MULTI-ACTOR CONTRACTS, COMPETING GOALS AND REGULATION OF FOREIGN INVESTMENT

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A. Introduction: The Multi-Actor (Investment) Contracts Opportunity

"The most important way we improve regulation, according to the responsive approach, is by conceiving of regulatory culture not as a rulebook but as a storybook and helping one another to get better at sharing instructive stories."[1]

The regulation of foreign direct investment (FDI) is addressed in both domestic and international law. Most of the regulation of FDI occurs in the domestic sphere while the international realm often dictates the scope of impacts that domestic regulatory initiatives may have on foreign investors. Customary international law and investment treaties recognize the ability of states to regulate foreign investment, but discriminatory regulation or regulation that violates international laws on investment protection is proscribed.[2] Interactions between domestic regulation and international protection of foreign investment are relevant to all countries. However, for Third World countries, there is the added question of whether and how foreign investment contributes to economic development.[3] As a result, the relationship between the regulation of foreign investment and economic development, particularly in the Third World context, is an oft-debated issue.[4]

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[1] John Braithwaite, "The Essence of Responsive Regulation" (2011) 44 UBC L Rev 475 at 520 [Braithwaite, "Essence"].

[2] See generally, Surya P Subedi, *International Investment Law: Reconciling Policy and Principle*, 2d ed (Portland, OR: Hart Publishing, 2012); Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (Oxford: Oxford University Press, 2013); Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context* (Leiden, Nethl: Martinus Nijhoff Publishers, 2013). On foreign investment regulation in Canada, see Russell Diegan, *Investing in Canada: The Pursuit and Regulation of Foreign Investment* (Scarborough: Thomson Profession, 1991); Navin Joneja, *Regulation of Foreign Investment in Canada – The Investment Canada Act: Law, Policy and Practice* (Toronto: Carswell, 2014).

[3] See Ibironke T Odumosu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World" (2007) 8:2 San Diego Int'l LJ 345.

[4] See Ha-Joon Chang, "Regulation of Foreign Investment in Historical Perspective" (2004) 16 Eur J of Devp Research 687; Ha-Joon Chang, *Kicking away the Ladder: Development Strategy in Historical Perspective* (London, UK: Anthem, 2002). Professor Chang's historical survey of the regulation of foreign investment suggests that countries move in the direction of further liberalization and non-discrimination in

Beyond the debates about the economic implications of foreign investment regulation, the relationship between foreign investment and other subjects that impact the public-interest generate significant discussion.[5] Presented here is an analysis of the regulation of the sometimes competing aims presented by foreign investors, governments, and local communities in the extractive industries. These aims sometimes overlap, depend on particular contexts, and are difficult to present in profit, economic growth and development, ecological sustainability, and social wellbeing categories. Rather, they ebb and flow; the goals fluctuate based on the particular situation, time, and place of the actors involved. The interests are not static; for example, local communities are not always concerned about environmental integrity. Environmental goals are more often the concern of local communities where pollution impacts the health of these communities, impedes their ability to farm, fish, or earn other livelihood, and generally creates communities that are uninhabitable.[6] Like other actors, some of these communities are also interested in the economic contributions of FDI. But their interests transcend this single focus. Therefore, the focus here on the often competing economic and environmental integrity goals generated by extractive industry projects is presented with an understanding that these goals are not static.[7]

Management of the risks generated from these competing areas is mainly addressed at the domestic level. Adopting insights from both proponents and critics of responsive regulation as well as scholarship on regulatory contracts, this article draws lessons from Canadian experience with regulation and contracts in extractive industries.[8] These Canadian contracts have different combinations of actors – state-investor, investor-local communities, and sometimes, state-local communities-investor. Ongoing study of these contract formations lend credence to the suggestion that contracts could reduce conflict and foster more amicable relationships between

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their foreign investment systems as an *outcome* of economic development and not necessarily as a *cause* of economic development.

[5] There have been analyses of the relationship between foreign investment and several areas relevant to the public interest. See for example, Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Abingdon, UK; New York: Routledge, 2013); Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (London; New York: Routledge, 2012).

