacity to participate in FDIs and to benefit from the investment project. In certain cases, the contracts expressly set the amount of recovery work to be performed by the investor for each year of the operations. This is the case of the Mongolia/DWM P&S Contract of 2009 which states that the amount of work for environmental recovery to be performed by the investor shall be USD 40,000 for the first two years (USD 20,000 for each year), USD 120,000 for the second two years (USD 60,000 for each year) and USD 90,000 for the last year.[88] It is self-evident, however, that these amounts could be of little help in case of massive environmental damages.

Some contracts, such as the Guinea/Bauxite Convention, may require the company to implement a plan for the environmental and social management of the investment project during the extractive operations. This plan shall comprise: (a) the identification of any negative impact the project could have on the natural and human environment, (b) the identification of goals and means for reducing such an impact, (c) the timeframe, budget and personnel appointed for achieving the environmental goals, (d) the restoration programme and budget. The plan shall be approved by the competent authority of the host state.[89]

Sometimes the contracts contain reference to the obligation of the investor to 'respect the preservation of property, agricultural areas, and fisheries, when carrying out … [extractive operations]', thus extending the obligation of the investor to preserve not only the ecosystem, but also the economic and social equilibrium based on it.[90]

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[87] Congo/Congo Iron SA Convention (n 52) Art 10.1; DRC *Convention Type d'Amodiation de La Generale de Carrieres et des Mines (versions du 20 mars 2006)*, Arts 8.2, 8.7, 8.8, 10.7, 10.8, 11.6, 11.7, 12.2, 13.1, lett. e), 13.2, lett. m); Azerbaijan/BP Exploration Agreement (n 47) Art 26; Guyana/Esso Petroleum Agreement (n 61) Arts 28.1–28.6; Kurdistan/Hawler P&S Contract (n 48) Arts 37.1–37.5; P&S Contract Model Liberia (n 48) Art 6; Mauritania/Kosmos E&P Contract (n 45) Art 6.4; Timor-Leste/ENI P&S Contract (n 53) Art 5.3; Libyan Exploration and Production Sharing Model Agreement (n 52) Art 5.5, lett. e); Mining Development Contract Papua New Guinea/Ramu Nicke (n 45) Art 14; Sierra Leone Petroleum Model Licence 2012 (n 48) Arts 14, 17; PSC Block 45 Suriname (n 47) Arts 24.2–24.9; Senegal/Ndiouck Mining Concession (n 52) Art 35.

[88] Mongolia/DWM P&S Contract (n 56) Art 10.5.

[89] Guinea/Bauxite Convention (n 48) Art 14.2.

[90] Kurdistan/Hawler P&S Contract (n 48) Art 37.4. See also, Chad/Manajem Exploitation Permit (n 52) Art 5: *'... en assurant la protection de l'environnement physique, les populations locales, les us et coutumes ancestrales, en contenant la pollution sous toutes ses formes dans les normes acceptables*

In addition to ad hoc obligations for the protection and restoration of the environment in the area affected by the investment, a number of contracts establish that the parties shall cooperate to develop and protect the cultural heritage and the biodiversity of the country, more generally;[91] and in some cases the investor undertakes to finance specific environmental projects for the benefit of the host state.[92]

Beside the investor's obligations, some environmental clauses contain the host government's commitment to grant regulatory stability in environmental matters. For example, Article 37 of the Kurdistan/Hawler P&S Contract of 2008 provides for the obligation of the investor 'to minimise any adverse material impact on national parks and nature reserves which may arise directly as a result of the …. Operations', on the one hand; and the host state engagement 'not to designate or create or permit the creation of any national parks, nature reserves or other protected areas, located … within the Contract Area', on the other hand.[93]

This type of clause aims to mitigate the hold-up risk inherent in the extractive industry investments and to 'respond to the investor's need for protection from arbitrary or discriminatory changes in applicable rules that may adversely affect the [value of the] investment', during the term of the contract.[94] The clause is apt to give rise to the investor's legitimate expectations concerning the stability of the regulatory framework and, if no exception is provided under the contract, it may result into a significant limitation of the state's scope of manoeuvre in the environmental field.[95]

4. BREACH OF CONTRACT AND DISPUTE SETTLEMENT: ARE BENEFIT SHARING AND COMMUNITY PARTICIPATION CLAUSES ENFORCEABLE BY THE STATE?

The clauses described in the previous section provide for specific financial and operational commitments by the investor for the benefit of the host state and its population and are often part of a wider bargain, which aims to balance the investor's economic interests in the extractive project with the sustainable development needs of the host state. Benefit sharing and community participation clauses, however, may be meaningless if the investment contract does not provide for effective instruments of enforcement and redress in cases where the investor breaches its engagements. For this reason, to test the efficacy of benefit sharing and

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ou prévues par le Code Minier et la Législation sur l'Environnement;' Sierra Leone Petroleum Model Licence 2012 (n 52) Art 17.7, lett. e) and f).

