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Accounting for Human Rights:
The Challenge of Globalization and Foreign Investment Agreements

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Abstract

Following the triumph of neoliberalism, trade and investment are considered to be the dominant routes to economic and social development. This has further enhanced the power of transnational corporations. Developing countries are increasingly expected to secure foreign investment to stimulate their economies and lift the local population out of poverty. However, foreign investment also has implications for protection and enjoyment of human rights. Transnational corporations manage their risks by imposing stabilization clauses on host countries that constrain their ability to protect and enhance human rights. Conventional accounting and corporate social responsibility reports seem to be unable to respond to the emerging agenda on human rights. This paper seeks to stimulate debates about the protection and enjoyment of human rights by drawing attention to the way corporations constrain governments and people through clauses in investment agreements. Some evidence is provided through an examination of an investment agreement relating to the Chad–Cameroon oil and pipeline project. The paper calls for the production of counter accounts to challenge the hegemony of corporations and create spaces for the enjoyment of human rights.

Key words: Human Rights, Corporate Social Responsibility, Globalization, Stabilization Clauses.

1. Introduction

The triumph of neoliberalism (Fukuyama, 1992) and the associated mobility of capital, privatizations, deregulation and a general roll-back of the state has increased corporate influence on the daily lives of the people and their right to food, water, shelter, security, paid employment, safety at work, clean environment and a non-discriminatory environment has deepened calls for greater corporate accountability (Mitchell and Sikka, 2005). Rather than enhancing democratic control of corporations[1] and aligning corporate conduct with the basic human rights and freedoms, as enshrined in the Universal Declaration of Human Rights[2] (UDHR), the trend has been to expand the scope of annual accounting reports published by corporations even though they are often a poor medium of corporate accountability (Jones, 2011). This has been supplemented by a variety of corporate social responsibility (CSR) reports (for example, see Bakan, 2004; Banerjee, 2007; Cooper, 2004; Crowther and Rayman-Bacchus, 2004; Demirag, 2005; Frederick, 2006; Hawkins, 2006; Solomon, 2007). Some may laud the glossy CSR brochures as evidence of corporate responsiveness to public pressures, but much of this responsiveness is primarily linked to the ability to make profits (Unerman and O'Dwyer, 2007). There is a suspicion that a large volume of the CSR reports are self-serving (Sikka, 2010) and corporate disclosures are frequently selective and part of the ideological battle to both accommodate and resist change (Adams, 2004; Spence, 2009). As the chief executive of Unilever put it,

> "Corporate social responsibility is a hard-edged business decision. Not because it is nice to do or because people are forcing us to do it, or because I want to do nice interviews …, but because it is good for our business … This is a hard-edged business issue." (The Guardian[3], 5 July 2003).

[1] For example, through rights for local communities and employees to elect directors, public right of access to corporate agreements and subordinating corporate objectives to social priorities of eradication of poverty, discrimination and exclusion.

[2] This is available at available at http://www.un.org/en/documents/udhr/

[3] http://www.guardian.co.uk/business/2003/jul/05/unilever1; accessed 14 April 2010.

The tensions between the hard-edged business practices geared to increasing profits for shareholders and the enjoyment of human rights by the people (Amnesty International, 2006; Christian-Aid, 2008; Environmental Defense Fund, 1999; ETC Group, 2008) have persuaded some to argue that corporate power cannot easily be reconciled with democracy and respect for human rights (Hertz, 2001; Bakan, 2004). Increasingly, there are calls for the development of alternative forms of accounting and "binding legal norms that hold corporations to human rights standards and circumscribe potential abuses of their position of power" (United Nations, 2003, p. 20).

The corporate responsibility to respect and protect human rights arises from developments in international law (Ratner, 2001; Jochnick, 1999) and obligations arising out of the1948 Universal Declaration of Human Rights[4] (UDHR) and related treaties[5] and articles promulgated by the United Nations (UN). The UDHR commits all UN member states to respect, protect and enforce the human rights of every individual to a standard of living for adequate health and wellbeing, including the right to food, clothing, medical care, housing and social services. It guarantees that everyone has the right to freedom of thought, conscience and religion. No one is to be subjected to arbitrary arrest, detention or exile and everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to them by law. The UDHR preamble states that it is "a common standard of achievement for all peoples and all nations" and requires that

[4] This is available at available at http://www.un.org/en/documents/udhr/

[5] The principles of UDHR have been codified into a number of treaties, conventions and binding legal obligations (Cronin-Furman, 2010). Chief amongst these is the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which covers matters such as the freedom from gender, religious and racial discrimination; right to life, work for a fair wage, education, decent living, housing and food, safe and healthy working conditions, form trade unions and the right to the highest attainable standard of physical and mental health. The ICESCR is accompanied by the International Covenant on Civil and Political Rights (ICCPR) and requires each state to protect the civil and political rights of individuals, including freedom of religion, speech, assembly, association, join a political party, vote, right to life and equality before the law.

> "every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction".

The informed legal opinion is that the UDHR reference (see above) to "every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all" (International Council on Human Rights Policy, 2002, p. 159). Thus obligations to respect and protect human rights and provide a remedy for injured parties rests not only on the state but also on corporations[6] (United Nations Human Rights Council, 2008), considered to be an important "organ of society" (see above).

The focus on corporations arises from the intensification of globalization and the related increase in the power of corporations. Transnational corporations are now a key source of cross-border investment and their quest for private profits frequently brings them in conflict with workers and local communities (Korten, 2001; Klein, 2001). Developing countries may welcome foreign investment to generate jobs and economic development, but it can also have an adverse effect on enjoyment of human rights, including labour rights, security, sovereignty of the state and even the right to life. Corporations have been accused of lax health and safety standards and inflicting death and injuries on innocent people (Hanna et al, 2005). By avoiding taxes, corporations deprive governments of scarce resources which could be used to develop social infrastructure and improve the quality of life of people by providing education, healthcare, security and pensions (Global Witness, 2006; Christian-Aid, 2008). In pursuit of profits, some corporations have also colluded with murderous and corrupt regimes (Black, 2001; Rowell et al., 2005; Clark, 1994). Yet the quality of corporate profits and their consequences

[6] The Organisation for Economic Co-operation and Development (OECD) recommends that "enterprises should … respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments" (OECD, 2000, p. 11). However, its recommendations are non-binding and considered to be "weak" (Ratner, 2001, p. p. 457).

for human rights is not evident from annual financial reports or glossy CSR brochures.

This paper seeks to encourage debates about corporate power and human rights and calls for the accounting and corporate social responsibility literature to connect with human rights. It highlights concerns about intensification of globalization and the rising power of corporations through an examination of the risk-management strategies used by transnational corporations. These include placing constraints, known as stabilization clauses, on the ability of many developing countries to protect human rights by disabling their capacity to develop regulation, levy taxes; improve labour, health and safety and environmental standards and constraining their citizens from seeking remedies in local courts of law. This paper illustrates and discusses the above issues by firstly examining the nature of contemporary globalization, which has facilitated economic growth, but also generated vast income and wealth inequalities. The dominant discourses persuade poorer countries to alleviate poverty by inviting foreign trade and investment. However, such processes also pose serious questions about the protection and enjoyment of human rights. The next section provides an illustration of the stabilization clauses through an examination of an investment agreement relating to the Chad-Cameroon oil and pipeline project. After discussing some of the social and political issues raised by the constraints it considers implications of the stabilization clauses for accounting and accountability. The final section then reflects upon the paper and calls for sustained research to advance human rights.

2. Globalization and Foreign Investment

Corporations are a major centre of power in contemporary capitalism. From its very inception capitalism was meant to be a global affair (Marx and Engels, 2002). It has not been accompanied by any economic and moral limits on the quest for private profits and thus capital is incessantly seeking new opportunities to make profits. Rapid advances in transport, communications and information technologies have freed capital from the prison of territorial limits. Constrained by the ideologies of neoliberalism, the contemporary state

is obliged to stimulate the economy through private investment, tax incentives and re/deregulation. The mobility of capital and flow of goods and services has been intensified by structural adjustment programmes and free trade zones, such as the European Union (EU), North American Free Trade Agreement (NAFTA) and the Association of Southeast Asian Nations (ASEAN). The mobility of capital and the power of transnational corporations has been further intensification of globalization has been accompanied by an institutional architecture, such as the World Bank, the International Monetary Fund (IMF) and the World Trade Organization (WTO).