[6] For a description of some of the relevant environmental challenges, see Rhuks Temitope Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (London, UK; New York: Routledge, 2013) [Ako, *Environmental Justice*].

[7] Scholars, governments and other policy makers have recognized the intersection between foreign investment and the environment. See generally, Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge: Cambridge University Press, 2012); Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge, UK; New York: Cambridge University Press, 2009).

[8] On responsive regulation, see generally, Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York; Oxford: Oxford University Press, 1992).

the actors involved in investment projects in extractive industries.[9] However, some of these contract formations are not particularly beneficial to local communities. Using regulatory examples from different parts of the world, including recent initiatives in resource-rich Nigeria, it is suggested here that a multi-actor approach to investment-related contracts in the extractive industries could have (quasi) regulatory implications for managing competing goals.

The proposed multi-actor approach developing through ongoing research on decision-making in the extractive industry advocates for the adoption of multi-actor (investment) agreements. These are contracts among foreign investors who are involved in project development, local communities that host or are impacted by particular investment projects, and the host Government(s).[10] This article is part of a series that investigates the potential contributions of a robust contract framework for addressing some of the challenges that the relationship between local communities, foreign investors, and governments present.[11] The multi-actor contract framework is imagined as a framework that only involves these three actors because these actors are immediately and often most directly impacted by the effects of foreign investment projects in the extractive industries. It is a tripartite framework that directly incorporates the interests and perspectives of these actors. However, the framework recognizes the need to regulate in the broader public interest, hence the involvement of the Government that sits at the negotiating table on the public's behalf.

Host governments have immense legal and regulatory capacity and power to determine the legal and economic structures of the projects, and indeed, of the entire jurisdiction that they govern. They also have the responsibility to ensure that the broader public interest is captured in whichever contractual and/or regulatory tools they adopt. Investors provide significant amounts of capital and expertise, and they physically implement projects in local communities. These investors are in constant, close contact with the host and impacted local communities. For their part, the local communities are inhabitants of the territories in which projects are implemented. Even though the entire country could potentially benefit from these projects, host and impacted communities directly bear the consequences of these projects, whether positive or negative. Their real property and other legal rights are implicated in

[9] See Ibironke T Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Agreement Framework" (on file with author) [Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework"].

[10] For a detailed discussion of the multi-actor agreements framework, see Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework", *ibid*.

[11] For a chronicle of the ongoing research, see Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework", *ibid*; Ibironke T Odumosu-Ayanu, "Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Laws and Industry-Community Agreements" (2012) 35 NC Centr L Rev 65; Ibironke T Odumosu-Ayanu, "Land, Niger Delta Peoples and Oil and Gas Decision-Making" (on file with author) [Odumosu-Ayanu, "Oil and Gas Decision-Making"].

engaging with investors and governments with regards to extractive industry projects. These communities have moral entitlements as well as economic interests that are directly impacted by extractive industry projects.[12]

The proposed multi-actor approach finds support in some contract approaches to regulation.[13] However, it transcends these existing perspectives. Rather than purport to be primarily a regulatory tool, it is argued here that multi-actor contracts could serve quasi-regulatory functions by providing support for regulatory initiatives. This support could, nevertheless, be determinative of the regulatory choices that governments make. The contracts would actively include affected communities that would act as parties having privity to ensure that both the government and investors fulfill their terms of the contracts. To the extent that these contracts include concrete obligations for the state and investors, they would serve a quasi-regulatory role.[14]

The present article does not fully articulate the scope, contributions and challenges of the multi-actor approach. The scope of the approach, the specific questions that need to be addressed and the need for further research have been explored in other work.[15] Here, the focus is on the (quasi) regulatory scope of the approach. There are several reasons that compel adoption of this contract approach which has potential quasi-regulatory capacities. Foreign investment law has typically focused on states and foreign investors without directing much specific attention to affected local communities. Local community interests are addressed in other areas such as environmental law and human rights law, which while important, may not necessarily address all of a community's concerns. Evidently, there is a need to question the emphasis placed on this state/investor-centric approach to foreign investment. In addition, states sometimes fail to adequately represent their constituents due to lack of capacity, lack of interest, and even conflict of interest in some cases. As a result, international law sometimes extends standing to non-state actors, including to investors in the international law on foreign investment and to individuals in human rights law.

