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**Contracting sustainable and responsible energy investment: trends,
actors and grass-roots innovations for multi-level governance**

Cambridge Centre for Environment, Energy and Natural Resource
Governance (C-EENRG)

This dissertation is submitted for the degree of Doctor of Philosophy

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Declaration

- This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

- It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

- This thesis does not exceed the regulation length, including footnotes, references and appendices.

Abstract

This thesis critically examines various contractual mechanisms by which the protection of foreign direct investment (FDI) in the energy sector is reconciled with other values of sustainable development through a ‘State-Investor-Population (S-I-P) Triangle’ lens.

FDI is a major engine of the world’s economy. Both the UN’s 2015 Addis Ababa Action Agenda and the 2030 Agenda for Sustainable Development call for FDI to serve as an essential financing element of sustainability efforts. However, because of the invasive nature and massive scale of cross-boundary business operations, FDI investment projects in the extractive industries are prone to have significant impacts on human rights and our natural environment.

Current research in this fast-changing field mainly concentrates on international investment treaties, national regulations, and relevant energy dispute case-law. By contrast, project-specific contractual and quasi-contractual instruments have received far less attention despite their potential importance as components of a broader framework of global energy governance. These instruments are, in many ways, beyond the radar of most academics researching this field.

This thesis seeks to address this research gap. It relies on fresh data sets compiled for this specific purpose and includes three primary forms of contracts, namely State-investor investment contracts (‘S-I’ contracts), Corporate-NGO partnerships/agreements (‘I-P’ contracts), and multi-actor (tripartite) investment contracts (‘S-I-P’ contracts), within and even beyond the S-I-P Triangle. Based on a research methodology combining socio-legal approaches and doctrinal analysis, the research conducted for this dissertation leads to three main findings:

Firstly, contemporary legal frameworks for regulating international energy investment are fragmented and imbalanced (in favour of foreign investors). Recent global resistances and increasing investment disputes have also demonstrated that conflicts between investment protection and other public policy goals - e.g. environmental protection, public health and labour rights - are becoming a key concern for energy investment projects. Thus, despite some limitations, private contractual arrangements can be a useful vehicle to prevent environmental and social damages, complement the fragmented regulatory frameworks, and enhance multi-level energy governance.

Secondly, by examining the datasets of various bilateral and multilateral contracts, this research re-classified current contractual mechanisms as 'soft contracts', 'enforcement contracts', and 'innovative contracts'. Original conceptual charts have been developed to capture the changing landscape of the targeted legal phenomena, and this thesis argues that contracts, especially 'innovative contracts', play a central role in energy governance and regulatory innovation. In the context of economic globalisation and community resistance, the thesis identifies three key driving actors behind the contracting practices, namely multi-national corporations, non-governmental organisations, and commercial lawyers, and this thesis suggests that these three change agents would be well placed to use these contractual arrangements as a technology to stimulate, guide and sustain environment-driven societal change and regulatory innovation.

Thirdly, the thesis uses China's outbound FDI in the energy sector as an in-depth case study to test the conceptual cartography proposed. It is clear from the Chinese case that the current 'top-down' regulatory and policy developments led by the Chinese government and other international institutions are still insufficient and may face challenges of efficient implementation. The operations of China's

overseas hydropower and extractive industries illustrate that grassroots resistance can be a crucial catalyst to stimulate “bottom-up” legal innovations and strengthen the existing regulatory frameworks. Through a better understanding and management of the drivers of such resistance, Chinese overseas investment may achieve a better alignment of the different interests involved. Also, this offers China a chance to be at the forefront of the new approaches analysed in this thesis.

The conclusion provides summaries of the main empirical research findings, arguments and their implications for both theoretical discussions and practical policy-making. Some recommendations for further research have also been addressed.

Keywords: FDI, Energy Investment, Investment Contract, NGO-Business Partnerships, Multi-level Governance, China

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All errors and omissions are mine own.



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Abbreviations

AIIB	Asian Infrastructure Investment Bank
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaties
CAO	Compliance Advisor Ombudsman
CNOOC	China National Offshore Oil Corporation
CNPC	China National Petroleum Corporation
CPC	Chinese Petroleum Corporation (Taiwan)
Taiwan	
CSP	Cross Sector Partnership
CSR	Corporate Social Responsibility
ECT	Energy Charter Treaty
ECFA	Economic Cooperation Framework Agreement
EIA	Environmental Impact Assessment
EITI	Extractive Industries Transparency Initiative
ENGO	Environmental Non-Governmental Organization
ESF	Environmental and Social Framework
FDI	Foreign Direct Investment
Formosa Chemical	Formosa Petrochemical Corporation (Taiwan)
FTA	Free Trade Agreement
FSC	Forest Stewardship Council
GDP	Gross Domestic Product
GMoU	Global Memoranda of Understanding
GONGO	Government Organized Non-government Organization
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICISID	International Centre for Settlement of Investment Disputes
ICMM	International Council on Mining and Metals
IEA	International Energy Agency
IIA	International Investment Agreement

IFC	International Finance Corporation
ILC	The International Law Commission
IPE	Institute of Public and Environmental Affairs
IPFSD	Investment Policy Framework for Sustainable Development
IRENA	International Renewable Energy Agency
IPIECA	International Oil and Gas Industry Association for Environmental and Social Issues
ISO	International Standards Organization
MEA	Multilateral Environmental Agreements
MDG	Millennium Development Goals
MMDA	Model Mining Development Agreement
MMSD	Mining, Minerals and Sustainable Development
MNC	Multi-National Corporation
MoU	Memorandum of Understanding
MDG	Millennium Development Goals
NCP	National Contact Point
NGO	Non-Governmental Organization
OBOR	One-Belt-One-Road
OECD	Organization for Economic Cooperation and Development
OFDI	Outward Foreign Direct Investment
PBI	Peace Brigades International
SCC	Stockholm Chamber of Commerce Arbitration Institute
SDG	Sustainable Development Goals
SLO	Social License to Operate
SOE	State-owned Company
Sinochem	China National Chemicals Import and Export Corporation
Sinopec	China Petroleum and Chemical Corporation
SIP	State-Investor-Population
SRI	Social Responsible Investing
TNC	Transnational Company

UNGP	UN Guiding Principles on Business and Human Rights
WCMC	World Conservation Monitoring Centre
UNCTAD	United Nations Conference on Trade and Development
UNGP	United Nations Guiding Principles on Business and Human Rights
WSSD	World Summit on Sustainable Development
WWF	World Wildlife Fund

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Chapter 1 – Introduction

“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” – Principle 1 of the 1992 Rio Declaration on Environment and Development

Foreign direct investment (FDI) is a key driver of the world’s economy. In recent decades, developing countries have made great efforts to attract FDI in energy and natural resource sectors¹. However, FDI and sustainable development can entertain both conflicting and synergistic relationships.

The 2030 Agenda for Sustainable Development² and the Addis Ababa Action Agenda³ both point out that FDI has been an essential part of sustainability efforts⁴. For example, under the Clean Development Mechanism⁵ and a variety of private environmental financing tools⁶, multi-national corporations (MNCs) can harness technological and financial resources for promoting sustainable development actions⁷.

However, foreign investment may have an adverse impact on the environment of host countries. Due to the invasive nature and large scale of operations, the energy and extractive industries are prone to have significant adverse impacts on the environment and surrounding communities. A prominent recent example is BP’s Deepwater Horizon accident in the Gulf of Mexico⁸. This tragedy in 2010 caused the largest ever marine oil spill. Although catastrophes

¹ Moran, T. H. (2006) *Harnessing foreign direct investment for development: policies for developed and developing countries*. CGD Books, Chapter 3 and 5.

² United Nations (2015a) Transforming our world: The 2030 agenda for sustainable development. Resolution adopted by the General Assembly. See also Nilsson, M., Griggs, D., & Visbeck, M. (2016) Policy: map the interactions between Sustainable Development Goals. *Nature News*, 534(7607), 320.

³ United Nations (2015b) Outcome document of the third international conference on financing for development: Addis Ababa Action Agenda.

⁴ See, generally, Dupuy, P.-M., & Vinuales, J. E. (2013) *Harnessing foreign investment to promote environmental protection: incentives and safeguards*. Cambridge: Cambridge University Press.

⁵ Streck, C. (2007) The governance of the Clean Development Mechanism: the case for strength and stability. *Environmental Law* (Vol 16 OUP Oxford 2005, 2007), 259, 264. See also Werksman, J. (1998) The clean development mechanism: unwrapping the ‘Kyoto Surprise’. *Review of European Community & International Environmental Law*, 7(2), 147-158.

⁶ Andonova, L. B. (2010) Public-private partnerships for the earth: politics and patterns of hybrid authority in the multilateral system. *Global Environmental Politics*, 10(2), 25-53. See also Zhang, Z., & Maruyama, A. (2001) Towards a private–public synergy in financing climate change mitigation projects. *Energy Policy*, 29(15), 1363-1378.

⁷ Dupuy, P.-M. & Vinuales, J.E. (2013).

⁸ Griggs, J. W. (2011) BP Gulf of Mexico oil spill. *Energy Law Journal*, 32, 57.

on this massive scale are thankfully uncommon, it still exemplifies the negative impact caused by the extractive companies' international operations.

The relations between energy infrastructure development and other environmental and social values is not a new topic. It has been a critical academic issue in the international energy sector for over two decades⁹, however, remains an issue of enduring and possibly growing relevance. For example, a leading international journal, the *Journal of Energy and Natural Resource Law*, and its expert panel selected this issue as the one that would attract the most attention in the year 2016¹⁰. The interplays can involve all kinds of energy infrastructure projects, including oil and gas, renewables, natural resource mining, energy transmission, and more.

This thesis investigates this challenging issue from the perspective of a more specific topic, namely the form and functions of specific contractual and multi-level governance approaches relating to energy FDI, which aim to align the interests of the State, the Investor and the affected populations, as well as to protect the natural environment. Based on a novel dataset of contractual arrangements gathered for this research project, this thesis critically examines this governance approach from a sustainable development analytical lens and discusses their potential for future regulatory and policy innovation. Though the empirical dataset collected in this study covers a wide range of jurisdictions globally, the scope of this research, however, has a strong focus on Greater China region. This point will be illustrated further in the following relevant sections.

This introductory part begins by providing three main observations to justify this research. It then outlines the governance issues for trans-boundary energy investment and, finally, it defines the objectives of the research.

1.1 Trends in global energy investment

To establish the background narratives, it is necessary to discuss three major recent trends in global energy investment below. The bird's-eye observation of these recent trends will serve

⁹ A comprehensive historical review on this issue can be found in Redgwell, C. (2016) *Energy Law in Europe. National, EU and International Regulation*, Third Edition, Oxford University Press, New York, Chapter 2.

¹⁰ See Smith, D. C. (2015) Looking ahead: The top ten energy and natural resources issues in 2015. *Journal of Energy & Natural Resources Law*, 33(1), 1-9.

to identify the emerging and most significant issues, circumscribe the knowledge gap, and adjust the suitable analytical lens to approach the subject.

1.1.1 Synergies - The significance of energy FDI for energy security and sustainable development

Energy enables our modern world to move forward, but many countries still face essential energy security challenges, especially the growing energy demands¹¹. Governments have been increasingly active in pursuing international energy investment and in replacing existing facilities that have approached the final stage of their operational lifecycle, particularly in developing economies¹².

For instance, since the early 1990s, China, with limited domestic natural resource reserves, began to invest abroad in the oil & gas sectors of resource-rich nations as a critical way to satisfy China's energy demands. With strong policy supports, China has become the world's largest investor in developing low-carbon electricity generation, energy efficiency facilities, and energy transmission networks in 2015¹³.

According to the World Energy Investment Outlook 2017, the scale of global energy investment has doubled since 2000¹⁴. Estimates from the International Energy Agency (IEA) suggest that the amount of investment in international energy supply would reach more than USD 1.6 trillion every year between 2011 and 2015 (Figure 1.1).

¹¹ See Yergin, D. (2006) Ensuring energy security. *Foreign affairs*, 69-82. See also Jacobson, M. Z. (2009). Review of solutions to global warming, air pollution, and energy security. *Energy & Environmental Science*, 2(2), 148-173.

¹² See Arcas, R. L., Filis, A., & Abu Gosh, E. S. (2015) *International Energy Governance*. Cheltenham and Northampton: Edward Elgar, especially Part 4 of this book and Chapter 16.

¹³ International Energy Agency (2014) *World Energy Investment Outlook - Special Report*. Retrieved from: <https://www.iea.org/publications/freepublications/publication/world-energy-investment-outlook---special-report---.html>. See Bloomberg New Energy Finance (2018) *Clean Energy Investment Report*. Retrieved from: <https://about.bnef.com/clean-energy-investment>.

¹⁴ Ibid.

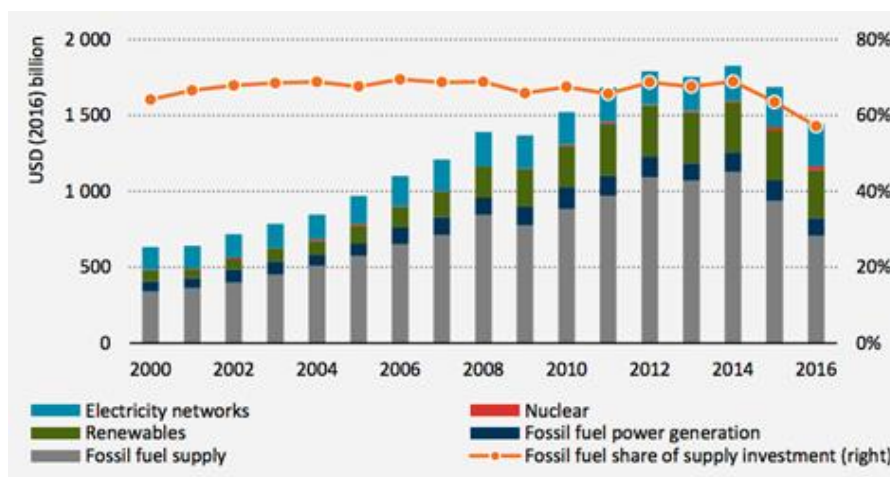


Figure 1.1 Global investment in energy supply, by fuel, 2000-2016 (columns) and the share of investment going towards fossil fuel supplies (orange line). Source: IEA, World Energy Investment Outlook 2017.

The IEA further estimates that global energy investment fell by 8% (2015's energy investment is USD 1.8 trillion in total, down from USD 2.0 trillion in 2014), with a noticeable decrease in oil and gas sectors. Regarding the long-term, the IEA also foresees that until the year 2030, at least a USD 26 trillion investment amount will be required in all energy sectors¹⁵.

Additionally, FDI in the energy sector is a large portion of total investment worldwide. Some of the largest MNCs worldwide are active in the energy sector. According to a report by the United Nations Conference on Trade and Development (UNCTAD), almost half of the "top-15 Transnational Companies (TNCs)" are involved in extractive industries or the power sector¹⁶. A growing number of energy multinational corporations are both based in developed and developing economies; numerous state-owned enterprises are influential in the sector (Table 1.1).

Table 1.1 The Top 15 non-financial state-owned TNCs; Source: UNCTAD Online Database

¹⁵ Ibid.

¹⁶ UNCTAD (2011) *World Investment Report: Non-Equity Modes of International Production and Development*, UN Doc UNCTAD/WIR/2011, 24 and web table 34, retrieved from: http://unctad.org/Sections/dite_dir/docs/WIR11_web%20tab%2034.pdf. See also Bloomberg New Energy Finance (2018).

The top 15 non-financial State-owned TNCs,* ranked by foreign assets, 2012

(Billions of dollars and number of employees)

SO-TNCs	Home country	Industry	State share	Assets		Sales		Employment		Transnationality Index*
				Foreign	Total	Foreign	Total	Foreign	Total	
GDF Suez	France	Utilities	36	175	272	79	125	110 308	219 330	0.59
Volkswagen Group	Germany	Motor vehicles	20	158	409	199	248	296 000	533 469	0.58
Eni SpA	Italy	Oil and gas	26	133	185	86	164	51 034	77 838	0.63
Enel SpA	Italy	Utilities	31	132	227	66	109	37 588	73 702	0.57
EDF SA	France	Utilities	84	103	331	39	93	30 412	154 730	0.31
Deutsche Telekom AG	Germany	Telecommunications	32	96	143	42	75	113 502	232 342	0.58
CITIC Group	China	Diversified	100	72	515	10	52	30 806	140 028	0.18
StatOil ASA	Norway	Oil and gas	67	71	141	28	121	2 842	23 028	0.29
General Motors Co	United States	Motor vehicles	16	70	149	65	152	108 000	213 000	0.47
Vattenfall AB	Sweden	Utilities	100	54	81	19	25	23 864	32 794	0.72
Orange S.A.	France	Telecommunications	27	54	119	24	56	65 492	170 531	0.42
Airbus Group	France	Aircraft	12	46	122	67	73	88 258	140 405	0.64
Vale SA	Brazil	Metal mining	3 ^c	46	131	38	48	15 680	85 305	0.45
COSCO	China	Transport and storage	100	40	52	19	30	7 355	130 000	0.50
Petronas	Malaysia	Oil and gas	100	39	150	43	73	8 653	43 266	0.35

Source: UNCTAD.

* These TNCs are at least 10 per cent owned by the State or public entities, or the State/public entity is the largest shareholder.

^b The Transnationality Index is calculated as the average of the following three ratios: foreign to total assets, foreign to total sales and foreign to total employment.

^c State owns 12 golden shares that give it veto power over certain decisions.

Recent studies on renewable sources of energy have claimed that foreign investment can significantly contribute to satisfying these growing global energy demands and transforming the world's energy systems towards a more sustainable one. Based on WEI's 2017 report, 2016's world investments in renewable energy accounted for about one-fifth of the world's energy cost¹⁷. Also, in 2015, building renewable energy infrastructures accounted for the most significant portion of investment in the electricity power sector (USD 313 billion)¹⁸.

For example, Under Mission Innovation, launched in 2015 at the Paris climate summit, 19 countries, including the US, UK, India, Japan and Germany, pledged to double governmental clean energy investment within five years¹⁹. The data series in the chart above ends in 2015, so there is still time for signatories to increase their efforts although early results are discouraging as the IEA says available data "indicate a possible further decline in 2016 following a small decline from 2014 to 2015"²⁰.

Governments are responsible for approximately a third of the total investment and two-thirds of clean energy R&D²¹. Among the 29 IEA member countries – including the US, UK

¹⁷ International Energy Agency (2017) *World Energy Investment Outlook*, Executive summary.

¹⁸ Ibid.

¹⁹ See Fues, T. (2017) How Can the G20 Promote the Global Partnership for Sustainable Development (SDG 17)? Development. Retrieved from <http://risingpowersproject.com/g20-global-partnership>. See also Falkner, R. (2016). The Paris Agreement and the new logic of international climate politics. *International Affairs*, 92(5), 1107-1125.

²⁰ Ibid.

²¹ See Jamasb, T., & Pollitt, M. G. (2015). Why and how to subsidise energy R+ D: Lessons from the collapse and recovery of electricity innovation in the UK. *Energy Policy*, 83, 197-205. See also Bosetti, V., Carraro,

and Germany, but not China or India – energy R&D doubled between 2000 and 2010 before stagnating and remaining below 1980 levels (Figure 1.2).

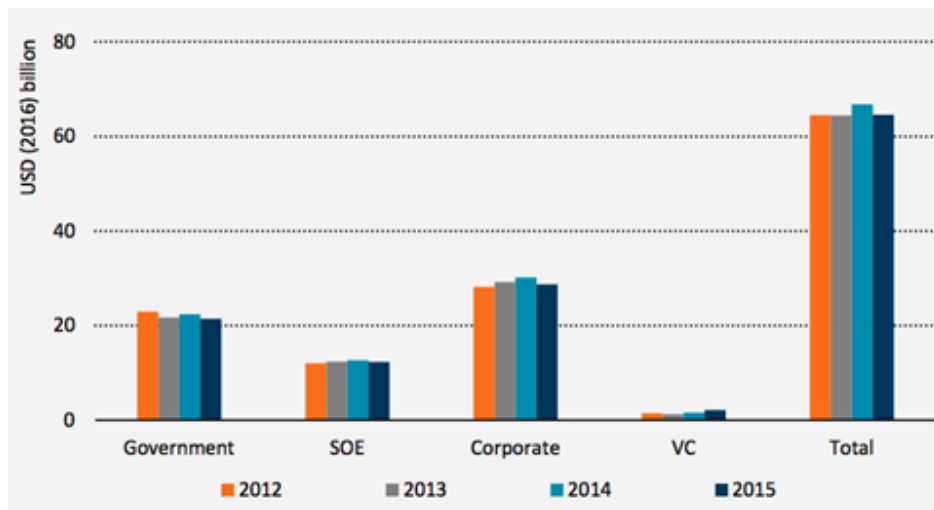


Figure 1.2 World spending on energy R&D 2012-2015, by the source of funding. Source: IEA World Energy Investment 2017.

These countries put 5 per cent of their total public R&D budgets towards energy in 2015, with these budgets comprising 0.1 per cent of public spending. The largest share of their energy R&D goes towards nuclear and basic energy research, with renewables and efficiency tied for second²².

Also, energy investment is crucial for the low-carbon transition, but it also creates significant risks regarding sustainable development and inclusive growth. Thus, a well-designed global policy framework for energy FDI should appropriately balance energy security, economic growth and other public interest considerations, such as environmental protection and human rights²³.

C., Massetti, E., & Tavoni, M. (2008) International energy R&D spillovers and the economics of greenhouse gas atmospheric stabilization. *Energy Economics*, 30(6), 2912-2929.

²² Ibid at 4.

²³ Heffron, R. J. (2015) *Energy Law: An Introduction*, Springer; Gunningham, N. (2013) Managing the energy trilemma: The case of Indonesia. *Energy Policy*, 54, 184-193; and Jenkins, K., McCauley, D., Heffron, R., Stephan, H., & Rehner, R. (2016) Energy justice: a conceptual review. *Energy Research & Social Science*, 11, 174-182.

The UN General Assembly adopted 17 Sustainable Development Goals (SDGs) in September 2015²⁴. This 17-principle action plan contains 169 targets and a further set of measurement indicators to monitor progress.

The SDGs aim to guide the global agenda for the years 2015-2030 and replace the Millennium Development Goals (MDGs)²⁵, which covered the previous period of 2000-2015. While the MDGs focused on developmental aid, the SDGs are significantly more comprehensive, applying in high, low and middle-income countries²⁶. SDGs range from ending poverty and hunger to reducing inequality within and among countries, and combating climate change to promoting access to justice.

The plan of action recognises the role of private investment strategies to realise the SDGs. It also reinforces the need for the government to establish effective rules, institutions and processes, and for advocates to increase strategies for influence to ensure that business activity in the natural resource sector is aligned with and contributes to achieving the SDGs.

In 2017, the UN's Conference on Trade and Development jointly issued a critical policy report with the Sustainable Business Institute at the European Business School, which once again highlighted the importance of FDI to achieve the SDGs' number 7 goal regarding energy²⁷.

1.1.2 Conflicts – Energy investment's negative impacts on environmental protection, human rights and social justice

Energy FDI is politically sensitive because it can influence national sovereignty over energy and natural resources. For example, many countries view the oil and gas industry as well as the electricity power sectors as a significant strategic sector highly relevant to national security²⁸. Energy is also socially sensitive. For the citizens globally, energy supply is a

²⁴ Nilsson, M., Griggs, D., & Visbeck, M. (2016). See also Gupta, J., & Vegelin, C. (2016). Sustainable development goals and inclusive development. *International environmental agreements: Politics, law and economics*, 16(3), 433-448.

²⁵ United Nations Department of Public Information (2015) *Millennium Development Goals Report 2015*. UN Publications.

²⁶ Ibid at 24.

²⁷ "SDGs 7: Ensure access to affordable, reliable, sustainable and modern energy for all". See also Nilsson, M., Lucas, P., & Yoshida, T. (2013). Towards an integrated framework for SDGs: Ultimate and enabling goals for the case of energy. *Sustainability*, 5(10), 4124-4151.

²⁸ Bompard, E., Carpignano, A., Erriquez, M., Grosso, D., Pession, M., & Profumo, F. (2017) National energy security assessment in a geopolitical perspective. *Energy*, 130, 144-154.

fundamental good which must remain affordable²⁹. FDI in the energy sectors also negatively impacts public health, labour safety, and community development³⁰.

Also, unfortunately, many past natural resource and energy investments, including ‘green’ energy and renewables, have delivered disappointing contributions to our environment³¹. Due to the damming of rivers, large hydropower dams can have severe environmental impacts³². Both onshore and offshore wind power farms can affect local birds and bats, produce many noises and interfere with the amenity of the landscape³³.

The extractive sector has a long history with human rights and social justice issues³⁴. For example, at the Ok Tedi mine in Papua New Guinea, BHP’s mining operations have generated many years of investment disputes and local resistances³⁵. In 2014, some environmental NGOs jointly stopped the same mining company’s operations in New South Wales and Queensland’s uranium mines³⁶.

Although the oil and gas industry has an overall controversial record when it comes to engaging with local communities³⁷, the other energy operations, including renewable energy (e.g. wind power turbines and biofuels) can also have negative environmental and social

²⁹ See Jenkins, K., McCauley, D., Heffron, R., Stephan, H., & Rehner, R. (2016).

³⁰ De Brabandere, E., & Gazzini, T. (2014) *Foreign Investment in the Energy Sector: Balancing Private and Public Interests*. BRILL NIJHOFF.

³¹ Akella, A. K., Saini, R. P., & Sharma, M. P. (2009) Social, economical and environmental impacts of renewable energy systems. *Renewable Energy*, 34(2), 390-396. See also Abbasi, S. A., & Abbasi, N. (2000) The likely adverse environmental impacts of renewable energy sources. *Applied Energy*, 65(1-4), 121-144.

³² Bell, D., Gray, T., & Haggett, C. (2005) The ‘social gap’ in wind farm siting decisions: explanations and policy responses. *Environmental politics*, 14(4), 460-477.

³³ Van der Horst, D., & Toke, D. (2010) Exploring the landscape of wind farm developments; local area characteristics and planning process outcomes in rural England. *Land Use Policy*, 27(2), 214-221.

³⁴ See Simons, P., & Macklin, A. (2014) *The governance gap: extractive industries, human rights, and the home state advantage*. Routledge. See also Haufler, V. (2010) Disclosure as governance: the extractive industries transparency initiative and resource management in the developing world. *Global Environmental Politics*, 10(3), 53-73.

³⁵ Kirsch, S. (2007) Indigenous movements and the risks of counter globalization: Tracking the campaign against Papua New Guinea’s Ok Tedi mine. *American ethnologist*, 34(2), 303-321.

³⁶ Mudd, G. M. (2010) The environmental sustainability of mining in Australia: key mega-trends and looming constraints. *Resources Policy*, 35(2), 98-115.

³⁷ Frynas, J. G. (2009) Corporate social responsibility in the oil and gas sector. *Journal of World Energy Law & Business*, 2(3), 178-195. See also Tordo, S., Warner, M., Manzano, O., & Anouti, Y. (2013). *Local content policies in the oil and gas sector*. The World Bank.

consequences³⁸. In other words, even ‘green’ energy projects sometimes have their dark sides, and the renewable energy industry is inextricably entwined with human rights issues too.

Kenya provides an apposite illustration of the conundrum faced by a range of countries. This country is becoming a new middle-income industrialised economy by the year 2030³⁹. In the context of UN SDGs, especially Goal 7, Kenya’s Vision 2030 has committed to eradicate poverty and provide affordable, modern and clean energy for all citizens in that country⁴⁰.

For these purposes, Kenya has put much effort into attracting FDI in renewables, especially wind power and geothermal⁴¹. However, in Kenya, a large number of renewable energy projects are located on indigenous peoples’ territories⁴². For example, the wind power projects in Ngong Hills and Kipeto are exactly located on the Maasai’s ancestral territories⁴³. Other potential wind farm projects in some coastal regions, such as Narok, Kajiado, and Laikipia regimes, are also within the indigenous peoples’ ancestral territories⁴⁴. In a majority of renewable energy projects in Kenya, land ownership is usually unclear and contested. According to Kenya’s land laws, only land that has been issued a formal allocation by the government can be recognised, and, due to the historical marginalisation and discrimination, many indigenous peoples’ land rights are not formally recognised by Kenya’s land laws⁴⁵. Therefore, those energy infrastructure projects that avoid addressing the land rights issues in Kenya may entail both significant impacts on indigenous communities and severe risk for foreign investors.

³⁸ Ibid at 30.

³⁹ Ibid at 13.

⁴⁰ Treiber, M. U., Grimsby, L. K., & Aune, J. B. (2015) Reducing energy poverty through increasing choice of fuels and stoves in Kenya: Complementing the multiple fuel model. *Energy for Sustainable Development*, 27, 54-62. See also Tigabu, A. D., Berkhout, F., & van Beukering, P. (2015) The diffusion of a renewable energy technology and innovation system functioning: Comparing bio-digestion in Kenya and Rwanda. *Technological Forecasting and Social Change*, 90, 331-345.

⁴¹ Ibid.

⁴² See Sena, K. (2015) Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Kenya. Published by the International Work Group for Indigenous Affairs (IWGIA) and Indigenous Peoples National Steering Committee on Climate Change (IPNSCCC). See also World Bank (2013) World Wildlife Fund and World Bank Sign Memorandum of Understanding on Africa’s Extractive Industries. Retrieved from: <http://www.worldbank.org/en/news/press-release/2013/05/28/world-wildlife-fund-world-bank-memorandum-of-understanding-africa-extractive-industries>.

⁴³ Ibid.

⁴⁴ See Larsson, S. (2014) *Law and Spatial Planning: Socio-Legal Perspectives on the Development of Wind Power and 3G Mobile Infrastructures in Sweden*. Lunds University.

⁴⁵ Ibid.

Besides land grabbing disputes in Africa, indigenous peoples in Latin America also oppose energy development projects rigorously⁴⁶ and may become the target of State violence, as illustrated by the social unrest in Mexico. In the cases of the wind power farm in Juchitán de Zaragoza (Gas Natural Fenosa's Bii Hioxo project) and San Dionisio del Mar (run by Mareña Renovables), two Mexican NGOs, the Integral Defence Committee of Human Rights "Gobixha"(Código DH) and Peace Brigades International (PBI), have reported with concern severe risks for human rights advocates and local community leaders⁴⁷. In these areas, private security, hired by energy companies, as well as the municipal and federal armed security forces, come together to protect the economic interests of extractive industries. This situation, which increased the presence of armed personnel in the region, has sometimes provoked violent tensions and clashes with local communities⁴⁸.

Similar to Mexico's trouble with the development of wind farms, in the construction process of both the Bonyic dams and Chan 75 in Panama, 'green authoritarianism' and state violence can also be observed clearly⁴⁹. In these two hydropower infrastructure projects, Panama's governmental agencies and private companies worked together to oppress local communities. With strong support from the Panama government, dam developers decided to use physical force to attack and arrest protesters, including women and children. The developers and states let the citizens in Naso and Ngobe villages experience what Radcliffe mentioned as 'geographies of fear' and inequitable development for Latin American Indigenous peoples⁵⁰.

Overall, the above selected cases on Kenya, Mexico, and Panama suggest that these environmental externalities and community conflicts, including human rights violations, indigenous land grabbing, and the required procedures for environmental impact assessment, are a crucial issue for studying international energy activities. And, based on the existing studies and new empirical datasets, this research aims to explore the Chinese outward energy investment as well as the inbound investment into Greater China area.

⁴⁶ See Finley-Brook, M. (2012) *Renewable Energy and Human Rights Violations: Illustrative Cases from Indigenous Territories in Panama*. In K. S. Zimmerer (Ed.), *The New Geographies of Energy* (1 ed., pp. 162-171): Routledge.

⁴⁷ PBI (2015) *Wind Farms and Concerns about Human Rights Violation in Oaxaca*. London.

⁴⁸ Ibid.

⁴⁹ Finley-Brook, M. (2012).

⁵⁰ Radcliffe, S. A. (2007) Latin American indigenous geographies of fear: Living in the shadow of racism, lack of development, and antiterror measures. *Annals of the Association of American Geographers*, 97, 385–397.

1.1.3 Investment disputes in the energy sector on the rise

The international energy industry invests in capital-intensive, complex, large-scale infrastructure projects that usually have a long operating life cycle⁵¹. Even with active public preparations, energy investment projects can cause some grievances and concerns from affected communities and other stakeholders. Global economic forces, governmental support initiatives and circumstances invariably change in these international energy investment cases, which may, in turn, lead an investment dispute⁵².

Arbitration has fast become the primary form of dispute resolution in international transactions and the energy sectors⁵³. The number of disputes submitted to arbitration has risen in conjunction with the growth of the world's economy in large part driven by the number of energy projects⁵⁴.

As a result, one can see increasing numbers of energy-related disputes in both commercial and investment arbitration. Between 2014 and 2015, the Stockholm Chamber of Commerce Arbitration Institute (SCC) has seen a more than 100 per cent increase in the number of energy-related cases, from 19 filed in 2014 to 43 filed in 2015⁵⁵. The bulk of these cases are related to oil and gas disputes, while electricity related disputes comprised approximately 40 per cent. A further 19 cases were explicitly brought under the Energy Charter Treaty (ECT) after 2015 (Figure 1.3).

⁵¹ For fossil fuels, see Patin, S. A. (1999) *Environmental impact of the offshore oil and gas industry* (Vol. 1). East Nortport, NY: EcoMonitor Pub. For renewable energy projects, please see Góralczyk, M. (2003). Life-cycle assessment in the renewable energy sector. *Applied Energy*, 75(3-4), 205-211.

⁵² In 2015's *Bilcon v Canada* case, a majority of the tribunal accepted a foreign investor's arguments that Canada had violated Canadian environmental regulations, which also constituted a breach of the minimum standard of investment protection treatment. In another NAFTA tribunal case related to environmental law and renewable energy, *Mesa v Canada* afforded more deference to the respondent government in the implementation of regulatory instruments. There are many other similar cases, such as *Allard v Barbados* (PCA Case No. 2012-06).

⁵³ See Waibel, M. (2014b) Investment Arbitration: Jurisdiction and Admissibility. In A. R. e. al (Ed.), *Handbook on International Investment Law: C.H. Beck/Hart; Sabater, A., & Stadnyk, M. (2014) International Arbitration and Energy: How Energy Disputes Shaped International Investment Dispute Resolution*. In K. Talus (Ed.), *Research Handbook on International Energy Law* (pp. 199-224): Cheltenham, UK. See also Alqurashi, Z. (2005) *International Oil and Gas Arbitration: OGEL*.

⁵⁴ Sabater, A., & Stadnyk, M. (2014).

⁵⁵ The Energy Charter Treaty Database, available at: <https://energycharter.org/what-we-do/dispute-settlement/cases-up-to-18-may-2018>.

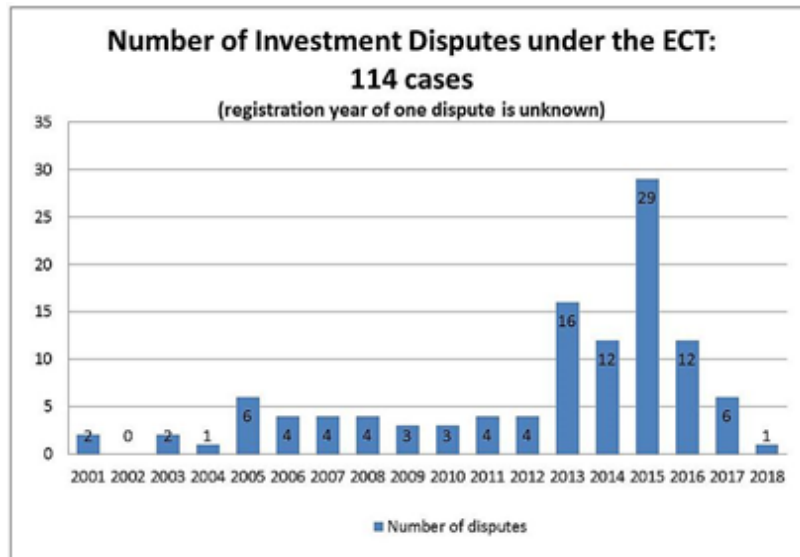


Figure 1.3 Number of investment disputes under the ECT (the year 2001 to 2018). Source: The Energy Charter Treaty Database.

In contrast, 48 cases were administered in 2016 under arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID), with 17 per cent of these cases related to electric power and other energy. Furthermore, ICSID’s ECT caseload amounted to 9.5 per cent of its total cases⁵⁶.

The outcome is that the global energy sectors, along with their related infrastructure construction projects, constitute the most significant portion of international commercial (contract-based) and investment (treaty-based) disputes around the world⁵⁷ (please see Figures 1.4 and Figure 1.5 below).

⁵⁶ ICC Dispute Resolution Library, available at: <https://iccwbo.org/dispute-resolution-services/professional-development/icc-dispute-resolution-library>.

⁵⁷ Ibid at 53.

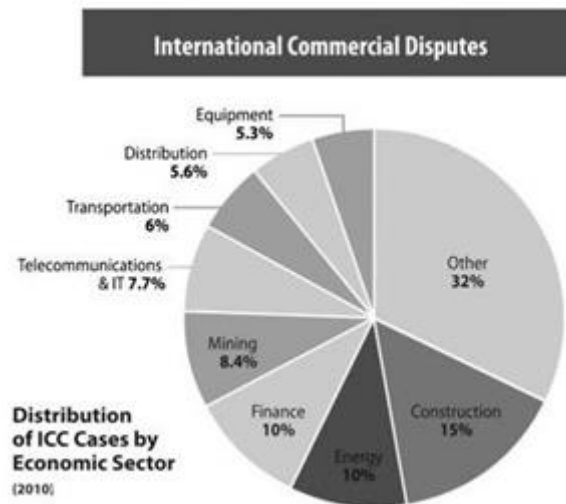


Figure 1.4 International commercial disputes. Source: ICC Dispute Resolution Library.

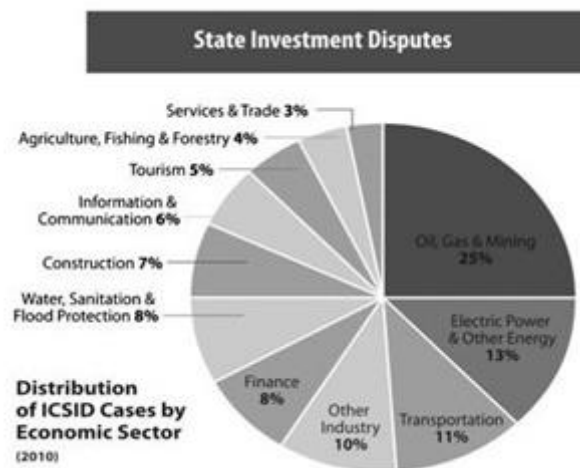


Figure 1.5 State investments disputes. Source: ICSID dataset.

Not surprisingly, through this decade more interventions by states hosting investments in the energy sector have resulted in increasing investment disputes globally. According to the UNCTAD, investment arbitration cases have increased in importance over the last two decades as foreign investors have applied the arbitration option offered in a large number of over 3,000 existing IIAs⁵⁸. By the end of 2012, some 540 investment arbitration cases had been filed worldwide, with 58 cases explicitly filed that year. These figures confirm that foreign investors are increasingly using investment arbitration.

⁵⁸ UNCTAD Investment Policy Hub, available at: <http://investmentpolicyhub.unctad.org/ISDS>.

According to the UNCTAD, at least 10 new cases on average were filed per year in the energy sector since 2001⁵⁹ (Figure 1.6).

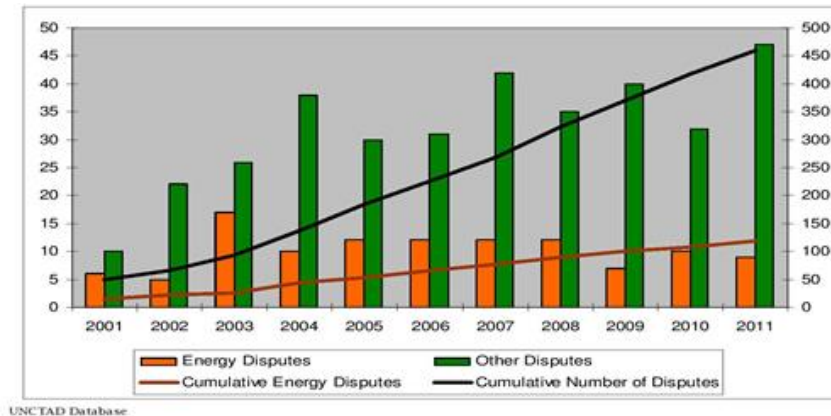


Figure 1.6 Number of known energy-related state-investor disputes. Source: UNCTAD Database.

With the same data source, Figure 1.7 below demonstrates that most of these disputes concern the oil and gas sector (44 per cent), followed by power generation (29 per cent) and energy transmission and distribution (25 per cent).

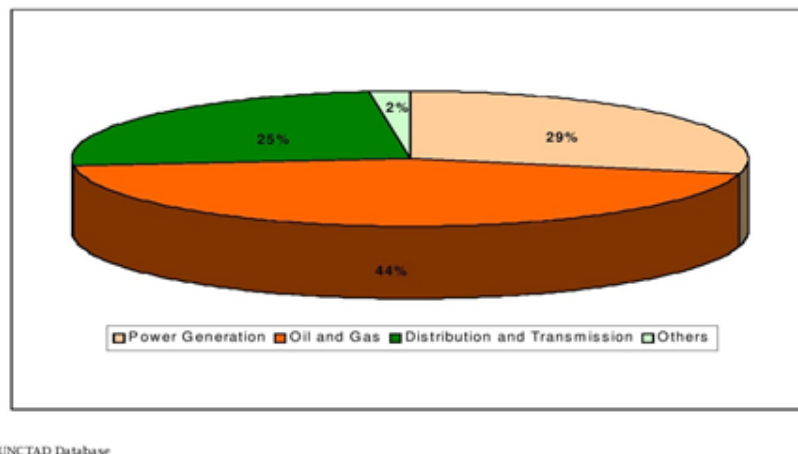


Figure 1.7 Sectoral distribution of known energy-related investment disputes from 2001-2011. Source: UNCTAD Database.

The most notable increase occurred in 2003 when emergency measures were taken by Argentina to fight the financial crisis. Almost half of all respondents in energy investment disputes are countries from Latin America⁶⁰. Argentina, Ecuador and Venezuela were also

⁵⁹ Ibid.

⁶⁰ De Brabandere, E., & Gazzini, T. (2014). See also Sabater, A., & Stadnyk, M. (2014).

heavily involved in investment disputes in the energy sector⁶¹. Most of the claimant companies are from developed countries - more than 9 out of 10 claims⁶².

A related trend is the growing number of investment disputes with environmental components⁶³. Since 2012, over 60 investment dispute arbitrations have touched some environmental elements. Amongst these environmental-related cases are several cases in which States have sought to enforce the environmental law against investors in investment arbitration.

Given the social and environmental risks arising from investment in the energy sector, this trend goes some way in explaining the increasing conflicts among stakeholders, namely energy investors, governments, and affected populations (usually assisted by NGOs and local communities). However, these statistics here do not mention the names of the cases specifically, mainly due to confidentiality reasons. This research has searched for a large part of these energy cases and put them in a list in appendix. Also, a specific table on China's recent investment dispute arbitration cases can be found in Appendix B (including investment arbitration cases from Hong Kong SAR and Macau SAR).

Compared to investment dispute arbitration, other types of dispute settlement have not received the same high level of attention. However, human rights and environmental protection can also be relevant in these dispute settlement mechanisms. The UN Principles on Responsible Contracts states that affected individuals and communities, though they are not parties to the State-investor investment contracts, should still have access to an effective grievance mechanism. Moreover, these mechanisms can be found in soft control instruments.

Soft control policy instruments encompass a diverse variety of tools, ranging from basic guidelines or codes to fact-finding mechanisms and contractual techniques. Some of these policy instruments are quasi-adjudicatory systems, where the actions of a private enterprise or

⁶¹ Ibid.

⁶² UNCTAD, (2011) 'World Investment Report: Non-Equity Modes of International Production and Development' UN Doc UNCTAD/WIR/2011, 24 and web table 34, Retrieved from: http://unctad.org/Sections/dite_dir/docs/WIR11_web%20tab%2034.pdf.

⁶³ See De Brabandere, E. (2014) *The Settlement of Investment Disputes in the Energy Sector*. In E. a. G. De Brabandere, T. (Ed.), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests*, Brill Nijhoff; Vinuales, J. E. (2016) *Foreign Investment and the Environment in International Law: The Current State of Play*, in K. Miles (ed.), *Research Handbook on Environment and Investment Law*, Cheltenham: Edward Elgar, Chapter 2. See also Parlett, K. (2017) *Protection of the environment in investment arbitration - a double edged sword*, Lexology, available at: <https://www.lexology.com/library/detail.aspx?g=659b201e-9676-4930-9175-45cda02a9619>.

a financing institution are scrutinised to evaluate their conformity with environmental and human rights standards.

For instance, Part II of the OECD Guidelines has a sophisticated accountability mechanism for the implementation of the substantive standards⁶⁴. States adhering to the guidelines are required to set up ‘national contact points’ (NCP) to receive complaints from civil society groups about the implementation of the Guidelines by multinational corporations (‘Specific Instances’). After assessing the complaints, NCPs can make a statement, with recommendations as appropriate, on the implementation of the Guidelines. So far, over 200 Specific Instances have been brought before different NCPs, many related to environmental and human rights issues.

Furthermore, the Global Compact designs a mild compliance mechanism and adopts the Global Compact Offices system. These offices’ functions are similar to the NCPs. Additionally, the International Finance Corporation (IFC) also established the Compliance Advisor Ombudsman (CAO) as the independent dispute settlement mechanism⁶⁵. The CAO deals with complaints from project-affected local communities with the purpose of enhancing environmental and social impacts on the ground. The inspection panel of the World Bank also performs these similar functions.

It is true that the parties to a dispute case can decide to use other mechanisms rather than those mentioned above, such as proceeding with their disputes amicably, either through negotiations, mediation (with the help of a third party) or in conciliation (with the assistance of independent experts). However, issues may arise regarding if the public interests and possible effects on human rights are well represented in these dispute procedures and reflected in their decisions.

1.2 The current legal frameworks and recent regulatory developments

FDI in the energy sector raises formidable legal questions, often requiring a delicate balance between public and private interests of the various stakeholders. The ‘social licence to operate’ and ‘good governance’ of MNCs have become important research themes in

⁶⁴ Gordon, K., Pohl, J., & Bouchard, M. (2011) Environmental Concerns in International Investment Agreements. *OECD Working Paper on International Investment* 2011/01.

⁶⁵ Wentzel, W. (2013) *Guide to Extractive Industries Documents - Mining World Bank Institute Governance for Extractive Industries Programme*. London.

international energy law, which require a careful evaluation of the social justice and environmental consequences of international energy investment projects⁶⁶.

A well-designed international agreement for regulating FDI in the energy sectors should balance economic growth, energy security, and other public policy (e.g. environmental protection and human rights) considerations appropriately. The hard law plays a crucial role in determining the conditions and terms applicable to energy FDI and is a significant vehicle for managing competing interests.

Currently, two main legal frameworks regulate FDI in the energy sectors⁶⁷. First, the international legal framework includes the treaties (either bilaterally or multilaterally), customary laws and international organisations. Second, the national legal framework covers the national laws and other regulatory systems of the countries having jurisdiction over the investment projects and the related economic operators. According to this principle, these legal rules and contracts have become the basic rule-based architecture within which the investment projects are undertaken and operated.

1.2.1 International law

For centuries, global legal systems have intended to vindicate the principle of holding those who cause foreseeable, significant damages to others liable for the harm caused by their actions⁶⁸. Now this concept is known as the “*sic utere*” principle and has been widely incorporated into international environmental law. Principle 21 of Stockholm Declaration in 1972 and Principle 2 of the Rio Declaration also clearly recognised this principle. These Principles acknowledge that countries must “ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of

⁶⁶ See Penttinen, S. L. (2018). Sustainability in the Energy Sector: Policy Directions and Implementing Measures. *Oil, Gas & Energy Law Journal (OGEL)*, 16(3); Mbengue, M.M. and Raju, D. (2014) Energy, Environment and Foreign Investment, in De Brabandere, E., & Gazzini, T. (2014) *Foreign Investment in the Energy Sector: Balancing Private and Public Interests*. BRILL NIJHOFF. Leiden. and Schwartz, P. (2009) Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining. In J. a. O. Ebbesson, P. (Ed.), *Environmental Law and Justice in Context*. Cambridge: Cambridge University Press.

⁶⁷ Mbengue, M. M., & Raju, D. (2014). See also Karl, J. (2014) FDI in the Energy Sector: Recent Trends and Policy Issues. In E. D. Brabandere & T. Gazzini (Eds.), *Foreign Investment in the Energy Sector*: Brill Nijhoff.

⁶⁸ Dupuy, P.-M., & Vinuales, J. E. (2018) *International Environmental Law*, Second Edition, Cambridge: Cambridge University Press.

national jurisdiction.”⁶⁹ As a result, both sovereign states and private companies need to avoid causing damages to others.

Multilateral Environmental Agreements (MEAs) are primarily addressed to states and have, at best, indirect regulatory implications for MNCs⁷⁰. By the fundamental ‘polluter pays’ principle, a few specialised agreements establish civil liability rules for private actors that have the potential to cause particularly grave environmental damage, such as oil spills or nuclear leakages. All of these instruments rely on domestic implementation and require the contracting parties to establish the necessary enforcement mechanisms.

Though many treaties have clauses incorporating the *sic utere* principle, there is no consensus so far concerning how this should be applied. Currently, several multilateral environmental agreements have been established to address transboundary pollution issues, but only a few of these agreements have genuinely entered into force. The inadequacy of international environmental agreements on liability for cross-boundary environmental damages is clearly illustrated by the facts that no country asserted any liability and compensation claims for the worst nuclear accident in history, namely the Chernobyl nuclear accident⁷¹.

National states have been less than enthusiastic about creating responsibilities for themselves as MNCs subject to their jurisdiction cause transboundary environmental damages. Despite many recent incidents of severe transboundary pollution, the progress in developing liability standards under international law environment has been little. Since the 1972 Stockholm Conference 1992, the international community has invested more effort in developing worldwide liability standards. However, scant progress has been achieved by this regime. The International Law Commission (ILC) has been working on the principles of “International Liability for Injurious Consequences Arising out of Acts Not Prohibited by

⁶⁹ "London Convention: Convention On The Prevention Of Marine by Dumping of Wastes and Other Matter" <https://www.epa.gov/sites/production/files/2015-10/documents/lc1972.pdf>. See also Vinuales, J. (2015) *The Rio Declaration on Environment and Development A Commentary*. Oxford: OUP.

⁷⁰ Maljean-Dubois, S., & Richard, V. (2013) The applicability of international environmental law to private enterprises. In P.-M. Dupuy & J. Vinuales (Eds.), *Harnessing Foreign Investment to Promote Environmental Protection Incentives and Safeguards*. Cambridge: Cambridge University Press. See also: Affolder, N. A. (2009). The private life of environmental treaties. *American Journal of International Law*, 103(3), 510-525.

⁷¹ Wynne, B. (1992). Uncertainty and environmental learning: reconceiving science and policy in the preventive paradigm. *Global environmental change*, 2(2), 111-127. See also Steinhauser, G., Brandl, A., & Johnson, T. E. (2014). Comparison of the Chernobyl and Fukushima nuclear accidents: a review of the environmental impacts. *Science of the Total Environment*, 470, 800-817.

International Law” since 1978⁷². The ILC’s approach intended to focus liability on the economic operator of the activities causing the damages rather than on the national states. This approach relies on countries establishing their procedures for compensating environmental harm victims.

In 2001, the ILC released a preamble and 19 articles on “Prevention of Transboundary Harm from Hazardous Activities”⁷³. Then in 2004, it also published eight draft principles on “The Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities”⁷⁴ for comment. These initiatives and other hard efforts can be a sound foundation for future progress, but they still fall short of developing effective and comprehensive global liability standards for environmental damages.

Also, international investment law indicates that MNCs have both rights and duties. There is an apparent tendency to make them responsible for certain kinds of conduct; although, at the present moment, this has been completed by domestic laws. In short, the recognition of the MNCs as a single entity under public international law and the recognition of their responsibility for violating international norms is developing slowly⁷⁵. Although the draft Code on Transnational Corporations seeks to address these issues, it never progressed beyond its draft status. However, the Code contains many useful principles that may begin to be recognised in due course.

So far, public international law has not yet established a global agreement on liability for trans-boundary pollution (although firm commitments were made in both Stockholm and Rio Declarations).

1.2.2 National law

⁷² McCorquodale, R. (2010) The individual and the international legal system. In M. Evans (Ed.), *International Law* (3rd ed.): Oxford University Press.

⁷³ See UN Prevention of Transboundary Harm from Hazardous Activities, available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_7_2001.pdf.

⁷⁴ UN draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries (2006), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf.

⁷⁵ Maljean-Dubois, S., & Richard, V. (2013).

So far, the international community still lacks a single globally-agreed agreement on transnational corporations' liabilities and responsibilities⁷⁶. However, remarkable progress can be found at the international level and in several jurisdictions, which put the efforts to hold polluters liable for the environmental and social damages occurred by their business operations.

Some jurisdictions are modifying their national regulations to remove the obstacles and simplify the procedures for private plaintiffs to file litigations⁷⁷. These litigations usually aim to recover from harm caused by environmental pollution and seek compensation. Public laws and policies are also being revised to ensure governmental departments can recover damages for severe environmental damages. Currently, in the absence of a global comprehensive corporate liability regime, national laws are entertaining more and more international environmental lawsuits.

Regarding human rights issues, there has been a sharp growth in the dispute settlement mechanisms, both globally and nationally⁷⁸. These human rights cases, before the national courts of home states, usually allege violations of human rights, environmental standards and other social policies. There are still many intuitional constraints in this regime. For example, the Bhopal litigation was not successful because of the very conservative interpretation of the *forum non conveniens* doctrine. With new more liberal thinking and recent policy patterns, it has become possible, for instance, to hold the parent companies accountable for their subsidiaries subsidiaries' environmental damages which had been caused in host states. These recent trends may continue, which may accelerate the development of principles of liability of transnational parent enterprises.

All the states must ensure compliance with rules and principles which are prescribed in treaties and customary international law regarding environmental protection. Multi-national companies' home states also have the power to control their corporate citizens' behaviours in other jurisdictions. MNCs also need to ensure that their operations follow the requirements prescribed in international environmental law.

⁷⁶ Bellmann, C. (2016) Trade and Investment Frameworks in Extractive Industries: Challenges and Options. E15 Expert Group on Trade and Investment in Extractive Industries — Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

⁷⁷ Pathak, P. (2014) Human Rights Approach to Environmental Protection. *OIDA International Journal of Sustainable Development*, 7(1), 17-24. See also Shelton, D. (2011) *Human rights and the environment*. Cheltenham: Edward Elgar.

⁷⁸ Ibid.

However, the existing studies point out that national legal systems are often inefficient in controlling MNCs' operations⁷⁹. In an era of economic globalisation, businesses operate in a more decentralised international network, and they can flexibly relocate the profits and their projects across the jurisdictions. The national regulatory systems, therefore, have limited abilities to control over the possible harmful operations by these modern private entities. Moreover, many developing countries heavily rely on the FDI capitals of these large transnational corporations. In order to attract and maintain the inward FDI capitals, these developing countries may be unwilling to enforce and enact higher environmental and human rights standards.

Meanwhile, private litigations aiming to make environmental polluters liable for damages has faced many challenges. In the cases where a large, single and apparent polluting source is visible, private plaintiffs sometimes may recover their damages⁸⁰. These cases include smelter litigations and large-scale oil spills cases in the early 20th century. Some particular chemicals and toxic substances (i.e. asbestos) can cause unique harm to human beings and the environment. However, the obstacles of proving evidence and establishing individual causation have made private law a poor instrument for preventing the environmental damages from multiple sources. While many countries depend on public and administrative laws and mechanisms to prevent environmental harm, these legal and policy instruments do not usually provide proper compensation to environmental victims. It becomes very challenging to hold transnational corporations and polluters accountable for their severe damages across several jurisdictions.

1.2.3 Recent regulatory developments to recalibrate international investment law with sustainable development

Due to the growing awareness of addressing environmental and social issues in significant energy and natural resource projects, new normative developments have recently been identified in international investment law⁸¹. Modern international investment law and relevant policy instruments embrace the environmental and social consequences of international energy

⁷⁹ Salacuse, J. (2013) *The Three Laws of International Investment: National Contractual and International Frameworks for Foreign Capital*. Oxford: Oxford University Press.

⁸⁰ Hober, K. (2014) Recent trends in energy disputes. In K. Talus (Ed.), *Research Handbook on International Energy Law* (pp. 225-240): Cheltenham, UK.

⁸¹ Dupuy, P.-M. & Vinuales, J.E. (2018). See also Douglas, Z., Pauwelyn, J., & Viñuales, J. E. (2014) *The Foundations of International Investment Law: Bringing Theory into Practice*. Oxford: Oxford University Press.

activities. These emerging issues include access to energy resources, the conduct of energy, to the sale and movement of the end energy product⁸².

In recent years, a new generation of international investment agreements (IIAs) has developed for regulating investment and addressing environmental and social issues⁸³. International investment treaties refer to agreements signed by States to protect and promote foreign investment. Through these IIAs, countries commit to protecting foreign investment in their territory by a variety of principles and standards, which may contain fair and equitable treatment and the prohibition of expropriation without proper compensation. IIAs often provide foreign investors with the right to enforce such committed protections through international investment arbitration mechanisms⁸⁴. IIAs may also include bilateral investment treaties (BIT), Free Trade Agreements (FTA) and other bilateral and multilateral economic partnership agreements which incorporate investment provisions.

In January 2011, the OECD already published a large-scale survey on international investment agreements and reviewed a sample of 1,623 IIAs (around half of the world's investment treaty population)⁸⁵. This survey focuses on states' investment treat-making practices regarding environmental policy concerns and the evolution of addressing these environmental and social issues over the past decades. There are three main findings of this large-scale research project: 1) more modern treaties contain environmental languages; 2) only around 8 per cent of the whole sample investment treaties refer to environmental considerations, and 3) regarding the content and languages, wide variations can be found across jurisdictions and over time.

After this OECD report was published in 2011, the new generation of IIAs and investment-related norms increasingly responded to environmental and social risks associated with foreign investment, including through the environmental and human rights provisions and

⁸² Lyster, R., & Bradbrook, A. (2006) *Energy Law and the Environment*. Cambridge: CUP. See also Zillman, D., Redgwell, C., & Omorogbe, Y. (2008) *Beyond the Carbon Economy: Energy Law in Transition*. Oxford: Oxford University Press.

⁸³ Dupuy P.-M., & Vinuales, J.E. (2013). See also Gordon, K., Pohl, J., & Bouchard, M. (2014) *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*. Retrieved from: <http://ssrn.com/abstract=2469662> or <http://dx.doi.org/10.2139/ssrn.2469662>.

⁸⁴ Sabater, A., & Stadnyk, M. (2014). See also Berger, K. P. (2003) Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators. *Vanderbilt J Trans'l L*, 36, 1347.

⁸⁵ Gordon, K., Pohl, J., & Bouchard, M. (2011).

relevant reporting requirements⁸⁶. For example, the NAFTA and 2012 US BIT model both update or develop the related clauses in the body of these agreements, such as the ‘adherence,’ clauses, ‘no-lowering standards,’ clauses, ‘institutional arrangement’ clauses, and ‘corporate social responsibility’ (CSR) clauses⁸⁷.

The similar trends are also visible in recent international conferences and investment policy-making. In 2015, the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD) stated that nations are increasingly taking a more active role in sustainability affairs⁸⁸. This trend is affirmed by States creating stronger environmental and human rights norms, more actively promoting sustainability and putting more emphasis on the role of corporate responsibility for impacts on citizens and the environment.

On top of IPFSD, the OECD Policy Framework for Investment (OECD PFI) in 2015 also demonstrates that placing more emphasis on regulating the world economy does not mean discouraging international investment⁸⁹. The 2015 OECD PFI, on the contrary, states that this active role of government is precisely how a nation can ensure foreign investment drives broader value creation for promoting sustainability⁹⁰.

To reconcile investor protection with other sustainable goals, the international community has proposed three reform avenues that can be considered in the area of international investment law⁹¹: 1) the first suggestion is the reinforcement of requirements regarding the exhaustion of local remedies stated in IIAs; investment arbitration dispute claims should only be accepted after using all the national remedies; 2) the second is about establishing an appeal mechanism for international investment arbitration; the new appeal mechanism could review coherence of investment arbitration decisions and address the application of investment treaty in various jurisdictions, and 3) specific mechanisms may be designed to ensure foreign

⁸⁶ Schill, S. W. (2014) Foreign Investment in the Energy Sector: Lessons for International Investment Law. In E. De Brabandere & T. Gazzini (Eds.), *Foreign Investment in the Energy Sector*: Brill Nijhoff.

⁸⁷ See NAFTA's Environmental Record - IISD, available at: <https://www.iisd.org/sites/default/files/publications/nafta-environmental-record-commentary.pdf>. See also *2012 U.S. Model Bilateral Investment Treaty*, available at: <https://www.state.gov/documents/organization/188371.pdf>.

⁸⁸ UNCTAD. Investment Policy Framework for Sustainable Development (IPFSD), available at: [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx).

⁸⁹ OECD The Policy Framework for Investment (PFI), available at <http://www.oecd.org/investment/pfi.htm>

⁹⁰ Ibid.

⁹¹ Schill, S. W. (2014). See also Salacuse, J. (2013).

investors' duties, no matter arising from national laws, investment contracts, or public international law, are all integrated into the interpretation of IIAs.

1.2.4 Summary - The limits of 'formal' regulations

Currently, two major regulations can be applied to regulate MNCs in particular. The 'formal' regulations mentioned here are the ones undertaken by governments (whether at the national or local level) or intergovernmental organisations (whether at the multilateral or regional level)⁹². Such regulation can involve conventional 'command and control' instruments based on laws, regulations, and administrative or judicial decisions and which directly set liabilities and responsibilities upon corporations. Regulation can also be conducted through some more cooperative approaches⁹³. For example, partnerships with business associations, individual companies, and environmental and social NGOs, may be based on mandatory obligations included in contractual agreements or on voluntary compliance instruments.

For global energy governance, there is an urgent need to investigate how these international treaties, national laws, soft laws, and other project-specific instruments can address the negative environmental and social impacts occurred by international energy activities.

1.3 Knowledge gap in the current academic literature

FDI in the energy sector indeed raises formidable legal questions, often requiring a delicate balance between public and private interests of the various stakeholders. In the current literature, a tendency which stops the investigation of 'law' at the level of national legislation or of an international agreement can be identified⁹⁴.

Historically, the internationalisation of domestic laws and other important legal principles is a critical feature of energy law⁹⁵. Before the 1970s, the lack of international energy trade and the multi-jurisdictional environmental damages caused by energy activities may explain why

⁹² See Morgera, E. (2009) *Corporate Accountability in International Environmental Law*. Oxford: Oxford University Press. See also Ong, D. (2001) The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives. *European Journal of International Law*, 12.

⁹³ Orts, E. W., & Coglianese, C. (2007) Debate: Collaborative Environmental Law: Pro and Con. *University of Pennsylvania Law Review*, 156, 289-311.

⁹⁴ Affolder, N. (2011) Why Study Large Projects? Environmental Regulation's Neglected Frontier. *UBC Law Review*, 44(3), 521-554. See also Affolder, N. (2010) Rethinking Environmental Contracting. *Journal of Environmental Law and Policy*, 21, 155.

⁹⁵ Cameron, P. (2016).

there were not so many international treaties regarding energy or soft laws that focus on global energy markets.

Since the 1970s, the landscape of international energy law has changed rapidly. The modern oil and gas laws clearly illustrate the internationalisation process of domestic energy law and the evolution of international energy law⁹⁶. Also, the WTO and Energy Charter Treaty's related energy arbitrations have contributed to international applications of energy investment and trade standards and principles⁹⁷.

This significant development may also lead to the prevailing research approaches in current international law studies, focusing on the international treaties, dispute case laws, related principles, and their interplays with national laws. As Affolder has pointed out, project-specific environmental governance has not received enough attention from legal researchers⁹⁸. She clearly states that:

“International lawyers are very good at collecting and collating treaty provisions. We well document relevant international resolutions, but we are too often hesitant to roll up our sleeves and engage in the time consuming and inherently messy work of seeing how these legal requirements are implemented in individual project settings.”

Thus, this failure to investigate the nature of contractual and quasi-contractual instruments as part of a broader regulatory architecture of energy and natural resource governance have represented a misleading picture, obscuring the embeddedness of those innovative governance mechanisms in its legal environment and cultural context⁹⁹.

⁹⁶ Cameron, P., & Kolo, A. (2012) *What is Energy Investment Law and Why Does it Matter?*
http://www.eisourcebook.org/cms/March_2013/Peter%20&%20Abba%20-%20Energy%20Investment%20Law.pdf.

⁹⁷ Konoplyanik, A., & Walde, T. (2006). Energy Charter Treaty and its role in international energy. *J. Energy Nat. Resources L.*, 24, 523. See also Selivanova, Y. (2007). *The WTO and energy: WTO rules and agreements of relevance to the energy sector*. Geneva: International Centre for Trade and Sustainable Development.

⁹⁸ Affolder, N. (2013) Beyond law as tools: foreign investment projects and the contractualisation of environmental protection. In P.-M. Dupuy & J. E. Vinuales (Eds.), *Harnessing Foreign Investment to Promote Environmental Protection Incentives and Safeguards*. Cambridge: Cambridge University Press.

⁹⁹ Ibid.

Zhiguo Gao notes that none of the oil and gas contracts he was able to collect for his 1994 study comprehensively addressed environmental issues¹⁰⁰. His conclusions raise the issue of whether environmental and social initiatives and values have received more attention in recent energy and natural resource investment contracts over the past decades. Nonetheless, since Gao's study was released in 1994, his research could not reflect the likely subsequent changes within the international energy law regime or in the more recent energy investment contracts' contents vis-à-vis human rights and sustainability.

Of course, there is some subsequent research, such as Ong¹⁰¹, Viñuales¹⁰² and Tienhaara¹⁰³, which indeed addresses valuable questions. For example, what is the contribution of transnational agreements to the development of international law, particularly international environmental law? How can foreign investment contracts contribute to global environmental governance? Moreover, what are the relations between international economic law, international environmental law, and international human rights law? However, this follow-up research has not yet wholly evaluated other forms of contractual arrangements – e.g. Business-NGO partnerships and other multi-actor contracts – and their usefulness for environmental governance and human rights protection. To date, existing literature still lacks a comprehensive understanding of the contracting landscapes in various geographical regions, industries and contracting cultures, so there is an urgent need to understand how these contractual arrangements can make significant contributions to often long durations of energy investment projects.

As an important regulatory and governance mechanism, contracts do not operate in isolation from international and national legal frameworks. If researchers look at modern international investment projects, environmental and social initiatives have been introduced through various forms of contractual arrangements. These project-level initiatives and legal instruments, including State-investor contracts, NGO-Business partnerships, community

¹⁰⁰ Gao, Z. (1994) International Petroleum Exploration and Exploitation Agreements: A comprehensive environmental appraisal *International Oil and Gas Investment: Moving Eastward?* (pp. 317-335) Zuidpoolringel, Netherlands: Kluwer Law International.

¹⁰¹ Ong, D. (2001).

¹⁰² Viñuales, J. E. (2016).

¹⁰³ Tienhaara, K. (2011) Foreign Investment Contracts in the Oil and Gas Sector: A Survey of Environmentally Relevant Clauses. *Sustainable Development Law and Policy*, 11, 15. See also Tienhaara, K. (2013) Reconfiguring Investment Contracts to Promote Sustainable Development. In K. P. Sauvant (Ed.), *Yearbook on International Investment Law and Policy 2011 - 2012*. Oxford: Oxford University Press.

development agreements and other cross-sector collaborations, are still mainly operating below the radar of mainstream legal researchers, invisible to international environmental law today.

To sum up, the mainstream scholarship has mainly focused on the study of 'law' at the national and international levels. The analysis at a project-level still has not received enough attention from legal academia. Also, a systematic review of the dynamic interactions between different legal mechanisms for reconciling global energy investment with human rights and environmental protection values has not been done properly. An understanding of how policymakers can mobilise the potential for creating future legal innovations and synergies. Thus, it seems appropriate to investigate such changes that focus on the micro-level of project-specific regulation.

1.4 Research questions and the discussion structure

To fill the research gaps, this thesis aims to critically examine various contractual and quasi-contractual arrangements and to investigate the following questions. In so doing, this research frames the inquiry by a tripartite framework – states (S), investor (I) and affected communities/population (P) - and has three main purposes.

1.4.1 Research questions and objectives

1) What is the nature of environmental/social and human rights contractual and quasi-contractual arrangements between foreign investors, host states and affected communities in the context of international energy investment? More specifically, why and where are they occurring?

2) Can some recent patterns be inducted from the diverse avenues of bilateral investment contracts and multi-actor contractual arrangements?

3) Is it possible to identify trends in current and future contracting practices as regards FDI in the energy sector? To what extent are such practices influenced by global resistance and community involvement? What main features can be found in the Chinese case study?

The overall working hypothesis is that these 'bottom-up' driving forces, such as NGOs and individual citizens, are increasingly mobilising the use and the design of contractual arrangements and quasi-contractual agreements/partnerships in the cross-boundary energy investment scenario. This thesis illustrates this argument by focusing on the case study of Chinese outward and inbound investment in the energy and extractive sectors.

This research addresses the above research questions through the following approach:

Firstly, this research used different online resources open for the public in order to compile a dataset covering three major types of contracts: state-investor investment contracts, Business-NGO partnerships, and multi-actor investment contracts within the ‘S-I-P triangle’.

Secondly, this research crafted an analytical framework for assessing the empirical data and captured specific patterns and features in modern contractual practices. By examining the collected data on bilateral investment contracts, Business-NGO partnerships, and multi-actor agreements, this research reclassified them into three main types of contracts, namely soft contracts, enforcement contracts, and innovative contracts, each with its functioning features. This integrative chart will hopefully shed light on the potentials of contractual approaches for becoming a regulatory and policy innovation platform. This chart will also highlight the dynamic interactions, mutual supportiveness, and disparities among those three current regulatory instruments for energy investment.

