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CHAPTER 11

INTEGRATING HUMAN RIGHTS INTO THE EXTRACTIVE INDUSTRIES: HOW INVESTMENT CONTRACTS CAN ACHIEVE PROTECTION

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1. Introduction

States are in a unique position to regulate each and every activity of business enterprises operating in the extractive industries.[1] International law recognizes that states have permanent sovereignty over the natural resources located within their territories.[2] As a result of this, businesses generally cannot operate in the extractives sector without obtaining permits and authorizations from the host state and are required to operate within the parameters of the terms of their investment contracts and the laws applicable to their activities. This gives host states ample opportunity to structure the legal framework applicable[3] to the investments in the extractives sector in a manner that realizes their duty to protect human rights. However, states are often encouraged to make their regulatory framework as attractive as possible to outside investors.[4] Laws

[1] According to the Multilateral Investment Guarantee Agency, extractive industries comprise of oil, gas and mining sectors, see http://www.miga.org/sectors/index.cfm?stid=1813

[2] UN General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources"; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, *ICJ Reports*, 2005, at para.244; N. Schrijver, *Permanent Sovereignty over Natural Resources*, Max Planck Encyclopaedia of Public International Law, para.1; M. Sornarajah, *The International Law On Foreign Investment* (Cambridge University Press, 3rd ed., 2010) 40.

[3] This legal framework includes, but is not limited to, investment laws, treaties and contracts, licenses and permits, national laws and regulations applicable to businesses operating in the extractive industries.

[4] T. H. Cheng, Power, "Authority and International Investment Law", *American University International Law Review* 2004-2005, 465, 500.

applicable to foreign investments (hereinafter collectively referred to as 'FIL')[5] are often designed with the sole purpose of promoting foreign investments, without placing any obligations over investors, in order to increase global economic growth and act as a tool for development.

The concessions provided to foreign investors under the FIL framework may place significant obstacles to states' ability to implement their duty to protect human rights.[6] Whether favourable legal frameworks for investment in fact increase international investment flows and whether foreign investment contributes to economic development of the host state are often debated.[7] This is more so in the extractive industries, where the location of the valuable resources is considered the primary determinant of investment decisions.[8] There is no empirical evidence that higher environmental standards and human rights compliance deters foreign investments in the extractive industries.[9]

This paper considers how states can integrate their human rights obligations into investment contracts as a means of minimizing the adverse effects of business activities related to the extractives sector on human rights. The first two parts establish the theoretical background and the legal framework within which the concrete proposals in the final part are discussed. The analysis will begin with how the permanent sovereignty

[5] In the context of this paper, FIL is understood in a narrow sense to comprise of investment treaties and the investment contracts between the state and the investor. In a broader sense, FIL would also comprise of national law provisions on foreign investment promotion, terms of the investment license and permit etc., as any of these instruments may be taken into consideration when a dispute is submitted to an international arbitration tribunal or a local court by an investor against the host state. It is important that all these instruments include necessary provisions to ensure social and environmental protection; however, the focus of this paper will solely be on investment contracts.

[6] *See, e.g.*, ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.*, Decision on Liability of 30 July 2010, ICSID Case No. ARB/03/19, para 262.

[7] Sornarajah, The International Law On Foreign Investment op.cit., 57.

[8] J. P. Walsh and J. Yu, "Determinants of Foreign Direct Investment: A Sectoral and Institutional Approach", *IMF Working Paper*, WP/10/187, at 21.

[9] *See*, Y. Xing and C. D. Kolstad, "Do Lax Environmental Regulations Attract Foreign Investment?", *Environmental Resource and Economics* 2002, 1, 22. Studies specific to human rights found different results on the relationship between human rights and FDI. *Compare, e.g.*, S. L. Blanton and R. G. Blanton, "What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment", *Journal of Politics* 2007, 143, 152; J. P. Tumman and C. F. Emmert, "The Political Economy of U.S. Foreign Direct Investment in Latin America, 1979-1993", *Latin America Research Review* 2004, 49.

principle enables host states[10] to utilize the legal instruments applicable to investor conduct to fulfill their duty to protect under international human rights law ('IHRL') in the extractive industries.[11] For this purpose, Section 2 considers the theoretical understanding of international law as both an expression and constraint on sovereignty. It treats the discourses in international investment law and international human rights law separately before considering how the two fields interact.

This paper further aims to contribute to the discussion on the implementation of state duty to protect in the extractive industries in light of the 2011 UN Guiding Principles on business and human rights, formulated by for UN Special Representative John Ruggie, (alternatively 'UN Guiding Principles' and 'UNGPs').[12] In Section III, it considers the expectations of the UN Guiding Principles for states in adopting investment contract provisions that are consistent with a human rights approach. It suggests that the UNGPs place an expectation on states to ensure the laws and contracts include adequate and appropriate remedies and terms of liability for when violations occur despite proper due diligence measures by businesses. It is also important that the host state puts in place efficient enforcement mechanisms to ensure proper implementation of the protections and guarantees integrated into these instruments.