Given the inherent limitations in states' regulation, direct local community participation has the potential to foster robust decision-making and enhance regulatory initiatives. Recognition of the contributions of local community participation partly accounts for the conclusion of Community Development

[12] Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework", *ibid*.

[13] See the discussion in part D of this article.

[14] Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework" *supra* note 9.

[15] For a detailed discussion of the challenges and questions for further research, see Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework", *ibid*.

Agreements (CDAs) between investors and local communities in many parts of the world, and the conclusion of agreements between Governments and local communities.[16] For example, the Government of British Columbia has concluded Economic and Community Development Agreements with some indigenous nations in the Province of British Columbia.[17] References here to CDAs and other existing contract forms do not necessarily suggest an endorsement of these agreement forms, their contents, or their processes. As discussed in Part D, they are only addressed here as examples of existing agreements that incorporate local communities. While many of the investor-local community CDAs and even the British Columbia Economic and Community Development Agreements are *mostly* revenue-related agreements, the proposed multi-actor agreements are conceived of as more robust agreements that could make some regulatory contributions, especially with regard to balancing competing regulatory goals.

Investment in the extractive industries typically involves competing goals. For example, the goal of obtaining economic benefit from foreign investment must be balanced with the goal of minimizing the negative environmental impacts of investment projects. As argued here, there is sometimes a focus on the economic benefits of projects to the detriment of other factors such as the (immediate) impacts of environmental degradation on local communities. More direct participation of local communities presents an opportunity to better understand the views and interests of these communities, to take these views and interests seriously in regulation, and also to provide direct recourse to dispute settlement mechanisms that may otherwise be unavailable.

While it is not envisaged that multi-actor contracts would only apply to foreign project proponents and not to their local counterparts, it is necessary to understand this approach within the context of foreign investment for at least two reasons. First, and especially for Third World countries, many investors in the extractive industries are foreign investors. Second, given the conflict that sometimes

[16] See Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework", *ibid*.

[17] See Economic and Community Development Agreement between Her Majesty the Queen in Right of British Columbia and Stk'emlúpsemc of the Secwepemc Nation, August 24, 2010; Economic and Community Development Agreement between Her Majesty the Queen in Right of British Columbia and the McLeod Lake Indian Band, August 25, 2010; Economic and Community Development Agreement between Her Majesty the Queen in Right of the Province of British Columbia and Nak'azdli First Nation, June 12, 2012; Economic and Community Development Agreement between Her Majesty the Queen in Right of the Province of British Columbia and the Ktunaxa Nation Council Society, January 29, 2013; Economic and Community Development Agreement between Lower Similkameen Indian Band & Upper Similkameen Indian Band and Her Majesty the Queen in Right of the Province of British Columbia, March 28, 2013; Economic and Community Development Agreement between Her Majesty the Queen in Right of the Province of British Columbia and William Lake Indian Band, March 6, 2013; Economic and Community Development Agreement between Her Majesty the Queen in Right of the Province of British Columbia and Soda Creek Indian Band, March 5, 2013; online: <http://www.newrelationship.gov.bc.ca/agreements_and_leg/economic.html> .

exists between the regulation of foreign investment and international investment law, it is necessary to consider the location of these proposed multi-actor contracts in the regulation of foreign investment. The negotiated multi-actor contracts may better position states within the investment protection mandate that international investment law places on them. It is unlikely that quasi-regulatory initiatives included in these agreements could be deemed discriminatory under international investment law, as investors would participate in negotiations and work out terms from their perspective. Balancing investment protection with regulation in the public interest are sometimes competing goals that require carefully crafted solutions, some of which are located in the realm of negotiated contracts.