Thirdly, this research, in Chapter 7, applies and test the developed original conceptual charts on China’s outward energy investment. This China chapter aims to demonstrate that the ‘bottom-up’ forces mentioned earlier and some key actors, such as NGOs, innovative commercial lawyers, and international energy companies, behind the innovative contracting practices, are all key factors fostering innovation in contractual practices towards a more sustainable and responsible energy investment future.

1.4.2 The discussion structure

Chapter 1 has set the background context of this research and identified three main purposes. This introduction has justified the significance of this research by providing three recent trends in global energy investments. This chapter also identified the knowledge gap in current literature and set the research objectives and working scope.

Chapter 2 will set up the analytical framework for assessing empirical data. It starts by reviewing the current international, national, and other ‘softer’ accountability mechanisms for regulating foreign investment in the energy sector via a sustainable development lens and revisits the “State-Investor-Population” (S-I-P) Triangle. This research project likes to address that contemporary legal frameworks for regulating international energy investment are fragmented and imbalanced (in favour of foreign investors). Thus, private contractual arrangements can be a useful vehicle to prevent environmental and social damages. It also has

the potentials to complement the fragmented regulatory frameworks and enhance multi-level energy governance. This chapter also presents the methodological part of this research, including methods for data collection and data analysis. Also, it will address the research contributions and limitations.

Chapter 3, 4 and 5 compose the main body of this thesis, investigating various contractual mechanisms in the ‘S-I-P’ triangle and their practices, effectiveness and interactions with other regulatory approaches.

To be specific, Chapter 3 looks at the ‘S-I’ (State-Investor) dimension, focusing on environmental and social considerations in state-investor investment contracts. Chapter 4 reviews the ‘I-P’ (Investor-Population) dimension. Due to a large number of community development agreements / corporate-NGO partnerships around the world, this chapter only focuses on examining the values and challenges of Corporate-NGO partnerships in Greater China’s oil and gas sectors. This should be an important case study for other energy sectors.

Chapter 5 turns to the multi-actor investment contracts, and other multilateral initiatives within the ‘S-I-P’ (State-Investor-Population) triangle and even goes beyond. The discussion focuses on examining the feasibility of the recent proposal for establishing a multi-actor investment contract framework and whether these multi-actor contracts can lead to a new governance paradigm shift (‘governance by contract’).

To provide original theoretical insights, Chapter 6 re-classified current contractual mechanisms as ‘soft contracts’, ‘enforcement contracts’ and ‘innovative contracts’, and developed an original conceptual chart to chart the dynamic interplays of the legal topography as targeted. Under a context of economic globalisation and community resistance, this thesis identified three key driving actors, namely multi-national energy corporations, non-governmental organisations and commercial lawyers, for transnational governance. These three change agents may see contract as a technology itself, which can stimulate, manage and reinvent environment-driven societal transformation and regulatory development.

After crafting the original conceptual charts, Chapter 7 aims to use this set of charts to examine China’s recent outward FDI in the energy sector as an illustrative case study. It looks at the environmental and social policies in Chinese overseas energy investment and pays particular attention to the community resistance to China’s hydropower and extractive industries. This chapter uses the evidence to examine and support an essential argument in this

thesis - global resistances and protests are shaping the modern contracting practices in the international energy investment regime and, through the platforms provided by various contractual arrangements, these ‘bottom-up’ forces can be useful for promoting future legal and policy transformation.

Chapter 8 concludes this research. This chapter will provide summaries of the main empirical findings and evaluate the research arguments. The researcher humbly hopes the empirical findings and the original conceptual charts are not only useful to offer theoretical perspectives but also to serve as a starting point for future interdisciplinary studies. For instance, the original conceptual charts may guide economic modelling to empirically test the actual impacts of energy investment on the affected communities and the effectiveness of those various contractual instruments.

Chapter 2 – Setting the analytical framework

“The current energy system is characterised by inequality.” – Nnimmo Bassey, Nigerian environmental activist

This chapter aims to set the analytical framework for the following chapters, in particular, chapter 3, 4 and 5. These three chapters, as the main body of this thesis, empirically examine the effectiveness of various contractual mechanisms for safeguarding environmental and social values in the context of international energy investment.

For this purpose, Section 2.1 first rethinks international energy investment through a lens of sustainable development. The concept of sustainable development helps to clarify that regulating international energy investment requires multi-actor and multi-level collaborations (e.g. international, national and individual). Through this critical angle, Section 2.2 turns to exam the conflicts and emerging issues in the ‘State-Investor-Population’ triangle (S-I-P triangle). Also, this chapter presents the methodological parts of this thesis, including the research methods, data collection and data analysis procedures (Section 2.3). Finally, Section 2.4 outlines the possible contributions, research limitations and ethical considerations of this research.

2.1 Rethink energy investment through a lens of sustainable development

This thesis defines the concept of sustainable development in broad terms, as a process which improves human beings’ lives while also respecting the environment, based on bottom-up agendas and priorities. This definition builds on the 1992 Rio Declaration’s Principle 1¹⁰⁴. According to this Principle, people are at the centre of development and are entitled to have a healthy, harmonious, and productive life with nature¹⁰⁵. This concept has been criticised for being too vague¹⁰⁶; however, it has important implications for addressing environmental and social issues in international energy investment and recalibrating current investment law and policy.

2.1.1 Recent normative developments at the international level

¹⁰⁴ Principle 1 of the Rio Declaration 1992, available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.html>.

¹⁰⁵ See Dupuy, P.-M., & Vinuales, J. E. (2018).

¹⁰⁶ The United Nations Conference on Environment and Development, See full text: <https://www.cbd.int/doc/ref/rio-declaration.html>.

Today cross-boundary investment is more about quality, not just quantity¹⁰⁷. Given both the positive and negative impact brought by global energy investment, the United Nations' Development Programme and other international organisations have pointed out that the quality of investment, not just quantity, truly matters¹⁰⁸.

International instruments developed over the last thirty years offer specific evidence and guidance to support this argument¹⁰⁹. The Brundtland Report in 1987¹¹⁰ and the UN conference on environment and development in Rio 1992¹¹¹ took a crucial role in developing the concept of sustainable development. Many important legal instruments and policy tools were adopted in the Rio conference and the follow-on world summits, such as the Plan of Implementation (adopted at the Rio+10 conference), and the critical document 'The Future We Want' (adopted at the Rio+20 conference) in 2012¹¹². More recently, the recent adoption of a new set of SDGs, embodied in the United Nations' 2030 Agenda for Sustainable Development, provides new insight for conceptualising and operationalising the concept of sustainable development¹¹³.

Economic growth is indeed an important goal of sustainable development. Principle 3 of the Rio Declaration 1992 states the right to development, while the vision of SDG 8 is to encourage 'sustained, inclusive and sustainable economic growth'. Achieving these goals for development requires attracting private direct investment, including in natural resource sectors in countries where these provide an essential basis for economic activities.

With regard to environmental considerations, the Rio Declaration's Principle 4 states, "environmental protection shall constitute an integral part of the development process". The Rio Declaration is based on concepts developed in the Brundtland Report. Principle 3 of the

¹⁰⁷ Cameron, P. (2010) *International Energy Investment Law*. Oxford: OUP. See also Dolzer, R. a. C. S. (2013) *Principles of International Investment Law*. Oxford: Oxford University Press.

¹⁰⁸ See United Nations. (2015a). See also International Energy Agency (2014).

¹⁰⁹ Clement-Davies, C. (2014) Contractual Stability in the Energy Sector: Reconciling the Needs of States and Investors. *International Energy Law Review*, 32(2), 47-48. See also Bradbrook, A. J., Ottinger, R. L., International Union for Conservation of Nature and Natural Resources. & IUCN Environmental Law Programme. (2003) *Energy law and sustainable development*. Gland, Switzerland; Cambridge: IUCN.

¹¹⁰ United Nations (1987). Our common future: Report of the 1987 World Commission on Environment and Development. *United Nations, Oslo, 1*, 59.

¹¹¹ Grubb, M. (1993). *The Earth Summit agreements: a guide and assessment; an analysis of the Rio'92 UN Conference on Environment and Development*. Earthscan and the Energy and Environmental Programme of the Royal Institute of International Affairs. See also Ephraums, J. J., & Jenkins, G. J. J. (1992). *Climate change 1992*. Cambridge University Press.

¹¹² Leal Filho, W., Manolas, E., & Pace, P. (2015). The future we want: Key issues on sustainable development in higher education after Rio and the UN decade of education for sustainable development. *International Journal of Sustainability in Higher Education*, 16(1), 112-129.

¹¹³ Gordon, K., Pohl, J., & Bouchard, M. (2014).

Rio Declaration also addresses that the right to development needs to consider the environmental values of future and present generations¹¹⁴. This Principle is about inter-generational equity, which has significant policy and philosophical implications for safeguarding our environment for future generations, and environmental sustainability underpins most UN SDGs as well.

Regarding social considerations, Principle 5 of the Rio Declaration 1992 views poverty eradication as “an indispensable requirement for sustainable development”¹¹⁵. Principle 22 also calls on countries to support the interests of local communities and indigenous peoples¹¹⁶. As the Rio Declaration emphasises the relations between economic growth and environmental sustainability, subsequent World Summits have more fully turned to the significance of social dimensions in sustainable development.

For instance, the 2002 World Summit on Sustainable Development released the Plan of Implementation¹¹⁷. This action plan contains language on public health, hunger, poverty, water, sanitation, and energy. Corporate social accountability is also mentioned in the document¹¹⁸. This plan acknowledged that respect for human rights is essential to achieving sustainable development¹¹⁹. In addition, social issues are a vital component of the SDGs, such as ensuring healthy lives, access to water and energy, ending hunger and poverty, promoting decent work, and reducing inequalities.

Without taking social and environmental considerations seriously, an investment that is economically beneficial (regarding GDP and public revenues) to the host state as a whole still should not be viewed as promoting sustainable development¹²⁰. In some affected communities, people are dispossessed of their lands and are attacked by armed security forces.

¹¹⁴ United Nations (1987). See also Sturzenegger, F. (2010) *The natural resources trap: Private investment without public commitment*. MIT Press.

¹¹⁵ Principle 5 of the Rio Declaration 1992, available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>; See also Vinuales, J. (2015).

¹¹⁶ Principle 22 of the Rio Declaration 1992, available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

¹¹⁷ United Nations (2002a) Report of the World Summit on Sustainable Development. Available at <http://www.un-documents.net/aconf199-20.pdf>.

¹¹⁸ See Morgera, E. (2009).

¹¹⁹ United Nations (2002b) Plan of Implementation of the World Summit on Sustainable Development. Available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf

¹²⁰ Principle 4 of the Rio Declaration 1992, Available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.html>.

Principle 4 of the Rio Declaration 1992 states that “environmental protection shall constitute an integral part of the development process”. Also, Principle 5 of the Declaration regards poverty eradication as “an indispensable requirement for sustainable development”¹²¹. These principles have been applied in some international rulings. For instance, the International Court of Justice (ICJ) has pointed out that the necessity to reconcile economic development with environmental protection is explicitly expressed in the concept of sustainable development¹²².

Implementation of all the UN new SDGs would require investment projects to address environmental and social issues adequately¹²³. The social and environmental dimensions of investment projects are connected intimately with many fundamental human rights¹²⁴. The 2002 World Summit published the Plan of Implementation, which clearly states that “respect for human rights is essential for achieving sustainable development.” Human rights are also relevant to almost every social matter in an investment project. For instance, land acquisition is related to indigenous peoples’ rights to property, food, housing and ancestral lands. Foreign investors may also have labour rights issues and need to consider the human rights relevant to the environment.

Environmental degradation can widely influence public health and other recognised human rights¹²⁵. For example, the African Charter on Human and Peoples’ Rights affirms the right to a clean environment (Article 24)¹²⁶. In 1993, the Vienna Declaration and Programme of Action also stated the pursuit of economic growth should not trump globally recognised

¹²¹ Principle 5 of the Rio Declaration 1992, Available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

¹²² Shiva, V. (2016). *Earth democracy: Justice, sustainability and peace*. Zed Books Ltd. See also Bosselmann, K. (2016). *The principle of sustainability: transforming law and governance*. Routledge.

¹²³ Promoting foreign investment in the Sustainable Development Goals, Note by the UNCTAD secretariat, available at: http://unctad.org/meetings/en/SessionalDocuments/ciid35_EN.pdf.

¹²⁴ Diana, S. K. (2013). The Mongolian energy industry: filling in the gaps. Available at: <https://www.dlapiper.com/en/uk/insights/publications/2013/06/the-mongolian-energy-industry-filling-in-the-gaps/>. See Diana, S. K. & Batsuren, B. (2013). With new law, Mongolia opens to investors. Available: <https://www.dlapiper.com/en/us/insights/publications/2013/11/with-new-law-mongolia-opens-to-investors/>.

¹²⁵ Zillman, D. M., & Lucas, A. (2002). *Human rights in natural resource development: Public participation in the sustainable development of mining and energy resources*. Oxford University Press. See also Vadi, V. (2012). *Public health in international investment law and arbitration*: Routledge.

¹²⁶ Article 24, African Charter on Human and Peoples' Rights, Available at: <http://www.achpr.org/instruments/achpr>.

human rights. In practice, NGOs and human rights advocates have widely engaged with the natural resource investment projects over the past decades¹²⁷.

In any investment process, social, environmental and economic considerations are interlinked and can involve complex choices. The principles of participatory and accountable governance discussed in the previous section provide guidance on how these choices should be made.

2.1.2 Other ‘softer’ accountability mechanisms at the international level

On a different level of normativity and enforcement, ‘soft law’ initiatives are emanating from international organisations¹²⁸. Many important actors draft principles, rules and standards related to international energy law, including international organisations, NGOs, business associations, and international financing institutions. International organisations regarding the energy sectors include the International Energy Agency (IEA), the Energy Charter Treaty, the International Atomic Energy Agency, International Renewable Energy Agency (‘IRENA’), UN Environment Programme, UN Development Programme, and the OECD Nuclear Energy Agency.

The importance of soft laws is also a fundamental feature of the discipline of international energy law¹²⁹. Firstly, soft laws may contribute to the formation of binding international norms, either via the incorporation of initially non-binding standards into a real treaty, or as these soft laws are regarded as legally authoritative by a large number of countries over a sufficient length of time, via the establishment of customary law. Secondly, international guidelines also can raise the standard expected of energy companies in ways other than their application by the tribunals. The industrial practices voluntarily adopted by one leading energy corporation may become a model for domestic oil and gas legislation, thereby raising the requirements expected by other foreign investors seeking to enter and operate in that jurisdiction in the future¹³⁰.

Therefore, this research will also pay attention to the following soft laws concerning FDI in the extractive industries:

¹²⁷ Ferguson, R., & Lovell, S. (2015) Grassroots engagement with transition to sustainability: diversity and modes of participation in the international permaculture movement. *Ecology and Society*, 20(4).

¹²⁸ Karl, J. (2014).

¹²⁹ Cameron, P. (2010).

¹³⁰ Pusceddu, P. (2014) Contractual Stability in the Oil and Gas Industry: Stabilisation, Renegotiation and Unilateral State's Undertakings. *International Energy Law Review*, 32(2), 58-67.

- (1) UN Guiding Principles on Business and Human Rights (UNGPs);
- (2) OECD Guidelines for Multinational Enterprises;
- (3) International Finance Corporation Performance Standards;
- (4) Voluntary Principles on Security and Human Rights;
- (5) Extractive Industry Transparency Initiative;
- (6) UN Global Compact, and
- (7) UN Principles for Responsible Contracts.

2.1.3 Incorporating sustainable development into national investment policies

Even an investment deal which is economically beneficial to the host state as a whole can be detrimental if other environmental and social values are not adequately factored in. Balancing economic, environmental as well as social considerations is central to responsible investment and sustainable development¹³¹. Over the past two decades, policymakers at the national level have also clarified the implications and trade-offs of this concept¹³².

Indeed, law is only one aspect of the whole story. Other public policy instruments outside the legal regime, such as macroeconomic policies, can also influence investment projects' patterns¹³³. Although national legislation may nominally protect human rights and the natural environment, these laws are usually not enforced adequately because of vested conflicting interests, power imbalances, and resource insufficiency.

Tax law is a proper example when it may be circumvented, as it is not always easy to collect tax payments. Some natural resource investment deals have been awarded in violation of substantive regulations and prescribed procedures. Legal implementation may take forms in some unexpected directions, often reflecting power imbalances between those who can stand to obtain or to lose from different interpretations of the law. Whether affected citizens are well-organised for taking collective actions may significantly impact the legal rights they formally hold.

¹³¹ Park, P. (2013). *International Law for Energy and the Environment* (2 ed.): CRC Press. See also Sovacool, B. K. (2013) *Energy & Ethics*: Palgrave Macmillan.

¹³² Gordon, K., Pohl, J., & Bouchard, M. (2014).

¹³³ Horst Keppler, J., & Schulke, C. (2009) *Investing in the Energy Sector: An Issue of Governance*. Paris.

Problems in implementation typically mean that investment projects reflect a gap between law and practice¹³⁴. Law enforcement can have both intended and unexpected outcomes for real-life processes. Even well-implemented regulations can have unexpected results, but given the role of legal rules in framing the conditions of foreign investment, effective use of legal instruments by governmental agencies and advocates alike is a very significant ingredient of efforts to make sure that FDI is responsible and can contribute to sustainable development.

Many governments have become more aware of the far-reaching repercussions of investment law, mainly after investors brought international arbitrations challenging the public action in wide-ranging policy areas¹³⁵. Unlike many legal arrangements relevant to foreign investment, effective enforcement mechanisms mean that investment treaties and arbitration can have real bite.

At a local level, citizens and NGOs in many developing countries have mobilised social movements as well as resorted to legal actions to contest large-scale energy investment projects. In many cases, law is a significant part of broader advocacy strategies combining collective political actions and legal resource empowerments¹³⁶.

Now, most of the massive investments in energy and natural resources are subject to public scrutiny¹³⁷. Corporations face pressures to safeguard social and environmental values effectively, and many private enterprises take a proactive role in incorporating corporate social responsibilities into their core business operations. The business and human rights issues are moving to the mainstream of international business agenda¹³⁸. However, balancing economic considerations with environmental and social values is much more complicated in practice. First, there is no global consensus on how to cope with significant trade-offs. Second, evaluating and balancing these fundamental values evolve and are inherently context-specific.

¹³⁴ See Cotula, L. (2010a) *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investment*. London: IIED. See also Cotula, L. (2011) *Land Deals in Africa: What is in the Contracts?* London: IIED.

¹³⁵ Horst Keppler, J., & Schulke, C. (2009).

¹³⁶ Cotula, L. (2010b) Rethinking investor-state contracts through a sustainable development lens. Analysis, IISD, Retrieved from <https://www.iisd.org/itn/2011/10/07/rethinking-investor-state-contracts-through-a-sustainable-development-lens>.

¹³⁷ Ibid.

¹³⁸ Rivkin, D. W. (2016) *The wise counselor and the frontiers of business and human rights*. Paper presented at the Human Rights Law and the Extractive Industries, Panama City.

Moreover, the sustainability can look very different at various levels¹³⁹. A decision that may be beneficial to development at the national level can be unsustainable to the local communities.

To sum up, promoting responsible and sustainable investments requires a holistic approach to address all the economic, environmental, and social issues at stake in every investment stage¹⁴⁰. Host states, foreign investors and home states are three major actors with fundamental interests in an investment project. Both host states and foreign investors' home states have been working on establishing rules to regulate international transactions and to embody principles in various legal instruments.

Based on the discussions above, the concept of sustainable development provides a handy lens to assess quality in energy investment processes. Sustainable development is a flexible and evolving concept. So far no universally accepted definition exists¹⁴¹. In the investment context, corporations, states, and affected citizens have the chance to discuss competing visions of what constitutes the nature of sustainable development and how to balance multiple values¹⁴².

Through this lens, attracting investment is not a final goal in itself but a vehicle to the end. While the major concerns of foreign investors usually focus on maximising their commercial profits, for host countries and citizens, the primary goal of attracting FDI should be to mobilise assets and capitals for a more sustainable future¹⁴³.

2.2 Revisit the “State-Investor-Population” (S-I-P) Triangle

Natural resources are distributed unevenly across geographical areas and do not follow national boundaries. Any activity regarding transnational energy and natural resource investment involves a matter of sovereignty and is subject to the host country's regulatory powers.

¹³⁹ See Gunningham, N. (2009a) The new collaborative environmental governance: The localization of regulation. *Journal of Law and Society*, 36(1), 145-166. See also Odumosu-Ayanu, I. T. (2014a) Governments, Investors and Local Communities: Analysis of A Multi-Actor Investment Contract Framework. *Melbourne Journal of International Law*, 15.

¹⁴⁰ Sornarajah, M. (2010) *The International Law on Foreign Investment* (Second ed.): Cambridge University Press. See also Sturzenegger, F. (2010).

¹⁴¹ Birnie, P. W., Boyle, A. E., & Redgwell, C. (2009) *International law and the environment* (3rd Ed.) Oxford; New York: Oxford University Press. See also Brownlie, I. (2008) *Principles of Public International Law* (7th Ed.) Oxford: Oxford University Press.

¹⁴² Dolzer, R. a. C. S. (2013). See also Miles, K. (2013) *The origins of international investment law: empire, environment and the safeguarding of capital* (Vol. 99) Cambridge University Press.

¹⁴³ Cotula, L. (2010b).

Academic studies argue that contemporary international investment law has become unbalanced in overemphasising investment protection over the regulatory authority of the host countries and, more importantly, the affected citizens and public interests¹⁴⁴. To fully understand the complex interplays within the SIP triangle, one should not only focus on the practices of State-investor contracts but also analyse the other different aspects, namely the P-I and S-P dimensions within the whole triangle that have other regulatory focuses.

In the existing studies, investment arbitration analysis, traditionally, focuses on the conflicts between the private interests of the foreign investor and the public interests of the host state¹⁴⁵ (Figure 2.1). Under this context, it is not surprising that the substantial analyses of these private-public tensions are captured in the current academic discourses and scholars' writings.

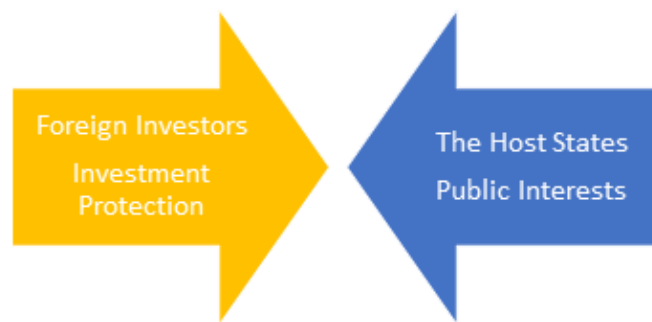


Figure 2.1 Public-private tensions between foreign investors and the host states

It is hard to deny that studying the investment disputes related to energy FDI could provide some benefits because energy investment law can be viewed as *pars pro toto* for the whole of international investment law. Therefore, tribunal decisions and their legal reasoning from a specific sector (such as the energy sector) can make theoretical contributions to international environmental law and international investment law in general¹⁴⁶.

Nonetheless, if researchers and practicing lawyers can take a step back and review energy FDI operations from a broader perspective, not all the tensions regarding environmental and human rights in investment treaty arbitration can be properly understood through the lens of

¹⁴⁴ De Schutter, O., Swinnen, J., & Wouters, J. (2013) *Foreign Direct Investment and Human Development*: Routledge. See also Danish Human Rights Institute. (2014) *Human Rights and State-Investor Contracts: Guidance and assessment tool for company negotiators*. Copenhagen, Denmark.

¹⁴⁵ De Brabandere, E. (2014).

¹⁴⁶ Hober, K. (2014) Recent trends in energy disputes. In K. Talus (Ed.), *Research Handbook on International Energy Law* (pp. 225-240): Cheltenham, UK. See also Martin, A. T. (2011) Dispute Resolution in the International Energy Sector: An Overview. *Journal of World Energy Law and Business*, 4(4), 332-368.

this conventional public-private divide. Interestingly, some conflicts even exist within the ‘box’ of the public interests – the interests of affected citizens and communities can be different from the other public interests protected and promoted by the host state under some national policies.

The sad truth is that sometimes interests of a host state and a foreign investor can not only be aligned in the protection of public interests but also to the detriment of it¹⁴⁷. The latter phenomenon has been mentioned as the “resource curse” in academic and policy discussions¹⁴⁸. The resource curse phenomenon occurs quite often in the situation where developing countries have an abundance of natural resources but misuse them. In this scenario, a rapacious state can exploit the country’s valuable natural resources for its economic benefits, depriving the citizens of its due. In fact, the basic triangular relation, what people mention as “State-Investor-Population” triangle, can be much more complicated in practice. The complexity of the SIP triangle can be demonstrated further by the following points:

Firstly, a host state can have various political and territorial governing subdivisions. National, regional, and local governments all may have conflicting interests with each other, and therefore hold different views on the same energy investment project.

Secondly, the host country’s population can also be a heterogeneous category. For instance, a renewable energy infrastructure project is very likely to bring the benefits of economic growth and energy security to the whole country, but this specific project can be harmful to a small segment of the local population. Moreover, interests may also differ inside the affected communities, which depends on the extent of who benefits from that energy investment project and who does not.

Thirdly, each aspect of the S-I-P triangle is governed by different bodies of law and regulation, and these different bodies of law may collide with each other. For example, the protection of human rights in the energy development projects may be governed by the S-P dimension’s international human rights laws and domestic constitutional law. These rules may not be consistent with the fundamental values of international law on foreign investment governing the S-I dimension.

¹⁴⁷ Ibid.

¹⁴⁸ Smith, D. C. (2015) Looking ahead: The top ten energy and natural resources issues in 2015. *Journal of Energy & Natural Resources Law*, 33(1), 1-9. See also Laryea, E. (2011) Contractual arrangements for resource investment. In F. N. Botchway (Ed.), *Natural Resource Investment and Africa's Development* (pp. 107-133) Cheltenham UK: EE Publishing.

Figure 2.2 below demonstrates the S-I-P triangle and how it involves different branches of public international law and national law respectively¹⁴⁹.

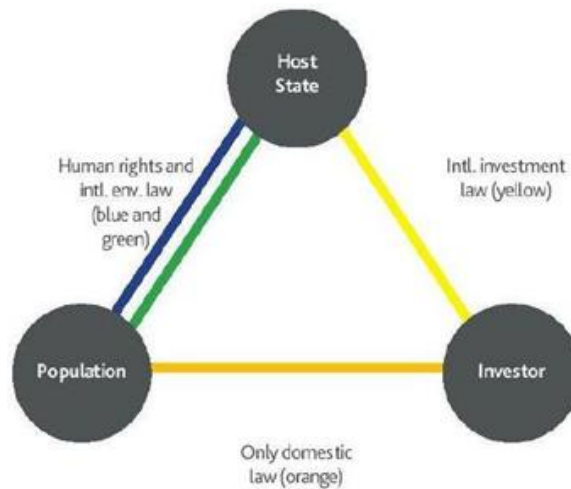


Figure 2.2 The SIP Triangle and its Law. Source: Viñuales, Jorge E. (2015). *International Investment Law and Natural Resource Governance*. P.5, E15Initiative. Geneva, available at www.e15initiative.org

This tripartite framework provides useful insights for framing the inquiries of this research. This research aims to examine the contractual arrangements for safeguarding environmental and social values in each dimension of this ‘S-I-P’ triangle, namely the S-I, I-P, and S-I-P contracts.

Also, this tripartite framework highlights the different professional roles that lawyers can play in this triangle. Host states, as a primary regulator in this triangle, may have governmental lawyers working for them. Foreign investors are usually transnational energy corporations in this case; the lawyers working for them are ‘investment lawyers’ or ‘commercial lawyers’. Finally, for the affected population, there are also environmental lawyers and human rights advocates who may defend the interests of these affected individuals (See Figure 2.3).

¹⁴⁹ Viñuales, J. (2015).

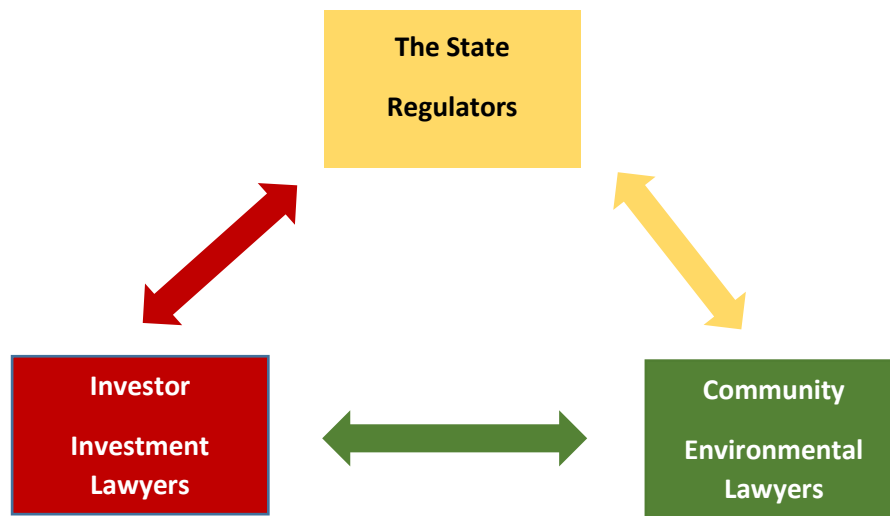


Figure 2.3 Different professional roles for lawyers working in this tripartite framework.

As a contemporary governance mechanism, contracts do not operate in isolation from the international and national law¹⁵⁰. In fact, contractual arrangements are central to any large energy investment project operating within this SIP triangle. Nowadays in modern investment contracts, environmental and social initiatives are written in various types of contractual clauses and other arrangements.

Different types of lawyers (e.g. investment, environmental and human rights, and governmental lawyers) may have different perspectives on an investment contract. In recent investment contracting practices, all these three types of lawyers should start to speak the same ‘language’, which is the language concerning the environment and social justice values in every development project. To be more specific, today commercial lawyers and investment lawyers should also play the roles of environmental and human rights lawyers, sometimes even as a regulator, in their daily legal and negotiation practices. This research will have a further examination on the roles of practicing lawyers for investment projects in the following chapters.

Based on this tripartite framework, this chapter below will explain how the author collected and analysed different contracts within this SIP triangle and found relationships to its three dimensions.

¹⁵⁰ Tienhaara, K. (2013) Reconfiguring Investment Contracts to Promote Sustainable Development. In K. P. Sauvant (Ed.), *Yearbook on International Investment Law and Policy 2011 - 2012*. Oxford: Oxford University Press. See also Affolder, N. (2010).

2.3 Methodologies, data-sets and data analysis

This section outlines the research methodologies, data sources, and possible research limitations. Some methodological discussions on the nature of legal research will also be briefly addressed.

This research aims to combine a traditional doctrinal analysis with socio-legal research methodologies. So it mainly has a qualitative approach, employing case studies and a comparative design. In short, the whole research process can be divided into two main stages: 1) primary data collection and 2) critical data analysis. Before going into the details of the research methods, it would be useful to reflect on the nature of the legal inquiry, which provides a border view to chart the targeted legal and social phenomena in this research.

2.3.1 Legal inquiry and the targeted legal topography

The nature of the legal inquiry is to explore the uncharted territory of legal topography, such as national laws, international treaties, legal instruments, institutions, practices and principles¹⁵¹. Legal scholars should not be prisoners of well-established legal principles and concepts. On the contrary, conceptual innovation is very desirable, which can be the best foundation for future interdisciplinary research and the best evidence of genuine progress in legal study.

In order to capture specific features of the targeted legal topography, legal scholars and practitioners have developed many innovative conceptual charts over the centuries. For example, leading legal philosophers, such as Hans Kelsen, Ronald Dworkin and H.L.A Hart, all established their original and innovative conceptual charts in legal studies. Under this context, a well-established legal conceptual chart is one that can merely: 1) be able to capture both empirical and legal features of the targeted topography, 2) apply “legally-sensitive” analytical concepts, 3) be appropriately fine-tuned in terms of assessing criteria and scale to explore well-defined target’s features, 4) set a number of statements that conditions of success are clearly spelt out, 5) establish the chart with a good faith effort¹⁵².

¹⁵¹ Viñuales, J. E. (2013) On Legal Inquiry. In *D. Alland, V. Chetail, O. De Frouville, & J. E. Viñuales* (Eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy*: Leiden.

¹⁵² Ibid.

For this research, the legal research methodologies applied can be put into two main categories¹⁵³. The first category is those methodologies which are internally-focused. This kind of methodology views the laws and other rules as a ‘self-contained entity’. The second category of legal research methodology is a more applied and integrated methodology and usually integrates the academic insights or approaches of another discipline (i.e. economics, politics, philosophy, anthropology and geography) into the legal inquiry and applies the concepts and insights from other disciplines when discussing a legal problem.

For social sciences studies, the term empirical means that the research is grounded in the experiment, participation observation, investigation or other experiences¹⁵⁴. Empirical legal research or socio-legal studies aim to understand how the legal rules work. For example, the scholars are interested in the possible consequences of legal reforms, how the crucial actors behave in some legal regimes, and how laws and regulations are formulated and implemented. As a result, empirical approaches of legal research are not just interested in ‘law in books’ but ‘law in action’ as well.

Socio-legal and empirical methodologies can include both quantitative and qualitative analytical skills on the data collected¹⁵⁵. These skills include structured and semi-structured interviews, observations, quantitative surveys, case studies, and economic modelling. On the other hand, doctrinal methodologies will be able to highlight the legal implications of a particular approach or relationships between different legal concepts¹⁵⁶. However, they are only indirectly concerned with the actual operation of law. Hence, finding a way that sufficiently integrates the technical aspects in an inquiry and is also concerned with the practical operation of legal techniques (in the present context, contractual and quasi-contractual arrangements) requires the development of a suitable analytical framework capable of reading certain features of the legal topography. In this research project, the researcher decides to establish them by using an empirical or socio-legal methodology.

¹⁵³ Cryer, R., Hervey, T., Sokhi-Bulley, B., & Alexandra, B. (2011) *Research Methodologies in EU and International Law*: Hart. See also McConville, M., & Chui, W. H. E. (2007) *Research Methods for Law*: Edinburgh University Press.

¹⁵⁴ Vaccaro, I., Smith, E. A., & Aswani, S. (2010) *Environmental social sciences: methods and research design*. Cambridge: Cambridge University Press. See also McConville, M., & Chui, W. H. E. (2007).

¹⁵⁵ McConville, M., & Chui, W. H. E. (2007).

¹⁵⁶ Cryer, R., Hervey, T., Sokhi-Bulley, B., & Alexandra, B. (2011).

The analytical framework developed in this dissertation aims to organise different types of contracts into categories that are both legally relevant and empirically useful. Both the empirical and legal dimensions must be considered because ignoring technical aspects of contractual arrangements may result in an insufficient understanding of the outcomes of certain legal disputes over foreign investment and hence of the mechanisms that play a role in unbalancing the system.

Regarding academic originality, this analytical framework aims to clarify certain features of the legal topography, such as the current unbalancing of different interests and the techniques that are being used to achieve better balance. With newly developed legally-relevant analytical concepts, this research also wishes to become a foundation for future inter-disciplinary research, e.g. economics modelling other quantitative evaluations, to empirically evaluate the impacts of FDI across the world.

The following paragraphs will give more details about the data sources, data collection process and possible challenges.

2.3.2 Stage One - Searching three main types of contracts

The data collection process of this research can be divided into two main stages. In Figure 2.4, we can see the whole data collecting and analysing process targets a range of data sources, including State-investor investment contracts, Business-NGO partnerships, model contracts designed by the international organisations, multi-actor investment contracts and other contractual mechanisms.

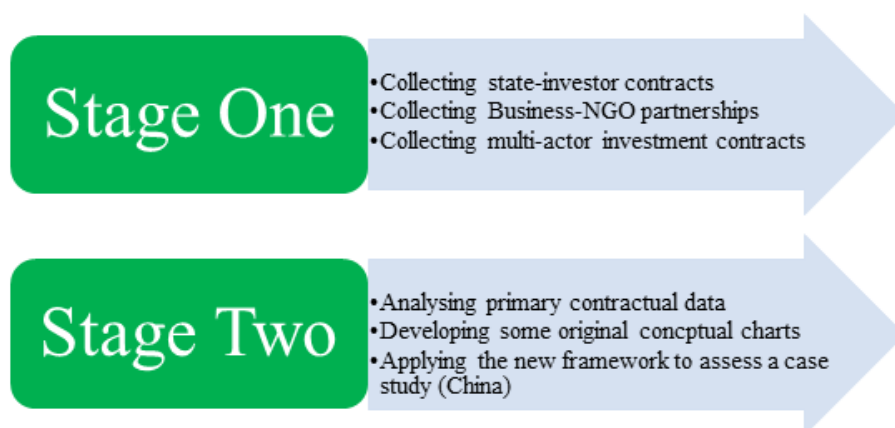


Figure 2.4 This research’s data collection and analyse processes

1. For finding State-investor contracts:

Typically, State-investor contracts are not published and not available to the public, despite a recent call for investment contract transparency internationally¹⁵⁷. However, luckily, several online data banks are still very useful for collecting primary contract materials in the energy investment regime. Among all of these online data sources, some are free, but some are paid services.

This research only used the free online data sources for searching energy and resource contracts. Both the free website and the paid services can directly provide sample investment contracts for downloading and offer the web links to the governmental or corporate official websites where they published their free copies of investment contracts online.

This research mainly uses the websites and the relevant data sources below to establish empirical datasets. Many of the contract websites provide helpful functions for the researcher to download the samples of published investment contracts and to filter the investment contracts by name, contract type, nation, year of the signatory, and specific provisions, such as environment, human rights, and community development.

The following paragraphs will further discuss the specific information of these online data sources and how the researcher collects empirical data materials from them.

1) “Contract Monitoring Roadmap”

This Roadmap is a very well-designed, informative, and interactive online data resource¹⁵⁸. This website can provide an overview of all the published investment contracts worldwide. It details the direct links and information of how the researcher can gain access to these investment contracts and related documents. Very interestingly, this Monitoring Roadmap was initially designed to monitor the contract transparency in all jurisdictions around the world. However, this website only provides State-investor investment contracts.

2) “Resource Contracts”

“Resource Contracts” covers a wider range of different contract types¹⁵⁹. It is a more comprehensive, searchable, and user-friendly databank, covering State-investor investment contracts, community development agreements, environmental impact assessment agreements,

¹⁵⁷ Tienhaara, K. (2013).

¹⁵⁸ “Contract Monitoring Roadmap” official website, available at: https://www.open-contracting.org/2013/10/03/9_steps_for_contract_monitoring_an_interactive_roadmap.

¹⁵⁹ “Resource Contract” official website, available at: <https://resourcecontracts.org>.

corporate environmental management plans, and other forms of contracts in the energy and natural resource industries.

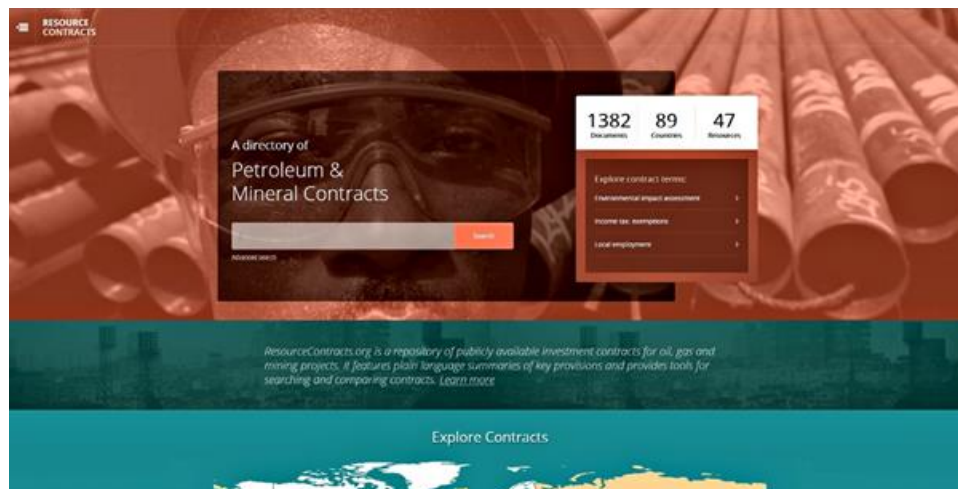


Figure 2.5 “Resource Contracts” provides searching tools for finding and filtering natural resource contracts, which collected state investment contracts and other forms of contracts from 1958. Source: <http://www.resourcecontracts.org/>

As Figure 2.5 shows, the online databank of “Resource Contracts” already covers 1,382 petroleum and mineral investment contracts from 89 countries. The period of these contracts can be traced back from the year of 1958 to 2017. This research uses this website as a major data source because of its abundant information.

3) “Making transparency a global standard”

This online data platform targets governments around the world¹⁶⁰. The operator of the website is also monitoring which country has published their extractive contracts online or made them transparent to the public. This website also provides direct links of the investment contracts and documents. Not surprisingly, it also aims to conduct online campaigns, which oversees governmental authorities who have not established new legislation or any mechanism to make their investment contracts transparent. This website also monitors whether these mechanisms are implemented successfully or not.

¹⁶⁰ “Making transparency a global standard” official website, available at: <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan011683.pdf>.

World Map - Who has published contracts?

This map shows which governments have published extractive contracts and provides links to them. Countries with a dark blue marker have published most or all their extractive contracts online. Countries with a light blue marker have only published a few contracts, or have legislated to publish contracts but have not yet done so.

Have we missed any countries out? Included any countries you don't feel should be in the map? Let us know! You can comment below the map or email apowell@publishwhatyoupay.org



Figure 2.6 An online map of jurisdictions that have published investment contracts online. Source: “Making Transparency a Global Standard”.

In Figure 2.6, an online map identifying jurisdictions where energy and extractive contracts have been published and with direct access links to the contractual documents.

4) “Oilwiki guides”

The Oilwiki guides is a sophisticated website, which not only provides country-level energy and natural resources contracts but also offers their publications that summarise international and national natural resource policies, other model contracts and the changing geopolitics of energy resources¹⁶¹.

5) “LEITI Contracts, Agreements and Concessions”

The LEITI online databank is searchable by year, nation and different energy sectors¹⁶². For instance, if an online data bank user use ‘Liberia’ as a search keyword for finding contracts, this online site will provide all available state investment contracts, concessions, joint venture agreements, and other environmental agreements signed between Liberia’s government and extractive corporations.

¹⁶¹ “Oilwiki guides” official website, available at: <http://goxi.org/group/openoil-ug>.

¹⁶² “LEITI Contracts, Agreements and Concessions” official website, available at: <http://www.leiti.org.lr/contracts-and-concessions.html>.

6) “Petroleum Production Sharing Contracts”

This website only emphasises Production Sharing Contracts in the oil and gas sectors, especially in developing economies¹⁶³. For example, it offers direct accesses to the signed PSC between international oil companies and worldwide petroleum regulating authorities, such as the oil PSC on Timor Sea Zone.

7) “FAO Contract Farming Resource Centre”

This FAO centre is initially designed to be a “one-stop” website. It provides not only samples of investment contracts in energy sectors but also contracts in agriculture and land deals¹⁶⁴.

8) “Oyu Tolgoi Investment Agreements”

This “Oyu Tolgoi Investment Agreements” website has a strong focus on Africa. The contracts downloaded from this website are of high quality usually with full content¹⁶⁵. The website also provides online access to those investment contracts in Africa that detail the obligations, rights and duties of all parties covering the full lifespan of energy and natural resource project.

9) “Model Mining Development Agreement Project”

The International Bar Association launched this MMDA project website¹⁶⁶. The purpose of this MMDA project is to illustrate examples of good practices in the industry and those contractual clauses that can promote sustainable and responsible mining. This project also aims to do capacity building for professional lawyers and negotiators who work for the local communities and private energy and mining enterprises by designing a model mining contract and a negotiating checklist template. Also, the IBA experts set up guidelines for sustainably implementing mining investment projects.

10) “UN Principles for Responsible Contracts”

¹⁶³ “Petroleum Production Sharing Contracts” official website, available at: <http://www.laohamutuk.org/Oil/PSCs/10PSCs.htm>.

¹⁶⁴ “FAO Contract Farming Resource Centre”, available at: <http://www.fao.org/in-action/contract-farming/en>.

¹⁶⁵ “Oyu Tolgoi Investment Agreements”, available at: http://www.turquoisehill.com/i/pdf/Oyu_Tolgoi_IA_ENG.PDF

¹⁶⁶ “IBA Model Mining Development Agreement Project”, available at: <http://www.mmdaproject.org>.

On this UN platform, people can find full documentation of the UN's Principles for Responsible Contracts and its related research report and meeting documents¹⁶⁷. The UN website also designs a set of training materials for negotiators and provides several model contract templates with specific draft terms.

11) “Barrows Collection”

The Barrows Collection online data source is a paid service. The Barrows Collection claims that they have collected the most comprehensive international references for energy contracts¹⁶⁸. Their dataset includes contracts in oil, coal, gas, renewables, and all other types of mining and extractive industries. Besides contracts, the online data source also contains other important mining and energy legislation and case laws across various jurisdictions. This research did not buy its paid service but used its free functions for searching useful information and industrial guidelines.

12) Other data sources

Besides all the online databanks addressed above, nowadays more and more national governments also voluntarily release their investment contracts online for the public use. These contracts published by governments are also useful data sources. For instance, the EU¹⁶⁹, US¹⁷⁰, Canada¹⁷¹, Australia¹⁷² and some developing countries (such as Ghana¹⁷³ and the Democratic Republic of Congo¹⁷⁴) have published their countries' contracts online.

Moreover, today energy companies and industry associations also have begun to provide useful online data, such as BP. BP works with Oil, Gas & Energy Law (OGEL) to set up an online portal focusing on the updates of its Caspian Region - Legal Agreements and portal¹⁷⁵. This BP webpage¹⁷⁶ provides copies of its formal-signed contracts and relevant legal

¹⁶⁷ “UN Principles for Responsible Contracts”, available at:

https://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf

¹⁶⁸ “Barrows Collection”, available at: <http://www.barrowscompany.com>.

¹⁶⁹ Investment and trade EU Commission, <http://ec.europa.eu/trade/policy/accessing-markets/investment/>

¹⁷⁰ U.S. Department of State, <https://www.state.gov/e/eb/ifa/bit/117402.html>.

¹⁷¹ Government of Canada, see: <https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/completing-slips-summaries/financial-slips-summaries/return-investment-income-t5/accrued-interest/investment-contracts/what-investment-contract.html>.

¹⁷² “Department of the Premier and Cabinet, Australian Government”, available at:

http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_466_currencies.html.

¹⁷³ Government of Ghana, see: <http://www.ghana.gov.gh/index.php/media-center/news/2266-government-newmont-conclude-investment-agreement-negotiations>.

¹⁷⁴ Republic of Congo, see: <https://investmentpolicyhub.unctad.org/IIA/CountryBits/56>

¹⁷⁵ “Oil, Gas & Energy Law (OGEL)”, available at: <http://www.ogel.com>.

¹⁷⁶ “BP Legal agreements”, available at: http://www.bp.com/en_az/caspian/aboutus/legalagreements.html.

documents, such as BP's recent Production Sharing agreements, Host Government Agreements, and Community Development Agreements in the Caspian area as well as other agreements about BP's global operations.

Civil society groups, such as environmental NGOs, also publish their monitoring reports, and these are all significant data sources. These reports provide an independent and external perspective on energy companies' operations. Many of these civil society groups' reports concentrate on examining severe conflicts between communities and investors, environmental issues, and human right violations in the extractive and energy industries. Business & Human Rights Resource Centre¹⁷⁷ is an excellent example for this type of data source. They published weekly updates on the corporate responsibilities issues and essential news of human rights and business globally. Of course, these reports also addressed the human rights and environmental impact of the FDI in the energy sectors.

For collecting State-investor investment contracts, the researcher covers the investment contracts from both developed (e.g. US, Canada, and EU) and developing countries (e.g. middle Asia, Latin America, and Africa). In the first data collecting stage, this research uses the online platforms to collect published contracts, which come from a wide range of jurisdictions around the world. In the end, by utilizing all the databases and data collecting avenues discussed above, the dataset of this research covers more than 370 to 400 investment contracts (the 'S-I' contracts).

2. For finding the 'I-P' contracts:

There are already more than 1,350 cross-sector collaborative initiatives currently published on the UN Sustainable Knowledge Platform¹⁷⁸. This UN online cross-sector collaboration databank was launched after the 2002 World Summit in South Africa, which also has searching tools to filter the partnerships by working area and by the collaborative themes. However, it may not be possible to examine and discuss so many cross-sector partnerships in a doctoral thesis. This research, therefore, decided to use an illustrative case study approach to study the contracting practices in the 'I-P' dimension.

1) Illustrative case studies - focusing on the Business-NGO partnerships Greater China

¹⁷⁷ See "Business & Human Rights Resource Centre", available at: <http://business-humanrights.org>.

¹⁷⁸ "UN Sustainable Knowledge Platform", available at: <https://sustainabledevelopment.un.org>.

After reviewing the academic literature regarding NGO-Business partnerships, it is fair to suggest that studying these cross-sector engagements and arrangements require a deeper socio-legal investigation, in particular case studies focusing on a jurisdiction or a region, in order to capture their operations.

For social scientists, case study is an intensive examination of just one or a few selected cases. Yin argues that the case study method is appropriate to answer research questions about ‘how’ and ‘why’, and where there are real-life examples of what the researcher likes to study¹⁷⁹. When the research purpose is to have a deep understanding of single or multiple phenomena, the use of the case study method would be appropriate.

While just one single case study can provide rich information on the nature of the social phenomenon or practices which is subject to academic research, having multiple cases usually offers a much stronger foundation for theory building¹⁸⁰. Yin stresses the significance of not just “finding the most convenient or accessible site from which you can collect data”, but to be able to provide specific reasons for how and why the specific case should be selected. Moreover, using multiple data sources of information can act as an approach of triangulating to ensure consistency in the data collected in this study, and to help ensure the overall quality of the information collected¹⁸¹.

For collecting the ‘I-P’ contracts, such as community development agreements and Business-NGO partnerships, the researcher noticed that so far the existing literature rarely addressed the environmental contracting practices in the Asia-Pacific region and Greater China. The researcher is originally from Taipei Taiwan, so a strong focus of this research would be placed on mainland China, Taiwan, and ASEAN member countries. This study therefore uses two chapters, namely Chapter 4 and Chapter 7, discussing the case of China’s outward and inbound energy investment.

The decision is not only due to the convenience of gaining information, but these regimes are now developing rapidly both regarding long-term economic growth and energy market revolutions. The Asian Infrastructure Investment Bank (AIIB) has already been launched in 2015¹⁸², and China is actively implementing its ambitious ‘One-Belt-One-Road’ initiative. It is

¹⁷⁹ Yin, R. (2013) *Case Study Research: Design and Methods* (Applied Social Research Methods), SAGE Publications.

¹⁸⁰ Ibid.

¹⁸¹ McConville, M., & Chui, W. H. E. (2007).

¹⁸² Lee, W., & Hein, A. (2017) Asian Investment Infrastructure Bank. *Politica Northwestern*, 1(1), 6.

expected that more and more interactions and international co-operation on energy issues would appear in this exciting region. Taiwan has already signed free trade agreements with many ASEAN countries, a memorandum of understanding to institutionally cooperate in renewable energy generation and energy efficiency management with Mongolia¹⁸³ and the Economic Cooperation Framework Agreement (ECFA) with mainland China¹⁸⁴. All these factors provide a good entry point for the research to conduct case studies in this region.

For the study of the 'I-P' relation, this thesis focuses on the Business-NGO partnerships between oil and gas companies and NGOs in the Greater China area. The next section provides more information about how the researcher used another online digital mapping platform to search and select these cross-sector partnerships in Greater China.

2) Using digital methods to find and map the landscape of cross-sector partnerships in Greater China

For exploring the current landscape of CSPs in Greater China, it may be necessary to ask first: What are the geographies and current situation of CSPs in Greater China? The academic literature should be useful to provide an overview of CSP / Business-NGO partnerships in Greater China. However, a powerful online tool already exists – NGO2.0 Map. This platform is developed by MIT New Media Action Lab, which can be used for mapping the Business-NGO engagements in Greater China¹⁸⁵ (Please see Figure 2.7).

¹⁸³ Diana, S. K. & Batsuren, B. (2013). See also Taiwan-Mongolia Mou Signed For Cooperation On Renewable ... (n.d.). Retrieved from <http://www.eco-business.com/news/taiwan-mongolia-mou-signed-cooperation-renewabl>.

¹⁸⁴ Cross-Strait (Taiwan and mainland China) Economic Cooperation Framework Agreement (ECFA) Available at <http://www.mac.gov.tw/public/data/051116322071.pdf>.

¹⁸⁵ 'NGO 2.0 Map', available at: <http://www.ngo20map.com>.



Figure 2.7 Business-NGO engagements map in Greater China. Source: NGO2.0 Map <http://www.ngo20map.com>.

Due to a large number of cross-sector partnerships in the region, the researcher decided to target the large oil and gas companies operating in Greater China. This decision was based on the information available so far and these companies' strong impacts on the environment and our society. After this careful consideration, this thesis ended up focusing on the following three groups of NGO-Business partnerships in Greater China. They are:

Group 1 – International oil and gas companies investing in China

Group 2 – Chinese state-owned oil and gas companies

Group 3 – Two major Taiwanese oil and gas companies

All three of these groups of oil and gas companies have different styles of operations. This research aims to make some comparisons on their partnering and contracting approaches with their NGO partners. These comparisons may provide general insights for observing the Business-NGO engagements and their community relations in Greater China. As large environmental NGOs are more likely to engage in such resource-demanding engagements¹⁸⁶, reviewing some of the most active and leading international and Chinese domestic NGOs' practices was an appropriate position to start.

¹⁸⁶ Chu, C. (2011) *Grassroots NGO's in China: a study of the legitimation process* (Doctoral dissertation, The University of Hong Kong (Pokfulam, Hong Kong)).

3) For finding other multi-actor contracts:

Regarding the search of the multi-actor contracts, this research mainly relies on the case studies mentioned in the existing literature. So far, the energy industry associations, such as the “global oil and gas industry association for environmental and social issues”¹⁸⁷ (IPEICA) and the “International Council on Mining and Metals” (ICMM)¹⁸⁸, establish online datasets and publish specific reports on the cross-sector partnerships in their industries. All of these extractive industrial associations are useful data sources for collecting cross-sector collaborative contracts, instruments and policy initiatives. Additionally, many cross-sector partnerships and community development agreements have been available online by a range of groups, such as companies, NGOs, policy think tanks, and research institutes¹⁸⁹. The researcher has found valuable case studies of these multi-actor investment contracts in Africa and Latin America, and the functions of this new type of multi-actor contracts would be examined in Chapter 6.

2.3.3 Stage Two – Data analysing approaches

At the first stage, this research extracts significant theoretical insights from the legal documents and contractual materials collected. Then, those carefully selected case studies would be assessed by the conceptual charts developed at the second stage.

This thesis applies both deductive and inductive research strategies for data analysing. The deductive reasoning is a useful tool to develop research questions and original theoretical frameworks. For example, this research used this skill to formulate research questions in Chapter 1 and craft original conceptual charts in Chapter 6. On the other hand, an inductive reasoning approach is appropriate to use in the process of informing and expanding theories. Applying a more descriptive research design is well suited for this research as it is useful to illuminate issues and research fields that have been subject to little existing studies, as is the case of cross-sector partnerships and contracts in the global energy investment regime.

¹⁸⁷ IPEICA (2006) Partnerships in the oil and gas industry, Retrieved from:
<http://www.ipeica.org/publication/partnerships-oil-and-gas-industry>.

¹⁸⁸ Bradshaw, B., & McElroy, C. (2014) Company–community agreements in the mining sector. In C. Louche & T. Hebb (Eds.), *Socially Responsible Investment in the 21st Century: Does it make a Difference for Society?* (Vol. 7, pp. 173-193): Emerald Group Publishing Limited.

¹⁸⁹ Cotula, L. (2010a).

Inductive analytical skill is often viewed as the principal approach for qualitative data analysis¹⁹⁰. The primary purpose of this analytical rationale is to help research findings to emerge from the dominant, frequent, and critical themes that appear in the raw data. Similarly, Thomas mentions the inductive method has two main objectives¹⁹¹: (1) to condense comprehensive and extensive raw data into a concise format; (2) to establish strong links between research aims and the initial findings and ensure that these connections are clear, transparent, and visible. This analytical approach is also similar to Miles who emphasises three vital missions for any qualitative analysis: “data reduction, data display and data verification”.

The data analysis process of this research generally applies Thomas’s coding process¹⁹². The analysis follows some critical stages, such as labelling data, data reduction, summarising texts, establishing links, and displaying theoretical models. The outcome can be the establishment of an original analytical framework or conceptual chart covering legally-sensitive concepts and conveying key messages. This analytical process requires research skills to choose, review, interpret, and distil information from all the raw data materials.

To put it more specifically, when the analysing procedure begins, the researcher usually previews every collected contract first. After understanding the contract’s main structure, special attention would be placed on the targeted sections or some keywords. For example, the researcher always searches the keywords including environmental protection, sustainable development, human rights, community development, labour rights, land rights, social justice, and so on. Finally, the targeted paragraphs in the contracts were read carefully. This research aims to distil their legal meanings and push the new ideas to a theoretical level.

For using the online databanks mentioned above, some keywords can be used to search for available contracts for further analysing. The keywords can be the name of the country signing the contracts or the year of signing these contracts. Please see Figure 2.8 and Figure 2.9 below.

Search by ‘country’ – Using ‘Kenya’ as a keyword to do contract search

¹⁹⁰ Thomas, R. M. (2003) *Blending Qualitative and Quantitative Research Methods in Theses and Dissertations*: Corwin Press.

¹⁹¹ Cryer, R., Hervey, T., Sokhi-Bulley, B., & Alexandra, B. (2011).

¹⁹² Thomas, R. M. (2003).

Lion Petroleum Inc., Block 1, PSA, 2007 ^o
ERHC Energy Kenya Limited, CEPSA Kenya Limited, Block 11A, Farmout Agreement, 2013 ^o
CAMAC Energy Kenya Limited, L27, PSA, 2012 ^o
CAMAC Energy Kenya Limited, L28, PSA, 2012 ^o
CAMAC Energy Kenya Limited, Block L16, PSA, 2012 ^o
CAMAC Energy Kenya Limited, Block L1B, PSA, 2012 ^o
Model Contract, PSA, 1999 ^o
ERHC Energy AGC Profond Limited, Block 11A, Annex, 2012 ^o
Lion Petroleum Inc., Block 2B, PSA, 2008 ^o
ERHC AGC Profond Ltd., Block 11A, PSA, 2012 ^o
Model Contract, PSA, 2010, 001 ^o
Loon Peru Limited, Lote 127, Exploitation License, Exploration License, 2007 ^o

Lion Petroleum Inc., Block 1, PSA, 2007 ^o
ERHC Energy Kenya Limited, CEPSA Kenya Limited, Block 11A, Farmout Agreement, 2013 ^o
CAMAC Energy Kenya Limited, L27, PSA, 2012 ^o
CAMAC Energy Kenya Limited, L28, PSA, 2012 ^o
CAMAC Energy Kenya Limited, Block L16, PSA, 2012 ^o
CAMAC Energy Kenya Limited, Block L1B, PSA, 2012 ^o
Model Contract, PSA, 1999 ^o
ERHC Energy AGC Profond Limited, Block 11A, Annex, 2012 ^o
Lion Petroleum Inc., Block 2B, PSA, 2008 ^o
ERHC AGC Profond Ltd., Block 11A, PSA, 2012 ^o
Model Contract, PSA, 2010, 001 ^o
Loon Peru Limited, Lote 127, Exploitation License, Exploration License, 2007 ^o

Figure 2.8 Kenya’s investment contracts in the online data bank

After this search, in total 24 investment contracts signed between energy corporations and the government of Kenya can be found. The dataset shows that these contracts were all signed from 1999 to 2013. On the other hand, if a researcher searches by ‘year signed’, the result will show 20 investment contracts signed in the years 2015 and 2016.

Search by ‘year signed’ – Using ‘2016’ and ‘2015’ as keywords to do contract search:

Peruvian Latin Resources, S.A.C., Amendment, Exploration License, Investment Promotion Agreement, 2015
Model Contract, Concession, 2016
Ndiouck, Wakali Ginde, Concession, 2016
GCM, RENZO, Contrat d'exécution des Travaux de Recherches sur le PE 12.090
Repsol Exploración, S.A., Petróleos de Portugal – Petrogal, S.A., Kosmos Energy Portugal, Partex (Iberia) S.A., Camarão, Concession, Amendment, 2015
President Petroleum S.A, CNO-8 Puesto Guardian, Concession, 2015
DRC, Gécamines, Exaco [MKM] - JVA, 2015
Sabodala Gold Operations SA, Sabodala, Concession, 2015
Congo Iron S.A., Mont Nabemba, Concession, 2016
Erdenes Oyu Tolgoi LLC, Turquoise Hill Resources Limited, Oyu Tolgoi Netherlands B.V., Río Tinto International Holdings Limited, Oyu Tolgoi LLC, THR Oyu Tolgoi Ltd., Oyu Tolgoi Deposit-6708A-6710A, Underground Mine Development and Financing Plan, 2015
Equator Exploration STP Block 12 Limited, Block 12, PSA, 2016
GALP Energia São Tomé E Príncipe, Unipessoal, Lda, Block 6, PSA, 2015
LA GENERALE DES CARRIERES ET DES MINES S.A-Congo Dongfang International Mining S.A.R.L, PE 527, Contrat de cession ,2015
Model Contract, Concession, 2015
Roxgold Sanu S.A., Yaramoko, Concession, 2015
Perupetro S.A., Petrolera Monterrico S.A., Block II (Northwest), Amendment, Exploitation License, 2015
Perupetro S.A., Petrolera Monterrico S.A., Block XV, Amendment, Exploitation License, 2015
Perupetro S.A., Savia Peru S.A., Block Z-33, Amendment, Exploitation License, Exploration License, 2015
Repsol Exploración, S.A., Kosmos Energy Portugal, Petróleos de Portugal - Mexilhão, Amendment, 2015
Repsol Exploración S.A., National Oil Company of Liberia, Block LB-16, PSA, 2015

Figure 2.9 Kenya's investment contracts signed in 2015 and 2016

After finding these contracts, this research starts by reviewing the clauses of environmental and social development within these selected state investment contracts. Please see the Appendix for more information about the dataset.

2.4 Research limitations and possible contributions

This research involves a broad range of legal mechanisms for balancing investor protection and other public interests. At least, there could be three main limitations of collecting data.

2.4.1 Possible research limitations

Firstly, information transparency is still a significant issue. Though many contracts are already open for the public, contracts concerning energy investment, land deals, biodiversity protection, and community development are very often private. Reasonable efforts may help to gain access to these investment agreements. However, there is no guarantee that these

contracts would be publicly disclosed. The energy industry is a quite sensitive sector and is usually relevant to several national security issues. Though this chapter has listed useful online databases available, many of these energy investment contracts, cross-sector partnerships and community agreements are not published by the governments. As a result, currently, it may not be possible to generate a comprehensive list of all these contracting arrangements. It is, however, challenging to conduct a sampling process like many other research subjects in the social sciences realms.

Secondly, international energy law itself is still evolving rapidly. Setting the selection criteria for collecting the empirical data and choosing case studies could still be challenging. For example, there are over 3,000 investment IIAs across the world. A full analysis of all these existing investment legal and policy instruments would be far beyond the working scope of this research. A smart strategy for dealing with this issue may be to proceed with this study based on the previous large-scale empirical studies first, such as World Bank and UN's joint published reports: *"Survey on environmental concerns in international investment agreements"*¹⁹³. This research tries to update the existing empirical studies with its datasets. In fact, many model contracts regulating foreign investment have also been published. Leading business and industrial associations, e.g., ICMM and IPIECA, and other relevant international institutions released useful information online. Because of the constraints mentioned above, the current research, however, only can provide a limited vision for viewing the related emerging issues in international energy law.

Thirdly, some contracts available are not written in English, but rather in Spanish, French or other languages. Therefore, this researcher mainly relies on contracts and documents written in English or Chinese.

Due to these research limitations stated above, this thesis has a strong focus on the Chinese case studies (See Chapter 4 and 7). However, in other chapters (i.e., Chapter 3, 5 and 6), this research also discussed the functions of the contractual approach in a general way.

2.4.2 Possible research contributions

This research argues that a contractual approach for regulating investments and promoting sustainable development can serve as a significant tool for stimulating regulatory innovation

¹⁹³ See World Bank (2013), p.15-17.

and multi-level governance, especially in the regulatory environment of those developing countries. The ultimate goal of this research is to enrich the existing understanding of energy investment and sustainable development in context of project-specific contracts and to think more broadly about how these contractual mechanisms can be applied as a ‘technology’ to stimulate environment-driven societal transformation.

Based on the detailed analyses of the raw contracting materials, this research also assumes that different regional trends (evolution in the type of contractual arrangements by country or region), time trends (types of contracts over time) and sector trends (e.g. oil and gas, mining, etc.) can be identified. The working hypothesis is that the participation of affected communities and even their resistances would be a significant driving force for innovative contracts. In short, this research may argue that the most innovative contracts appear in the jurisdictions where residents have more chances to be involved in the contract negotiations, or their local activities and resistances have avenues to shape the contracting practices. Without any external influences, a pure ‘top-down’ model itself is not likely (or is very slow) to change the status quo. This argument will be supported by empirical evidences collected in the Chinese case studies (Please see Chapter 4 and 7).

Afterall, this research likes to more deeply understand how energy is regulated at the international level and explore the root and the usefulness of these innovative contracts for global governance. The implications are expected to be both practical and theoretical. Theoretically, it aims to examine whether there is a new paradigm for contractualising environmental governance under the transboundary energy investment context and what this integrative and multi-actor approach means for the understanding of international energy law and investment law. For the practical aspect, this research explores the contractual techniques and why they are robust to manage interactions over time.

Chapter 3 –The ‘S-I’ dimension: Environmental and social considerations in State-investor investment contracts

“Contracts have the power to transform multinational enterprises into ad hoc legal institutions with the power to dictate the law that governs their relations with states and their activities within states.” – Susan Leubuscher, former UNEP's Basel Convention secretariat

This chapter explores the relations between investors and states, namely the ‘S-I’ dimension in the ‘S-I-P’ triangle. The evolution of contemporary investment contracts has lasted for decades. Investment contracts, functioning with international investment treaties and national laws, have a crucial role in regulating both foreign investors and states’ rights and responsibilities. The primary purpose of this chapter is to evaluate the contracting practices of contemporary State-investor contracts in the extractive sectors, especially those mechanisms designed for safeguarding human rights and the environment.

In the following paragraphs, Section 3.1 provides an overview of the history and recent developments of investment contracts. Investment contracts do operate in a broader web of legal frameworks¹⁹⁴, so the analysis will pay attention to the interactions among investment treaties, investment contracts and national laws. The discussion would be focused on how the values of environmental protection and human rights have evolved over these years. Section 3.2 first discusses the mechanism design of environmental protection value in the energy investment contract. Some of the more common designs are environmental impact assessments and plans for companies to conduct environmental management.

Then, Section 3.3 turns to the clauses regarding human rights, community development and social justice. This part will examine how local governments, energy companies, legal professionals, and civil society groups can participate in the design and negotiations of these commercial contracts. New principles for drafting these kinds of clauses will be discussed. Finally, Section 3.4 will evaluate the actual performances of the environmental and social clauses in the recent investment contracts. The discussion will focus on the usefulness of these contracts’ innovative designs as well as some practical issues about implementing them successfully.

¹⁹⁴ Salacuse, J. (2013) *The Three Laws of International Investment: National Contractual and International Frameworks for Foreign Capital*. Oxford: Oxford University Press.

3.1 An overview of the S-I relation: Investment treaties and investment contracts

There is an apparent paradox in natural resource investments. In recent decades, low and middle-income developing countries put effort into attracting FDI for their national development¹⁹⁵. When investments enter, these projects often cause conflicts over environmental impacts, land acquisition, or labour issues¹⁹⁶.

To make sense of the nature of this apparent paradox, people should understand the value of investments is about its quality for sustainable development, not just its quantity. It is critical for developing countries to rethink the types of foreign investments they like to attract and the environmental and social standard with which these foreign investors need to comply.

International legal tools can be useful to coordinate the application of various instruments. For instance, these international mechanisms could require tribunals to take into account other relevant international rules applicable to the relations among all the contracting parties when they interpret investment treaties.

However, applying different international and national rules in practice often can cause difficult issues. For instance: How should an investment tribunal respond if an investor has failed in its responsibility to protect human rights¹⁹⁷? To have higher certainty and clarity, this research requires more explicit treaty clauses on these matters.

3.1.1 Environmental and social provisions in investment treaties

The evolution of international investment law and policy is now at a crossroads. The heated debates are around the standards of investment protection designed in the investment treaties and the clauses that allow foreign investors to file investment arbitrations against

¹⁹⁵ See Moran, T. H. (2006). See also Economy, E., & Levi, M. (2014) *By all means necessary: how China's resource quest is changing the world*. Oxford University Press.

¹⁹⁶ Dolzer, R. a. C. S. (2013) *Principles of International Investment Law*. Oxford: Oxford University Press. See also Miles, K. (2013) *The origins of international investment law: empire, environment and the safeguarding of capital* (Vol. 99) Cambridge University Press.

¹⁹⁷ See Bartels, L. (2016) International Economic Law and Human Rights: Friends, Enemies or Frenemies? In *European Yearbook of International Economic Law* 2016 (pp. 485-492) Springer International Publishing. See also Dupuy, P.-M., & Vinuales, J. E. (2015) Human rights and investment disciplines: integration in progress. In M. Bungenberg, J. Griebel, S. Hobe, & A. Reinisch (Eds.), *International Investment Law* (pp. 1739-1767) Oxford: Hart Publishing.

states¹⁹⁸. The international community and many countries have been reviewing their investment policies and IIA designs¹⁹⁹.

Also, the investor-state dispute system, with some apparent shortcomings, is also under reform at this moment²⁰⁰. As debates go on, another critical area may be neglected in the mainstream discussion, which is how the treaty and dispute mechanism reforms could bring more sustainable and responsible investment in the energy sectors²⁰¹.

The first-generation of investment treaties have a very narrow focus on protection of investment²⁰². The traditional investment treaties usually have nothing or very little content concerning the standards of responsible investment conduct and the quality of investment projects. This fact has caused imbalances in the obligations and rights of other key stakeholders involved in the investment projects. Policymakers should consider integrating other standards of sustainable and responsible investment into the legal instruments which have a legal bite, such as investment treaties. This approach could be possibly applied to the investment dispute settlement mechanisms.