In Section IV, the Qara Zaghan Gold Mining contract between the Government of Afghanistan and Afghan Krystal Natural Resources Company (AKNR) for exploitation of the gold mine in the Qara Zaghan region in Afghanistan will be analysed as a case study.[13] The focus, when analyzing this contract, is on impact of the investment on the local communities' right to land and right to an adequate standard of

[10] Under the UN Guiding Principles on Business and Human Rights both host and home states carry the duty to protect. The focus of this paper; however, is only on the host states' duty to protect; See *John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (2011).

[11] This should be distinguished from the discussion on whether the principle of permanent sovereignty over natural resources should prevail in the face of investment protections. On that discussion, *see*, D. E. Vielleville and B.S. Vasani, "Sovereignty over Natural Resources versus Rights Under Investment Contracts: Which One Prevails?", *Transnational Dispute Management* 2008, 21.

[12] Guiding Principles, *supra* n. 10.

[13] A copy of this contract is available on the website of the Afghanistan Ministry of Mines and Petroleum. *See*, http://mom.gov.af/Content/files/QaraZaghan-Contract-2.pdf

living. The analysis draws on the authors' collective experience advising states, intergovernmental organizations and non-governmental organizations on the appropriateness of legislation and contracts relating to the extractive industry development. We argue that for a state to meet its human rights obligations, it must incorporate human rights in its investment contracts. The recommendations include requiring impact assessments and community engagement, and introducing articles aimed at protecting the state's continuing sovereignty in the area of human rights regulations.

2. International Law as Sovereign Expression and Constraint

Sovereignty is a much debated concept with different dimensions, the discussion of which falls beyond the scope of this paper.[14] It, however, still largely remains the cornerstone of international law.[15] In the traditional and widest sense it denotes the nation-state's "… right to exercise … to the exclusion of any other state [or international organization], the functions of a state."[16] According to Brownlie, the notions of sovereignty and equality of states bear three main consequences:[17] "(1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor". The latter requires the state's expression of its sovereignty to limit its jurisdiction under the former two consequences and to submit itself to external

[14] *See*, J. H. Jackson, "Sovereignty: Outdated Concept or New Approaches, in Redefining Sovereignty", W. Shan et al. (eds.), *Redefining sovereignty in international economic law* (Hart Publishing, 2008), 3.
[15] Ibid.
[16] PCA, *Island of Palmas Case*, US v the Netherlands, Award of the Tribunal of 4 April 1928, 8.
[17] J. Crawford, *Brownlie's principles of public international law*, (Oxford Press, 8th ed., 2012) 289. According to Lowe, "what sovereignty signifies is not a defined, static body of rights and duties but a changing frame of reference in international relations, whose content is partly – perhaps largely – determined by factors and processes outside the law." V. Lowe, "Sovereignty and International Economic Law", W. Shan et al. (eds.), *Redefining sovereignty in international economic law* (Hart Publishing, 2008), 77, 78.

standards and external courts and tribunals under IHRL and FIL. This section will elaborate on the allocation of power and authority on issues covered by IHRL and the FIL between the states and other relevant non-state actors. It will demonstrate the disproportionate shift of power and authority from states to non-state actors in IHRL and FIL. This shift results in non-state actors protected by FIL holding significantly more power than those protected under IHRL, which ultimately hinders the enforcement of IHRL when it clashes with FIL.

2.1 Permanent Sovereignty over Natural Resources

In the extractive industries, the doctrine of permanent sovereignty over natural resources both expands and constrains the state's ability. Common Art. 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) finds that the State, on behalf of its people, are "entitled to and endowed with the legal capacity to dispose freely of natural resources" in a territory.[18] The state retains a permanent interest in the natural resources at all times, though it can assign or grant rights for identifying, mining, or cultivating the resources.[19] The management of the extractive industry is therefore one more intimately linked to sovereignty.

This authority of the state over its natural resources is constrained in the sense that it entails obligations for prudent natural resource management, both the resource itself and the income generated from the resource, which would enable the state to use

[18] N. Schrijver, Sovereignty over natural resources: balancing rights and duties (Cambridge University Press, 1997) 7. See also, L. Cotula, Human rights, natural resource and investment law in a globalised world: shades of grey in the shadow of the law (Routledge, 2012) 5; UN GA Resolution on Permanent Sovereignty, para.1 declares "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."

[19] For a more in-depth discussion of Permanent Sovereignty over Natural Resources, *see*, *e.g.*, E. Duruigbo, "Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law", *George Washington International Law Review* 2006, 49; K. N. Gess, "Permanent Sovereignty Over Natural Resources", *International and Comparative Law Quarterly* 1964, 398.

its maximum available resources for realization of human rights and the wellbeing of its peoples.[20] As Jack Donnelly argues "[s]overeignty is (only) the authority to decide, the right to choose among alternative courses of action the one that appears most beneficial or least harmful" for the peoples. Art. 2 of the ICESCR supports such an interpretation of the state's purview as it obliges states to "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights" in the Covenant.[21]

2.2. Permanent Sovereignty, IHRL and FIL

Permanent sovereignty over natural resources is exercised by the State on behalf of and for the benefit of the peoples. The doctrine does not entail a peremptory norm for exploitation of natural resources by states only, but rather it gives the power to the state to determine the way in which the sources will be exploited.[22] In this sense, entering into an investment agreement for exploitation of natural resources or into an investment treaty granting protections to foreign investors is an exercise of the state's sovereignty over its natural resources. However, once these instruments are entered into, they act as a limitation over the state's authority to exploit those natural resources to the extent, and in the manner, provided in the particular instrument. Similarly, entering into IHRL obligations pertinent to natural resources is an exercise of state sovereignty, but once