In response to the competing goals engendered by investment projects, it is necessary to include host and impacted local communities in the decision-making process. Such involvement would impact regulation and contribute to more robust regulatory decision-making and enforcement because regulators would be forced to consider competing goals that they may otherwise not adequately consider in the absence of the direct involvement of these communities. The quasi-regulatory contributions of the proposed multi-actor investment agreement regime is supported by literature on the participation of citizens in investment decision-making, and by alternative regulatory practices that incorporate local communities in regulatory decision-making. [18]

Part B analyzes the regulation of foreign investment within the context of international law. It focuses on the discipline that the international investment law regime places on foreign investment regulation and the potential contributions of a multi-actor contract approach to investment relationships. Part C draws examples from Nigeria's recent regulatory responses to economic and environmental goals. The Nigerian experience illustrates that its government is more apt to respond to financial challenges than it is to respond to long-standing environmental concerns that have significant and even immediate impacts on the communities that either host or are impacted by the exploitation of oil and gas. Part D presents a detailed analysis of contract and tripartite approaches to regulation, drawing support from the literature for a local community-involved foreign investment regime in the extractive industries. It also analyzes the potential challenges of a multi-actor contract approach, concluding that its potential contributions outweigh the challenges if properly managed. In concluding the article, part E outlines the potential contributions of the multi-actor approach to foreign investment regulation and the management of competing goals.

[18] On public participation in extractive industries, see generally, Donald M. Zillman, Alastair Lucas & George (Rock) Pring, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002).

B. Foreign Investment Regulation and the International Law on Foreign Investment

A strong economy is essential for the wellbeing of countries and citizens in a globalized 21st century. To the extent that FDI contributes to economic growth and development, governments focus significant attention on the promotion of these investments.[19] As much as possible, governments seek to stay in a position of economic significance. The African Development Bank notes that in 2009, 27 million people were added to the ranks of poor people in Africa.[20] The global financial crisis of 2008-9[21] has been identified as a major cause of the rise in the number of poor people in Africa leading to a socio-economic crisis for some. Even though the number of affected people are discussed based on general averages, the stories and impacts are local. Regulatory responses must also be specific and local.

For over two decades African countries have turned to FDI to provide foreign capital for economic growth.[22] These countries attract FDI by providing generous assurances, protective measures, and incentives to foreign investors in order to encourage the investors to invest in their countries. The race to attract foreign investment is not often accompanied by dedicated regulatory initiatives to ensure that the benefits of foreign investment are well-harnessed and that non-beneficial impacts of foreign investment are kept to a minimum. Reductions in foreign investment mean that the competition to attract investors and much-needed foreign capital intensifies; policies to prioritize the economy above other concerns become common place. Meanwhile, foreign investment regulation involves a

[19] For the debate on the relationship between foreign investment flows and economic growth, see generally, Xiaoying Li & Xiaming Liu, "Foreign Direct Investment and Economic Growth: An Increasingly Endogenous Relationship" (2004) 33 World Dev 393; Marta Bengoa & Blanca Sanchez-Robles, "Foreign Direct Investment, Economic Freedom and Growth: New Evidence from Latin America" (2003) 19 Eur J Pol Economy 529; Magnus Blomstrom, Robert Lipsey & Mario Zejan, "Is Fixed Investment the Key to Economic Growth?" (1996) 111 QJ Econ. 269; J. Benson Durham, "Absorptive Capacity and the Effects of Foreign Direct Investment and Equity Foreign Portfolio Investment on Economic Growth" (2004) 48 Eur Econ Rev 285. See also Theodore H. Moran, Edward M. Graham & Magnus Blostrom eds, *Does Foreign Direct Investment Promote Development* (Washington, D.C.: Institute for International Economics, 2005); Yingqi Annie Wei & VN Balasubramanyam eds, *Foreign Direct Investment: Six Country Case Studies* (Cheltenham, UK; Northampton, Massachusetts: Edward Elgar, 2004).

[20] African Development Bank Group, "Africa and the Global Economic Crisis: Strategies for Preserving the Foundations of Long Term Growth" (Working Paper No, 98, July 2009), online: African Development Bank Group <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/WORKING%2098.pdf > at 9.

[21] The dates of the recent global financial crisis could vary depending on when one thinks it commenced – 2007 or 2008 – and also whether everyone would agree that the crisis has come to an end. As a result, in referring to post-crisis responses in this article, I recognize that it is arguable that the crisis is ongoing in some places and has not become an occurrence of the past.