91 Congo/Congo Iron SA Convention (n 52) Arts 10.2, 10.3: *'[l]es Parties conviennent de mettre en place un programme particulier de développement et de planification portant sur la protection de la biodiversité et le développement durable de toute réserve existante à la Date de Signature et de toute réserve future créée par l'Etat après consultation et accord de Congo Iron S.A.'*.

92 Guyana/Esso Petroleum Agreement (n 61) Art 28.7.

93 Kurdistan/Hawler P&S Contract (n 48) Arts 37.6–37.7.

94 Cotula (n 3) 67.

95 The legitimate expectations of the investor are protected by international investment agreements under the fair and equitable treatment standard. See, among many, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para 219; *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Award, 30 April 2004, para 98.

community participation clauses, the authors decided to analyse the dispute settlement mechanisms provided for by the investment contracts to verify whether the state has an effective instrument of redress.

All investment contracts under analysis feature dispute settlement clauses, which cover 'any dispute' arising out of the contractual relationship between the parties, thus including disputes concerning benefit sharing and community participation engagements. In some cases, the link between benefit sharing and community participation clauses and dispute settlement mechanism is expressly stated.[96]

Dispute settlement clauses can be divided into two groups: (a) dispute settlement clauses providing for the appointment of an independent expert (IE) and (b) dispute settlement clauses providing for the appointment of an arbitration tribunal. Some contracts feature both options: the IE to settle technical issues and arbitration for any other dispute arising out of the contract.[97]

When contracts provide for arbitration, the preferred solutions are: arbitration in accordance with the UNCITRAL Rules of Arbitration[98] or arbitration under the auspices and according to the arbitration rules of the International Chamber of Commerce (ICC) in Paris.[99] Arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) in Washington DC with the application of the ICSID Convention or the ICSID Additional Facilities Rules is also a recurrent option.[100]

In this regard, it is worth observing that, while ad hoc arbitration under UNCITRAL and ICC arbitration are often employed to settle disputes that may arise out of a contractual relationship between private companies and states or state-owned companies,[101] the ICSID is

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[96] Mining Development Contract Papua New Guinea/Ramu Nicke (n 49) Art 14.4.

[97] For example, the DRC/Shining JVA (n 42) establishes both the appointment of an '*Expert indédependant*' to decide over '*le prix des actions de la Société ou le montant de l'indemnité prévue à l'Article 17.3*' (Art 1.2 (49)) and an '*Arbitrage … suivant le reglement d'arbitrage de la Chambre de Commerce Internationale de Paris*' to settle any controversy between the parties directly related to the JVA (Art 13). See also, Kurdistan/Hawler P&S Contract (n 48) Art 42; Guyana/Tullow Petroleum Agreement (n 48) Art 26.3 referring to ICSID any dispute arising out of or relating to the decision of the expert; Sierra Leone Petroleum Model Licence 2012 (n 52) Art 25, in this case the independent expert is in lieu of arbitration.

[98] Azerbaijan/BP Exploration Agreement (n 47) Appendix 6; Mongolia/DWM P&S Contract (n 56) Art 22.3.

[99] Congo/Congo Iron SA Convention (n 52) Art 33.3; Senegal/Ndiouck Mining Concession (n 52) Art 42; Guinea/Chalco HG Convention (n 46) Art 37.2; Mauritania/Kosmos E&P Contract (n 41) Art 28.1; Ghana/ENI Concession Agreement (n 39) Art 24.1; Timor-Leste/ENI P&S Contract (n 53) Art 12.2; P&S Contract Model Liberia (n 48) Art 31; Libyan Exploration and Production Sharing Model Agreement (n 52) Art 23.

[100] Sao Tome/Equator Exploration Contract (n 47) Art 25.4; Guinea/Bauxite Convention (n 48) Art 29.3; Guyana/Esso Petroleum Agreement (n 61) Art 26.3; Senegal/Total P&S (n 68) Art 32; Convention d'exploitation miniere sur le gisement de nickel et minerais associes de musongati between Burundi and BMM International, Art 53; Equatorial Guinea/Kosmos Energy P&S Agreement (n 47) Art 26.3; Sierra Leone Petroleum Model Licence 2012 (n 52) Art 25; Mining Development Contract Papua New Guinea/Ramu Nicke (n 49) Art 25.3 and PSC Block 45 Suriname (n 47) Art 41. These contracts provide for ICSID as an alternative to the UNCITRAL Arbitration.