The evolution of sustainable and responsible investment provisions has now become a new theme in the regime of international investment law. Though the development of this kind of sustainable provisions still progresses slower than the investment protection provisions, some innovative and sophisticated designs are emerging²⁰³, such as the evolution of (1) treaty clauses on state obligations and (2) treaty clauses on investors' obligations.

1) Treaty clauses on state obligations

Some investment treaties intend to clarify what countries need to do for promoting sustainable and responsible investment. A few treaties' preambles mention international legal

¹⁹⁸ Sornarajah, M. (2012) Starting anew in international investment law. *Perspectives on topical foreign direct investment issues by the Yale Columbia Centre on Sustainable International Investment*, (74).

¹⁹⁹ Gordon, K., Pohl, J., & Bouchard, M. (2014).

²⁰⁰ Rivkin, D. W., Lamb, S. J., & Leslie, N. K. (2015) The future of investor-state dispute settlement in the energy sector: engaging with climate change, human rights and rule of law. *Journal of World Energy Law & Business*, 8(2), 130-153.

²⁰¹ Gehring, M. (2010) Introduction to 'Sustainable Development in World Investment Law'. In M.-C. Cordonier Segger, M. W. Gehring, & A. Newcombe (Eds.), *Sustainable Development in World Investment Law*: Kluwer Law International. See also Gentry, B. S. (2016) *International Investment Agreements and Investments in Renewable Energy from Barriers to Opportunities: Renewable Energy Issues in Law and Policy*: Yale School of Forestry & Environmental Studies.

²⁰² Gordon, K., Pohl, J., & Bouchard, M. (2014). See also Gao, Z. (1998) *Environmental Regulation of Oil and Gas*: Kluwer Law International.

²⁰³ See Gentry, B. S. (2016). See also Cotula, L. (2010a), p.7.

instruments. For instance, the preamble of the EU-Canada CETA treaty²⁰⁴ refers to the UN Declaration of Human Rights as well as the Guidelines for Multinational Enterprises set by OECD²⁰⁵, which do encourage corporations to respect human rights in their operations.

Many treaties have "non-lowering of standards" provisions designed to prevent host countries from deviating from their domestic environmental, social and labour laws. For instance, the US Model bilateral investment treaty reaffirms the responsibilities and obligations of the countries as members of relevant international organisations and international agreements, such as the International Labour Organization and the obligations under this organisation's Declaration on Fundamental Principles and Rights at Work. The 2016 Morocco-Nigeria BIT²⁰⁶ also has similar advanced provisions.

Other treaties can go further. The 2016 Morocco-Nigeria BIT also requires states to promise that their national laws and policies should be consistent with international environmental and human rights agreements²⁰⁷. Also, other investment treaties, such as the 2013 Japan-Mozambique BIT²⁰⁸ and the 2016 Morocco-Nigeria BIT²⁰⁹, have provisions requiring nations to take actions to combat corruption.

2) Treaty clauses on investors' obligations

Many recent treaties also clarify the obligations of foreign investors. For instance, some treaties (or model treaties) ask foreign corporations to comply with specific applicable laws. The India Model BIT 2015²¹⁰, as well as the Intra-MERCOSUR Protocol in 2017²¹¹, are outstanding examples.

In many developing countries, compliance with these countries' national law may not be substantial enough to uphold minimum environmental and social standards. Unlike in advanced countries such as the UK and the US, which have comprehensive regulatory webs of

²⁰⁴ EU-Canada Comprehensive Economic and Trade Agreement (CETA), available at: <http://ec.europa.eu/trade/policy/in-focus/ceta>.

²⁰⁵ OECD Guidelines for Multinational Enterprises, available at: <http://www.oecd.org/investment/mne/1922428.pdf>.

²⁰⁶ Morocco - Nigeria BIT (2016), available at: <http://investmentpolicyhub.unctad.org/IIA/treaty/3711>.

²⁰⁷ Ibid.

²⁰⁸ Japan - Mozambique BIT (2013), available at: <http://investmentpolicyhub.unctad.org/IIA/treaty/2154>.

²⁰⁹ Morocco - Nigeria BIT (2016).

²¹⁰ The Indian Model Bilateral Investment Treaty (2015), available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560>.

²¹¹ Intra-MERCOSUR *Investment Facilitation* Protocol (2017), available at: <http://investmentpolicyhub.unctad.org/IIA/treaty/3772>.

environmental laws and social regulations in place, the environmental awareness and relevant management mechanisms in the developing countries have developed slowly²¹².

As a result, several recent investment treaties refer to compliance with relevant international agreements and other corporate social responsibility standards, such as combating corruptions and/or protecting human rights. For instance, the 2016's Morocco-Nigeria BIT²¹³ has an innovative provision to require that investors (in mandatory terms):

“Uphold human rights

Act in accordance with ILO Declaration on Fundamental Principles and Rights at Work, and Comply with environmental impact assessment requirements applicable under the law of the home state or the host state, whichever is more rigorous, and maintain appropriate environmental management systems.”

Many other treaties have provisions to prevent foreign investors from engaging in corruption, including the 2015 India Model BIT, the Morocco-Nigeria BIT 2016, and the Intra-MERCOSUR Protocol.

The US investment treaties provide an advanced example in this field. Over the past decades, a bipartisan investment policy goal has enhanced the capacities of US investment treaties to protect the environment²¹⁴. In US's Model BIT 2004²¹⁵, Article 12 is entitled “Investment and the Environment”. The US Model BIT 2012 even significantly improved and expanded this Article 12 with more extensive sustainable and environmental obligations of investors.

The US's recent free trade agreements usually cover one specific chapter on trade, investment and the environment²¹⁶. The US model BITs use similarly drafted investment and the environment chapters in US FTAs²¹⁷. Both of them usually protect the state's ability to

²¹² See OpenOil. (2012) *Oil Contracts- How to Read and Understand them*. Retrieved from: <http://openoil.net/understanding-oil-contracts/>

²¹³ Morocco - Nigeria BIT (2016).

²¹⁴ Salacuse, J. W. (2017). BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries. In *Globalization and International Investment* (pp. 25-45). Routledge. See also 胡枚玲 (2016) 從美國 BIT 範本看國際投資與環境保護之協調. 北京理工大學學報(社會科學版) 第 18 卷第 1 期.

²¹⁵ The 2004 U.S. Model BIT, USTR, available at: https://ustr.gov/archive/Trade_Sectors/Investment/Model_BIT/Section_Index.html.

²¹⁶ Free Trade Agreements, USTR, available at: <https://ustr.gov/trade-agreements/free-trade-agreements>

²¹⁷ US Model BIT 2004.

regulate in an authentic and non-discriminatory way. Whether regarding the environmental, social and other areas, the regulating actions should be consistent with most-favoured-nation commitments and other national treatments (among all the foreign investors).

Annex B of the US Model BIT covers many principles for environmental protection. These environmental principles are reinforced in Annex B, which explicitly minimises the exposure of non-discriminatory and environmentally-sensitive regulating activities to foreign investor statements of indirect expropriation.

Overall, progress in the US investment treaties and policies has been successful. This US bipartisan investment policy reform has formulated a set of balanced negotiation purposes that not only liberalise the markets and provide protection for US investors but enhance US investment policy goals in environmental protection, transparency, social justice and the rule of law. Moreover, the dispute resolution mechanisms designed in these treaties can also provide private actors consistent support for coping with environmental harm.

3) Summary

The discussions above have shown some progress in this changing field. The innovative mechanisms adopted in investment treaties can integrate other sustainable and responsible investment standards into the mainstream investment protection narrative. However, the progress is still far away from a comprehensive set of solutions. As to the future of investment treaties and their environmental and social mechanisms, there are still three main challenges.

First, treaty practices in this area have not yet settled. Responsible and sustainable treaty provisions are still rare and often seem underdeveloped compared to other treaty provisions. Even many of the provisions in the model treaties discussed above are yet to be placed into real-life treaties. Some investment treaties are even not yet in force, e.g. the Intra-MERCOSUR Protocol²¹⁸ and the Morocco-Nigeria BIT²¹⁹.

Second, many complicated legal issues are still at stake. Several international legal instruments which treaties could refer to are directed at national states rather than foreign investors. Coupled with quite limited treaty practice in the investment realm, these policy and

²¹⁸ Intra-MERCOSUR Investment Facilitation Protocol (2017).

²¹⁹ Morocco - Nigeria BIT (2016).

legal complexities can raise challenges for negotiators – for example, how the drafters can design effective provisions on investor obligations.

Third, several fundamental issues remain unresolved, e.g. ensuring the sustainable and responsible investment clauses genuinely have a legal bite. Some preambles mentioned above merely refer to relevant international standards; this approach does not have much effect. In fact, these clauses are not usually mandatory nor supported by effective enforcement instruments.

Facing these questions, one may think about the outcomes of foreign investor non-compliance in an investment arbitration context. Should non-compliance of these sustainable and responsible provisions be a jurisdictional issue, where corporations who do not obey these clauses are excluded from investment protection?

Alternatively, how could investment tribunals apply responsible and sustainable investment provisions when deciding the outcome of the dispute? Should host countries be allowed to make counterclaims against foreign investors based on alleged violations of those environmental and social provisions?

Also, to what extent, if any, should there be space for third parties to invoke responsible and sustainable investment clauses? Several recent investment disputes are originated, at least in part, in the tensions that involve third parties, e.g. communities and individual citizens affected by the investment project. Recently, a report conducted by IIED pointed out that third-party perspectives are largely overlooked in the current design of ISDS proceedings and other investment arbitration mechanisms²²⁰.

At this stage, these questions are politically and technically challenging to answer. In fact, investment treaties may not necessarily be the best vehicle for tackling all these environmental, social, and economic issues raised in investment processes²²¹. National regulations and law have a critical role to play in every jurisdiction. In addition, several current international instruments, from international environmental agreements, human rights conventions to many ‘soft laws’, have set basic standards related to sustainable and responsible investment actions. However, this thesis would like to examine further the contractual mechanisms in this cross-boundary energy investment scenario.

²²⁰ Cotula, L. (2010a).

²²¹ Gordon, K., Pohl, J., & Bouchard, M. (2014), p.10-12.

3.1.2 Investment contracts and their historical developments

A State-investor investment contract is a legal agreement between the host State (where the investment project will take place) and the foreign investor, which constitutes part of the legal framework for regulating investments²²². This form of contract can also implicate the host countries' duties and investors' responsibilities for human rights and environmental protection.

Investment contracts, along with national laws and other applicable international investment treaties, set up the obligations and rights of both the host state and investor for developing, constructing, and operating an investment project.

Through these state investment contracts, both parties may effectively agree on a majority part of the legal frameworks which will govern the investment projects, especially where domestic regulations in the under-developed host States, or where the investment is in a nascent industry within the host country. In these situations, the contracting negotiations may directly have significant impact on the applicable laws and conditions for both parties and the operation of the investment project.

State investment contracts can also shape the balance between economic considerations with the other pillars of sustainable development, namely the environmental and social aspects²²³. These investment contracts will define the legal terms of the investment project and decide the extent to which this investment project may advance or undermine sustainable development in the host country. Therefore, both government's capacity to negotiate investment contracts and civil society's ability to monitor the commercial deals done by the government and the investor are vital factors for formulating a more sustainable investment deal in every critical business sector.

State-investor contracts are widely used in many industrial sectors, particularly oil and gas, renewable energy, infrastructure development, agriculture, and mining²²⁴. In these critical industries, State-investor contracts may have different names, such as Product sharing contracts, concession and licensing agreements, host government agreements, host country contracts, investment contracts, and state contracts.

²²² Salacuse, J. W. (2017).

²²³ Levashova, Yulia, Tineke E. Lambooy, and I F. Dekker. (2016) *Bridging the Gap between International Investment Law and the Environment*. The Hague, the Netherlands: Eleven International Publishing.

²²⁴ Miles, K. (2013).

Typically, in an energy investment project, state investment contracts start to play an important role from the initial stage negotiation. Considering the risks and impacts of human rights violation and environmental pollution at the contracting stage provides a valuable chance to evaluate this investment project. It is especially important in the operating context where host states' national law and other regulations could not provide sufficient support²²⁵.

The origins of modern investment contracts in the energy and extractive sectors can date back to before the beginning of the 20th century. At that time, foreign energy companies first started to negotiate contracts for investment protection, because they believed many regulating actions taken by host states were unjust²²⁶.

A company named Russian Lena Goldfields Company was set up in 1855. The company began to develop the Lena River area's gold mining in Siberia. In 1918, the mining properties were nationalised, which led to a renegotiation of Lena Goldfields' mining concession contract²²⁷.

The host state government adopted higher and stricter policy requirements on mining concessions with foreign companies. This situation was hostile to the company. The investment contract between Lena Goldfield and the government of Siberia contained the first known clause for international investment arbitration. The company filed an arbitration against the government, and the international tribunal decided for the first time that an investment contract between a private operator and a sovereign nation could be 'internationalised', and potentially based on applicable laws beyond which enacted by the host state²²⁸.

In 1911, Mexico's constitutional revolution also changed the interests of foreign companies in the oil industries²²⁹. After that significant constitutional change, the Mexican government treated foreign investors' oil concessions as 'temporary' rather than 'permanent'

²²⁵ Cotula, L. (2008) Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses. *Journal of World Energy Law & Business*, 1(2), 158-179. See also Segger, M.-C., & Weeramantry, C. G. (2004) Corporate social responsibility: international strategies and regimes. In M.-C. Segger & C. G. Weeramantry (Eds.), *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (1st ed.): Brill - Nijhoff.

²²⁶ See Douglas, Z., Pauwelyn, J., & Viñuales, J. E. (2014).

²²⁷ Bungenberg, M., Griebel, J., Hobe, S., & Reinisch, A. (2015) *International Investment Law: A Handbook*: Nomos/Hart Publishing.

²²⁸ Anniversary of tragic events at Lena Goldfields, available at: <https://www.prlib.ru/en/history/619175>.

²²⁹ Cameron, P. (2010) *International Energy Investment Law*. Oxford: OUP. See also Cameron, P., & Correa, E. (2002) Towards the Contractual Management of Public-Participation Issues: A Review of Corporate Initiatives. In D. M. Zillman, A. Lucas, & G. R. Pring (Eds.), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*. Oxford: OUP.

interests. This constitutional change was also followed by the enactment of Mexican new labour law, which caused a serious labour strike. Mexico's Supreme Court decided to confirm the new labour law can apply to oil projects and support labours' interests. An expropriation order by the Mexican government prohibited multinational oil companies from the country's market. In the following decades, oil concessions in the Middle East were frequently altered through renegotiation. This circumstance is due to the changing political and economic conditions; the bargaining powers of the host governments, international cartels (e.g., OPEC), and transnational oil companies are also changing. This case presented the original model and bargaining issues of investment contracts in the energy sector²³⁰.

In the mid of 1980s, a large number of contract negotiators in the energy sector began to reflect on the relations between energy development and the environment²³¹. Therefore, they introduced environmental policies and the core values of some social legislation into the negotiations of state investment contracts. Though the vague environmental and social provisions became more sophisticated during the 1980s, the overall conditions still need to be improved.

Even until the 1990s, most of the contractual systems concerning oil and gas industries remained quite weak on environmental protection and social development²³². Nigeria can serve as a proper example: The country is one of the largest oil producers in Africa. However, Nigeria's Model Production Sharing Contract 1995 is surprisingly almost silent on environmental control and regulation. The only relevant environmental provision is the insurance clause which states that "*all insurance policies...shall be based on good international petroleum industry practice...*" Moreover, many other examples of this kind of contracts can be found across the developing regions.

The application of the environmental and social provisions in investment contracts may be part of the legacy from conventional oil and gas concession agreements, which already predates the sustainability era²³³. As the time and demand come for sustainable development,

²³⁰ Laryea, E. (2011) Contractual arrangements for resource investment. In F. N. Botchway (Ed.), *Natural Resource Investment and Africa's Development* (pp. 107-133) Cheltenham UK: EE Publishing.

²³¹ Gathii, J., & Odumosu-Ayanu, I. T. (2015) The Turn to Contractual Responsibility in the Global Extractive Industry. *Business and Human Rights Journal*, 1(1).

²³² Daintith, T. (2013) *Guide to Extractive Industries Documents - Oil & Gas World Bank Institute Governance for Extractive Industries Programme*. London.

²³³ Gehring, M. (2010).

it may be easier to add a few new provisions to the existing contractual templates rather than introducing a new set of legislation.

Gao²³⁴ (in 1994) and Tienhaara²³⁵ (in 2011) have released significant publications examining the development of state investment contracts and their environmental clauses. The landscape of this legal instrument, however, has been evolving rapidly since these published reports. Based on the existing studies, this research intends to study the recent trends in contracting practices concerning energy investment among various jurisdictions.

3.1.3 Recent trends in designing investment contracts

Since the early 1990s, there have been some improvements in social and environmental provisions in various jurisdictions²³⁶. For example, Romania's Model Concession Agreement 1996 has introduced a specific Article on the environment, safety and insurance. The contents of this Article are for the following:

“1) Compliance with all environmental permitting procedures under 'prevailing Romanian Law';

2) A 'full environmental assessment';

3) Conduct of petroleum operations 'in accordance with generally accepted international petroleum industry practice';

4) Remedial measures by the government in case the contractor fails to do so;

5) Insurance Programme property, pollution damage and third-party liability; and

6) Revocation of contract in the event of repeated violation of environmental requirements.”

To illustrate, this Romanian model contract has significantly improved in the substantive content, which covered almost every stage of an energy investment's operating lifecycle.

²³⁴ Gao, Z. (1994).

²³⁵ Tienhaara, K. (2011) Foreign Investment Contracts in the Oil and Gas Sector: A Survey of Environmentally Relevant Clauses. *Sustainable Development Law and Policy*, 11, 15.

²³⁶ See also Tienhaara, K. (2013) Reconfiguring Investment Contracts to Promote Sustainable Development. In K. P. Sauvant (Ed.), *Yearbook on International Investment Law and Policy 2011 - 2012*. Oxford: Oxford University Press.

In April 2009, after initial discussions and cooperation with the World Bank group, the Mining Law Committee of the International Bar Association resolved to initiate a new project to design a contemporary Model Mining Development Agreement (MMDA)²³⁷. The new MMDA was based on the best practice principles at the international level, which can serve as an important model or template for negotiating State-investor contracts in the mining sector, especially in developing countries without strong environmental regulations.

The root of such an MMDA project arose from disagreements between foreign mining companies and the governments of developing countries concerning what constituted a best practice mining contract or development agreement²³⁸. The Democratic Republic of Congo's contract review is a crucial example of this. Facing challenges from investors, the investment committee of Congo cooperated with the International Institute for Sustainable Development as well as the Sustainable Development Strategies Group to identify best practice for mining development projects and effective community participation.

The primary purpose of the MMDA project is to produce a model template of mining development agreement. The template is based on international best practice and sustainable mining principles adopted in the industry. These practices and principles include almost every aspect of a mining project²³⁹:

“efficient macroeconomic management, an effective legal and regulatory framework, security of tenure, objective criteria for the grant of exploration and mining licences, limited administrative discretion, a defined role for government, efficient mining sector institutions and administrative capacity, physical and infrastructure services, competitive fiscal and taxation conditions and effective investment protection.”

The IBA's MMDA project is intended to be applied as the foundation of negotiations to improve investment contracts signed by transnational mining corporations and host states' governments in those jurisdictions where 'mature' mining regulations are not in place, where a mining law requires supplementation by investment contract or as a negotiation template for mining contracts with state-owned energy companies.

²³⁷ International Bar Association (2011) *MMDA 1.0 A Template for Negotiation and Drafting*.

²³⁸ International Bar Association (2010) *IBA Model Mining Development Agreement Project*. Retrieved from: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=41f1038e-dcbf-44fd-ad17-898b7aa04a1a>.

²³⁹ Ibid.

The final model contract of the MMDA project can be viewed as an ‘innovative product’ made by the World Bank and IBA, which has been successfully balancing various conflicting values and considerations of an investment project in the international mining sector.

After this innovative achievement, the UN’s Principles for responsible contracts was also published in October 2011²⁴⁰. This project was developed by Professor John Ruggie who was the former “UN Special Representative on Business and Human Rights”. These principles integrate the human rights risks into State-investor contract negotiations and management and provide clear guidance for negotiators.

These ten crucial principles are the final product of four years of study and many inclusive multi-stakeholder interviews. This document aims to help integrate the risks of human rights violations into investment contract negotiations and the follow-up management. These 10 principles include a wide range of themes, such as community engagement, compliance and monitoring, transparency, operating standards, and stabilisation clauses²⁴¹.

This evolution demonstrates the powerfulness and significance of contractual arrangements for synergising economic growth with other sustainable development values.

3.2 Contractual arrangements for environmental protection

With the theoretical lens of sustainable development, this research below will analyse various contractual mechanisms in the context of global energy investment and pay particular attention to their functions for promoting sustainable development, namely economic, social and environmental dimension, in every energy investment project.

The “Precautionary Principle” is an important pillar of sustainable development²⁴². This principle can have many implications for regulating investment projects, especially the environmental aspects. Principle 15 of the Rio Declaration in 1992 clearly states²⁴³:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible

²⁴⁰ Shemberg, A., & Saldarriaga, A. (2016) *Guide To Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking*.

²⁴¹ Rivkin, D. W. (2016) *The wise counselor and the frontiers of business and human rights*. Paper presented at the Human Rights Law and the Extractive Industries, Panama City.

²⁴² See Dupuy, P.-M., & Vinuales, J. E. (2018).

²⁴³ The Rio Declaration on Environment and Development, available at: http://www.unesco.org/education/pdf/RIO_E.PDF See also Vinuales, J. (2015).

damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

This vital Principle in international environmental law offers guidelines on how stakeholders can evaluate the environmental risks and possible legal and policy instruments to reduce them. Any inaction of the state could not be justified by claiming that they lack full scientific evidence and knowledge. According to this Principle, governmental authorities still need to take actions to safeguard the environment. Even currently, there is no comprehensive scientific evaluation on the certainty and the consequences of the negative impacts. Based on the UN’s guideline, this precautionary principle can change the burden of proof between governments and foreign investors liable for sustainability.

The “polluter pays principle” is another important principle in international and national environmental law²⁴⁴. Based on this Principle, foreign investors and their subcontractors are responsible for the costs caused by the project and the environmental liabilities relating to pollution and other damages. This Principle may create an economic incentive to minimise the environmental damages because it requires that the contracting party, which has the most control over the investment project, should be responsible for the costs and damages²⁴⁵.

To use this policy incentive successfully, the regulators must decide environmental fines very carefully. The level should make it cheaper to pollute the environment than to prevent harm. For instance, some oil and gas contracts exempt foreign investors from paying the fines, only in the situation of “gross negligence, reckless behaviour or willful misconduct”.

It reveals that the host country needs to assume liability for environmental damages that are not deemed to be occurred by this kind of action, and it would be difficult to prove that investors’ behaviours are ‘gross negligence or misconduct’, not least because of difficulties in collecting evidence. Contractual clauses of this kind are thus not viewed as best practice because these provisions already undermine economic incentives to prevent environmental harm.

In the areas of natural resource investment, the interactions between contractual mechanisms and national legislations vary across jurisdictions. In some countries, investment

²⁴⁴ See Birnie, P. W., Boyle, A. E., & Redgwell, C. (2009) *International law and the environment* (3rd Ed.) Oxford; New York: Oxford University Press. See also Dupuy, P.-M., & Vinuales, J. E. (2018).

²⁴⁵ Gillespie, A., (2014) *International environmental law, policy and ethics* Oxford University Press. (pp. 1 online resource (xxii, 196 pages)) Retrieved from <http://dx.doi.org/10.1093/acprof:oso/9780198713456.001.0001>.

contracts may have lengthy clauses on environmental impact assessment²⁴⁶. In some jurisdictions, contractual designs merely refer to national legislation²⁴⁷. In general, national laws which can apply to all investments could be more effective and equitable than those project-specific contracts and their provisions²⁴⁸. Moreover, if stricter requirements are already embodied in national regulations, non-compliance of these rules would be a real violation of legislation rather than just a breach of commercial contract²⁴⁹.

In fact, designing robust instruments to minimise environmental and social risks is still an essential part of investment contracts. After reviewing many contract samples, the mechanisms for maximising sustainability outcomes can be summarised into three main aspects: 1) Environmental impact assessments and management action plans; 2) Connecting applicable laws and standards; and 3) Project monitoring, compensation, and sanctions.

1) Environmental impact assessments and management action plans

The primary purpose of environmental and social impact assessments is to evaluate the possibilities or potential consequences of a proposed investment project before the proposal is officially approved²⁵⁰. The environmental and social impact mechanisms also aim to assess alternatives to the original proposed project and evaluate preventative or mitigating activities. Corporate environmental management plans detail how a specific environmental risk, such as air pollution or oil spills, would be addressed throughout the whole operation of the investment project. By applying complete environmental and social impact assessments for projects very likely to adversely affect local communities and the environment, contractual designs and national legislation (e.g. environmental law, mining regulation, oil and gas codes, and other industry-specific laws) both can make contributions to sustainable development goals.

National legal frameworks firstly should clarify the requirements and processes for deciding if an investment may seriously affect the environment and communities²⁵¹. This critical issue should also require that the impact assessments be completed during the initial stages of project negotiation and the procedure should involve community consultation and other public participation opportunities, which invite affected citizens to comment on early

²⁴⁶ Such as the US Model BIT 2004.

²⁴⁷ See Dominican Republic–Central America–United States Free Trade Agreement 2004 (CAFTA–DR) and Egypt–Morocco BIT 1976.

²⁴⁸ See Canada–Costa Rica BIT 2010 and Canada Model BIT 2004.

²⁴⁹ Sornarajah, M. (2010) *The International Law on Foreign Investment* (Second ed.): Cambridge University Press

²⁵⁰ Ibid.

²⁵¹ Ibid at 249.

investment proposals. Governmental agencies and civil society groups may play a crucial role by carefully monitoring how environmental and social impact assessments proceed. Moreover, international standards, such as the World Bank Group' IFC and OECD performance requirements. These international standards can offer useful guidelines on impact assessments good practice globally. Very importantly, these national regulations concerning impact assessments can be supplemented by more specific clauses in the investment contract.

For instance, a Product Sharing Agreement 1997 of Kazakhstan, which governs the oil and gas extractive operations in the Karachaganak field, includes a nine-page long Article XVII and two important annexes²⁵². The main contents of these contractual arrangements are on environmental protection programmes, detailing a baseline research plan, environmental and social impact assessment, regular monitoring and reporting mechanisms on the operations, corporate environmental management plan and other schemes. These clauses reveal what issues should be addressed by these initiatives, their review procedures and the approval (or rejection) by governmental authorities, their periodic revision schemes, etc. For example, the 2008 Concession Agreement between Liberia and Firestone Liberia is an excellent example in the agricultural sector²⁵³. According to this agreement, the Firestone Liberia's corporate environmental management plan and its potential modifications must be approved and re-examined every five years (section 15(c)).

In order to ensure that impact assessments are meaningful, contracts should adopt robust methodologies, robust baseline studies, extensive public participation from the local communities, and proper accountability and sanction mechanisms. According to an international NGO (the World Commission on Dams) report, previous cases reveal that environmental and human rights risks have usually been underestimated. For instance, an independent report on the oil extraction fields of the Chad-Cameroon project pointed out that the impact assessments of this project had underestimated the land area acquired by the project²⁵⁴ and the number of citizens affected by this project. The real number of households

²⁵² Production Sharing Agreements in Kazakhstan: Problems and Means of Improvement, available at: <http://www.investkz.com/en/journals/50/342.html> See also Esty, Benjamin C., and Florian Bitsch. "The Kashagan Production Sharing Agreement (PSA)." Harvard Business School Case 213-082, May 2013. (Revised September 2013.)

²⁵³ "Government of Liberia and Firestone Liberia Sign Amended and Restated Concession Agreement" Liberia Government, https://www.emansion.gov.lr/2press.php?news_id=633

²⁵⁴ See from Affolder, N. (2013) Beyond law as tools: foreign investment projects and the contractualisation of environmental protection. In P.-M. Dupuy & J. E. Vinuales (Eds.), *Harnessing Foreign Investment to Promote Environmental Protection Incentives and Safeguards*. Cambridge: Cambridge University Press.

eligible for resettlement is around 900 (the original estimated number was just 60 to 150 households). Moreover, attention is required to make sure that any mitigation instrument covered in the social impact assessments are genuinely integrated into considerations both by the foreign investor and its global subcontractors and other suppliers. In this context, guidance and training on how to enforce the mitigating schemes are particularly significant if the investor's subcontractors and other local suppliers have limited capacity.

2) Connecting applicable laws and standards

It is crucial to understand the substantive rules and performance standards which can apply to the project operations²⁵⁵. It would be good practice for the investors to ensure full compliance with existing and future national regulations and with evolving international agreements and standards. Importantly, these environmental and social requirements are only useful if these standards can apply not only to the foreign investors but also to their subcontractors and global suppliers, especially when there is no independent policy measure to monitor their environmental performances and verify the whole project's economic feasibility.

An investment contract sometimes may explicitly point out that national law can apply to the project directly, removing any doubts to the contrary. Investment contract may also ask for compliance with stricter norms and standards, in particular, if national legislations are lower than what is globally acceptable. For instance, the contract can explicitly ask for compliance with relevant international human rights (or environmental) agreements, such as the African Human Rights Charter. Also, the contractual arrangements can require compliance with other international vital standards, such as the Guidelines on Multinational Enterprises adopted by OECD as well as the environmental and social performance standards of international development banks like the Asian Infrastructure Investment Bank and the World Bank Group's IFC.

If investment projects receive financial funding from 'Equator Principles' or other multilateral lenders, it is necessary for investors to ensure compliance with lenders' standards²⁵⁶. For instance, an investor needs to comply with all the required performance standards if he is awarded a financial loan from the IFC, World Bank and other international and regional

²⁵⁵ Clement-Davies, C. (2014). See also OpenOil. (2012).

²⁵⁶ Traidcraft. (2013) *Investors running wild on land: the threats posed by international investment agreements*. London. See also Salacuse, J. (2013).

development banks. However, even if these multilateral development banks are not a lender, their environmental and social standards can still be covered into any form of investment contracts and applied by contracting parties. This approach is a significant pillar of the well-developed ‘Equator Principles’. According to these principles, IFC standards can also be applied to the investment projects financed by conventional commercial banks.

As a result, governmental agencies should connect investment contracts with the environmental and social performance standards detailed in the policy documents of development banks and other multilateral lenders. Civil society groups may also harness public pressure on the governments to manage investment projects in this way.

In some cases, foreign investors can be willing to comply with higher performance standards than the basic standards required under national legislation for CSR or other reputational considerations. It is true this approach may be helpful for the private enterprises to obtain loans on moral grounds. In contrast, foreign investors may ask for exemptions from generally applicable performance standards and legislation in some unusual cases. For instance, some investors have insisted that some national environmental law and the regulations concerning natural parks are very likely to hinder the implementation of an investment project. These exemptions should be avoided and are not usually accepted by the regulators. Moreover, of course, they are not considered as best practice within the industrial sector. While in some exceptional circumstances, this request could be possible to offset the damages suffered from other policy instruments.

In many industrial sectors, investment contracts routinely mention international best practice within the industry. However, these contractual provisions have not been comprehensively developed. It would be more useful to connect the investment contract with specific bodies of international standards applicable, e.g. the World Bank Group’s IFC safeguard standards and policies, or requirements set by other international environmental and human rights treaties. For instance, a 1982 copper mining contract from Australia requires compliance with the operation and environmental standards by the International Atomic Energy Agency and the International Commission on Radiological Protection.

3) Project monitoring, compensation, and sanctions

The contract provision may ask foreign investors to monitor and report the operations regularly to assist host governments in supervising the investment projects. Investment

contracts usually can require foreign investors to evaluate the environmental impacts of their projects and pay a significant number of funds to the environmental agencies in the host countries. It is also common that environmental provisions may require investors to disclose their environmental information, which helps the host governments to work with investors to manage natural resources affected, such as water and forestry²⁵⁷.

For oil spills, marine pollution, and other industry-specific contexts, special contractual arrangements would be required in investment contracts. This is reasonable to ensure the investment contract orders the foreign investor and its global subcontractors to immediately take all necessary activities to prevent further obvious environmental and social disasters and to recover the natural environment to pre-existing situations. Contractual clauses clarifying a foreign investor's responsibility for environmental harm caused by large-scale oil spills can also be very useful. Additionally, thorough decommissioning clauses (for oil platforms), extractive site rehabilitation and closure clauses (usually for mining projects) and other similar provisions that concern environmental and social requirements at the final stage of an investment project are very critical. These contractual provisions can be more useful if accompanied by other well-designed financial instruments (i.e. some special trust funds) offered by the foreign investor in the project's initial stages. If any contractual provision refers to international standards, the international standards need to be directly related, and the contents should be formulated.

The effectiveness of these environmental management and monitoring mechanisms will be enhanced if the provisions establish independent instruments for regulatory authorities to gain useful data from the sites²⁵⁸. This independent instrument may contain the power of regulatory authorities to implement periodic inspections of investment projects' facilities, as well as third-party's verifying and monitoring.

3.3 Contractual arrangements for human rights and social development

In 2011, the United Nations Guiding Principles on Business and Human Rights ('UNGPs') was formally endorsed. These essential principles have stimulated recent legal reforms of related key international standards in the area of business and human rights as well as domestic

²⁵⁷ See examples in Tienhaara, K. S. (2009) *The expropriation of environmental governance: protecting foreign investors at the expense of public policy*. Cambridge: Cambridge University Press.

²⁵⁸ Traidcraft, (2013).

laws. This new global trend means that private enterprises are now under increased global pressures to respect human rights throughout their business operations²⁵⁹.

For private enterprises, a critical response to this global pressure is by introducing human rights clauses into their commercial contracts, including investment contracts. This section here intends to briefly address some of the important legal issues which may arise for companies, governmental officials and lawyers involved with drafting these relevant human rights provisions.

The UNGPs demonstrate that the obligations to respect human rights require that private corporations must²⁶⁰:

“(a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and

(b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”

As a business relationship is based on a commercial contract, it should be possible to draft provisions in the contract requiring the parties to take actions to identify, mitigate and avoid foreseen adverse human rights impacts. Contracting parties would also agree to the standards and procedures for the remediation of actual negative impacts on human rights.

As well as offering a chance to generally establish expectations in relation to companies' future performances on preventing human rights violations, commercial contracts and investment agreements allow contracting parties to reallocate responsibility for dealing with human rights issues specific to an economic deal or corporation relationship. This point may require the one of the contracting parties (and their commercial lawyers) to firstly conduct a certain level of human rights due diligence, including identifying any risk that can be associated with a specific region/country, industry and the previous human rights performance.

There is no one-size-fits-all solution, because the range and nature of potential adverse human rights consequences may vary depending on the jurisdictions in which corporations

²⁵⁹ Shemberg, A., & Saldarriaga, A. (2016).

²⁶⁰ Human Right Risk Assessment, Retrieved from <https://www.business-humanrights.org/sites/default/files/documents/Equatorial%20>.

operate²⁶¹. In every jurisdiction, the government's ability to take actions to address human rights risks also varies. Though commercial contracts are not the only vehicle by which a private enterprise may have the chance to influence the activities of its business partners, nowadays contractual clauses directed at decreasing the risks of human rights violations are becoming very common.

Contract clauses relating to labour rights and working conditions have been applied for many years in agreements for manufacturing and supplying consumer goods (such as shoes, clothing and electronics). For instance, purchasers in the supply chain may require international suppliers to do business by those standards. Buyers may insist on a right which allows them to conduct audits or investigations to ensure standard compliance. The similar clause may also be identified in the governmental procurement contracts globally.

Transnational corporations in the extractives and energy sectors now are also increasingly willing to include the human rights and environmental clauses in their contracts, especially the cases of joint venture agreements²⁶². In several joint ventures in the extractive sectors, while the contracting parties share the risks and economic benefits of the venture agreement, responsibility for operational affairs will typically rest with one party only. In this particular context, non-operator parties should hope to ensure that the operational party takes actions to ensure and respect human rights. Including relevant human rights responsibilities in the joint venture is a reasonable way to achieve this. Another increasingly common feature of extractive industry contracts is a contract clause asking that contracting parties ensure operating standards related to public health, working safety, environmental protection and human rights are all "cascaded" down to the supply chain.

Similarly adhering to the Equator Principles, the International Finance Corporation and other international financing institutions also ask for their borrowers, in specific contexts, to offer covenants regarding the management of negative environmental and social consequences²⁶³. Typically, this kind of covenant may require the borrower to proceed with an environmental impact assessment and to prepare a detail management plan for these matters.

²⁶¹ Cotula, L. (2011) *Land Deals in Africa: What is in the Contracts?* London: IIED.

²⁶² Crockett, A. (2014) Human Rights Clauses in Commercial Contracts. *Expert Articles, Investment & Human Rights Project*.

²⁶³ Francioni, F. (2013) The private sector and the challenge of implementation. In P.-M. Dupuy & J. Vinuales (Eds.), *Harnessing Foreign Investment to Promote Environmental Protection Incentives and Safeguards*. Cambridge: Cambridge University Press.

All these impact assessments and action plans are subject to approval by the development banks. This situation can also be found in global supply chain contexts. Lending institutions will usually seek a contractual right to make periodic audits and investigations of operating sites and working facilities to ensure compliance with social and environmental covenants. Following recent improvements to the IFC Performance Standards and Equator Principles, lending institutes are likely to require borrowers to set up grievance mechanisms for a range of high-risk investment projects.

3.4 Evaluation: Practices, effectiveness and interactions with other approaches

For the past several decades, state investment contracts have dominated investments in the extractive and energy industries, especially in the oil and gas sector²⁶⁴. This chapter has charted the evolution of the relevant environmental and social provisions embedded in the investment contracts. The previous paragraphs have discussed their strengths for preventing environmental and social harm and for stimulating future regulatory innovation. These advanced contractual arrangements do offer a new avenue to enforce contractual obligations.

The following section begins to discuss three major practical issues with implementing State-investor contracts and move to the debate about how this mechanism can contribute to sustainability in the contexts of global energy investment.

3.4.1 Practical issues about State-investor contract implementation

With regard to the effectiveness of implementing State-investor investment contracts, this chapter points out three practical issues below.

1) Policy incoherence between contracts and other legal frameworks

An investment project is usually regulated by three major legal frameworks: national, contractual, and international²⁶⁵. Firstly, countries may sign international, regional and bilateral investment treaties with each other. Then, by designing and implementing the domestic laws and policies, national States decide how FDI would be attracted, protected, and regulated. Also,

²⁶⁴ Zerk, J. (2014) Oil and gas projects and human rights. In G. Picton-Turbervill (Ed.), *Oil and Gas: A Practical Handbook* (2 ed., pp. 141-158): Globe Business Publishing Limited. See also Gao, Z. (1998).

²⁶⁵ Bellmann, C., (2016) Trade and Investment Frameworks in Extractive Industries: Challenges and Options. E15 Expert Group on Trade and Investment in Extractive Industries — Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

it is prevalent that governments also apply investment contracts and other contractual arrangements.

Regulating foreign investment is typically the task of host countries and their specialised governmental agencies and departments. These specialised agencies are usually narrowly focused on the economic dimension of growing FDI and trade flows as well as promoting industrial policies. It is a pity that these commercial agencies are not well attuned to the investment projects' negative consequences on human rights and environmental protection. They may not fully realise that the host countries also have legal obligations under international environmental and human rights laws. Unfortunately, the governmental agencies which are in charge of human rights and environmental protection also may not be aware of the interplays between investment activities and other public policies in the country. Also, these environmental and human rights departments may lack the significant expertise to participate in or respond to investment decision-making very properly. As a result, this shortcoming leads to some national investment policies which fail to address host states' environmental and human rights international obligations.

The UN Guiding Principles on Business and Human Rights have attempted to address the issues of policy incoherence. According to Principles 8²⁶⁶ to 10²⁶⁷, especially Principle 9²⁶⁸ and 10, national states need to have a holistic approach to the issues of business and human rights. This holistic approach should ensure policy coherence between investment-relevant policies with other public policies at both the international and national levels.

Clarifying how the state's contractual mechanism can contribute to sustainable development and investment protection is urgently needed. Kenya can be examined as an instance²⁶⁹. Based on the contract materials published on the website of Resource Contracts,

²⁶⁶ Principle 8: "States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support."

²⁶⁷ Principle 10: "10. States, when acting as members of multilateral institutions that deal with business-related issues, should: a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights..."

²⁶⁸ Principle 9: "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts."

²⁶⁹ Belyi, A. V. (2014) International energy law, institutions and geopolitics. In K. Talus (Ed.), *Research Handbook on International Energy Law* (pp. 624-650): Cheltenham, UK. See also Tienhaara, K. (2013).

the researcher found 8 contracts negotiated between Kenya and natural resource investors from 2007 to 2013 online:

“Kenya, ERHC Kenya and CEPSA Kenya-Block11A-Farmout Agreement, 2013;

CAMAC Energy, Block L27 - Kenya, 2012;

CAMAC Energy, Block L16 - Kenya, 2012;

Kenya, ERHC AGC Profond - Block 11A - Production Sharing Contract, 2012;

CAMAC Energy, Block L1B - Kenya, 2012;

CAMAC Energy, Block L28 - Kenya, 2012;

Lion Petroleum, Block 2B - Kenya, 2008; and

Lion Petroleum, Block 1 - Kenya, 2007.”

Quite surprisingly, recent energy and resource investment contracts in Kenya do not address environmental and human rights protection. For example, in a Production Sharing Contract between CMC Energy Company and Kenya’s government, the only environmental and human rights relevant contents are demonstrated by the provision below²⁷⁰:

“9 JOINT LIABILITY AND INDEMNITY (6) In the event of an emergency or extraordinary circumstances requiring immediate action, including the safeguarding of lives or property or protection of the environment or for health reasons, the Operator, on behalf of the Contractor, may take all such actions as it deems proper or advisable to protect the joint property, its investments and its employees, and shall give written notice to the Government immediately thereafter. Any and all costs incurred in connection with such emergency activities shall be regarded as Petroleum Costs for the purpose of cost recovery under Clause 27 and the Accounting Procedure.”

It is not possible in this chapter here to generalise the observations on the environmental and human rights provisions in Kenya’s investment contracts, because the researcher has only been able to review a small number of contracts of this country. However, this initial survey

²⁷⁰ See Republic of Kenya, available at

https://www.sec.gov/Archives/edgar/data/1402281/000135448812003921/cak_ex104.htm See also OpenOil, available at: http://wiki.openoil.net/Kenyan_Model_Production_Sharing_Contract.

has noticed the issues of policy incoherence and wondered whether Kenya's regulatory authorities have participated in these contracting procedures.

2) Enforcement of contracts

The contractual framework is an outcome of negotiation between foreign investors and governments (or a relevant agency which is responsible for regulating FDI). The FDI projects are also shaped by the national laws in the home countries which were the sources of that foreign capitals. In addition, the specific provisions in state investor countries usually either integrate national legislation into or exclude them from the investment project.

In national legislation, both property and contractual rights are the two significant building blocks of the investment process and implementation. As a result, how the effectiveness of these national legal systems can protect these two fundamental legal rights are very critical for contract enforcement.

In general, economically advanced jurisdictions, on the one hand, can establish more effective and efficient measures to ensure the enforceability of the investment contracts. The main reason behind this policy attitude is that the stability and enforceability of contractual transaction are critical to these countries' prosperity and economic growth. On the other hand, those economically underdeveloped jurisdictions may not pay so much attention to the issue of contract's enforceability, which can eventually impede their economic advancement²⁷¹.

Moreover, some legal mechanisms in relation to investment protection may be only subject to national legislation exclusively, not a contractual framework. For example, some national laws can decide which industrial sectors are open or closed to foreign investors. In some specific industries, other national investment laws and policies can require foreign investors to have a local partner to cooperate with and ask for the maximum amount of equity which foreign investors need to hold in the account of the investment project. Even in the cases where governments are not a contracting party in these investment contracts, national investment legislation, however, still can set some conditions for foreign investors, such as providing technology transfer in the country or asking for some foreign exchange payments²⁷².

²⁷¹ Cotula, L. (2010a). See also Berger, K. P. (2003) Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators. *Vanderbilt J Trans'l L*, 36, 1347.

²⁷² Tienhaara, K. (2006) Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana. *International Environmental Agreement: Politics, Law and Economics*, 6, 371.

The enforceability of investment contracts depends on not only national laws but also the judiciary systems and other private regulations in the host countries²⁷³. Without strong and comprehensive legal frameworks, enforcing investment contracts in many developing countries may face several practical problems²⁷⁴.

3) Contract transparency issues

Although recent calls for contract transparency can be found across the world, State-investor investment contracts are not often published for the public²⁷⁵. However, disclosing the contents of these investment contracts is now a growing practice in the extractive and resource industries. Many governments around the world have voluntarily published their countries' investment contracts on the official websites.

For instance, the Republic of Mongolia has started to publish the full contents of mining and large infrastructure investment contracts online since 2016²⁷⁶. As these published contracts demonstrate, many contractual provisions state the government's expectations for contract transparency and community participation. In a recent Regional Development agreement signed by the Mongolian government and a mining operator, part 4 of this agreement states²⁷⁷:

“4.6 The Investor shall conduct all of its local and regional socio-economic development programs and activities based on principles of transparency, accountability and public participation.”

“4.7 The Investor shall continue to prepare, conduct, implement, update on an appropriate basis, and make public socio-economic baseline studies, socio-economic impact assessments, socio-economic risk analyses, as well as multi-year communities plans, community relations management systems, policies, procedures and guidelines, and mine closure plans, all of which shall be produced with community participation and input and be consistent with international best practice.”

²⁷³ Tienhaara, K. (2011).

²⁷⁴ Markusen, J. R. (2001). Contracts, intellectual property rights, and multinational investment in developing countries. *Journal of International Economics*, 53(1), 189-204.

²⁷⁵ Berger, K. P. (2003).

²⁷⁶ See Mongolian Government's Ministry of Commercial Affairs, official website:

http://www.mfa.gov.mn/?page_id=35465&lang=en See also Diana, S. K., & Batsuren, B. (2013) With new law, Mongolia opens to investors. Retrieved from DLA Piper Publications website: Retrieved from <https://www.dlapiper.com/en/us/insights/publications/2013/11/with-new-law-mongolia-opens-to-investors/>

²⁷⁷ International Bar Association (2010).

Liberia Extractive Industries Transparency Initiative (LEITI) is a collaborative mechanism between extractive industries and the Liberian government²⁷⁸. This initiative set up a specific website and published all relevant State-investor investment contracts online for the stakeholders as well as the public. Also, recently this LEITI has been reducing the technical terms in the contracts and making the language more accessible to the public. The contractors also provide summaries or reports to explain the contract terms which have more direct impacts on communities and public interests²⁷⁹.

In 2015, a research report confirmed that even foreign investors in the extractive sector are also starting to call for contract transparency²⁸⁰. Representatives from the private sector now agree that the publication of investment contracts indeed support investors' 'social license to operate' and enhance trust with all the stakeholders.

There are other transparent initiatives that aim to make investment contracts available to the public. For example, the website of 'Resource Contracts' (www.resourcecontracts.org) focuses on the contract transparency issues in the oil, gas and mining sectors. And the online platform of Open Land Contracts (www.openlandcontracts.org) focuses on the contracts in agriculture, forestry, and land issues. Of course, many improvements are still expected on the issue of transparency.

3.4.2 Benefits of investment contracts for responsible energy investment

Proponents for investment contracts believe these well-designed contracts can improve environmental conditions in host states by introducing international standards in oil, gas, and other energy sectors²⁸¹. Nonetheless, this perspective may raise some questions. First, no definitive source can be identified when it comes to these international standards. These international standards usually adopted by a single industry, and a vague reference to the international standards may not be beneficial. Furthermore, this point of view creates a type of circular logic. Governments can require that an investment project should adhere to some

²⁷⁸ Liberia Extractive Industries Transparency Initiative, available at <http://www.leiti.org.lr/>

²⁷⁹ Allen & Overy (2013b) Guide to Extractive Industries Documents – Mining. See also International Bar Association (2010).

²⁸⁰ Janson, J., Burke C. and Jiang, W. (2009) Chinese Companies in the Extractive Industries of Gabon & the DRC: Perceptions of Transparency. Center for Chinese Studies, University of Stellenbosch.

²⁸¹ Daintith, T. (2013).

international practices²⁸², but the so-called international standards may be set up by the very same project.

Proponents also may argue that State-investor investment contracts can improve upon a host state's environmental and human rights level by contractually requiring adherence to the business standards of the foreign investor's home nation. This view is correct, but, sometimes, it may ignore the issue of whether business operation standards in those investors' home state are also adequate. Indeed, several international industrial standards have been criticised as being too vague or lenient. These industrial standards typically only focus on production processes without paying attention to associated environmental and social impacts²⁸³. For example, the international standard of plywood manufacturing may not also consider any negative impacts on forests. Also, the overall environmental protection and regulation system of a country is usually a complicated combination of industrial standards and procedural protection for safeguarding citizens' rights to protect public health and the environment (e.g., the right to food, to water, and to information)²⁸⁴. These procedural protections, whether coming from the host country and the investor's home government, are never covered in the existing State-investor investment contracts and could be nullified in some situations by the investment contracts' international arbitration provisions.

At last, proponents may also argue that State-investor investment contracts are likely to improve the host state's environmental and social standards by contractually imposing the safeguarding mechanisms designed by a multilateral development bank or international financing institutes, such as the World Bank Group, Asian Development Bank, and the European Bank for Reconstruction and Development. However, NGOs and human rights advocates have questioned the usefulness and adequacy of these international standards by multilateral development institutions for some decades²⁸⁵. Civil society groups are highly

²⁸² Zillman, D. M., & Lucas, A. (2002) *Human rights in natural resource development: Public participation in the sustainable development of mining and energy resources*. Oxford University Press. See also Pusceddu, P. (2014) Contractual Stability in the Oil and Gas Industry: Stabilisation, Renegotiation and Unilateral State's Undertakings. *International Energy Law Review*, 32(2), 58-67.

²⁸³ Cashore, B., Renckens, S., Levin, K., Bozza, L., Auld, G., (2009) Can Non-State Governance "Ratchet Up" Global Standards? Assessing Indirect and Evolutionary Potential. Paper presented at the Conference on New Governance and the Business Organization, May 25-27.

²⁸⁴ Bebbington, A., Bebbington, D. H., Bury, J., Langan, J., Muñoz, J. P., & Scurrah, M. (2008). Mining and social movements: struggles over livelihood and rural territorial development in the Andes. *World development*, 36(12), 2888-2905. See also Bekaert, G., & Hodrick, R. (2017). *International financial management*. Cambridge University Press.

²⁸⁵ Doh J.P. and Guay T.R. (2006) Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective. *Journal of Management Studies*, 43(1), 47–

critical of the World Bank Group and its private sector arm - the International Finance Corporation. These advocates question whether IFC's standards can be viewed as an international benchmark and examine whether IFC's proposal is weakening the existing international environmental and social frameworks²⁸⁶. Also, some scholars believe the drafters of these investment contracts may tend to use these multilateral development institution standards as ceilings rather than ground floors to build new project-specific standards up from. Also importantly, efforts made by nations with lower environmental or social standards to progressively evolve their regulations would be stunted at some point where they met the multilateral development institutions' standards.

In sum, investment contracts have both advantages and disadvantages. Though these investment contracts may include some provisions regarding environmental protection and human rights, in general, these provisions so far have not provided enough protection for local citizens, communities, and the natural environment. Due to the current fragmented legal frameworks, third parties' rights and interests sometimes may not be enforced effectively.

The actual performances of these State-investor contracts would depend on the negotiators who can participate in the contract negotiations and how they design these critical contracts²⁸⁷.

3.4.3 Summary

Based on the selected case studies and the critical discussions concerning the functions of modern State-investor contracts, this chapter summarises the assessment into three key points below.

First, today even so-called "green" and renewable energy projects can create adverse social and environmental impacts²⁸⁸. It is also necessary to understand both synergistic policy

73. See also Yaziji M. and Doh J. (2009) *NGOs and Corporations: Conflict and Collaboration*. 1st ed. Cambridge University Press.

²⁸⁶ Performance Standards – IFC, available at:

https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards. See also World Vision (2015) *Getting Intentional: Cross-Sector partnerships, business and the post-2015 development agenda*, retrieved from: <http://www.wvi.org/united-nations-and-global-engagement/publication/getting-intentional-cross-sector-partnerships>.

²⁸⁷ See United Nations OHCHR (2015) *Principles for Responsible Contracts – Guidance for Negotiators*. United Nations Publication. See also O'Faircheallaigh, C., & Corbett, T. (2005) Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements. *Environmental Politics*, 14(5), 629.

²⁸⁸ PBI, (2015).

incentives and safeguarding mechanisms for preventing potentially harmful effects of these investments.

Second, State-investor contracts have the potential to become a useful platform or vehicle for safeguarding human rights and the environment. The development of both environmental and human rights provisions have made significant progress during the past decades. In theory, well-designed environmental and social provisions embedded in State-investor investment contracts can respond to the challenges brought by the energy investment projects especially in those developing countries without robust regulatory environments. However, due to many practical limitations and contracting realities, the progress is far from ideal for promoting sustainable and responsible investment. Some innovative ‘products’ have been released by the International Bar Association, World Bank, and the United Nations, such as the MMDA, UN Principles for Responsible Contracts, and the UN Principles for Business and Human Rights²⁸⁹. These new developments provide the foundation and important templates for future investment contracting and further regulatory innovation.

At last, the complexity of this S-I-P triangle includes many practical problems. This fact also reminds us to examine each dimension of the S-I-P triangle and the interplay among various bodies of law and regulation. The root of today’s investment contracts can be traced back over one century. However, actors in this changing field, including legislators, international financing institutions, MNCs, and civil society groups, are witnessing a reform agenda only at the initial stage. There is an urgent need for doing much more legal and policy research on these reforms and the progress.

As awareness of the importance of state contracts rises, so too will the chances to propose further policy and legal reforms. Since state investment contracts present a new form of synthesis of private and public interests, it may be appropriate to conclude that both public and private interests should be protected under further reforms. These ongoing reforms can be based on both political and practical reasons. It is also reasonable to conclude that in the years that State-investor contracts have evolved, business interests have been defended mostly through the coffers of investment project sponsors while the affected communities and individuals of host states have been unaware and their essential interests mostly unrepresented.

²⁸⁹ See International Bar Association (2010); World Bank (2014). See also United Nations OHCHR (2016) *A Turn to Responsible Contracting: Harnessing Human Rights to Transform Investment*. E15 Expert Group on Trade and Investment in Extractive Industries Working Paper, Geneva.

During the same period, national interests of host states have been represented by small parts of governments, including governmental agencies whose primary concerns are related to energy supply and economic growth—at the exclusion of environmental protection and social policy departments, and in some cases national legislators.

Overall, it would be necessary to address the point that only ‘top-down’ development policies cannot ensure the material conditions of local citizens. In several under-developed countries (with abundant natural resources), local citizens are power-poor, especially indigenous peoples, and several practical issues in relation to negotiation and contract enforcement still widely exist.

Based on the discussions above, it is clear that the contractual approach can bring benefits for future responsible energy investment across the jurisdictions. So far the main question is: why actors are not yet including sustainability terms in their contracts? Besides the three major practical obstacles for implementing sustainable development clauses within the state-investor contracts, the reason could be a ‘cultural thing’. If practicing commercial lawyers and governmental officials working in the developing economies can realise the significance of having sustainable considerations in their business operations, this important ‘green’ awareness may have the potential to totally change the way of doing business and serving their corporation clients. So far the International Bar Association has provided many practical guild-lines to make this approach possible. In the future, more empirical research (such as doing interviews with stakeholders) is required to find out the cultural obstacle behind the commercial contracting practices. This is not only a research task for lawyers but also for other social scientists.

Therefore, Chapter 4 turns to assess the policy and governance potential of the community development agreements between investors and affected citizens as well as the cross-sector partnerships between energy companies and environmental NGOs. Due to the broad scope of these agreements around the world, Chapter 4 has a strong focus on using case studies in the Greater China region.

Chapter 4 – The ‘I-P’ dimension: examining the values and challenges of Corporate-NGO partnerships in Greater China’s oil and gas sector

“Founded on the principles of private initiative, entrepreneurship and self-employment, underpinned by the values of democracy, equality and solidarity, the co-operative movement can help pave the way to a more just and inclusive economic order.” – Kofi Annan, former United Nations Secretary-General (1938 - 2018)

This chapter moves to examine the engagements between investors and communities (including civil society groups), namely the ‘S-I’ dimension in the ‘S-I-P’ triangle.

Corporations are required by national and international laws and policies²⁹⁰, including Principle 18 of the UN Guiding Principles on Business and Human Rights²⁹¹, to practice meaningful consultations, in good faith, with relevant stakeholders and potentially affected groups. However, any one sector will find global challenges too complicated for them to tackle or solve alone²⁹², and there is growing cognisance that the civil sector and the private sector have significant roles in delivering solutions²⁹³.

While changing mindsets and adapting to the potential of partnership models takes time, academia has a role to play in investigating the increasing number of successful long-term business-NGO partnerships and learning from the lessons of what is and is not successful. Until now the existing research mainly focused on western case studies, so overview on the nature and extent of these CSPs/engagements and how they function, especially in the Greater China area, is lacking. This chapter aims to bridge this gap and hopefully provide the industry, environmental NGOs and policy-makers some evidence-based insights for future collaboration, value creation and development in Greater China. This type of innovative research and dissemination of best practices can support a broader adjustment in attitude and generate a more conducive setting for effective multi-sectorial partnering.

²⁹⁰ Gatto, A. (2011) *Multinational enterprises and human rights: Obligations under EU law and international law*. Edward Elgar Publishing. See also Muchlinski, P. (2007) *Multinational enterprises and the law*. Oxford: Oxford University Press.

²⁹¹ UN Guiding Principles on Business and Human Rights - OHCHR Available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See also Shemberg, A., & Saldarriaga, A. (2016) *Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking*.

²⁹² UN Global Compact, (2007) UN Global Compact Leaders Summit 2007 Final Report, Available via http://www.unglobalcompact.org/newsandevents/event_archives/Leaders_Summit_2007.html.

²⁹³ WSSD. (2002). United Nations: World Summit on Sustainable Development, Johannesburg Summit 2002. Retrieved from <http://www.un.org/jsummit/>

4.1 The changing relations of modern business and civil society

While NGOs and businesses have long considered each other as 'adversaries'²⁹⁴, there is now a mounting interest in working collaboratively towards a sustainable future. Because neither sector is capable of handling intensifying environmental and social concerns independently, there is a need to unite. Awareness is building that engaging in partnerships could allow access to various core competencies that are often exclusive to each organisation and sector²⁹⁵.

One of the most participatory and effectual mechanisms to implement sustainable development and boost international cooperation are partnerships. They are unique by being voluntary, multi-stakeholder enterprises linked explicitly to the application of globally agreed commitments, particularly the Plan of Implementation of the World Summit on Sustainable Development (WSSD) (Johannesburg Plan of Implementation)²⁹⁶, Agenda 21²⁹⁷, the Programme for the Further Implementation of Agenda 21 and the Rio+20 outcome.

A Partnerships Forum at Rio+20 consisted of five highly dynamic and interactive sessions that highlighted how partnerships make essential contributions to the enactment of sustainable development²⁹⁸. The Forum's goal was to showcase dedicated partnerships to enable the implementation of priority actions that were agreed upon at the Rio+20 Conference as well as fortify this collaborative mechanism making it even more accountable for implementation. The Partnerships Forum inspired enthusiasm, commitment and leadership from different stakeholders to continue reinforcement partnerships in the Conference follow up²⁹⁹.

The Rio+20 outcome document also presents valuable mandates and references on particular areas to advance additional work on the use of partnerships (UN Sustainable

²⁹⁴ Cohen, J. (2003). State of the Union: NGO-business Partnership Stakeholders. In J. Andriof, S. Waddock, B. Husted, & S. S. Rahman (Eds.), *Unfolding Stakeholder Thinking 2: Relationships, Communication, Reporting and Performance*. Sheffield: Greenleaf Publishing Limited.

²⁹⁵ Boué K and Kjær K (2010) *Creating Value through Strategic Partnerships between Businesses and NGOs - A descriptive case study of six partnerships in Norway*, Copenhagen Business School 2010 MSc dissertation.

²⁹⁶ Johannesburg Plan of Implementation - the United Nations, available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf

²⁹⁷ Agenda 21, available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

²⁹⁸ Partnership Drivers, Sustainable Development Knowledge Platform, available at: <https://sustainabledevelopment.un.org/partnershipdrivers.html>

²⁹⁹ UN Sustainable Development Knowledge Platform, available at: <https://sustainabledevelopment.un.org/milestones/wssd>.

Development Knowledge Platform)³⁰⁰. The Rio+20 outcome document also includes many sections for partnership references and interrelated issues. For example, point 55 in the document explains³⁰¹:

‘We commit ourselves to reinvigorate the global partnership for sustainable development that we launched in Rio in 1992. We recognise the need to impart new momentum to our cooperative pursuit of sustainable development, and commit to working together with Major Groups and other stakeholders in addressing implementation gaps.’

Also, point 64 says³⁰²:

‘We acknowledge that involvement of all stakeholders and their partnerships, networking and experience sharing at all levels could help countries to learn from one another in identifying appropriate sustainable development policies, including green economy policies. We note the positive experiences in some countries, including in developing countries, in adopting green economy policies in the context of sustainable development and poverty eradication through an inclusive approach and welcome the voluntary exchange of experiences as well as capacity building in the different areas of sustainable development.’

In recent years, a rather fundamental change in the governance of sustainability issues has been identified by many scholars. Traditionally governmental organisations had the duty of dealing with sustainability issues. However, the private sector and civil society organisations have also recently been invited to and have increasingly taken up their share of responsibility, which has then opened up the policy arena to actors from other parts of society and corporation³⁰³.

In the mid-1990s, societal as well as academic interest in cross-sector collaboration, that is a collaboration between actors from the different parts of society, have grown; there are some possible explanations for this. To begin, the 1992 World Summit on Sustainable Development

³⁰⁰ Ibid.

³⁰¹ Point 55, Future We Want, Outcome document, available at: <https://sustainabledevelopment.un.org/futurewewant.html>.

³⁰² Point 64, Future We Want, Outcome document, available at: <https://sustainabledevelopment.un.org/futurewewant.html>.

³⁰³ Arts B, Leroy P (eds). (2006) Institutional dynamics and environmental governance. Dordrecht: Springer. See also Dubbink W. (2003) *Assisting the invisible hand. Contested relations between market, state and civil society*. Dordrecht: Kluwer Academic.

(WSSD) in Rio de Janeiro firmly placed the pursuit of global sustainable development on the political agenda³⁰⁴.

There are two related ways that partnerships are connected to sustainable development. First, it was argued that the complicated character of sustainability problems requires the active involvement of all societal spheres in order to resolve them. Secondly, the idea of sustainable development itself emphasises the need for mutual achievement of social equity, environmental health and economic wealth, for which the responsibilities and resources are apportioned to different societal spheres.

The link between sustainable development and cross-sector partnerships was solidified when partnerships were acknowledged as an essential tool for implementing sustainable development at the WSSD in Johannesburg in 2002³⁰⁵.

4.1.1 The benefits and potentials of cross-sector partnerships

Much debate on the role of different actors in society was initiated by the United Nations Conference on Environment and Development, held in Rio in 1992. A keynote was that sustainable development would only be realised if all nations and parts of society would find rewarding means of cooperating. The IPIECA publication, *Technology Cooperation and Capacity Building: Contribution to Agenda 21* (produced in association with UNEP in 1994)³⁰⁶ reflected this theme and highlighted an evolution in oil and gas industry collaboration with stakeholders: from being narrowly fixated on technology cooperation to embracing broader sustainable development goals.

The past ten years have seen a steep change in the number of multi-stakeholder partnering initiatives in the oil and gas industry. In 2002, the Johannesburg World Summit for Sustainable Development (WSSD) acknowledged that multi-stakeholder partnerships are vital for implementing sustainable development goals. Governments formally ‘endorsed’ the opinion that business has a part in the solution and business agreed. In 2002, a report on the contribution of the oil and gas industry to sustainable development was published in the joint OGP/IPIECA

³⁰⁴ UN Sustainable Development Knowledge Platform, available at: <https://sustainabledevelopment.un.org/>

³⁰⁵ Eweje G. (2007) Strategic partnerships between MNEs and civil society: the post-WSSD perspectives. *Sustain Dev* 15(1):15 – 27.

³⁰⁶ Agenda 21, available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

publication³⁰⁷: The oil and gas industry from Rio to Johannesburg and beyond—contributing to sustainable development. The publication investigates partnerships that are variously driven by research, policy or product; that comprise different combinations of NGOs, governments, international, governmental organisations, community groups, and oil and gas companies; and that include varying degrees of contractual responsibility. More importantly, through these publications, it is useful to see how the extractive industries respond to this worldwide trend.

The challenges of sustainable development in the oil and gas sectors often revolve around opposing interests. The industry is working with stakeholder groups at all levels all over the world to tackle these challenges. Each partnership is one of a kind, shaped by the demands of the joint undertaking and by the partners' specific needs. Some shared benefits and pitfalls of working in partnership can be identified by examining the whole set of case studies. There are at least seven benefits of cross-sector partnerships for sustainable development, according to the IPICA's partnership report³⁰⁸:

- 1) Stepping more securely into the arena of sustainable development;
- 2) Delivering higher quality project outcomes;
- 3) Facilitating development and growth of projects;
- 4) Improving stakeholder engagement;
- 5) Creating open communication channels with local communities;
- 6) Contributing to the local economic development of host communities; and
- 7) Contributing to broader regional or global sustainable development efforts.

A number of environmental NGOs have relationships with the extractive industries³⁰⁹. For example, the international mining corporation Xstrata strives to protect biodiversity in Australia and safeguard human rights in Colombia. Chevron eliminated the transmission of

³⁰⁷ The oil industry experience: technology cooperation and capacity building, contribution to Agenda 21, available at: <https://portals.iucn.org/library/node/26420>.

³⁰⁸ IPEICA (2006) Partnerships in the oil and gas industry, available at: <http://www.ipeica.org/publication/partnerships-oil-and-gas-industry>

³⁰⁹ Han, X. (2010) Environmental Regulation of Chinese Overseas Investment from the Perspective of China. *The Journal of World Investment & Trade*, Volume 11, Issue 3, pp. 375 – 408. See also Weng, L., Sayer, J. A., & Xue, L. (2017) Will China redefine development patterns in Africa? Evidence from Cameroon. *The Extractive Industries and Society*. 查道炯、李福勝、蔣姮 (2014) 中國境外投資環境與社會風險案例研究, 北京大學出版社, 北京.

HIV from mother to child in Angola³¹⁰. However, the performance and driving forces of various NGOs are substantially different.

4.1.2 Typologies for corporate-NGO engagements

Partnerships between NGOs and businesses are not static, but, as with other types of organisations, are dynamic and can progress over time³¹¹. It is significant to note that a partnership could contain elements from one or more of these typologies at the same time and are only meant to be illustrative of the different forms and contents of NGO-business partnerships. An NGO-business relationship could also develop and progress over time, where the partners increase their involvement as they build trust and share resources, but regression to a 'lower' or less intense type of partnership is also possible³¹².

1) Philanthropy – This is the most basic and conventional type of collaboration between businesses and NGOs. The most common type of partnership, it involves a one-way exchange of resources to the NGO from a business. They are limited in cooperative efforts and do not require the sharing of resources. Being simple in initiation and organisation with low levels of engagement and only a peripheral connection to business' activities are often characteristics of philanthropic partnerships³¹³.

2) Reciprocal exchanges – This type includes partnerships in which the relationship between a business and an NGO is constructed on an exchange of resources for a selected activity; a cause-related marketing campaign would be an example. In these sorts of partnerships, a company agrees to give a fixed sum of money for the sale of certain merchandise with the partner NGO's logo³¹⁴. The partnership between IKEA and UNICEF is an example where, for each teddy bear sold by IKEA, IKEA would donate €1 to UNICEF's work towards

³¹⁰ Ibid.

³¹¹ Austin, J. E. (2007). Sustainability through Partnering: Conceptualizing Partnerships Between Businesses and NGOs. In P. Glasbergen, F. Biermann, & A. P. Mol (Eds.), *Partnerships, Governance and Sustainable Development*. Cheltenham: Edward Elgar Publishing Limited.

³¹² Neergaard, P., Thusgaard, J., & Crone Jensen, E. (2009). Barriers and Success Factors in the Establishment and Continuous Development of NGO-Business Partnerships in Denmark. *Working Paper. CBS CSR. Copenhagen: Copenhagen Business School*.

³¹³ Jamali, D., & Keshishian, T. (2009). Uneasy Alliances: Lessons Learned from Partnerships between Businesses and NGOs in the context of CSR. *Journal of Business Ethics*, 84, 277–295.

³¹⁴ Googins B.K. and Rochlin S.A. (2000) Creating the Partnership Society: Understanding the Rhetoric and Reality of Cross-Sectorial Partnerships. *Business and Society Review*, 105(1), 127–144.

children's well-being. IKEA gets publicity and the public relations benefit of connecting to a good cause while UNICEF gets money for their mission³¹⁵.

3) Independent value creation – This type engagement means that both partners work together in order to generate desired value but have individual goals. This necessitates much more effort from both partners compared to the previous two types of partnerships³¹⁶; Neergaard et al. coined this as semi-strategic collaborations³¹⁷. An illustration of this is a partnership where the company contributes their employees' time and technical knowledge to an NGO's relief work during an international catastrophe. In this case, the partnership would offer an advantage to the company by inspiring their employees and humanising their image, and to the NGO by bettering the quality of their relief work³¹⁸.

4) Strategic partnerships - In these partnerships, partners work together purposefully “on a common problem which they would both like to see resolved”³¹⁹. Such endeavours create a much more reliant association between the partners, and “value will only be created through a mutually dependent exchange of ideas, resources and efforts”³²⁰. In these situations, the partners see difficult problems affecting their missions, and they are not in a place to resolve things by themselves and are thus required to cooperate in order to be successful. These are the real ‘strategic partnerships.’ According to partnership theory, strategic partnerships possess the most potential for added value because combining forces permit actors to arrive at outcomes that were unachievable by either partner on their own³²¹.