[22] See generally, Ibironke T Odumosu-Ayanu, "South-South Investment Treaties, Transnational Capital and African Peoples" (2013) 21 Afr J Int'l& Comp L 172 [Odumosu-Ayanu, "South-South Investment Treaties"].

complex network of regulatory frameworks.[23] International and domestic regulatory regimes co-exist, and the approaches to regulation range from liberal to regulatory state approaches. Domestic regulation is greatly influenced by international rules that favour liberalization and minimal state intervention. Yet competing economic, social, and environmental issues also inform domestic regulation. Sound regulatory practices are required to reconcile concerns of competing jurisdictions and approaches.

Regulation of foreign investment presents both opportunities and risks, particularly for African countries that seek to foster their economic positions. First, there is the risk that overregulation of foreign investment, in order to address concerns such as environmental sustainability, will discourage foreign investment. Second, there is a risk that adoption of regulation that breaches international commitments to foreign investors will attract sanctions from international arbitral tribunals which could bring the possibility of millions of dollars payable in damages. Third, there is a risk of under-regulation resulting in the failure to mitigate contributions to anthropogenic climate change and other environmental concerns.

International investment law disciplines and could sometimes restrain domestic government regulation of foreign investment despite the argument that "'[g]ood' regulation is back in fashion."[24] As Professor Haines notes, literature on regulation has oscillated between governance/instrumental approaches to regulation, deregulation, and emphasis on a strong role for the regulatory state and the law.[25] However since "the 2008-9 economic crisis the emphasis is once again on better regulation, not deregulation. Deregulation is a bad word. Getting rid of regulation without reconstructing better, more effective, regulation is part of the problem."[26] While deregulation may be a "bad word" in some parts of the world, it continues to have currency in parts of Africa. Authors argue that the quality of regulation could contribute to financial crises or the mitigation of crises' effects. Of course, regulation also has a significant impact on other socio-economic issues and environmental integrity. Jeffrey Friedman argues that the recent financial crisis was a result of

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[23] See Muthucumaraswamy Sornarajah, "Mutations of Neo-liberalism in International Investment Law" (2011) 3 Trade L & Dev 203.

[24] Fiona Haines, *The Paradox of Regulation: What Regulation can Achieve and what it Cannot* (Cheltenham, UK; Northampton MA, United States: Edward Elgar, 2011) 14 [Haines, *Paradox of Regulation*].

[25] *Ibid*. at 10-14.

[26] *Ibid*. at 14. A Better Regulation for Growth paper notes that "[d]eregulation and "regulatory relief" were the key principles of the 1980s, often coupled with privatization, based partly on the "small government" ideology, but more often on a growing body of applied microeconomics about the costs and benefits of regulation. This phase was a natural reaction to the rapid growth of regulation in an era when the market impacts of regulation were simply not recognized." Scott Jacobs and Peter Ladegaard for the Better Regulation for Growth Program, *Regulatory Governance in Developing Countries* (Washington, DC: International Finance Corporation, 2010) at 5.

regulations that constrain modern capitalism[27] while Joseph Stiglitz takes the view that those activities that went unrestrained by "good regulation" contributed to the financial crisis.[28] Yet others like Balleisen offer a nuanced view of the origin of the recent global financial crisis.[29]

Regardless of its cause(s), it is clear that the impacts of the recent global crisis were immediately visible. Governments' focus on the economy may be seen as the result of the immediate visibility of the results of economic downturns. At the beginning of the crisis, the United Nations Conference on Trade and Development (UNCTAD) reported that global FDI declined by more than 20 per cent in 2008 due to the global financial crisis.[30] Although Third World countries were not seriously affected at the initial stages of the crisis, all countries were urged to "resist the temptation of protectionism" and respond by creating favourable conditions for the recovery of FDI flows and economic growth.[31] As UNCTAD predicted, FDI inflows into Africa fell by 36 percent in 2009.[32] While recovery had started on a global level, the decline continued in Africa in 2010[33] and 2011.[34] The decline resounded in Nigeria and other African countries.