[20] *See* Jack Donnelly, "Human Rights and State Sovereignty", *Human Rights and Welfare Working Papers*, at 17 available at http://www.du.edu/korbel/hrhw/workingpapers/2004/21-donnelly-2004.pdf; *See also*, E Duruigbo, "Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law", *George Washington International Law Review* 2006, 65 (arguing that "The right of peoples to sovereignty over natural resources necessarily imports an entitlement to demand that governments manage these resources to the maximum benefit of the people."); L. A. Miranda, "The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights and Peoples-Based Development", *Vanderbilt Journal of Transnational Law* 2012, 800, (asserts that "the doctrine [of permanent sovereignty over natural resources] possesses an intrastate dimension: one that was originally qualified as an obligation of the government of a state to its peoples as a whole.")

[21] International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 2(1), 993 U.N.T.S. 3, *entered into force* 3 January 1976.

[22] Schrijver, *Permanent Sovereignty over Natural Resources*, op.cit., para.23.

these obligations become binding they will act as a constraint over the state's authority over its natural resources.

The roots of both areas of law are found in the international law on state responsibility, and both "set[] minimum standards of protection . . . protect[ing] non-state actors against arbitrary exercise of state sovereignty."[23] The two fields differ, though, in the focus of their protection and the expectation of equal treatment.[24] Between the late 1800s to the mid-1900s, the US and European home states sought to provide a higher level of protection for foreign investors than what was provided under the domestic laws of developing, principally post-colonial, states.[25] Consequently, FIL demands discriminatory treatment in favour of foreign investors, providing "an internationally recognized legal framework to protect foreign investment which would give direct rights and standing to the investor vis-à-vis the host state" and a set of minimum standards that may mean foreign investors receive compensation for actions domestic citizens would not.[26] IHRL, on the other hand, "aims to protect human dignity" and in doing so requires equality and non-discrimination.[27] Whereas FIL permits demands on the state that favour investors based on their nationality, IHRL requires states to treat all within their territory or jurisdiction in a non-discriminatory manner, prohibiting deference based on nationality.

While permanent sovereignty gives the states the right to formulate the legal framework applicable to natural resource exploitation, it is argued here that states are under an obligation to ensure that this framework adheres to the principle that the state's sovereignty must be exercised by "choos[ing] among alternative courses of action the one that appears most beneficial or least harmful".[28] As a consequence, the state should strike the appropriate balance between FIL and IHRL when exercising its permanent sovereignty. This may require limitations imposed on investor rights by the state to

[23] Cotula, op.cit., 39.
[24] Ibid.
[25] *Ibid.* 39-40.
[26] Sornarajah, The International Law On Foreign Investment op.cit., 35, 37.
[27] Cotula, op.cit., 40.
[28] See, Schrijver, Permanent Sovereignty over Natural Resources op.cit.

protect human rights of the local communities, or the limitation of land rights of the local community in order to enable the investor to conduct its business activities. Balancing the rights of the beneficiaries of these two areas requires an exercise of sovereignty by the state. In this sense, in the extractives sector the state is well situated to act as a barrier between the investor and the local communities whose rights and interests often clash.

2.3 How does FIL Restrict States' Ability to Implement their IHRL Obligations

Investment contracts may trigger a shift of power and authority over the actions of the foreign investor relating to the investment within the host state.[29] This is a shift that transfers the power and authority from the state to investors and international tribunals to different extents, depending on the content of the instrument, and therefore, acts as a constraint on the host state's sovereignty, on its power to regulate. While the transfer of power and determination of its extent is an expression of sovereignty, once this shift takes place, the host state's ability to exercise sovereignty vis-à-vis the foreign investment becomes restricted by the standards prescribed in the relevant instrument. Foreign investment law instruments diminish the ability of the state organs, including the executive, legislature and the courts to act in a manner contrary to the rules prescribed by these instruments.[30]

Investment contracts can restrict the sovereignty of the host state in favour of private parties by stipulating legal or fiscal stabilization or by referring the settlement of disputes to international arbitration. For instance, art. 27(2) of the Qara Zaghan Gold Project Contract between Afghanistan and Afghan Krystal Natural Resources Company[31] provides that "[a]ny future changes to existing Mineral Laws shall have no

[29] *See*, Cheng, "Authority and International Investment Law" op.cit., 469.
[30] *Ibid* 481.
[31] Accessible at http://mom.gov.af/Content/files/Mineral%20Contracts/File_211_QaraZaghan_Contract-English.pdf

bearing on the terms, conditions or validity of this contract." This constitutes a stabilization clause for the Mineral Laws of Afghanistan as it affects the investor.[32] The 2010 Minerals Law, which was in force at the conclusion of this contract,[33] does not itself include a legal stabilization clause; however, the company will escape the stronger environmental or social protections that are found in the subsequent Minerals Law,[34] relying on the stabilization clause found in the investment contract. As the duration of the contract is set for 10 years, any changes to the Minerals Law of Afghanistan within that period will be inapplicable to the Qara Zaghan project.