[101] According to the ICC Commission on Arbitration and ADR, 'States, State Entities and ICC Arbitration' (2012) https://iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities.pdf accessed 23 March 2023, '[a]pproximately 10 per cent of ICC arbitrations involve a state or a state entity'. Only a minority of the ICC's caseload involving States and State entities arise from the breach of a BIT.

known to be the world's leading institution devoted to the settlement of investment disputes brought by foreign investors against states under BITs.[102] Indeed, although Article 36 of the ICSID Convention expressly allows claims from both 'any Contracting State' and 'national of a Contracting State',[103] states are usually respondent before ICSID tribunals and very few cases are known to have been submitted to the ICSID by claimant-states under contracts.[104] This may be due to the circumstance that other arbitration forums, such as the ICC, are usually preferred to settle disputes arising out of contractual relationships, and to the fact that the state 'may have at its disposal avenues of relief more expedient than investment arbitration' in case of breach of investment contract.[105] In addition, states usually want to be perceived as 'investment friendly' by foreign investors and they tend to avoid the negative publicity that might derive from international arbitration. Thus, disputes are often settled amicably and investment arbitration remains an instrument of last resort.[106] Be that as it may, the fact remains that a number of recent investment contracts, along to ICC and ad hoc UNCITRAL arbitration, expressly contain the parties' consent to submit their disputes to the ICSID for arbitration, thus, theoretically opening the door to the possibility that states bring a claim before the ICSID against the investors for breach of the investment contract, including the breach of benefit sharing and community participation clauses.

5. CONCLUDING REMARKS

The detailed analysis of contracts conducted in this chapter has shown that the debate on the double-edged nature of investments in the extractive industry has exercised a significant impact on the negotiating practice of the legal instrument regulating the relationship between

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[102] ICSID Caseload – Statitstics' (2023–1) https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf; UNCTAD, Investor–State Dispute Settlement Cases: Facts and Figures 2020 https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf.

[103] Convention on the settlement of investment disputes between States and nationals of other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 Art 36: '[a]ny Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party'.

[104] *Gabon v. Société Serete S.A.*, ICSID Case No ARB/76/1; *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No ARB/98/8; *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No ARB/07/3; *Republic of Equatorial Guinea v. CMS Energy Corporation and others*, ICSID Case No. CONC(AF)/12/2; *Republic of Peru v. Caravelí Cotaruse Transmisora de Energía S.A.C.*, ICSID Case No. ARB/13/24. See, Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1(1) *JIDS* 97–122.

[105] Ibid., 98.

[106] This is also confirmed by the circumstance that only two of the few cases publicly known to have been brought by states against investors before ICSID tribunals (five) – all grounded-on investment contracts – have led to a decision by the arbitration tribunal (see, *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Li*mited (n 104); *Government of the Province of East Kalimantan v .PT Kaltim Prima Coal and others* (n 104)). The remaining cases have been discontinued or settled (see, *Gabon v. Société Serete S.A*. (n 100); *Republic of Equatorial Guinea v. CMS Energy Corporation and others* (n 104); *Republic of Peru v. Caravelí Cotaruse Transmisora de Energía S.A.C*. (n 104)).

the investor and the host state. In all of the examined contracts, a variety of clauses, and the preambles of the contracts themselves, provide evidence of the effort of the parties to balance economic gains and negative externalities in their contractual relationship.

In the opinion of the authors, however, among the typologies of clauses analysed in this research, a distinction should be drawn between the clauses on local employment and training, on the one hand, and the clauses on local development and the environment, on the other.

The clauses on employment and training are the ones mirroring more clearly an actual exchange of performances. In this sector, the investor has a real expertise to offer and the local economy might receive a positive impact in terms of the acquisition of new professional skills and economic development. The existence of an actual bargain underlying these clauses is confirmed by the precision of some of the texts, which even entail the establishment of a monitoring system. Another piece of evidence arguably showing the seriousness of these commitments is that the costs deriving from the obligations on local employment and training are recoverable from the primary material and deductible for tax purposes. As far as fragile settings are concerned, local employment and training clauses in investment contracts may also respond to the need of supporting the state in 'dealing with the impact of the conflict and addressing its causes',[107] notably unemployment and/or underemployment, the exclusion of minority groups, and the lack of skilled labour.[108] Indeed, the majority of the investment contracts executed by conflict-affected and post-conflict states analysed in the present work contains this type of clauses, although with different degree of engagement by the foreign investor.[109]

As opposed to employment and training clauses, a question is looming large with respect to the *rationale* of environmental and social clauses in investment contracts. What is the actual purpose pursued by the parties when they introduce obligations of this kind into a contractual relationship? Would it not be easier and perhaps more efficient for the host state to carefully negotiate the economic benefits of the investment contract for then to adopt in its internal legal order all of the needed policies of social redistribution and environmental protection? One might be tempted to say that properly functioning state authorities should not need to

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[107] E. Nnadozie and S. Abdulmelik, 'The Role of the Private Sector in Sierra Leone's Post-Conflict Reconstruction Efforts', in Hany Besada (ed) *From Civil Strife to Peace Building: Examining Private Sector Involvement in West African Reconstruction* (Wilfrid Laurier University Press 2009) 145, 146, 151; C. Khoubesserian, 'State Building in a Post-Conflict Context. The Liberian Framework for Donor Aid and Private Investment', in Hany Besada, ibid., 244–5.