In the integrated global economy, the availability of technology, money, organizational structures, ideology and political patronage have made corporations the dominant force of our times. Global capitalism anticipated by Marx and Engels is already with us[7] (Hertz, 2001; Korten, 2001; Trade Union Congress, 2005; United Nations Food and Agriculture Organization, 2000; Rugman, 2005). At the beginning of the twenty-first century, the world trade is dominated by an estimated 78,000 transnational companies with some 780,000 affiliates. 52 of the largest 100 economies in the world are corporations, mostly headquartered in the western world, and the annual sales revenue of each of the six largest corporations are exceeded by the GDP of only 21 countries. In 2002, the top 200 corporations had combined sales equivalent to 28% of world GDP[8]. Nearly 70% of the world trade and 80%-90% of the foreign direct investment is controlled by just 500 corporations and a mere 1% of corporations own half the total stock of foreign direct investment (Korten, 2001; Rugman, 2005). The annual global foreign direct investment (FDI) reached a peak of US$2 trillion in 2007 and despite a deepening economic recession it is expected to be $1.8 trillion in 2011 (UNCTAD, 2009). Some 48% of the global FDI flows to developing and transition economies giving corporations enormous influence on the terms and the nature of the trade.

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[7] Also see the website of Share The World's Resources (http://www.stwr.org/multinational-corporations/multinational-corporations-mncs-beyond-the-profit-motive.html; accessed on 13 May 2010)
[8] http://www.stwr.org/imf-world-bank-trade/reforming-international-trade.html

Through trade, mergers and acquisitions, corporations have not only acquired vast monopoly powers, but with it also the power to shift jobs, investment, taxes and the power to discipline states. According to the United Nations Food and Agriculture Organization (2000), just 20 corporations control the global coffee trade; only 3 account for over 80% of the global cocoa trade; 6 of them hold 70% of wheat trade and one controls 98% of the production of packed tea. Just 10 global corporations control 55% of the global trade in pharmaceuticals; 67% of the trade in seed and fertilisers; 55% of the pharmaceutical trade; and 66% of the global biotechnology industry (ETC Group, 2008). By any standard transnational corporations wield considerable power and their intervention in large scale trade and investment is unavoidable even though their commitment to any locality, product and people is temporary and conditional upon profits.

The intensification of globalization is accompanied by extreme inequalities. A 2006 UN report estimated that the richest 1% of adults, mostly resident in the West, own more than 40% of the planet's wealth and a mere 10% command 85% of the world total of global assets, but the bottom 50% own just 1%.(the Guardian, 6 December 2006; also see Davies et al., 2008). At the same time, around 2.1 billion people, mostly living in mineral rich developing countries, survive on less than $2 a day and 880 million on less than $1 a day (World Bank, 2008). More than 1 billion people do not have access to safe drinking water. About 1.9 million people die every year from diarrheal diseases and around 1.5 million (or 5,000 a day) of the fatalities are children under the age of five (Water Aid, 2007). A child born in a less developed country is almost 14 times more likely to die during the first 28 days of life than a child born in an industrialized country. Low-income countries provide an average 10 beds per 10,000 people compared to 63 in Europe. Around 80% of maternal deaths could be averted if women had access to essential maternity and basic health-care services. The infant mortality rate[9] for Finland, France, Germany, UK and US is 3.7, 4.2, 4.3, 4.8 and 6.3 respectively, whilst for Angola, Congo, China, Ghana, India, Nigeria and Tanzania the rates are 131.9, 70.3, 23.0, 56.6, 55.0, 109.5 and 72.6 respectively (United Nations, 2007). Out of an estimated

[9] The number of deaths of infants below the age of one in a given year per 1,000 live births in the same year.

total of 2.2 billion children, over 1 billion live in poverty (UNICEF, 2004). An estimated 640 million lack basic shelter, 500 million do not have adequate sanitation facilities, 400 million lack access to safe water, 270 million have no access to healthcare, 140 million have never been to school and 90 million face daily starvation. An estimated 774 million adults lack basic literacy skills (UNESCO, 2007). Due to pressure on revenues, 34 out of 84 countries have decreased the share of gross national product (GNP) devoted to education since 1999. 24 out of 105 countries allocated less than 3% of GNP to education. Such inequalities encourage poor nations to seek foreign investment, which brings considerable complexities to the enjoyment and protection of human rights.

Prominent economists, politicians, journalists and other opinion formers routinely advance the view that trade is the only way to alleviate poverty, secure economic prosperity and provide a decent standard of living for citizens. This worldview is promoted by the World Bank, IMF and WTO and also embedded in the Millennium Development Goals promoted by the United Nations for eradication of poverty in developing countries (United Nations, 2004, 2005). As developing countries often lack the financial resources and technical know-how to exploit their natural resources, they frequently turn to global agencies (e.g. IMF, World Bank) and transnational corporations to provide investment through a variety of bilateral, multilateral, direct and joint investment programmes and treaties. The supply and demand for investment is driven by competing and complementary motives. Transnational corporations are primarily motivated by profits as companies seek competitive advantage through the creation, defence or expansion of market shares, low costs, low social obligations (such as taxes) and access to raw materials and other inputs for production of goods and services. Foreign investment is attractive to developing countries in that it not only provides local employment and tax revenues, but can also generate foreign exports, either to the investing company's home country, or to third-country markets, which in turn can fuel further investment, employment and possibly a way out of poverty. Foreign investment may be used to import technology and know-how to build infrastructure (schools, hospitals, roads, bridges, transport, electricity and water facilities), but it may also displace governments or perform the functions

traditionally associated with governments – for example corporations may distribute food, run schools, hospitals and security services. This may all be considered to be part of trade, but poses serious questions about the boundaries between the state and corporations where exactly the responsibility for protection of human rights lies. Citizens may expect to hold governments to account through the ballot-box for the provision, or lack thereof, of public goods, but the same is not possible when these services are provided by corporations. Elected parliaments may debate government policies and demand to see relevant documents, but corporate contracts are confidential and considered to be private and are thus not available to citizens, or their representatives. Admittedly, some strong governments may be able to challenge corporations or negotiate arrangements to bring some contracts under public scrutiny, but the governments of many poor countries lack the necessary financial, legal and administrative resources to secure that. It is also possible for corporations to subvert any local drive for protection of human rights through alliances with local elites or by influencing the governments of their home countries to exert pressure on less powerful governments and thus safeguard their investment and profits. Faced with the pressing need to stimulate the economy and reduce poverty, many poor and weak developing countries yield to corporate demands and accept constraints on their sovereign right to enact laws and regulations that protect human rights and meet their UDHR obligations.

Since foreign investment is driven by the search for profits, transnational corporations are focused on the risks of investment, particularly the commercial and political risks of investing in another country with a different legal and political system. Corporations can hedge against foreign exchange and interest rate risks through transactions in complex financial instruments, investment guarantees, export finance and insurance[10] provided by their home country governments (Gianturco, 2001). Such support is often driven by domestic economic and employment considerations and rarely requires the transnational corporation to conduct its foreign operations in a manner which

[10] Another reason for the state support is that the private sector is often unwilling or unable to solely underwrite the risks associated with foreign trade.

will fulfil the home and the host state's obligations under the UDHR to protect and respect human rights.