While stabilization clauses restrict the state's ability to enforce new regulation against the protected investor, international arbitration clauses require the state to submit itself to dispute settlement outside its own national courts. Investment treaty provisions often support and strengthen the conditions of investment set out in the investment contract. They can impose serious restrictions on the state's ability to regulate in the extractive industries.[35]

Even though the FIL instruments tend to restrict states' ability to impose new conditions on investors, these instruments can only be created with state consent. Since the content of these instruments are formulated or negotiated by states,[36] they give the

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[32] On stabilization clauses, *see*, *e.g.*, Cotula, op.cit., 4; J. Letnar Cernic, "Corporate Human Rights Obligations under Stabilization Clauses", *German Law Journal* 2010, 210; A. Shemberg, *Stabilization Clauses and Human Rights: A Research Project conducted for the IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights* (2008), *available at* http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES&CACHEID=9feb5b00488555eab8c4fa6a6515bb18

[33] A new Minerals Law was passed in 16 August 2014.

[34] For instance, art. 92 of the 2014 Minerals Law requires license holders to enter into Community Development Agreements "for the purpose of assisting the local communities affected by Mineral Activities in order to promote sustainable local economic development, the general welfare and quality of life of the local communities, recognizing and respecting the rights, customs and traditions of local communities."

[35] 26 per cent of all cases submitted to ICSID up to date since the inception of the centre were related to disputes in the oil and gas and mining industries. See ICSID Caseload and Statistics, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20%28English%29%20%282%29_Redacted.pdf

[36] The content of national laws or investment contracts may be influenced by requirements of loan conditionality on creating a favourable investment framework imposed by international financial institutions. However, as mentioned earlier, there is no evidence that applying stricter environmental and

necessary flexibility to the state to implement their human rights obligations at the formulation or negotiation stage. On this theoretical background on the interaction of sovereignty, IHRL and FIL, the following sections will focus on the demands of IHRL regarding business activity and the ways in which these could be incorporated into investment contracts.

3 The Potential Impact of the UN Guiding Principles

To date, the international community's focus on business and human rights has primarily been aimed at examining the impact of foreign investment and in particular of multinational corporations ('MNCs') on human rights and suggesting or creating soft-law mechanisms for remedying those impacts.[37] This is understandable as most foreign investment, though not all, comes in the form of investments from multinational corporations.[38] Currently, the leading framework for responsibilities in the area of business and human rights is the UN Guiding Principles, which recognizes a tripartite division of responsibility for governing the human rights impacts of corporations.[39] States are to protect human rights from impacts by corporations, businesses are to respect human rights in their activities, and both states and businesses are to ensure negative human rights impacts are remedied.[40] This section will outline the responsibilities recognized in the Guiding Principles while suggesting that they also

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social standards deter investments in resource extraction. Therefore, there is no reason for states to adopt lax environmental and social regulation to fulfil the loan conditionality.

[37] J. G. Ruggie, "Business and Human Rights: The Evolving International Agenda", *American Journal of International Law*, 2007, 819; *see, also, e. g.*, UN Guiding Principles, op.cit., para. 1; Report of the UN Special Representative to the Secretary General on Business and Human Rights, Protect, Respect and Remedy: A Framework for Business and Human Rights, U.N. Doc. A/HRC/8/5 paras. 1-3, (2008) ("Framework"); OECD Guidelines for Multinational Enterprises (2011), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf ("OECD Guidelines"); *see also*, C. de la Vega, et al., *Holding Businesses Accountable for Human Rights Violations: Recent Developments and Next Steps*, 2-3 (Friedrich Ebert Stiftung, July 2011), *available at* http://library.fes.de/.

[38] Sornarajah, The International Law On Foreign Investment, op.cit., 60.

[39] UN Guiding Principles, op.cit.

[40] Ibid.

offer a tool for better explaining and guiding the integration of human rights in FIL instruments.

The UNGPs draw on the traditional understanding of a state's responsibility within human rights: respect, protect, and fulfil.[41] Ruggie's alteration to this topology has been criticized,[42] but it was a clear attempt to harmonize his framework with international law.[43] It is with this approach in mind that the UNGPs' division of labour forms the underpinning of the recommendations in this Chapter. The power of the host state to exercise regulatory controls in the extractive industries is restricted by investment contracts, international investment treaties and domestic laws on investment or natural resources, but only to the extent it consents to. The state's obligation to protect human rights against the negative impacts from extractive investments requires the state to construct its investment consent in a way that allows it to meet its obligations on a continual basis. Embedding the responsibilities recognized in the UNGPs can help the state realize its human rights obligations while pursuing foreign investors for its extractive industries. The next section considers how this can be done in the extractive industry.