In countries with plentiful natural resources, Company-Community development agreements (CDAs) are extensively utilized in the relationships between investors and communities. Signed by businesses and affected communities, CDAs have many forms and terms across the world. For instance, Chevron had a Global Memorandum of Understanding (‘GMoU’) with Niger Delta communities in 2015³²². The conditions in this GMoU stated that

³¹⁵ UNICEF. (2009). IKEA Social Initiative. Retrieved 2014, 20-June from UNICEF's Corporate Partnerships: http://www.unicef.org/corporate_partners/index_25092.html.

³¹⁶ Googins B.K. and Rochlin S.A. (2000).

³¹⁷ Neergaard, P., Thusgaard, J., & Crone Jensen, E. (2009).

³¹⁸ Ibid.

³¹⁹ Neergaard, P., Thusgaard, J., & Crone Jensen, E. (2009).

³²⁰ Googins B.K. and Rochlin S.A. (2000).

³²¹ Ibid.

³²² Chevron's Model Community Empowerment Program in the Niger Delta, see full text: <https://www.chevron.com/-/media/chevron/stories/documents/nigeria-case-study-GMoU.pdf>.

Chevron should deliver benefits agreed upon by the host communities. A similar model is used by Shell, BP and other giant oil and gas companies to negotiate a CDA with the communities³²³.

Another popular type of CDA is the Impact and Benefit Agreements (‘IBAs’) between companies and communities. In Canada, mining corporations occasionally sign IBAs with host mining communities. These IBAs occur between indigenous communities in Canada and the Canadian Crown. In all types of Company–Community contracts, bilateral agreements have grown to hold a significant place in defining relationships concerning natural resource development and other pertinent activities. In some jurisdictions, legislation even asks for CDAs between companies and affected communities³²⁴. As discussed in the literature, company-community agreements are vital for the energy sector to have legal accountability and responsibility, and the International Bar Association also offers model CDA in section 22 of their Model Mine Development Agreement³²⁵.

Currently, a significant number of studies on the CDAs functioning globally already exist. Therefore this chapter focuses more on the partnerships between energy companies and civil society groups, particularly environmental and social welfare NGOs.

4.1.3 Cross-sector partnerships as private environmental governance

The developments outlined above have caught the notice of many social scientists with diverse disciplinary backgrounds, the most evident being sociology, political science, organisation studies and management.

In a relatively short amount of time, the various kinds of research have delivered a considerable volume of knowledge. The research to date has produced insights on three main topics related to business-NGO interactions³²⁶:

1) The drivers behind the appearance and an amplified significance of business-NGO interactions,

³²³ “Working with communities”, Shell Global, Model community agreements, available at: <https://www.shell.com/sustainability/communities/working-with-communities.html>

³²⁴ Neergaard, P., Thusgaard, J., & Crone Jensen, E. (2009).

³²⁵ IBA Model Mining Development Agreement Project, available at:

<https://www.ibanet.org/Article/Detail.aspx?ArticleUId=41f1038e-dcbf-44fd-ad17-898b7aa04a1a>

³²⁶ Van Huijstee M.M. (2010) *Business and NGOs in interaction - A quest for corporate social responsibility*, Faculty of Geosciences, Utrecht University.

2) The incentives for both parties (i.e. businesses and NGOs) to take part in business-NGO interactions, and

3) The conditions under which the character of the interactions may take a cooperative form.

The central idea in this chapter is ‘partnership’. Although many disciplines that study partnerships exist³²⁷, the idea can be focused into two central perspectives: actor perspective and institutional perspective³²⁸. Overall, these two perspectives are said to focus on varied facets of the partnership phenomenon and respond to a wide range of relevant questions. The first one, the actor perspective, deems partnership as an appropriate instrument for achieving set goals and problem solving of individual actors. The second, the institutional perspective, views partnerships as new mechanisms in the environmental governance regime.

1) The actor perspective

The actor perspective considers partnerships as tools for fostering the actor’s goals³²⁹. This perspective focuses on reasons for partners, the merits and demerits of partnering and identification of paramount success aspects. Notwithstanding, this actor perspective is criticised for not looking at the partnership phenomenon as a unique solution for fundamental societal challenges.

2) The institutional perspective

The second, the institutional perspective, looks at partnerships as new arrangements in environmental governance³³⁰. From this angle, the institutional perspective views partnerships as new arrangements in the modern environmental governance system that emerge naturally out of their institutional setting. The main issues researchers are concerned with is the part partnerships play and the roles they could accomplish in an assumed new environmental

³²⁷ Austin, J. E. (2007). See also Andonova, L. B. (2010). Public-private partnerships for the earth: politics and patterns of hybrid authority in the multilateral system. *Global Environmental Politics*, 10(2), 25-53.

³²⁸ Van Huijstee, M. M., Francken, M., & Leroy, P. (2007) Partnerships for sustainable development: a review of current literature. *Environmental Sciences*, 4(2), 75-89.

³²⁹ See Boué K and Kjær K (2010).

³³⁰ See Biermann, F., Man-san Chan, A. M., & Pattberg, P. (2007) Multi-stakeholder partnerships for sustainable development: does the promise hold? *Partnerships, governance and sustainable development: Reflections on theory and practice*, 239. United Nations Sustainable Development Knowledge Platform. See also International Civil Society Centre (2014) Multi-stakeholder Partnerships Building Blocks for Success’. Retrieved from: <http://icscentre.org/area/multi-stakeholder-partnerships>.

governance landscape. Features usually included in such analyses make up the driving forces behind the partnership tendency and the institutional setting of this tendency.

From an institutional perspective, the main issue is the real and presumed function and role of partnerships in a global environmental governance setting. This calls for collective determinations of actors throughout all sectors of society³³¹. Inter-sectoral partnerships with a sustainable development aim can be interpreted as one such new configuration, and primary concerns are the levels of inclusiveness or democracy and the legitimacy of partnerships³³². For instance, Patteberg³³³ discusses how the vital contribution of partnership can be unified into the democratic and sincere governance of global environmental affairs.

To sum up, the current partnership literature distinguishes two significant perspectives that focus on the diverse features of the partnership phenomenon and address difficult questions. The actor perspective concentrates on how partnerships work and frame partnerships as possible strategic tools for achieving stated objectives and for solving the problem of individual actors. On the other hand, the institutional perspective looks at partnerships as new arrangements in the environmental governance system that emerge naturally out of their institutional setting.

Beyond these two perspectives, there is a need to empirically understand the current cross-sector partnerships landscape in different industries, regions and cultural contexts. Also, it would be necessary to look at the politics and social context beyond these cross-sector partnerships. Such an effort is needed to understand the type of agreements, the frequency and location of agreements, as well as potentially positive and negative effects, which can only be assessed from a general overview plus in-depth case studies. Thus, this research chooses the oil and gas companies operating in Greater China, for a more comprehensive case study. In order to make comparisons between partnering patterns and to provide insights for international investment regulations, this chapter covers the case studies of the international oil giants, Chinese state-owned oil and gas companies and Taiwan's two major oil companies besides investing in this region.

³³¹ Ibid.

³³² Arts B. (2002) 'Green alliances' of business and NGOs; New styles of self-regulation or 'dead-end-roads'? *Corporate Social Responsible Environ Manage* 9(1):26 – 36.

³³³ Pattberg, P. (2004). Private environmental governance and the sustainability transition: functions and impacts of NGO-business partnerships. *Governance for industrial transformation*. Environmental Policy Research Centre, Berlin, 52-66.

4.2 Extractive industries and civil society in Greater China

Before starting the empirical analysis, it is helpful to provide the background of the extractive industries in Greater China, the geographies of civil society activities, and the research already available on this topic.

4.2.1 The extractive industries in Greater China

The Chinese mines are globally known for the immense danger they pose to mining workers, in addition to causing a significant portion of pollution, experiencing fatal accidents and posing severe occupational health problems³³⁴. The sites have caused a great deal of desperation in population who moved from rural areas looking for better opportunities in urban-based economies³³⁵.

Over the last decade, Chinese extractive corporations have made a great global debut³³⁶. They are not only expanding their operations in China but are also engaging in some notable foreign projects primarily in Africa and South America. As a result, the Chinese corporation has quickly risen to the top tier of global rankings of extractive industries (See Table 4.1).

Table 4.1: The largest Chinese and Western oil companies. Source: Production company websites; “Fortune Global 500, 2016“, published by July 2017

Company	Fortune 500 rank	Oil/gas Production Mn.bpd	Profits \$bn.
ExxonMobil	2	4.2	41
Chevron	6	2.6	19
Conoco Phillips	10	1.9	12
Sinopec	16	0.7	4
CNPC	25	3.7	15
Marathon Oil	108	0.3*	4
Sinochem	257	0.02	0.6
CNOOC	409	0.8	4

³³⁴ Gonzalez-Vicente, R. (2012). Mapping Chinese mining investment in Latin America: politics or market?. *The China Quarterly*, 209, 35-58. See also Zhou, C., Van Witteloostuijn, A., & Zhang, J. (2014). The internationalization of Chinese industries: Overseas acquisition activity in Chinese mining and manufacturing industries. *Asian Business & Management*, 13(2), 89-116.

³³⁵ Pattberg, P. (2004).

³³⁶ Post, S. C. M. (2016) Key takeaways from China’s 13th five-year plan and annual reports. See also Hasmath, R. and J. Hsu, eds. (2009) *China in an Era of Transition: Understanding Contemporary State and Society Actors*. New York and Basingstoke: Palgrave.

As reported by a notable energy consultancy based in Washington, a number of Chinese oil companies, such as Sinopec, CNPC, and CNOOC, are now competing with ExxonMobil to be the world’s greatest listed energy corporation³³⁷. Table 4.2 presents a comparison of the fundamental data of the four Chinese corporations listed on the Fortune 500 versus the largest four non-Chinese extractive companies.

Table 4.2: The largest Chinese and Western mining companies. Source: Production company websites; “Fortune Global 500, 2016,” published by July 2017

Company	Fortune 500 rank	Revenues \$bn.	Profits \$bn.	Home country
Arcelor Mittal	39	105	10	Luxembourg
BHP Billiton	183	39	13	Australia
CVRD (Vale)	235	32	12	Brazil
Baosteel	259	30	3	China
Rio Tinto	263	30	7	U.K.
China Minmetals	412	21	0.5	China
Chinalco	476	18	1	China
China Metallurgical Group (MCC)	480	18	0.4	China

The metal and mining companies that had some notable foreign production projects as of December 2016 are listed in Table 4.3 with their respective profiles.

³³⁷ The World’s Largest Oil & Gas Companies 2018: Royal Dutch Shell Surpasses Exxon As Top Dog, Forbes, 2018, available at <https://www.forbes.com/sites/clairepoole/2018/06/06/global-2000-oil-gas/#742e055e1d1b>. See also Nolan, P. (2012) Is China buying the world? *Challenge*, 55(2), 108-118.

Table 4.3 Profile of Chinese mining companies with overseas operations. Source: Production company websites; “Fortune Global 500, 2016,” published by July 2017

Company	Focus	Type	Listings outside China
Aluminum Corporation of China (Chinalco)	Mainly bauxite and aluminum	SOE	Hong Kong, New York
Baosteel Group Corporation	Iron and steel	SOE	None
Nanchuan/Bosai	Bauxite	Private	None
China Machinery and Electrical Equipment Export and Import Company (CMEC)	Engineering, construction, power stations, energy, mining	SOE	
China Metallurgical Group Corporation (MCC)	Engineering, construction; mining	SOE	Hong Kong (P)
China Minmetals Corporation	Metals mining and trading	SOE	Hong Kong
China National Geological and Mining Corp. (CGM)	Metals production and trading	SOE	None
China Non-Ferrous Metals Mining Group (CNMC)	Engineering, construction, mining	SOE	None
Jinchuan	Nickel and platinum	SOE	None
Luanhe Industrial Group	Steel and mining	Private	None
Shenhua Group Corporation	Coal and power generation	SOE	Hong Kong
Shougang Group	Iron and Steel	SOE	Hong Kong
Sinosteel	Steel and mining		Hong Kong (P)
Tonghua Iron and Steel	Iron and Steel	SOE	None
Wuhan Iron and Steel	Iron and steel	SOE	None
Yankuang	Coal	SOE	Hong Kong, New York

After China ‘opened up’ its economy in 1978 and entered the WTO in 2001, Chinese extractive corporations have played a notable role globally and also faced significant environmental challenges³³⁸.

As of now, the geography of Chinese extractive industries is still undergoing significant changes³³⁹. Some of the major national corporations are making mergers with local and small companies. The full list of all these companies is not available. The researcher therefore has decided only to discuss the oil and gas corporations of the extractive industries of Greater China, which makes this research feasible and doable.

4.2.2 State-owned companies (SOEs) in China

³³⁸ Global Environmental Institute (2013) *Environmental and Social Challenges of China’s Going Global*. China Environment Press. See also 韓秀麗 (2013) 中國海外投資的環境保護問題研究—國際投資法視角, 法律出版社, 北京.

³³⁹ Economy, E., & Levi, M. (2014). See also Leung and Zhao (2013) *Environmental and Social Policy in Overseas Investment: Progress and Challenges for China*. World Resources Institute. Liang et al. (2014) *The Corporate Responsibility to Respect Human Rights in China and Globally*. Global Business Initiative on Human Rights.

Due to the globalisation trend, China's policy of establishing a 'socialism market economy' (since 1979) has caused major changes in the layout of state-owned corporations³⁴⁰. Enterprises are being privatised where the state is the major shareholder.

The National Reform and Development Commission (NRDC) has been encouraging the companies to undergo mergers forming a small number of large, globally active corporations and to follow the novel concepts of corporate governance³⁴¹. Currently, this process is about complete for the oil sector and is on-going in the mining industry³⁴². However further changes are deemed necessary to merge companies into a small number of more significant, competitive corporation of each sub-sector.

State-owned corporations are expected to work to meet the overall objectives decided in the country's five-year plans. The State-owned Assets Supervision and Administration Commission of the State Council (SASAC) is the governmental body that holds the government's shares in the state-owned corporations. SASAC works abroad from the state's side and takes care of the state-owned entities of the corporations as directed by the law³⁴³. SASAC is responsible for promoting and directing the restructuring of SOEs. The council is also responsible for hiring and firing the CEOs of these enterprises under the guidance of the central government. The council validates the performances of the enterprises and proposes incentives or penalties for them when necessary.

The operational processes of Chinese extractive corporations, even being greatly different from their western counterparts due to greater involvement of the state, are substantially similar to those of the Western Companies³⁴⁴. Notably, the Chinese corporations have to compete for assets not only with the Chinese competitor but also with the international companies both in their homeland as well as abroad and are listed on the stock market hence making them answerable to shareholders. This is measured by factors like being listed as Global Fortune 500

³⁴⁰ Nolan, P. (2004) *Transforming China: globalization, transition and development*. Anthem Press. 單文華 (2014) 中國對外能源投資的國際法保護, 清華大學出版社, 北京. See also 葛察忠、夏友富、智穎颯、龍風 (2010) 中國對外投資中的環境保護政策, 中國環境科學出版社, 北京.

³⁴¹ Economy, E., & Levi, M. (2014). See also 馮並 (2015) 一帶一路 – 全球發展的中國邏輯, 高寶出版, 臺北.

³⁴² Greenovation: Hub (2014) China's Mining Industry at Home and Overseas – Development, Impacts and Regulation. Retrieved from: http://www.ghub.org/cfc_en/wp-content/uploads/sites/2/2014/11/China-Mining-at-Home-and-Overseas_Main-report2_EN.pdf.

³⁴³ State-owned Assets Supervision and Administration Commission China, <http://en.sasac.gov.cn/>

³⁴⁴ Shankleman J (2008) Going Global: Chinese Oil and Mining Companies and the Governance of Resource Wealth, Woodrow Wilson International Center for Scholars.

companies³⁴⁵ and improving corporate governing practices. Moreover, when these Chinese extractive corporations become members of international business associations like the IPIECA, they are also bound to follow the policies and guidelines issued by these bodies.

4.2.3 Corporate philanthropy in China

The number of NGOs operating in China has noticeably increased recently despite the many different types of restrictions and hurdles being created by political and regulatory bodies. The increasing number of NGOs ensures increased charity practices in the region³⁴⁶. Keeping this in mind, it must be noted that corporations are important because of the increase of charity activities and for their passive role in promoting activities related to civil society engagement in China. The socio-economic infrastructure of China comprises a noticeably uneven distribution of access to all forms of social services³⁴⁷. Because of this, philanthropy is regarded as an essential measure that can be implied to improve this situation, promote dialogue and help the activities related to social change in the country.

Businesses in China are using charitable activities as strategic tools of differentiation³⁴⁸. The recent trend shows clearly that businesses that engage in actual philanthropic activities have higher chances of survival. On the other hand, the businesses which ignore the need for engagement are condemned to public penalisation. This is evident from the increasing discontent particularly from the ones at the economic progression of the country³⁴⁹. Due to the increasing demand among the Chinese masses for a raised standard of life as characterised by a clean and safe environment, there is a considerable difference in transforming material conditions, particularly in the urban regions.

The tone of public dialogue has been greatly influenced by the increased use of internet and micro-blogging³⁵⁰. This has resulted in a substantial alteration in public opinion and thinking which is now considered to be more diverse, volatile and unforeseen. The internet can lead to public discontent being spread uncontrollably across the cyber-space; hence, the

³⁴⁵ Fortune Global 500 List 2018, available at: <http://fortune.com/global500/>

³⁴⁶ Schrader A & Zhang M, (2012) *Corporate Philanthropy in China: A Practitioner's Guide for Foreign Donors*, The Conference Board.

³⁴⁷ Fulda, A. (2015) *Civil Society Contributions to Policy Innovation in the PR China*: Palgrave Macmillan UK. See also Hasmath, R. & Jennifer H. (2008) "NGOs in China and issues of accountability." *Asia Pacific Journal of Public Administration* 30 (1), 1-11.

³⁴⁸ Ibid.

³⁴⁹ Nolan, P. (2012). See also Hasmath, R. and J. Hsu, eds. (2009).

³⁵⁰ Ibid.

corporations have considerably changed their style of dealing with the people. The companies that establish positive relationships with the citizens will surely take advantage of the opportunities as they arise.

For multinational corporations, the impact of the opacity and complexity of the non-profit sector in China is quite noticeable³⁵¹. They are mainly concerned with how they can spend their money on social activities in the most fruitful manner. Along with being confused by the setup of the Chinese social sector, these companies also face the challenge of dealing with the regulatory environment of China, which is quite different compared to Western nations³⁵². This is partially the reason for the blunder most of the MNCs make in choosing philanthropic activities that are mismatched to the strategic objectives or benefit from the evolving local resources³⁵³.

4.2.4 NGO landscape in China

After the political reforms and opening policy, the Chinese government relaxed its control over the society which resulted in a social space being created where a number of associations evolved³⁵⁴. Naturally, the fast-growing associations attracted the attention of scholars undertaking Chinese studies³⁵⁵. A number of the researchers studied Chinese non-profit sector with the western mindset.

It was soon evident to these researchers that the Chinese organisations were not comparable to their western counterparts. Most of the associations were initially formed as a government organised non-government organisations (GONGOs) run or mainly controlled by the government agencies regarding funding, employment and membership. Some of the well-reputed GONGOs like the Chinese Red Cross, the Women's Federation, trade unions and China Disabled People's Federation are all grouped in this category.

After investigating these organisations, some researchers established that only a very few numbers of these organisations could be regarded as NGOs by the western standards³⁵⁶.

³⁵¹ See Liang et al. (2014).

³⁵² Leung and Zhao (2013). See also Global Environmental Institute (2013).

³⁵³ Chu, C., (2011).

³⁵⁴ Hasmath, R. & Jennifer H. (2008).

³⁵⁵ Calhoun, C. and G. Yang (2007) Media, Civil Society, and the Rise of a Green Public Sphere in China, *China Information*; (21) 211-34. See also Howell, J. (2007) Civil Society in China: Chipping Away at the Edges. *Development* 50(3): 17-23.

³⁵⁶ Ibid.

According to the generally accepted definition of NGO as established by Salomon and Anheier³⁵⁷, NGOs have five main characteristics, i.e. they are private, formal, non-profit, voluntary and self-governing³⁵⁸. However, many of the Chinese organisations do not qualify as autonomous or voluntary.

In addition to these, in the late 1990s, some new grassroots associations evolved in the society with a focus on issues concerning the public like womens' rights advocacy and environmental conservation. Most of these started as registered secondary organisations or business bodies. With the passage of time, some managed to become listed as social enterprises or other non-commercial organisations. These organisations are distinct from the GONGOs. They are established by individuals, are self-governing, voluntary, formally organized and non-profit distributing. These organisations are referred to as grassroots NGOs and are actually the real NGOs in China.

4.2.5 CSP research on China

Over the past few decades, China has reportedly been focusing on ways to increase its GDP. The steps China has taken to grow its GDP have however set in motion new social challenges that have urged policymakers to give priority to processes and approaches that will help with the application of social justice and will continue the prosperity of the entire nation³⁵⁹. In the thirteenth five-year plan, one of the key objectives is to focus on environmental preservation and social welfare³⁶⁰.

Likewise, over the period of the last few years, the number as well as magnitude of grassroots NGOs has increased sharply. The growth is based on a number of crucial factors. After the Sichuan earthquake in 2008, not even a single institution in China was fully prepared to take over the gruesome task of full-scale post-quake disaster relief. This gap in requirement and provision of services created a great opportunity for grassroots NGOs to be born and evolved. Moreover, the government has reportedly reduced the hurdles from the process of

³⁵⁷ Mei, Y (2012) Corporate Communication Handbook for NGOs, China Association for NGO Cooperation, Available via <http://www.cango.org/showProject.aspx?id=348>.

³⁵⁸ Ibid.

³⁵⁹ Avory, B (2014) Three Lessons from BSR's CiYuan Initiative: Building Corporate-NGO Partnerships in China, BSR Insight, Available at: <http://www.bsr.org/en/our-insights/bsr-insight-article/three-lessons-from-bsrs-ci yuan-initiative>.

³⁶⁰ China's 13th Five-Year Plan for Ecological & Environmental Protection, available at: <http://www.chinawaterrisk.org/notices/chinas-13th-five-year-plan-2016-2020/>

NGO registration mainly by reducing manifold bureau sponsorship to just one bureau. Even after this significant change, some NGOs still complained that the new policy has not reduced the complications involved in the process as a whole particularly for the NGOs with little networking resources³⁶¹.

Since the very inception of the very first NGOs in China in the 1980s, a plethora of challenges has been witnessed, and they are not likely to end any time soon³⁶². The problems like lack of professionals and inconsistent funding in the grassroots are just a tip of the iceberg. Despite the problems, the private sector is still striving to contribute to society and the environment positively. The private sector can play its role not only by providing financial assistance but also by providing technical expertise, their time and products to the new and evolving NGOs so that they can better meet their objectives. On the other side, the NGOs do also reciprocate by offering expertise in areas they have experience in, and successfully executing the projects on the ground. So far the literature on partnerships has given some insights into their performance and impact on the society³⁶³.

More recently, Ogilvy Earth and Brown³⁶⁴ started a qualitative and quantitative analysis that aimed to establish a relationship between corporations and NGOs in China. They mainly focused on learning the way partnerships are being started, developed and continued between two parties. They studied more than 100 NGOs and about 44 corporations and interviewed a large number of significant players in the sector.

Through the interviews, they established that a number of these relationships are based on the need to enhance public relations. They also noted that well-established NGOs have more potential to bring benefit to the brands, more than smaller NGOs and the emphasis is hence on them in the majority of the cases. This fact was supported by their research findings that maintained that 91% of the companies undertook CSR to improve their corporate image rather than to provide social services.

³⁶¹ Avory, B (2014).

³⁶² Schrader A & Zhang M, (2012). See also Yeh, Emily T. (2005) Green governmentality and pastoralism in western China: 'Converting pastures to Grasslands', *Nomadic Peoples*. 9(1), 9-30.

³⁶³ See Stalley, P. (2006) *A Double-edged Sword: Foreign Firms and Environmental Governance in China*. (PhD), George Washington University.

³⁶⁴ OgilvyEarth and Millward Brown (2013) The future of CSR - NGO Partnerships, Available via http://www.ogilvy.com.cn/cds/news/president.aspx?con_id=3803&items=6.

The report did also witness a tendency of increased CSR reporting in China with a growing number of corporations presenting their annual reports to take their initiatives forward³⁶⁵. The corporations mainly present rather vague information that is not based on any current news or any project that is supposed to need NGO collaboration. The main findings of the research carried out so far can be summarised in these three points:

1. The driving forces behind the birth and elevated importance of CSP setups;
2. The benefits of engaging in CSP engagements for private bodies (NGO and businesses);
3. The circumstances which are likely to transform the interactions to collaboration.

4.3 CSP landscape in Greater China

In a world with limited resources and several global problems, cooperation between NGOs and corporations can be an efficient way to get the most out of the restricted resources to take care of significant issues. However, this hypothesis must be evaluated in light of factual data. Hence, this part provides the empirical analyses of CSPs carried out by three groups of oil and gas corporations in Greater China, including the international oil companies, Chinese state-owned oil companies and Taiwan's two major oil and gas companies.

4.3.1 International oil companies

As there are some NGOs operating in China which are continually changing, it is not possible to keep a full record of these non-profit entities. In order to evaluate the research hypothesis, the author has used the approach of collecting data from limited oil and gas corporations based in greater China.

In Greater China, three types of oil and gas companies are working which are the international, Chinese state-owned and Taiwanese. The IPIECA and OGP provide the list of important global oil and gas companies. This chapter starts with analysing these two lists and then evaluates the companies based on standards for in-depth study. The three standards on which the companies are evaluated are 1) Does the company maintain at least one branch office based in Greater China? 2) Has the company set up a Chinese Website or a Website that focuses on its operations in Greater China? 3) Does the company have its CSR reports written in Chinese?

³⁶⁵ OgilvyEarth and Millward Brown (2013).

According to the lists issued by OGP and IPIECA, 72 oil and gas companies are operating around the globe which are either working with or are in a joint venture or retail agreement with the Taiwanese/Chinese oil and gas companies. Out of these 72 companies, 18 do have at least one branch office in Greater China, most in Beijing or Shanghai. Only a very few numbers of these companies operate a Chinese contact office in southern mainland China. For example, ConocoPhillips has an office in Shanghai.

Regarding the next requirement, the author has pointed out that only 7 out of the 18 companies have published CSR reports based on their projects in China and have websites in Chinese. With these two conditions fulfilled, it is safe to say that these 7 oil corporations namely, Chevron, BP, ConocoPhillips, Statoil, Shell, ExxonMobil and Total, are seriously concerned about the Greater China energy markets. Table 4.4 shows the profiles of the international oil and gas companies.

Table 4.4 Profiles of international oil and gas companies in Greater China

International Oil and Gas Company	China Office	IPIECA Membership	OGP Membership	CSR Report On China	Chinese Website
Anadarko Petroleum Corporation	✓	✓	✓		
Addax Petroleum	✓	✓	✓		
BG Group	✓	✓	✓		
BP	✓	✓	✓	✓	✓
Chevron Corporation	✓	✓	✓	✓	✓
ConocoPhillips	✓	✓	✓	✓	✓
BG Group	✓	✓	✓	✓	
BP	✓	✓	✓	✓	
ExxonMobil	✓	✓	✓	✓	✓
Chevron Corporation	✓	✓	✓	✓	✓
ConocoPhillips	✓	✓	✓	✓	✓
BG Group	✓	✓	✓	✓	
Hess Limited	✓	✓	✓		
Nexen Inc.	✓	✓	✓		
Petróleo Brasileiro SA	✓	✓	✓		
Qatargas	✓	✓	✓		
Saudi Aramco	✓	✓	✓		
Shell	✓	✓	✓	✓	✓
Statoil	✓	✓	✓	✓	✓
Total	✓	✓	✓	✓	✓
Woodside Energy	✓	✓	✓		

Every single one of these 7 oil corporations working in China are members of OGP and IPIECA and are registered with the international stock markets.

After shortlisting the companies for detailed study, this research move on to review all of their CSR reports and websites, with a particular focus on community/stakeholder engagement and other linked sections. The research did also find out the specific NGO partners of the targeted companies. The author went as far as contacting the companies directly to receive an update on their collaboration with the NGOs. Table 4.5 shows 43 multi-sector partnerships of the 7 global oil and gas companies and their NGO associates.

Table 4.5 NGO-Corporate Partnerships - International Oil & Gas Companies

NGOs / International oil and gas companies	BP	Cheveron	Conocophilip	ExxonMobil	Shell	Statoil	Total
China Children and Teenagers Fund		✓					
Boys' and Girls' Clubs Association of Hong Kong		✓					
Jane Goodall Institute		✓					
China Women's Development Foundation		✓					
Operation Smile		✓					
Red Cross Society of China		✓					
Asian Injury Prevention Foundation		✓					
Bridge2China		✓					
Light & Love School / China Social Welfare Education Foundation			✓				
China Association of Social Workers (CASW) and the TEDA International Cardiovascular Hospital (TICH) of Tianjin			✓				
International Crane Foundation			✓				
Local NGOs in Bohai Bay Area			✓				

U.S.-China Environmental Fund Badaling Special Zone Administration and Beijing Badaling Tourism General Company			✓				
Sunshine Home			✓				
Tianjin Dream Factory and Liu's Institute			✓				
Child Development Charity Council							
Yongning Education Aid Center			✓				
China Children and Teenagers' Fund			✓			✓	
France Marie Stopes International							✓
China Youth Development Foundation							✓
Franco-Chinese Foundation for Sciences and their Applications (FFCSA)							✓
Junior Achievement	✓						
Beijing Human and Animal Environmental Education Center (BHAEEC)	✓						
The Suonandajie Nature Protection Station	✓						
China Charity Federation (CCF)				✓			

China Charity Federation and the Hong Kong Red Cross				✓			
Hong Kong Arts Association				✓			
Practical Skills Training Center for Rural Women				✓			
Junior Achievement				✓			
Road Safety Council and Kwai Tsing District Council's Road Safety Campaign Committee				✓			
Mobil China Environmental Education Fund / State Environmental Protection Administration				✓			
Global Village of Beijing				✓			
Environmental Groups in HK				✓			
Holland Wetlands International and the International Union for the Conservation of Nature(IUCN)					✓		
Friends of Nature					✓		
Institute for Environment and Development (IED)					✓		
Fuping Development Institute					✓		
China Foundation for Poverty Alleviation					✓		

Gasu Women Association Fuping Development Institute					✓		
World Resource Institute Institute for Environment and Development					✓		
China Association of Rural Energy Industry					✓		
China Foundation for Poverty Alleviation					✓		
Friends Of Green China Tianjin					✓		

Shell has 10 CSPs which is the highest number as compared to other international oil and gas corporations. ExxonMobil and ConocoPhillips follow Shell with 9 CSPs each. BP has established 4 CSPs whereas Total has 2. Statoil has the least (only 1) CSP with the China Children's and Teenagers' fund. The international corporations tend to provide parallel cooperation to big GONGOs such as the China Foundation for Poverty Alleviation and other international foundations like the WWF. This chapter will address this point in further detail, focusing on more qualitative findings.

4.3.2 Chinese state-owned companies

This research focuses on the 4 largest Chinese oil and gas corporations, and all of them are state-owned. Hence, this research will focus on all four state-owned companies and their partner NGOs. Below is the profile of Chinese state-owned oil and gas companies presented as Table 4.6.

Table 4.6 Profiles of the Chinese state-owned oil and gas companies

Company	IPIECA Membership	OGP Membership	International Stock Market registered
CNOOC	✓	✓	✓
CNPC		✓	✓
Sinochem			✓
Sinopec	✓	✓	✓

The four Chinese state-owned oil corporations, China National Petroleum Corporation (CNPC), China National Offshore Oil Corporation (CNOOC), China Petroleum and Chemical Corporation (Sinopec) and China National Chemicals Import and Export Corporation (Sinochem), all have extensive global presence. All are listed on the international stock markets, such as the New York and London stock markets. Moreover, three of them have a membership of OGP (CNOOC, CNPC and Sinopec) and two of the four companies are members of IPIECA (CNOOC and Sinopec).

As members of industry international associations, they are bound to follow the guidelines or rules issued by these international bodies. This collectively translates to the Chinese state-owned oil and gas corporations being under the global isomorphic pressures both from the international financing partners or the industry associations.

Table 4.7 sheds light on 18 cross-sector cases of cooperation between the 4 Chinese state-owned oil and gas corporations and their NGOs partners.

Table 4.7 NGO-Corporate Partnerships - Chinese National Oil & Gas Companies

NGOs / Chinese state-own oil companies	CNOOC	CNPC	Sinochem	Sinopec
China Foundation for Poverty Alleviation		✓		
China Woman's Development Foundation		✓		
China Poor Mother's Foundation		✓		
Red Cross (South Osaka, China)	✓	✓		
Lifeline Express	✓			✓
CNOOC Foundation Marine Environmental and Ecological Protection Public Welfare Foundation	✓			
China's Children and Teenagers' Fund	✓			
China Legal Aid Foundation	✓			
China Indonesia Thousand Islands Local NGOs	✓			
Calgary Homeless Foundation	✓			
China Next Generation Education Foundation			✓	
Zhoushan Municipal Charity Council			✓	
Far East Horizon Charity Fund			✓	

Healing the Children			✓	
WWF & Hevecam Campo Ma'an				

CNOOC has 7 CSPs within its own company to take care of corporate social responsibilities. Sinochem is currently working with 5 CSPs whereas CNPC has 4 CSPs. Sinopec, however, has just one CSP with the Lifeline Express. The majority of these CSPs are in collaboration with the GONGOs like the China Foundation for poverty alleviation, China Women's Development Foundation, China's Children and Teenagers' Fund and China Next Generation Education Foundation.

4.3.3 Two major Taiwanese oil and gas companies

The Taiwanese energy markets including oil, natural gas and electricity, are not entirely liberalised. According to the current regulations³⁶⁶, these energy markets are not fully open for international oil and gas corporations. This regulatory environment makes Formosa Petroleum

³⁶⁶ Natural Gas Enterprise Act, Ministry of Economic Affairs Taiwan, full text: <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0130045>.

Chemical Group and CPC Taiwan become the only two stakeholders of this industry in Taiwan as there is no permission for the international oil and gas corporations.

Hence, this chapter actually focuses on these two Taiwanese oil and gas companies and their partnering NGOs. Table 4.8, below, shows the profiles of the two main Taiwanese oil and gas companies.

Table 4.8 Profiles of the two major Taiwanese oil and gas companies

Company	IPIECA Membership	OGP Membership	International Stock Market registered
CPC Taiwan	-	-	✓
Formosa Petrochemical	-	-	✓

CPC Taiwan is a state-owned oil and gas company and is the primary hub of Taiwan’s Petrochemical industry. Before February 9, 2017, the company was referred to as Chinese Petroleum Corporation (CPC) until the board of governors changed the name of the company on the said date effective immediately. Formosa Petrochemical Corporation (Formosa Petrochemical) on the other hand is the only private oil corporation that is allowed by Taiwan’s Government to operate on the island.

CPC Taiwan and Formosa Petrochemical are both listed in the international stock markets, but neither of the two is a member of IPIECA or OGP. Resultantly they are not bound to follow the partnering principles, guidelines and regulations issued by these industry associations (for detail check Appendix). This added to the un-liberalised energy market which can lead to an even more isolated situation for the Taiwanese Petrochemical industry.

Table 4.9 displays a total of 7 cross-sector partnerships between the two Taiwanese companies and their partnering NGOs.

Table 4.9 NGO-Corporate Partnerships - Taiwanese major Oil & Gas Companies

NGOs / Taiwanese oil companies	CPC Taiwan	Formosa Chemical
Formosa Foundations		✓
Jane Goodall Institute	✓	
World Vision	✓	
ROC Disable Association	✓	
Taiwan Smile Group	✓	
Taiwan Toy Library	✓	
Taiwan University Medical School Fund	✓	

4.3.4 ‘Critical cooperation’ is emerging both in the literature and CSP practices

Looking into the current CSP environment in Greater China, a new pattern of collaborating is emerging, which is the case of critical cooperation led by basic level environmental NGOs.

Critical cooperation is a combination of the co-operational and adversarial approaches and can be moulded easily to be used at different stages of cross-sector typologies and engagements. Practically, the NGOs using this approach tend to criticise the corporations at first, clearly demarcate the problem and can then force the corporations in question to be more environmentally responsible in their operations. In this way, the NGOs can be more effective when they target the major oil and gas corporations.

At this level, the study maintains that ‘Critical cooperation’ is an effective alternative way for the NGOs, particularly the grass root level ones and the indigenous Chinese communities of China to engage with the major petrochemical corporations.

As suggested by the literature, critical cooperation across both common and conflicting interests needs the focus on at least four aspects of the relationship³⁶⁷: 1) balancing power asymmetries 2) acknowledgement of critical rights 3) negotiation on both conflicting and converging interests and 4) managing stakeholder relations.

As evident from the above discussion, the situation for grassroots NGOs is quite difficult in Greater China. The external regulatory and political atmosphere is not particularly healthy and also the businesses do not generally consider the grassroots as qualified enough to work

³⁶⁷ OgilvyEarth and Millward Brown (2013).

with. Hence, it is the best strategy for the grassroots to start with criticism and then force the corporations to cooperate with them at the later stages. The grassroots should find out the problems and then lead to communication with the corporations. Once the companies have realised the serious nature of the situation based on the recommendations of the NGOs, they should act in such a way as to rectify the situation causing concern to the NGO. It is not a viable option for the grassroots to wait for financing from the major oil corporations. In that case, the relationship is imbalanced, and it becomes impossible to make negotiations and keep the critical rights. This chapter quotes one such recent example to back this argument (Table 4.10).

Table 4.10 Ma Chun's Critical Cooperation Approach

Back in 2012, Apple INC changed its policies regarding withholding any information related to the environmental impacts of its factories in China. This change was mainly due to the efforts of Mr Ma Jun, who won the 2012 Goldman environmental prize in recognition of his efforts.

Ma Chun is an ex-journalist and the founder of the Institute of Public and Environmental Affairs (IPE) of China. IPE has revealed over ninety thousand water and air pollution events by domestic as well as foreign companies operating in China. Ma Chun believes in the power of citizens and the value of information transparency. Through the Green Choice Supply chain of IPE, (which has 41 local NGO partners) IPE has educated customers to use their purchasing power to create an impact on corporate manufacturing and management practices. Even without any regulatory within the government, IPE has successfully agreed more than 500 companies to make public their efforts and plans regarding cleaning up of their facilities. Now, IPE is working in collaboration with major brands like Sony, Levi's, Unilever, GE, Coca-Cola, Siemens, Nike, Wal-Mart H&M, Vodafone Lenovo and Adidas and all of these corporations now refer to the digital mapping regularly and do self-regulating.

IPE has most recently been involved in high profile effort regarding the US IT giant Apple. Apple is the only company to not respond to the requests of IPE. Apple made a long-term policy stating not to disclose its supply chain information. IPE worked with some other NGOs to launch a campaign by the name of 'Poison Apple' to protest against the company's non-disclosure of supply chain information. Finally, in 2011, Apple reached out to the Chinese environmental organisations and began a movement to force its suppliers to make their practices cleaner and environmentally responsible. Ma Jun and his NGO colleagues keep contact with Apple staffs. It is due to the efforts of Ma Jun that the Tech Giant is making its factories more environmentally friendly and is taking care of the human rights issues.

Source: China's Institute of Public and Environmental Affairs (IPE)

4.4 Evaluation: Practices, effectiveness and implications

The regulatory infrastructure and policies ruling over the non-profit sector have an enormous external impact on CSPs in greater China. This chapter, hence, focuses on and elaborates on three observations about external influence in the coming sections.

4.4.1 The political economy of CSP in Greater China

This part starts by providing three observations on the political economy of CSP in Greater China, including, political context, the role of third parties and regulatory environment for the development of CSPs.

1. The political aspect of the development of civil society in China is considerably different as compared to the west

This perspective can lead to quite different practices, regulatory infrastructure and principles. Understanding local facts and the particular challenges they have to cope with is critical for successful operation of NGOs in China. The industry is ruled by its own distinctive set of principles, derived from China's socialist market and autocratic political system. A greater deviation is observed because of the reason that the Chinese government plays a tripartite role in the civil society sector being the direct partner, regulator and partner through government-owned and related agencies.

A significant portion of the non-profit sector is under the direct control of the government, and all of the major agencies are owned by the government or mutually connected. Working in this atmosphere needs a patient attitude and strong commitment to understanding how things are supposed to work and being flexible and adaptable to the prevailing conditions.

There exist strong political imitations that control scale, topics and magnitude of public discussion and the functioning of NGOs. The government of China is supportive of the NGOs³⁶⁸. The government tends to collaborate with these organisations on points that are in favour of the government's own public welfare agenda (for example health, environment and education). The government is however not supportive of the NGOs whose operations tend to be contradictory with the authenticity of the national policy. NGOs do have to bring their focus areas in line with the political landscape of the country.

³⁶⁸ Avory, B (2014).

The situation in Taiwan, on the other hand, is an entirely different one. The NGOs of Taiwan have more freedom to even challenge the government and businesses.

2. The current regulatory atmosphere ruling over the non-profit industry is significantly restrictive

According to the Chinese regulatory framework, there is still a high number of barriers for setting up an NGO in mainland China. These barriers consist of a rigorous registration procedure, the requirement of a public sponsoring entity, very high minimum number of members and large endowment and capital minimums. Moreover, there also exist severe restrictions on public fundraising, the establishment of branch offices and eligibility for tax exemption³⁶⁹.

The current rules and policies in China are restrictive and lack detail and clarity in a number of critical areas. A thorough understanding of China's national and local regulatory system as well as the limitations on operation and management of non-profit organisations is immensely important to make better decisions on proper giving channels and partnering bodies and also for establishing and continuing impactful and effective corporate-NGO partnerships.

The number of registered NGOs in China has doubled over the last decade. As of 2017, around five hundred thousand organisations were operating across China. During the last five years, the amount of donations given to these non-profits has rapidly increased from 1.6 billion US Dollars in 2012 to 15.2 Billion US Dollars in 2017³⁷⁰. To compare that amount to the US, the total charitable giving in China was just 5 per cent of that in America. Based on this, it can be assumed that there is an opportunity for expansion in this sector.

The prevailing political and regulatory regulations do affect the CSP operations. The sustained increase and development of local NGOs should lead to a valuable chance for corporations to make constructive relations for CSR activities in China.

3. There are enormous opportunities for 'Matchmakers' in Greater China

The fast growth of China's non-profit sector means there are new opportunities for new cross-sector operations, but that depends on the assumption that the regulatory environment

³⁶⁹ "China law puts foreign NGOs under tighter control", *Financial Times*, <https://www.ft.com/content/a61994da-3ec1-11e8-b7e0-52972418fec4>.

³⁷⁰ NGOs in China, *South China Morning Post*, available at: <https://www.scmp.com/topics/ngos-china>.

and market regulations continue to move in a favourable direction. There are many growth limitations for the grassroots NGOs in China. The uncertain legal status of as many as one-third of these bodies, their lack of proper infrastructure and the continued dominance of the GONGOs leave the grassroots Chinese NGOs struggling for resources, funding, new members and volunteers.

In addition, contrary to the rest of the world, public fundraising is not possible for the grassroots both online and offline. With both public as well as government funding extremely difficult to secure, grassroots NGOs must learn the way of building effective working partnerships with the corporate sector if they want to sustain and continue their operations. Taking this all into account, some organisations have come forth to help bridge the gap between the two sectors and to create opportunities for partnership by playing the role of matchmaker.

The most important role played by these organisations is that of a facilitator to mitigate the issues regarding working with major corporations as this process can overwhelm the small organisations with little resources and insufficient experience. NPI is one such organisation working in Shanghai. According to the official website, NPI has collaborated with corporations like Baidu, China Merchants Bank and Lenovo³⁷¹.

4.4.2 Performance of these CSPs

Then we proceeded to examine the performance of these CSPs in Greater China. Here this study again points out three key findings.

1. Insufficient voluntary collaboration notably at real strategic partnership level among oil corporations and NGOs in greater China

In comparison to the Western world, the development of CSPs in China is at a relatively initial stage. After studying 67 CSPs, it is safe to say that most of the current CSPs in this region are yet at the philanthropy level. IPIECA has never selected a single CSP case from Greater China as a notable collaboration example or case study.

Even though, there are still some challenging and beneficial collaborations. The current CSP landscape is also regarded to be under a process of mass transformation. Increasing number of corporations are looking for opportunities to transform from sponsors to actual

³⁷¹ NPI Shanghai, official website (Chinese) <http://www.npi.org.cn>.

partners of the NGOs. However, they do accept that there is an uneven distribution of resources across the country.

Contrary to that, Formosa Petrochemical uses a foundation approach. They found their foundations and direct the funding to donations for the area they are concerned about. But, this must be noted that these collaborations are yet at a sponsor/charity level and cannot be regarded as real strategic partnerships.

2. As of now, a considerable portion of the CSPs in greater China is company dominated

The industry insists that they are making contributions to the societies, but, as said by the majority of the NGOs, these collaborations are not actually community-based.

The geographies of the CSPs operating at this time indeed draw our attention. Majority of the engagements are between the Chinese GONGOS and China's state-owned oil companies, and they are largely at the sponsor/charity level. All of these NGOs have offices in Shanghai, Beijing and Taipei. However, the extractive operations do not take place in these major cities, and the power and resources are not evenly distributed. Ideally, inter-sector collaborations should be issue based. All the stakeholders involved should sit down on the same table and debate on the issues created by the operations of the corporations.

It is a fact that these engagements do benefit the society in some ways but they are not directly related to the communities where they are operating in. The current CSPs in greater China are not useful to cope with the actual challenges rather they work as corporate charities. GONGOS do receive important resources from the state-owned oil corporations, but they also work at basic philanthropy/charity level.

3. The government acts as the main factor for developing CSPs

It is a common concept that CSPs among the private sector and NGOs are only governed by the parties involved. However, this chapter, using empirical data, infers that the Chinese government does play a vital role in the formation of the CSPs. With the support of the authorities, the CSP can be founded and operated without any hurdle. The case study involving BP and WWF China about environmental education can be a good example here³⁷².

³⁷² See WWF China, news section: <https://en.wwfchina.org/?2652/Spreading-the-Word---Nick-Young-reports-on-BP--WWFs-Environmental-Education-Programme-in-China>.

4.4.3 Companies' strategies

The following paragraphs investigate the way the energy industry operating in the Greater China region, where it is evident that the businesses use the CSP in the strategies of their corporations. Talking of the corporations' partnership priorities, this research narrows down to three key findings below:

1. International, Chinese state-owned and Taiwanese oil companies have different partnership tending in terms of 1) selection of partners, 2) Types of partnerships 3) Areas of work/projects

Keeping in view the unique operational environment of China, international companies have to decide how to distribute their donations effectively and also how much involvement is needed from their side to oversee these charitable contributions. International oil and gas corporations have a greater tendency to partner up with the international NGOs and notable GONGOs in China. It is critical for MNCs to opt for the channels that are related to the corporation's presence, proficiency level and involvement in the Chinese region. It must also be noted that the MNCs do want to establish and continue stable and constructive relationships with the Chinese government, particularly in the oil and gas industry. All the Chinese GONGOs receive funding from the Chinese authorities and are a part of the government³⁷³. However, this fact cannot be overlooked, as evident from the case studies, that there is still room for better Business-NGO cooperation in this area.

The Chinese state-owned corporations behave somewhat conservatively on this partnering issue. They do not usually collaborate with the Chinese grassroots NGOs and do not have a strong trust on the international NGOs. Hence, they donate their money to the GONGOs comfortably. This behaviour can be easily explained by the fact that both these bodies are a part of the Chinese government and the personnel working in one organisation often get transferred to the other after a few years. For instance, the current CEO and chairman of CNOOC used to work for the high profile Chinese GONGO³⁷⁴, i.e. China Foundation for Poverty Alleviation³⁷⁵. Hence collaborating with their former colleagues is a much easier

³⁷³ Hasmath, R. & Jennifer H. (2008).

³⁷⁴ Hasmath, R and Hsu, J.Y.J. (2014) "Isomorphic Pressures, Epistemic Communities and State-NGO Collaboration in China", *The China Quarterly*, 2014.

³⁷⁵ China Foundation For Poverty Alleviation, official website: <http://en.cfpa.org.cn>.

option for the Chinese state-owned oil companies and it is usually a way to show that they have modern CSR awareness.

In comparison, Taiwanese oil corporations tend to prefer the local Taiwanese NGOs. Most of the notable international NGOs have not established their branch offices in Taiwan, and the civil society is mature and developed as of now. The local NGOs of Taiwan have a long history of working in some areas like social welfare, environmental protection and human rights³⁷⁶. Moreover, the Taiwanese government is very helping for these non-profit organisations, and they can quickly get funding from both governmental and public bodies. However, lack of international NGOs working in this area means that there is reduced global isomorphic pressure on development of Business-NGO partnerships in Taiwan.

2. International, Taiwanese and Chinese state-owned oil and gas corporations have different understandings of their partnering NGOs

Taiwanese oil corporations understand the capacities of their NGO partners in more detail. The reason behind this is that the development of civil society in Taiwan is more mature as compared to China. Taiwan's third sector is extremely professional, and they openly criticise the major corporations and the government. They have a well-established professional reputation and have been keeping an eye on the public and private sector for a very long period.

In mainland China, however, the evolving NGO culture is still a new phenomenon, and the regulatory infrastructure seems to be a bit too restrictive as of now. This means that both the international as well as local Chinese oil corporations do not have very high-level information about the authenticity and capacities of their NGO partners, this is more evident with the grassroots NGOs. However, the case study of Exxon & Global Village Beijing does show a bright perspective for grassroots NGOs if they cooperate with the international corporations³⁷⁷.

3. Oil companies have different strategies while working locally and abroad

This is a good point to examine closely. The Chinese oil companies tend to have changed strategies when they step into a new market. For instance, the four major Chinese national oil corporations have recently made notable investments in Latin America and South America.

³⁷⁶ Yaziji M. and Doh J. (2009).

³⁷⁷ China operations, ExxonMobil, available at: <https://corporate.exxonmobil.com/en/company/worldwide-operations/locations/china>.

They face some difficult situations and conflicting issues when working in the African states like Cameroon. So, now they are starting to learn how to engage with the local communities in a better way and bridge the cultural gaps. This is the exact opposite of the situation when the Chinese companies stay in the domestic territory and work with the Chinese GONGOs.

The international and Taiwanese oil corporations, on the other hand, do not act differently while working in their homeland or abroad. They maintain that their projects are the subject to the same standards and the same partnering strategies regardless of where they work.

4.4.4 NGOs' partnering strategies

Focusing on the partnering strategies applied by the NGOs, this chapter infers three key findings from the data which are:

1. NGOs based in mainland China are willing to work with corporations and believe that collaboration can be helpful for them in achieving their organisations' objectives

It is believed equally by the corporations as well as the NGOs that those CSPs can prove to be beneficial for social, cultural, economic and environmental issues.

NGOs operating in the grassroots face a plethora of challenges. Most of them do not have proper infrastructure and also face considerable competition from the GONGOs. These organisations do not get proper attention regarding funding, staff recruitment and resource acquisition. Moreover, the Chinese regulatory environment does not allow online or offline fundraising, so the only choice for the grassroots is to maintain good working partnerships with the corporate bodies. However, recently some establishments have started the task of bridging the gap between the corporate sector and the NGOs. Ultimately, the NGOs, especially the grassroots, will benefit from this trend.

The non-profit sector in China is increasingly becoming reliant on sponsorship from companies, especially the local and grass-root NGOs. The growing opportunities for philanthropic operations are receiving boosts from the substantial portion of the society that is mainly under the control of private investors and people in the business. This willingness to donate resources has created some opportunities for corporate charity.

2. Even though most of the NGO partners were focusing on a diverse range of fields, a closer look reveals that social/community improvement and education are the areas where non-profit organisations and companies tend to invest the most of their efforts.

Even though the areas mentioned above do require the most attention, many NGOs have reportedly ventured into environmental conservation, which is said to be at the core of a number of corporations. Researchers maintain that this trend is due to media influence.

The change from charitable donations to more sustainable projects is a clear indicator of the fact that NGOs do have the ability to do well for specific areas especially when they have in-depth knowledge and experience of the areas in question. Some of the corporations are optimistic that maintaining good NGO-Corporation relationships will be helpful in attaining their goals. As a result, these engagements have demonstrated that NGOs performed a considerable role in their achievement of corporate goals. However, there is minimal information regarding the functioning of NGOs. Even the NGOs themselves cannot be sure about the performance of their counterparts. Lack of this essential information has resulted in the decreased possibility of making strong collaborations.

3. There is a severe lack of experienced talent in China's non-profit sector

This is one of the major obstacles in capacity building of these NGOs. There is a huge difference in the employment patterns in the non-profit sector of China and the developed nations like the US. Non-profit employment in the developed world is highly regarded and considered honourable, the exact opposite of the Chinese culture. This problem for Chinese non-profit organisations is made worse by the recent regulations imposed on them that even limit the payroll expenditures. Hence corporate organisations eyeing China as a potential playing field should consider the fact that local norms here are substantially different from the well-established global organisations.

Another thing that must be noted here is that Chinese NGOs do not comply with the basic requirements such as having a solid internal control framework, financial management system, and information management. This situation means that strict measures must be taken to develop proper guidelines for selecting beneficiaries or partners in China. Professionalism and transparency in financial dealings should be the critical points for the proper functioning of established collaborations and partnerships.

The current environment shows disagreement over whether NGOs working in China can yet be regarded as a community of experts in which their interpretive and symbolic abilities can be effectively utilised or whether it is the duty of NGOs to produce new knowledge or not. The NGO sector cannot yet be regarded as a community of experts because NGOs themselves

lack proper transparency. China does not have any well-formed NGO atmosphere. This must also be noted that the NGO sector is a hugely diverse sector and the people working for the NGOs represent a broad array of professions. However, the participation of NGOs across the sector can eventually lead the sector to succeed.

A small portion of the NGOs can be regarded as having the expertise and inherent symbolic and interpretive abilities that are a result of this expertise. For instance, the Climate Change Action Network in China, which comprises an assortment of NGOs focused on the environment are in this category. However for most of the cases and especially when the NGOs are considered on their own, they have little experience. This situation is subject to debate that NGOs in China are responsible for the production of information or not, but one point is for sure, NGOs do play a vital role in the dissemination of information to the general public. It is most probably due to the coercive pressure that the Chinese NGOs fail to achieve a mature epistemic environment. However, NGOs can be more effective as agents of change not by pushing the boundaries of knowledge but using their abilities in a relatively low-key manner to bring the existing issues to new light and/or bringing forward the underrated economic, political and social issues.

4.4.5 Summary of findings and arguments

Cross-sector collaboration is considered being one of the major environmental governance methods to act on sustainable development and globally accepted commitments like the 2002 WSSD in Johannesburg³⁷⁸, Agenda 21³⁷⁹ and Rio+20³⁸⁰ outcome. Extractive corporations have caused enormous environmental issues and have put in place CSPs for sustainable development for almost 20 years.

Besides the ‘S-I’ dimension, This chapter has studied and examined in depth the geographies, politics and performances of the on-going CSPs among the oil and gas corporations operating in greater China and NGOs of the region (the ‘I-P’ dimension). Unfortunately, China does not use sustainable and human rights clauses very often in their

³⁷⁸ Report of the World Summit on Sustainable Development, <http://www.un-documents.net/aconf199-20.pdf>.

³⁷⁹ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

³⁸⁰ United Nations Conference on Sustainable Development, Rio+20, <https://sustainabledevelopment.un.org/rio20>.

investment contracts. Therefore, this chapter has turned to the alternative solutions on the ‘I-P’ dimension and examined these innovative instruments’ practical performance.

This chapter focuses on seven international, two Taiwanese and four Chinese state-owned oil and gas corporations and reports that there are currently sixty-two CSPs working in greater China. However, the majority of these CSPs are yet at the charity level. This chapter studies social network and institutional perspectives to understand and compare the Chinese state-owned, international and Taiwanese oil and gas companies on the issues related to partnering with NGOs.

The results indicate that it is true that partnerships act as a progressive instrument to foster development but they also pose considerable limitations. The lack of constructive involvement between the non-profit sector and the corporate industry can be, up to some extent, attributed to isomorphic pressures within Business-NGO relationships in Greater China. Further, keeping in view that NGOs are relatively new to the social infrastructure of China, this chapter has recommended that oil companies do not have sufficient meaningful knowledge of the NGO field, just like the NGOs have not yet matured enough to become a part of an epistemic community where their experience or record can be used as reference material by the corporations. So, resultantly, the CSP landscape of this region is substantially defined by the major oil and gas corporations, and the CSP geographies are not very much community-based and problem-oriented.

Due to the unique historical background of the development of NGO-business collaborations in greater China, this research establishes that ‘critical cooperation’ is a compelling strategy for the non-profit organisations, particularly for the grassroots to form partnerships with the energy corporations. In addition, authorities, including the Chinese local governments and other social entities, play a notable role in establishing an external environment for upcoming CSPs.

To conclude, strategic partnerships between NGOs and businesses are yet at a very early stage of evolution and still have limited effect and scope particularly in greater China. However, there is the enormous potential for such strategic partnerships. NGOs can, on the one hand, act as watchdogs to monitor companies’ activities, and, on the other hand, cooperate with the private sector for environmental governance and social innovation. The relationships like these are beneficial not only for partner organisations but also for the society collectively.

As evident from the theoretical discussion in the previous sections, this chapter can summarise the major points for the practitioners. It is the responsibility of the Taiwanese and Chinese governments to establish a regulatory atmosphere to unlock the maximum potential of the CSPs, providing platforms where NGOs and businesses could engage to exchange ideas and information could be immensely helpful in the selection of suitable partners. Moreover, the Taiwanese government needs to provide incentives to the international NGOs so they can bring in their expertise. Due to the positive impacts of the global isomorphic pressures, the Taiwanese oil and gas corporations need to consider getting the partnerships of international industry organisations to avoid being cut off from the global picture.

For the long-term future, this study can predict that the driving forces for further regulatory reforms should come from both the global pressures and China's local communities. As discussed above, the 'critical cooperation' approach has the power to challenge the current governance framework. Moreover, when the Chinese companies increase their investment globally, they may face more challenges from the international communities and industrial associations. These pressures will accelerate the institutional reform procedures within and outside China.

Possible ideas for further study can be based on a longitudinal analysis that considers a strategic partnership right from its inception and throughout its lifespan, which may acquire detailed information and understanding of the working dynamics involved in such a partnership. As a result, finding out while certain strategic partnerships fail while others are successful can develop an understanding of how to manage strategic partnerships effectively. In addition, it would be necessary to carry out a comparative study of CSPs in different states to note if there are variations in the dynamics, characteristics or motivations of partnerships.

Chapter 5 – The ‘S-I-P’ triangle and beyond: Proposing a multi-actor investment contract framework?

“My notion of democracy is that under it the weakest should have the same opportunity as the strongest.” – Mahatma Gandhi (1932)

The current system for regulating activities and relations in international and domestic investment regimes involves minimal engagement of host and affected local citizens in formal legal arrangements³⁸¹. In this situation, various actors contest the interests derived from, and obligations imposed by, existing legal frameworks in the SIP triangle.

A new type of multi-actor contract can outline the conceptual roadmap for future contracting in natural resource sectors and provide justifications underlying these patterns in global contracting practices³⁸². By including affected third parties, local communities and other citizens, the new multi-actor investment contracts illustrate that host state governments and foreign investors are ‘trustees’ of these investment projects and the benefits of natural resource extractions should be mobilised for the public. Scholars also point out that contracts among multiple actors in the natural resource extraction context have the capacities to cope with the absence of responsibility and remedial regulations and can address the adverse impacts caused by extractive operations³⁸³.

Examples of this new form of multi-actor contracts include contracts which can be designed to provide third parties with a legal right to sue the contract; multi-actor environmental contracts; human rights agreements, and state-investor-local community tripartite contracts. These new contractual arrangements illustrate that the law of contract has shifted from the early nineteenth-century model that contracts only protect the rights of contracting parties (e.g. foreign investors) without any concern for affected third parties (e.g.

³⁸¹ Zillman, D. M., & Lucas, A. (2002) *Human rights in natural resource development: Public participation in the sustainable development of mining and energy resources*. Oxford University Press. See also Bradshaw, B., & McElroy, C. (2014) Company–community agreements in the mining sector. In C. Louche & T. Hebb (Eds.), *Socially Responsible Investment in the 21st Century: Does it make a Difference for Society?* (Vol. 7, pp. 173-193): Emerald Group Publishing Limited.

³⁸² Odumosu-Ayanu, I. T. (2014a) Governments, Investors and Local Communities: Analysis of A Multi-Actor Investment Contract Framework. *Melbourne Journal of International Law*, 15. See also International Civil Society Centre (2014).

³⁸³ Moog, S., Spicer, A., & Böhm, S. (2015). The politics of multi-stakeholder initiatives: The crisis of the Forest Stewardship Council. *Journal of Business Ethics*, 128(3), 469-493. See also Odumosu-Ayanu, I. T. (2014b).

individual citizens and local communities) who are direct victims of harmful extractive operations³⁸⁴.

Based on the discussions on the contractual mechanisms in the S-I and I-P dimensions, this chapter will discuss a new model of contracting for energy and natural resources which expands the scope for companies' obligations to those adversely influenced by corporate activities, namely the multi-actor contracts in the SIP triangle. The chapter below will also evaluate this new type of multi-actor contracts, focusing on their functions, enforcement of corporate responsibility, and practical challenges and possible solutions.

5.1 Introduction to the multi-actor investment contracts (tripartite contracts)

Contracts are at the centre of extractive sector governance. Most natural resource sector contracts involve sizeable private business actors. However, the engagement of private business actors does not mean that all these contracts are only private contractual arrangements. As this study has briefly mentioned above, defining contracts in natural resource sectors as exclusively private ones does not adequately represent their current status. Such a narrow definition may have adverse impacts on any responsibilities, which could be owed to the most negatively impacted by extracting operations.

Although contracts constitute the essential part of environmental governance in extractive industry regulation, the potentials and functions of these contracts for corporate liability and social responsibility have not been examined in detail. As Tienhaara notes, foreign investment contracts are “much less studied and poorly understood”³⁸⁵. Recent studies on extractive sector contracts, negotiation templates, and sustainable perspectives on these contracting practices have started to emerge³⁸⁶. However, most of these literatures primarily emphasised traditional state-investor contracts. Corporation liability and remedial implications of various contract types rarely have been reviewed in recent studies.

³⁸⁴ Shelton, D. (2011) *Human rights and the environment*. Cheltenham: Edward Elgar. See also Percival, R. V. (2010) Liability for environmental harm and emerging global environmental law, *Maryland journal of international law*, 25(37).

³⁸⁵ Tienhaara, K. (2013). See also Tienhaara, K. S. (2009) *The expropriation of environmental governance: protecting foreign investors at the expense of public policy*. Cambridge: Cambridge University Press.

³⁸⁶ Cotula, L. (2016). *Foreign investment, law and sustainable development*. International Institute for Environment and Development. London: IIED. See also Zerk, J. (2014) Oil and gas projects and human rights. In G. Picton-Turbervill (Ed.), *Oil and Gas: A Practical Handbook* (2 ed., pp. 141-158): Globe Business Publishing Limited.

Tripartite investment contracts are agreements between foreign energy corporations, governments and local communities. However, these contracts exist and are designed for critical purposes, particularly for deciding legal liabilities for extractive operations. This new type of tripartite agreement is the epitome of contractual responsibility in extractive industries. In these contracts, one of the key features is that the diversity of the actors engaged, the diversity of conflicting interests addressed and the public law nature of these multi-actor contracts. These contractual arrangements immediately transport the concept of sustainable development beyond traditional private contract law³⁸⁷.

Because of the diversity of the actors and interests involved, this chapter argues that this form of tripartite investment contracts has indeed moved far beyond the concept of private contract and served as a useful policy instrument for multi-level environmental governance and other social policy implementation.

Existing academic studies show that tripartite investment agreements so far have not been applied very commonly in the energy investment³⁸⁸. However, some apt examples still can be found, e.g., the environmental contracts conducted in Canada's mining industries and some joint ventures signed in the oil and gas sector in South Africa.

In 2011, De Beers Canada Inc., a mining company, entered into an environmental and social agreement with Canada's government and the local communities in the Northwest Territories³⁸⁹. This multi-actor agreement details the environmental management plan, impact assessments, and monitoring mechanisms for the company's extractive operations.

In Australia, the Government of South Australia sometimes get involved in the community development agreements or extractive industry contracts, particularly in the cases regarding indigenous peoples³⁹⁰. A recent example of a joint venture which includes all three actors is the Richtersveld Pooling Sharing Joint Venture Agreement in South Africa³⁹¹. This contract was

³⁸⁷ Odumosu-Ayanu, I. T. (2014b). See also Affolder, N. (2012) *Transnational Conservation Contracts: A Primer*. Paper presented at the Annual Meeting.

³⁸⁸ Affolder, N. (2013). See also Odumosu-Ayanu, I. T. (2014a).

³⁸⁹ Buchanan, S., & Marques, J. C. (2018). How home country industry associations influence MNE international CSR practices: Evidence from the Canadian mining industry. *Journal of World Business*, 53(1), 63-74. See also Affolder, N. (2011) Why Study Large Projects? Environmental Regulation's Neglected Frontier. *UBC Law Review*, 44(3), 521-554.

³⁹⁰ O'Faircheallaigh, C., & Corbett, T. (2005) Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements. *Environmental Politics*, 14(5), 629.

³⁹¹ Full text can be downloaded from: <https://pmg.org.za/committee-meeting/23376>.

signed between the government of South Africa, the community of Richtersveld Alexkor and a state-owned diamond mining company Alexkor³⁹².

The new type of tripartite contracts, involving governments, foreign investors and communities, can also be found in the form of cross-sector partnerships/collaborations, community development agreements or other multi-actor agreements. Moreover, international organisations and industry associations also provide model contracts and publish these kinds of multi-actor contracts and collaborative initiatives online, such as IPIECA³⁹³ (for the oil and gas sector) and ICMM³⁹⁴ (for mining industries). Tripartite investment contracts are acknowledgements of the significant relationships among host governments, foreign investors and local communities. These contracts demonstrate the unique role these stakeholders play in the SIP triangle. However, it requires further assessment of the extent to which this kind of tripartite contracts could be broadly applied.

This chapter therefore focuses on the functions of this new type of tripartite agreements. It is important to evaluate the external regulatory environments for stimulating this new type of multi-actor contracts, their pros and cons in governing the environment and community relations, theoretical implications they brought (whether a new contractual governance paradigm is emerging), as well as the prospect of this new multi-level governance mechanism.

5.2 Assessing external regulatory settings for supporting multi-actor contracts

Before evaluating the governance functions of those multi-actor contracts, it may be useful to review the current external regulatory settings first. The working hypothesis here is simple. The limitations of current regulatory frameworks - both international and national - provide both opportunities and constraints for formulating multi-actor contracts. On the one hand, multi-actor contracts can be useful to support the ineffectiveness of current legal frameworks and even provide strong fuels to advance regulatory and policy innovations. On the other hand, without strong supports from the current legal frameworks or the involvement of governments, multi-actor contracts may not be widely adopted in the extractive industries. As a result, it is

³⁹² Gathii, J., & Odumosu-Ayanu, I. T. (2015) The Turn to Contractual Responsibility in the Global Extractive Industry. *Business and Human Rights Journal*, 1(1), 69-94.

³⁹³ IPEICA (2006) Partnerships in the oil and gas industry, Retrieved from: <http://www.ipieca.org/publication/partnerships-oil-and-gas-industry>.

³⁹⁴ International Council on Mining and Metals, ICMM 10 Principles, Retrieved from: <https://www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles>. See also Bradshaw, B., & McElroy, C. (2014).

necessary to have this macro-level overview on the limitations of current frameworks and the interplays between multi-actor contracts and other governance instruments, including those soft laws and initiatives.

Existing literature on international investment law debate the proper policy and legal arrangements for addressing the interests between foreign investors and host states³⁹⁵. Early commentators³⁹⁶ even see investment contracts as ‘economic development agreements’³⁹⁷, and were keen to elevate these economic agreements to an international status that allocated them out of the national regime where nations’ sovereign powers prevailed.

As international investment treaties started to proliferate, scholars like Andrew Guzman³⁹⁸ questioned whether countries in the Third World would get harmed by signing these investment treaties. Recent studies of international investment law also have been focusing on investment dispute case laws, in particular, international investment arbitrations³⁹⁹. Other commenters have questioned the centrality of FDI to international development⁴⁰⁰. Some researchers focus on the interplays between sustainable development values and international investment law⁴⁰¹. Given that the discussion focus varies, these debates demonstrate a need for making the international investments work better for all stakeholders.

³⁹⁵ Levashova, Yulia, Tineke E. Lambooy, and I F. Dekker. (2016). See also Vinuales, J. (2015) *International Investment Law and Natural Resource Governance, E15 Expert Group on Trade and Investment in Extractive Industries Working Paper*, Geneva.

³⁹⁶ Lall, S., & Narula, R. (2004). Foreign direct investment and its role in economic development: do we need a new agenda?. *The European Journal of Development Research*, 16(3), 447-464.

³⁹⁷ An example is the agreement between the Province of British Columbia and Kwadacha Nation, see: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/kemess_kwadacha_ecda_-_signed.pdf.

³⁹⁸ Guzman, A. T. (2002). A compliance-based theory of international law. *Cal. L. Rev.*, 90, 1823. See also Elkins, Z., Guzman, A. T., & Simmons, B. A. (2006). Competing for capital: The diffusion of bilateral investment treaties, 1960–2000. *International organization*, 60(4), 811-846.

³⁹⁹ De Brabandere, E. (2014) *The Settlement of Investment Disputes in the Energy Sector*. In E. a. G. De Brabandere, T. (Ed.), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests*, Brill Nijhoff. See also Waibel, M. (2014b) *Investment Arbitration: Jurisdiction and Admissibility*. In A. R. e. al (Ed.), *Handbook on International Investment Law*: C.H. Beck/Hart.

⁴⁰⁰ Chang, H. J., & Grabel, I. (2014). *Reclaiming development: an alternative economic policy manual*. Zed Books Ltd.. See also Karl, J. (2014).

⁴⁰¹ Gehring, M. (2010) Introduction to ‘Sustainable Development in World Investment Law’. In M.-C. Cordonier Segger, M. W. Gehring, & A. Newcombe (Eds.), *Sustainable Development in World Investment Law*: Kluwer Law International; Cotula, L. (2010a) *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investment*. London: IIED. See also Segger, M.-C., & Weeramantry, C. G. (2004).