[108] UNCITRAL, 'Best Practices in Investment for Development. How Post-Conflict Countries can Attract and Benefit from FDI: Lessons from Croatia and Mozambique, Investment Advisory Series, Series B' (2009) 3 p 2: 'FDI has, of course, a commercial objective: its primary goal does not include contributing to economic and social recovery. Moreover, FDI is rarely the major source of capital formation, output and employment in any economy. It will never by itself deliver economic prosperity, let alone be the driving force in peace-building. FDI is one of many factors and its contribution should be assessed in this context; Mary Martin, Vesna Bojicic-Dzelilovic, '"It's Not Just the Economy, Stupid". The Multi-Directional Security Effects of the Private Sector in Post-Conflict Reconstruction' (2017) 17(4) *Conflict, Security & Development* 361.

[109] As to local employment, the majority of these contracts fall into the 'undetermined' category described above in section 3.1 (see e.g., 2006 Libyan Exploration and Production Sharing Model Agreement (n 52) Art 5.7.1; Sierra Leone Petroleum Model Licence 2012 (n 52) Art 21.2; Congo/Congo Iron SA Convention (n 52) Art 20 or involve small amounts of investment (see, DRC/PERENCO Avenant 8 (n 64) Art 3.7).

require foreign investors to substitute for themselves in the adoption of sound economic and social measures taking in due consideration the negative externalities created by the extractive activity. To the contrary, fragile states may need external support to face economic and social challenges, often too large to confront on their own. In weak and impoverished post-conflict settings, environmental and social clauses contained in investment contracts may play a role in the processes of rehabilitation of the environment, as well as, of the educational, healthcare and social systems.[110] In the abstract, clauses such as that contained in the DRC/PERENCO Avenant 8, Article 3.8 ('*les Sociétés s'engagent à mettre en œuvre des projets sociaux au profit des communautés locales dans les domaines de la santé, de l'éducation, de la construction ou de la réparation des infrastructures*…') may contribute to the state's efforts towards reconstruction.[111]

However, the examined environmental and social clauses, albeit with some limited exceptions, are vaguer or involve investments for negligible amounts. For example, the above-mentioned DRC/PERENCO Avenant 8, provides for a contribution of USD 400,000 per year vis-à-vis the company's declared average production of 25,000 boepd (for 11 fields).[112] Some environmental clauses – the ones which restate that the environmental legislation of the host state is binding on the investor – are also redundant and would seem to perform a rhetorical function at best. Some others, as the case of the contract of Kurdistan shows, are actually limiting the regulatory power of the host state in the environmental field. The prospects for an actual enforcement of these obligations are equally intangible, due to the vagueness of the clauses and to the scarce propensity of state authorities towards the initiation of arbitrations.

In conclusion, the role of investment contracts as a tool for fostering the rebuilding of the economy in post-conflict settings is highly dependent on the specific features of each contract and can be hampered by the absence of meaningful prospects of enforcement. The textual analysis of the contracts shows that the environmental and social clauses tend to be so generic that, even assuming the presence of judicial or arbitral remedies, the determination of a specific breach would be extremely difficult. To the contrary, in the examined contracts, the clauses on local employment and training tend to be more specific and are therefore more likely to exercise an impact on rebuilding the economy of the host state.

On the whole, it is not surprising that companies tend to contribute to the sustainable development of host societies through the contractual clauses related most closely to their traditional areas of activity. The training of workers and the transfer of knowledge are more feasible fields of action for companies than environmental protection and the development of society as a whole. These latter objectives are particularly ambitious and may have to be pursued through legal instruments that clearly identify the ways of implementation and the boundaries of mutual powers in the cooperation between public institutions and investors. Admittedly, investment contracts may not be enough for this.

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[110] Gearoid Millar, 'Investing in Peace: Foreign Direct Investment as Economic Restoration in Sierra Leone?' (2015) 36(9) *Third World Quarterly* 1700. The author focuses on the experience of Sierra Leone and concludes that FDIs shall be approached with caution in relation to economic restoration as 'as the actual experiences of such projects on the ground may be substantially different from those theorized'.

[111] DRC/PERENCO Avenant 8 (n 63) Art 3.8; P&S Contract Model Liberia (n 48) Art 29.3; Congo/Congo Iron SA Convention (n 52) Art 20.3.1; Kurdistan/Hawler P&S Contract (n 48) Art 32.2.

[112] See the Company website at https://www.perenco.com/subsidiaries/drc accessed 23 March 2023.