The burden of the UNGPs rests on States, which are required to regulate corporate behavior regardless of their capacity to do so.[44] The UNGPs were drafted with the recognition that states may be unable or unwilling to exercise the necessary control over corporate actors,[45] yet they still recognize an obligation on states to "[e]nsure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable respect for human

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[41] See, I. E. Koch, "Dichotomies, Trichotomies or Waves of Duties", *Human Rights Law Review* 2005, 103; Report on the Right to Adequate Food as a Human Rights Submitted by Mr. Asbjørn Eide, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1987/23, para 66 (1987); M. M. Sepúlveda Carmona, The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights (Intersentia, 2003) 157,162.
[42] *See*, *e.g.*, Letnar Cernic, op.cit., 1269.
[43] *See*, Ruggie, "Business and Human Rights: The Evolving International Agenda", 838.
[44] *See*, Framework, op.cit., paras 47-49.
[45] *See*, *ibid.*, para 14; *see also*, Ruggie, "Business and Human Rights: The Evolving International Agenda", 830.

rights."[46] This proves difficult if human rights are isolated within the state's legal or policy framework. An integrated approach that embeds human rights protections within the other legal provisions is necessary to ensure "departments and agencies which directly shape business practices" are apprised of the state's obligations and find it within their capacity to consider human rights.[47]

Applying the UNGPs to the extractive industry, the state is expected to provide policy coherence between IHRL and the terms and conditions of investment contracts. States should ensure provisions do not allow or facilitate a business's negative impact on human rights. The state must not relinquish its ability to adopt new human rights compliant legislation or new regulations, or enforce those standards on the business. Where negative impacts are an inherent part of the operation, the state is expected to require advanced planning for addressing these impacts in a human rights compliant manner, including the provision of compensation for impacted individuals and communities. Finally, where the business has had an unforeseen negative impact, the contract must not exempt the business from local courts or from an obligation to pay compensation.

Businesses, on the other hand, have a responsibility to respect human rights even where the State fails to regulate. The UNGPs advance a 'do no harm' philosophy which places the corporation's obligations primarily in negative terms: the corporation should not interfere with the enjoyment of a human right, and should avoid complicity when a state violates human rights.[48] In addressing these demands, businesses are expected to undertake due diligence to determine the risks they pose to human rights, and to establish grievance mechanisms for addressing complaints about human rights

[46] UNGPs, op.cit., para. 3.
[47] Framework, op.cit., paras 35-41; Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, J. Ruggie, *Business and Human Rights: First Steps Towards Operationalization of 'Protect, Respect and Remedy' Framework*, U.N. Doc. A/HRC/14/27, para 18 (2010).
[48] Framework, op.cit., paras 24, 54-64, 73.

violations.[49] In advance of signing a contract, businesses should conduct due diligence on the impact of their operations and establish means for addressing grievances. Respecting human rights, though, also demands that businesses not seek exemptions from the state's human rights laws, or pressure the state to avoid seeking new human rights compliant regulations.[50] Finally, due diligence must not simply be conducted before an investment, but should function as a continuous part of the business's operations.[51]

While businesses are expected to create non-judicial mechanisms by which they can resolve complaints by individuals and communities harmed by their actions,[52] the burden for ensuring corporations meet their obligations rests with the territorial host state. While the UNGPs reflect a voluntary framework for businesses – noting a responsibility, not an obligation or duty to respect human rights – the expectation is that the host state will work to ensure enforcement of the corporation's responsibility. Home states may also regulate the activities of their corporations abroad,[53] but the UNGPs indicate an expectation that the actions taken by a territorial host state in line with its duty to protect will lead to a clear framework of binding expectations on the corporation's responsibility to respect human rights. This has been appropriately criticized elsewhere as not reflecting the full obligations of a state,[54] but it does emphasize the importance of host states' laws embedding the duty to protect and the corporation's responsibility to respect human rights in a clear and integrated framework. In this sense, the UNGPs recognize that human rights act as a constraint on sovereignty while also expecting the state to utilize its sovereignty in restraining corporate impacts on human rights through, *inter alia*, FIL.

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[49] *See*, UNGPs, Principles 17-21 and accompanying commentary; *see also*, R. Lindsay et al., "Human Rights in the Oil and Gas Sector: Applying the UN Guiding Principles", *Journal of World Energy Law and Business* 2013, 18, 21.
[50] Ibid.
[51] UNGPs, Principle 17, Commentary.
[52] UNGPs, Principle 28; *see also*, Lindsay, et al., op.cit., 31.
[53] *See*, UNGPs, Principle 2 and Commentary.
[54] *See*, N. Jagers, "UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?", *Netherlands Quarterly of Human Rights*, 2011, 159, 161.

4. Incorporating the UNGPs into Investment Contracts

This section considers ways in which the UN Guiding Principles can be incorporated, utilizing the example of the Qara Zaghan Contract.[55] Investment contracts can initially make an explicit reference to the UN Guiding Principles or to human rights as a specific term. The Qara Zaghan Contract, for instance, provides in art. 29 that the investor will manage its operations in a "technically, financially, *socially, culturally and environmentally* responsible manner to achieve the environmental protection and sustainable development objectives and responsibilities required by" the Contract and the laws of Afghanistan but also "any applicable international conventions to which Afghanistan is a signatory." This could allow for Afghanistan to consider its international environmental and human rights obligations when interpreting the provisions of this contract. However, the wording of this entire subsection is not very strong and is slightly confusing. It is unclear how an interpreting court or tribunal would apply this provision in light of the Mineral Law stabilization clause in art. 27(2) of the Contract. Integrating the UNGPs into investment contracts, though, needs to be more comprehensive than a simple acknowledgment of the UNGPs or human rights within the contract. Instead, the principles of the UN Guiding Principles need to be embedded throughout the instrument, in order for the state to fulfill its duty to protect.