There is the issue of political risks and unilateral actions by the host governments, especially as after huge expenditure the investing company cannot easily abandon the project and is at the mercy of the host government. Corporate foreign investment is conditional upon generating acceptable returns, which in turn are dependent upon assumptions about wage rates, pension contributions, taxes, environmental, energy, regulatory, transport levies and a variety of other costs for the duration of the project, which could last for decades. In response to domestic pressures, the host government may make concessions to its citizens, and in the process alter costs and profits expected by investors. In addition, it is also possible that for ideological, economic and social reasons, the operations of foreign corporations could be wholly or partially nationalised, or sequestrated by host governments. Even if the incumbent government honours the contract, there is no guarantee that future governments will, especially when the countries have a tradition of coups and counter-coups. They may pay appropriate financial compensation immediately, or the negotiations could go on for many years. The host country laws may not adequately protect property rights, or the legal processes to secure redress may be cumbersome and costly. Thus the very act of foreign investment throws up a variety of risk management problems. Human rights issues are nested in the cauldron of competing objectives of corporations, host governments and the people's aspirations for a better quality of life.

One approach to managing this conflict is to draft international treaties and agreements that prioritise human rights and the ability of the local population to influence host governments to secure social change over the narrow corporate concerns about maximisation of profits. However, such treaties and agreements are not on the immediate horizon. For a considerable time, governments, or government sponsored entities, negotiated bilateral investment treaties and a patchwork of rules and regulations, reflecting the respective bargaining power of the parties, emerged. Until the mid-1990s the OECD and the WTO sought to develop a Multilateral Agreement on Investment (MAI), and the proposed rules seemed to limit the sovereign

powers of the host states and advance the power of transnational corporations at the expense of human rights, democracy, labour and environmental standards (see Picciotto and Mayne, 1999; Arnold, 2005). The rules placed limits on the powers of governments to support domestic companies and restricted their powers in directing or discriminating against foreign companies in sensitive areas (e.g. defence, environment, security sensitive regions, forested areas). The rules also legitimised the creation of international arbitration panels (rather than the host countries' courts) to adjudicate on disputes and enabled corporations to sue elected governments for introducing laws (e.g. healthcare, pensions, and environment) which could be detrimental to corporate profits. In the face of organized opposition from civil society and non-governmental organizations, the MAI negotiations were abandoned (Neumayer, 1999; Tieleman, 2000). In many ways, the MAI framework legitimised the conditions already imposed upon developing countries, and the collapse of the negotiations did not lead to any new enlightened global framework for protecting human rights, though negotiations continue (for example see, United Nations Human Rights Council, 2009).

Meanwhile, the nature of foreign investment agreements (these are directly between the host governments and transnational corporations) and bilateral investment treaties (these are mainly between governments) primarily rests upon the relative bargaining strength of the parties involved and established norms. Since the early twentieth-century US companies have inserted stabilization clauses in foreign investment contracts agreements with developing countries. Early clauses tended to ban the host state from nationalising the project and/or required the consent of both contracting parties to modify the investment contract, but gradually the scope of the clauses has been broadened to stabilize or freeze specific aspects of a project, including its fiscal and regulatory regime. Such clauses come in many varieties and are now widely used by transnational corporations to manage the non-commercial risks (fiscal, regulatory, political) by stabilizing or freezing the terms and conditions of a project (Leader, 2006; Shemberg, 2008; Nwaokoro, 2010; Černič, 2010). They generally guarantee the investors (mostly in the West) that the domestic laws affecting the investment will remain unchanged, or frozen, during the lifetime of the project. The clauses

either do not allow new laws to apply to the project, or force host governments to compensate investors for compliance with new laws, especially where they erode the returns promised to investors (Cotula, 2008). The clauses are usually accompanied by arrangements for arbitration. Such clauses constrain the ability of a sovereign state to legislate, protect human rights and meet its international obligations. Given the obvious conflicts, the United Nations Conference on Trade and Development (UNCTAD) has called for a balance to be struck "between the legitimate commercial expectations of an investor party and the right of a host country party to oversee the evolution of the resulting relationship in a manner that is consistent with national development policies[11]" (UNCTAD, 2004, p. 45). However, the investment agreements and treaties are ultimately shaped by asymmetries of power and are often found to be "one-sided instruments. They are concerned with limiting the measures that may be taken by governments against foreign investors or foreign owned investments. The treaties contain a series of rights for inward capital – protection against expropriation, guarantees of non-discrimination, and freedom to transfer funds out of a host state – but they lack any counter-balancing investor responsibilities" (Peterson, 2006, p. 20).

The investor agreements tend to be confidential, but in recent years some have attracted the attention of civil society and non-governmental organizations. One such agreement related to the development of Chad-Cameroon oil and pipeline project and illustrates the concerns outlined above.

3. The Chad-Cameroon Oil and Pipeline

3.1 The Investment Project and Agreements

At more than US$3.5 billion[12], the Chad-Cameroon oil pipeline project was one of the largest ever private-sector investment projects in Africa. The project was initially established in 1988 between the government of Chad and

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[11] A weaker and more neoliberal version is advocated by the OECD (2002) which advises that the stabilization clauses should not grant blanket exemptions or rights to compensation, but should be restricted to clearly specified legislation and clearly specified compensation terms.

[12] By 2007, the project cost was estimated to be $4.2 billion (Gary and Reisch, 2005, p. 6)

a consortium of oil companies for exploration of oil. The initial permit was valid until 2004 and was accompanied by a 30 year concession to develop 300 oilfields around Doba in south-western Chad, but in 2004 the period was extended to 35 years with an automatic extension for another 35 years, if needed – i.e., it could last for 70 years. The second portion of the project, commencing in 1997, involved the construction of a 1,070 kilometre (650 miles) pipeline from land-locked Chad to Cameroon's Atlantic coast at Kribi where a floating storage offloading facility was to be built. This agreement was for 25 years, with a renewal option for another 25 years, if needed – i.e., it could last for 50 years. The projects are covered by a number of agreements and protocols between the Republic of Cameron and the Republic of Chad and a consortium of companies, which included ExxonMobil, ChevronTexaco, and Petronas, the Malaysian state oil company.

The consortium planned to produce and export around 225,000 barrels of oil a day, mostly to Europe and the USA. Most of the 1,070 kilometre (650 mile) pipeline had to be built underground (which makes leakage difficult to detect) and pass through virgin rainforest that has been the traditional home for a Pygmy minority of hunters and gatherers and thus had the potential to affect their culture and livelihood. The oil company consortium contributed about 80% of the finance for the project and the remainder came from export credit agencies, the World Bank's International Finance Corporation, the European Investment Bank and private sector banks. Under the agreement, the governments of Chad and Cameron formed two joint-venture companies, the Chad [Tchad] Oil Transportation Company (TOTCO) and the Cameroon Oil Transportation Company (COTCO), to own and operate the projects. The oil companies were the majority shareholders of both TOTCO and COTCO and the International Bank for Reconstruction and Development (one of the five constituents of the World Bank) provided a loan of $90 million to enable Chad and Cameroon to finance their minority holding (about 3%) in the companies. The project was brokered by the World Bank, and all of the providers of finance claimed to voluntarily adopt the highest social and environmental standards (Amnesty International, 2005). For example, ExxonMobil, the biggest investor in the project, claims that "We promote respect for human rights, not just because doing so fosters a stable and productive business

environment, but more importantly, because it is the right and responsible thing to do. We believe our business presence should have a positive influence on the people in the communities in which we operate. …ExxonMobil's approach to respecting human rights consists of several core elements, including building local economic capacity … adhering to corporate policies and expectations … applying national laws and universally recognized principles, and engaging with external groups …" (ExxonMobil, 2010, p. 45).

The project offered possibilities of economic development for Chad and Cameroon, ranked respectively at 167th and 141st place in the UN Development Programme's Human Development Index and an average life expectancy of 44.7 years and 46.8 years respectively (United Nations Development Programme, 2004). Around 80% of Chad's population[13] and 40% of Cameroon's population[14] lives on less than $1 a day. The World Bank estimated that the project would generate revenues of around US$2 billion from royalties and taxes for Chad[15] over the 25-year life of the project. Cameroon was expected to receive nearly $500 million from taxes and transit fees. The World Bank notes that during the initial construction phase (the first three years), the project employed 13,000 local people[16] and many received technical training for the job. In the same period, around $740 million in procurement was allocated to local contractors for services such as truck transportation, civil works, vehicle maintenance and food catering. ExxonMobil

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[13] As per the World Bank's press release on 16 September, 2004 (http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/CHADEXTN/0,,contentMDK:20255280~menuPK:349881~pagePK:141137~piPK:141127~theSitePK:349862,00.html; accessed on 10 May 2010)

[14] As per the World Bank's website (http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/CAMEROONEXTN/0,,contentMDK:20375876~menuPK:753511~pagePK:1497618~piPK:217854~theSitePK:343813,00.html; accessed 20 May 2010).