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[27] Jeffrey Friedman, "A Crisis of Politics, Not Economics: Complexity, Ignorance, and Policy Failure" (2009) 21 Critical Rev127, online: http://www.criticalreview.com/crf/pdfs/Friedman_intro21_23.pdf.

[28] Joseph Stiglitz, "The Anatomy of a Murder: Who Killed America's Economy?" (2009) 21 Critical Rev, online: <http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2009-1020-Stiglitz-article.pdf>. Professor Stiglitz notes that, "this is a crisis of our economic and political system. Each of the players was, to a large extent, doing what they thought they should do. The bankers were maximizing their incomes, given the rules of the game. The rules of the game said that they should use their political influence to get regulations and regulators that allowed them, and the corporations they headed, to walk away with as much money as they could."

[29] Edward Balleisen, "The Global Financial Crisis and Responsive Regulation: Some Avenues for Historical Inquiry" (2011) 44 UBC L Rev 557 at 563 expresses the view that regulatory failures offer only a partial account of the origin of the crisis.

[30] UNCTAD Investment Brief, Number 1, 2009, online: UNCTAD, <http://unctad.org/en/Docs/webdiaeia20095_en.pdf>.

[31] *Ibid*.

[32] United Nations: Office of the Special Adviser on Africa, FDI in Africa – Policy Brief No. 4, October 2010.

[33] UNCTAD Global Investment Trends Monitor, "Global and Regional FDI Trends in 2010" (No. 5, 17 January 2011) at 4 notes as follows: "Inflows to Africa, which peaked in 2008 driven by the resource boom, appear to continue the downward trend of the previous year. For the region as a whole, UNCTAD estimates show that FDI inflows fell by 14% to $50 billion in 2010, although there are significant regional variations. While the downward trends of inflows to North Africa appear to have stabilized, in sub-Saharan Africa, inflows to South Africa declined to barely a quarter of the 2009 level, contributing to the large fall of FDI inflows in the subregion."

[34] UNCTAD Global Investment Trends Monitor, "Global Flows of Foreign Direct Investment Exceeding Pre-Crisis Levels in 2011 Despite Turmoil in the Global Economy" (No. 8, 24 January 2012) at 1 notes that: "Africa, the region with the most least developed countries (LDCs), continued its decline in FDI inflows."

Even though economic downturns typically have immediate impacts compared to some environmental challenges whose impacts may linger for decades before becoming visible, initially, the global crisis did not have a significantly negative impact on African countries because their financial markets were not as integrated with global markets as were markets elsewhere. This held true in the case of Nigeria. Subsequent experience however demonstrated otherwise.[35] In Nigeria, foreign investors began to disinvest and repatriate capital and dividends, and external reserves were depleted.[36] The global crisis

> resulted in [a] decline in oil revenues leading to revenue attrition for all tiers of government; reduced capital inflows into the economy; depletion of external reserves; demand pressure in the foreign exchange market; substantial decline in stock market capitalization and share prices. The stock market lost about 70 per cent of its market value in 2008. The price collapse within the market resulted in massive wealth destruction, credit contraction, impairment of banks, assets liquidation and loss of confidence in the global financial markets.[37]

The crisis presented a situation that is difficult for regulators with limited capacity to deal with. Yet, as discussed in part C, the government quickly responded with regulatory initiatives. The same is not often the case where the impact is felt mostly by local communities in typically marginalized natural resource-rich territories.

With or without a financial or socio-economic crisis, the regulation of foreign investment, especially in Third World countries, is a much debated subject. Domestic regulation of foreign investment is closely linked with international rules on the regulation of these investments. International law generally recognizes the rights of states to regulate the activities of economic actors, including foreign investors, within their jurisdictions. This recognition is included in some investment treaties and other instruments.[38] This right, however, is not without limitations.