As John Ruggie recognized, investment can touch on a large variety of human rights. Investment contracts can be improved to include very direct provisions for the protection of specific human rights most relevant to that specific field. With the extractive industries, past cases indicate states need to be particularly concerned about the following issues: indigenous and minority rights; freedom from detention and torture; freedom of expression and association; freedom of religion; right to an adequate

[55] This section focuses on incorporating the UNGPs into one type of investment protection instrument: investment contracts. International investment treaties and national laws on resource extraction and investment promotion are also an important component of FIL, but due to space constraints, the analysis necessary to address the specifics of treaties and national laws is not included here.

standard of living; right to health; cultural rights; property rights; and the right to an adequate remedy.[56] This piece cannot address all of these issues, so it focuses on contract provisions in the extractive industries that interfere with right to property and right to an adequate standard of living.

Investment contracts establish the special legal framework within which the investor will carry out exploitation of natural resources. The investment contract will normally operate within and comply with the laws of the host state, including its investment treaty commitments. In the extractive industries, contracts typically include provisions on the rights and obligations of both the government and the license holders throughout their license period, dispute settlement, termination clauses, and fiscal aspects of resource extraction. While these areas appear relevant only to the relationship between the investor and the state, the issues covered by them may interfere with the enjoyment of third parties' human rights. Third party individuals that are most significantly affected by oil, gas and mining activities typically include the members of local communities living at or around the resource site and the labour force involved. Natural resource extraction may impact the right to property and right to an adequate standard of living in a variety of ways. Conducting business in this industry may require removal of local communities from their lands, which would interfere with their livelihoods. Communities may lose shelter, food and water resources due to their removal from land. Activities of a mining or an oil and gas company may cause contamination of air, water and soil, which would negatively impact the food and water sources as well as the health of the communities. These adverse impacts could be also created by the suppliers or subcontractors of the foreign investor.

Investment contracts may be silent on the potential impact of the investor's activities on the human rights of third parties or may provide inadequate safeguards. In order to avoid or mitigate the adverse consequences, contracts may include certain

[56] See, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97, para 25 (2006).

provisions, obliging the company and the relevant public authorities to act or not to act in a particular way. However, the formulation and implementation of these provisions are of utmost importance, if they are to achieve the necessary protection. Otherwise, they will fail to satisfy the expectations of the human rights obligations of the host state. The following section will demonstrate how provisions of a contract are relevant to the protection of human rights by looking at Qara Zaghan Contract. The adequacy of the provisions of this contract will be investigated with specific focus on right to property and right to an adequate standard of living.

4.1. Right to Property, Land Use and Right to an Adequate Standard of Living

The impact of oil, gas and mining activities are strongly felt on communities' right to property and right to an adequate standard of living. These projects often involve resettlement of communities, which directly interferes with their use of land and thus with their property rights in connection with that their right to housing and food. The right to property is guaranteed in art. 17 of the UDHR[57] and in regional human rights instruments such as the European Convention on Human Rights[58] (art. 1 of Protocol I), art. 14 of the African Charter on Human and Peoples' Rights[59] and art. 21 of the American Convention on Human Rights.[60] Under the European system the right to property has been interpreted in a broad manner to cover "all manner of things which have an economic value"[61] while the Inter-American Court of Human Rights recognizes interests beyond mere ownership of property.[62] Wide interpretation of property rights

[57] Universal Declaration of Human Rights (adopted 10 December 1948. UNGA Res 217 A(III) (UDHR)
[58] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR)).
[59] African Charter on Human and Peoples' Rights (African Charter) (adopted 27 June 1981, entered into force 21 October 1986).
[60] American Convention on Human Rights (ACHR) (adopted 21 November 1969, entered into force 18 July 1978).
[61] C. Ovey and R. C.A. White, The European Convention on Human Rights, (Oxford University Press, 4th ed., 2006), 350.
[62] Inter-Am. Ct. H.R., *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Judgment of August 31, 2001, (Ser. C) No. 79 (2001), para.144.

extends the protection guaranteed in these instruments to individual or collective occupants or users of land who do not hold the title to the land.[63] Removal from land will deprive communities from use of land for shelter, production of food and other means for generation of income, such as artisanal mining. This interferes with property rights, as well as depriving communities from their means of subsistence, adversely impacting their livelihood and at times their cultural rights.

Contracts relating to oil, gas and mining activities should be drafted in a way to prevent or minimize any adverse impacts of the business activities on the communities' livelihood. Safeguards should be incorporated to each stage of the oil, gas and mining activity stretching from the pre-licensing stage to post expiration or termination of the license. The main considerations of the host state negotiators related to use of land should be community consultation and consent, compensation and terms of resettlement. These issues are analyzed in turn below.

4.2. Consent and Community Consultation

The first step to achieving human rights protection in oil, gas and mining projects is to engage with communities at every stage of the project through an open consultation process. The international standards require not only consultation, but also 'consent' for natural resource extraction in areas populated by indigenous peoples. Free, prior and informed consent ('FPIC')[64] is the standard found in the UN Declaration on the Rights

[63] In many African countries, land is owned by the state and used or occupied by the people based on customary system of property rights. *See*, Cotula, op.cit., 19-20.