5.2.1 Limitations of the current legal frameworks on FDI

Of all the existing regulatory mechanisms, international investment treaties, national laws and State–investor contracts are the most prevalent legal frameworks that determine and regulate international investment relationships⁴⁰². These ways of legal engagement should be of somewhat universal application, though the contents, focus and effectiveness of every instrument would depend upon the actual parties and jurisdiction. Global Memorandum of Understandings (GMOUs) and Impact and Benefit Agreements are specific to some jurisdictions and are principally adopted in mining and oil and gas projects⁴⁰³. Despite their varied focus and completely different composition of parties, all of these mechanisms contribute to governance within the foreign investment regime. However, these legal instruments all have their limitations.

Firstly, investment treaties have historically been constrained in their scope. By practices of public international law, treaties are conducted between national states. If investment treaties had determined the rights and obligations of the state parties to the treaties without more, commentators might not have been as critical as they have been. However, these treaties confer enforceable rights on foreign investors who are not parties to the treaties. Also, the treaties mostly do not impose obligations on these investors. Further, they mostly do not provide enforceable rights for host communities who are equally important actors. While modern versions of these treaties have begun to incorporate human rights and environmental protection clauses within their purview, they do not provide enforceable rights for host communities like they do for foreign investors.

Secondly, those bilateral contracts, including State–investor contracts and community development agreements, usually exclude a significant actor as a party to the contract. The conventional investment contract is signed between the host state and the foreign investor; the typical community development agreement and IBAs are negotiated between foreign investors and affected communities. These contracts do not include robust interplays amongst all the

⁴⁰² Bellmann, C. (2016) Trade and Investment Frameworks in Extractive Industries: Challenges and Options. E15 Expert Group on Trade and Investment in Extractive Industries — Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum. See also Salacuse, J. (2013) *The Three Laws of International Investment: National Contractual and International Frameworks for Foreign Capital*. Oxford: Oxford University Press.

⁴⁰³ Gao, Z. (1998) *Environmental Regulation of Oil and Gas*: Kluwer Law International. See also Ingelson, A., & Nwapi, C. (2014). Environmental impact assessment process for oil, gas and mining projects in Nigeria: A critical analysis. *Law Env't & Dev. J.*, 10, 1.

related actors. Also, these agreements usually do not address obligations and duties towards all related actors. Currently, environmental harm and other damages to local communities are usually addressed by stakeholders applying a range of legal principles in lengthy litigations and by governments using recourses to sanctions designed in environmental law and other regulations⁴⁰⁴. Citizens' capacity to hold the state accountable for the failure to protect and regulate properly is somewhat difficult. The protection of human rights is an essential responsibility of governments, because any of the actors in natural resource investment projects may incur human rights violations. Duties and rights are placed in carefully designed regulations, whereas the regulating practices point out the current regime cannot address the constant interactions comprehensively.

Thirdly, although community development agreements and cross-sector partnerships offer some opportunities of directly engaging affected communities through contractual arrangements, the scope of these contracts sometimes is still limited. These bilateral agreements often do not have the active interactional functions that this research envisages for tripartite and multi-actor contracts. While community development agreements, to some extent, may sometimes involve states as contracting parties in some cases, they remain mostly bilateral development agreements. For example, even in some advanced jurisdictions, IBAs are mostly signed after the investment projects have been commissioned, excluding local communities and aboriginal peoples from having a voice at the time of contract negotiating the contents and conditions of the investment project⁴⁰⁵.

Though governments must consult all these stakeholders, however, the scope of these public consultations sometimes could be very limited⁴⁰⁶. Other types of bilateral agreements, such as NGO-Business partnerships and GMoUs, are even less possible to have any significant pre-project engagements. These contracts and 'collaborations' are mostly dominated by the powerful corporations, such as the NGO-Business partnerships in Greater China (see Chapter 4). Some confidentiality provisions within these agreements also make it more challenging for affected communities to get access to the detailed contents of the contracts. While all these bilateral development agreements and cross-sector partnerships can form a quasi-regulatory

⁴⁰⁴ Morgera, E. (2009) *Corporate Accountability in International Environmental Law*. Oxford: Oxford University Press. See also Percival, R. V. (2010).

⁴⁰⁵ Odumosu-Ayanu, I. T. (2014a). See also Rajagopal, B. (2003) *International Law From Below: Development, Social Movements and Third World Resistance*. New York: Cambridge University Press.

⁴⁰⁶ Cameron, P., & Correa, E. (2002).

mechanism, the enforceability of these contracts and the generalisation of their effectiveness remain unclear in practice⁴⁰⁷.

The existing bilateral contracts put effort into providing avenues for active engagements among governments, foreign investors and citizens, but all these mechanisms still have some significant limitations as mentioned above.

5.2.2 Non-binding approach and other recent regulatory developments

To address the sustainable challenges of the extractive industries, recently there are two major regulatory developments. One emerging approach is the application of a variety of non-binding standards and voluntary mechanisms, at the international, national and local levels, for natural resource management⁴⁰⁸. The other major approach is the improvements of domestic and international regulations.

There are many examples of the first voluntary and non-binding approach. Since the 1990s, the UN Centre on Transnational Corporations has been drafting a Code of Conduct for Transnational Corporations⁴⁰⁹. Following this critical step by the UN system, numerous voluntary and non-binding initiatives have been launched⁴¹⁰. For instance, the Global Compact, Extractive Industries Transparency Initiative, and Kimberley Transparency Initiative⁴¹¹ are all great illustrations of this kind of non-binding initiatives.

As mentioned in the proceeding chapters, the UN's 10 Guiding Principles on Human Rights and Business also require private enterprises to respect human rights in their global operations. Also, these Guiding Principles encourage both the public and private actors to provide effective grievance mechanisms for the affected individual citizens and communities. Moreover, many sector-specific and corporate-specific non-binding rules and standards have

⁴⁰⁷ Bradshaw, B., & McElroy, C. (2014). See also O'Faircheallaigh, C., & Corbett, T. (2005).

⁴⁰⁸ Prakash, A., & Potoski, M. (2012) Voluntary Environmental Programs: A Comparative Perspective. *Journal of Policy Analysis and Management*, 31(1), 123-138. See also Walker, J., Howard, S., (2002) Finding the Way Forward: How Could Voluntary Action Move Mining Towards Sustainable Development? Environmental Resources Management (ERM) and International Institute for Environment and Development (IIED), London.

⁴⁰⁹ The United Nations Draft Code of Conduct on Transnational Corporations, available at: <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2891>.

⁴¹⁰ Sauvart, K. P. (2015). The negotiations of the United Nations code of conduct on transnational corporations: experience and lessons learned. *The Journal of World Investment & Trade*, 16(1), 11-87.

⁴¹¹ Kimberly Process Certification Scheme, available at: <https://www.kimberleyprocess.com/en/about>.

been crafted and released over the past decades. However, some comments⁴¹² questioned that all these non-binding and voluntary codes mentioned above are mostly the negotiating outcomes of the Western-dominated international institutions and Western-funded non-governmental organisations. The Third World's real voices and the perspectives of those individuals who genuinely suffer the severe adverse impacts of extractive activities were not included in the public consultations or discussions for drafting these voluntary codes⁴¹³. As a result, the outcomes of these non-binding principles, to some extent, may not adequately represent the most vulnerable people living in the extractive regions.

The second significant regulatory development to responding to natural resource extraction challenges is a range of home- and host-country new regulations⁴¹⁴. These regulations are new mechanisms undertaken by the countries where the companies operate in and by the state where these companies' headquarters are based. This recent regulatory development may allow the affected citizens and groups to use favourable laws to sue those international extractive corporations for polluting the environment and human rights violations. The Canadian government, for example, conducted a new regulation targeting the overseas activities of Canada's multinational mining corporations⁴¹⁵; the new regulation requires Canadian mining companies to set up a special office or department to enforce this home-country act and monitor the environmental and social impacts of their overseas operations⁴¹⁶.

One of the features in these new home-country regulations addresses the issues of contract transparency, confidentiality and information disclosure. This transparency requirement is fundamental in monitoring companies' real operations overseas, which can apply to the contracts signed by the international extractive companies with the developing countries. Contract transparency helps public engagement of all negotiated and signed resource contracts. The proper transparency arrangements can make sure that resource contracts should be

⁴¹² Ferdinand, P. (2016) Westward ho—the China dream and 'one belt, one road': Chinese foreign policy under Xi Jinping. *International Affairs*, 92(4), 941-957. See also Hasmath, R. and Jennifer H. (2008).

⁴¹³ Ameha, A., Nielsen, O. J., & Larsen, H. O. (2014). Impacts of access and benefit sharing on livelihoods and forest: Case of participatory forest management in Ethiopia. *Ecological Economics*, 97, 162-171. See also International Civil Society Centre (2014).

⁴¹⁴ Muchlinski, P. (2007) *Multinational enterprises and the law*. Oxford: Oxford University Press. See also Tévar, Z. N. (2012) 'Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations' *Cuadernos de Derecho Transnacional* 398, 400.

⁴¹⁵ Regulating Canadian mining companies abroad, CIPS Policy Brief, available at: https://www.cips-cepi.ca/wp-content/uploads/2015/01/CIPS_PolicyBrief_Drohan_Jan2010-1.pdf.

⁴¹⁶ See Natural Resources Canada Featured Initiatives, available at: <https://www.nrcan.gc.ca/19501>.

beneficial to all the citizens and the confidentiality clauses can only protect commercial secrets. Contract transparency mechanisms are also essential to prevent serious corruptions in the global extractive industries and promote the public's abilities to oversee the activities of extractive industries and governments.

The issue of revenue transparency is also closely relevant to contract transparency⁴¹⁷. Revenue transparency mechanisms aim to maintain credibility in the management and distribution of resource wealth and revenues created in the industry. For instance, the US's corporate disclosure law⁴¹⁸ requires the US corporations to disclose the information of any payments to a foreign government, such as Africa and other developing countries, in their corporate annual reports.

It is clear that these new home-state approaches have offered a significant opportunity to hold transnational corporations responsible. These newly-developed mechanisms have opened up many policies and legal spaces for the home country of the investor to manage the contestation of extractive companies' overseas activities. In this case, this new approach serves as a new policy and legal instrument to ensure investors and host countries are more amenable to ensuring the extractive operations of natural resources are genuinely beneficial to the citizens in the countries where these investors operate.

In practice, these home-country mechanisms are usually ignored by host states and constrain the communities and citizens who are adversely affected to getting access to these mechanisms. Bringing litigation is an important and unique exception. For instance, the US Alien Tort Statute⁴¹⁹ was applied to examine human rights violations where foreign investors had any connection with the US⁴²⁰. However, the US Supreme Court, in 2013, decided to

⁴¹⁷ Janson, J., Burke C. and Jiang, W. (2009) Chinese Companies in the Extractive Industries of Gabon & the DRC: Perceptions of Transparency. Center for Chinese Studies, University of Stellenbosch. See also Cotula, L. (2011) *Land Deals in Africa: What is in the Contracts?* London: IIED.

⁴¹⁸ US SEC Disclosure Laws and Regulations, available at: <https://www.inc.com/encyclopedia/sec-disclosure-laws-and-regulations.html>.

⁴¹⁹ The Alien Tort Statute (ATS) is a U.S. federal law first adopted in 1789 that gives the federal courts jurisdiction to hear lawsuits filed by non-U.S. citizens for torts committed in violation of international law. Full text see: <https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute>.

⁴²⁰ Mullenix, L. S. (2017). *The Alien Tort Statute and Corporate Liability in the Age of International Terrorism*. See also Gordon, J. C. (2017). *Improving the prospects of international law enforcement through the US alien tort statute* (Doctoral dissertation, University of Birmingham).

eviscerate this perspective by stating that only litigations against businesses whose conduct truly affects and concerns the US could be allowed to bring suits under this legislation.

5.2.3 Summaries

Establishing a comprehensive framework for incorporating host affected communities as essential actors within those enforceable multi-actor contracts is a challenging task. This task should aim to ensure the participation of affected communities at every stage of investment contracting, e.g. from the stage of negotiation, contract implementation and, if applicable, dispute settlement.

Negotiating these multi-actor investment agreements could be an even more complicated endeavour. The negotiating powers are imbalanced and unevenly distributed among all the actors. The existing legal frameworks are also complex in this regime, including investment treaties, State-investor contracts, other transnational agreements and national laws, which make the negotiations of multi-actor investment contracts even more challenging in practice.

In summary, the above discussions on the existing legal frameworks have highlighted two key themes useful in this chapter. The first point is that the current international investment regime focuses mostly on the narrow relation between host states and investors. Secondly, the new regulatory mechanisms show that some achievements have been made at both the international and domestic legal regimes, which incorporate local communities' interests and voices through a variety of regulations and contractual arrangements, such as the US Alien Tort Statute and the contract transparency mechanism in the mining and extractive industries⁴²¹. However, our overall impression is that these voluntary, non-binding and home-state based mechanisms are by themselves still insufficient to ensure remedies to the vulnerable citizens who truly suffer the unfortunate outcomes of energy and natural resource extraction.

The new form of multi-actor investment contract discussed in this chapter may have the potential to supplement the current regulatory approaches. Unlike the home-state mechanisms, the new type of multi-actor or tripartite contract is consistent with many Principles of the UN Principles for Responsible Contracts⁴²². For example, Principle 9 contemplates that modern corporations should set up effective grievance mechanisms for those non-contractual actors

⁴²¹ Ibid.

⁴²² United Nations OHCHR (2015) *Principles for Responsible Contracts – Guidance for Negotiators*. United Nations Publication.

influenced by an investment project⁴²³. Also, contract law has the ‘third-party beneficiary principle’ which supports the argument that both contracting governments and foreign investors should care about the situations of those powerless people and communities in extraction scenarios. Unlike the worldwide non-binding industrial standards and voluntary mechanisms, multi-actor contracts can enforce legal obligations of contracting parties at the end.

In analysing a multi-actor contract framework, this chapter avoids suggesting that this new type of contract does not have any limitations. Though this newer form of investment agreements can provide a new way to allocate responsibilities of different actors and shift a new turn towards ‘contractual governance’ for natural resource regime, the design and application of this new form of tripartite agreement is still at an initial stage within the industry. The provisions of multi-actor contracts could be better drafted in the future, which can demonstrate the multiplicity of different actors’ interests. This type of provision is particularly necessary in the cases that weak states are lacking effective legal systems and control over their natural resources and territories.

The next section will further assess the reasons to justify multi-actor contracts, their potential contributions to multi-level governance, as well as the possible difficulties to implement them.

5.3 Multi-actor investment contract framework

This section discusses the approaches of re-designing a new multi-actor contract framework for regulating foreign investment in the energy and natural resource sectors. At first, it would be proper to review the reasons to justify the need for producing this kind of new contract form. Then, the critical opinions on the limitations of this new multi-actor contracting approach will be addressed. Finally, the discussion will focus on the potential contributions of this new tripartite contracting approach for multi-level natural resource governance.

5.3.1 Why do we need multi-actor contracts?

Existing international investment law studies have a focus on international investment treaties, State-investor investment contracts, and investment disputes⁴²⁴. However, the recent

⁴²³ Principle 9: “Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.”

⁴²⁴ Sornarajah, M. (2012).

developments of new governance mechanisms (e.g. voluntary and home-based) have been the game-changers for reinventing the regulation and adjusting to actors' relationships in this field of law. Now it would be a proper time to re-examine international investment law's current focus on the two specific actors: investors and states.

Questioning the current focus on the State-investor dimension is particularly necessary with multi-jurisdictional projects in natural resource and extractive industries⁴²⁵. The feature of these multi-jurisdictional infrastructure projects usually involve many directly-affected actors and even engage more than one state and region. These multi-jurisdictional projects have stronger impacts on the livelihoods of local people, and it is also questionable whether the host states can sufficiently represent the interests of these people.

States have duties to protect their citizens and people's wellbeing, but, unfortunately, recent history shows that states may lack capacities and interests (sometimes even conflict of interests) to enforce useful mechanisms for promoting their citizens' socio-economic status and supporting legal empowerment. Due to the limitations and ineffectiveness of other bilateral approaches, the calling for a more direct and robust engagement among all the relevant stakeholders, especially local citizens, can be the origin of a new multi-actor contractual model⁴²⁶.

Following this observation, the following paragraphs discuss several driving factors which may justify the emergence and needs of this new type of multi-actor investment contracts for governing extractive activities.

Firstly, among all the factors is indeed the demand of local communities around the world for direct and active participation in significant economic transactions that impact them. Following movements for public participation, governments adopted public consultation procedures and environmental and social impact assessments. Meanwhile, corporations also began to conclude development agreements with local communities. The unrest in several resource-rich countries in the Global South is also an important impetus for reinventing the legal mechanisms for local community engagement and empowerment. For example, the oil

⁴²⁵ Sornarajah, M. (2015) *Resistance and Change in the International Law on Foreign Investment*. Cambridge: Cambridge University Press; Bellmann, C. (2016); and Bebbington A.J. and Bury J.T. (2009) Institutional challenges for mining and sustainability in Peru. *Proceedings of the National Academy of Sciences*, 106(41), 17296–17301.

⁴²⁶ Odumosu-Ayanu, I. T. (2014a). See also Affolder, N. (2007) Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance. *Pace Environmental Law Review*, 24, 35-65.

giant Chevron has signed several community development agreements and beneficial arrangements with the local people in the Niger Delta, which intend to bring stability and peace to the areas where the company operates. While environmental degradation in the Nigeria Delta area is very well-known, Chevron's community agreements mainly focus on the clauses of benefits⁴²⁷. Some commentators therefore have pointed out that providing economic benefits while simultaneously polluting the environment is a problem of some of these business-community benefit-sharing agreements. It is quite common that many community development agreements mainly and only focus on the clauses of benefits sharing. Some research has pointed out this could be the main weakness of the current community agreements between businesses and local communities⁴²⁸.

The proposed multi-actor contractual framework is a direct response to local communities' demand for stronger participation in economic and investment decision-making. This new type of tripartite contracts provides a chance to formalise all the public participation and affirm all the interests of various stakeholders that are represented appropriately. Although some types of community engagement are now occurring, multi-actor investment contracts can be viewed as a new attempt to formalise and legalise this participation and confirm that all the perspectives of various stakeholders are appropriately included.

Secondly, the impact of colonialism in areas around the world necessitates the need for specific attention to natural resource extraction and other significant projects. The African Commission on Human and Peoples' Rights states that Article 21 of the African Charter on Human and Peoples' Rights ('African Charter')⁴²⁹, which acknowledges peoples' rights to 'freely dispose of their wealth and natural resources', originated during the time of colonialism, when the human and material resources of Africa were exploited for the benefit of external actors. This case was tragic for indigenous Africans, depriving them of their birth right and alienating them from their lands.

⁴²⁷ See Chevron in Nigeria, available at: <https://www.chevron.com/-/media/shared-media/documents/chevron-nigeria-cr-report-2017.pdf>.

⁴²⁸ Sosa, I., & Keenan, K. (2001). Impact benefit agreements between aboriginal communities and mining companies: Their use in Canada (p. 2). Ottawa: Canadian Environmental Law Association.

⁴²⁹ UNICEF. (2014). The African charter on the rights and welfare of the child.

The repercussions of colonial exploitation have left Africa's cherished resources and people still exposed to foreign exploitation⁴³⁰. The writers of the Charter desired to remind African governments of the unsavoury legacy that blighted the continent and restore shared economic development to its rightful place at the centre of African society. The plunder of natural resources under colonialism has led to suspicion surrounding the further potential exploitation of natural resources, the surrender of large expanses of land as a result of biased and strongly opposed concession contracts, and the acute corruption of government officials that contributed to a distrust of both government actors and industry.

Thirdly, following the decolonisation movement in the latter stages of the 20th century, the debate regarding the status of peoples and the rights attached to each status has risen in significance⁴³¹. The African Charter was adopted in 1981, making provision for the specific rights of peoples. In the decision of *SERAC v Nigeria*⁴³², the African Commission has pointed out that the Nigerian Government's activities have in violated of the economic rights of the Ogoni people, whose territory produces significant amounts of fossil fuels in Nigeria⁴³³.

Also pertinent is the indigenous status of peoples living on lands holding significant natural resource wealth. A major force for reviewing the agreements that influence foreign investment is the autonomous status of some of these peoples. Canada's IBAs are based in part on the unique nature of the Canadian Government's relationship with the indigenous peoples; indeed, the status of these peoples is a direct stimulus for the IBAs⁴³⁴. In areas of the world where indigenous status is being challenged, there has been demand for indigenous peoples to be formally recognised. For both indigenous and nonindigenous peoples, judicial recognition, the right to land, fishing rights and other rights, underpin their call for inclusive rights and recognition beyond the provision of benefits.

A fourth consideration is the fact that some corporate social responsibility ('CSR') initiatives, particularly in the Third World, appear to be limited in their impact. Such CSR

⁴³⁰ Laryea, E. (2011) Contractual arrangements for resource investment. In F. N. Botchway (Ed.), *Natural Resource Investment and Africa's Development* (pp. 107-133) Cheltenham UK: EE Publishing. See also Weng, L., Sayer, J. A., & Xue, L. (2017).

⁴³¹ Rajagopal, B. (2003). See also Sornarajah, M. (2015).

⁴³² 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR), available at: <http://www.achpr.org/communications/decision/155.96>.

⁴³³ Ingelson, A., & Nwapi, C. (2014). See also World Bank (2013).

⁴³⁴ O'Faircheallaigh, C. (2015). *Negotiations in the indigenous world: Aboriginal peoples and the extractive industry in Australia and Canada*. Routledge. See also O'Faircheallaigh, C. (2007).

initiatives are often driven by the benefits they provide. While the benefits model is potentially advantageous, as Idemudia and Ite observed in the Nigerian oil industry, it is also beset by significant challenges⁴³⁵. The failure of oil companies to demonstrate that they are striving to observe the moral minimum has served only to strengthen community perceptions of foreign investors as opponents that must be resisted and overcome. It is considered that no amount of road or bridge building, provision of energy supplies or the award of scholarships can offset the constant, 24-hour daylight that results from the gas flaring carried out by foreign oil companies. Such positive actions would not have an equal impact on the communities as the perceived adverse injunction actions undertaken by the oil companies. The critical issue here is that there is no substitute for failure to observe the moral minimum. Positive actions would doubtlessly create more added values if negative injunction actions were observed.

A fifth significant driver for reassessing the focus on investment treaties and State–investor contracts – with the accompanying focus on states and investors – results from the significance assigned to FDI and its essential contribution to economic development. Some scholars working in international investment law assert that the consequences of FDI may be more nuanced than many parties are willing to accept⁴³⁶. It was noted at the United Nations Conference on Trade and Development that “while oil has played an important role in Nigeria, data show that over 70 per cent of the citizens live on only one US dollar a day (this represents a quarter of all Africans living in this condition)”⁴³⁷. It is impossible to overemphasise the significance of a viewpoint that directly includes the poor – incorporating the peoples of host communities – to outside investment. The extractive industries in many Third World countries support a strategy of caution, considering conditions similar to those under a ‘resource curse’ scenario already exist. Regardless of the position taken on the importance of FDI to socio-economic empowerment, it is imperative to explore the utilisation of a framework that directly recognises local communities as relevant actors in the framework.

The final justification for reviewing the existing State–investor contract and investment treaty models is to utilise the democratic values that underpin local and international societies

⁴³⁵ Idemudia, U., & Ite, U. E. (2006). Corporate–community relations in Nigeria's oil industry: challenges and imperatives. *Corporate Social Responsibility and Environmental Management*, 13(4), 194-206. See also Kolk, A., & Lenfant, F. (2018). Responsible business under adverse conditions: Dilemmas regarding company contributions to local development. *Business Strategy & Development*, 1(1), 8-16.

⁴³⁶ Cotula, L. (2010a). See also Sornarajah, M. (2012).

⁴³⁷ UNCTD (2017) Is local content a catalyst for development? The case of oil in Nigeria http://unctad.org/en/PublicationsLibrary/suc2017d6_en.pdf.

and integrate these into the framework⁴³⁸. Implementing a democratic approach that does not offer an undue advantage to states and investors, but instead recognises their shared integral roles in the investment system, is not impossible but presents challenges. This democratic approach highlights the public law nature of investment frameworks, and the conflict with the prevailing tendency to traditionally classify this area as private. The Extractive Industries Transparency Initiative embraces democratic values and emphasises a multi-stakeholder approach that includes governments, industry and civil society, to ensure transparency⁴³⁹. It is important to present a framework for multi-stakeholder contracts in response to international acceptance of multi-stakeholder processes. An enforceable framework is needed that accommodates all relevant actors and is accessible to all.

It is clear that local communities are occasionally consulted regarding project development, but they have no clearly defined means of recourse under current international investment law. The multi-actor framework goes beyond merely promoting consultation with all relevant actors to promoting sustained interaction and, eventually, contractual rights. While acknowledging the challenges when considering peoples' rights, the framework's main purpose is to strengthen peaceful socio-economic coexistence between actors in projects from the Niger Delta, to Canada's Northwest Territories, to the Amazon.

5.3.2 Potential difficulties of adopting a multi-actor contract framework

A multi-actor contract framework has clear potential for success, but like other global models, it has its difficulties. It is important to highlight some of these challenges and how they can be addressed.

First of all, multi-actor contracts would involve a need for negotiation between actors having a broad spectrum of interests and differing levels of resources, leading to the potential for biased power relationships⁴⁴⁰. There is a precedent for this in existing State–investor contracts, in GMoUs and IBAs, and also in some investment treaties. An inevitable reality of many contracts negotiations is inequality in negotiating power⁴⁴¹.

⁴³⁸ Afforlder, N. (2007). See also Cotula, L. (2015) *Democratizing international investment law: recent trend and lessons from experience*. London: IIED.

⁴³⁹ Extractive Industries Transparency Initiative, available at: <https://eiti.org>.

⁴⁴⁰ Odumosu-Ayanu, I. T. (2014a).

⁴⁴¹ See Sornarajah, M. (2000). *The settlement of foreign investment disputes* (Vol. 94). The Hague: Kluwer Law International.

In order to address this challenge, developing expertise in negotiation skills would be crucial for all parties involved⁴⁴². Government resources may be needed to develop the capacity of host communities to negotiate effectively. It would also be necessary to address information asymmetry by having mechanisms in place that ensure equality in the sharing of relevant information to all parties. Also, it would be necessary to develop consistent mechanisms for the settlement of local and regional disputes. Supervision at a regional level may help to mitigate the challenges presented by diversity in experience, availability of information and unreasonable use of power.

Next, the relationship between these contracts and existing laws presents an additional challenge. Multi-actor contracts should not reduce the rights and obligations held by all parties under the law⁴⁴³. Only if parties explicitly agree to relinquish some of their pre-existing entitlements should this occur. Nor should there be an argument that statutes should in any way cater to peoples' needs if doing so obviates the need for contractual arrangements to stand. All actors should be free to make contractual arrangements offering direct recourse to the settlement of disputes under the protection of the law. Legal arrangements including statutes, investment treaties already exist; yet investors and other actors feel the need to insert additional protections when negotiating contracts. If beneficial, the same standard should apply to local communities as relevant and equal partners in the investment framework. The extent to which agreements provided in existing law may negatively affect and add to guarantees would be a topic of vigorous negotiation. However, multi-actor contracts should include enforceable contractual guarantees to all actors that ensure existing laws respecting the wellbeing of the actors and other affected parties, such as environmental protection, would be honoured.

Third, corruption and ineffectiveness in some states still stand as both a driver towards multi-actor contracts and as a potential challenge⁴⁴⁴. In a corrupt state, a framework that supports communities to negotiate their relationship, and provides enforceable rights in negotiations with extractive industry actors and governments, can mitigate the impact of more dubious government officials who do not appropriately represent the interests of peoples. Even

⁴⁴² Sturzenegger, F. (2010) *The natural resources trap: Private investment without public commitment*. MIT Press. See also United Nations OHCHR (2015).

⁴⁴³ Odumosu-Ayanu, I. T. (2014b).

⁴⁴⁴ Papyrakis, E., Rieger, M., & Gilberthorpe, E. (2017). Corruption and the extractive industries transparency initiative. *The Journal of Development Studies*, 53(2), 295-309. See also Knutsen, C. H., Kotsadam, A., Olsen, E. H., & Wig, T. (2017). Mining and local corruption in Africa. *American Journal of Political Science*, 61(2), 320-334.

where corruption is not considered a concern, government preferences may be for natural resource extraction and infrastructure development rather than reflecting the interests of the communities affected by these projects. As a result, this potential corruption and possible government bias support arguments in favour of multi-actor contracts. However, corrupt, ineffective or compromised governments may also make negotiating and implementing appropriate agreements particularly difficult. Locating these contracts within the jurisdiction and competence of regional economic organisations may present a mitigating factor in addressing this issue.

Fourth, it is possible that multi-actor investment contracts could effectively co-opt local communities, enforcing a system in which they are compromised⁴⁴⁵. Being parties to a multi-actor investment contract could automatically make local communities part of a more extensive system that they would otherwise choose to resist. It could also be argued that by being parties to these contracts and being effectively co-opted, local communities would no longer have grounds for resistance. They could no longer resist unfavourable policies or assert their agency and, for example, secure more reasonable living conditions. Being parties to multi-actor investment contracts might achieve this goal. It is crucial to understand that a healthy ambivalence and scepticism would be useful here, as the other actors would then recognise the potential for resistance presented by the local communities. Under these conditions, local communities would not have to conclude contracts where they do not consent, for they would no longer be obliged to conclude contracts in which the terms are considered unacceptable.

At last, it is important to consider the fact that some outcomes of multi-actor contracts might not be socially beneficial or represent the broader public interest⁴⁴⁶. Many of the impacted communities have a strong understanding of their position and potential and have been negotiated extensively — both with governments and investors — on a range of issues. When considering the broader public interest, the government is viewed as a significant stakeholder in multi-actor contracts with a responsibility to ensure that the broader public interest is served⁴⁴⁷.

⁴⁴⁵ Bellmann, C. (2016); Shemberg, A., & Saldarriaga, A. (2016). See also Roberts, K. (2015) Corporate liability and complicity in International Crimes. In S. S. Jodoin, M-C. (Ed.), *Sustainable Development, International Criminal Justice, and Treaty Implementation*. Cambridge: Cambridge University Press.

⁴⁴⁶ De Brabandere, E., & Gazzini, T. (2014). See also Vadi, V. (2012) *Public health in international investment law and arbitration*: Routledge.

⁴⁴⁷ About the discussion on the changing role of government, please see: Odumosu-Ayanu, I. T. (2014a).

For this framework to be successful, states would need to act both individually and as regional organisations. The strength of a state's political will would be decisive in determining its willingness to adopt a framework with the potential to ensure positive outcomes for all actors. Despite the obvious challenges of multi-actor frameworks, they potentially hold considerable promise and could integrate the primary stakeholders within one framework, address democratic limitations in investment law and allow negotiation of interests, benefits and obligations for all actors. Multi-actor contracts would foster friendly relationships as well as defining the responsibilities for each of the actors. Such stronger relationships would encourage sustainable exploitation of resources and urge responsible development of projects through careful management. Some further research is undoubtedly necessary to fully establish the potential impact of this framework.

5.3.3 Contributions of the multi-actor framework for energy investment governance

When it comes to the positive side of this approach's contributions for enhancing regulation and multi-level governance in the realm of global energy investment, some observations on this could be outlined below.

Multi-actor contracts are principally used in projects involving extractive industries or similar projects that are closely linked to host and impacted communities⁴⁴⁸. Such industries can potentially involve a number of different goals that have a variety of impacts on different actors. In attempting to achieve the goals of extractive industry projects, foreign investors often fail to suitably compensate host communities, who are often displaced or not relocated to acceptable locations as promised. A multi-actor contract, negotiated correctly, would suitably address these diverse interests and guarantee that such communities have means to solve disputes under a framework that fully acknowledges their rights.

It is only natural for actors to protect issues that are of importance to them. In guarding their interests, they become quasi-regulators of the actions of other actors⁴⁴⁹. For example, governments are usually thought of as regulators of FDI, yet they are also often regulated in that foreign investors hold them accountable and insist that they comply with a stipulated legal

⁴⁴⁸ Affolder, N. (2010) Rethinking Environmental Contracting. *Journal of Environmental Law and Policy*, 21, 155. See also Biermann, F., Man-san Chan, A. M., & Pattberg, P. (2007).

⁴⁴⁹ Cutler, A. C., & Dietz, T. (2017). The politics of private transnational governance by contract: Introduction and analytical framework. In *The Politics of Private Transnational Governance by Contract* (pp. 23-58), Routledge.

agenda. In order to achieve a robust regulatory framework, particularly in cases where governments fail to enforce the regulation, having all actors directly involved in decision-making as part of multi-actor contracts would undoubtedly result in better regulation and enforcement⁴⁵⁰.

The multi-actor contracts could themselves serve directly as regulatory mechanisms, though this would strictly depend on the context and nature of each contract. To establish effective legal foundations, any clauses in multi-actor contracts would have to be inside broader statutory frameworks⁴⁵¹. In such circumstances, caution must be exercised by all relevant actors. Given that some such regulatory contracts between governments and industry already work effectively, there are grounds for further research on how multi-actor contracts can also serve as regulatory mechanisms. Some such government-investor regulatory contracts have been affected due to their voluntary nature and the lack of substantial legislative background. The advocacy of new regulatory approaches and on occasion, new regulatory methods, is often triggered by recent events and developments⁴⁵². Further investigation is indeed necessary in order to ensure that multi-actor contracts serve effectively as regulatory mechanisms for balancing different policy goals.

5.4 Turn to ‘governance by contract’?

Competing goals are a common feature of investment in the extractive industries⁴⁵³. For example, for local communities, the goal of securing economic benefit as a result of foreign investment must be aligned with the goal of keeping negative environmental impacts of foreign investment projects to a minimum. Often, the emphasis on the potential economic benefits of such projects is to the detriment of other important factors including the potential impact of environmental damage on local communities⁴⁵⁴.

⁴⁵⁰ Ibid.

⁴⁵¹ Salacuse, J. (2013). See also Schill, S. W. (2014) Foreign Investment in the Energy Sector: Lessons for International Investment Law. In E. De Brabandere & T. Gazzini (Eds.), *Foreign Investment in the Energy Sector*: Brill Nijhoff.

⁴⁵² Smith, A., Seyfang, G., Hielscher, S., & Hargreaves, T. (2013) Constructing grassroots innovations for sustainability. *Global Environmental Change*; Muller et al (2016) *Innovative Justice: Developing new ways to bring fairness between people*. HiLL Publishing. See also Orts, E. W., & Deketelaere, K. (2001).

⁴⁵³ Bebbington A., Bebbington D.H., Bury J., Langan, J., Munoz, J.P., and Scurrah, M. (2008) Mining and Social Movements: Struggles Over Livelihood and Rural Territorial Development in the Andes. *World Development*, 36(12), 2888–2905. See also Greenovation: Hub (2014).

⁴⁵⁴ Gunningham, N. (2009a). The new collaborative environmental governance: The localization of regulation. *Journal of Law and Society*, 36(1), 145-166. See also Odumusu-Ayanu, I. T. (2014a).

The more direct inclusion of local communities presents opportunities to understand their views and interests better when developing regulation and also to inform more effective direct recourse to settle disputes. It is clear that contracts have the potential to go far beyond their current purpose of regulating the technical and financial aspects of projects to be equally effective in imposing accountability mechanisms.

Although multi-actor contracts would apply primarily to advocates of foreign projects rather than their local counterparts, it is nonetheless necessary to recognise this approach in the broader context of foreign investment regulating frameworks for two key reasons. First, investors in extractive industries are often foreign, especially in Third World economies. Second, the critical role of multi-actor contracts in regulating foreign investment must be carefully considered, mainly as conflict already exists between these regulations and international investment law.

5.4.1 Some reflections on this new type of multi-actor contract

The proposed multi-actor mechanism champions the use of multi-actor agreements. These contracts are formed between the three principal actors in the agreement: the foreign investors who are accountable for project development, the host Government(s) and the local communities that host the project or are directly impacted by it.

Only the actors that are directly affected by such projects are involved in the multi-actor contract framework. This tripartite framework aims to integrate the interests and views of these actors directly. However, such a framework must also recognise its responsibility to regulate effectively in the broader public interest, leading to the involvement of government on the public's behalf.

The legal and regulatory capacity of host governments is significant, and they have the authority to dictate the legal and economic structures of such projects and of the entire jurisdiction they control⁴⁵⁵. They are also obligated to establish that the broader interests of the public are served in any contractual and regulatory mechanisms they approve.

Despite the potential for the entire country to benefit from such projects, it is the host and impacted communities who must directly bear the consequences, whether positive or negative.

⁴⁵⁵ Gathii, J., & Odumosu-Ayanu, I. T. (2015a). See also Lange, B. (2003) Regulatory Spaces and Interactions: An Introduction. *Social & Legal Studies*, 12(4), 411-423.

It is important to consider the property and other legal rights of impacted communities when engaging with investors and governments to develop extractive industry projects. Such extractive industry operations directly influence the economic benefits on such communities as well as their moral entitlements⁴⁵⁶.

The proposed multi-actor framework is supported by the approaches to regulation found in other existing contracts; however, it goes beyond these existing perspectives. Rather than serving primarily as regulatory tools, multi-actor contracts could easily have quasi-regulatory functions and provide essential support for regulatory initiatives. However, this well-intentioned support could equally have the impact of determining the regulatory decisions that governments take. Such contracts would actively include impacted communities with rights to make sure both the government and investors fulfil obligations set out regarding the contracts. The contracts would, therefore, be able to serve a quasi-regulatory role in any such extraction projects.

Direct local community involvement has the potential to ensure robust decision-making and strengthen regulatory initiatives in order to overcome the inherent limitations in state regulation⁴⁵⁷. Multi-actor contracts are more likely to place states inside the investment protection mandate placed upon them by international investment law. As foreign investors would fully participate in negotiations and work out terms from their perspective, it is considered improbable that quasi-regulatory enterprises included in multi-actor agreements could be judged as discriminatory in international investment law.

Balancing the conflicting goals of protecting investments with regulation in the interest of the public is often challenging and requires carefully crafted solutions, which are sometimes addressed by negotiated contracts. To properly address the issue of competing goals in such investment projects, it is essential that host and impacted local communities are fully involved in the decision-making process.

Such involvement would significantly impact the framework. Regulators would be forced to consider conflicting goals that they might otherwise not adequately have addressed. The

⁴⁵⁶ Sovacool, B. K. (2013) *Energy & Ethics*: Palgrave Macmillan. See also Zerk, J. (2006) *Multinationals and Corporate Social Responsibility*. Cambridge: Cambridge University Press.

⁴⁵⁷ Gunningham, N. (2009b). Environment law, regulation and governance: Shifting architectures. *Journal of Environmental Law*, 21(2), 179-212. See also Young, J., Septoff, A., (2002) Digging for Change: Towards a Responsible Minerals Future, an NGO and Community Perspective. Mineral Policy Centre.

proposed multi-actor contract approach is supported by existing literature on the participation of local communities in investment decision-making, and by current regulatory practices already used in other investment projects that incorporate citizens in regulatory decision-making.

Although these newer contracts are established more on environmental issues, they are still helping to establish accountability and responsibility mechanisms that did not previously exist. This groundwork is vital for the continued consolidation of the progress made so far so that these new mechanisms can be utilised effectively to establish greater human rights accountability. These contractual forms demonstrate a malleability to serve different means – the technical and financial interests at the centre of the state and investor relations, and also the broader impacts of extractive industry activities on environmental, social and human rights.

Contracts can be written to provide remedies appropriate to situations involving all parties in extractive industry activities. Such contracts are viable alternatives for addressing issues most important to the specific parties that other frameworks cannot readily satisfy. However, these emerging contracts are not limitation-free. The idea that consent is the factor to be considered in contract law is contested, as this narrow perspective undervalues other purposes of contract law.

Now, contracting for natural resource extraction must be understood in conjunction with concerns for human rights and environmental responsibility rather than guided solely by outmoded notions of consent⁴⁵⁸. The broad range of extractive industry contracts, particularly those affecting indigenous communities, sometimes involves new combinations of legal traditions to best reflect how extractive industry activities relate to the circumstances of the communities they impact.

Initial steps have been taken towards establishing a framework that can be utilised to negotiate in the extractive industry context effectively. Such contracts may be limited to addressing the issues that impact third parties and, when they do, there may be challenges in the language adopted in drafting the relevant provisions regarding interpretation and enforceability. Relying on contracts that are traditionally considered to be the primary mode of

⁴⁵⁸ United Nations OHCHR (2016). See also International Bar Association Model Mining Development Agreement Project. Retrieved from: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=41f1038e-dcbf-44fd-ad17-898b7aa04a1a>.

private ordering when extracting natural resources is limited because such a view ignores the broader social, environmental and human rights circumstances surrounding these activities. As a result, it is necessary to focus on newer contract forms that encapsulate a broader acceptance of all the actors involved in the process of extracting natural resources.

It is clear that more holistic contracts that account for this broader context are favoured, and it is acknowledged that this sometimes comes at a cost even though these newer contractual forms account for a much broader context.

In many CDAs or cross-sector partnerships, local communities seek benefits and trade some rights to achieve these benefits in the negotiations. In Canada, indigenous peoples regularly exchange legal rights when mitigating the negative impact of natural resource extraction or seeking economic benefits⁴⁵⁹. The Pinehouse IBA – an accord between two mining companies (Cameco and Areva) and the local communities their project impacts– requires the support of the local community for both existing operations and future projects⁴⁶⁰. Any community opposition to the authorisation of proposed projects amounts to a violation of the agreement. The Pinehouse Agreement was ‘entered into in full and final satisfaction of any claim’ by the indigenous communities against the extraction companies ‘for any infringement of Aboriginal rights by the Operations’⁴⁶¹. Agreements that are more socially-inclined, particularly CDAs, exist to manage risk for investors and are not instances of free, prior and informed consent.

Many CDAs are not entered into ‘prior’ to the approval of extractive industry projects; in fact; they are often formed months or even years after the extraction projects have commenced. Clear examples of this practice are the GMoUs in Nigeria⁴⁶². As a result, investors regularly use these CDAs to protect their investments by significantly reducing ‘risk and potential

⁴⁵⁹ Affolder, N. (2010). See also O’ Faircheallaigh, C. (2006) *Environmental Agreement in Canada: Aboriginal Participation, EIA Follow-up and Environmental Management of Major Projects*. Calgary: Canadian Institute of Resources Law.

⁴⁶⁰ See the collaboration agreement between communities and Cameco and Areva, available at <http://ccsi.columbia.edu/files/2015/01/Collaboration-Agreement.pdf>. For comments, please see Odumosu-Ayanu, I. T. (2015). Indigenous Peoples, International Law, and Extractive Industry Contracts. *AJIL Unbound*, 109, 220-225.

⁴⁶¹ Ibid.

⁴⁶² Ite, U. E. (2007a). Changing times and strategies: Shell’s contribution to sustainable community development in the Niger Delta, Nigeria. *Sustainable development*, 15(1), 1-14. See also Ite, U. E. (2007b). Partnering with the state for sustainable development: Shell’s experience in the Niger Delta, Nigeria. *Sustainable Development*, 15(4), 216-228.

downstream project delays' through establishing cordial relationships with communities even after some initial challenges. Despite these challenges, contracts of this type remain a potential platform for establishing free, prior and informed consent.

Questions remain regarding the form that such contracts should take. Some of these questions may be addressed through clear (legislative) mandates regarding the establishment of free, prior and informed consent. Regardless of the form of these newer contracts, most are not subject to public and legal scrutiny. Overall, there are still the opportunities for biased agreements to be formed that may not directly benefit the broader public, meaning that transparency is crucial.

While modern contractual forms present apparent limitations when establishing accountability and responsibility frameworks for all actors, their potential is nevertheless evident. These contractual forms have potential, beyond their embryonic stages, to address adverse human rights, safety, health or environmental impacts, or to act as frameworks for guaranteeing investment in local education, health and other community areas.

The next step is to develop and use contractual forms that provide enforceable support for those communities unfairly impacted by natural resource extraction. While there is considerable potential for broadening the impact of the actors participating in investment arrangements, there are also barriers. In fact, utilising democratic capacities available through arrangements that recognise the actors' roles in the current investment system may be difficult, but not impossible.

As a consequence, addressing responsibility in extraction industries through a contract approach highlights the risk of neo-liberalisation of resource governance or what might be referred to as 'market-based solutions to social problems'⁴⁶³, especially for local communities. Self-determination remains one of the main drivers in relationships with governments as well as investors for many indigenous communities. It is, therefore, necessary to explore the relationship between neo-liberalisation and self-determination in establishing contractual

⁴⁶³ Castree N. (2010a) Neoliberalism and the Biophysical Environment 1: What 'Neoliberalism' is and What Difference Nature Makes to it. *Geography Compass*, 4(12), 1725–1733. Castree N. (2010b) Neoliberalism and the Biophysical Environment 2: Theorising the Neoliberalisation of Nature. *Geography Compass*, 4(12), 1734–1746. See also Schwartz, D. L. (2014) *The Energy Regulation and Markets Review* (Third Ed.) London: Law Business Research.

responsibility in the extractive industry. Ironically, negotiated contracts may well be a greater reflection of self-determination than is evident in the first instance.

To summarize, there is a preference for contracts that recognise a greater awareness of responsibility in the extractive industry, despite the limitations that accompany them. Contracts have been part of the oil, gas and mining industries for a considerable time and, despite the increase in the number of investment treaties for protecting foreign investors and an approach to addressing corporate responsibility that is less than robust, they have remained vital. That recognition of responsibility is now being extended to actors other than states and investors.

5.4.2 The prospect of multi-actor investment contracts

It has been often asserted that to promote economic growth and social welfare, state regulation "needs to be both effective and efficient."⁴⁶⁴ If regulation must be both efficient and effective, the question is then whether multi-actor contracts can support these aims or not.

Regulating FDI in the extractive industries cannot be cheap; effective regulations may require a high financial cost for governmental regulators⁴⁶⁵. These regulating costs are quite significant for those less economically-developed countries. The discussions in this chapter have addressed many issues in relation to the effectiveness and possible challenges of multi-actor contracts in the energy investment context. At this stage, this section briefly outlines some further issues regarding the prospect of applying multi-actor contracts for regulating investments and engaging communities.

Firstly, the role of governments in this new type of multi-level contracts may need further careful examination⁴⁶⁶. For instance, the interests of the wider citizens may be different from the interests of stakeholders included in these multi-actor contracts. Consequently, governmental regulators should retain its obligations to consider the more extensive public interests properly. The multi-actor investment contracts may offer a new layer of protection for local communities affected directly in a way that the broader public citizens are not. As other academic works on the effectiveness of community development agreements, multi-actor contracts should also consider setting up a contract registration mechanism (usually under a

⁴⁶⁴ Tietenberg, T. H., & Lewis, L. (2016). *Environmental and natural resource economics*. Routledge. See also Redgwell, C. (2016).

⁴⁶⁵ Tietenberg, T. H., & Lewis, L. (2016). See also Kahn, A. E., Kahn, A. J., & Khan, A. E. (1988). *The economics of regulation: principles and institutions* (Vol. 1). MIT Press.

⁴⁶⁶ Gathii, J., & Odumosu-Ayanu, I. T. (2015a). See also Odumosu-Ayanu, I. T. (2014a).

governmental agency) to ensure that the wider public also enjoys a sufficient level of protection. The governments should undertake this work.

Secondly, some people may argue that the local communities and individual citizens do not have enough enterprise to participate in the negotiating procedures of multi-actor investment contracts⁴⁶⁷. There is an apparent imbalance of negotiation power between communities and large international energy companies. Also, there is an urgent need for governmental authorities' further interventions and policy adjustments. For example, governments may consider providing financial funding, legal empowerment, and negotiation capacity building for the local communities and citizens. Governments can design some independent and external mechanisms to monitor and control the provisions negotiated in these multi-actor investment contracts. It is also possible for governments to officially link these contractual provisions with the external national and international legal frameworks. Of course, the issue of contract transparency should be addressed appropriately, because transparency in contract negotiations could ensure that the whole process is free and fair.

Thirdly, from a regulation economics perspective, people may not ignore the considerable financial and procedural cost for public participation⁴⁶⁸. Requiring local communities and citizens affected by the investment projects to participate in these multi-actor contracts can be viewed, to some extent, as additional burdens on the citizens. The guidelines to the solution of this issue already can be found in existing community development agreements and environmental contracts. The internal relations of every local community is different, and the decision-making procedures also vary in different jurisdictions. As a result, the usefulness and prospect of these new multi-actor investment contracts are eventually context-specific.

This chapter has considered the potential of multi-actor investment contracts to manage the conflicting goals often present in foreign investment regulation. There is undoubtedly a need for further monitoring of developments within this subject in order to form more definite conclusions. For example, the Canadian Government has developed the initial industry-

⁴⁶⁷ Cotula, L. (2015). See also Cotula, L. (2016).

⁴⁶⁸ Tietenberg, T. H., & Lewis, L. (2016). See also Kahn, A. E., Kahn, A. J., & Khan, A. E. (1988).

government regulatory contract in energy efficiency, and this contract was tested in practice⁴⁶⁹. In the future, the multi-actor approach undoubtedly requires more practical experiments.

Despite the limitations and imbalances in the current international investment law architecture, there remains a need to share "instructive stories" that will enable the further improvement of regulation⁴⁷⁰. The multi-actor contract framework has the potential to create such "instructive stories" that can develop meaningful regulation and also develop more friendly relationships within the foreign investment framework.

⁴⁶⁹ Government of Canada announces energy efficiency contract at Base Petawawa, available at: <https://www.canada.ca/en/department-national-defence/news/2018/06/government-of-canada-announces-energy-efficiency-contract-at-base-petawawa.html>.

⁴⁷⁰ Sornarajah, M. (2015). See also Wentzel, W. (2013).

Chapter 6 – Extracting governance dynamics and innovative patterns

“Never doubt that a small group of thoughtful, committed, citizens can change the world. Indeed, it is the only thing that ever has.” – Margaret Mead

Based on the empirical evidence presented in the preceding paragraphs, this chapter aims to develop original conceptual charts to capture the interactions among the existing three major legal frameworks for regulating international energy investment. Also, the newly-developed charts hope to highlight the usefulness of the contractual approach for promoting legal and policy innovations and enhancing multi-level environmental governance.

Through these original conceptual charts, this research puts the project-specific contractual mechanisms into the centre of international natural resource governance. It has revisited the ‘S-I’ (e.g. traditional investment contracts), ‘S-P’ (e.g. business-NGO partnerships), and ‘S-I-P’ (e.g. multi-actor investment contracts) by their real functions and reclassify them into three new categories, namely ‘soft contracts’, ‘enforcement contracts’ and ‘innovative contracts’. By applying this new contract classification, this research aims to add a dynamic perspective to the original ‘State-Investor-Population’ (S-I-P) triangle and highlights the potential of an ‘innovative contract’ for contributing to future formal and informal law-making (both international and domestic) and social innovations.

For the discussion purpose, Section 6.1 below aims to chart the dynamic interactions between contractual, national and international legal frameworks, and investment dispute. This section uses the recent development of UN’s Principles for Responsible Contracts as a proper illustration. The functions of these contractual approaches for preventing investment disputes and stimulating future legal changes will also be discussed.

Then section 6.2 of this chapter reclassifies various kinds of contracts previously examined into three major new categories: soft contract, enforcement contract and innovative contract. This research labels these contracts by focusing on their actual functions and argue that ‘innovative contracts’ can provide a beneficial platform for natural resource governance and have substantial impacts on further legal, policy and social innovations.

Section 6.3 further explores the origins of these ‘innovative contracts’. This thesis also likes to argue that this kind of innovative contractual arrangements could not be easily found in those pure ‘top-down’ regulatory approaches. On the other hand, those innovative contractual mechanisms often emerge from the ‘bottom-up’ public participation and fierce

local resistance. When it comes to the reasons and ‘fuel’ behind these legal evolutions, this research highlights the significant role of multi-national companies, non-governmental organisations and commercial lawyers for launching and negotiating those ‘innovative contracts’. In the “bottom-up” governance approach, NGOs and commercial lawyers are crucial agents (or it is proper to call them legal and policy entrepreneurs) for promoting positive policy, legal and social changes

In this research, energy companies are seen as both a critical objective subject to relevant regulations and a vital actor who can also act actively to bring positive regulatory changes and societal evolutions. Therefore, to establish these new and dynamic conceptual charts, the discussion below starts by rethinking the changing role of transnational energy companies in the modern society. In the view of this thesis, investors have a central role in the S-I-P triangle. The limitations of the existing legal frameworks for regulating international energy investment actually bring many opportunities for ‘informal regulation’, such as ‘corporate self-regulation’.

Besides energy MNCs, this research also highlights the involvements of NGOs and commercial lawyers. Though the role of government today is changing in this context, this research argues that now the key function of government is to design an ecosystem which can encourage a ‘bottom-up’ and a more ‘collaborative’ approach for policy and social innovations.

Finally, this chapter provides with some theoretical insights and the potential of these innovative contractual arrangements for future multi-level environmental governance (Section 6.4). And a new analytical framework for assessing other case studies in investment and the environment is also proposed in section 6.5.

6.1 Dynamic interactions between contractual, domestic and international legal framework

All the legal instruments discussed above have attracted some commentary in the current literature, but a full and systematic understanding of the interactions and mutual supportiveness between all these legal instruments still does not exist.

Figure 6.1 shows a fundamental model of the tripartite interactions between regulations (R), contracts (C) and disputes (D). This research firstly frames the relationships in these three dimensions: R-C, C-D and R-D.

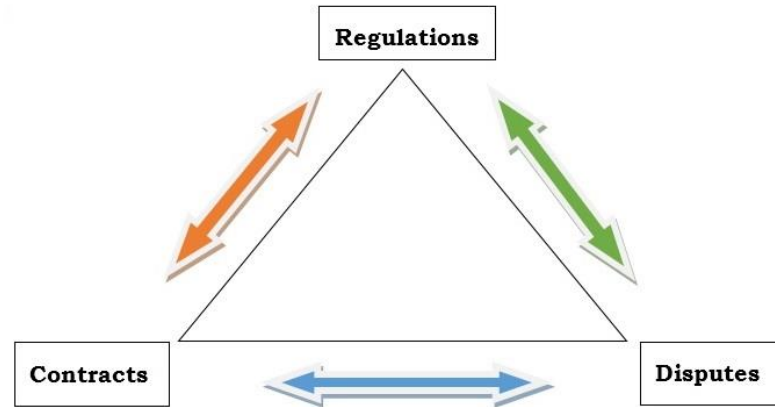


Figure 6.1 Tripartite interactions between regulations (R), contracts (C) and disputes (D)

Essentially, this fundamental model guides the researcher to look at the mutual impacts within each relationship. For instance, in the R-C interactions, one can think about both the C's impacts on R and R's impacts on C. This principle can be applied to both C-D and R-D relationships. The complete analysis would be beyond the main purposes of this research and require further primary and secondary empirical data. Here, this research presents critical questions in this triangle.

1) R-C Interactions

What are the impacts of international laws and standards on the contracts? Do these contracts adhere to international regulations? Are there any 'token clauses'? To what extent do contracting practices make contributions to regulatory reforms? How do negotiators integrate soft laws, standards or principles into modern contract negotiations?

2) C-D Interactions

Do claims under treaty and claims under contract make a difference to dispute procedures and outcomes? To what extent can judicial procedures or arbitration tribunals help to re-negotiate the contracts? Does any key clause prevent or cause investment disputes? What are the possible problems of enforceability and application of stabilisation clauses in State-investor contracts?

3) R-D Interactions

How do the decision bodies apply these environmental and human rights regulations? What human rights and environmental issues do they currently discuss in the investment

disputes? To what extent can dispute resolutions become key drivers for future regulatory revolution?

Therefore, Figure 6.1 shows that contracts (C) is at the crucial position within the C-R-D triangle. On the one hand, foreign investors apply the contractual devices, such as State-investor investment contracts, to impact the contents and applications of national legislation to protect their investments. The contractual arrangements for many FDI projects in energy and natural resources are the outcomes of and are mainly governed by national, rather than directly by international, law frameworks. Also, international legal frameworks, i.e. international investment treaties and international environmental agreements, interact with the contractual and national frameworks in various ways. For example, foreign investors can use investment contracts to secure the added protection provided by international law, and sovereign countries can attempt to shape State-investor investment contracts to require private investors to follow the requirements under international investment treaties and other international agreements.

An example is the UN Principles for Responsible Contracts. In a typical State-investor contract, stabilisation clause is one of the crucial tools for foreign investors to mitigate the regulatory risks brought by the states⁴⁷¹. The State may apply their regulatory power to primarily change the conditions and domestic regulations applicable to the FDI project after the conclusion of that project's negotiation. However, over the past few decades, stabilisation clauses have been facing criticism from the environmental activists and human rights advocates. A major concern of these advocates is that stabilisation clauses may become a serious obstacle when the State likes to implement domestic public policies and meet the state's obligations under international environmental or human rights laws⁴⁷².

These policy and legal debates eventually attracted the attention from the UN Special Representative for Business and Human Rights. As a result, this special representative from the UN and the research unit of the International Finance Corporation started joint empirical research on the potential impacts of stabilisation clauses⁴⁷³. The main issue is whether these stabilisation clauses construct an obstacle for preventing States from fulfilling its obligations

⁴⁷¹ United Nations OHCHR (2015) *Principles for Responsible Contracts – Guidance for Negotiators*. United Nations Publication.

⁴⁷² United Nations OHCHR (2016) *A Turn to Responsible Contracting: Harnessing Human Rights to Transform Investment*. E15 Expert Group on Trade and Investment in Extractive Industries Working Paper, Geneva.

⁴⁷³ Clement-Davies, C. (2014). See also Cotula, L. (2008). Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses. *Journal of World Energy Law & Business*, 1(2), 158-179.

under public international law. After a detail analysis on 88 investment contracts as well as some model contracts from different jurisdictions and industrial sectors, the joint research between UN and IFC commented: modern stabilisation clauses are drafted in a way that can genuinely have negative influences on a host State’s public policies and its legal obligations under international environmental and human rights laws⁴⁷⁴.

Following this large-scale empirical study, the UN’s SRSG still kept consulting with a range of stakeholders, i.e., governmental officials, MNCs, civil society groups and international human rights experts for over three years. According to the empirical findings of this research and the following public consultations, the SRSG finalised the UN Principles for Responsible Contracts and its updated report for the Human Rights Council.



Figure 6.2 The development and impacts of UN Principles for Responsible Contracts

Figure 6.2 demonstrates the evolution circle of UN principles for responsible contracts and how contracting practices interplay with investment disputes and other international and domestic regulations. From a dynamic perspective, contracts can play a crucial role in regulatory and policy reforms. The legal and policy reforms usually start from C (stabilisation clauses in State-investor investment contracts) and then move to D (commercial and investment disputes concerning the conflicts between stabilisation clauses and public policies). Finally, the debates appear in the disputes can lead to further research and the final product (R, UN Responsible Contracts Principles).

6.2 Macro-level observation: Reclassifying contracts and exploring their functions

⁴⁷⁴ London School of Economics and Political Sciences (2016) *Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking*. Investment and Human Rights Project, LSE.

After examining the dynamic interplays between contractual design, regulations (international and national), and related investment dispute cases, it is proper to take a closer look at the central role of these contracts and their arrangements.

So far the existing literature tends to categorise a variety of contractual arrangements mainly by their signed parties, such as State-investor contracts, community development agreements, and SIP tripartite contracts. This research is not only interested in the formats of these contracts but also the functions that different contracting practices can contribute to global environmental and social governance and legal innovations.

While the original S-I-P triangle provides a useful structure for organising contractual data and discussions, this S-I-P analytical structure does not address much of the dynamic dimensions in the state-investor-population triangle. The dynamic dimension of the S-I-P triangle can provide a unique angle to explore new questions: How do the three different legal frameworks interact? How can the regulators design more sophisticated and innovative regulatory instruments for environmental governance and human rights protection? Moreover, what are the driving forces or key actors behind these legal and policy innovations?

In this new perspective, this section starts to re-label the various contractual mechanisms in the S-I-P triangle based on their functions for stimulating regulatory and social innovation. By reviewing the assessments in proceeding chapters and some selected essential case studies, this thesis tends to reclassify all the contracts within the S-I-P into three different categories: ‘soft’, ‘enforcement’ and ‘innovative contracts’.

6.2.1 ‘Soft contracts’

‘Soft contracts’ in this research refer to those contracts which have some provisions or sections concerning environmental and human rights, but they do not have enforceability. Therefore, although these environmental and social provisions do exist, the contracting parties or the third parties, such as affected communities, do not have any legal right to enforce those contractual provisions⁴⁷⁵. This type of contract can appear in any phase of an investment project.

⁴⁷⁵ Cotula, L. (2015) *Democratising international investment law: recent trend and lessons from experience*. London: IIED. See also Cotula, L. (2016). *Foreign investment, law and sustainable development*. International Institute for Environment and Development. London: IIED.

Typically, the life cycle of an investment project can be divided into five phases⁴⁷⁶: 1) Preparation stage; 2) Promoting stage; 3) Initiating stage; 4) Implementation; and 5) Ending or decommissioning the project (Figure 6.2).

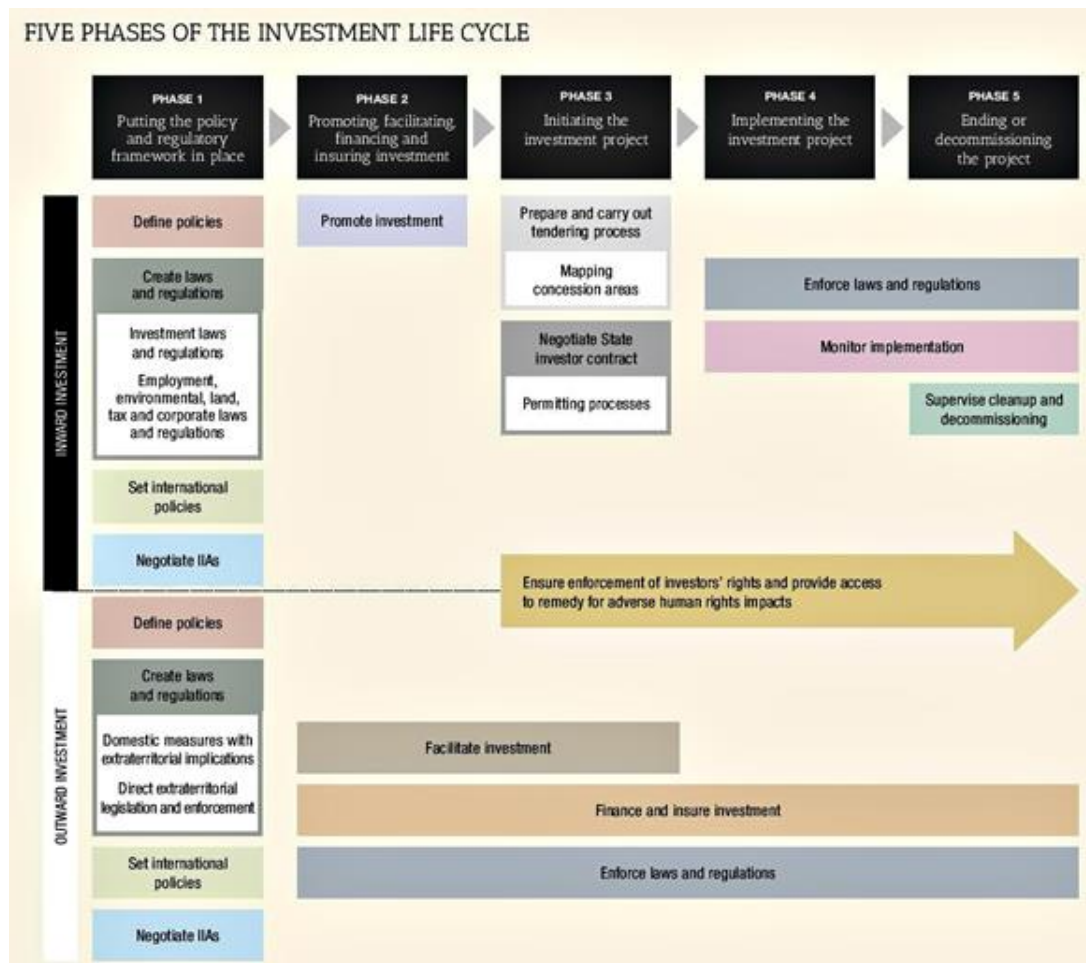


Figure 6.3 The investment lifecycle. Source: London School of Economics & UNGP (2016)

Usually, when an international energy investment project is launched, contracts may start to play a very crucial role in Phase 3 (Initiating Stage). Stakeholders should consider possible environmental and human rights consequences as early as possible. In particular, those investment projects operating in countries which do not have strong regulations and other effective mechanisms, because well-designed investment contracts or other ‘watchdog’ mechanisms may fill the governance gap in the existing international and national legal frameworks.

⁴⁷⁶ London School of Economics and Political Sciences (2016). See also Dolzer, R. a. C. S. (2013) *Principles of International Investment Law*. Oxford: Oxford University Press.

From a regulator's perspective, when the calls for stronger environmental governance appear, it is more convenient to create some new provisions and mechanisms to the existing contracts rather than drafting new national legislation or even a comprehensive international agreement. In theory, well-designed environmental and social provisions inserted in investment contracts can respond to the challenges of transboundary projects' public participation and compensation issues⁴⁷⁷.

'Soft contracts' in this research mean a contract does have some mechanisms on environmental protection and human rights either in its preamble or any provision, but the language of these mechanisms is usually quite vague, and the content does not have any legal enforceability. For example, some preambles of the collected contracts mention principles of sustainable development or environmental protection but without any concrete substance. Also, some conventional CSR provisions do exist in these 'soft contracts'.

These contracts usually can be seen as corporate philanthropy and charity activities in the communities. Individuals and communities do not have any legal right to require the investors to donate or assist the local development. Though this type of contract may have the ability to raise people's awareness on environmental and human rights issues, the researcher labels them as 'soft contracts' due to the unenforceable nature of their environmental and social clauses. This research also assumes these soft contracts are precisely the unsurprising outcomes of the traditional/state-centric international investment legal framework.

There are several examples of this type of 'soft contract' which have been discussed in this research. Especially in the oil and gas sectors, many operators of the investment projects began to recognise the importance of environmental protection in the mid of 1980s and consider introducing these non-commercial clauses, i.e. environmental and community development, into their energy investment contracts. However, many of these initially developed clauses only use very broad and vague languages. Until the late 1980s, the contents of 'soft contracts' have been more sophisticated. However, overall these environmental and social provisions still demand much improvement.

Chapter 3 has pointed out many investment contracts in the 1990s still kept silent on environmental and social issues regarding those large-scale extractive operations. Nigeria is

⁴⁷⁷ Tienhaara, K. (2013). See also Cotula, L. (2010a).

one of the biggest oil and gas producer in African countries⁴⁷⁸. However, this country's published Model Production Sharing Contract 1995 remained quite weak on environmental protection and any other social dimension. In this version of the model contract, the only relevant provision is about insurance; it states as below:

'all insurance policies...shall be based on good international petroleum industry practice...'

Overall, this type of investment contracts, which this thesis terms 'soft contracts' (or token contracts), is still widely used in modern extractive and natural resource contracts. Examples are those 'corporate social responsibility clauses' and provisions using vague language on environmental principles or community development.

While these soft contracts may not have legal enforceability, it can still be an important milestone of contracting evolution. It was the first time commercial contracts have some non-economic clauses, talking about other public policies. At least, these contracts, even as 'beautiful tokens', are still helpful to raise sustainable development awareness for commercial partners and the public. Finally, this approach at least reminds contracting parties and other stakeholders to evaluate the effectiveness and other practical issues in the contractual approach.

6.2.2 'Enforcement contracts'

The analysis of 'enforcement contract' here focuses on how these contracts can function as 'quasi-regulatory' mechanisms. The substantial contents of these 'enforcement contracts' can vary from one contract to the other, including well-designed environmental and social provisions embedded in State-investor investment contracts to those current multi-actor investment contracts. One key point about 'enforcement contract' is that all these contractual provisions are legally enforceable and can be taken into account as an essential part of the whole regulatory framework on the energy investment project.

If investors fail to fulfil their contractual obligations, the governments can ask for improvements on the company side and eventually revoke the operating licenses. In many cases, these 'watchdogs' or safeguarding mechanisms are based on the existing legal frameworks within the jurisdiction, such as domestic environmental regulations, public health regulations

⁴⁷⁸ Omeje, K. (2017). *High stakes and stakeholders: Oil conflict and security in Nigeria*. Routledge. See also Ingelson, A., & Nwapi, C. (2014). Environmental impact assessment process for oil, gas and mining projects in Nigeria: A critical analysis. *Law Env't & Dev. J.*, 10, 1.

and so on. Thus, this type of contract can be viewed as a powerful tool for assisting related law enforcement.

1) Modern environmental and social provisions in state investment contracts

During the 1990s, many improvements on environmental and social provisions in the State-investor investment contracts can be found in a number of jurisdictions. For example, the Model Concession Agreement 1996 in Romania has designed a quite sophisticated environmental and social clause. This provision states as below.

“1) Compliance with all environmental permitting procedures under 'prevailing Romanian Law';

2) A 'full environmental assessment';

3) Conduct of petroleum operations 'in accordance with generally accepted international petroleum industry practice';

4) Remedial measures by the government in case the contractor fails to do so;

5) Insurance Programme property, pollution damage and third-party liability; and

6) Revocation of contract in the event of repeated violation of environmental requirements.”

In this 1996 Model Concession Agreement, the environmental provision has been significantly improved in both the substantive and procedural designs and addressed every stage in the lifecycle of an investment project.

2) Other bilateral and multi-actor environmental and social agreements

According to the UN Principles on Responsible Contracts, any investment project is required to prepare a practical and feasible community development plan and agreement from the earliest phase and throughout the whole life cycle of the project⁴⁷⁹.

Although it may not be possible to attach a very detailed community development agreement which can cover every aspect of an investment plan, the community development agreement should be agreed by all the contracting parties. If the community is not a contracting party, there should be some necessary participation mechanisms during the negotiations and

⁴⁷⁹ United Nations OHCHR (2015).

contract implementation. For example, if an investment plan may adversely influence indigenous peoples' communities, a community development agreement will be necessary, which should detail the public participation procedures and the mechanism for gaining a 'free, prior and informed consent' from the affected community⁴⁸⁰.