[15] "In late 2003, ExxonMobil made its first royalty payment into the government of Chad's account at Citibank in London, and Chad was likely to receive $140-150 million in oil revenues during 2004 and over $200 million in 2005. Over their 25-year production span, the first three oil fields in southern Chad may earn the government more than $5 billion in oil revenues" (Gary and Reisch, 2005, p.1)

[16] As per an IFC fact sheet (http://www.ifc.org/ifcext/eir.nsf/AttachmentsByTitle/ChadCameroonPipeline1/$FILE/CHAD+CAMEROON+PIPELINE+FACT+SHEET.pdf; accessed 26 Jun 2010).

explained that "88 percent of the 5,700 people employed by the project in Chad at year-end 2007 were nationals. Total direct employment in Cameroon is 1,200; 91 percent are Cameroonian[17]". In contrast, local NGOs claim that only about 500 people in both countries received permanent employment, often in low-paid positions at an average monthly wage of US$225, considerably less than the amounts paid to foreign workers[18]. A field study by Sikod (2006) noted that in the rural areas where the underground pipeline was located, the unskilled and semi-skilled work was mainly performed by local males between the ages of 18 and 45. The employment of local people depended on the terrain and the geographical size of the village, especially as on average about two kilometres of pipeline was laid a day. Around 90% of the people said that their employment lasted from one day to 60 days. Around 28 persons per village secured some employment on the pipeline project at daily rates of between 1,200 and 7,000 Communaute Financiere Africaine (CFA) francs (between US$2 and US$12). The International Confederation of Free Trade Unions (ICFTU) reported that 4,000 workers were forced to do unpaid overtime worth some 6 thousand million CFA francs to complete the project ahead of schedule and in 2005 workers' protests were met with a police crackdown resulting in arrests, injuries and deaths[19].

The project had the potential to provide economic development, but it also had the potential to cause loss of farmlands, sustainable livelihoods, displacement of communities and the accompanying loss of cultural identities. In particular, the project posed challenges for the wellbeing of the indigenous peoples' "right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions … rights to life, physical and mental integrity, liberty … right not to be subjected to forced assimilation or destruction of their culture" and the state's obligations to "provide effective mechanisms for prevention of, and redress for … Any action which has the

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[17] As per ExxonMobil brochure "profile: Chad/Cameroon – Doba Basin" (http://www.exxonmobil.com/corporate/files/news_pub_poc_chad.pdf; accessed on 14 June 2010).

[18] http://www.fossilfreeeib.org/fp_detail.php?fpID=16; accessed on 14 June 2010.

[19]http://www.icftu.org/displaydocument.asp?Index=991222845&Language=EN ; accessed 20 June 2010.

aim or effect of dispossessing them of their lands, territories or resources … Any form of forced population transfer" (United Nations, 2008, p. 5).

Right from the beginning, civil society organisations were concerned that the revenues could be misused, may not go to the regions affected by the development or be used to alleviate poverty or build social infrastructure. Such concerns were aired because Chad and Cameroon are distinguished by high levels of corruption. For example, in 2005, Chad was named as the world's most corrupt country, ranked joint 158th by Transparency International[20] and Cameroon was ranked 137th. Chad also has a long history of civil war, political instability, a weak judicial system and widespread corruption (Amnesty International, 2005; Gary and Reisch, 2005). Since 1990, Chad has been ruled by General Idriss Déby, who came to power in an army coup and became President in 1991 and was re-elected in 1996 and 2001. In June 2005, a referendum eliminated the constitutional limit of two-terms and General Idriss Déby stood for the office of president. Amidst claims of political repression he was re-elected in 2006 (BBC News[21], 2 February 2008). Various coups against his regime have been foiled in 2006 and 2008 (BBC News, 15 March 2006[22]; 4 February 2008[23]). Witnesses claim that opposition leaders have been carried off by armed men in uniforms with no insignias and have not been heard from since (New York Times, 12 February 2008). Chadian armed forces continue to be accused of human rights abuses against the civilian population, including deliberate and arbitrary killings and rape, especially in southern oil-rich regions (Amnesty International, 2005, p. 15).

Since 1982, Cameroon has been ruled by President Paul Biya, considered to be one of the world's twenty worst living dictators, and Wallechinsky (2006) notes that "every few years Biya stages an election to justify his continuing reign, but these elections have no credibility. In fact, Biya is credited with a

[20] http://www.transparency.org/policy_research/surveys_indices/cpi/2005; accessed 2 June 2010.
[21] http://news.bbc.co.uk/1/hi/world/africa/7224008.stm; accessed 13 May 2010.
[22] http://news.bbc.co.uk/1/hi/world/africa/4808758.stm; accessed 13 May 2010.
[23] http://news.bbc.co.uk/1/hi/world/africa/7225023.stm; accessed 13 May 2010.

creative innovation in the world of phony elections. In 2004, annoyed with the criticisms of international vote-monitoring groups, he paid for his own set of international observers, six ex-U.S. congressmen, who certified his election as free and fair" (p. 6-7). The average annual income per capita in Cameroon is around $1,000, but in 2009 President Biya is reported to have spent $40,000 a day on a twenty-day long holiday in a five star Paris hotel (Daily Mail[24], 6 September 2009). Amnesty International (2005) notes that in his regime "torture persists and political prisoners have continued to die in appalling prison conditions after unfair trials. Opposition activists and human rights defenders remain at risk of being detained, and their peaceful political activities are frequently obstructed by the authorities" (p. 8).

To pacify critics and address possible concerns about corruption, the World Bank negotiated a deal under which the net incomes due to Cameroon and Chad were to be deposited into a bank account in London, pending audits. Some 10% of the revenues were earmarked for a Future Generations Fund and civil society representatives and a member of the opposition were to be part of a monitoring board. The project had to meet the World Bank's safeguard policies on environmental assessments and resettlements, and two national parks were to be created to compensate for the loss of a small forest. In 1998, the Chadian government introduced the Oil Revenues Management Act and under this more than 80% of the project revenues were to be invested in education, water, rural development, infrastructure, environment and healthcare. Cameroon created the Foundation for Development and Environment to oversee the project's impact on the environment and indigenous people. Nevertheless, the project was mainly governed by the terms of the investment agreement (or Convention of Establishment) which made no mention of human rights, but contained the following stabilization clauses.

> 24.1 The Republic of Cameroon guarantees the stability of legal, tax, customs and exchange control regime applicable to the activities undertaken under this Convention, as defined in article 30.1, as

[24] http://www.dailymail.co.uk/news/worldnews/article-1211368/President-Cameroon-attacked-25-000-day-holiday.html; accessed 10 June 2010.

well as the stability of the terms and conditions of this Convention.

24.2 With regard to the activities undertaken under this Convention, the Republic of Cameroon shall not modify such legal, tax, customs, and exchange control regime in such a way as to adversely affect the rights and obligations of COTCO, Shareholders, Affiliates, Contractors, Shippers or Lenders arising from this Convention and no legislative, regulatory or administrative measure contrary to the provisions of this Convention shall apply to the persons mentioned above without COTCO's prior written consent.