[64] According to UN-REDD Programme Guidelines on Free Prior and Informed Consent, Free refers to a consent given voluntarily and absent of "coercion, intimidation or manipulation."; Prior means "consent is sought sufficiently in advance of any authorization or commencement of activities."; Informed refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.; Consent refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected peoples or communities. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community, *available at* http://www.un-redd.org/Launch_of_FPIC_Guidlines/tabid/105976/Default.aspx

of Indigenous Peoples. According to art. 10 of the Declaration, indigenous peoples cannot be removed from their lands without obtaining FPIC. This standard is also found in instruments considered as benchmarks such as the The Indigenous and Tribal Peoples Convention,[65] IFC Performance Standards,[66] International Bar Association's Model Mining Development Agreement[67] and the World Bank Policy on Involuntary Resettlement. Beyond the rights of the indigenous peoples, the last three instruments recognize the right of the affected non-indigenous communities to informed consultation and participation at every stage of the project that interferes with their rights on land.[68] These standards on community consultation and consent should be incorporated into investment contracts.

In Afghanistan, a country sitting on vast valuable mineral deposits,[69] the 2010 Minerals Law does not include any clear provisions on public consultation and consent process.[70] The Qara Zaghan Contract, which is governed by this law, also does not require the parties to carry out public consultation prior to commencement of the exploitation of the mine. Art. 7 implies that the exploitation license has been granted but cannot be proceeded with until the Ministry of Mines and Petroleum (MoMP) accepts the Environmental and Social Impact Assessment (ESIA) and the Environmental and Social Management Plan (ESMP).[71] Pursuant to art. 7(1), the MoMP has to accept or reject the Feasibility Study, which contains the ESIA and the ESMP within a month after submission. This does not give sufficient time to the MoMP for effective

[65] ILO Convention No.169, at art. 16, *entry into force* 5 September 1991.
[66] Performance Standard 7.
[67] Available at http://www.mmdaproject.org/
[68] See for instance the IFC Performance Standard 1
[69] K. Mahr, Treasure Land: The Mines of Afghanistan by Yuri Kozyrev, Time Lightbox (29 August 2013).
[70] There is no clear provisions on community consultation in the 2014 Minerals Law either. It vaguely refers to a consultation with local communities in preparation of the Community Development Plan. The Law does not contain details on the procedure and the standards to be followed. These are left to the regulations which are not available on th website of the Ministry of Mines.
[71] Pursuant to art. 7(1)(E) the ESMP will address: "i. the environmental impact as noted in the ESIA and mitigating the effects to the environment and include measures to safeguard the environment from unnecessary damage; ii. the social impacts as found in the ESIA and what measures will be taken to mitigate the negative impact of the proposed mining to the local populations. The plan will outline development projects to assist the local peoples in social development; iii. the health and safety of the employees as detailed in a Health and Safety Plan"

consultation with affected populations. It is unclear whether the ESIA and ESMP have requirements that will make it conducive to human rights. It is also unclear from the contract, if the community in the area around the mine was already consulted regarding the plans for mine development or during the preparation of the ESIA and the ESMP. This is exacerbated by art. 7(2) which deprives the MoMP from revoking the license if it is not convinced about the company's ability to avoid the bad impacts of its intended activity from the feasibility study. Instead, under art. 7(2) it must "…. cooperate with AKNR to remediate the concerns resulting in the rejection."

In order to comply with its duty to protect under the UNGPs, states must ensure that their investment contracts contain provisions requiring the affected community to be consulted, pursuant to the internationally recognized standards, throughout the development of the project by both the state and the investor at relevant stages and allowed to provide insight into how to mitigate the harm they will face from the project. The state should also reserve the right to suspend or revoke the license, if the investor is in serious breach of the consultation requirements.

4.3. Compensation and Terms of Resettlement

Interference with property rights are typically compensated monetarily. Some laws also include the option of resettlement as a form of reparation, where affected communities have to be removed from the land. In cases where communities or individuals are removed from land, compensation alone may not be the most appropriate remedy. Removal from land, in particular for rural communities, may cause loss of shelter, food, income sources and cultural attachment. As others have noted "displacement caused by development largely occurs in a manner that violates human rights and leads to the increased impoverishment of the displaced."[72] Resettlement and compensation is a

[72] Inclusive Development International, et al., *Reforming the World Bank Policy on Involuntary Resettlement: Submission to the World Bank Safeguards Review*, 2, (2013), *available at*

complex issue, but the harmed individuals need to have a range of options available for reparation, not simply financial compensation.

Restitution has long been the preferred method for redressing loss of land as a result of widespread armed conflict or human rights abuse.[73] Where restitution is impossible, though, human rights law calls for a combination of responses to violations and negative impacts. The Van Boven-Bassiouni Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law make it clear that where restitution is impossible, reparations must include the combination of substantive reparations most aptly suited for redressing the violations and returning the individual to a state as close as possible to what they would have enjoyed had the harm not occurred in the first place.[74] This may include social and legal rehabilitation.[75] The investor and/or the state need to ensure an opportunity for social rehabilitation, either through the reconstruction of a community via relocation or additional social support through integration into new communities, adapting the economic skills of the community, or other forms of ensuring the social welfare of the individuals harmed.