Recent developments in environmental contracts in the realm of natural resource extractive industries is an example of project-based 'watchdog' and 'enforcement contract'. Affolder well noted that these 'watchdog' mechanisms in Canada's mining regions⁴⁸¹, e.g. the Ekati diamond mining area, have been enhancing civil society groups' participation capacity and creating strong practical measures to monitor all the environmental and community development commitments made by the foreign mining company⁴⁸².

In fact, in many 'enforcement contracts' concluded in the US and Canada's extractive industries, the main feature of these contracts have been on enhancing public participation from the individual citizens and civil society groups as well as setting up adequate measures to oversee and enforce the community development and environmental commitments undertaken by the private enterprises.

Other typical instances of 'enforcement contracts' are those contractually-agreed 'watchdogs' mechanisms as well as so-called 'transnational conservation contracts'. These 'enforcement contracts' are a platform which can bring stakeholders to create safeguarding and synergistic means for promoting responsible and sustainable investment. For safeguarding functions, Article 4 of the Diavik Environmental Agreement established a specific 'Environmental Monitoring Advisory Board' in the legal organisation form of NGO under Canadian law⁴⁸³.

The 'access and benefit sharing' (ABS) agreements is a form of transnational conservation contracts, which also has a solid regulatory component, regulating the negative environmental

⁴⁸⁰ O' Faircheallaigh, C. (2006) *Environmental Agreement in Canada: Aboriginal Participation, EIA Follow-up and Environmental Management of Major Projects*. Calgary: Canadian Institute of Resources Law. See also Zillman, D. M., & Lucas, A. (2002) *Human rights in natural resource development: Public participation in the sustainable development of mining and energy resources*. Oxford University Press.

⁴⁸¹ Affolder, N. (2010) Rethinking Environmental Contracting. *Journal of Environmental Law and Policy*, 21, 155.

⁴⁸² Ekati Diamond Mine Socio-Economic Agreement, available at: <http://www.miningnorth.com/wp-content/uploads/2011/10/EKATI-Socio-Economic-Agreement.pdf>.

⁴⁸³ Affolder, N. (2011). See also Affolder, N. (2013).

impacts of bioprospecting activities⁴⁸⁴. ABS is quite popular in the cross-boundary investment projects by pharmaceutical and biotechnology industries.

To sum up, in this research, “enforcement contract” means the contracts contain provisions on environmental management/social development and they are legally enforceable. In some advanced jurisdictions, such as Canada, the US and Australia, it is not uncommon to see that investment agreements do create some safeguarding and monitoring mechanisms for energy investment projects. ‘Enforcement contracts’ can be seen as a ‘technology’ to regulate the foreign investors’ activities globally. In addition, the examples of ‘enforcement contract’ may raise the debate of whether the contractual instruments can be viewed as a choice to the applicable legal regimes or just as a supplement to the existing regulatory frameworks.

6.2.3 ‘Innovative contracts’

Finally, what matters for multi-level governance so far is that some environmental or social development contracts do go beyond both national and international legal frameworks and truly have innovative elements. These innovative contracts play a significant role in governance functions, especially in the areas where legal frameworks are not complete or are quite weak.

From the macro-level observations, this type of innovative contract usually exists in company-community agreements, Business-NGO partnerships and multi-actor agreements. Sometimes it is also possible to see some innovative contractual designs embedded within conventional investment contracts between states and foreign investors. Besides being a regulatory tool, one of the essential features of ‘innovative contracts’ is that they can be a crucial catalyst for future legal and policy revolution (with these contracts’ external impacts) at the international, regional or local levels.

Similar to the UN’s Principles for Responsible Contracts and its relevant official research, in 2016, the Mining Law Committee of the International Bar Association also decided to initiate a large MMDA research project, aiming to design a model contract template for mining

⁴⁸⁴ Affolder, N. (2012) *Transnational Conservation Contracts: A Primer*. Paper presented at the Annual Meeting. See also Ameha, A., Nielsen, O. J., & Larsen, H. O. (2014). Impacts of access and benefit sharing on livelihoods and forest: Case of participatory forest management in Ethiopia. *Ecological Economics*, 97, 162-171.

development agreement⁴⁸⁵. This project's advanced model contract can offer a guideline for negotiating for State-investor investment contracts in the mining and natural resource industries and other relevant community development agreements, particularly applicable in those developing regions⁴⁸⁶.

This MMDA template can be regarded as an 'innovative product' designed by the experts in the research unit of the IBA. From the very beginning, this model contract aims to balance the economic interests of the international mining sector with other environmental and social values. The development process of this MMDA model contract is quite similar to the evolving circle for generating the UN's Principles for Responsible Contracts addressed in section 6.2. The evolution of MMDA illustrates the importance of innovative contractual mechanisms for stimulating legal and policy innovations, at both a domestic and international scale, as well as for synergising economic growth with other sustainable development values.

By applying the MMDA template, the Koidu Kimberlite and Rutile mining projects eventually lead to new mining legislative reforms in Sierra Leone⁴⁸⁷. Also, the mining projects using the MMDA template in Madagascar also help to introduce new national mining regulations to that country⁴⁸⁸. In Uganda, the discovery of abundant oil resources around the Lake Albert area attracted many foreign capitals. Extractive companies, such as Heritage Oil, even worked with the Uganda government to draft a new Petroleum Bill because of the requirements in their investment contracts⁴⁸⁹.

At the multilateral level, the World Bank's project-specific approvals on the investment projects also can stimulate domestic legal revolution⁴⁹⁰. These legal and policy innovation examples are reforming national environmental regulations, redrafting mining and natural resource laws, and harnessing financial support for energy infrastructure projects.

⁴⁸⁵ International Bar Association (2011) *MMDA 1.0 A Template for Negotiation and Drafting*. See also International Bar Association Model Mining Development Agreement Project.

⁴⁸⁶ Ibid.

⁴⁸⁷ "Sierra Leone at the crossroads: Seizing the chance to benefit from mining", available at: <http://www.eisourcebook.org/cms/19th%20July/Sierra%20Leone%20at%20the%20Crossroads,%20Seizing%20the%20Chance%20to%20Benefit%20from%20Mining.pdf>.

⁴⁸⁸ "New Mining Code in Madagascar must not Sacrifice the People", TANY Collective, Paris, available at: <http://www.minesandcommunities.org/article.php?a=13103>.

⁴⁸⁹ Kasimbazi, E. B. (2015) Environmental Regulation of Oil and Gas Exploration and Production in Uganda. *Journal of Energy & Natural Resources Law*, 30(2), 185-221.

⁴⁹⁰ World Bank (2013). See also Wentzel, W. (2013) *Guide to Extractive Industries Documents - Mining World Bank Institute Governance for Extractive Industries Programme*. London.

Importantly, innovative contracts of individual investment projects not only can have an impact on domestic regulatory reforms but also may alter international treaty instruments. For instance, the contracting and negotiating process of the Baku-Tbilisi-Ceyhan oil pipeline generated a new international treaty⁴⁹¹. This new international agreement is among all the host states involving in this trans-boundary energy project, which aims to ensure the freedom of transit principle for transmitting petroleum across various jurisdictions. However, this new international treaty also had an unintended impact on environmental laws, which allows corporations to ‘freeze’ the local regulations and formulate an accelerated procedure for the expropriation of land targeted by this oil project.

The instances above clearly demonstrated that the interactions between national legislation, international agreements and contractual instruments are not uni-directional. It is not always the case in which national and international law attempt to influence contracting practices. In contrast, the contractual arrangements, especially those ‘innovative contracts’, also have strong potential and abilities to transform and enhance the existing legal systems.

6.3 Micro-level observation: Legal and policy entrepreneurs behind ‘innovative contracts’

This section turns to another the micro-level dimension of these contractual governance instruments. As discussed in the previous paragraphs, the ‘innovative contracts’ are useful for future regulatory and policy innovation. Therefore, the key question here would be: What are the key actors or driving forces behind the ‘innovative contract’?

Based on the empirical data and case studies examined in this research, this section below would like to focus on the potential of three legal and policy entrepreneurs, namely modern MNCs, NGOs and innovative commercial lawyers.

6.3.1 The changing role of modern MNCs and the emergence of ‘corporate self-regulation’

The primary function of the private business sector is to capitalise on market opportunities and create profits for investors and owners⁴⁹². Economic globalisation has brought new

⁴⁹¹ Odumosu-Ayanu, I. T. (2014a) Governments, Investors and Local Communities: Analysis of A Multi-Actor Investment Contract Framework. *Melbourne Journal of International Law*, 15.

⁴⁹² Gordon, K., Pohl, J., & Bouchard, M. (2014).

challenges and serious risks that modern corporations are increasingly facing⁴⁹³. Now the discussion is directed towards corporations from a variety of stakeholders, including investors, consumers, governmental agencies, social media and NGOs. Businesses today are expected to have more social and environmental responsibilities other than solely maximising the economic interests of their shareholders⁴⁹⁴. Heap⁴⁹⁵ clearly states that businesses are a major cause of a variety of global challenges – i.e. human rights violations, financial crisis and environmental harm – but the private sector is also the strong driving force behind technological innovation and globalisation.

Googins and Rochlin⁴⁹⁶ also suggest that, in the 21st century, the rise of corporate powers, accompanied by the decline of the public sector and government power, has formulated a new role for business enterprises. In this new role, businesses can be an interested partner whose success is linked with sustainable and healthy societies. Private enterprises have also become an attractive partner for communities and NGOs for several reasons⁴⁹⁷: 1) corporations have a range of resources, including financial and non-financial assets; 2) businesses have access to knowledge and cutting-edge managerial know-how for their technological innovations; and 3) businesses today are inextricably connected to each other and with the societies they have operations in.

In summary, the leaders of corporations today are becoming more aware of not only the risks ahead for their companies' survival but the possible opportunities and interests that can be gained by collaboration rather than confrontation with other social sectors⁴⁹⁸.

1) Does a corporation have an international legal personality?

⁴⁹³ Newell, P., Rai, S., & Scott, A. (2002) Development and the Challenge of Globalisation (pp. 1-26) ITDG Publishing. See also Nolan, P. (2004) *Transforming China: globalization, transition and development*. Anthem Press.

⁴⁹⁴ OgilvyEarth and Millward Brown (2013). See also Morgera, E. (2009) *Corporate Accountability in International Environmental Law*. Oxford: Oxford University Press.

⁴⁹⁵ Heap, S. (2000) *NGOs Engaging with Business: A World of Difference and a Difference to the World*, Oxford: INTRAC.

⁴⁹⁶ Googins, B. K., & Rochlin, S. A. (2000). Creating the partnership society: understanding the rhetoric and reality of cross-sectoral partnerships. *Business and society review*, 105(1), 127-144.

⁴⁹⁷ See International Civil Society Centre (2014) *Multi-stakeholder Partnerships Building Blocks for Success*. Retrieved from: <http://icscentre.org/area/multi-stakeholder-partnerships>.

⁴⁹⁸ World Vision (2015).

A central debate on MNCs in public international law is the issue of whether private corporations can also be subjects of international law and regulations⁴⁹⁹. This discussion is significant in international law, as organisations and groups need this legal status to operate in the public international law regime, and legal personality is also a condition to file legal claims in a range of international tribunals and dispute settlement mechanisms. This situation is contrasted with entities which are only objects of the international law. As objects of the law, these entities might apply legal norms to protect them, such as the international treaties which protect human rights, children and women. However, these entities, as legal objectives in international law, may not own the legal rights and be able to enforce these rights in a tribunal system. In short, this question may be summarised as whether multi-national corporations are capable of possessing legal rights and duties in public international law, and own capacities to protect their rights by filing international claims.

Brownlie (2008) defines an international person who would be a legal subject of public international law: “*an entity of the type recognised by customary law as capable of having rights, duties, and powers to file a legal suit is a legal person.*”⁵⁰⁰ O’Connell (1970) also argued that “legal personality is only shorthand for the proposition that an entity is endowed by international law with legal capacity”⁵⁰¹. Jennings and Watts (1992) addressed the concept of the international person as an entity that owns legal personality in public international law and possesses legal rights, liabilities or powers as established by international treaties and owns the capacities to act, either directly or indirectly, in the international law arena⁵⁰².

Conventionally, international law was regarded as governing only the formal and mutual relations between sovereign states. The traditional perspective is that only states are the principal subjects of international law⁵⁰³. According to these formal debates, the majority of international legal scholars think that transnational private companies do not own legal personality in international law. Based on this traditional opinion, transnational companies have not been granted duties and rights under public international law. Although these

⁴⁹⁹ Francioni, F. (2013) The private sector and the challenge of implementation. In P.-M. Dupuy & J. Vinuales (Eds.), *Harnessing Foreign Investment to Promote Environmental Protection Incentives and Safeguards*. Cambridge: Cambridge University Press.

⁵⁰⁰ Brownlie, I. (2008) *Principles of Public International Law* (7th Ed.) Oxford: Oxford University Press.

⁵⁰¹ O’Connell, D. O. (1970) *International Law* (2nd Ed.) London: Stevens & Sons.

⁵⁰² Jennings, R., & Watts, A. (1992) *Oppenheim’s International Law* (9th Ed.) London: Longman.

⁵⁰³ Lowe, V. (2007) *International Law*. Oxford: Oxford University Press. See also McCorquodale, R. (2010) The individual and the international legal system. In M. Evans (Ed.), *International Law* (3rd ed.): Oxford University Press.

transnational companies benefit from a variety of international treaty provisions, they are not necessarily allowed to enjoy equal legal rights. As private corporations do not have legal personality in international law, therefore, they are mostly subject to the specific jurisdiction where these companies are incorporated.

On the contrary, some international law scholars have regarded transnational corporations as subjects of public international law⁵⁰⁴. Some of them have applied a *de facto* approach due to these companies' significant participation in the international law, organisations and communities⁵⁰⁵. Moreover, these scholars' arguments can be supported by the growing trend of privatisation of international law in many international investment dispute arbitrations and investment treaties⁵⁰⁶. There is also movement at the international level. This new movement promotes the draft code of corporate responsibility and requires MNCs should take their international legal responsibility and respond to citizens' human rights claims globally⁵⁰⁷. However, these perspectives have not been fully adopted by the UN Human Rights Council or any national states⁵⁰⁸. Businesses have been taken into the international law arena only voluntarily based on those specific instruments, such as the Global Compact⁵⁰⁹. So far it may not be argued that these transnational corporations already have full international legal personality.

In fact, the classic point of view - only sovereign states had legal personality in public international law - was radically challenged in the twentieth century. The advent of international institutions and the development of international criminal law began to recognise that international governmental organisations and individual citizens can also have international legal persons⁵¹⁰. While this significant change is both for good and bad, the transnational company has hardly been viewed as a legal subject that is capable of having rights and responsibilities in public international law. It is believed that this perspective may be about

⁵⁰⁴ Ong, D. (2001) The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives. *European Journal of International Law*, 12.

⁵⁰⁵ Ibid.

⁵⁰⁶ Sabater, A., & Stadnyk, M. (2014).

⁵⁰⁷ Percival, R. V. (2010) Liability for environmental harm and emerging global environmental law, *Maryland journal of international law*, 25(37).

⁵⁰⁸ Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Human Rights Council, available at:

<https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx>

⁵⁰⁹ The ten principles, UN Global Compact, available at: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

⁵¹⁰ Francioni, F. (2013).

to change, given that multi-national corporations today may have the same or even stronger dominant economic power around the world.

These lengthy academic debates about the legal subjectivity of transnational corporations have precluded engagements with the substantive issues of the obligations, duties and rights of corporates under public international law. Maljean-Dubois has argued that multi-national companies have an economic and political position that articulates themselves in a range of legal instruments (though they do not have a legal entity)⁵¹¹. This opinion could be more helpful to lead the discussion focus to the features of MNCs and how these characters are different from nations.

Unlike those domestic business entities (even those businesses who own manufacturing facilities abroad or export products, services and technological know-how), large transnational companies have the abilities to flexibly move their production sites and vital assets across national jurisdictions. They can easily re-structure their management units independently of state borders and lose every link to a country except for the formal and legal nexus of incorporation. These critical features of MNCs, including operational fluidity and the detachedness from domestic regimes, are some of the significant reasons why domestic legislators fail to implement adequate control over the power of these companies, and why transnational companies have played a critical role in the area of international law⁵¹².

Having a position in this debate is not the purpose of this research. Instead, the present research will follow Alvarez' suggestions and focus on "addressing which international rules may apply to and relevant to corporations rather than whether corporations are or are not subjects of international law"⁵¹³.

2) *The emergence of informal regulations: 'Corporate self-regulation'*

Because of the limitations of current international and national frameworks discussed, this section move the focus on the recent new types of self-regulation undertaken by corporations alone and their relations with the current legal frameworks and other contractual approaches,

⁵¹¹ Gatto, A. (2011). *Multinational enterprises and human rights: Obligations under EU law and international law*. Edward Elgar Publishing.

⁵¹² Zerk (2006).

⁵¹³ Alvarez, J. E. (2011). Are corporations subjects of international law? *Santa Clara J. Int'l L.*, 9, 1. See also Noortmann, M., Reinisch, A., & Ryngaert, C. (Eds.). (2015). *Non-state actors in international law*, Bloomsbury Publishing.

i.e. in collaboration with NGOs in environmental and social policy areas via co-regulation strategies.

Stephan Schmidheiny had addressed the rationale behind these corporate self-regulation mechanisms in 1992. His research points out that global enterprises have a duty to promote sustainable development, and one of the best approaches for making this happen is to combine public regulatory standards with the private voluntary initiative⁵¹⁴.

From an environmental economics perspective, environmental damages were viewed as a type of market failure that would be fixed by financial instruments which can also provide economic incentives to corporations to behave in a more ecologically sustainable way⁵¹⁵. In the past, businesses see environmental problems and regulations as a barrier to their market and benefits, and they attempted to minimise the regulatory impact on their businesses. However, new thinking can be identified in the field, which is termed ‘eco-modernism’⁵¹⁶. According to the main ideas of this ‘eco-modernism’ approach, businesses began to believe that evolving technologies have the potential to ameliorate the environmental harm occurred by corporates’ manufacturing activities and other operations⁵¹⁷. Therefore, there is a robust synergistic dimension in the nexus of business-environmental regulation-technology.

Of particular importance as regards to corporate self-regulation has been the widespread adoption of the international industrial standards on environmental management, such as International Standards Organization (ISO) 14000 series of standards for MNC’s environmental management⁵¹⁸. These industrial standards illustrate a hybrid private-public collaborative regulatory model. The nature of this kind of standard is private. Multinational firms can follow these standards established by a non-governmental international institution that includes the 134 national standard-setting groups from all its country members. These standard-setting groups can be governmental agencies, hybrid organisations or entirely private

⁵¹⁴ Schmidheiny, S. (1992). *Changing course: A global business perspective on development and the environment* (Vol. 1). MIT press.

⁵¹⁵ Tietenberg, T. H., & Lewis, L. (2016). *Environmental and natural resource economics*. Routledge.

⁵¹⁶ Bäckstrand, K. (2004). Scientisation vs. civic expertise in environmental governance: Eco-feminist, eco-modern and post-modern responses. *Environmental Politics*, 13(4), 695-714.

⁵¹⁷ Fineman, S. (2017). The business of greening: an introduction. In *The business of greening* (pp. 1-10). Routledge. See also Grunwald, A. (2016). Diverging pathways to overcoming the environmental crisis: A critique of eco-modernism from a technology assessment perspective. *Journal of Cleaner Production*.

⁵¹⁸ Cashore, B., Renckens, S., Levin, K., Bozza, L., Auld, G., (2009) Can Non-State Governance “Ratchet Up” Global Standards? Assessing Indirect and Evolutionary Potential. Paper presented at the Conference on New Governance and the Business Organization, May 25-27.

institutes⁵¹⁹. Those national industrial bodies, however mainly dominate the decision-making in this ISO standard-setting process. Usually, these national industrial standard setting groups have involved strong local industrial memberships in their home jurisdictions, and they are keen on participating in the formulation of ISO environmental management standards. Meanwhile, the ISO can be viewed as a public regime, because the environmental or other industrial standards adopted by this standard setting body will generally serve as benchmarks for state members' national law and other inter-governmental institutions' strong references⁵²⁰.

It is true that effective corporate self-regulation still needs to depend on the proper industrial standard setting and vigorous enforcement of conventional 'command and control' model in host states⁵²¹. Without these supportive mechanisms, only punishing private enterprises may not function in the right way. However, increased formal and official regulations can also cause many problems. In resource-limited state jurisdictions, it would not be very useful if the regulators require too much of corporations and make their duties overbearing. Other alternative approaches also exist, such as the contractual governance instruments discussed in the proceeding chapters. Good examples are the partnerships between energy companies and environmental NGOs, multi-actor investment contracts and other multilateral initiatives.

Because of the increasing international environmental harm caused by MNCs, calls for stricter liability of these multi-national companies under public international law will continue to grow. As our review above, the mainstream scholars still argue that only national states have legal subjectivity in public international law⁵²².

This chapter has moved beyond this theoretical debate and turns to examine whether the limitations of corporate liability regulations caused the recent emergence of corporate self-regulation. Indeed, both international and national legal frameworks have proven to be not effective and insufficient to reduce the adverse environmental effects and promote more sustainable business management. The demands for better governance at the international and national levels have contributed to the development of industrial standard setting, corporate

⁵¹⁹ Clocksin, W. F., & Mellish, C. S. (2012). *Programming in Prolog: Using the ISO standard*. Springer Science & Business Media.

⁵²⁰ International Organization for Standardization. (2006). *Environmental Management: Life Cycle Assessment; Principles and Framework* (No. 2006), ISO.

⁵²¹ Orts, E. W., & Deketelaere, K. (2001). See also Orts, E. W., & Coglianese, C. (2007) Debate: Collaborative Environmental Law: Pro and Con. *University of Pennsylvania Law Review*, 156, 289-311.

⁵²² Lowe, V. (2007). See also O'Connell, D. O. (1970).

‘self-regulation’ and other forms of collaborative instruments, e.g. NGO-Business partnerships⁵²³.

Based on these observations, this thesis argues that the constraints do exist in the ‘top-down’ international and national regulation models and the ‘bottom-up’ innovative approaches have the potential to supplement the fragmentation of existing frameworks. MNCs now have power and capacity to mobilise assets to make important contributions to international standard setting and regulatory innovation⁵²⁴.

3) *Seeking new ways to regulate and harness MNCs’ power*

MNCs so far have not been recognised as a full legal person in public international law⁵²⁵. The subjectivity of MNCs in international law is still awaiting the positive granting of duties and rights⁵²⁶. However, due to the growing economic power and environmental impact of MNCs, the ongoing calls for stricter responsibilities of MNCs under public international law will continue to grow⁵²⁷. When the solutions turn to national law, the domestic legal system in many countries also faces challenges to control these large multi-national corporations and implement those new environmental and social regulations effectively⁵²⁸.

Though MNCs have substantial and increasing influences on today’s global economy and the environment, this trend should not distract our attention from the primary responsibility of nation states. For a new multi-level governance model, a combination of traditional ‘command and control’ regulations, public-private collaborations, corporate self-regulation mechanisms, industrial standard setting actions, and a global agreement on corporate responsibility and liability should be considered. As discussed before, MNCs can have a strong position for contributing to a variety of ‘bottom-up’ standard setting and regulatory innovations. Now the

⁵²³ See World Vision (2015). See also Fues, T. (2017) How Can the G20 Promote the Global Partnership for Sustainable Development (SDG 17)? Development. Retrieved from <http://risingpowersproject.com/g20-global-partnership>.

⁵²⁴ Muchlinski, P. (2007) *Multinational enterprises and the law*. Oxford: Oxford University Press.

⁵²⁵ Zerk, J. (2006) *Multinationals and Corporate Social Responsibility*. Cambridge: Cambridge University Press. See also Wouters, J., & Chané, A.-L. (2013) *Multinational corporations in international law*.

⁵²⁶ Ibid.

⁵²⁷ Roberts, K. (2015) Corporate liability and complicity in International Crimes. In S. S. Jodoin, M-C. (Ed.), *Sustainable Development, International Criminal Justice, and Treaty Implementation*. Cambridge: Cambridge University Press. See also Morgera, E. (2009).

⁵²⁸ Gunningham, N. (2009) The new collaborative environmental governance: The localization of regulation. *Journal of Law and Society*, 36(1), 145-166. See also Odumosu-Ayanu, I. T. (2014a); Odumosu-Ayanu, I. T. (2014b) Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment. *University of New Brunswick Law Journal*, 65.

significant issues are about how regulators around the world can re-design the current legal frameworks by which the assets and power of MNCs can be harnessed for these critical social innovations. . Meanwhile, the local resistances and environmental and human rights litigations against the trans-national corporations also stimulate and enforce MNCs to keep evolving and participating in the field.

Above all, powerful transnational companies can influence the law-making procedures at the national level by MNCs' economic and social lobbying power⁵²⁹. Similar situations are also happening at the regional (such as the EU⁵³⁰ and ASEAN⁵³¹) and international levels. However, conflicting interests and public policies among states, international institutions, and NGO activism, can reduce the influences of transnational corporations.

6.3.2 NGOs: Local resistances are shaping investment contracting and law-making practices

The rise of the third sector is usually regarded as the regime of non-commercial based values⁵³². The decline of state power and the increasing intertwining of Neoliberal global economic policies have created a demand for various environmental, social and political groups' participation in global governance. The NGO phenomena can be viewed as a societal response to the new situations dominated by Neoliberals and the supporters for increasing central state's control power.

NGOs are associations which do not seek economic profits, and they are not run by the state (or originate from it)⁵³³. NGOs can attract members and stakeholders who share the similar beliefs and concerns because they have their economic freedoms and usually do not have electoral constituents. Their features can cover the values of pluralism, solidarity, and

⁵²⁹ Kenny, S. Y., & Larson, R. K. (1993). Lobbying behaviour and the development of international accounting standards: The case of the IASC's joint venture project. *European Accounting Review*, 2(3), 531-554.

⁵³⁰ van Schendelen, M. P. (2002). Machiavelli in Brussels: The art of lobbying the EU. Amsterdam University Press.

⁵³¹ Yoshimatsu, H. (2002). Preferences, interests, and regional integration: the development of the ASEAN industrial cooperation arrangement. *Review of international political economy*, 9(1), 123-149. See also Yoshimatsu, H. (1999). The state, MNCs, and the car industry in ASEAN. *Journal of Contemporary Asia*, 29(4), 495-515.

⁵³² Yaziji M. and Doh J. (2009). See also Zerk, J. (2006).

⁵³³ Austin, J. E. (2007) Sustainability through Partnering: Conceptualizing Partnerships between Businesses and NGOs. In P. Glasbergen, F. Biermann, & A. P. Mol (Eds.), *Partnerships, Governance and Sustainable Development*. Cheltenham: Edward Elgar Publishing Limited.

autonomy⁵³⁴. One of the key features of the third sector is that these non-governmental groups have the freedoms outside the legitimate politics areas⁵³⁵. This feature also allows the civil society groups to take actions and become a supportive voice for the most vulnerable citizens and marginalised communities.

NGO's operations are also task-oriented and driven by citizens with common concerns. Working staff and members in NGOs can be pursuing specific public policy goals, such as several environmental and social policy missions. In practice, NGOs can perform a range of social service and humanitarian functions. For instance, they may help to bring individual citizens' voices to the governmental departments, monitor the implementation of any significant public policy, and enhance public participation down to a local community level. Moreover, some NGOs are working on specific themes, i.e. environmental protection, social welfare, public health and human rights.

The engagement of NGOs is critical to counterbalance the impacts of economic interest actors. The environmental externalities caused by these private actors are usually insufficiently addressed by the national states' intervention or by consumer actions. Civil society associations, such as the Birds Life International, WWF or Greenpeace international, are a number of examples of a growing and leading body of conservation and environmental NGOs successful at both the international and domestic levels. Their primary mission is to channel public pressures and raise public awareness for conservation issues and other environmental harm. These environmental NGOs also have devoted their substantial efforts to assist in policy implementation and law enforcement. It is true that the functions of these environmental NGOs can be identified in many different approaches.

In the global energy investment regime, the current study already witnessed that NGOs, on the one hand, can represent local communities and citizens to act against the harmful operations done by the transnational energy corporations. On the other hand, NGOs can also decide to cooperate with the private sector in the forms of Business-NGO partnerships and other collaborative initiatives. Examples have been addressed in Chapter 4 and 5. The

⁵³⁴ Pattberg, P. (2004). See also Steffek J. and Hahn K. (2010) Evaluating transnational NGOs: legitimacy, accountability, representation. New York, Palgrave Macmillan; Stewart, R. B. (2001) A New Generation of Environmental Regulation. *Capital University Law Review*, 29, 21.

⁵³⁵ Tully, S. (2004). *Corporate-NGO partnerships as a form of civil regulation: lessons from the energy biodiversity initiative*. Centre for Analysis of Risk and Regulation, London School of Economics and Political Science. See also Howell, J. (2007).

paragraphs below address another form of regulation – civil regulation – to highlight the usefulness of NGOs for enhancing multi-level governance and regulation innovation.

1) Civil regulation

The new type of ‘civil regulation’ refers to the active engagements of environmental and social policy NGOs in the procedure of policymaking, enforcement monitoring and compliance control⁵³⁶. Civil regulation is a natural response to the growing power of transnational corporations but is neither States’ formal command and control regulation model nor the firms’ voluntary CSR initiatives.

Peter Newell has argued that NGOs can choose to apply both the ‘liberal’ as well as ‘critical’ governance strategies⁵³⁷. The more ‘liberal’ strategies cover a collaborative approach to corporates and can, eventually, participate in new standard setting and Business-NGO partnerships and other cooperative initiatives. As examined in Chapter 4, these collaborative initiatives in the Greater China area devoted to the specific environmental and social policy goals or to focus on monitoring the operations of one particular investment project. On the other hand, ‘Critical’ strategies refer to NGOs in a more typical position as a watchdog of company actions, as a monitor of business malpractices and as an advocate of stricter controls over corporation excesses.

The ‘liberal’ collaborative strategy is evident in a wide range of cases of Business-NGO partnerships. The performances of these cross-sector partnerships vary in practice. In addition to the cross-sector partnerships in the oil and gas sectors, one of the most well-known cases is the establishment of the Forest Stewardship Council (FSC)⁵³⁸. Also, cross-sector partnerships have been widely applied in the context of market reforms and industrial liberalisations as these processes cause adverse environmental consequences. For example, in the water resource sector, NGOs, transnational companies, United Nations’ water-relevant agencies as well as national governments have successfully set up such cross-sector arrangements⁵³⁹. Another remarkable instance of Business-NGO partnerships is related to global insurance industries.

⁵³⁶ Zillman, D. M., & Lucas, A. (2002). See also Tully, S. (2004).

⁵³⁷ Newell, P., Rai, S., & Scott, A. (2002). See also Nyambura, R. (2016) The energy fix. *New Internationalist*, 24-25.

⁵³⁸ See Moog, S., Spicer, A., & Böhm, S. (2015). The politics of multi-stakeholder initiatives: The crisis of the Forest Stewardship Council. *Journal of Business Ethics*, 128(3), 469-493.

⁵³⁹ See UN-Water Decade Programme on Advocacy and Communication (UNW-DPAC), online report: <http://www.unwaterbestpractices.org/WaterforLifeENG.pdf>.

This kind of cross-sector partnership emphasised how insurance companies could apply their risk assessment tools to craft insurance incentives for companies to operate in a more environmental-friendly manner.

Critical strategies may start with protests, campaigns and other resistance strategies⁵⁴⁰. However, eventually, these strategies still can lead to the formulation of cooperation and partnerships with corporations. For example, the FSC mentioned above is a direct outcome of local resistance led by both local and Western NGOs against the rapidly increasing deforestation in Brazil from the late 1980s and 1990s⁵⁴¹. Additionally, the local campaigns against the oil giant Shell regarding the company's operations in the area of Niger Delta, and the negative effects on the indigenous peoples assisted that transnational oil company to put more efforts significantly on corporate environmental management⁵⁴². Some influential and leading international NGOs are very good at taking a dual critical and cooperative approach to the corporations. For example, Greenpeace launched a hostile campaign against genetically modified food produced by the Monsanto. In the well-known PVC-free credit card campaigns, Greenpeace was engaged in many conversations and meetings with the managers of those companies⁵⁴³.

2) 'Bottom-up' approaches' possible contributions to international law-making

While national states are the primary actors of public international law, transnational corporations still have many channels and participation opportunities to shape the international law-making procedures⁵⁴⁴. For instance, the private sector can make contributions to the missions of the International Labour Organisation through a 'tri-partism' negotiation mechanism and protect their interests in international commercial arbitrations or the WTO dispute resolution⁵⁴⁵.

⁵⁴⁰ Ekins, P. (2005). See also Newell, P., Rai, S., & Scott, A. (2002); and Nyambura, R. (2016).

⁵⁴¹ See FSC Brasil - Forest Stewardship Council, available at: <https://br.fsc.org/pt-br>.

⁵⁴² "We're still active in Delta State," Shell Nigeria, available at: <https://www.shell.com.ng/media/2018-media-releases/we-are-still-active-in-delta-state-shell.html>.

⁵⁴³ See Greenpeace in the 1990s, Greenpeace UK, available at: <https://www.greenpeace.org.uk/about/impact/history/greenpeace-1990s>.

⁵⁴⁴ Noortmann, M., Reinisch, A., & Ryngaert, C. (Eds.). (2015).

⁵⁴⁵ Casier, L., Fraser, R., Halle, M., & Wolfe, R. (2014). Shining a light on fossil fuel subsidies at the WTO: how NGOs can contribute to WTO notification and surveillance. *World Trade Review*, 13(4), 603-632.

NGOs' contribution to international and national law-making is another emerging phenomenon⁵⁴⁶. NGOs often have a very critical attitude against the neo-liberal notions and Western capitals' supporters. These civil society groups have repeatedly mobilised assets and capacities in several protests against the WTO meetings at Cancun and Seattle, as well as the actions by the World Bank Groups and International Financial Corporation. In the investment regime, one prominent example is that several NGOs launched a large-scale international campaign against the negotiations and adoption of a multilateral investment agreement⁵⁴⁷.

Since civil society groups' first engagement on the international stage was in relation to issues of foreign investment protection, it can be expected that NGOs can possibly play a crucial role in the international economic realm⁵⁴⁸. For instance, the establishment of the Stockholm Convention on Persistent Organic Pollutants⁵⁴⁹ was significantly initiated by a published report with engagement from World Wild Foundation WWF⁵⁵⁰. In addition, NGOs are very likely to strongly impact the procedures and outcomes of a legal case, such as the Brent Spar case⁵⁵¹. In this famous case, Greenpeace channelled the public awareness and initiated a campaign to prevent Shell from some inappropriate decommission operations and sinking its oil exploration platforms into the North Sea.

6.3.3 Commercial lawyers as agents for policy and social change

Commercial lawyers are experts on legal affairs, business risks and significant agents for commercial contracting at a project-specific level. In modern society, lawyers, as commercial advisers, should be equipped with a more comprehensive and long-term view of business benefits; this requires knowledge and understanding of environmental and human rights issues.

⁵⁴⁶ Noortmann, M., Reinisch, A., & Ryngaert, C. (Eds.). (2015).

⁵⁴⁷ Odell, J. S. (2009). Breaking deadlocks in international institutional negotiations: The WTO, Seattle, and Doha. *International Studies Quarterly*, 53(2), 273-299. See also Walter, A. (2001). NGOs, business, and international investment: the multilateral agreement on investment, Seattle, and beyond. *Global Governance*, 7, 51.

⁵⁴⁸ Young, J., Septoff, A., (2002).

⁵⁴⁹ The Stockholm Convention on Persistent Organic Pollutants 2001, available at: https://www.wipo.int/edocs/lexdocs/treaties/en/unep-pop/trt_unep_pop_2.pdf.

⁵⁵⁰ WWF working with Business & Industry, available at: http://wwf.panda.org/wwf_offices/armenia/help_us/business_industry. See also Hu and Wang (2014) Environmental and Social Risk Management of Chinese Transnational Corporation. Yale School of Forestry and Environmental Studies and WWF.

⁵⁵¹ In 1995, Shell was embroiled in a public dispute over the decommissioning and disposal of the Brent Spar, a redundant oil storage installation in the North Sea. Brent Spar was damaging to Shell's reputation: despite the support of independent scientists for our proposals, Shell did not win public acceptance. See: <https://www.shell.co.uk/sustainability/decommissioning/brent-spar-dossier.html>.

At the International Bar Association's 2014 annual session in Vienna, the former UN General Secretary Kofi Annan mentioned this point in his keynote speech⁵⁵²:

"Lawyers have a very important role to play...All of you are persons of influence...Lawyers can influence and go beyond what they think clients want."

This thesis argues that innovative commercial lawyers, with a brand new mindset regarding sustainable development, can play a critical role in balancing their corporate clients' business profits with other public policy considerations. The UN Principles for Responsible Contracts as well as the UN Guiding Principles on Business and Human Rights both are good examples of modern contractual settings that attempt to have a synergistic combination of business, environmental protection and human rights. These new types of innovative contracts would have the power to guide national legal reforms as well as to create new standard-setting at the international level.

One approach taken by transnational companies in responding to these increasing global pressures is by inserting environmental and social policy provisions into the commercial and investment contracts. For this purpose, international energy companies need to consult their professional lawyers for innovative suggestions to do an environmental and human right due diligence on the investment projects. These assessments can help the energy companies to identify, mitigate and prevent potential adverse influences on the affected communities and individuals. Commercial lawyers are also able to participate in dispute settlement procedures and the compensation and remediation processes for actual damages.

Therefore, this new type of innovative commercial lawyers not only need to have excellent commercial awareness as usual but also they should become quite sensitive to the multiple dimensions of an investment project, including the environmental and human rights risks caused by corporate operations. Legal professionals will be respected, because they know all the positive laws should be rooted in principles, natural law and ethics, rather than only relying on technical legal expertise. In this case, successful commercial lawyers today should have the capacity to safeguard the corporate integrity and to balance a range of conflicting interests.

⁵⁵² See from Rivkin, D. W. (2016) *The wise counselor and the frontiers of business and human rights*. Paper presented at the Human Rights Law and the Extractive Industries, Panama City.

To provide benchmarks and guidelines for today's innovative commercial lawyers, the International Bar Association, in 2016, has published a useful document - Practical Guide on Business and Human Rights for Business Lawyers, which came together with a very detailed working plan and a toolbox in its Reference Annex⁵⁵³.

To draft these model contracts and principles, the experts in IBA's research units have strived to understand the balance between corporate economic benefits with other public interests. The IBA research units have been studying and drafting two documents since 2014. The 'Practical Guide on Business and Human Rights for Business Lawyers' is a comprehensive and accessible guideline for commercial lawyers. These new Guiding Principles drafted by the IBA aim to empower and broaden commercial lawyers' advisory capacities. Besides the traditional commercial considerations, these guiding principles cover the emerging issues of project risk management, transparency and information disclosure, human rights, environmental protection and climate change, the development of relevant global standards, and dispute settlements. In addition, the Reference Annex explores further the crucial implications of the Practical Guide for commercial lawyers and the particular issues that lawyers may need to consider in real-world practice.

These guiding principles for human rights protection and drafting responsible contracts have provided useful templates and models for commercial lawyers, in particular, the paragraphs about contracting and making agreements. Here, it is necessary to re-address these guiding principles and model contracts would be especially useful for the projects in international energy sectors.

Nowadays, transnational corporations in the energy sectors are increasingly willing to adopt environmental and human rights provisions in their energy investment contracts, especially in the joint venture agreements⁵⁵⁴. For the joint ventures in the energy sectors, a growing feature is the use of a new clause which requires contracting parties to ensure all the requirements in relation to public health, working safety, environmental protection and human rights affairs should be "cascaded" down their global supply chains⁵⁵⁵. These recent trends in

⁵⁵³ International Bar Association (2016) Business and Human Rights Practical Guide for Business Lawyers. (Practical Guide) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=d6306c84-e2f8-4c82-a86f-93940d6736c4>.

⁵⁵⁴ Cameron, P. (2016).

⁵⁵⁵ Crockett, A. (2014) Human Rights Clauses in Commercial Contracts. *Expert Articles, Investment & Human Rights Project*. See also Laryea, E. (2011).

joint venture agreements in the energy sector are based on the negotiating experiences over the past decades and the active participation by commercial lawyers.

On the one hand, from a technical perspective, many of the contracting practices inherently involve legal issues. For example, causation, proportionality, and grievance mechanisms are concepts which have developed in the legal regime over a long period of time. On the other hand, issues in practical terms are often not purely legal, especially in the energy industries.

Modern innovative lawyers should be sensitive to the multiple dimensions of social and environmental risk. In the cases of large energy and infrastructure projects with severe impacts, innovative commercial lawyers (with a ‘green’ mind-set) have the chance to infuse the environmental and social values into a variety of contractual instruments. State-investor investment contracts and other contracts, therefore, can be a multi-actor platform for legal professionals, inviting several stakeholders and policymakers to do brainstorming on the policy and legal solutions for a responsible and sustainable investment project.

Modern commercial lawyers will thus be empowered not only because of technical legal expertise but also because they understand that law is steeped in ethics. Therefore, modern lawyers should be empowered to embrace the role of guarding corporate integrity in today’s business world. A report submitted to the UN Working Group on Human Rights and Business in July 2018 also highlights the importance of business lawyers for human rights protection. The paragraph 41 of this report states: *“Business lawyers- both in-house counsel and external firms – have a unique position for shaping the path an enterprise may take. Often, they are seen as one of the main obstacles to adopting effective human rights due diligence, with a traditional narrow focus on legal risk. However, some bar associations, large law firms and in-house counsel endorse the GPs and acknowledge that human rights DD should be a core part of the advice provided by a wise counsellor. Companion note II: need for change in mindset among mainstream business lawyers.”*⁵⁵⁶

6.4 The usefulness of innovative contracts: Adding a dynamic perspective to the ‘S-I-P triangle’

⁵⁵⁶ Full text can be accessed on UN Human Rights Office of High Commissioner, <https://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx#hrc>.

Usually, energy corporations have been granted the legal rights to implement their investment projects. Today, the global community has paid more attention to corporations' obligations for gaining a 'social license to operate' (SLO)⁵⁵⁷. This SLO concept is firmly rooted in the local communities' social acceptance to the foreign investment projects⁵⁵⁸. In an ideal situation, the total negative impacts of extractive projects should be offset by the benefits generated by the resource exploration.

6.4.1 Community tensions and global resistances

The current realm of international investment law is composed of bilateral and multilateral international investment treaties and the investment-related sections in recent free trade agreements. Existing research has illustrated that this existing regulatory architecture has presented a 'top-down' decision making and policy development rationale, which is rooted in a neo-liberalism ideology⁵⁵⁹. This neo-liberal model and dominate thinking has caused a long history of tensions between extractive industries and local communities. As discussed in this thesis, these issues can cover land grabbing, pollution, state violence, human rights violation and compensation.

There is a sad truth about the tensions between investors and communities. In many investment arbitrations, governments even joined the side with foreign investors rather than standing with their citizens and communities⁵⁶⁰. Usually, individual citizens and local communities do not have equal economic and political power to compete with big transnational energy companies, such as Shell, BP and those Chinese state-owned oil companies. The 'resource curse' case where governments corrupted and aligned with foreign investors will make the situation more complicated⁵⁶¹.

⁵⁵⁷ See Moffat, K., & Zhang, A. (2014). The paths to social license to operate: An integrative model explaining community acceptance of mining. *Resources Policy*, 39, 61-70.

⁵⁵⁸ Doh J.P. and Guay T.R. (2006) Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective. *Journal of Management Studies*, 43(1), 47–73. See also Coglianese, C. (2001) Social Movements, Law, and Society: The Institutionalization of the Environmental Movement. *Faculty Scholarship* (Paper 1404).

⁵⁵⁹ Castree N. (2010b).

⁵⁶⁰ Sabater, A., & Stadnyk, M. (2014). See also Junita, F. (2015) The foreign mining investment regime in Indonesia: regulatory risk under resource nationalism policy and how international investment treaties provide protection. *Journal of Energy & Natural Resources Law*, 33(3), 241-265.

⁵⁶¹ The Bloomberg 'Resource Curse', available at: <https://www.bloomberg.com/quicktake/resource-curse>.

Notably, these local community resistances are more likely to happen in the jurisdictions with weak investment, environmental, and social regulations. Governments in these jurisdictions have insufficient institutional capacities to defend individual citizens' legal rights and respect communities and the environment. In those areas, the meaning of development is defined as strong economic achievement and energy security, though other stakeholders may have very different points of view on 'development'.

These debates are the central topic on international energy investment. From the perspectives of local community and civil society groups, both the current 'top-down' policy-making model in the transnational investment regime and the existing international framework on energy investment remain largely disconnected from the real needs of local citizens. As a result, the current system of international energy activities can be featured by inequality⁵⁶².

Recent research in law and development has attempted to capture this social and legal pattern and to theorise the interactions between social movements and law⁵⁶³. This research has tried to argue that the NGOs and other civil society groups are also influencing the contracting practices in the investment situations. This argument can bring new theoretical insights to the SIP triangle, environmental contracting, and international investment law in general.

6.4.2 Adding a dynamic perspective to the 'S-I-P triangle'

So this research tries to summarise the empirical findings in Chapter 3 to 5 and present a new conceptual chart here.

⁵⁶² Leal-Arcas, R., Filis, A., & Gosh, E. S. A. (2014) *International energy governance: Selected legal issues*. Edward Elgar Publishing. See also Cotula, L. (2016).

⁵⁶³ Rajagopal, B. (2003) *International Law From Below: Development, Social Movements and Third World Resistance*. New York: Cambridge University Press. See also Coglianese, C. (2001).

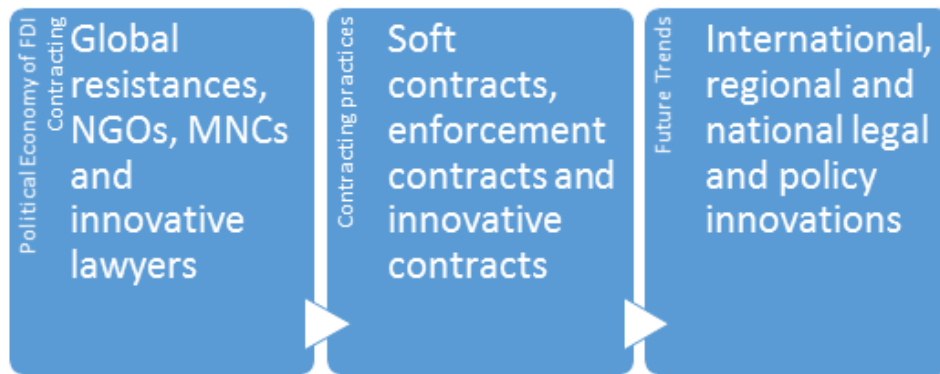


Figure 6.4 Rethinking global resistances, investment contracting and legal innovations

In Figure 6.4, this original chart intends to capture the roles of various ‘innovative’ actors and the position of contractual arrangements in the landscape of international law and policy innovation. In short, this new chart adds a dynamic dimension to the original ‘S-I-P’ triangle and highlights the usefulness of innovative contractual design which can bring the legal and social revolutions.

By focusing on the external impact of the multi-actor contractual arrangements, this original conceptual chart may be able to broaden the current research horizon and add a dynamic perspective to the original ‘S-I-P’ triangle and, more broadly, on the energy and natural resource management in a multi-level context.

Based on the established empirical observations above, this chapter here suggests that the contractual approaches at the project-specific level, including State-investor investment contracts, NGO-Business agreements, and other bilateral and multi-actor environmental contracts with ‘innovative elements’ for regulation, can be positioned to integrate with other regulating frameworks. These contractual instruments can also serve as a social innovation platform where multiple stakeholders have some space to exchange dialogues on the designs of the project and the responsibilities for other public policy goals. As discussed before, this contractual arrangement sometimes can provide essential support to the current legal frameworks, especially in the developing countries without strong environmental regulations, and stimulate legal and policy synergies.

Assessing the FDI contracting practices and social change with this original conceptual chart, the analytical perspectives could be not only static but also more dynamic. This

conceptual charts firstly capture, at the macro-level, the dynamic interactions between contracts, key actors, and the legal norm revolution. Also, at the micro-level focusing on contracts, this chart points out the critical legal and policy entrepreneurs behind the most innovative contractual arrangements. These institutional entrepreneurs can be: 1) MNCs (with their corporate self-regulation mechanisms), 2) NGOs (with their capacities for resistances and campaigns), and 3) Innovative commercial lawyers working in different sectors (with an innovative and green mind-set).

In summary, this chapter can further address three key points. First, the ‘bottom-up’ local resistances against international energy investment globally are shaping the design of investment contracts, contracting practices and legal frameworks. Second, project-specific contracts play a central role in the regulatory network. Among all these contractual arrangements, some of the most ‘innovative’ contracts can make significant and positive contributions to the legal and policy revolutions at international, regional, and national scales. Third, three key driving actors behind the innovative contracts are MNCs, NGOs, and innovative commercial lawyers. They are individual and institutional entrepreneurs in the field of law and policy.

Finally, with this new conceptual chart, this research suggests investment and environmental contracts can be a focal point for understanding multi-level and multi-actor environmental governance across various jurisdictions. The key points mentioned here are also helpful when researchers rethink the theories of collaborative governance, social movements, and law and development.

6.4.3 Harnessing grass-root innovations for multi-level environmental governance

Contractual approaches for environmental governance can cover a variety of legal and policy mechanisms, from conventional investment contracts, cross-sector partnerships to the new generation of multi-actor contracts. Such useful mechanisms all require foreign investors to re-estimate their projects’ impacts on human rights and the environment. More importantly, these contractual mechanisms can provide available grievances and prevent environmental harm and human rights violations at an early stage of project development.

Drawing from the discussions above, a contractual approach for multi-level governance is an inherent part of regulating foreign investment and stimulating future regulatory and social innovation (Please see Figure 6.5).



Figure 6.5 Contractual approaches as an innovation platform for future synergies

NGOs and innovative commercial lawyers (equipped with their professional legal expertise in both business operations and sustainable development), can be future guardians of corporate integrity and entrepreneurs for legal and policy revolutions. Therefore, at the project-specific level, the contractual approach also provides a space for all stakeholder, i.e. professional lawyers, MNCs, civil society, and policymakers, for brainstorming new solutions and promoting sustainable investment.

The project-based contractual approach is crucial because it can link with other aspects of a foreign investment project. Moreover, the contracting parties possess the capacity to create and shape the ‘social space’ of contracting and enhance companies’ competitiveness. This research has figured out at least five critical questions for this ‘contract-based’ model for multi-level governance:

1) Re-focusing on the scope of contracting parties (i.e. multi-actor contracts tend to include communities as a contracting party) and the practical issues of public participation and negotiation processes;

2) Rethinking nations’ sovereignty over their natural resources and why global protests and resistances occurred;

3) Noticing the significance of contractual design to prevent global resistances and energy investment disputes;

4) Reviewing the functions of these contractual mechanisms for environmental and social governance and their interactions with other regulatory frameworks;

5) Reflecting on the role of contractual approach for future regulatory innovations and synergies between different branches of public international law

The existing academic publications, both in law and non-legal literature, tend to analyse these various forms of contracts separately. The apparent problem is that these current discussions usually have been focusing on the formats of these contractual instruments – State-Investor, Investor-Community and State-Investor-Community – rather than on the substantial contents, actual functions and their external impacts on other major regulating frameworks or mechanisms. Furthermore, the legal and governance significance of contractual forms already transcend issues of individual contract's legality. This idea is supported by the fact that legal regimes usually need to be adjusted to open up for specific types of contract. The instance of the Peruvian conservation agreement mentioned in Chapter 5 reveals that regulatory reforms sometimes need to pave the way for some newly-designed conservation contracts.

Contractual approaches to governance heavily depend on precedent. The application of standardised agreement templates and model contracts developed by international organisations can be very useful for contracting negotiations in energy and natural resource industries. These comprehensive model contracts usually provide the most advanced environmental and human rights protection mechanisms as contracts' standard provisions. For example, the negotiation procedures of trans-national conservation contracts and forest carbon contracts usually need to engage repeat actors. The model contractual provisions significantly reduce the negotiation time and diverse setting of these cross-sector contracts and provide stronger safeguards for communities and the environment.

6.5 Summary – A new analytical lens for assessing FDI in the energy sector

Based on the empirical evidences (mainly in Chapter 3 to 5), this chapter has reclassified all the contracts within the S-I-P triangle into three newly-developed and legal-sensitive concepts, namely 'soft contracts', 'enforcement contracts', and 'innovative contracts'. The discussion focus now should be put on the forms of 'enforcement contract' and 'innovative contract', especially those advanced model contracts developed by leading international organisations. These two types of contracts have the capacity either for supplementing the

existing legal frameworks or stimulating future legislative transformation and policy innovation.

This chapter has also illustrated that MNCs, NGOs and innovative commercial lawyers can be critical drivers of positive social changes and innovative contracting practices. Also, local resistances and global protests against energy investment projects are both shaping the contractual and regulatory designs. This ‘bottom-up’ approaches for that they are more likely to meet the real needs of affected individuals and communities⁵⁶⁴.

If we look at the contracting practices, especially the development of innovative contracts, and their dynamic relations with other national and international legal frameworks, this whole picture eventually outlines the future of multi-level governance within the S-I-P triangle. Moreover, contracts can have a central role in this new governance landscape. As the empirical part of this research has shown, studying project-specific contracts can provide useful insights for reflecting on the theories of law, development and social movements.

In conclusion, these new research findings and developed conceptual charts can propose a new analytical lens for assessing energy investment projects across different jurisdictions. To apply this analytical lens to assess FDI projects in the extractive sectors, a researcher can start by reviewing the development of national and international legal frameworks of the investment project first and identify the gap (or space) for the contractual approach. The newly developed contract classification would be useful to assess the contracting practices in that jurisdiction. Furthermore, the analysis can focus on the key drivers and changemakers (e.g. NGOs, companies, commercial lawyers and governments) behind these contracting practices and how they make contributions to legal and policy changes.

For the next chapter, this thesis aims to use China’s outward investment in the energy sectors as an important case study to apply this analytical lens developed here (Please see Figure 6.6).

⁵⁶⁴ Muller et al (2016). See also Pauwelyn, J., Wessel, R. A., & Wouters, J. (Eds.) (2012) *Informal international lawmaking*. Oxford University Press.



Figure 6.6 The analytical lens for assessing FDI in the energy sector

In short, this analytical lens and the other conceptual charts developed in this chapter can provide useful angles to observe the changing landscape of multi-level governance in the natural resource regime. This research will mainly apply this new analytical lens to assess a significant (and arguably one of the largest) case study on China's overseas energy and extractive industries investment. This case study can have strong connections with Chapter 4 which is focusing on the oil and gas companies operating within the Great China regime and should be useful to explore China's participation in today's global energy governance.

Chapter 7 – A case study on China’s outward investment in the energy sectors

“We have learned our lesson from focusing too much on the elites, and now we know that deals and agreements are not solid if they are not based on people-to-people relations.” – Fan Hongwei, a specialist from Myanmar, talked at China’s Xiamen University

In Chapter 4, this research examined the cross-sector partnerships between international and Chinese oil and gas companies and the environmental NGOs in Greater China. Based on the previous observations, it is clear that China’s domestic regulatory environment has not provided sufficient policy support for initiating and maintaining cross-sector partnerships⁵⁶⁵. Thus, many grass-roots NGO and citizens need to apply the ‘critical cooperation’ approach (protest first and cooperate later) to force energy companies and foreign investors to respond to their requests. This research regards that this is probably also the case with China’s foreign investment projects in the energy sector.

Starting from the “Going Out” plan introduced in the 1990s to all the way to the recent “One-Belt-One-Road” (OBOR) project and the formation of Asian Infrastructure Development Bank in 2015, China has considerably increased its foreign direct investment in the energy sectors over the last few decades⁵⁶⁶. However, these large investment infrastructure projects may cause severe negative impacts on the host countries’ environmental protection and local communities, which have also led to local resistance actions against the Chinese outward energy investment projects globally.

This chapter analyses China’s outward investments in the energy sector and the related governing laws for keeping the economic, social and environmental interests in balance. The assessments in this chapter would be based on the conceptual chart developed in Chapter 6, which focuses on the innovative elements in the regulatory and contractual mechanisms and how the three principal key actors, namely corporations, environmental NGOs and commercial lawyers, can shape the legal and policy innovations in practice.

⁵⁶⁵ Hasmath, R and Hsu, J.Y.J. (2014) “Isomorphic Pressures, Epistemic Communities and State-NGO Collaboration in China”, the *China Quarterly*, 2014. See also Chu, C., (2011) *Grassroots NGO's in China: a study of the legitimation process* (Doctoral dissertation, The University of Hong Kong, Pokfulam, Hong Kong.

⁵⁶⁶ Energy Charter Treaty (2017) *China Investment Report*. Energy Charter Secretariat. See also Economy, E., & Levi, M. (2014) *By all means necessary: how China's resource quest is changing the world*. Oxford University Press. 李平 (2015) “一帶一路”戰略: 互聯互通、共同發展 – 能源基礎設施建設與亞太區域能源市場一體化, 中國社會科學出版社, 北京.

To respond to the environmental and social challenges brought by energy investment, efficiently formulated social and environmental policies can help point out and reduce unforeseen social and environmental risks involved in such investments⁵⁶⁷. Thus, this chapter focuses on the environmental and social consideration at three major levels – international, national and individual institutional - of China’s outbound investment policies.

For the first part of this chapter, it starts by presenting the fragmentation and limitations of current international legal frameworks – e.g., Energy Charter Treaty, NAFTA and WTO/GATT - for regulating cross-boundary energy investment. As of now, the Chinese government, financial institutions, and multinational companies have started to realize the adverse social and environmental outcomes of their foreign operations. The “top-down” regulatory policy developments in this aspect are still insufficient, and the governing bodies are likely to face immense challenges for appropriately and effectively implementing such non-legally binding policies.

Based on the selected case studies of Chinese outward FDI in hydropower and extractive industries, the second part of this chapter (7.2) highlights the importance of local resistance and points out that these resistance activities can be a crucial catalyst to stimulate “bottom-up” legal and governance innovations at the local, national and trans-national levels. After a more in-depth analysis of this trend, this study argues that, if China likes to lead the way on sustainable governance in the near future, the Chinese government and investors may need to place people at the centre of investment processes and rethink the potential of grassroots resistance, instead of just viewing this phenomenon as ‘barriers’ and/or ‘risks’ of China’s international economic expansion.

7.1 China’s ‘Going Out’ policy and its global implications

Foreign investment is an integral part of China's economic engine⁵⁶⁸. Over the last thirty years, China did attract enormous foreign funding and technology to help itself grow

⁵⁶⁷ Cameron, P. (2016). See also 唐曉陽、熊星翰 (2015) 中國海外投資與投資監管：以中國對非投資為例，外交評論：外交學院學報，(03), 26-45.

⁵⁶⁸ Nolan, P. (2012). See also 馮並 (2015) 一帶一路－全球發展的中國邏輯，高寶出版，臺北.

economically⁵⁶⁹, and China's outgoing foreign direct investment has been proliferating during the same period.

The “Going Global” policy initiative by the 10th five-year plan as well as China joining the WTO in 2001 has signalled the nation's ambition to take a more proactive role in the world's economy⁵⁷⁰. Consequently, this trend has also enhanced China's capacities and experiences to invest overseas.

As reported by the United Nations Conference on Trade and Development, China's outbound FDI reached approximately US\$183.1 billion in the year 2016. Spread over 192 different regions and countries, about one-fourth of this enormous amount was invested in extractive industries⁵⁷¹.

More recently, China's ambitious OBOR policy initiative, as defined in a 2015 official document from China's government, presents a vision for the future regional integration of Eurasia with China at the centre⁵⁷². Some observers have pointed out that the next five to ten years will witness a new wave of Chinese OFDI following the recent launch of China's Silk Road Fund, Asian Infrastructure Investment Bank and the proposal of OBOR initiative⁵⁷³.

As Chinese foreign investment is mainly focused on energy infrastructure large-scale projects⁵⁷⁴, exploration of natural resources, these fields are closely related to local land, the environment and the living standard of the inhabitants. Such projects, if carried out without proper environmental check and balance can easily result in substantial environmental damages.

⁵⁶⁹ See Hasmath, R. and J. Hsu, eds. (2009) *China in an Era of Transition: Understanding Contemporary State and Society Actors*. New York and Basingstoke: Palgrave. 隋平 (2011) 海外能源投資法律與實踐, 法律出版社, 北京. 馮並 (2015).

⁵⁷⁰ Leung and Zhao (2013) *Environmental and Social Policy in Overseas Investment: Progress and Challenges for China*. World Resources Institute. See also Nolan, P. (2004). 葛察忠、夏友富、智穎颯、龍風 (2010) 中國對外投資中的環境保護政策, 中國環境科學出版社, 北京.

⁵⁷¹ See from Weng, L., Sayer, J. A., & Xue, L. (2017). 單文華 (2014) 中國對外能源投資的國際法保護, 清華大學出版社, 北京.

⁵⁷² Ma, Y. (2014) *The Environmental Implications of China's New Bank*. *The Diplomat*. See also Shan, W. (2015) *Toward a Multilateral or Plurilateral Framework on Investment*, E15 Expert Group on Trade and Investment in Extractive Industries Working Paper, Geneva. See also 唐曉陽、熊星翰 (2015).

⁵⁷³ Global Environmental Institute (2013). See also 楊振發 (2013) 國際能源法發展趨勢研究—兼論對中國能源安全的影響, 知識產權出版社, 北京.

⁵⁷⁴ See *Greenovation: Hub* (2014).

Chinese overseas ventures have become a key concern in the international community⁵⁷⁵. As stated by a former leader of the US Export-Import Bank, American and international environmental organisations that were initially only concerned about the environmental externalities of Western transitional corporations have now also started monitoring the Chinese companies.

Internationally, there are more pressing concerns about the likely threats presented by the enormous outbound Chinese capital in the natural resources and energy sectors⁵⁷⁶. A survey conducted on business managers from 15 African countries who have business links with China revealed that most of them regard that the Chinese are not an environmentally responsible nation⁵⁷⁷. A report from the Energy Charter Treaty showed that only 26 per cent of the surveyed Chinese corporations have carried out third-party environmental and social impact evaluation of their projects⁵⁷⁸. It must also be noted that disputes regarding Chinese projects have also started to surface⁵⁷⁹.

As China is expanding its global footprint, several developing countries and least-developed countries have abundant natural resources but lack having a sound institutional framework in place⁵⁸⁰. Hence, social and environmental regulations, practices and policies that Chinese investors follow in the countries they are carrying on the projects will have an enormous impact on the local life and environment. Another notable point is that China is not the only one in this business; emerging economies like India, Mexico and Brazil are just about to follow the same path. The intensity and complicated nature of these issues require a more detailed understanding with a scope beyond the traditional suppositions to find a long-lasting and feasible approach to solve the practical problems. If Chinese enterprises can fully embed principles of sustainability in their overseas investment activities, China will serve as a flagship example of how emerging market investments catalyse sustainable growth.

⁵⁷⁵ Energy Charter Treaty (2017).

⁵⁷⁶ Weng, L., Sayer, J. A., & Xue, L. (2017). See also Wang, F. (2014) Analysis of Human Rights Policies of Chinese-funded Overseas Enterprises - Analysis of Human Rights Policies of Chinese-funded Overseas Enterprises. (2014) *Human Rights 人權：英文版*, (01), 25-27.

⁵⁷⁷ Weng, L., Sayer, J. A., & Xue, L. (2017). 唐曉陽、熊星翰 (2015); 單文華 (2014).

⁵⁷⁸ Energy Charter Treaty (2017).

⁵⁷⁹ World Energy Investment Report (2017).

⁵⁸⁰ Weng, L., Sayer, J. A., & Xue, L. (2017); OECD (2014) Creating an environment for investment and sustainable development, in Development Cooperation Report 2014: *Mobilising Resources for Sustainable Development*, OECD Publishing, Paris. See also Junita, F. (2015).

7.1.1 China's recent outward foreign direct investment (OFDI) trends

As FDI is regarded to be the precursor to economic development and innovation, China has set quite a few priorities in its 13th FYP⁵⁸¹ to open up its economy even more, reduce restrictions on market access, attract more foreign investment and latest technology, and enhance the overall efficiency of the way foreign capital is utilised.

China's OFDI has been considerably growing since the 'Going Out' strategy was made official. By 2016, China's net outward foreign direct investment touched \$170 billion, which makes it the second largest investor globally after the United States⁵⁸². Below is a graphical illustration of China's OFDI since 2007:

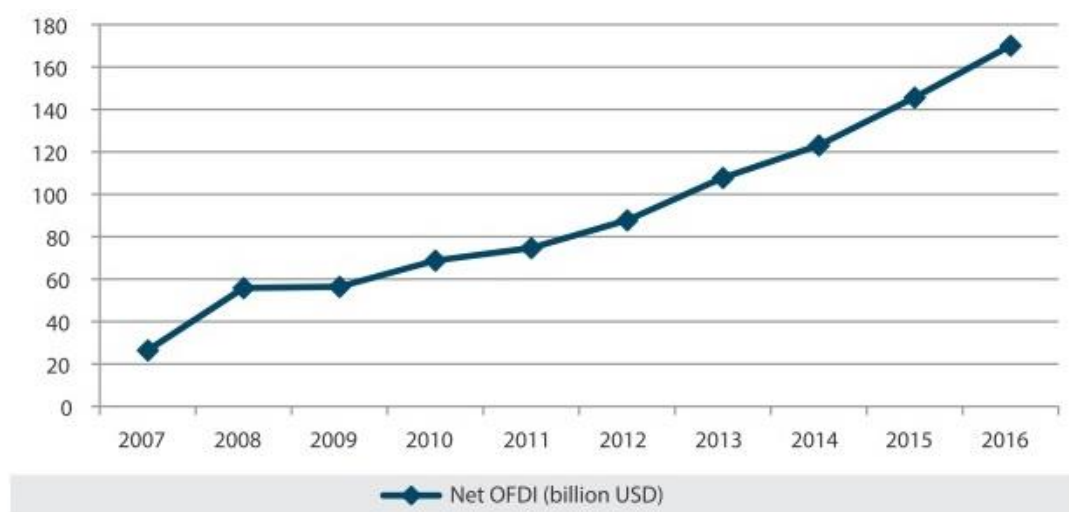


Figure 7.1 China's net OFDI. Source: State Statistics Agency, Government of China PRC
<http://data.stats.gov.cn>

Regarding the sector-wise distribution of China's FDI, the structure is optimised, with the real-estate sector and service industry getting the most attention. The service industry had the largest non-financial OFDI in the year 2015 which was roughly one-quarter of the total. Notably, the share of investment in information transit, software and IT increased from a mere 4.9 per cent in 2015 to 12 per cent in 2016⁵⁸³. In the manufacturing sector, China's share is also increasing. Manufacturing industries achieved 18.3 per cent of the country's net OFDI in 2016, increasing from 15 per cent in 2015⁵⁸⁴. However, in the primary sector, China's OFDI only

⁵⁸¹ Post, S. C. M. (2016) Key takeaways from China's 13th five-year plan and annual reports.

⁵⁸² Energy Charter Treaty (2017).

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

amounted to 9 per cent of the national total in 2016⁵⁸⁵. M&As have also been playing a role in the structural adjustment and growth of China's overseas investment⁵⁸⁶.

Moving on to the destinations the OFDI of China is aimed at, there is a trend of more investments in the developing countries than the developed ones⁵⁸⁷. One of the increasingly popular destinations for China's FDI in Africa. China's total FDI in this region has grown threefold from 2000 to 2015, going from 13 Billion to 35 Billion USD. China is focusing on Africa not only as a potential source of critical natural resources but also as a fast-growing market for Chinese export products. African nations, on the other hand, are keen to get Chinese OFDI as this is a source for creating employment, improving public infrastructure, boosting international trade and facilitating human development.

However, over the last decade, investments and M&As aiming for industrialised countries have been a new trend for Chinese investors' FDI operations⁵⁸⁸. Europe particularly became a popular destination for Chinese M&A practices⁵⁸⁹. In 2016, more than 35 Billion USD were invested by the Chinese in Europe which is 77% more than the previous year. In 2016, more than 50 per cent of China's OFDI was in countries such as Germany and the UK, which has allowed China to maintain advanced technology and infrastructure assets in these countries⁵⁹⁰.

7.1.2 Outward FDI trends in the energy sector

China has evolved as a major investor in the energy sector with involvement in related infrastructure projects throughout the world. In the coming years, China's OFDI is expected to focus on the development of cross-border power grid and transmission stations is already a part of the agenda of cooperation between China and its neighbour countries⁵⁹¹. Chinese power corporations are also being encouraged to take part in power generation and grid projects in other countries as well⁵⁹². In order to finance a number of such projects, the Chinese Government has founded a 40 billion USD Silk Road Fund to financially support the operations

⁵⁸⁵ Ibid.

⁵⁸⁶ Nolan, P. (2012). 唐曉陽、熊星翰 (2015).

⁵⁸⁷ Energy Charter Treaty (2017). See also Global Environmental Institute (2013).

⁵⁸⁸ Ferdinand, P. (2016) Westward ho—the China dream and 'one belt, one road': Chinese foreign policy under Xi Jinping. *International Affairs*, 92(4), 941-957. See also Nolan, P. (2004).

⁵⁸⁹ Ibid.

⁵⁹⁰ Energy Charter Treaty (2017).

⁵⁹¹ Greenovation: Hub (2014).

⁵⁹² Shan, W. (2015). See also 查道炯、李福胜、蔣姮 (2014) 中國境外投資環境與社會風險案例研究, 北京大學出版社, 北京.

of Chinese SOEs around the globe with a goal of creating an energy network with the regions like Central Asia, Middle East, South Caucasus, Europe, Africa and Latin America⁵⁹³.

In order to fund SOEs in their struggle for global impact in the international energy sector investments, the Chinese government has founded the Silk Road Fund to provide necessary financial support to the energy-related projects. Investment Banks of China have also been funding some of the major energy projects, and this trend is expected to continue in future⁵⁹⁴.

China has been actively taking part in many energy-related infrastructure constructions all over Asia, Europe, Africa and Latin America. Along with the progress of the ‘Going Out’ strategy and the OBOR Initiative, China’s OFDI in foreign energy projects and construction initiatives has been increasing over the last 10 years. Pioneers to invest abroad were China’s state-owned oil companies which intended to acquire more oil and gas resources⁵⁹⁵. Such projects were carried out in all the regions like Africa, the Middle East, Central Asia and Latin America regardless of the political instability these regions were going through. Recently, China has been investing considerable amounts in emerging energy technology and developing projects for the energy sector to help the country adopt the latest technologies. China has become the 20 per cent contributor to the global energy research and development budget in 2016 with a 7 per cent annual increase since 2012⁵⁹⁶.