24.3 (a) Where COTCO is of the opinion that a legislative, regulatory or administrative measure which has been taken by the Republic of Cameroon adversely affects the rights and obligations of COTCO, Shareholders, Affiliate, Contractors, Sub-Contractors, Shippers or Lenders arising from this Convention, COTCO has the right to request that such measures not apply to the persons mentioned above with respect to activities undertaken under this Convention…

24.4 The Republic of Cameroon shall not undertake any nationalisation or expropriation affecting assets belonging to COTCO, Shareholders, Affiliates, Contractors, Sub-Contractors, Shippers or Lenders. However, if circumstances or an emergency imperatively call for such measures, the Republic of Cameroon agrees that, in accordance with the principles of international law, a fair and equitable compensation, of which one of the elements covers any remaining debt arising from the financing of the construction of the Cameroon Transportation system. Shall be paid within a time period that conforms to the principle of international law …

Article 25 of the agreement lists the taxes, custom duties and charges that the company will be exempt from for the entire duration of the project. Article 30 expressly outlines the national laws and regulations that are to apply to the project and also outlines those which are not to be applied. Other national laws and regulations may be applied to the project only where they are consistent with the investment agreements. If the national laws and regulation conflict with the terms of the agreement itself then the agreement clauses are to prevail. Article 36 of the agreement sets up a dispute settlement procedure with the cases being heard before the Washington DC based International

Center for Settlement of Investment Disputes[25] (ICSID) and any awards made by it are to be considered to be "final and irrevocable (Article 36.4).

Similar clauses are also to be found in the agreement, written in French, between the government of Chad and the consortium. For example, Article 21.3 of the TOTCO-Chad agreement states that

> "During the term of this Convention, the Republic of Chad guarantees that no governmental act taken after December 19, 1988 will be applied to TOTCO, without prior agreement between the Parties, which has the duly established effect of increasing, directly, indirectly or by virtue of its application to Shareholders, the obligations and charges imposed by this Convention or which has the effect of adversely affecting the rights and economic benefits of TOTCO or of Shareholders as provided for in this Convention, including the effect duly established and passed on to TOTCO of the adverse effect on the charges of Affiliates or of the Contractors as a result of such act" (cited in Amnesty International, 2005, p. 22).

The Chad agreement gives the oil companies powers associated with exploration, extraction and transportation of oil, use of roads, clay, sand and occupation of land. The consortium promises to indemnify people for the damage but the terms and the nature of damage are not specified (Leader, 2006). The investment agreement provides that the "Consortium must conform scrupulously … to the laws and regulations of the Republic of Chad insofar as the Convention does not indicate otherwise", but an accompanying clause adds that

> "All references to these laws and regulations throughout this Convention will not be interpreted in any way that either directly or indirectly increases the obligations and [financial burdens] imposed on the Consortium by this Convention, nor will it prejudice the rights and economic advantages of the Consortium as they are provided for by the present Convention" (cited in Leader, 2006, p. 78 and footnote 66).

[25] ICSID is part of the World Bank and its primary purpose is to provide facilities for conciliation and arbitration of international investment disputes (for further details see, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home).

In the case of Chad, disputes were to be decided by the Paris-based International Chamber of Commerce[26]. The arbitrator can have regard to the domestic law but may often be under specific instructions from the contract. The Chad/Cameroon project instructs that the interpretation must not "… prejudice the rights and economic advantages of the investor" (cited in Leader, 2006, p. 677).

Agreements for both Chad and Cameroon specify that if the countries decide to change the regulatory environment around the project, they should seek the prior consent of the oil consortium (Amnesty International, 2005, p. 22). Despite the claims by ExxonMobil (see above), the agreements do not mention human rights and do not exclude the possibility that Chad and Cameroon could be penalised for steps taken to improve the material condition of their citizens, or laws introduced to protect and conform with the state's human rights obligations[27].

The investment agreements with the consortium of oil companies, accompanied by an Environment Management Plan drafted in 1999, were approved by the World Bank. The net effect of the agreements is to give special privileges to companies on legislative, taxation, customs, exchange control and other matters to enable them to carry out the project and these privileges could last for more 50-70 years. The pipeline was completed in July 2003 and production from the oilfields reached their peak capacity 225,000 barrels in late 2004.

The project had considerable positives as the World Bank set-up oversight panels and involved civil society panels in monitoring the project, but the outcomes were very different. Nguiffo (2005) notes that when NGOs and local communities raised concerns about workers' rights, the World Bank Inspection Panel told them that worker rights did not fall under its mandate. The Panel also told them that it did not have a policy on contractual business

[26] The International Chamber of Commerce has permanent observer status with the United Nations.
[27] Governments fearful of upsetting investors may voluntarily minimise the risk of disputes and thus dilute their actions for protecting human rights.

relationships between the consortium and small local businesses. Although policies existed on access to water and compensation, the Inspection Panel told the communities that they had to first prove the quality of their water was negatively affected. Since the communities had no access to prior scientific evidence to support their case, most of the complaints were dismissed due to lack of evidence. Farmers in Cameroon complained that they did not receive adequate compensation for loss of farms and land. The compensation for the loss of raffia trees was 120 times below their market value (Environmental Defense Fund, 1999, p. 6). Fewer than 5% of the Bagyéli people affected by the pipeline secured any paid employment on the pipeline project. They received little compensation and few of the promised healthcare facilities (United Nations Development Programme, 2004, p. 92).The project resulted in construction of roads which also paved the way for loggers and poachers to enter remote areas and with it new diseases and threats to wildlife (Friends of the Earth, 2001, 2002).

The project was supposed to be preceded by adequate public consultations, but civil society organisations complained of lack of public information. The Environmental Defense Fund (1999) noted that “The public consultations that the World Bank insisted on holding resembled a political party’s meetings where only propaganda is presented. The oil exploitation was depicted as something positive, with no mention of environmental risks or the rights of local populations. Pretty video films were shown to distract the population, the majority of which are illiterate and do not understand what is happening” (p. 7). Often military personnel were present during public meetings making it very difficult for people to voice their concerns. Amnesty International (2006) notes that during the 2001 presidential race in Chad, incumbent candidate General Idriss Déby had the opposition leader Ngarledji Yorongar arrested. One of the “crimes” for which he was charged and tortured was his opposition to the Chad-Cameroon oil pipeline. President Déby used part of his $25 million signing-on bonus from oil companies to buy arms for his supporters.

The inauguration of the pipeline prompted a national day of mourning by civil groups in Chad as many villagers claimed that the project had denied them access to clean water, farmers were unable to access their lands, and due to

oil spillage fish stocks off Cameroon's coast had been depleted. The International Confederation of Free Trade Unions (ICFTU) complained that in September 2005 the Chadian police broke up demonstrations against ExxonMobil, resulting in the deaths of two former employees, serious injuries to two and the arrest of 30 people[28].

The project has continued to be mired in controversy and allegations of abuse of human rights (see Friends of the Earth; Amnesty, Gary and Reisch, 2005; Neba and Ngeh, 2009). In January 2006, the World Bank suspended loans and grants to Chad because its government reneged on the agreement to spend oil money on alleviating poverty. In December 2005 Chad's government revised the Petroleum Revenue Management Law and decided to spend a higher share of its oil money on military, as well on schools, hospitals and roads. It voted to double the share of money that can be spent without oversight from a committee of government and civilian representatives (New York Times, 7 January 2006). Following further negotiations, the government promised to allocate 70 percent of its oil revenues in 2007 to help the poor and the loan facilities were reinstated. In 2007, World Bank instructed the consortium to take corrective action to fully compensate farmers in Chad who lost land and their livelihoods due to the company's actions (Reuters[29], 22 March 2007).

3.2 Some Issues Relating to Stabilization Clauses

The stabilization clauses inserted in the Chad-Cameroon oil and pipeline project raise some fundamental questions about protection of human rights, the citizens right to seek redress in a court of law, the ability of sovereign governments to enact laws and develop a regulatory capacity, the power and accountability of transnational corporations, their home countries and much more. The stabilization clauses draw attention to the unevenness of economic globalization as they seem to be primarily imposed on developing countries.

[28] http://www.yesmagazine.org/issues/spiritual-uprising/1340; accessed 30 April 2010.
[29] http://www.reuters.com/article/idUSN2238323720070322; accessed 28 Jun 2010).

Shemberg's survey of 88 agreements notes that "the stabilization clauses in non-OECD countries are more likely than those in OECD countries to limit the application of new social and environmental laws to the investments" (Shemberg, p. 39).