It is important to note that the World Bank recognizes resettlement as "depending on the case, include[ing] (a) acquisition of land and physical structures on the land, including businesses; (b) physical relocation; and (c) economic rehabilitation of displaced persons (DPs), to improve (or at least restore) income and living standards."[76] It also recognizes that resettlement should be "avoided where feasible"

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http://www.inclusivedevelopment.net/wp-content/uploads/2013/04/Reforming-the-World-Bank-Policy-on-Involuntary-Resettlement.pdf.

[73] See, Centre on Housing Rights and Evictions, The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, available at http://2001-2009.state.gov/documents/organization/99774.pdf.

[74] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, Annex, Principles 15-23 (2005).

[75] *Ibid.*, at Principle 21.

[76] World Bank Group, Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects, 5 (2004).

because "resettlement can be severely harmful to people and their communities."[77] While the World Bank's policy seems to recognize a wide range of possible responses under the heading of "resettlement," the obligation for redressing human rights impacts requires the option that is most responsive to the victim's needs. Consequently, it is not the investor, the financer or the state that should be determining the restitution on its own, but rather resettlement and rehabilitation again need to be considered in consultation with the victims. As such, adequate laws will ensure the wide range of options for remedies and reparations, instead of simply dictating compensation as an adequate standard. The obligation to recognize the range of reparations is not solely on the state, as businesses also have a responsibility to remedy impacts,[78] but this article is specifically addressing the obligations of the state. The state can transfer the burden of rehabilitation and restitution to the licensee in the legislation but a truly human rights-compliant act would require this broader range of potential reparations also be imputed to the state.

The Qara Zaghan Contract does not include any provision on remedies for loss of land. It provides in art. 29 that the MoM shall provide the land and rights of way necessary for the operation of the investor and grant exclusive rights to use such land; however, it does not specify the conditions for obtaining this land and remedying its potential impacts on the local communities.

Since the contract is governed by the Laws of Afghanistan, the 2010 Minerals Law can fill in the gaps where the contract fails to address an issue. The 2010 Minerals Law provides that land can be expropriated for mining activities in accordance with the law, but does not specifically refer to compensation.[79] Exploitation license holders are required to submit an Environmental Impact Assessment and an Environment Management Plan, which includes measures for resettlement or compensation of affected communities and issuance of financial bond by the holder to guarantee its

[77] Ibid.
[78] UNGPs, op.cit., Principles 28-29.
[79] The Minerals Law [Afghanistan], art. 65 (14 February 2010), *available at* http://mom.gov.af/Content/files/Minerals%20Law_Feb_14_2010.pdf.

obligations towards the affected communities.[80] Besides a reference to international best practice,[81] no specific guidelines are included in the mining regulations as to the conduct of resettlement. It is further provided, in art. 66, that the license holder shall compensate third parties for damage caused as a result of its activities. The procedure for and evaluation of compensation is laid out in arts. 91 and 92 of the Mining Regulations, which include compensation for damage to property, land, infrastructures, livestock and crops.

The contract itself need not include detailed provisions on how the remedies provided will be implemented, if these are already addressed in the national law. The contract can simply refer to the national law provisions. If the applicable national law does not have the appropriate provisions, like the Afghan Minerals Law, the contract should incorporate the international standards found in the documents such as the IFC Performance Standards, IBA's MMDA or the World Bank's standards on involuntary resettlement, In any case, the contract shall ensure that removal of communities from land is conducted in compliance with the internationally accepted standards.

5. Conclusion

While FIL instruments are both an expression and constraint on the sovereign interests, the state's ability to enact investment protections is in turn constrained by its human rights commitments. By embedding the UN Guiding Principles into FIL, states can begin to adapt a comprehensive and integrated approach to their responsibility to protect human rights against negative impacts caused by foreign investment. Investment contracts play an important role in providing privileges and guarantees to investors, but they can also have an important role to play in advancing human rights protection from impacts of business activities. This piece has examined the Qara Zaghan Contract as a case study to identify good practices and current weaknesses in states' approach to

[80] Ibid., at arts. 78, 79.
[81] Ibid., at art. 88.

human rights issues in their investment contracts. It is only a limited contribution to the effort of identifying best practices and more comprehensive research needs to occur.

As discussed in this Chapter, the Qara Zaghan Contract was tied to Afghanistan's 2010 Minerals Law, limiting the ability of the state to protect human rights on an on-going basis. That law did not require community consultation, did not adequately address the economic and social rights of affected communities, and relies heavily on resettlement rather than preferred forms of remedies for affected communities. Since the contract, Afghanistan has adopted a new law, which appears to better take into account the needs of affected communities,[82] but as these developments will not help the individuals and communities affected by operations agreed to in the Qara Zaghan Contract, the case sits as a cautionary tale not just for Afghanistan but other states. If states are to meet their human rights obligations, their FIL must make clear the investors' obligations to respect human rights, provide adequate substantive and procedural remedies for affected individuals and communities, and allow the state to continually develop their human rights standards.

[82] *See*, *supra* 34 and 70.