Now it is hard to deny that China is playing a vital role in the global energy sector. The country, even being one of the major producers of fossil fuels worldwide, is also the largest importer of the same⁵⁹⁷. China is more than likely to attain global dominance as a producer and provider of renewable energy. As of now, the challenge for Chinese decision-makers is to design and implement market and regulatory frameworks that will remove hurdles for overseas investors, catalyse energy transition and attract the much-needed investment while keeping stranded assets and disputes with the investors to a minimum⁵⁹⁸.

⁵⁹³ International Energy Agency (2017) and World Energy Investment Report 2017.

⁵⁹⁴ Lee, W., & Hein, A. (2017) Asian Investment Infrastructure Bank. *Politica Northwestern*, 1(1), 6. See also Ma, Y. (2014).

⁵⁹⁵ Ibid.

⁵⁹⁶ Energy Charter Treaty (2017).

⁵⁹⁷ Ibid.

⁵⁹⁸ Leung and Zhao (2013). See also Liang et al. (2014) *The Corporate Responsibility to Respect Human Rights in China and Globally*. Global Business Initiative on Human Rights. 梁曉暉 (2014) 中國及全球範圍內企業尊重人權的責任, 項目報告書.

7.1.3 Energy-related disputes are also growing

China and other member states of the International Energy Charter have emphasised the importance of full access to adequate investment, dispute settlement procedures and international investment arbitration⁵⁹⁹.

Under current records, Chinese companies are claimants in four cases before ICSID⁶⁰⁰: *Beijing Urban Construction vs Yemen*⁶⁰¹; *Ping-An Life Insurance (Group) vs Belgium*⁶⁰²; *Hong Kong's Standard Chartered Bank vs Electric Supply Company of Tanzania*⁶⁰³; *Tza Yap Shum vs Peru*⁶⁰⁴ and China is respondent in only one case registered in 2014 (*Ansung Housing Company (Korean) ICSID A RB/14/25*)⁶⁰⁵.

The arbitration of these Chinese investment disputes against Central Asian illustrates the potential of the Energy Charter Treaty in protecting Chinese and foreign investments against expropriation and other political risks⁶⁰⁶. An overview of concrete cases of investment dispute settlement will highlight the lessons learned and possible improvements to the investment dispute settlement system.

7.2 Legal frameworks for regulating energy FDI: International and China

The Chinese government has made great efforts to make the domestic investment regulatory environment better for the investors and improve the business conditions for them⁶⁰⁷. First, the government now issues “five-in-one business licenses” for both domestic and foreign investors, which has largely streamlined and simplified the business registration procedure⁶⁰⁸.

⁵⁹⁹ Han, X. (2010) Environmental Regulation of Chinese Overseas Investment from the Perspective of China. *The Journal of World Investment & Trade*, Volume 11, Issue 3, pp. 375 – 408. See also Energy Charter Treaty (2017).

⁶⁰⁰ Ibid.

⁶⁰¹ *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30.

⁶⁰² *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29.

⁶⁰³ *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20.

⁶⁰⁴ *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6.

⁶⁰⁵ *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25.

⁶⁰⁶ Han, X. (2007) The application of the principle of proportionality in *Tecmed v. Mexico*. *Chinese Journal of International Law*, 6(3), 635-652. See also 查道炯、李福胜、蒋姮 (2014). and 陳臻、楊衛東、周章貴 (2015) 能源投資典型案例評析, 陽光時代律師事務所, 法律出版社, 北京.

⁶⁰⁷ Global Environmental Institute (2013). See also Han, X. (2010). 韓秀麗 (2013) 中國海外投資的環境保護問題研究—國際投資法視角, 法律出版社, 北京.

⁶⁰⁸ Energy Charter Treaty (2017).

Second, China has also been taking measures to improve its intellectual property rights regime and towards greater liberalisation of capital flows⁶⁰⁹.

However, a comprehensive review of all the applicable legal frameworks would be beyond the purposes of this chapter. The paragraphs below aim to provide a relatively concise overview of the fundamental international frameworks, namely the GATT/WTO, Energy Charter Treaty, and the North American Free Trade Agreement. Another important task is to re-examine China's involvement as well as participation according to these international norms and evaluate the recent social and environmental policy formulations in China's local investment-related regulations. More detail and critical discussions on these regulatory frameworks would be presented in section 7.4.

7.2.1 International frameworks on energy investment

Analyses have shown that at both national as well as international level, there is an emerging sustainability law that controls energy investments⁶¹⁰. International law limits the exercise of sovereign power in such situations as can cause a negative impact on other countries or when it is pursued in an unsustainable manner.

The main energy sources that are subject to specific international regulation are nuclear power and oil and gas⁶¹¹. The use of nuclear energy and fossil fuel causes a lot of potentially adverse social, cultural, environmental and health effects. Such projects may result in environmental havocs like oil spills, environmental degradation, pollution and the mass scale displacement of communities or other accidents that might affect a large number of people. Other energy sources, like the renewable ones, are seldom regulated because of the myth that their effects are limited only to the national border⁶¹².

⁶⁰⁹ Grunwald, A. (2016) Diverging pathways to overcoming the environmental crisis: A critique of eco-modernism from a technology assessment perspective. *Journal of Cleaner Production*. See also 李響、陳熹、彭亮 (2016) 能源法學, 山西經濟出版社, 太原.

⁶¹⁰ De Schutter, O., Swinnen, J., & Wouters, J. (2013) *Foreign Direct Investment and Human Development*: Routledge. See also Redgwell, C. (2001).

⁶¹¹ Greenovation: Hub (2014). See also 楊解君 (2012) 國際能源合作與國際能源法, 世界圖書出版社, 北京.

⁶¹² Energy Charter Treaty (2017); Economy, E., & Levi, M. (2014). See also 盛斌、段然 (2016) 投資者-東道國爭端解決機制的發展及對中國的影響, *國際經濟合作*, (3), 60-65.

ECT and NAFTA are two major international organisations that are directly linked to the energy sector⁶¹³. Both ECT and NAFTA have clear and specific provisions on sustainability. ECT was entirely designed for the energy sector while NAFTA has a chapter that expressly deals with energy. However, both ECT and NAFTA's sustainability clauses are subject to challenges. The concerns related to these mechanisms overshadow the fairness and neutrality of the process. These include the slow pace and seemingly toothless nature of the mechanisms⁶¹⁴.

In addition to multilateral treaties, there are also several international soft laws guiding the international energy sectors⁶¹⁵. For instance, the Mining, Minerals and Sustainable Development Process (MMSD 2000 – 2002)⁶¹⁶, Equator Principles (EPs 2003 updated 2006)⁶¹⁷, Natural Resources Charter (updated 2010)⁶¹⁸, Extractive Industries Transparency Initiative⁶¹⁹, and the Responsible Mineral Development Initiative (2011) by World Economic Forum⁶²⁰ are some leading worldwide initiatives to enhance sustainability in the mining and metals sector.

Review of the international initiatives above carried out over the past 10 years has revealed several emerging themes to inform the development of Guidance for Chinese Mining Companies and Investors⁶²¹ by the Chinese government.

7.2.2 China's international engagements in treaty making

⁶¹³ Bellmann, C. (2016). See also Shan, W. (2015); Arcas, R. L., Filis, A., & Abu Gosh, E. S. (2015) *International Energy Governance*. Cheltenham and Northampton: Edward Elgar.

⁶¹⁴ Wang et al. (2016) Sustainability Impacts of Chinese Outward Direct Investment: A review of the literature. International Institute for Sustainable Development. See also 李貴英 (2013) 在 WTO 與 ECT 架構下檢視能源貿易與投資之規範: 推動多邊能源規範架構之整合, 國際經貿整合與能源產業發展研討會, 能源局與台灣經濟研究院, 臺北.

⁶¹⁵ Cotula, L. (2016). Foreign investment, law and sustainable development. International Institute for Environment and Development (iied). 薛景文 (2013) 第四代雙邊投資協議 (BITs) 與國際投資協議中環保抗辯之研究: 國際投資協議之保障標準與地主國環保規範需求之衡平, 行政院國家科學委員會.

⁶¹⁶ *Mining, Minerals and Sustainable Development (MMSD)*, available at: <https://www.iied.org/mining-minerals-sustainable-development-mmsd>.

⁶¹⁷ Equator Principles, available at: <http://equator-principles.com>.

⁶¹⁸ The *Natural Resource Charter* is a set of principles for governments and societies on how to best harness the opportunities created by extractive resources, available at: <https://resourcegovernance.org/approach/natural-resource-charter>.

⁶¹⁹ The *Extractive Industries Transparency Initiative (EITI)*, available at: <https://eiti.org>.

⁶²⁰ The World Economic Forum's *Responsible Mineral Development Initiative (RMDI)*, available at: <https://www.weforum.org/whitepapers/responsible-mineral-development-initiative-implementation-manual>.

⁶²¹ Industry Guidelines for Chinese Mining Companies Abroad (IB2017/26), available at: <http://dpa.bellschool.anu.edu.au/experts-publications/publications/5764/ib201726-industry-guidelines-chinese-mining-companies-abroad>.

China formally joined the WTO in December 2001⁶²². Under the WTO system, although the GATS, TRIPS, TRIMs systems are all related to investment, only exceptional clauses touch upon environmental issues. However, TRIMs does not say too much about a host country's domestic environmental regulations⁶²³.

The Chinese government also took part in sixteen multilateral environmental treaties, which China must implement through international corporation or transformation of its domestic legal frameworks⁶²⁴. However, not every treaty obligates the corporations to protect against environmental problems caused by their overseas investors. Environmental regulation of corporations occur only indirectly when, and if, each country implements any obligations the treaty may place upon them.

According to China's recent bilateral investment treaties, the BITs concluded by China still put emphasis on investment protection and do not pay much attention the other public values, such as environmental protection and human rights.

There is even no environmental clause in the China-India BIT in 2006⁶²⁵ and China-Mexico BIT in 2008⁶²⁶ at all. The exceptions are the BIT between China and Albania⁶²⁷ as well as Guyana⁶²⁸. The prefaces of these two BITs have the following wording: “...agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application.” Moreover, there are exceptional exemptions for interference by host states to protect the public interest, that means expropriation can be conducted for the public or national interest, but there are no explicit definitions about whether they include

⁶²² Casier, L., Fraser, R., Halle, M., & Wolfe, R. (2014) Shining a light on fossil fuel subsidies at the WTO: how NGOs can contribute to WTO notification and surveillance. *World Trade Review*, 13(4), 603-632. See also 施文真 (2013) WTO、氣候變遷與能源, 元照出版社, 臺北.

⁶²³ WTO Agreement on Trade-Related Investment Measures, available at: https://www.wto.org/english/tratop_e/invest_e/trims_e.htm.

⁶²⁴ Ferdinand, P. (2016). See also 單文華 (2014).

⁶²⁵ *China - India BIT (2006)*, UNCTAD, available at: <http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/912>.

⁶²⁶ *China - Mexico BIT (2008)*, UNCTAD, available at: <http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/938>.

⁶²⁷ *China - Albania BIT (1993)*, UNCTAD, available at: <https://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/9>.

⁶²⁸ *China - Guyana BIT (2004)*, UNCTAD, available at: <https://investmentpolicyhub.unctad.org/IIA/country/2/treaty/9>.

environmental interests, and this kind of exceptional clause always will be interpreted very strictly.

Above all, each of these clauses is related to the host state, not the home state or its investor. Whether there are specific environmental clauses in BITs is vital because they can impose obligations on the parties and their investors, which can also become the reason for international investment disputes.

The different bodies of law are tightly interconnected. For example, international law may have an impact on a country's domestic law-making, and investment agreements may have a clause requiring the project to be compliant with other international and national laws. Also, the investors or other affected parties may seek compensation via national courts and international arbitration mechanisms. Thus, it is also necessary to review the recent developments in China's national regulatory frameworks.

7.2.3 China's national environmental and social policies in outbound FDI

China has been developing policy mechanisms to address the environmental and social issues of Chinese investors⁶²⁹. The 2005 yearly meeting of the National People's Congress stressed the need for Chinese Enterprises to focus on social responsibility when working on foreign investment plans; this requirement was made a part of Chinese Company law in 2006⁶³⁰.

Numerous governmental lawmaking agencies are working on social and environmental guidelines to regulate the operations of companies under their control⁶³¹. State-owned Assets Supervision and Administration regulatory system looking over the foreign investment projects of central SOEs also requires advanced risk assessment and mitigation. In 2007, SASAC developed and released "Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities"⁶³², endorsing that CSR is critical for central SOEs to expand their foreign economic ventures.

⁶²⁹ Han, X. (2010). See also 查道炯、李福勝、蔣姮 (2014).

⁶³⁰ Article 5, Company Law of the People's Republic of China, available at http://www.fdi.gov.cn/1800000121_39_4814_0_7.html.

⁶³¹ See Global Environmental Institute (2013). 劉箭 (2006) 國際投資與環境保護的法律衝突與協調 — 以晚近區域性投資條約及相關案例為研究對象, 現代法學, 28(6), 34-44.

⁶³² *Guidelines to the State-owned Enterprises Directly under the Central Government ... enterprises (SOEs)*, SASAC China, available at: http://en.sasac.gov.cn/2011/12/06/c_313.htm.

In February of 2013, Ministry of Environmental Protection (MEP) and Ministry of Commerce (MOFCOM) jointly released guidelines that could reform the social as well as environmental impact of Chinese companies working on investment projects in foreign countries. The “Guidelines on Environmental Protection for Overseas Investment and Cooperation”⁶³³ require that all Chinese institutions working abroad should carry on environmental impact assessments, work on mitigation measures and work along with the local communities to find out the potentially harmful effect of their investment. Even though these guidelines are based mainly on environmental problems and do not focus much on social issues, they are a crucial first leap towards developing a more sustainable approach throughout China’s foreign investment projects. As of early 2017, the implementation of these policies was still in the pipeline. The actual implementation of these policies on the ground will be the second and the most vital step in bringing the change.

Some financial bodies in China have formulated their policies⁶³⁴. The Export-Import Bank of China (China Exim) released some guidelines bringing the attention of their prospective clients to the expected social and environmental impacts of their operations. In 2008, China Exim and China Council for International Cooperation on Environment and Development (CCICED) together released a more precise framework: “Guidelines for Environmental and Social Impact Assessment of the China Export-Import Bank's Loan Projects”⁶³⁵. Under these guidelines, China Exim was given the right to address social and environmental aspects in both the local and foreign financing contracts. Companies that want to get bank financing are bound to conduct social and environmental assessments before starting an international project. They also give the bank the power to keep in check the client’s implementation of the said assessment. As one of the greatest export credit agencies in the world and one of China’s most powerful policy banks, China Exim’s approach to social and environmental risk management can be a trendsetter for other Chinese investors. CDB also endorsed environmental policies, like restricting access to credit to companies engaged in “high energy consumption, high pollution

⁶³³ Guidelines on Environmental Protection for Overseas Investment and Cooperation, MOFCOM, China, available at: <http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml>

⁶³⁴ See Lee, W., & Hein, A. (2017). See also 韓秀麗 (2013).

⁶³⁵ Guidelines for Environmental and Social Impact Assessment of the China Export-Import Bank's Loan Projects, CCIECD China, available at: <https://www.internationalrivers.org/resources/guidelines-for-environmental-and-social-impact-assessments-of-the-china-export-and-import>.

and excess capacity” industries, and putting in place environmental impact assessment loan veto arrangements.

Moreover, the Chinese-led AIIB also formed an Environmental and Social Framework (ESF)⁶³⁶ in 2016, which is a system meant to help the new development bank and its clients to achieve socially and environmentally sustainable development results⁶³⁷. It is achieved by integrating good international practice on social and environmental planning and risk management and impacts decision-making on, and development and implementation of, Bank-supported Projects.

Industrial associations and stakeholders are also starting to set up social and environmental standards⁶³⁸. For instance, in 2007 and 2009, two guides regarding sustainable foreign practices were released: “A Guide to Sustainable Overseas Silviculture by Chinese Enterprises” (State Forestry Administration)⁶³⁹ and “A Guide to Sustainable Overseas Forests Management and Utilization by Chinese Enterprises” (State Forestry Administration and MOFCOM)⁶⁴⁰. In October 2014, “Guidelines for Social Responsibility in Outbound Mining Operations” were released by the Ministry of Commerce China⁶⁴¹.

The guidelines deal with a number of operational issues like corporate environmental management, conservation of cultural heritage, labour issues, human rights and community engagement. Also, some associations, like the China International Contractors Association, are also working on developing new guidelines. However, most of the current guidelines are non-legally binding⁶⁴².

7.3 China’s overseas investment in hydropower and extractive industries

⁶³⁶ AIIB’s *Environmental and Social Framework* (ESF), AIIB, available at: https://www.aiib.org/en/policies-strategies/_download/environment-framework/20160226043633542.pdf.

⁶³⁷ Lee, W., & Hein, A. (2017). See also Ma, Y. (2014). See also 張曉君、孫南翔 (2016) 企業海外投資的非政府性障礙及中國的對策研究, *現代法學*, 2016 年第 1 期.

⁶³⁸ See *Greenovation: Hub* (2014). 楊振發 (2013).

⁶³⁹ *A Guide on Sustainable Overseas Silviculture by Chinese Enterprises*, available at: <https://www.forestry.gov.gy/wp-content/uploads/2016/05/AGuideonSustainableOverseasForestManagementandUtilizationbyChineseEnterprises.pdf>.

⁶⁴⁰ Ibid.

⁶⁴¹ *Guidelines for Social Responsibility in Outbound Mining Investments*, China Chamber of Commerce of Metals, Minerals and Chemicals CCMC, available at <https://www.emm-network.org/wp-content/uploads/2015/03/CSR-Guidelines-2nd-revision.pdf>.

⁶⁴² Ibid.

This chapter does not only aim to introduce the development of related rules and regulations but also plans to understand the key drivers behind these regulatory changes and the interactions between different values, such as human rights, economic development and nature conservation.

Existing studies primarily emphasise the analyses of the international investment treaties and the investment arbitration case laws⁶⁴³ related to them. However, this chapter is more concerned with the local and individual levels and assumes that these local resistances and social movements against energy investment projects are a crucial driving force for legal and policy innovation.

This section firstly reviews China's overseas investment in hydropower and extractive industries as well as their negative impacts on the affected communities. It is also useful to examine some positive cases of successful collaborations between Chinese energy companies and local communities. This chapter also discusses their achievements and potentials for improving environmental regulation and environmental governance model at different levels.

7.3.1 China's hydropower industry goes global

Since the dawn of the 21st-century, Chinese corporations have emerged as major entities in global dam building. The first major overseas dam building project for the Chinese companies was the much debated Merowe Dam of Sudan (started 2003) which was funded by the China Exim Bank. As of now, Chinese Dam constructors and financiers constitute 75 per cent of the global dams being constructed, mainly for electric power generation.

However, dam building is the key point of all the social and environmental controversy regarding Chinese investment projects. Chinese dam constructors are generally willing to take high governance, environmental and geographical risks for their projects. A number of high-profile protests against hydropower and mining projects of Chinese companies were recorded in 2005 and 2006⁶⁴⁴.

⁶⁴³ Gordon, K., Pohl, J., & Bouchard, M. (2011); Barra, M. (2015). Overview and Lessons Learnt in Central Asia from Investment Disputes under the Energy Charter Treaty. Meeting of the Energy Charter Industry Advisory Panel, China National Petroleum Corporation, Beijing; Segger, M. C. C., & Weeramantry, J. C. (Eds.). (2017). 查道炯、李福勝、蔣姮 (2014).

⁶⁴⁴ McDonald, K., Bosshard, P., & Brewer, N. (2009) Exporting dams: China's hydropower industry goes global. *Journal of environmental management*, 90, S294-S302. See also 葛察忠、夏友富、智穎颯、龍風 (2010).

The government of Myanmar halted the Myitsone Dam and hydroelectric power project in 2011, a project of the China Power Investment Corporation that continued for more than 10 years⁶⁴⁵. The suspension was due to some prominent environmental and social issues pointed out by the locals, including conservation of biodiversity and migrant relocation.

In Nepal, Chinese dam constructors are significantly involved in the hydropower projects. Nepal requires a generating capacity of 1,200 MW to cope with the regular blackouts that happen during dry seasons in Kathmandu⁶⁴⁶. As of now, two projects are on the way under two Chinese hydropower companies. Both of these projects raise serious concerns among NGOs and local communities about their impact on the environment and how risks are being managed. The public has boycotted the two projects due to the lack of institutional management by the Nepalese government.

These cases have raised numerous concerns regarding the potential negative impacts of Chinese companies taking overseas dam projects. First, China's foreign hydropower industry has followed the footsteps of its domestic hydropower industry. The Chinese dam constructions have yet to prove that it can be environmentally and socially responsible within China, only then the industry's ability to do so abroad can be called into question. Second, the primary strategy of investors from China is to make those resources accessible which were inaccessible previously, such as the resources found in conservation sites. Third, major Chinese financiers, investors and equipment suppliers building dams abroad have so far not fully implemented human rights or environmental guidelines. And the guidelines they adopted may not be consistent with the global standards.

Moreover, the Chinese dam builders have not been openly interacting with civil societies, but they have been adaptive and quick at learning to engage with NGOs. Some Chinese corporations have made efforts to collaborate with the local NGOs. Meanwhile, host countries also engage with the Chinese dam builders for constructive dialogues. The governments have invited local NGOs to provide recommendations and input to their environmental policy-making including assessment of high-risk, sensitive projects.

7.3.2 Chinese participation in extractive industries

⁶⁴⁵ Gleick, P. H. (2012). China dams. In *The world's water* (pp. 127-142). Island Press, Washington, DC.

⁶⁴⁶ Wilmsen, B., Webber, M., & Yuefang, D. (2011). Development for whom? Rural to urban resettlement at the Three Gorges Dam, China. *Asian Studies Review*, 35(1), 21-42. See also 查道炯、李福勝、蔣姮 (2014).

Extractive industries produce non-renewable resources. The exploitation of non-renewable natural resources, such as minerals, oil, gas and timber, needs a tremendous amount of energy as well as heavy machinery, and the negative impacts on water and land due to the infrastructure development of such projects affect states all around the world especially the ecologically and politically fragile ones⁶⁴⁷.

For the past two decades, the Chinese extractive industries have been actively participating in search of non-renewable natural resources abroad⁶⁴⁸. After a series of riots and protests in states like Sudan, Gabon and Zambia, Chinese financiers and government bodies seem to be more aware that environmental deterioration and compromising human rights in Chinese projects can result in an unacceptable backlash. For instance, Zijin Mining Group's project of the Rio Blanco Copper mine in Peru had to be suspended and aborted due to a local public outcry in 2006⁶⁴⁹.

Case studies⁶⁵⁰ from Peru illustrated problems both in the Peruvian government's policy and legal frameworks and the extent of Chinese companies' CSR strategies. The Peru government increased taxes and duties on the mining firms. It is a reform plan to redistribute finance from mining projects. Also, Peru established the Ministry of Environment in 2008 and had also recently joined the Extractive Industries Transparency Initiative.

The government made the International Labour Organization Convention a part of their constitution to guarantee prior consultation rights for tribal and local peoples on projects that can potentially impact their lives in any way⁶⁵¹. Consulting the tribal people is crucial because there is a high level of social conflict surrounding these projects and the Chinese financiers and developers.

How are the Chinese TNCs different from their western counterparts in this field? Some scholars suggested that there are minor differences and more similarities⁶⁵². Just like western corporations, Chinese mining companies' projects are market-oriented. Their goal is to

⁶⁴⁷ Janson, J., Burke C. and Jiang, W. (2009) Chinese Companies in the Extractive Industries of Gabon & the DRC: Perceptions of Transparency. Center for Chinese Studies, University of Stellenbosch.

⁶⁴⁸ Ibid.

⁶⁴⁹ "Significant progress in Rio Blanco Copper-Molybdenum Mine", available at: <http://www.zijinmining.com/investors/117500.htm>.

⁶⁵⁰ Jason, Burke and Jiang (2009).

⁶⁵¹ ILO Conventions, available at https://www.ilo.org/moscow/areas-of-work/gender-equality/WCMS_249143/lang--en/index.htm.

⁶⁵² Weng, L., Sayer, J. A., & Xue, L. (2017).

maximise profit, identify the best location of resources, create stakeholder values, and cope with the social and environmental risks. On the other hand, a major difference is that some Chinese corporations have recently expanded their global presence and become real TNCs; they are still on the learning and experiencing stage. Examples are present of the Chinese companies that relocated whole communities and cleaned up the environmental damages created by the previous operations.

Other than mining, Chinese oil and gas companies also struggle with local politics when working abroad. The Chinese involvement in the petroleum industry was considerably reinforced in August 2009 when Sinopec took over Addax, thus gaining rights over the Canadian company's investments in Gabon.

Gabonese stakeholders who were made a part of the consultation argued that now Sinopec complies with international standards regarding business operations, environmental protection, and community engagement⁶⁵³. The issue regarding initial insufficient environmental impact assessment for the Lotus block in 2006 has long been resolved, although many Gabonese still cannot forget this event.

7.3.3 Positive recent changes: From resistance to collaboration

According to the negative case studies mentioned above, it is possible to summarise the major environmental and social risks brought by the Chinese overseas energy projects⁶⁵⁴:

- 1) insufficient CSR awareness and improper monitoring;
- 2) the communication gap between the stakeholders and the inadequate disclosure of information;
- 3) unplanned and inappropriate investment decisions that can cause social conflicts, and
- 4) poor environmental policies and implementation in the host states.

With the experiences, the Chinese investors have now realised that their relations with the host government can be improved significantly. They need to develop and maintain positive and constructive relations with the host communities, civil society groups and trade unions in order to be successful in the host regions for the long term. Besides negative aspects of these

⁶⁵³ Ibid.

⁶⁵⁴ Leung and Zhao (2013).

protests, it would also be necessary to look at the positive values of these communities' engagements.

The following paragraphs present two examples of cross-sector collaborations between host communities, non-governmental organisations and Chinese investors, which, to some extent, demonstrate the power and potential of legal and policy innovation from below.

1) “*Gulf Community Agreement*”

The “Gulf Community Agreement” is a multi-sector agreement which is signed by the Government of Queensland, MMG (Minmetals Hanxing Mining Co., Ltd, China Minmetals Corporation) and local peoples⁶⁵⁵. The goal of this agreement is to protect local cultural heritage and environment and offer employment opportunities and related skills training for citizens in the gulf area.

Working in collaboration with UN-Habitat and international environmental NGOs, this agreement focuses on public health, infrastructure construction, education training, micro-credit and agriculture financing for indigenous communities⁶⁵⁶. In practice, this agreement leads the Chinese corporation to emphasise environmental protection and has gained an environmental certification of the ISO14001. This cooperative agreement also includes biodiversity protection plans that aim to protect the endangered species in the affected area.

The cross-sector agreement also has developed a US \$3 million community development trust fund managed by the Queensland Government as well as the Chinese company and representatives of the community. With the trust fund's financial backing, the Chinese mining company worked in cooperation with Golden Grove and other local bodies to provide vocational training and help young locals secure jobs in mining and other fields.

2) *International Rivers Program*

The International Rivers is an American environmental NGO. The organisation is looking over 304 hydropower ventures in 74 countries in which Chinese energy corporations or investors are involved in some way⁶⁵⁷. This NGO does not only focus on overseas Chinese

⁶⁵⁵ *Gulf Communities Agreement*. 2008-2013, available at:

https://www.csr.uq.edu.au/MMG_Century_15_year_GCA_Review_FINAL.pdf.

⁶⁵⁶ See Everingham, J., Barnes, R., & Brereton, D. (2013). *Gulf Communities Agreement 2008-2013. 15-year Review*. Brisbane: CSRM, The University of Queensland.

⁶⁵⁷ China Global Dams Database, The International Rivers, available at:

<https://www.internationalrivers.org/taxonomy/term/1332>.

investors but also studies and devotes similar services to dam constructors in the European Union, the United States and other regions.

The International Rivers started a long-term plan in 2006, which, on the one hand, reinforces the capacities of indigenous communities and civil society organisations⁶⁵⁸, and, on the other hand, aims to enhance Chinese international dam constructors' social and environmental performance. The approach is derived from the supposition that this model is fruitful to the public interest as well as to the long-term business projects.

The program follows a range of strategies to engage with Chinese enterprises and other important stakeholders. 1) The International Rivers analyse the decision-making processes of the selected dam projects. The NGO staff also monitors the implementations through site visits. 2) The program uses various social media approaches to create awareness about environmental and social impacts of China's dam projects. 3) International Rivers establishes an effective dialogue mechanism directly with Chinese enterprises, financiers and community leaders to discuss environmental impacts and social policies.

Since 2009, that effective dialogue mechanism has helped International Rivers converse with the staff and management of Sinohydro, the largest hydropower contractor in China as well as in the world. This string of dialogues encouraged Sinohydro to adopt a Sustainable Development Policy Framework that is at par with the highest global standards⁶⁵⁹.

The mechanism respects the indigenous peoples' rights as directed by the UN declaration, decides to develop grievance mechanisms for compensating the damages of project-affected people, promises to comply with the safeguard policies of the World Bank, and defines environmentally sensitive areas, such as national parks.

Sinohydro has also focused on International Rivers' recommendations on a range of foreign dam projects. It decides to give up some problematic projects, like the Agua Zarca Dam in Honduras, a project that had the potential for severe violations of the human rights.

The SASAC, the State Council of China, and other government bodies started providing guidelines to bring forward environmentally and socially responsible overseas projects by

⁶⁵⁸ Hu and Wang (2014) Environmental and Social Risk Management of Chinese Transnational Corporation. Yale School of Forestry and Environmental Studies and WWF.

⁶⁵⁹ Sinohydro's Sustainable Development, Health Safety and Environment, and Ethics Policies, available at: <https://www.internationalrivers.org/campaigns/sinohydro-corporation>.

Chinese enterprises. The China Banking Regulatory Commission and China Exim Bank developed and released environmental guidelines⁶⁶⁰.

Globally, China was also engaged in developing the safeguard guidelines of various development banks, including the World Bank⁶⁶¹, to assess, avoid or mitigate the social and environmental risks related to hydropower projects⁶⁶². The case studies above have demonstrated the power of community engagement for driving legal and governance innovations at the local, national and transnational levels.

7.4 The “bottom-up” legal innovations: Challenges and opportunities

The case studies above illustrate that China's overseas energy investment, especially hydropower, mining and oil extraction, has operated in various geographical locations around the world. According to the local resistance cases in Myanmar, Peru and Gabon, Chinese enterprises usually obtain official permission to develop from the host states but have to ensure they are also offered social licenses from local communities.

Most of these actions of resistance have caused the suspension of China's overseas energy investment projects. In some cases, after constructive conversations with the residents, the Chinese enterprises and governmental authorities made some new adjustments to their legal rules and policies, responding to the pressure from resistances. These changes make the investment projects successfully restart.

This section provides a closer analysis of this legal and governance evolution process. It also evaluates this process and trends by focusing on three major aspects: 1) the limitations of current international investment frameworks, 2) China's challenges for implementing its related regulations and 3) the values of this “bottom-up” legal innovation process.

7.4.1 Limitations of the existing international approaches

International investment law regulates global capital; this body of international law focuses on international economic relationships. From a historical perspective, international

⁶⁶⁰ *China Export-Import Bank - Environmental Management Framework*, available at:

<https://1bps6437gg8c169i0y1drtgz-wpengine.netdna-ssl.com/wp-content/uploads/wpallimport/files/archive/emerging-sustainability-frameworks-CDB-ChinaExim.pdf>.

⁶⁶¹ World Bank Environmental and Social Framework (ESF), available at

<https://www.worldbank.org/en/projects-operations/environmental-and-social-framework>.

⁶⁶² Ferguson, R., & Lovell, S. (2015). Grassroots engagement with transition to sustainability: diversity and modes of participation in the international permaculture movement. *Ecology and Society*, 20(4).

investment law usually excludes non-economic elements from its realm. The successful enforcement of international investment law, to some extent, relies on the stability and predictability of its instruments for investor protection⁶⁶³.

Professor Sornarajah, in his recent book “*Resistance and Change in the International Law on Foreign Investment*” (2015, Cambridge University Press), argues that the current international investment framework is not functioning well⁶⁶⁴. Particularly, he argues an urgent need for recalibrating the international arbitration system for investment disputes, in which he pointed out the role of neoliberalism in the operation of the investment arbitration system. Regarding the possibility of balancing interests between foreign investors and public interests, Sornarajah argues that the application of the doctrine of proportionality in new treaties and investment arbitrations may not be regarded as an appropriate solution to current problems.

He also divides the evolution of international investment law on into three major periods of change: 1) the period of expansion, which started in 1990, placing emphasis on investment protection; 2) the period of conflict during which modern model treaties, such as the 2004 US Model Treaty, paid attention to the host state’s interests; and 3) the period of uncertainty which began in 2008⁶⁶⁵.

The historical origin favours the interests of investment protection at the cost of local citizens and their habitats⁶⁶⁶. In the period of uncertainty, the international investment agreements do not always provide clear guidelines for transnational corporations to engage with peoples in the Third World, who are usually the most vulnerable to the negative impacts of foreign investment and international investment law⁶⁶⁷. Though there is considerable diversity in the law governing energy investment projects in low and middle-income economies, a common recurring theme is the existence of imbalances in legal frameworks⁶⁶⁸.

⁶⁶³ Sornarajah, M. (2017). *The international law on foreign investment*. Cambridge university press. See also de Brabandere, E., & Gazzini, T. (2014).

⁶⁶⁴ Sornarajah, M. (2015). *Resistance and change in the international law on foreign investment*. Cambridge University Press.

⁶⁶⁵ Cotula, L. (2015).

⁶⁶⁶ Diepeveen, R., Levashova, Y. & Lambooy, T., (2014). “Bridging the Gap between International Investment Law and the Environment”, 4th and 5th November, The Hague, The Netherlands. *Utrecht Journal of International and European Law*. 30(78), pp.145–160. See also Schill, S. W., Tams, C. J., & Hofmann, R. (Eds.). (2015). *International investment law and development: bridging the gap*. Edward Elgar Publishing.

⁶⁶⁷ Odumosu-Ayanu, I. T. (2007). Locating Third World Resistance in the International Law on Foreign Investment. *International Community Law Review*, 9(4), 427-444.

⁶⁶⁸ Ibid.

When the energy investment is the subject, international law recognises that each state has sovereign rights over its natural resources and has the right to develop its domestic legislations. One of the most significant tasks that the ECT, NAFTA, WTO's investment section and other investment treaties face is the need for autonomous regulation for the issues of human rights and environmental protection, and also complying with the obligations of the state parties towards any foreign investing parties⁶⁶⁹. A lack of clear guidelines in the investment treaties for the resolution of potential issues brings about strict policy and legal challenges for foreign investors and state parties, as they have to rely on the decisions made by independent tribunals.

International energy investment law has been instrumental in fortifying the legal safeguarding of foreign investments⁶⁷⁰. In contrast, the efforts made for improving the readiness of the legal frameworks so that investments have a sustainable development have progressed more slowly. One example is the lack of advancements in international human rights laws, which have made them lag behind the legal protection that international law gives to foreign investment.

In contrast to the legal arrangements to protect and promote foreign investment, the arrangements to address social and environmental considerations are often left to non-binding guidelines and standards that struggle to address the major power asymmetries at stake. In many issues regarding the environment or those with a social impact, the ruling is often left to the non-legally binding local customs and standards⁶⁷¹.

In the future, the recalibrating of the international energy investment law is necessary so that it acts in an environmentally and socially acceptable way⁶⁷².

7.4.2 Current challenges faced by China

The Chinese government has encouraged its SOEs to invest internationally under its "Going Out" strategy; this has notably increased since the new millennium⁶⁷³. Regulations concerning outbound FDI have been rapidly developing in the past few decades. These laws have been created and drafted to increase overseas investments by accelerating the administrative approval process⁶⁷⁴. However, this chapter has observed that China's

⁶⁶⁹ Cameron, P., & Kolo, A. (2012).

⁶⁷⁰ Ibid.

⁶⁷¹ Cotula, L. (2016).

⁶⁷² Miles, K. (2013).

⁶⁷³ Chu, C., (2011).

⁶⁷⁴ Han, X. (2010); 單文華 (2014).

sustainable development and environmental protection laws for FDI are either incomplete or do not even exist.

More recently, the Chinese government has begun creating different regulations which aim to mitigate the problems that investing companies face when they invest in global infrastructure and natural resource projects. In practice, the host countries in which Chinese companies invest also lack of strong legal frameworks for mitigating social and environmental risks⁶⁷⁵.

According to CBRC's new Green Credit Guidelines, Article 21 requires that financing institutes need to ensure project operators abide by the host country's domestic regulations, especially the environmental, land, public health and safety laws⁶⁷⁶. Also, the guidelines (Article 5) set by China's Ministry of Commerce asks corporations shall respect and obey the host country's environmental laws and regulations⁶⁷⁷.

However, only relying on local laws is not enough⁶⁷⁸. The first hurdle is the lack of understanding of the legal and regulatory clauses in the host countries. Environmental regulations are often seen to be insufficient in many developing nations. Local communities will not be satisfied and will suffer if the Chinese companies only adhere to the pre-existing guidelines in the host nation's laws. Also on occasion, the foreign investors and host nation are both united in both the pursuance and detriment of public welfare, a phenomenon known as the "resource curse".

Elizabeth Economy points out another interesting aspect. In her recent book, she argues that the most effective method by which people can understand the effects of foreign Chinese investment on a host nation is the way that these companies operate back home, where it has been seen that neither the companies nor the Chinese government pay much heed to environmental preservation⁶⁷⁹.

The example that Economy uses is of the Environmental Impact Assessment, whose practice has been discredited due to political hurdles created by local government officials, corruption, as well as data fraud. The Chinese government has only very recently begun to try

⁶⁷⁵ Hu and Wang (2014). See also Greenovation: Hub (2014).

⁶⁷⁶ Liang et al. (2014).

⁶⁷⁷ Leung and Zhao (2013); 查道炯、李福胜、蒋姮 (2014).

⁶⁷⁸ Ibid.

⁶⁷⁹ Economy, E., & Levi, M. (2014).

to regulate this field, its own “grow at all costs” policy has often been very damaging to the environment. As a result, the voluntary guidelines in place by the Chinese companies, their effectiveness when used in another country is a highly controversial topic.

Future investment agreements, such as BITs and FTAs concluded by China, should pay more attention to the host country’s natural environment as well as the responsibility of Chinese transnational corporations to preserve the host country's environment. China should enhance its control of the environmental impact of the foreign investment, and this measure should not be seen as a conflicting measure with regards to the broader regulatory power of the host country.

7.4.3 Place people at the centre of investment processes

As mentioned, discussions about the international legal frameworks on investment are often framed in top-down, macro-level forms⁶⁸⁰. International investment law cannot ignore anymore that the massive resistance from developing countries has not altered its essential domain.

Grass-root social movements are attempting to direct foreign investment law towards humanitarian causes which have had a fair amount of attention in international law. With each interaction with the concerned authorities, these ground-level movements align themselves with regulatory and participatory bodies. The international community is adverted to these groups’ statuses (or lack thereof) within the international economic order and the impacts of their actions on international investment law⁶⁸¹.

The ICSID case of *Tenicas Medioambientales Tecmed S.A. v. United Mexican States* ("*Tecmed v. Mexico*") provides perhaps the best illustration of this changing wind⁶⁸². The reason for this arbitration decision is the evaluation of the different stakeholders when developing international investment law. Before, the position of the developing nations with regards to these laws was not ideal or favourable, but now with increased activism from the domestic groups, a reconstructed international investment system is in transition.

⁶⁸⁰ Morosini, F., & Badin, M. R. S. (Eds.). (2017). *Reconceptualizing International Investment Law from the Global South*. Cambridge University Press.

⁶⁸¹ Rajagopal, B. (2003). *International law from below: Development, social movements and third world resistance*. Cambridge University Press. See also Miles, K. (2013).

⁶⁸² Han, X. (2007). See also Odumosu-Ayanu, I. T. (2007).

The international investment regulatory systems are often altered due to the protests and resistance⁶⁸³. International investment law, therefore, should recognise resistance even though it makes an effort to exclude the phenomenon from its realm, especially when it emerges from grass-roots activists groups (those who do not fall within the expert and international NGO category). However, the question, resistance by whom and through which strategies, remains.

This new approach brings the concerned people to the centre of the issue, rather than relegating them to being side-lined, passive victims or beneficiaries of the development projects.⁶⁸⁴ Such methods will both advance investment models that are in keeping with the locals' real demands, as well as increase the faith and legitimacy of the foreign investors in those countries.

In the case studies of Chinese overseas energy investment, leading Chinese transnational enterprises like to maintain a good corporate image and reputation. Unfortunately, the Chinese extractive and hydropower companies are not precisely homogeneous representations of the Chinese government despite them being owned by the state. A better result can be obtained if the negotiations are both with the companies individually and also the governments of both the host and home nations. The modern foreign investment law has emerged through a highly dynamic process involving decentralised negotiations and contestation.

Consequently, it would be able to claim that people welcome social movement activists, NGOs, and individual companies for their representation and safeguarding. These organisations push pre-existing governance mechanisms and investment laws towards a more environmentally and socially sustainable outcome.

NGOs, and social activists and their movements are seen in this new model as the tools through which a new legal system is constructed which can be used for future partnerships⁶⁸⁵. Advocates may utilise the various legal norms strategically by utilising the law to its maximum potential and creating a room for bottom-up debates⁶⁸⁶. At the moment the different

⁶⁸³ Sornarajah, M. (2015). See also Radi, Y., International Investment Law and Development: A History of Two Concepts (December 1, 2014). Grotius Centre Working Paper 2015/045 - IEL; Leiden Law School Research Paper, available at SSRN: <https://ssrn.com/abstract=2572987>.

⁶⁸⁴ Smith, A., Seyfang, G., Hielscher, S., & Hargreaves, T. (2013). Constructing grassroots innovations for sustainability. *Global Environmental Change*. See also Ferguson, R., & Lovell, S. (2015).

⁶⁸⁵ Ekins, P. (2005).

⁶⁸⁶ Miles, K. (2013). See also Cotula, L. (2016).

organisations of law give many chances to activists to campaign for alteration at all levels, be it local, national, international and transnational.

In September 2015, 17 Sustainable Development Goals were created by the UN General Assembly. These recognise the need for private investment in the achievement of these goals and put people in the centre of the global agenda from 2015 to 2030.

Other international guidelines include UNCTAD's Investment Policy Framework for Sustainable Development which was launched in 2012 (a revised edition was released in 2015)⁶⁸⁷. The essential principles adopted by this policy framework ensures that investment policy promotes sustainable development, and provides insights for NGOs and local communities to harness multiple legal tools which can make a real difference to the regulatory architecture and enforcement of natural resource investment and governance.

7.5. Conclusion: Can China lead the way in green governance?

Ever since the country's economic reforms, China's FDI has increased at a very rapid rate. Due to the Asian Infrastructure Investment Bank's roles and the "One Belt One Road" development plans, it is anticipated that Chinese outward infrastructure and energy investments will grow both in the Eurasian region as well as globally.

The evidences has demonstrated that China had put much effort into improving both its international and domestic investment laws and policies for sustainable investment. However, as the case studies regarding hydro-power projects and overseas extractive operations illustrated in this chapter, the 'top-down' regulatory approach alone may not be strong enough to resolve the conflicts that occurred in the affected communities.

This chapter has presented the case studies of Chinese overseas investment in hydropower and extractive industries. These projects face severe local resistances, but some of these critical interactions become the catalyst for environmental law and governance innovations at various levels, such as the Gulf community agreement and the International Rivers programs.

The international frameworks for regulating cross-boundary energy investment, including the WTO/GATT system, ECT, NAFTA and other bilateral investment treaties, so far are still incomplete and unbalanced; there are still legal and geographical constraints in the application.

⁶⁸⁷ See UNCTAD Investment policy framework, available at: [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx).

The environmental provisions within those investment treaties usually do not have direct legal binding on the enterprises. China is now just joining the ECT system, but of course, does not involve NAFTA. International investment law indeed has a history of putting more emphasis on investment protection rather than public interests in the host countries and local communities.

Though the Chinese governments and financial institutions have made some progress in enhancing the domestic sustainable development policies in outbound investment, the progress is relatively slow. The published voluntary standards and guidelines are also not legally binding, and they have faced many challenges in terms of implementation and enforcement overseas. On the other hand, this chapter has presented a model for legal innovation (stimulated by the grass-roots power). According to our observations, the Chinese investors can usually obtain legal permissions to develop from the host states' governmental authorities but have problems having social licenses to operate. Local resistance and social movements against Chinese investment projects eventually shape the companies' behaviours and stimulate the legal innovation both at the national and international levels.

These local protests make the Chinese companies recognise the fact that they cannot just rely on the local laws and the permissions from the governments but also need to engage with the local communities and other stakeholders directly. These cross-sector collaborations play a significant role in improving transnational environmental governance and creating future legal reforms, such as the cases of the Gulf community agreement and International River program.

Based on the evidence above, China's energy corporations and commercial lawyers have not played a very influential role in designing innovative mechanisms to safeguard affected communities' public interests. There is a huge space for these two important actors to enhance their awareness and capacities in this significant matter. China's government, industry associations and international environmental NGOs may assist to meet the demand for capacity-building in the near future.

According to Harvard professor Joseph Nye, the concept of 'soft power' plays a key role in China's future development and its overseas impacts. To be more specific, if China likes to become a real world leader in the future, the country should not only rely on its 'hard power' (such as the military, political and economic powers) but also has to enhance its 'soft power',

including leaderships in sustainable development, culture and the rule of law⁶⁸⁸. Economy also argue⁶⁸⁹ that the creation of AIIB can be a chance to see how China introduces robust environmental standards to global infrastructure investment.

Eventually, the purpose of this chapter is not to criticise China's overseas environmental performance according to the Western or international standards. The world has seen improvements from the Chinese governments and enterprises, and the scenario of "China is buying the world" is so far not true. By examining the case of China's outbound energy investment, this chapter highlights the importance of local resistance and presents a model of legal and governance reforms through cross-sector cooperation. This research argues that China should reflect on the positive values of these local protests or "bottom-up" resistances, rather than just seeing them as non-commercial risks to be eliminated. If China plans to lead the way in green governance, it should pay more attention to those "bottom-up" innovative ideas.

Of course, in the future, there is a need for more detailed empirical studies on this topic. This chapter tends to address that resistance and survival are also an integral part of the public international law. Moreover, the concept of resistance may be applied to various bodies of international law, such as investment, trade, environment and human rights. After all, the essential spirit of international law is to seek peace of human beings and sustainable development of our planet.

⁶⁸⁸ Nye Jr, J. S. (2015). *Soft Power: The Means to success in world politics*. Public Affairs; New Ed edition. See also Beeson, M., & Xu, S. (2016). Leadership with Chinese characteristics: What role for soft power? In *Global and regional leadership of brics countries* (pp. 169-188). Springer International Publishing.

⁶⁸⁹ Economy, E., & Levi, M. (2014).

Chapter 8 – Conclusion

“You cannot get through a single day without having an impact on the world around you. What you do makes a difference, and you have to decide what kind of difference you want to make.” — Jane Goodall

This thesis so far has critically examined various modern contractual mechanisms by which the economic benefits of energy investment is balanced with other values of sustainable development through a ‘State-Investor-Population (S-I-P) Triangle’ lens (with a strong focus on China’s outward and inward energy investment projects).

This final chapter concludes with summaries of the main empirical research findings, arguments and their implications for both theoretical discussions and practical policy-making. Some recommendations for further research will also be addressed.

8.1 Summarising research findings and discussion narratives

The relations between cross-boundary energy investment and other environmental and social values are not a brand-new topic. An example is BP’s Deepwater Horizon accident in the Gulf of Mexico.

This thesis tackles this challenging issue and assess the functions of various innovative regulatory and policy instruments for regulating energy FDI and safeguarding affected communities and the environment. It critically examines contemporary bilateral and multilateral energy investment contracts via a sustainable development analytical lens and discusses their potential for future regulatory and policy innovations.

1) Regulating FDI is an issue of global energy governance

In order to establish the background narratives, Chapter 1 identified significant recent trends in global energy investment. The significance of energy FDI for energy security and sustainable development, energy investment’s negative impacts, and energy-related investment disputes are all on the rise. The bird’s eye observation of these recent trends help us to find the emerging and significant issues, identify the knowledge gap and adjust the suitable analytical lens to approach them.

Indeed, law is only one aspect of the whole story and has many limitations for implementing; regulating FDI is an issue of global energy governance. A well-designed international agreement for regulating FDI in the energy sectors should balance economic

growth, energy security and other public policy (e.g. environmental protection and human rights) considerations appropriately. It is necessary to investigate how these international treaties, national laws, soft laws and other project-specific instruments interact with each other.

2) Revisited the SIP triangle with the lens of sustainable development

The concept of sustainable development provides a handy lens to assess quality in energy investment processes. Sustainable development is a flexible and evolving concept. In the investment context, corporations, states and affected citizens have the chance to discuss competing visions of what constitutes the nature of sustainable development and how to balance multiple values.

Also, this research revisited the “State-Investor-Population” Triangle. Contemporary international investment law has become unbalanced in overemphasising investment protection over the regulatory authority of the host countries and, more importantly, the affected citizens and public interests. To understand the complex interplays within the SIP triangle, one should not only focus on the practices of State-investor contracts but also analyse the other different aspects, namely the P-I and S-P dimensions within the whole triangle that have other regulatory focuses. This tripartite framework provides useful insights for framing the inquiries of this research.

3) The working hypothesis of this research

The overall working hypothesis of this research is that the ‘bottom-up’ driving forces, such as energy MNCs, NGOs, and commercial lawyers, are increasingly mobilising the use and the design of contractual arrangements and quasi-contractual agreements/partnerships in the cross-boundary energy investment scenario.

This research used different online resources open for the public in order to compile a dataset covering three major types of contracts: State-investor investment contracts, Business-NGO partnerships and multi-actor investment contracts within the ‘S-I-P triangle’.

4) The evaluation of State-investor contracts’ contracting patterns and performances

A State-investor contract is a legal agreement between the host states and foreign investors, which can help enhance the S-I dimension’s governing functions in the whole SIP triangle. These investment contracts can be viewed as a significant segment of the whole legal

frameworks for regulating transboundary energy investments because these contractual documents can detail the obligations and rights of both host countries and foreign corporations.

For the past decades, state investment contracts have dominated the investments in the extractive and energy industries. Since the early 20th century, investment importing host states granted excessively large concessions, especially in the oil and gas sector, to investors to extract natural resources within their territories, and sometimes these concessions spanned across the entire country or the region.

This research has charted the evolution of the relevant environmental and social provisions embedded in the investment contracts. The discussions have covered their strengths for preventing environmental and social harm and for stimulating future regulatory innovation. In sum, investment contracts have both advantages and disadvantages. Though these investment contracts may include some provisions regarding environmental protection and human rights, in general, these provisions so far have not provided enough protection for local citizens, communities and the natural environment. Due to the current fragmented legal frameworks, third parties' rights and interests sometimes may not be enforced effectively. The actual performances of these state-investor contracts would depend on the negotiators who can participate in the contract negotiations and how they design these crucial contracts.

5) The Business-NGO partnerships in Greater China's energy sector

Regarding the contracts in the 'I-P' dimension, this research examined the contracting practices, namely the Business-NGO partnerships, in Greater China's oil and gas sector. This research has examined in depth the geographies, politics and performances of the on-going CSPs among the oil and gas corporations and NGOs operating in Greater China. The study focuses on seven international, two Taiwanese and four Chinese state-owned oil and gas corporations and reports that there are currently sixty-two CSPs working in greater China. However, the majority of these CSPs are yet at the charity level. This research applies social actor and institutional perspectives to understand and compare the Chinese state-owned, international and Taiwanese oil and gas companies on the issues related to partnering with NGOs.

The results indicate that it is true that partnerships act as a progressive instrument to foster development but they also pose considerable limitations. The lack of constructive involvement between the non-profit sector and the corporate industry can be, up to some extent, attributed

to isomorphic pressures within Business-NGO relationships in Greater China. Moreover, NGOs are relatively new social phenomena in the Chinese context.

This research has pointed out oil and gas companies operating in Greater China have not fully recognised that NGOs have significant expertise in environmental protection and social development. On the other hand, NGOs in China have not been matured enough to be a member of an epistemic community where the energy corporations can use their experience or knowledge. So, the CSP landscape of this region is significantly defined by the major oil and gas corporations, and the CSP geographies are not very much community-based and problem-oriented. Therefore, it would be difficult to deny that the major oil and gas corporations effectively and socially form the current CSPs.

Due to the unique historical background of the development of NGO-business collaborations in Greater China, this research establishes that ‘critical cooperation’ is a compelling strategy for the non-profit organisations, particularly for the grassroots to form partnerships with the energy corporations. Furthermore, the authorities including the Chinese local government and other social entities play a notable role in establishing an external environment for upcoming CSPs. If this tendency continues to exist, policy changes that ensure the transparency of non-profit projects might be necessary to enable the corporate-NGO partnerships comfortable with external auditing.

6) Assessing the proposal for new multi-actor (tripartite) contracts

Finally, for the new type of multi-actor (tripartite) contracts, this research argues that the current system for regulating activities and relations in international and domestic investment regimes involves minimal engagement of host and affected local citizens in formal legal arrangements. In this situation, various actors contest the interests derived from, and obligations imposed by, existing legal frameworks in the SIP triangle. A new type of multi-actor contract can outline the conceptual roadmap for future contracting in natural resource sectors and provide justifications underlying these patterns in global contracting practices. By including affected third parties, local communities and other citizens, the new multi-actor investment contracts illustrate that host state governments and foreign investors are ‘trustees’ of these investment projects and the benefits of natural resource extractions should be mobilised for the public. Scholars also highlighted that contracts among multiple actors in the

natural resource extraction context have the capacity to cope with the absence of responsibility and remedial regulations and can address the adverse impacts caused by extractive operations.

Examples of this new form of multi-actor contracts include contracts which can be designed to provide third parties with a legal right to sue the contract; multi-actor environmental contracts; human rights agreements, and state-investor-local community tripartite contracts. These new contractual arrangements illustrate that the law of contract has shifted from the early nineteenth-century model that contracts only protect the rights of contracting parties (e.g. foreign investors) without any concern for affected third parties (e.g. individual citizens and local communities) who are direct victims of harmful extractive operations.

For this framework to be successful, states would need to act both individually and as regional organisations. The strength of a state's political will would be decisive in determining its willingness to adopt a framework with the potential to ensure positive outcomes for all actors.

Despite the apparent challenges of multi-actor frameworks, they potentially hold considerable promise and could integrate the primary stakeholders within one framework, address democratic limitations in investment law and allow negotiation of interests, benefits and obligations for all actors. Multi-actor contracts would foster friendly relationships as well as defining the responsibilities for each of the actors. Such stronger relationships would encourage sustainable exploitation of resources and urge responsible development of projects through careful management. Some further research is undoubtedly necessary to fully establish the potential impact of this framework.

8.2 Theoretical implications: Adding a dynamic perspective to the SIP triangle

Based on the empirical evidence presented in the preceding chapters, this research has developed original conceptual charts to capture the interactions among the existing three major legal frameworks for regulating international energy investment. The newly-developed charts highlight the usefulness of the contractual approach for promoting legal and policy innovations and enhancing multi-level environmental governance.

These original conceptual charts put the project-specific contractual mechanisms into the centre of international natural resource governance. This study revisits the S-I (e.g. traditional investment contracts), S-P (e.g. business-NGO partnerships), and S-I-P (e.g. multi-actor

investment contracts) by their real functions and reclassify them into three new categories, namely ‘soft contracts’, ‘enforcement contracts’ and ‘innovative contracts’.

This new contract classification adds a dynamic perspective to the original ‘State-Investor-Population’ (S-I-P) triangle and highlights the potential of an ‘innovative contract’ for contributing to future formal and informal law-making (both international and domestic) and social innovations.

Assessing the FDI contracting practices and social change with this original conceptual chart, the analytical perspectives could be not only static but also more dynamic. This conceptual chart first captures, at the macro-level, the dynamic interactions between contracts, key actors and the legal norm revolution.

At the micro-level focusing on contracts, the conceptual chart demonstrated the critical legal and policy entrepreneurs behind the most innovative contractual arrangements. These institutional entrepreneurs can be: 1) MNCs (with their corporate self-regulation mechanisms), 2) NGOs (with their capacities for resistances and campaigns), and 3) Innovative lawyers working in different sectors (with an innovative and green mind-set). The ‘bottom-up’ local resistances against international energy investment globally are shaping the design of investment contracts, contracting practices and legal frameworks.

Also, the new empirical findings and developed conceptual charts in this research can jointly propose a new analytical lens for assessing energy investment projects across different jurisdictions (please see Figure 6.6). This research applies this newly-developed analytical lens and uses China’s outward investment in the energy sectors as an important case study in Chapter 7.

Importantly, this research has proposed a new multi-actor governance framework for international energy investment, and the previous chapters have demonstrated under what conditions such a multi-actor governance framework for energy investment might be implemented. It is also useful to summarise some fundamental elements here: 1) Due to the limitations of ‘formal regulations’ at the international level and domestic level, there is an urgent need to find out the alternative solutions and other project-specific instruments and understand their connections with the existing ‘formal regulations’, 2) Investment contracts have both advantages and disadvantages, and the actual performances of these State-investor contracts would depend on the negotiators who can participate in the contract negotiations and

how they design these critical clauses, 3) Strategic partnerships between NGOs and businesses, as a quasi-regulatory instrument, have the enormous potentials for transnational environmental and energy governance, which can also be a key element of the multi-actor contractual framework (namely the ‘I-P dimension), 4) A multi-actor contract, negotiated correctly, would suitably address the diverse interests in the energy investment context and guarantee that local communities have means to solve investment disputes under a framework that fully acknowledge their rights, and 5) As demonstrated in the Chinese investment case studies, the key to implement these multi-actor contractual approaches is the bottom-up driving forces supported by three legal and policy entrepreneurs, such as MNCs, NGOs and commercial lawyers. They truly added a dynamic perspective to the ‘S-I-P triangle’ and the way of thinking about international investment regulations.

8.3 Practical implications (focusing on China)

1) For China’s outward energy investment

Ever since the country’s economic reforms, China’s outward FDI has increased at a very rapid rate, and it is anticipated that Chinese infrastructure and energy investments will continue to grow both in the Eurasian region as well as globally.

The international frameworks for regulating cross-boundary energy investment, including the WTO/GATT system, ECT, NAFTA and other bilateral investment treaties, so far are still incomplete and unbalanced; there are still legal and geographical constraints in the application. The environmental provisions within those investment treaties usually do not directly legally bind the enterprises. China is now just joining ECT, but of course, does not involve NAFTA. International investment law indeed has a history of putting more emphasis on investment protection rather than public interests in the host countries and local communities.

Though the Chinese governments and financial institutions have made some progress on enhancing the domestic sustainable development policies in outbound investment, the progress is relatively slow. The published voluntary standards and guidelines are also not legally binding, and they have faced many challenges regarding implementation and enforcement overseas.

Indeed, China had put much effort into improving both its international and domestic investment laws and policies for sustainable investment. However, as the case studies regarding hydro-power projects and overseas extractive operations illustrate, the ‘top-down’ regulatory

approach alone may not be strong enough to resolve the conflicts that occurred in the affected communities.

On the other hand, this research has presented a model for ‘bottom-up’ legal innovation. The Chinese investors can usually obtain legal permissions to develop from the host states’ governmental authorities but have problems having social licenses to operate. Local resistance and social movements against Chinese investment projects eventually shape the companies’ behaviours and stimulate the legal innovation both at the national and international levels.

These local protests make the Chinese companies recognise the fact that they cannot just rely on the local laws and the permissions from the governments but also need to engage with the local communities and other stakeholders directly. These cross-sector collaborations play a significant role in improving transnational environmental governance and creating future legal reforms. This model has been proved useful in the cases of the Gulf community agreement and International River program.

Based on the evidence above, China’s energy corporations and commercial lawyers have not played a very influential role in designing innovative mechanisms to safeguard affected communities’ public interests. There is a huge space for these two important actors to enhance their awareness and capacities in this significant matter. China’s government, industry associations and international environmental NGOs may assist to meet the demand for capacity-building shortly.

2) For establishing CSPs in Greater China

Strategic partnerships between NGOs and businesses are yet at a very early stage of evolution and still have limited effect and scope particularly in Greater China. However, there is enormous potential for such strategic partnerships. NGOs can, on the one hand, act as watchdogs to monitor companies’ activities, and, on the other hand, cooperate with the private sector for environmental governance and social innovation. The relationships like these are beneficial not only for the partner organisations but also for the society collectively by tackling the challenges and opportunities which are beyond the scope of a single organisation or sector.

For the NGO personnel, particularly the ones working with grassroots NGOs in mainland China, it is a wise decision to apply ‘critical cooperation’ as an effective way to involve major oil and gas corporations in their operations. Furthermore, the NGOs can integrate the resources from social media, match-makers and governmental bodies.

On the corporate side, knowledge sharing regarding the potential of strategic partnerships outside as well as within organisations is necessary. Polling top-level officials on strategic partnership knowledge could provide a good indication of the current awareness of the strategic collaborations and to what limits the organisations see their potential and are willing to commit to them. Providing platforms where NGOs and businesses could engage to exchange ideas and information could be immensely helpful in the selection of suitable partners.

It is the responsibility of the Taiwanese and Chinese governments to establish a regulatory atmosphere for realising the maximum governance potential of the CSPs. Moreover, the Taiwanese government needs to provide incentives to the international NGOs so that they can bring in their expertise and know-how. Finally, due to the positive impacts of the global isomorphic pressures, the Taiwanese oil and gas corporations need to consider getting the partnerships of international industry organisations to avoid being cut off from the global picture.

Possible ideas for further study can be based on a longitudinal analysis that considers a strategic partnership right from its inception and throughout its lifespan to acquire detailed information and understanding of the working dynamics involved in such a partnership. Moreover, finding out while certain strategic partnerships fail while others are successful is a must to develop an understanding of how to manage strategic partnerships effectively.

8.4 Implications for China's Belt and Road Initiative

Foreign investment has been playing an important role in China's economic development since its beginning of the Open Door policy in the 1970s. As China is growing its global impacts, the Chinese "Belt and Road" initiative sets a new vision for regional cooperation and integration of Eurasia.

Energy investment is a key part of the Belt and Road Initiative. By the end of 2016, the countries along the Belt and Road Initiative have received a huge amount of Chinese investment, totalling USD\$ 235 billion, of which over \$95 billion are investments in the energy sectors, especially foreign oil, gas and other natural resources. These energy infrastructure projects are located in a wide swath of Eurasia, including around 65 countries. And the main purpose of these energy projects is to enhance China's energy security and regional cooperation. This trend makes the observations and discussions in this research valuable and timely.

At this moment, China has signed BITs with many countries along the Belt and Road Initiative (Please see Appendix A and Appendix L). However, a large number of these investment treaties were established during the 1980s and 1990s. China has been rapidly changing its foreign and economic policies since the 1980s. These investment treaties, on the one hand, do not include many sustainable development and human rights clauses, and, on the other hand, these state investment treaties provide limited scope for investor-state investment dispute arbitration.

So far, it is still not very clear how much China's policymakers and negotiators rely on these current BITs with developing economies along the Belt and Road Initiative. Though China's official 13th Five Year Plan mentioned that negotiating new investment treaties that achieve the 'high standard' of sustainable development and human rights should be a priority of China's government and those giant state-own investors, meanwhile, China is enhancing its domestic legal framework for outward investment. However, after reviewing the recent development of China's investment treaty-making practices, the progress is relatively slow in this matter.

At the international level, China seems to establish a Chinese-led development bank, namely the Asian Infrastructure Investment Bank, rather than relying on the current major international frameworks for energy governance, such as Energy Charter Treaty and the investment-related instruments in WTO. This situation highlights the challenges and obstacles of the Chinese Belt and Road Initiative, which may increase the environmental and social risks in the target areas including those developing countries along the Belt and Road Initiative without strong domestic legal frameworks.

Therefore, the multi-actor contractual framework developed in this research may be valuable to safeguard human rights and the environment across the Belt and Road Initiative's target countries. And, of course, the successful implementation of this multi-actor contractual approach for energy governance relies on the efforts and awareness of those three important policy entrepreneurs, namely commercial lawyers, civil society and NGOs, and the governmental authorities (with a new sustainable development mind-set). To sum up, the approach proposed in this research is quite different from the Chinese government's top-down approach, which pays more attention to other actors' potential impacts on international energy governance.

8.5 Recommendations for future research

Based on the overall evaluation outcomes, this research suggests that future research can do a further review of the transnational and domestic institutional settings for encouraging ‘bottom-up’ legal and social innovations.

Regarding the practical approaches for stimulating these ‘bottom-up’ legal and social innovations, the role of new technologies is very crucial. At this moment, over three billion people on this planet are active online. Four primary technological drivers – social media, the cloud, mobile and 'big data' – are significant components and ‘global game changers’ in the way networking and public policy are done today as part of what has been designated the ‘Information Revolution’. The evolving data infrastructure associated with increasingly environmentally-minded citizens is concurrently reordering how local communities can interact with corporations and governments on global environmental issues, e.g. energy and climate change.

In the era of digitalisation, the power of social media for advancing policy reforms has attracted attention from both scholars and practitioners. Existing international law studies have seen an eager debate over how current international norms and established principles can be applied to new cyber-circumstances in the age of social media. So far, these analyses have mainly focused on how international law can account for the emerging technological challenges and stay faithful to enduring legal principles and political commitments. As a result, a further exploration of how emerging new technologies (e.g. social, cloud, mobile and Big Data) may enhance citizen engagement with global issues and its possible influences on international law and governance is still necessary.

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Appendix A - Table of Treaties, Declarations, and Other International Instruments

International environmental treaties

Aarhus Convention/UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)

African Convention on the Conservation of Nature and Natural Resources (Revised African Convention) 2003

Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System 1987

Agreement on the Co-operation for the Sustainable Development of the Mekong River Basin 1995

ASEAN Agreement on the Conservation of Nature and Natural Resources 1985

ASEAN Agreement on Transboundary Haze Pollution 2002

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989

Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Liability Protocol) 1999

Beijing Declaration on Environment and Development 1991

Charter of the United Nations (UN Charter) 1945

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973

CLC Convention/International Convention on Civil Liability for Oil Pollution Damage (CLC Convention) 1969

Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo Convention) 1972

Convention for the Prevention of Marine Pollution from Land-based Sources (Paris Convention) 1976

Convention for the Protection of World Cultural and Natural Heritage/UNESCO Convention for the Protection of World Cultural and Natural Heritage (World Heritage Convention) 1972

Convention on Biological Diversity (CBD) 1992

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) 1993

Convention on Environmental Impact Assessment in a Transboundary Context / UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) 1991

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973

Convention on Long-Range Transboundary Air Pollution (LRTAP) 1979

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention)

1972

Convention on Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention) 1991

International Convention for the Prevention of Pollution from Ships (MARPOL Convention) 1973/1978

International Convention for the Prevention of Pollution of the Sea by Oil 1954

International Convention on Civil Liability for Oil Pollution Damage (CLC Convention) 1969

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Oil Fund Convention) 1971

Kyoto Protocol on Climate Change 1997

Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol)

Ramsar Convention / Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention) 1971

Stockholm Convention on Persistent Organic Pollutants 2001

UN Convention on the Law of the Sea (LOSC, UNCLOS) 1982

UN Framework Convention on Climate Change (UNFCCC) 1992

Washington Declaration on Protection of the Marine Environment from Land-Based Activities 1995

International economic treaties

ASEAN Agreement for the Promotion and Protection of Investments 1987

Articles of Agreement of the International Monetary Fund (IMF Articles of Agreement) 1944

Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965

EC Treaty (TEC, Treaty of Rome)

Energy Charter Treaty 1994 (ECT)

General Agreement on Tariffs and Trade (GATT) 1994

ICSID Arbitration Rules 2006

North American Agreement on Environmental Co-operation (NAAEC) 1993

North American Free Trade Agreement (NAFTA) 1994

OECD Convention on Combating Bribery of Foreign Public Officials In International Business Transactions 1997

OECD Guidelines for Multinational Enterprises 1976

OECD Policy Framework for Investment (OECD PFI) 2015

TRIPS Agreement 1994

UNCITRAL Arbitration Rules 1976

UNCTAD Intra-MERCOSUR Protocol in 2017

WTO Agreement 1994

WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) 1994

WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

Bilateral investment agreements

Argentina–France BIT 1993

Argentina–Spain BIT 1992

Bolivia–Netherlands BIT 1992

Botswana–Peoples Republic of China BIT 2000

Canada–Costa Rica BIT 2010

Canada Model BIT 2004

Canada–Peru BIT 2006

Dominican Republic–Central America–United States Free Trade Agreement 2004 (CAFTA–DR)

Egypt–Morocco BIT 1976

EU-Canada Comprehensive Economic and Trade Agreement (CETA)

French Model BIT 2006

Germany–Peoples Republic of China BIT 2003

India Model BIT 2015

Intra-MERCOSUR Investment Facilitation Protocol

Japan - Mozambique BIT 2013

Lithuania–Ukraine BIT 2004

Morocco - Nigeria BIT 2016

Netherlands–Romania BIT 2008

Peoples Republic of China–Albania BIT 1993

Peoples Republic of China–Guyana BIT 2004

Peoples Republic of China–India BIT 2006

Peoples Republic of China–Mexico BIT 2008

United Kingdom–India BIT 1994

United Kingdom–Ukraine BIT 1993

United States–Argentina BIT 1991

United States–Canada FTA 1988

United States–Czech Republic BIT 1991

United States Model BIT 2004 351

Uruguay–United States BIT 2005

International human rights treaties

African Charter on Human Rights and People's Rights (African Charter)

American Covenant on Human Rights (ACHR) 1969

European Convention on Human Rights (ECHR) 1950

International Covenant on Economic, Social and Cultural Rights (ICESC) 1966

International Covenant on Civil and Political Rights (ICCPR) 1966

ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001

ILC Articles on Responsibility of States for Internationally Wrongful Acts (ILC Responsibility Articles) 2001

ILO Conventions

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 1977

UN Convention against Corruption 2003

UN Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007

Declarations

Agenda 21 1992

Rio Declaration on Environment and Development 1992

Stockholm Conference on the Human Environment 1972

The 2030 Agenda for Sustainable Development

The Addis Ababa Action Agenda

UN General Assembly Millennium Declaration 2000

UN Global Compact 2000

UN Sustainable Development Goals 2015

UN Johannesburg World Summit for Sustainable Development (WSSD) 2002

Other International instruments

AIIB's Environmental and Social Framework (ESF)

Equator Principles

Extractive Industry Transparency Initiative (EITI)

International Bar Association Model Mining Development Agreement (MMDA)

International Bar Association Practical Guide on Business and Human Rights for Business Lawyers

International Finance Corporation Performance Standards

Mining, Minerals and Sustainable Development (MMSD)

Natural Resource Charter

UNCTAD Investment Policy Framework for Sustainable Development (IPFSD)

UN Draft Code of Conduct for Transnational Corporations

UN Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

UN Guiding Principles on Business and Human Rights (UNGPs)

UN Principles for Responsible Contracts

UN Prevention of Transboundary Harm from Hazardous Activities 2001

Voluntary Principles on Security and Human Rights

World Bank Environmental and Social Framework (ESF)

World Economic Forum Responsible Mineral Development Initiative

Appendix B: Table of Cases

International Centre for the Settlement of Investment Disputes

ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case ARB/03/16, Award, 2 October 2006

Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33

Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25

Azurix Corp. Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006

Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010

Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/08, Award, 12 May 2005

Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, ICSID Case No. ARB/09/17, Award, 14 March 2011

Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012

Europe Cement Investment & Trade S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009

EVN AG v. The former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/10, Award, 2 September 2011

Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1

Hrvatska Elektroprivreda d.d. v. The Republic of Slovenia, ICSID Case No. ARB/05/24, Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings, 6 May 2008

Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Order of discontinuance of the proceeding, 25 September 2005

Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010

LG&E Energy Corp./LG&E Capital Corp./LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006

Libananco Holding Co. Limited v. Turkey, ICSID Case No. ARB/06/8, Annulment decision, 22 May 2013

Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award, 16 May 2012

Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)97/1, Award, 30 August 2000

Pac Rim Cayman LL.C. v. The Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012

Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6.

Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009

Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium, ICSID Case No. ARB/12/29

Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24 (ECT)

Reinhard Hans Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20, Award, 16 May 2012

SAUR International S v. Republic of Argentina, ICSID Case ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012

Sempa Enegy v. Argentina epublic, ICSID Case No. AB/02/16, Decision on Annulment, 29 June 2010.

SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004

Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, 7 December 2011

Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited, ICSID Case No. ARB/10/20

Tecnicas Medioambientales SA (Tecmed) v. United Mexican States, ICSID Case No. ARB(AF)00/2, Award, 29 May 2003

Tza Yap Shum v. Republic of Peru (ICSID Case No. ARB/07/6)

Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Award, 31 May 2012

Other Investment Arbitration Cases

Antoine Biloune v. Ghana Investment Centre, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989

Bilcon of Delaware et al v. Government of Canada, PCA Case No. 2009-04

Chemtura Corp. (formerly Crompton Corp.) v. Government of Canada, UNCITRAL, Award, 2 August 2010

Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010

Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures, 7 February 2013

CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award, 13 September 2001

Frontier Petroleum Service Ltd v. Czech Republic, UNICTRAL, Final Award, 12 November 2010

Glamis Gold Ltd. v. United States of America, UNCITRAL, Award, 8 June 2009

Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2011

Hulley Enterprises Ltd. v. The Russian Federation, PCA Case No. AA 226, UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009

Limited Liability Company Amto v. Ukraine, SCC Arb. No. 080/2005, Final Award, 26 March 2008

Methanex Corp. United States of America, NAFTA, Final Award on Jurisdiction and Merits, 3 August 2005

Methanex Corp. United States of America, NAFTA, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, 15 January 2001

Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17

Nykomb Synergetics Technology Holding AB v. the Republic of Latvia, SCC CASE 118/2001, Final Award, 16 December 2003

Peter A. Allard v. The Government of Barbados (PCA Case No. 2012-06)

Pope & Talbot, Inc. v. Government of Canada, UNCITRAL, Interim Award, 26 January 2000

Saluka Investments BV v. Czech Republic, UNCITRAL, Award, 17 March 2006

SD Myers Inc. v. Canada, UNCITRAL, Partial Award, 13 November 2000

United States Parcel Service of America v. Canada, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001

Veteran Petroleum Ltd. v. The Russian Federation, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009

Vito G. Gallo v. Government of Canada, UNCITRAL, Award, 15 September 2011

Yukos Universal Ltd. v. Russian Federation, PCA Case AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009

World Trade Organization

Canada – Certain Measures Affecting The Renewable Energy Generation Sector, WT/DS412/AB/R, 6 May 2013

Canada – Measures Relating To The Feed-In Tariff Program, WT/DS426/AB/R, 6 May 2013

European Communities – Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, 5 June 1998

European Communities- Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/R, 18

September 2000

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS 135/AB/R, 12 March 2001

India – Certain Measures Relating to Solar Cells and Solar Modules, WT/DS 456

United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R

Dispute settlement cases under the Energy Charter Treaty (ECT)

AES Summit Generation Ltd. (UK subsidiary of US-based AES Corporation) v. Hungary

Alstom Power Italia SpA, Alstom SpA (Italy) v. Mongolia

Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. (the Netherlands) v. Azerbaijan

Cementownia "Nowa Huta" S.A. (Poland) v. Republic of Turkey

Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey

Hrvatska Elektroprivreda d.d. (HEP) (Croatia) v. Republic of Slovenia

Hulley Enterprises Ltd. (Cyprus) v. Russian Federation

Ioannis Kardassopoulos (Greece) v. Georgia

Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey

Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands) v. Republic of Kazakhstan

Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia

Plama Consortium Ltd. (Cyprus) v. Bulgaria

Veteran Petroleum Trust (Cyprus) v. Russian Federation

Yukos Universal Ltd. (UK - Isle of Man) v. Russian Federation

International Court of Justice

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment of 30 November 2010, ICJ Reports 2010, p. 639

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea, Judgment of 19 June 2012, at <http://www.icj-cij.org/docket/files/103/17044.pdf> (accessed 2018.10.19).

Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Jurisdiction, Judgment of 22 July 1952, ICJ Reports 1952, p. 93

Barcelona Traction Light and Power Company (Belgium v. Spain), (New Application: 1962, Second Phase), Judgment, 5 February 1970, ICJ Reports 1970

Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment of 20 July 1989, ICJ Reports 1989, p. 15

Electricité de Beyrouth Company (France v. Lebanon), Order: Removal from the List, 29 July 1954, ICJ Reports 1954, p. 107

Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 25 September 1997, ICJ Reports (1997)

Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, p. 113

Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 20 April 2010, ICJ Reports 2010

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The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication No. 155/96 (2001), at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html> (accessed 2018.10.22)

European Court of Human Rights

Fretté v. France, (36515/97) [2002] ECHR 156, 26 February 2002

Kemal Uzan and others v. Turkey, Application No. 18240/03, Decision declaring the application inadmissible, 29 March 2011

Wingrove v. United Kingdom, 25 November 1996, Reports of Judgments and Decisions, 1996-V

European Court of Justice

Campus Oil Limited and others v. Minister for Industry and Energy and others, Case 72/83, Judgment, 10 July 1984, European Court Reports (1984)

Mines de Potasse d'Alsace (Handelskwekerij G.J. BV v. Mines de Potasse d'Alsace SA, Case 21/76, Judgment, 30 November 1976, European Court Reports (1976)

Municipality of Almelo and Others v. Energiebedrijf IJsselmij NV, Case C-393/92, European Court Reports (1994)

Appendix C: IPIECA's Practical Tips for Effective Partnerships



Partnership drivers

The actual drivers for entering into multi-stakeholder partnerships are many and varied. Through the case studies, there are examples of long-term strategic partnerships providing a mechanism for initiating targeted projects, tackling challenging global issues and responding to situations where relationship building is more important than project outcomes. The drive to partner is not only one-way. Increasingly as the mutual benefits are more visible and measurable, the NGO community, academia and other parts of civil society are seeking partnerships with the private sector.

Partner selection

There is growing awareness of the need to select partner organizations carefully to access the appropriate array of resources and competencies needed—and, equally importantly, to identify the appropriate representatives in terms of skills, status and organizational role from within the organizations. An increasingly competitive environment, when even NGOs sometimes compete for corporate partners, also suggests the need for a careful partner selection process. There is increasing recognition that thought should be given to sustaining the partnership activities beyond the life of the partnership itself. Therefore, it is important to attract certain types of partners—such as government authorities—who will go on to assume responsibility for sustaining or scaling up project outcomes once the initial resources supporting the partnership comes to an end.

Partnership building

The first phase of engaging in partnership is often characterized by a high degree of enthusiasm and goodwill. Building on this initial commitment and creating a strong foundation better equips partnerships to meet challenges at later stages. Equally, many of the partnerships in this publication functioned well simply by drawing on the relationship management skills of experienced staff within the partnering organizations.

Managing the partnership

At the stage of project implementation it is critical to maintain the partnership to address any flagging momentum. The case studies uncover a number of approaches being used in the oil and gas sector to ensure all partners retain focus and commitment throughout the project.

Evaluating the success of the partnership

Very few of the partnerships in this publication precisely measure their actual impacts. It is, however, in the interest of all partners to assess the value of their investment in a partnership. The individual outcomes of the partnership (i.e. for each participating organization) should be assessed as well as the common project outcomes. This is likely to reveal a number of unexpected, as well as expected, benefits for each partner.

Agreements and contracts

Contracts and agreements play an important role in almost all the partnerships profiled in this collection: a spectrum emerges ranging from partnerships that contain only minimal contractual elements to those that are mostly contract-based.

This may be a particular characteristic of partnerships in the oil and gas industry, stemming from the complex drivers underpinning the partnerships, and from the involvement of multiple stakeholders. It is necessary to distinguish between partnering agreements and contracts: a partnering agreement signals a voluntary collaboration and describes shared risks and implementation on terms that are jointly decided and renegotiable. In contrast, a contract is legally binding and focuses on transferring risk to the implementing party. Terms are often decided by the party contracting out. The trend in the industry appears to be that, even where the partnership contains contractual elements, more of a partnering approach is used in its development by consulting and pre-agreeing the content of the contract.

Exit strategies and moving on

Many of the partnerships described in this publication were launched without a clear understanding of how the experiment would end; a plan for 'closure' or 'exit' is rarely built from the beginning. The need to move on is often only addressed (and then rather poorly) at a late stage or when an exit is imminent. Furthermore, departure or moving on is often interpreted as failure. In reality, however, a partner (whether an individual or an organization) leaving or a partnership being disbanded—specifically where a task has been completed—can be a significant indicator of success. And even when it is not, an exit can itself be a trigger for an interesting entry or an opening up to a range of new possibilities.

Source: IPIECA. www.sustainabledevelopment.un.org/content/sustdev/csd/csd15/PF/info/C_Morris.pdf

Appendix D: ICMM Principles



These 10 Principles represent the ICMM's member companies' commitment to implementing and measuring progress towards their goal of sustainable development. They are largely based on issue areas identified in the MMSD project and have been benchmarked against leading international standards.

1. Implement and maintain ethical business practices and sound systems of corporate governance.
2. Integrate sustainable development considerations within the corporate decision-making process.
3. Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
4. Implement risk management strategies based on valid data and sound science.
5. Seek continual improvement of our health and safety performance.
6. Seek continual improvement of our environmental performance.
7. Contribute to conservation of biodiversity and integrated approaches to land use planning.
8. Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.
9. Contribute to the social, economic, and institutional development of the communities in which we operate.
10. Implement effective and transparent engagement, communication and independently verified reporting arrangements without stakeholders.

Source: ICMM, (2017)

Appendix E: WWF's Working with Businesses Principles



Business & Industry

WWF believes that business, trade and industry have a crucial role to play in supporting conservation efforts and promoting greater environmental responsibility for our planet.

WWF strives to build environmental awareness by working with businesses to help improve their environmental performance, as well as boost their economic bottom line.

Governed by the principle Good for the Earth, Good for Business, WWF Armenia is committed to partnering with companies who wish to look towards relationships involving:

Licensing

Corporate Sponsorship of WWF initiatives

In-kind Donations

WWF's approach to working with the private sector is constructive and solutions-oriented. It is both collaborative in its methods, rigorous in its standards, and challenging in its objectives.

Our guiding principles for corporate engagement are:

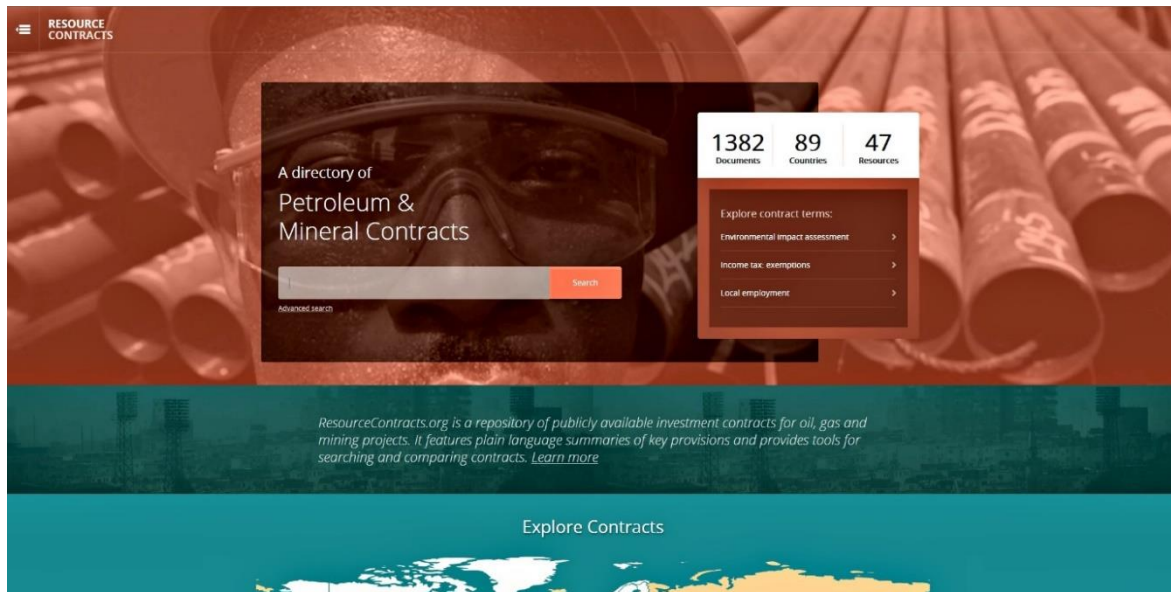
- Measurable results that support our conservation objectives
- Transparency
- The right to public commentary

Source: WWF Official Website, http://wwf.panda.org/wwf_offices/armenia/help_us/business_industry/

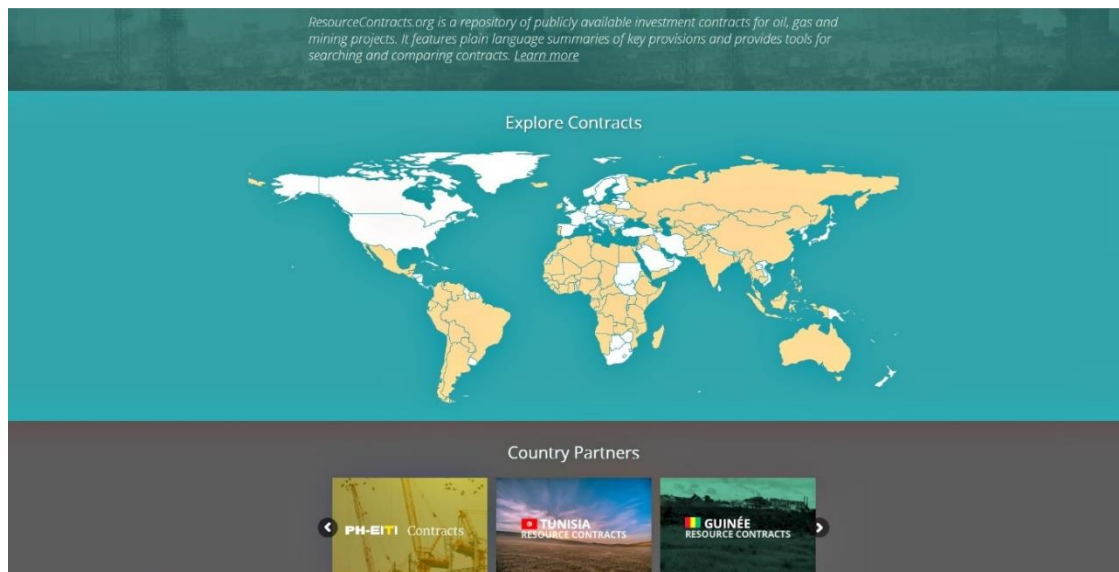
Appendix F: Table of State-Investor Contracts

This research built up its own data sets mainly based on the Resource Contracts website and other data sources. ResourceContracts.org is a repository of publicly available oil, gas, and mining contracts. The repository features plain language summaries of each contract's key social, environmental, human rights, fiscal, and operational terms, and tools for searching and comparing contracts. ResourceContracts.org promotes greater transparency of investments in the extractive industries, and facilitates a better understanding of the contracts that govern them.

The new ResourceContracts.org site is developed in partnership with the World Bank, the Natural Resource Governance Institute (NRGI), and the Columbia Center on Sustainable Investment. We are grateful for the contributions of a wide array of organizations including Global Witness, Oxfam, Publish What You Pay International, Open Oil, Open Contracting Partnership, Cadasta, The Carter Center, Open Corporates, African Mining Legislation Atlas, and the World Resources Institute, among others.



Young Innovations developed the site as an open source platform available for others to use under an open source license. The ResourceContracts online platform already includes 1382 contracts (covering 47 resources) from 89 countries worldwide and other associated documents.



This user-friendly website has an "Advanced Search" function. Users can search contracts and other documents by region, by country, by resource, by company name, by document type, by signed date and so on.

More importantly, this online platform also has annotated most of the documents, so users can apply the Annotation Category – e.g. environmental protections and Social/human rights impact assessment management plan - to filter these contractual documents very conveniently.

DOCUMENT	COUNTRY	YEAR	RESOURCE	CONTRACT TYPE
President Petroleum S.A, Petrolera San Jose SRL, Tripetrol Petroleum S.A, Matorras-Salta, Exploration License, 2012	Argentina	2012	Hydrocarbons	Exploration Permit/License
President Petroleum S.A, CNO-8 Puesto Guardian, Concession, 2015	Argentina	2015	Hydrocarbons	Concession Agreement
President Petroleum S.A, Petrolera San Jose SRL, Tripetrol Petroleum S.A, Ocultra, Exploration License, 2012	Argentina	2012	Hydrocarbons	Exploration Permit/License
Arpetrol Argentina S.A, CA-11 Faro Virgenes, Concession, Amendment, 2011	Argentina	2011	Hydrocarbons	Concession Agreement Contract Amendment
Petrola Entre Lomas S.A., Petrobras Energia S.A., Bajada del Palo, Extension Agreement, 2009	Argentina	2009	Hydrocarbons	Extension Agreement

This site provides summaries of contracts and their terms to facilitate understanding of important provisions in the documents. These summaries are not interpretations of the documents. Neither the summaries nor the full contracts are complete accounts of all legal obligations related to the projects in question. This site also includes document text that was created automatically; such text may contain errors and differences from the original PDF files. No warranty is made to the accuracy of any content on this website.

[About](#) | [FAQs](#) | [Guides](#) | [Glossary](#) | [Publish Contracts](#) | [Contact](#) | [API](#)

Due to the large number of contracts and the word limit for this thesis, it may not be possible to attach a full list of investment contracts in this appendix. All the data sets have been managed and saved by Microsoft excel files. This research has selected around 435 contracts with environmental and social elements. Here the researcher just provides screenshots of the original dataset:

A	B	C	
OCID	Category	Contract Name	OCID
ocds-591adf-3985013723	rc	Convention Makther - Permis de Recherche d'Hydrocarbures	ocds-591adf-3985013724
ocds-591adf-8634126018	rc	ETAP, Houston Oil and Minerals of Tunisia, Concession Amilcar, Convention Modification, 1988	ocds-591adf-8634126018
ocds-591adf-7399739588	rc	ETAP, Houston Oil and Minerals of Tunisia, Concession Amilcar, Permis de Recherche d'Hydrocarbures, 1989	ocds-591adf-7399739588
ocds-591adf-3757991515	rc	Ivanhoe Mines Mongolia Inc. LLC, Ivanhoe Mines Ltd., Rio Tinto International Holdings Limited, Oyu Tolgoi Deposit-6708A-6710A, Investment Promotion Agreeem	ocds-591adf-3757991516
ocds-591adf-5852837933	rc	Dowell Schlumberger de Mexico, S.A. de C.V., OFS Servicios, S.A. de C.V., Pemex Exploración y Producción, Contrato A, Service Contract, 2012	ocds-591adf-5852837933
ocds-591adf-1063902547	rc	ConocoPhillips China Inc., Far East Energy (Bermuda), Ltd., Qinman Area, Amendment, PSA, 2007	ocds-591adf-1063902547
ocds-591adf-2429560565	rc	Sistemas Integrales de Compresion, S.A. de C.V., Tecnologias Relacionadas con Energia y Servicios Especializados, S.A. de C.V., Ardic Construcciones, S.A. de C.V.	ocds-591adf-2429560565
ocds-591adf-1038726743	rc	Petrolera Mahuapan S.A.P.I. de C.V., Vitol Energy Mexico S.A. de C.V., GPA Energy S.A. de C.V., Pemex Exploración y Producción, Mahuapan, Service Contract, 20	ocds-591adf-1038726743
ocds-591adf-3939357031	rc	Compania Minera Zafrenal, S.A.C., Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-3939357031
ocds-591adf-3477938306	rc	Inversiones Estudios y Desarrollos, S.A.C., Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-3477938306
ocds-591adf-2529047700	rc	Reliant Ventures S.A.C., Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-2529047700
ocds-591adf-0856180292	rc	Yanac Minera Peru, S.A.C., Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-0856180292
ocds-591adf-9405332913	rc	Perupetro S.A., Petro-Tech Peruana S.A., Block Z-35, Exploitation License, Exploration License, 2005	ocds-591adf-9405332913
ocds-591adf-8059662450	rc	Sumitomo Metal Mining Peru, S.A., Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-8059662450
ocds-591adf-4212136752	rc	Oban Sociedad Anónima Cerrada, Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-4212136752
ocds-591adf-5502075847	rc	Perupetro S.A., Syntroleum Peru Holdings Limited, Sucursal del Peru, BP2 Energy Inc., Sucursal Peru, Block Z-1, Exploitation License, Exploration License, 2001	ocds-591adf-5502075847
ocds-591adf-2747761504	rc	Petroleos del Peru S.A., Petro-Tech Peruana S.A., Block Z-2B, Service Contract, 1993	ocds-591adf-2747761505
ocds-591adf-4654148810	rc	Perupetro S.A., Upland Oil and Gas L.L.C., Sucursal del Peru, East Cameron Partners del Peru S.A.C., Endevo Eureka del Peru S.A.C., Block XXIV, Amendment, Expl	ocds-591adf-4654148810
ocds-591adf-8258374587	rc	Perupetro S.A., Upland Oil and Gas L.L.C., Sucursal del Peru, East Cameron Partners del Peru S.A.C., Endevo Eureka del Peru S.A.C., Block XXIV, Exploitation Licen	ocds-591adf-8258374587
ocds-591adf-9753648336	rc	HARKEN DEL PERU LIMITADA SUCURSAL DEL PERU, Lote 95, Exploitation License, Exploration License, 2004	ocds-591adf-9753648336
ocds-591adf-4582194938	rc	Perupetro S.A., Nuevo Peru Ltd., Sucursal del Peru, BP2 Energy Inc., Sucursal Peru, Block Z-1, Exploitation License, Exploration License, 2005	ocds-591adf-4582194938
ocds-591adf-3843755960	rc	Pluspetrol Peru Corporation S.A., Hunt Oil Company of Peru LLC, SK Corporation Sucursal Peruana, Hidrocarburos Andinos S.A.C., Lote 88, Exploitation License, Exj	ocds-591adf-3843755961
ocds-591adf-8192707206	rc	Pluspetrol Peru Corporation S.A., Hunt Oil Company of Peru LLC, SK Corporation Sucursal Peruana, TECPETROL del Peru S.A.C., SONATRACH Peru Corporation S.A.C.	ocds-591adf-8192707206
ocds-591adf-4109359446	rc	BP2 Energy Inc., Lote 19, Translated Contract, 2003	ocds-591adf-4109359447
ocds-591adf-6209593883	rc	Perupetro S.A., Vietnam American Exploration Company L.L.C., Sucursal del Peru, Kel (Peru Z-38) Pty Ltd., Sucursal del Peru, Block Z-38, Exploitation License, Expl	ocds-591adf-6209593883
ocds-591adf-3096170926	rc	Perupetro S.A., Pitkin Petroleum Peru Z-38 S.R.L., Kel (Peru Z-38) Pty Ltd., Sucursal del Peru, Block Z-38, Exploitation License, Exploration License, 2012	ocds-591adf-3096170927
ocds-591adf-7968305907	rc	Perupetro S.A., Vietnam American Exploration Company L.L.C., Sucursal del Peru, Kel (Peru Z-38) Pty Ltd., Sucursal del Peru, Block Z-38, Exploitation License, Expl	ocds-591adf-7968305907
ocds-591adf-3927311570	rc	Corporación Minera Centauro, S.A.C., Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-3927311571
ocds-591adf-9524747307	rc	Perupetro S.A., SK Innovation, Sucursal Peruana, Block Z-46, Exploitation License, Exploration License, 2012	ocds-591adf-9524747307
ocds-591adf-3339136956	rc	Perupetro S.A., Savia Peru S.A., Block Z-52, Exploitation License, Exploration License, 2010	ocds-591adf-3339136957
ocds-591adf-9477584062	rc	Wild Acre Metals (Peru), S.A.C., Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-9477584062
ocds-591adf-3556619129	rc	Compania de Exploraciones Orion, S.A.C., Exploration License, Investment Promotion Agreement, 2013	ocds-591adf-3556619129
ocds-591adf-8058401040	rc	SMC Toroputo Ltd. Sucursal del Peru, Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-8058401040
ocds-591adf-667678399	rc	Pembroke Copper, S.A.C., Exploration License, Investment Promotion Agreement, 2014	ocds-591adf-667678399
ocds-591adf-0274601496	rc	Geovic Cameroon S.A., Exploration Permit No. 67, Concession, 2002	ocds-591adf-0274601497
ocds-591adf-9803917004	rc	Perupetro S.A., Petro-Tech Peruana S.A., Block XXVI, Exploitation License, Exploration License, 2007	ocds-591adf-9803917004

A	B	C	
169	ocds-591adf-4227152899	rc Empresa Minera Los Quenuales S.A., Iscayacu, Investment Promotion Agreement, 2007	ocds-591adf-4227152899
170	ocds-591adf-4257220858	rc Minera Barrick Misquichilca S.A., Pierina, Investment Promotion Agreement, 1998	ocds-591adf-4257220858
171	ocds-591adf-0523462294	rc Gas Transmission and Power Limited, Energy 905 Suntera Limited, Ideal Oil and Gas, Block 905 Anambra Basin, PSA, 2007	ocds-591adf-0523462294
172	ocds-591adf-3064471719	rc NFC Africa Mining PLC, China Nonferrous Metal Industry's Foreign Engineering and Construction Corporation, Chambishi, Concession, 1998	ocds-591adf-3064471719
173	ocds-591adf-5025757871	rc ETAP, Storm Ventures, Concession Permis Jenein - Tunisia, 2009	ocds-591adf-5025757871
174	ocds-591adf-0624472233	rc ETAP, YNG, Concession Permis Araifa - Tunisia, 2013	ocds-591adf-0624472233
175	ocds-591adf-0578902365	rc Geovic Cameroon S.A., Exploration Permit No. 67, Concession, 2002 (version française)	ocds-591adf-0578902365
176	ocds-591adf-9585889698	rc Convention Kebbil-Avenant N°1	ocds-591adf-9585889698
177	ocds-591adf-4977579802	rc MCC-Jianxi Copper Consortium, Aynak, Railway Agreement, 2010	ocds-591adf-4977579802
178	ocds-591adf-6180313215	rc Enap Sipetrol S.A., Mauro Dávalos Cordero, Amendment, Service Contract, 2010	ocds-591adf-6180313215
179	ocds-591adf-4661870534	rc Campo Puma Oriente S.A., Consorcio Pegaso, Joshi Technologies International Inc., Puma, Amendment, Service Contract, 2011	ocds-591adf-4661870534
180	ocds-591adf-7019279020	rc Enap Sipetrol S.A., Paraiso, Biguno, Huachito, Intracampes, Amendment, Service Contract, 2010	ocds-591adf-7019279020
181	ocds-591adf-7668743788	rc Enap Sipetrol S.A., Mauro Dávalos Cordero, Amendment, Service Contract, 2012	ocds-591adf-7668743788
182	ocds-591adf-9671561394	rc Repsol YPF Ecuador S.A., Overseas Petroleum and Investment Corporation, Amodaimi Oil Company Ltd., CRS Resources Ecuador LDC, Tiwacuno, Amendment, Serv	ocds-591adf-9671561394
183	ocds-591adf-737372636	rc Petróleos Sud Americanos del Ecuador Petrolamerex S.A., Sudamericana de Fósforos del Ecuador Fosforcomp S.A., Petroriva S.A., Pindo, Amendment, Service C	ocds-591adf-737372636
184	ocds-591adf-4394332202	rc Petroboll Inc., Grantmining S.A., Tigüino, Amendment, Service Contract, 2011	ocds-591adf-4394332202
185	ocds-591adf-1131018532	rc Minera Yanacocha S.R.L., Cerro Yanacocha, Investment Promotion Agreement, 1998	ocds-591adf-1131018532
186	ocds-591adf-8080364797	rc Minera Yanacocha S.R.L., Maqui Maqui, Investment Promotion Agreement, 1994	ocds-591adf-8080364797
187	ocds-591adf-2794555508	rc Apurimac Ferrum S.A., Exploration License, Investment Promotion Agreement, 2008	ocds-591adf-2794555508
188	ocds-591adf-8794785015	rc Marcobre S.A.C., Exploration License, Investment Promotion Agreement, 2008	ocds-591adf-8794785015
189	ocds-591adf-8182388352	rc Exploraciones Milenio S.A., Exploration License, Investment Promotion Agreement, 2005	ocds-591adf-8182388352
190	ocds-591adf-4472360738	rc Erdene MGL LLC, Ivanhoe Oyu Tolgoi (BV) Ltd, Oyu Tolgoi Netherlands B.V., Oyu Tolgoi LLC, Oyu Tolgoi Deposit-6708A-6710A, Amended and Restated Sharehold	ocds-591adf-4472360738
191	ocds-591adf-0639959550	rc Mopani Copper Mines PLC, Mufulira-Nikana, Concession, 2000	ocds-591adf-0639959550
192	ocds-591adf-3222702771	rc DNO ASA, Erbil Block, PSA, 2004	ocds-591adf-3222702771
193	ocds-591adf-8256689662	rc Minera Penoles de Peru, S.A., Exploration License, Investment Promotion Agreement, 2009	ocds-591adf-8256689662
194	ocds-591adf-7505781090	rc Exploraciones Milenio S.A., Exploration License, Investment Promotion Agreement, 2009	ocds-591adf-7505781090
195	ocds-591adf-8495627494	rc Compania Minera Milagros del Socorro, S.A., Exploration License, Investment Promotion Agreement, 2009	ocds-591adf-8495627494
196	ocds-591adf-5265824533	rc Egyptian General Petroleum Corporation, Alliance Egyptian National Exploration Company, Lagia Development Lease, Exploitation License, 2010	ocds-591adf-5265824533
197	ocds-591adf-1834156729	rc Norbest Limited, Hawler, PSA, 2007	ocds-591adf-1834156729
198	ocds-591adf-8168589398	rc Egyptian General Petroleum Corporation, National Exploration Company, Central Sinai, Concession, 1998	ocds-591adf-8168589398
199	ocds-591adf-9586019222	rc ETAP, OMV, Nawara, Concession - Tunisia, 2003	ocds-591adf-9586019222
200	ocds-591adf-1540020834	rc Perupetro S.A., Barrett Resources (Peru) Corporation, Sucursal del Peru, Korea National Oil Corporation, Sucursal Peruana, Advantage Resources International, S	ocds-591adf-1540020834
201	ocds-591adf-547217079	rc Rio Tinto Mining and Exploration, S.A.C., Exploration License, Investment Promotion Agreement, 2012	ocds-591adf-547217079
202	ocds-591adf-6025391075	rc Jinzhao Mining Peru, S.A., Exploration License, Investment Promotion Agreement, 2012	ocds-591adf-6025391075
203	ocds-591adf-0102398591	rc Cordillera De Las Minas S.A.C., Exploration License, Investment Promotion Agreement, 2003	ocds-591adf-0102398591
204	ocds-591adf-2803262551	rc Alturas Minerals S.A.C., Exploration License, Investment Promotion Agreement, 2007	ocds-591adf-2803262551
205	ocds-591adf-4621680086	rc Vena Peru S.A.C., Exploration License, Investment Promotion Agreement, 2007	ocds-591adf-4621680086

A	B	C	
370	ocds-591adf-9372360312	rc Apurimac Ferrum S.A., Exploration License, Investment Promotion Agreement, 2011	pe_dd20110224_Exploration-Investment-Contract_Apurima
371	ocds-591adf-5742489934	rc Konkola Copper Mines PLC, Konkola Division-Nchanga Division-Concession, 2004	krq_Taq-Taq_dd20020716_PSA_Genel.pdf
372	ocds-591adf-5062562123	rc Genel Enerji A.S., Taq Taq Block, PSA, 2002	krq_Taq-Taq_dd20061121_PSA-Amend-Agree_Genel-Enerji
373	ocds-591adf-3082701403	rc Genel Enerji A.S., Genel Energy International Limited, Addax Petroleum International Limited, TTPoCo, Taq Taq Block, Amendment, PSA, 2006	krq_Tawke-Block_dd20040625_PSA_DNO.pdf
374	ocds-591adf-2840001526	rc DNO ASA, Tawke Block, PSA, 2004	krq_Taq-Taq_dd20020716_PSC-Annexes_Genel.pdf
375	ocds-591adf-6899660250	rc Genel Enerji A.S., Taq Taq Block, Annex, PSA, 2002	krq_South-Sulaymaniyh-Area_dd20060504_EPSA_Westernz
376	ocds-591adf-8826942661	rc WesternZagros Limited, South Sulaymaniyh, PSA, 2006	
377	ocds-591adf-3624750089	rc Oleorey S.A. de C.V., Monclova Pirineos Gas, S.A. de C.V., Alfasid del Norte S.A. de C.V., Pemex Exploración y Producción, San Andrés, Service Contract, 2012	
378	ocds-591adf-8647672546	rc Perupetro S.A., Petro-Tech Peruana S.A., Block Z-45, Exploitation License, Exploration License, 2007	pe_dd20071121_Block-Z-45_Exploration-Exploitation-Liceni
379	ocds-591adf-8619573571	rc Perupetro S.A., Savia Peru S.A., Block Z-52, Exploitation License, Exploration License, 2010	pe_dd20071121_Block-Z-52_Exploration-Exploitation-Liceni
380	ocds-591adf-5947912794	rc Perupetro S.A., Petro-Tech Peruana S.A., Block Z-48, Exploitation License, Exploration License, 2007	pe_dd20110714_Block-Z-48_Exploration-Exploitation-Liceni
381	ocds-591adf-5178064622	rc Perupetro S.A., Upland Oil and Gas L.L.C., Sucursal del Peru, East Cameroon Partners del Peru S.A.C., Endevo Eureka del Peru S.A.C., Block XXIV, Amendment, Exp	pe_dd20110714_Block-XXIV_Exploration-Exploitation-Liceni
382	ocds-591adf-4347903490	rc Perupetro S.A., Vetra Peru S.A.C., Block XXV, Exploitation License, Exploration License, 2007	pe_dd20071121_Block-XXV_Exploration-Exploitation-Liceni
383	ocds-591adf-9062019392	rc Minera Sunset del Peru, S.A.C., Exploration License, Investment Promotion Agreement, 2012	pe_dd20120125_Exploration-Investment-Contract_Minera
384	ocds-591adf-1427685003	rc Minera Macusani, S.A.C., Exploration License, Investment Promotion Agreement, 2011	pe_dd20110726_Exploration-Investment-Contract_Minera
385	ocds-591adf-2875278723	rc Hatum Minas, S.A.C., Exploration License, Investment Promotion Agreement, 2011	pe_dd20110726_Exploration-Investment-Contract_Hatum-f
386	ocds-591adf-8579268357	rc Minera Peñoles de Peru S.A., Exploration License, Investment Promotion Agreement, 2003	
387	ocds-591adf-3610601405	rc Perupetro S.A., GMP S.A., Block I, Amendment, Service Contract, 1998	pe_dd19980813_Block-I_Service-Contract-Amend_Perupeti
388	ocds-591adf-5790278367	rc Solex del Peru, S.A.C., Exploration License, Investment Promotion Agreement, 2011	pe_dd20110727_Exploration-Investment-Contract_Solex-Pi
389	ocds-591adf-0430095345	rc Solex del Peru, S.A.C., Exploration License, Investment Promotion Agreement, 2010	pe_dd20121018_Exploration-Investment-Contract_Solex_M
390	ocds-591adf-0073976086	rc Gulf Keystone Petroleum International Limited, Kalgiran Ltd., Texas Keystone, Inc., Shaikan Block, Amendment, PSA, 2010	krq_Shaikan-Block_dd20100801_1st-Amend-Agree_Gulf-Ke
391	ocds-591adf-8733736834	rc Shakal Production Ltd., Oil Search (Iraq) Limited, PetOil Petroleum and Petroleum Products International Exploration and Production Inc., Shakal Block, Amendm	krq_Sarsang-Block_dd20100826_PSC_1st-Amend-Agree_Shak
392	ocds-591adf-6304551722	rc HKN Energy Ltd., Sarsang Block, Amendment, PSA, 2010	krq_Sarta-Block_dd20071106_PSC_Relliance_Agree_HK
393	ocds-591adf-7033732387	rc Reliance Exploration & Production DMCC, Sarta Block, PSA, 2007	krq_Sarsang-Block_dd20071106_PSC_HKN.pdf
394	ocds-591adf-2132740097	rc HKN Energy Ltd., Sarsang Block, PSA, 2007	
395	ocds-591adf-3151096248	rc Pacific Stratus Energy del Peru S.A., Lote 138, Exploitation License, Exploration License, 2007	
396	ocds-591adf-6314380103	rc Genel Energy International Limited, Gulf Keystone Petroleum International Limited, Ber Bahr Block, Amendment, PSA, 2010	krq_Ber-Bahr-Block_dd20100801_PSC-Amend_Genel_Gulf-I
397	ocds-591adf-9888950132	rc Genel Energy International Limited, Gulf Keystone Petroleum International Limited, Ber Bahr Block, Amendment, PSA, 2009	krq_Ber-Bahr-Block_dd20090716_PSC-Amend_Genel_Gulf-I
398	ocds-591adf-1806088707	rc Pacific Stratus Energy del Peru S.A., Lote 135, Exploitation License, Exploration License, 2007	
399	ocds-591adf-3723126760	rc Maple Gas Corporation del Peru S.R.L., Lote 31C, Exploitation License, Exploration License, 1994	
400	ocds-591adf-1195303977	rc Pan Andean Resources PLC (Peru), Lote 131, Exploitation License, Exploration License, 2007	
401	ocds-591adf-2064950212	rc Perupetro S.A., VEGSA C.G., Block II (Northwest), Exploitation License, 1996	pe_dd19960105_Block-II-NW_Exploitation-Liceni_Perupe
402	ocds-591adf-9776014613	rc Repsol Explorac Peru, Burlington Resources Peru Limited, Lote 57, Exploitation License, Exploration License, 2004	
403	ocds-591adf-6743049102	rc Petrobras Energia Peru S.A., Lote 58, Exploitation License, Exploration License, 2005	
404	ocds-591adf-4627474417	rc Perupetro S.A., Maple Gas Corporation del Peru S.R.L., The Maple Gas Companies, Limited, Blocks 31-B & 31-D, Amendment, Exploitation License, 2008	pe_dd20080102_Block-31B-&31D_Exploitation-Liceni-Am
405	ocds-591adf-7309505757	rc Perupetro S.A., The Maple Gas Corporation del Peru, Sucursal del Peru, Blocks 31-B & 31-D, Amendment, Exploitation License, 2007	pe_dd20070319_Block-31B-&31D_Exploitation-Liceni-Am
406	ocds-591adf-7021319128	rc Perupetro S.A., Maple Gas Corporation del Peru S.R.L., Blocks 31-B & 31-D, Amendment, Exploitation License, 2014	pe_dd20140330_Block-31B-&31D_Exploitation-Liceni_Per

The researcher is happy to provide the original excel files (with a full list of all the State-investor contracts collected for this research) as requested.

Appendix G: Table of other Cross-sector Contracts

For exploring the current landscape of CSPs in Greater China, a powerful online tool already exists – NGO2.0 Map. This platform is developed by MIT New Media Action Lab, which can be used for mapping the Business-NGO engagements in Greater China.



By using this powerful online data bank and other data sources (such as the energy companies' CSR reports), this research below provides the list of cross-sector partnerships between oil and gas companies and NGOs in the Greater China area.

International oil and gas companies operating in China				
Company	NGO	Issue	Date	Active
BP	Ministry of Education, World Wild Fund for Nature (WWF)	Conservation	2013-2015	No
BP	Junior Achievement	Education	2013-2015	No
BP	Beijing Human and Animal Environmental Education Center (BHAEEC)	Conservation	2013-2014	No
BP	The Suonandajie Nature Protection Station	Environmental Protection	2013-2014	No
Chevron	China Children and Teenagers Fund	Education	2016-present	Yes
Chevron	Boys' and Girls' Clubs Association of Hong Kong	Education	2013-2015	No
Chevron	Jane Goodall Institute	Conservation	2017-present	Yes
Chevron	China Women's Development Foundation	Women Rights	2016-2017	No
Chevron	Operation Smile	Charity	2016-2017	No
Chevron	Red Cross Society of China	Charity	2011-2012	No
Chevron	Asian Injury Prevention Foundation	Public Health	2010-2014	No
Chevron	Bridge2China	Charity	2011-present	Yes
ConocoPhillips	Light & Love School / China Social Welfare Education Foundation	Education	2016-present	Yes
ConocoPhillips	China Association of Social Workers (CASW) and the TEDA International Cardiovascular Hospital	Public Health	2016-present	Yes

	(TICH) of Tianjin			
ConocoPhillips	International Crane Foundation	Charity	2016-2017	No
ConocoPhillips	Local NGOs in Bohai Bay Area	Environmental Protection	2011-2014	No
ConocoPhillips	U.S.-China Environmental Fund Badaling Special Zone Administration and Beijing Badaling Tourism General Company	Environmental Protection	2012-2014	No
ConocoPhillips	Sunshine Home	Environmental Protection	2016-2017	No
ConocoPhillips	Tianjin Dream Factory and Liu's Institute of Child Development Charity Council	Children Development	2011-present	Yes
ConocoPhillips	Yongning Education Aid Center	Education	2016-present	Yes
ConocoPhillips	China Children and Teenagers' Fund	Education	2013-2015	No
ExxonMobil	China Charity Federation (CCF)	Charity	2016-2017	No
ExxonMobil	China Charity Federation and the Hong Kong Red Cross	Charity	2016-present	Yes
ExxonMobil	Hong Kong Arts Association	Arts and Environment	2013-present	Yes
ExxonMobil	Practical Skills Training Center for Rural Women	Women Rights	2013-2014	No
ExxonMobil	Junior Achievement	Education	2013-2014	No
ExxonMobil	Road Safety Council and Kwai Tsing District Council's Road Safety Campaign Committee	Charity	2011-present	Yes
ExxonMobil	Mobil China Environmental Education Fund / State Environmental Protection Administration	Environmental Education	2013-2015	No
ExxonMobil	Global Village of Beijing	Environmental Protection	2012-present	Yes
ExxonMobil	Environmental Groups in HK	Environmental Protection	2012-present	Yes
Shell	Holland Wetlands International and the International Union for the Conservation of Nature(IUCN)	Conservation	2013-2015	No
Shell	Friends of Nature	Conservation	2011-present	Yes
Shell	Institute for Environment and Development (IED)	Environmental Protection	2011-present	Yes
Shell	Fuping Development Institute	Charity	2015-2016	No
Shell	China Foundation for Poverty Alleviation	Poverty	2013-2015	No
Shell	China Foundation for Poverty Alleviation	Poverty	2012-2013	No
Shell	Gasu Women Association Fuping Development Institute	Women Rights	2012-2013	No
Shell	World Resource Institute Institute for Environment and Development	Conservation	2011-present	Yes
Shell	China Association of Rural Energy Industry	Energy	2011-2013	No
Shell	Friends Of Green China Tianjin	Environmental Protection	2015-present	Yes
Statoil	China Children and Teenagers' Fund	Charity	2016-present	Yes
Total	France Marie Stopes International	Charity	2012-2014	No
Total	China Youth Development Foundation	Charity	2015-present	Yes

Total	Franco-Chinese Foundation for Sciences and their Applications (FFCSA)	Research	2016-2017	No
Chinese National Oil & Gas Companies				
CNOOC	Red Cross (South Osaka, China)	Charity	2011-present	Yes
CNOOC	Lifeline Express	Charity	2011-present	Yes
CNOOC	CNOOC Foundation Marine Environmental and Ecological Protection Public Welfare Foundation	Marine Protection	2010-2014	No
CNOOC	China's Children and Teenagers' Fund	Charity	2013-present	Yes
CNOOC	China Legal Aid Foundation	Legal Aid	2013-present	Yes
CNOOC	China Indonesia Thousand Islands Local NGOs	Environmental Protection	2016	No
CNOOC	Calgary Homeless Foundation	Poverty	2015	No
CNPC	China Foundation for Poverty Alleviation	Poverty	2016-present	Yes
CNPC	China Woman's Development Foundation	Women Rights	2016-present	Yes
CNPC	China Poor Mother's Foundation	Women Rights	2016-present	Yes
CNPC	Red Cross (South Osaka, China)	Charity	2011-present	Yes
Sinochem	China Next Generation Education Foundation	Education	2013-present	Yes
Sinochem	Zhoushan Municipal Charity Council	Charity	2017-present	Yes
Sinochem	Far East Horizon Charity Fund	Charity	2012-2014	No
Sinochem	Healing the Children	Charity	2015-present	Yes
Sinochem	WWF & Hevecam Campo Ma'an National Park economy	Conservation	2013-2015	No
Sinopec	Lifeline Express	Charity		
Taiwanese major Oil & Gas Companies				
CPC Taiwan	Jane Goodall Institute	Conservation	2011-present	Yes
CPC Taiwan	World Vision	Environmental Education	1998-present	Yes
CPC Taiwan	ROC Disable Association	Charity	2006-present	Yes
CPC Taiwan	Taiwan Smile Group	Environmental Education	2013-2014	No
CPC Taiwan	Taiwan Toy Library	Charity	2013-2014	No
CPC Taiwan	Taiwan University Medical School Fund	Public Health	2015-present	Yes
Formosa Chemical	Formosa Foundations	Charity	2005-present	Yes

Other multi-actor contracts discussed in this research:

1. De Beers Canada Inc – The Canadian Government – Local Communities in the Northwest Territories
2. Alexkor – The Government of South Africa – Local Communities of Richtersveld
3. West African Gas Pipeline International Project Agreement
4. Ekati Environmental Agreement (e.g., The Independent Environmental Monitoring Agency - Dominion Diamond Ekati ULC - the Government of Canada)
5. The Baku-Tbilisi-Ceyhan Pipeline Project (BP - OSIAF - Azerbaijan)
6. Rio Tinto – Government of Madagascar – Various international NGOs (e.g., Birdlife International)
7. IPIECA and ICMM Model Contracts
8. IBA's MMDA Model Contract

Appendix H: UN Principles for Responsible Contracts (2015)



The 10 principles that can help guide the integration of human rights risk management into contract negotiations are listed below:

1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.
2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.
3. Project operating standards: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project.
4. Stabilization clauses: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.
5. "Additional goods or service provision": Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.
6. Physical security for the project: Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.
7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.
8. Project monitoring and compliance: The State should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.
9. Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.
10. Transparency/Disclosure of contract terms: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

Appendix I: IBA Practical Guide on Business and Human Rights for Business Lawyers



“The IBA Practical Guide is a hugely important step for respecting human rights worldwide, given the influence many lawyers have with Boards and CEOs. Corporate lawyers and the IBA contributed significantly to the development of the UN Guiding Principles

I warmly welcome this ‘next step’ guide for lawyers around the world.”

John Ruggie
Author of the UNGPs

At its Annual Conference in Vienna in October 2015, the IBA Council adopted its Business and Human Rights Guidance for Bar Associations (‘Bar Association Guide’). The IBA noted that its founding in 1947 had been inspired by the vision of the United Nations, with the aim of supporting the establishment of the rule of law and the administration of justice worldwide. It described the unanimous endorsement by the UN Human Rights Council of the UN Guiding Principles (UNGPs), drafted by the Special Representative of the UN Secretary General on Business and Human Rights (SRSG), Professor John Ruggie. It recalled the IBA’s significant contributions to and support of the SRSG’s UN mandate, and noted that governments have evidenced strong support for the UNGPs as an authoritative policy framework, including through the development of national action plans to implement them. It described the reflection of the UNGPs in international and industry specific standards. And it noted the growing recognition of a strong business case for respecting human rights and the management of risks, including legal risks, resulting in the need for lawyers to take human rights into account in their practice of law.

In order to help bar associations and lawyers better understand these issues, the IBA committed to prepare a Practical Guide for Business Lawyers on the Guiding Principles (the ‘Practical Guide’) that would ‘set out in detail the core content of the UNGPs, how they can be relevant to the advice provided to clients by individual lawyers subject to their unique professional standards and rules (whether they are in-house or external counsel acting in their individual capacity or as members of a law firm) and their potential implications for law firms as business enterprises with a responsibility to respect human rights themselves.’ At the conference, the IBA Council also adopted a resolution approving the Bar Association Guide, looking forward to the Practical Guide’s presentation for approval in May 2016, and stating that ‘in line with the provisions of the UN Basic Principles on the Role of Lawyers as resolved by the UN General Assembly in its ‘Human rights in the administration of justice’ resolution of 18 December 1990 (Basic Principles), nothing in the Guidance for Bar Associations or in the IBA Practical Guide for Business Lawyers (once approved) shall be interpreted as reducing respect for the fundamental human right of effective access to legal services provided by an independent legal profession to all in need of such services, including that all lawyers should always be able to fulfill their duties and responsibilities and enjoy the guarantees provided for by the Basic Principles, consistent with their legal and professional responsibilities.’ This Practical Guide has been prepared to fulfill these purposes.

Appendix J: IBA MMDA Project Development Timeline and Events



MMDA 1.0 was over one year in the making. The project encompassed two major innovations: (1) this website and (2) a series of consultations: collaborative stakeholder meetings on the content of MMDA 1.0.

The official website originally served as a forum for comment on various drafts of MMDA 1.0. This website now provides public access to MMDA 1.0 and related resources. The website also provides MMDA 1.0 users with a forum to share experience using the document.

MMDA 1.0 consultations involved a collaborative process engaging multiple stakeholders in mineral development, including industry, governments, and civil society. Below you will find the MMDA 1.0's development timeline and links to presentations and other supplemental information from these past events.

April 2009 International Bar Association Section on Energy, Environment, Resource and Infrastructure Law (SEERIL) Mining Law Committee formally kicks off the MMDA Project and identifies key Administrative Committee members.

October – December 2009 MMDA Project teams 'deconstructed' over 80 actual mine development agreements to identify provisions that represent alternative approaches and best practice in four broad subject matters: (1) Tenure; (2) Finance; (3) Party Rights & Obligations; (4) Other Terms & Conditions, leading to an outline of MMDA 1.0.

March 2010 Public presentation of MMDA 1.0 outline and request for participation and comment, in conjunction with Prospectors and Developers Association of Canada meeting in Toronto.

March 2010 Presentation on the MMDA Project and request for participation and comment on MMDA 1.0 at the World Mines Ministries Forum in Toronto.

April 24 – 25, 2010 Civil Society Consultation on MMDA 1.0, organized by the Mining Law Committee of the International Bar Association with the assistance of the International Institute for Sustainable Development and the Sustainable Development Strategies Group.

April 26 – 28, 2010 Presentation and discussion of MMDA 1.0 at a convening of the International Bar Association Section on Energy, Environment, Resource and Infrastructure Law (SEERIL) Mining Law Committee in Toronto.

Late April – September, 2010 First phase of Web-based consultation on MMDA 1.0.

June 2 – 4, 2010 Presentation on the MMDA Project and discussion of MMDA 1.0 at a Governance for Extractive Industries (GEI) forum in Wilton Park, UK.

June 17 – 18, 2010 Presentation on the MMDA Project and discussion of MMDA 1.0 at a World Economic Forum Meeting on Fair Mineral Development Initiatives, Ulan Bataar.

August 25 – 26, 2010 Presentation on the MMDA Project and discussion of MMDA 1.0 at a Public Finance Transparency Program meeting, Astana. In this meeting, Soros Foundation-Kazakhstan, the International Bar Association, and Revenue Watch Institute discussed MMDA 1.0 and issues surrounding transparency of investments in natural resource development. Participants included government, industry and civil society leaders.

September 2010 Re-drafting of MMDA 1.0.

October 4, 2010 Presentation of draft MMDA 1.0 at IBA annual meeting in Vancouver. IBA Annual Meeting Information

October 12, 2010 IBA Mining Law Committee chair Peter Leon presented and discussed the MMDA Project at the John F. Kennedy School of Government at Harvard University.

October 2010 Publication of draft MMDA 1.0 on this website.

October – November, 2010 Second phase of Web-based consultation on MMDA 1.0.

October 22, 2010 MMDA Project presentation and discussion of MMDA 1.0 with the African Union and the United Nations Economic Commission for Africa, Addis Ababa. For further information contact Wilfred Lombe at wlombe@uneca.org.

December 2010 MMDA Project presentations and discussions of MMDA 1.0 held in Beijing with China University of Geosciences and with the Law Centre of Chinese Ministry of Land & Resources.

December 20, 2010 End of public comment period on draft MMDA 1.0.

January – March 2011 Re-drafting of final MMDA 1.0.

April 4, 2011 Presentation of final MMDA 1.0 at Rocky Mountain Mineral Law Foundation Special Institute on International Mining and Oil & Gas: Law, Development & Investment, April 4, 2011 in Rio de Janeiro.

April 2011 Publication of final MMDA 1.0 on this website.

Appendix K: Examples of Multi-stakeholder Partnerships at the International Level (after 2015 Paris Agreement)

	Background and objectives	Lead facilitators, funders	Governance structure	Outcomes and challenges	Monitoring
The Global Alliance For Vaccines And Immunization (Gavi)	Established January 2000 and has raised over \$.5 billion. Vaccine provision and development, country level immunization programmes and health systems strengthening (HSS); special focus on low-income countries.	WHO, UNICEF, World Bank, Gates Foundation, International Federation of Pharmaceutical Manufacturer’s Association, US AID (funders 1/3rd from bilateral donors, private donations and Gates Foundation.	GAVI has a secretariat and Board – one third of Board elected on an independent basis with expertise in health; At country level GAVI works through Interagency Coordinating Committees and Health Sector Coordinating Committees.	Built on the experience of the Vaccine Initiative launched by UNICEF in 1990. Generally seen as successful in increasing the numbers vaccinated but less successful influencing vaccine pricing.	A Monitoring and Evaluation Framework and Strategy; ensures valid, reliable, useful performance measures are available and used to support organizational and stakeholder learning, management of strategy, improvement of programmes, mitigation of risk and reporting of performance.
The Global Polio Eradication Initiative (GPEI)	Launched by WHO in 1998 at the World Health Assembly –Objective to eradicate Polio by 2000; today polio reduced by 99% globally.	WHO, UNICEF, the US Centre for Disease control, Rotary International – bilateral donors also included Russian Federation, Kuwait, UAE, Saudi Arabia and Malaysia, World Bank and African and Inter-American Development Banks	The Advisory Committee on Polio Eradication and the Global Commission for the Certification of the eradication of Poliomyelitis and the UN Interagency Committee play vital roles with WHO regional offices, large networks of health workers, public health managers & professionals	Polio incidents have reduced by 99% but the commitment to global polio eradication by the World Health Assembly (WHA), is not legally binding on states, and therefore the enforcement mechanisms of GPEI are not strong.	GPEI operates within a broad framework of inter-governmental and interagency cooperation and participation. The Independent Monitoring Board assesses progress towards a polio-free world, convenes on a quarterly basis to independently evaluate progress towards each of the major milestones of the GPEI Strategic Plan; the IMB provides assessments of the risks posed by existing funding gaps.
Renewable Energy and Energy Efficiency Partnership (REEEP)	Initiated by the UK government in 2002 as a WSSD Type 2 partnership – response to WSSD failure to	Traditional bilateral donors (90 projects in over 40 countries); 60% of REEEP’s activities deal with policy	REEEP has a governing board that is responsible to a ‘Meeting of Partners’ which is the ultimate authority of	REEEP contributed to change in renewable energy. REEEP has used a multiple approach to establish	Has a Governing Board responsible for the conduct of the business of the organization in accordance

	<p>agree targets for renewable energy and energy efficiency – It aimed to promote collaboration to achieve a significant increase in the use of renewable energy and energy efficiency to improve energy security and provide for reliable delivery, and deal with climate change/energy issues. Project implementation and policy advice at national level, and advocacy at global level is its main thrust.</p>	<p>and regulation, the remaining with project financing.</p>	<p>REEEP. Projects are developed and proposed by the programme committee and final selection by the International Selection Committee. A governing board is responsible to an assembly, ‘a Meeting of Partners’, which is the ultimate authority of REEEP.</p>	<p>national partnerships involving small-scale private sector partners, NGOs and public partners. REEEP has also financed local projects that may not have been from the outset financially viable from a market point of view. South Africa proposed targets for of 5% of total primary energy use to come from renewable energy resources by 2010. By 2009 IAEA estimate this had reached 13.1%, now increased to 19%.</p>	<p>with the Statutes, and holds office for a period of four years. It is comprised of not less than six members and meets at least once a year. Its functions are to: develop and oversee the key strategic direction of the REEEP, including targets, timeframes and funding priorities; prepare the financial rules and accounting system of the organization, consider and decide upon applications to become Partners, provide instructions to the International Secretariat.</p>
<p>The Forest Stewardship Council (FSC)</p>	<p>FSC Founding Assembly in 1993, the secretariat relocated in 2003 to Bonn, Germany. Main thrust from UNCED in 1992 to establish an independent and international forest certification system. Vision: the world’s forests meet the social, ecological, and economic rights and needs of the present generation without compromising those of future generations through promoting environmentally appropriate, socially beneficial, and economically viable management of the world’s forests.</p>	<p>Not for profit NGO with membership in over 60 countries. It is financed through a multitude of sources – individual and corporate grants, donations and projects. It has a strong collaborative relationship with various UN bodies and has over the years worked with UNEP and had projects financed through the GEF. Governments cannot be members.</p>	<p>Board of Directors and an international secretariat with the General Assembly of members as the highest decision making body. It has three chambers for stakeholders from environment, social and economic organizations. There is also a quota to ensure a more balanced north/south representation.</p>	<p>Formally organised as an independent non-governmental organisation, works outside of national regulations with its outreach. With expertise competence and project portfolio, the FSC can function as an incubator for multi-stakeholder partnerships. The FSC administers a self-elaborated third party certification system on wood and timber products that serves to verify whether products– 8% of global forest is certified and 25% of all industrial round-wood production.</p>	<p>FSC has developed 12 system indicators under four main categories – economic, social, environmental and general. The FSC Monitoring and Evaluation Program has also developed a Code of Good Practice for Assessing the Impacts of Social and Environmental Standards, works with ten credibility principles integrated in the FSC monitoring work. sustainability, improvement, relevance, rigour, engagement impartiality, transparency accessibility, truthfulness, efficiency</p>
<p>Royal DSM and World Vision partnership</p>	<p>Royal DSM, the global life and materials science company, and World Vision</p>	<p>DSM and World Vision are working with the millers to build business expertise,</p>	<p>The collaboration sees both organisations jointly leverage their expertise,</p>	<p>By 2016, the DSM–World Vision partnership aims to contribute to the reduction of</p>	<p>The flagship of the partnership is the Miller’s Pride project in Dar es</p>

	are working together to achieve lasting progress in global health and development by improving the nutritional status of mothers and children.	improve food safety and increase markets and profits for the millers.	resources and reach in order to address undernutrition – the root cause of stunting and one-third of preventable child deaths.	the 165 million children under 5 across the globe who are stunted.	Salaam which includes close collaboration with the Tanzanian government. This project focuses on fortifying maize flour with essential micronutrients.
UN Global Compact CEO Water Mandate	Launched in 2007 and developed under the UN Global Compact’s three environment principles derived from the Rio Declaration for business to support a precautionary approach, promote greater environmental responsibility and encourage diffusion of environmentally friendly technologies has a broad-based analysis of the acute global water stress with action taken, but the CEO Water Mandate is voluntary and aspirational and	Participation in the CEO Water Mandate is open to all UNGC business signatories, and is funded and supported by companies, governments, and UN agencies and other stakeholders.	Run by a secretariat in the UN GC and the Pacific Institute and overseen by the CEO Water Mandate Steering Committee, which includes business, civil society and other representatives.	The CEO Water Mandate has set rigorous standards for reporting on companies’ activities in water and sanitation related areas, and the reporting policy follows those of the GRI. Member companies have changed their approach to water due to the work done under the CEO Water Mandate. Participating companies must also publish and share their water strategies, including targets and results, areas for improvement, in relevant corporate reports, using – where appropriate– the water indicators found in the GRI Guidelines. Companies must be transparent in dealings and conversations with governments and other public authorities on water issues.	While a voluntary initiative, the CEO Water Mandate incorporates a mandatory disclosure mechanism. It reports through a system called Corporate Water Disclosure which reports information to stakeholders (investors, NGOs, consumers, communities, suppliers, and employees) related to the current state of a company’s water management, the implications for the business and others, and the company’s strategic responses. Disclosure is a critical component of a company’s water management efforts and of water-related sustainability more generally. Disclosure reports are posted on the CEO Water Mandate’s public website; further, companies which fail to report are expelled.

Sources: World Vision report: Getting Intentional: Cross-Sector partnerships, business and the post-2015 development agenda, available at: <http://www.wvi.org/united-nations-and-global-engagement/publication/getting-intentional-cross-sector-partnerships>; BCG/MIT report: Joining Forces: Collaboration and Leadership for Sustainability, available at: <https://shop.sloanreview.mit.edu/store/joining-forces-collaboration-and-leadership-for-sustainability>; Multi-stakeholder partnerships: Making them work for the Post-2015 Development Agenda, Felix Dodds, Global Research Institute, University of North Carolina; available at: <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=1619&menu=1515>

Appendix L: China's recent investment arbitration cases and investment treaty practices (since 2010 to present)

China's recent investment arbitration cases

Cases As Respondent State						
No.	<u>Year Of Initiation</u>	<u>Short Case Name</u>	<u>Summary</u>	<u>Outcome Of Original Proceedings</u>	<u>Respondent State</u>	<u>Home State Of Investor</u>
1	2017	<u>Hela Schwarz v. China</u>	Hela Schwarz GmbH v. People's Republic of China ICSID Case No. ARB/17/19 Summary: The outcome of this case is still pending.	Pending	China	Germany
2	2014	<u>Ansung Housing v. China</u>	Investment: Capital expenditure of over USD 15 million for the development of a golf and country club in China. Summary: Claims arising out of the provincial government's alleged actions in relation to Ansung's investment in the construction of a golf and country club and luxury condominiums in Sheyang-Xian, Jiangsu province.	Decided in favour of State	China	Korea, Republic of
3	2011	<u>Ekran v. China</u>	Investment: Rights under a 70 year lease over 900 hectares of land in the Chinese province of Hainan held by Ekran Berhad's local subsidiary. Summary: Claims arising out of the Government's revocation of claimant's subsidiary rights to a leasehold land due to an alleged failure to develop the land as stipulated under local legislation.	Settled	China	Malaysia
Cases as Home State of claimant						
1	2017	<u>Sanum Investments v. Laos (II)</u>	Investment: Majority shareholding in the Savan Vegas Hotel and Casino. Summary: Claims arising out of the Government's actions allegedly in breach of a settlement agreement concluded by the claimant and Lao Holdings N.V. with the Government in 2014.	Pending	Lao People's Democratic Republic	China

2	2014	<u>Beijing Urban Construction v. Yemen</u>	<p>Investment: Rights under an agreement concluded between claimant and the Yemeni civil aviation and meteorology authority for the construction of an airport terminal.</p> <p>Summary: Claims arising out of the alleged forced deprivation of claimant's assets and contract concerning a project for the construction of an airport terminal in Sana'a.</p>	Settled	Yemen	China
3	2012	<u>Ping An v. Belgium</u>	<p>Investment: Largest shareholding in the Belgian-Dutch financial institution Fortis.</p> <p>Summary: Claims arising out of the Government's bailout, and subsequent nationalisation and sale to a third party, of the financial institution in which the claimants had invested, in the context of the 2008 financial crisis.</p>	Decided in favour of State	Belgium	China
4	2010	<u>Beijing Shougang and others v. Mongolia</u>	<p>Investment: Rights under a mining licence.</p> <p>Summary: Claims arising out of the cancellation of licenses held by the claimants in the Tumurtei iron ore mine in 2012.</p>	Decided in favour of State	Mongolia	China
5	2007	<u>Tza Yap Shum v. Peru</u>	<p>Investment: Majority shareholding in a Peruvian company engaged in the purchase and export of fish flour to Asian markets.</p> <p>Summary: Claims arising out of the seizure of the bank account of claimant's enterprise due to tax debt and other alleged actions undertaken by Peruvian tax authorities that resulted in the substantive deprivation of claimant's investment.</p>	Decided in favour of investor	Peru	China
6	2011	<u>Philip Morris v. Australia</u>	<p>Investment: Shareholding in Australian subsidiaries engaged in the manufacturing, import, market and distribution of tobacco products; related intellectual property rights.</p> <p>Summary: Claims arising out of the enactment and enforcement by the Government of the Tobacco Plain Packaging Act 2011 and its alleged effect on investments in Australia owned or controlled by the claimant.</p>	Decided in favour of State	Australia	Hong Kong, China SAR

7	2012	<u>Sanum Investments v. Laos (I)</u>	<p>Investment: Contributions made in the form of loans extended to local companies; majority shareholding in two hotels and casinos: Savan Vegas and Paksong Vehas; ownership stakes in certain slot clubs; business know-how.</p> <p>Summary: Claims arising out of an alleged series of measures by the Government of Laos, including its courts and provincial authorities, that affected claimant's bundle of rights for the construction and operation of two hotels and casinos, among other gaming facilities in which the claimant had invested.</p>	Settled	Lao People's Democratic Republic	Macao, China SAR
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Data Source: UNCTAD (2019) Investment Policy Hub: <https://investmentpolicy.unctad.org/>

China's recent investment treaty practices (since 2010 to present)

Bilateral Investment Treaties (BITs)						
No.	<u>Short Title</u>	<u>Status</u>	<u>Parties</u>	<u>Date Of Signature</u>	<u>Date Of Entry Into Force</u>	Full Text Available
1	<u>China - Turkey BIT (2015)</u>	Signed (not in force)	<u>Turkey</u>	29/07/2015	n/a	no
2	<u>China - United Republic of Tanzania BIT (2013)</u>	In force	<u>Tanzania, United Republic of</u>	24/03/2013	17/04/2014	yes
3	<u>Canada - China BIT (2012)</u>	In force	<u>Canada</u>	09/09/2012	01/10/2014	yes
4	<u>China - Congo, Democratic Republic of the BIT (2011)</u>	Signed (not in force)	<u>Congo, Democratic Republic of the</u>	11/08/2011	n/a	no
5	<u>China - Uzbekistan BIT (2011)</u>	In force	<u>Uzbekistan</u>	19/04/2011	01/09/2011	yes
6	<u>China - Libya BIT (2010)</u>	Signed (not in force)	<u>Libya</u>	04/08/2010	n/a	no
7	<u>Chad - China BIT (2010)</u>	Signed (not in force)	<u>Chad</u>	26/04/2010	n/a	no
Treaties with Investment Provisions (TIPs)						
1	<u>China - Hong Kong CEPA Investment Agreement (2017)</u>	In force	<u>Hong Kong, China SAR</u>	28/06/2017	28/06/2017	yes
2	<u>China - Georgia FTA (2017)</u>	Signed (not in force)	<u>Georgia</u>	13/05/2017	n/a	

		force)				yes
3	<u>China - Macao Agreement on Trade in Services (2015)</u>	Signed (not in force)	<u>Macao, China SAR</u>	28/11/2015	n/a	yes
4	<u>Australia - China FTA (2015)</u>	In force	<u>Australia</u>	17/06/2015	20/12/2015	yes
5	<u>China - Korea, Republic of FTA (2015)</u>	In force	<u>Korea, Republic of</u>	01/06/2015	20/12/2015	yes
6	<u>China - Switzerland FTA (2013)</u>	In force	<u>Switzerland</u>	06/07/2013	01/07/2014	yes
7	<u>China - Iceland FTA (2013)</u>	In force	<u>Iceland</u>	15/04/2013	01/07/2014	yes
8	<u>China - Japan - Korea, Republic of Trilateral Investment Agreement (2012)</u>	In force	<u>Japan, Korea, Republic of</u>	13/05/2012	17/05/2014	yes
9	<u>China - Taiwan Province of China Framework Agreement (2010)</u>	In force	<u>Taiwan Province of China</u>	29/06/2010	01/09/2010	yes
10	<u>China-Costa Rica FTA</u>	In force	<u>Costa Rica</u>	01/04/2010	01/08/2011	yes
Investment Related Instruments (IRIs)						
1	UN Guiding Principles on Business and Human Rights	2011	Multilateral	Guidelines, principles, resolutions and similar	n/a	yes
2	ILO Tripartite Declaration on Multinational Enterprises	2006	Multilateral	Guidelines, principles, resolutions and similar	n/a	yes
3	Doha Declaration	2001	Multilateral	Guidelines, principles, resolutions and similar	n/a	yes

Data Source: UNCTAD (2019) Investment Policy Hub: <https://investmentpolicy.unctad.org/>