The foreign investment agreements are written in dense legal language and often shrouded in secrecy[30], making it difficult to organise any sustained public scrutiny. In the case of Chad and Cameroon, they have imposed binding stabilization clauses on comparatively poor countries for a period of 50-70 years which the oil companies would not be able to impose on richer and more powerful countries. In developed countries, transnational corporations routinely manage the risks associated with changed social, legal and political circumstances and are not known to directly constrain the sovereign lawmaking powers of the state, but they do so in developing countries. As the United Nations Commission on International Trade and Law, (2001) notes,

> "All business organizations, in the private and public sectors alike, are subject to changes in law and generally have to deal with the consequences that such changes may have for business …General changes in law may be regarded as an ordinary business risk rather than a risk specific to the concessionaire's activities and it may be difficult for the Government to undertake to protect infrastructure operators from the economic and financial consequences of changes in legislation that affect other business organizations equally. Thus, there may not be a prima facie reason why the concessionaire should not bear the consequences of general legislative risks, including the risk of costs arising from changes in law applying to the whole business sector" (p.141).

[30] There are rare alternative examples. Under pressure from NGOs, UK-based oil company BP published the private investment contracts (see http://www.bp.com/lubricanthome.do?categoryId=6070) underpinning a major cross-border pipeline project known as the Baku-Tbilisi-Ceyhan pipeline. The company subsequently amended (in 2003 and 2005) the contracts to include "Human Rights Undertaking" (Shemberg, 2008) and address some of the problems identified by human rights advocates (also see Amnesty International, 2003; Baku-Ceyhan Campaign, 2005). Following a campaign by NGOs, Mittal Steel also revised some of its stabilization clauses (Global Witness, 2006). However, the Chad-Cameroon agreement has not been amended.

The home countries of transnational corporations have facilitated foreign investment through the provision of insurance and export credit facilities. Despite their obligations under the UDHR to respect and protect human rights they are content for the stabilization clauses to be imposed on poorer countries which would be utterly unacceptable in their own territorial jurisdiction.

Despite the comparatively poor record of Chad and Cameroon on corruption and human rights, the agreement drafted by the consortium did not include clauses to protect human rights. Civil society organizations have argued that foreign investment should be preceded by commitments to protect human rights and institutional structures that build the host state's capacity to protect human rights (Environmental Defense Fund, 1999; Amnesty International, 2003, 2005, 2006, Gary and Reisch, 2005; Global Witness, 2006). Though the World Bank took some steps to protect some revenues for improving social infrastructure the process does not seem to have worked well, possibly because the stabilization clauses disabled the state and corporations did not prioritise the protection of human rights in their investment decisions.

Historically, the state is expected to protect human rights and provide remedies for the injured citizens, but it cannot easily tackle discrimination at work, gender rights, and rights of minorities without developing appropriate systems of corporate governance, law enforcement and a capacity to investigate suspect practices. However, the opt-outs granted by stabilization clauses do not enable the host countries to develop regulatory capacity, or the ability to monitor corporate activities, identify transgressions and meet their human rights obligations. Consequently, the host states may be inclined not to honour international human rights obligations and thus hamper the development of international standards.

In Chad and Cameroon, some farmers and indigenous people have complained that the exploration and transportation of oil over vast distances has affected the quality and quantity of water due to leaks, pollution, soil erosion and extensive logging facilitated by new roads, etc. This means that people are deprived of the resources vital for their survival. Under Articles 11

of the International Covenant on Economic, Social and Cultural Rights (ICESCR) the

> "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions".

Article 12 requires the

> "States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

The UN Economic and Social Council explains that the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for human survival (United Nations Economic and Social Council, 2003). All states are required to protect these rights. The UN Council adds that

> "The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems" (United Nations Economic and Social Council, 2003, para 23).

The state's obligation to prevent corporations (third parties) from breaching human rights rests upon the assumption that it can exercise its sovereign right to enact laws and build capacities to regulate important areas of public policy. However, the ability of poor developing countries to meet these obligations is hampered by stabilization clauses, which could remain in effect for 50-70 years, and can limit their capacity to fulfil present and future obligations under their constitution and international treaties.

To facilitate clean water the state may have to impose levies on the oil consortium, or impose stringent environment safeguards and in the process change the profits expected by the investors who will then invoke the clauses

in the agreements and demand compensation. The state now faces the dilemma of either preserving the sanctity of the investment agreement or neglecting its human rights obligations. Often poor states will not have the means to conduct the necessary tests to establish the levels of pollution in water supply, rivers and lakes and even if they could they may not be in a position to apply the principle of the "polluter pays[31]", because stabilization clauses may constrain the host state from introducing such laws. The net effect of such clauses is to shift financial and social costs to citizens of the host countries. Faced with a radically changed environment the host state could favour unilateral termination of the investment agreement, but this may result in heavy compensation payable to transnational corporations. Perhaps, Chad and Cameroon could have insisted on 'change of circumstances' clauses in the agreement and thus enabling them to make desirable changes. The difficulty is that there are numerous formulations of 'circumstances' and it is almost impossible to compile an exhaustive list. In any case, the negotiation of agreements depends on the relative bargaining strength of the parties and poor countries are no match for the economic might of transnational corporations. It is worth noting that Exxon's 1996 revenues of $134.2 billion were 26 times greater than the gross domestic product (GDP) of Chad. In 2008 Chad and Cameroon had estimated GDP[32] of $6.7 billion and $21.8 billion respectively, compared to ExxonMobil sales revenues of $443 billion[33].

For any state to hold a corporation to account it needs to develop a legal infrastructure, but under the investment agreements the disputes are referred to international arbitration panels. The courts in Chad and Cameroon are not allowed to develop capacities to hear complex arguments, or question the relative neglect of human rights in investment agreements. As a result, it becomes difficult to build the legal expertise and train judges and lawyers to

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[31] Recently, The UK-based oil company Oil giant BP has been persuaded by the US government to put $20bn (£13.5bn) in a compensation fund for victims of the Gulf oil spill and company ahs also agreed not to pay dividend to its shareholders (BBC News, 17 June 2010; http://news.bbc.co.uk/1/hi/world/us_and_canada/10335114.stm).

[32] As per the World Bank statistics (http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf; accessed 3 July 2010)

[33] As per the company's annual financial statements.

craft new laws and investigative capacities. The judgement of arbitration panels is based upon interpretation of clauses in investment agreements rather than any domestic law or the host state's human rights obligations.

The right to an effective recourse in a domestic court of law is a key element of human rights guarantees. However, the stabilization clauses obstruct the possibilities of a legal remedy. The affected people have little or no recourse against the oil companies because they are not a direct party to the contract and often will not know the identity and standing of numerous sub-contractors and financiers involved on the project. The oil consortium claims to voluntarily apply the highest ethical and environmental standards, but they are always vague and capable of being easily diluted to meet commercial imperatives and do not give the local population any enforceable rights. The investing companies can make these standards as high sounding as possible, but they are not enforceable in any local court because they are not written into any law. The agreements may guarantee 24/7 electricity and water to the oil consortium, possibly by diverting it away from farmers and other local people, and as a result have an adverse impact on their livelihood. However, the people have little recourse against the government because the contracts are between the oil companies and two local limited liability companies (TOTCO and COTCO) even though the Chad and Cameroon governments hold minority stake in them. The people, if they can muster sufficient political and financial resources, may litigate against their governments, but such steps are also fraught with difficulties because the local state may have rarely guaranteed them clean water or a pristine environment. Thus the constitutional wrangling could last for decades. The terms of the investment agreements take precedence over local laws and if to meet street protests the host state resorts to passing new laws to protect worker rights, pensions, freedom of expression, the environment or the rights of the indigenous people, it may need to pay compensation[34] to oil companies, which paradoxically

[34] In 2009, an arbitration panel decided that Mexico should pay compensation of $170m to foreign investors (including $77m to Cargill Inc., other companies were Archer Daniels Midland, Tate & Lyle and Corn Products International) after US agricultural companies complained that Mexico slapped a discriminatory tax on their cross-border investments in the high-fructose corn syrup sweetener market (FDI Magazine, 15 October 2009

drains the scarce resources available for economic and social development. Governments fearful of upsetting corporations may well resort to strong-arm tactics to quell demands for social change. The stabilization clauses prioritise commercial interests over concerns about social justice and inhibit the state from meeting demands for the protection of human rights.