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[35] The Governor of the Central Bank of Nigeria expressed the view that: "Like other African countries, the Nigerian economy was initially perceived to have been isolated from the financial crisis. … However, the effects began to show by end-March 2008 with the crash in the capital market and some banks having expanded their businesses outside the shores of Nigeria, the contagion effect of the crisis hit the Nigerian economy." See Mallam Sanusi Lamido Sanusi, "The Impact of the Global Financial Crisis on the Nigeria Capital Market and the Reforms" (Delivered at the 7th Annual Pearl Awards and Public Lecture, Muson Centre, Onikan, Lagos, 27 May2011), online: Pearl Awards <http://pearlawardsng.com/uploads/downloads/the_impact_of_the_global_financial_crisis_on_the_nigerian_capital_market_and_the_reforms.pdf> at 6 [Sanusi, "Impact of the Global Financial Crisis on Nigeria"].

[36] *Ibid* at 6-7.

[37] *Ibid* at 8.

[38] See *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), art 2(a) (12 December 1974), UN GAOR, 29th Sess, Supp (No. 31) at 50, UN Doc A/3235.

There are at least two competing stories of the regulation of foreign investment on the international level. First, international law is reluctant to impose significant enforceable obligations on foreign investors. International law protects foreign investment, especially through thousands of bilateral investment treaties (BITs). The treaties focus *inter alia* on means of regulating and minimizing state intervention in the activities of foreign investors. Investor obligations are often included in voluntary codes, some of which are developed by the international community,[39] and corporate codes developed by investors themselves as forms of self-regulation. A nuanced view of the regulation of foreign investment suggests that there is some regulation of foreign investment in international law albeit mostly through non-binding instruments.[40]

Second, the regulation, or lack thereof, of foreign investment in international law has significant impacts on domestic regulation of these investments. International instruments, especially BITs, include significant protection for foreign investment. International investment law regulates state interventionism; hence some domestic regulation that impacts foreign investment may cause states to incur obligations to pay compensation for interference with foreign investment. Argentina, after its financial crisis of 2000 to 2002, is a case in point.[41] While the protection of foreign investment is a laudable goal, some have argued that the provisions of investment treaties may contribute to "regulatory chill".[42]

It is difficult to make sweeping comments about regulatory chill without a dedicated study of specific examples. Nevertheless, several standards included in investment treaties have the potential to impact domestic regulation. These include the expropriation standard, the fair and equitable treatment standard, umbrella clauses, national treatment clauses and the most favoured nation standard. The latter two standards, national treatment and most favoured nation treatment, will not be discussed further because they mostly require the same standard of treatment granted to domestic and other foreign investors respectively. The discussion here focuses on regulatory expropriation and umbrella clauses, as they are more likely to impact

[39] See United Nations Global Compact, online: United Nations <http://www.unglobalcompact.org/>; UNCTAD, Draft United Nations Code of Conduct on Transnational Corporations, online: <http://www.unctad.org/sections/dite/iia/docs/Compendium//en/13%20volume%201.pdf>; OECD, OECD Guidelines for Multinational Enterprises, online: <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

[40] Sol Picciotto, "Rights, Responsibilities and Regulation of International Business" (2003) 42 Colum J Transnt'l L 131.

[41] See for example, William W Burke-White & Andreas von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties" (2007-2008) 48 Va J Int'l L 307.

[42] See Alberto R Salazar, "NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law" (2010) 27 Ariz J Int'l & Comp L 31.

domestic regulation aimed at realizing the competing goals of economic development and ecological sustainability.[43]

Commentators recognize that while the regulatory expropriation standard is useful as a protection of the interests of foreign investors, "it can constrain the ability of host states to adopt and implement regulation in pursuit of sustainable development goals."[44] BITs typically include the regulatory expropriation standard. These investment treaties attempt to determine when a state may adopt regulatory expropriation measures – where the measure is for a public purpose, is non-discriminatory, and is subject to the payment of compensation.[45]

One of the major mechanisms that make investment treaties effective is international arbitration. Some may argue that the right to regulate should not be seriously constrained, if at all, because practice does not necessarily provide large-scale evidence of regulatory chill. For example, some African states have not had any actions initiated against them at forums such as the International Centre for Settlement of Investment Disputes (ICSID) while other African countries have only had to defend a few such cases.[46] In addition, Canada ratified the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (*ICSID Convention*)[47] on November 1, 2013 almost half a century after the Convention was opened for signature on March 18, 1965.[48] This is despite the fact that Canada has been a defendant in several investment disputes under the *North American Free Trade Agreement.*[49] The Canadian government's rationale for

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[43] For an introduction to regulatory expropriation, sometimes called creeping expropriation, indirect expropriation or measures tantamount to expropriation, see Suzy H Nikiema, "Best Practices: Indirect Expropriation" (International Institute for Sustainable Development: Best Practices Series, March 2012), online: www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf.