In principle, the host government could develop a two-tier system of laws: one applying to the enclave of the project and another for the rest of the country, but this is divisive and a recipe for social resentment and conflicts. The project area effectively functions as a state-within-a-state governed by the clauses of an investment agreement and the people living within that area are expected to accept inferior standards of healthcare and social rights (Global Witness, 2006). The stabilization clauses sharpen social conflict and a sense of social grievance and could encourage civil wars and secessionist movements. Thus the stabilization clauses become the means for violating international treaties and standards on human rights and encourage the state to clamp-down on protests and democratic dissent.

3.3. Some Accounting and Accountability Issues

The section examines three technologies that might amplify corporate accountability and respect for human rights. These are conventional financial reports, corporate social responsibility reports and production of shadow, or social, accounts, which could be mobilised to highlight the impact of foreign investment agreements, stabilization clauses and erosion of state sovereignty.

Stabilization clauses affect the quality of profits and social costs associated with generation of economic wealth. So how have the companies rendered an account of their operations in Chad and Cameroon, especially as they

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(http://www.fdimagazine.com/news/fullstory.php/aid/3035/Large_fines_leave_sour_taste_in_Mexico.html); accessed 24 June 2010). In another case, in 2008, the Peruvian government successfully defended a claim by Delaware-based Aguaytia Energy LLC for $142 million compensation by arguing that though stabilization clauses freeze some laws they do not create new substantive rights (for further detail see http://ita.law.uvic.ca/documents/AguaytiaAward.pd;; accessed 2 July 2010).

espouse commitment to “respect for human rights [and] applying national laws and universally recognized principles …” (ExxonMobil, 2010, p. 45)? It is not too unreasonable to expect that these promises warrant some disclosures about company policies about the quality of profits, or even disclosures about the effects on the local population. With this in mind, ExxonMobil’s 2009 annual report[35], the most recent available, was examined but it contained no information about stabilization clauses relating to any of its foreign investment agreements. The phrase “human rights” could not be found in the annual report. Despite the segmental analysis[36] there was no information about the profits made in Chad or Cameroon, even though in the context of those economies they may be very material. The same silences are also present in the 2009 annual report[37] of Chevron. Some of these shortcomings are due to the class and ideological interests embedded within accounting, which privilege the narrow interests of capital and seem incapable of reporting the impact of corporate practices on a wide variety of social constituencies (Johnson, 1972; Puxty, 1986). The accounting calculations inoculate management from consideration of the social costs of profits. The emphasis, for example in the income statement, is on celebrating the victory of capital on other social constituencies and appeasing markets by reporting higher profits. The social consequences are frequently considered to be externalities and little attempt is made to incorporate social costs into any business decision (Bebbington et al., 2001). Alternative forms of annual financial statements, such as Value Added Statements (Riahi-Belkaoui, 1999), can show how the corporate wealth is allocated amongst providers of finance (e.g. shareholders), human capital (e.g. employees) and society (e.g. taxation), but the underlying theories and the logic of capital maintenance, costs and rewards remain aligned with the interests of capital (for a discussion see Whittington, 2007) and neglect other social constituencies. Perhaps, there are pressures from institutions to improve the quality of accounting practices and

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[35]http://thomson.mobular.net/thomson/7/3095/4222/document_0/XOM_SAR09.pdf; accessed 4 January 2011.

[36] This is governed by International Financial Reporting Standards (IFRS) 8 and gives management considerable discretion in determining business segments.

[37]http://www.chevron.com/annualreport/2009/documents/pdf/Chevron2009AnnualReport_full.pdf; accessed 5 January 2011.

disclosures, but human rights do not get a mention in corporate governance codes (for example see, Committee on Financial Aspects of Corporate Governance, 1992; Financial Reporting Council, 2010) and international accounting and auditing standards.

Perhaps, oil companies respond to concerns about human rights in their corporate social responsibility reports. Therefore, the 2009 CSR report of ExxonMobil was examined. It emphasised that the company promotes "respect for human rights and serves as a positive influence in communities where we operate" (ExxonMobil, 2010, p. 44). The report mentions that the company is making economic contribution to the development of Chad and Cameroon by empowering women, supporting small businesses, facilitating local supply chains, leadership and skills training and making people aware of health hazards, such as malaria. However, the 52 page report does not provide any information about the stabilization clauses in its investment agreements or their impact on the local population. The 48 page social responsibility report published by Chevron states that the company is "deeply committed to conducting business in a socially responsible and ethical manner, and this report outlines our efforts to continually improve our performance and practices" (Chervron, 2010, p. ii). Interestingly, in contrast to the emerging literature (for example see, Jochnick, 1999; Ratner, 2001; Peterson, 2006; Cronin-Furman, 2010) the company pins the prime responsibility for protection of human rights on the state by adding that "Although governments have the primary duty to protect and ensure human rights, Chevron recognizes that it has a responsibility to respect human rights and can play a positive role in communities where we operate" (Chervron, 2010, p. 39). The company provides a lot of positive news about its healthcare, environmental and education projects, but nothing about any stabilization clauses that it has imposed through its investment agreements or whether any of its commercial programmes have yielded negative outcomes for the local population. The selectiveness of information is consistent with prior research which notes that the disclosures are dependent upon management discretion and are primarily driven by a business case for supporting social responsibility initiatives (for example, see Adams, 2004; Unerman and O'Dwyer, 2007). Given corporate obsessions of presenting

themselves in good light, it is unlikely that companies will ever voluntarily reveal the negative social impact of their operations. There are calls interventions by the state to draft legislative frameworks to demand more meaningful information (Archel et al., 2009), but the regulatory capacities of many developing countries are disabled by stabilization clauses in foreign investment agreements and they are unlikely to be in a position to develop any binding standards. Corporations are also willing to use their investment power to discipline host governments. For example, an ExxonMobil executive was quoted as saying to Wall Street Journal (October 14, 1997) that "Poor developing countries cannot afford environmental protection. If they insist on such measures, foreign investment might go elsewhere" (cited in Environmental Defense Fund, 1999, p. 2).

Oil companies operate in societies marked by inherent antagonisms. The structural contradictions cannot be dissolved by conventional accounting or CSR reports (Puxty, 1996). The silences in the official media have persuaded the marginalised to mobilise others and give visibility to their concerns through competing discourses amplified by leaflets, oratory, street-theatre, music, art and comedy (Thompson, 1968; Cooper et al., 2005; Spence, 2009). In the case examined here, social accounts of the stabilization clauses in the Chad-Cameroon investment agreements and their impact on the lives of ordinary people were provided by civil society organisations (for example, Amnesty International, 2003, 2005, 2006; Environmental Defense Fund, 1999; Friends of the earth, 2007). They used publicly available information as well as the contents of the investor agreements to construct an alternative account that specifically focused on human rights of the affected people. In this process, they were assisted by public spirited lawyers and academics. The social accounts sought to corroborate corporate claims with the lived experiences of the individuals directly affected and found them to be deficient. The civil society organisations visited remote parts of the countries, organised and attended public meetings, collected testimonies and engaged with the oil companies, the World Bank, the IMF and other institutions to create possibilities of public scrutiny. The increased public sensitivities may not have

diluted the stabilization clauses in the Chad-Cameroon agreements[38], but the resulting dynamic dialogue has created space for possible reforms of investor agreements and stabilization clauses (Shemberg, 2008; United Nations Human Rights Council, 2009, 2009). The social accounts signalled that corporate practices will be resisted and exposed. Such engagements may also persuade companies to broaden the scope of their CSR reports as continued silence may signal dishonesty and callousness. Nevertheless, social accounts, rest upon the mobilisation of adequate financial, human and legal resources for civil society organisations and they are under constant pressure of enrolment and inducement of corporate sponsorships (Gray, Bebbington and Collison, 2006).

4. Summary and Discussion

Foreign investment and trade is an inevitable feature of contemporary economic globalization and has strengthened the power of transnational corporations. This paper has sought to draw attention to some of the challenges that it poses for the enjoyment and protection of human rights through a partial examination of a foreign investment agreement[39]. It specifically drew attention to the impact of stabilization clauses which raise major legal, political, social, ethical and moral issues (for an indication see, Amnesty International 2005, 2006; Leader, 2006; Cotula, 2008; Macleod, 2008; Neumayer, 1999; United Nations Human Rights Council, 2008, 2009; Černič, 2010). Stabilization clauses are a reminder of the way profits are

[38] Under pressure from civil society organisations, UK-based oil company BP published the private investment contracts (see http://www.bp.com/lubricanthome.do?categoryId=6070) relating to a major cross-border pipeline project known as the Baku-Tbilisi-Ceyhan pipeline. The company subsequently amended (in 2003 and 2005) the contracts to include "Human Rights Undertaking" (Shemberg, 2008) and addressed some of the problems identified by human rights advocates (see Amnesty International, 2003; Baku-Ceyhan Campaign, 2005). Following a campaign by NGOs, Mittal Steel also revised some of its stabilization clauses (Global Witness, 2006). However, the Chad-Cameroon agreement has not been amended.

[39] It may be argued that investment and trade per se are not necessarily the cause of human rights problems or violations, but rather the agreements have effects which encourage governments and corporations to ignore human rights obligations, or constrain governments from taking steps to improve human rights.

prioritised and human rights are marginalised in business practices. The neoliberal project insists that civil and political freedoms are a necessary by-product of economic growth, but the Chad-Cameroon project examined in this paper shows that corporations view economic growth purely in terms of financial and contractual obligations. One might argue that economic, social, cultural and political rights are a necessary condition for reduction of poverty, economic stability and enabling citizens to live fulfilling lives, but they are excluded from investment agreements.

The rise of corporate power has compromised the autonomy of the state and constrained its ability to pursue what could be regarded as national priorities or citizens' rights. These developments have not been accompanied by changes in corporate accounting and accountability practices. One might look to accounting academics for advances that might humanise accounting, but such prospects remain poor, especially as a large volume of research published in leading academic journals privileges narrow technocratic issues and is rarely concerned with "an examination of the accounting issues associated with new forms of financial and economic transaction[s] …" (Unerman and O'Dwyer, 2010, p. 19). It is also doubtful that accounting and CSR developments can dilute the systemic pressures to report higher earnings or the executive quest for greater financial rewards, which are the key drivers of foreign investment, stabilization clauses and subordination of human rights to profits (Puxty, 1986).

In recent years, companies such as ExxonMobil and Chevron have made references to human rights[40] in their CSR reports, but too often the logic of cold economic calculations dominates investment decisions. The contents of CSR reports are mostly voluntary and it is rare for companies to voluntarily disclose the actual or potential negative impact of corporate practices on human rights. In any case without independent corroboration from stakeholders, corporate statements are likely to be seen as little more than publicity stunts. Such tensions are rarely addressed in contemporary

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[40] BP, another oil company, also publishes guidance on human rights (http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/BP_Human_Rights_2005.pdf; accessed 4 July 2010).

developments. For example, since 2003 the banking industry has voluntarily adopted what have come to be known as the Equator Principles[41], effectively a common standard for managing social and environmental issues related to the financing of development projects costing more that US$10 million. This screening is supposed to address protection of human rights and community health; environmental, safety and security issues by screening a project against the host country's laws and regulations and extant international treaties and agreements, but campaigners[42] have claimed that it is business as usual and that voluntary approaches have not addressed humanitarian problems (The Guardian, 14 January 2010). In most cases, the assessments carried out by banks remains secret and have not enhanced transparency and accountability of transnational corporations. The UK's 1995 Pension Act (as amended in July 2000) is another example of the way human rights agenda is resisted and accommodated. The Act requires the Trustees of occupational pension schemes to disclose through their Statement of Investment Principles (SIPs) "the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments". However, the legislation does not require companies to explicitly embrace human rights, publish investment agreements, or disclose how human rights are explicitly considered in their investment decisions.

Within the neoliberal paradigm, a framework developed by the United Nations United Nations Human Rights Council (2008, 2009) seeks to address some of the tensions identified above. It states that corporations have a responsibility to respect human rights and the state has a "duty to protect against human rights abuses by third parties, including business" (United Nations Human Rights Council, 2008, para 9) and both need to provide access to remedies for violations. It recommends that alongside their assessment of financial and business risks, corporations should carry out a process of due diligence for

[41] For details see http://www.equator-principles.com/documents/Equator_Principles.pdf; accessed 2 July 2010.
[42] Their criticisms are listed in a long letter (http://www.banktrack.org/download/bold_steps_forward_towards_equator_principles_that_deliver_to_people_and_the_planet/100114_civil_society_call_equator_principles.pdf; accessed 5 July 2010).

their projects "whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it … take proactive steps to understand how existing and proposed activities may affect human rights" (United Nations Human Rights Council, 2008, paras 25, 61). The framework recommends that corporations should provide the "means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available" (United Nations Human Rights council, 2008, para 82). More interestingly, the UN framework recommends that member states should "foster a corporate culture respectful of human rights at home and abroad" (para 27). The difficulty with the above proposals is that due to the impact of stabilization clauses some states, such as Chad and Cameroon, are not in a position to call giant transnational corporations to account. Civil society organisations have been effective in elevating the human rights agenda through production of social accounts, but the UN framework does not do anything to strengthen such possibilities. For example, as corporations are displacing the state they should be subjected to the freedom of information laws and required to publish investment agreements so that the public can corroborate their claims of protecting human rights. The imposition of such laws by the countries where transnational corporations are headquartered would help to mitigate the comparative powerlessness of citizens in many developing countries. Thus the public availability of investor agreements and related information in the US (where ExxonMobil and Chevron are headquartered) would have helped people in Chad and Cameroon to make sense of their plight. The scrutiny of corporate practices and policies can be enhanced by requiring that their directors be elected by all stakeholders (including employees, local communities, customers, etc.), but such possibilities are eschewed by the UN framework. Perhaps, a balance between human rights and corporate power cannot be struck within the confines of neoliberal ideology.

The need to make corporations accountable for human rights opens up rich possibilities for research (for some discussion see Sikka et al., 1995; Jochnick, 1999; Neu and Cooper, 2001; Cooper, 2005; Gray and Bebbington, 2006; Macleod, 2008; Spence 2009). Scholarly research can play a pivotal

role in advancing novel discourses, giving visibility to the plight of the marginalised people and showing the social cost of corporate profits. It can create possibilities of emancipatory change by examining corporate power through the lens of social justice, democracy, power, accountability and human brotherhood so that the whole of humanity can live fulfilling lives with dignity and respect. The narrowness of accounting practices needs to be exposed to create possibilities of alternative forms of reporting. There are possibilities for academics to build alliances with civil society organisations and significant others and use their expertise to produce richer social accounts to challenge the hegemony of corporations. Such alliances open up the possibilities of going beyond the corporate glossy CSR brochures and self-congratulatory statements to examine the impact of corporate practices on the lives of people. There are real possibilities of organisational behaviour research to consider possible barriers that organisations might encounter in changing organisational cultures and daily routines to embrace human rights, and the varieties of organisational processes that have been devised, or could be devised, to meet human rights obligations. The spotlight should also fall on the role of accountants, lawyers, bankers and other financial intermediaries, in devising investment agreements which prevent people from enjoying human rights. The role of the home states in constraining the host state's ability to meet human right obligations should be explored. The role of global agencies, such as the World Bank, would need to be scrutinised. A focus on human rights can reinvigorate accounting, corporate governance and CSR research and can help to strengthen democracy, public accountability and provide a better world.

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