[44] Lorenzo Cotula, "The Regulatory Taking Doctrine" (International Institute for Environment and Development Sustainable Markets Investment Briefings: Briefing 3) 1, online: IIED <http://pubs.iied.org/pdfs/17014IIED.pdf >.

[45] See generally, Andrew Newcombe, "The Boundaries of Regulatory Expropriation in International Law" (2005) 20 ICSID Rev – FILJ 1; Justin R Marlles, "Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law" (2007) 16 J. Transntn'l Law & Policy 275.

[46] For a list of ICSID cases, see ICSID, "ICSID Cases", online: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home>.

[47] *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 18 March 1965, (1965) 5 ILM 532, entered into force on 14 October 1966.

[48] ICSID News Release, "Canada Ratifies the ICSID Convention" online: ICSID, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement138>.

[49] *North American Free Trade Agreement*, US-Can-Mex, 19 December 1992, (1993) 32 ILM 289. For a list of the investment cases filed against the Government of Canada under NAFTA, see Foreign Affairs,

ratifying the *ICSID Convention* is not inward looking; it does not focus on the impacts of regulating foreign investment within Canada. Rather it is outward looking; it focuses on the protection of Canadian investors abroad. The Minister of International Trade noted that the "government is committed to helping protect Canadian investments around the world."[50] As a result, "[r]atifying this investment treaty is an important step toward further ensuring predictability and stability for Canadian investors operating abroad."[51]

Notwithstanding the fact that countries like Canada are embracing the investment arbitration model, that approach is not uniform. Countries such as Ecuador, Bolivia and Venezuela have withdrawn from the *ICSID Convention*.[52] Others such as South Africa are rethinking their BIT regime.[53] Argentina is defending scores of investment disputes that have resulted from measures it adopted to balance competing goals during its socio-economic crisis at the turn of the century.[54] Generally, the possibility that actions may be initiated at all may be a significant consideration when adopting environmental or other regulation that could impact foreign investors.[55] This consideration is an even greater concern in the (post) global financial crisis era where states are actively courting foreign investment.[56] A state "might decide not to take action in the public interest if it fears that such measures may qualify as indirect expropriation and, as such, require the State to pay

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Trade and Development Canada, "Cases Filed Against the Government of Canada", online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>.

[50] Foreign Affairs, Trade and Development Canada, "Canada Ratifies Important International Treaty on Investment Disputes", online: <http://www.international.gc.ca/media/comm/news-communiques/2013/11/01a.aspx?lang=eng>.

[51] *Ibid*.

[52] Sergey Ripinsky, "Venezuela's Withdrawal from ICSID: What it Does and Does not Achieve", Investment Treaty News, April 13, 2013, online: <IISD http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>; UNCTAD, "Denunciation of the ICSID Convention and BITS: Impacts on Investor-State Claims", IIA Issues Note No. 2, December 2010, online: UNCTAD <unctad.org/en/docs/webdiaeia20106_en.pdf>.

[53] See Odumosu-Ayanu, "South-South Investment Treaties", *supra* note 22.

[54] See Ibironke T Odumosu-Ayanu, "International Investment Law and Disasters: Necessity, Peoples and the Burden of (Economic) Emergencies" in David Caron, Michael Kelly & Anastasia Telesetsky eds, *The International Law of Disaster Relief* (Cambridge University Press, 2014) 374 (forthcoming).

[55] On regulatory expropriation and environmental regulation, see Thomas Waelde & Abba Kolo, "Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law" (2001) 50 ICLQ 811.

[56] It has been noted that some African states that have adopted significant changes in the laws that affect the mining industries in their countries have started to "re-evaluate their policies" in the face of the global financial crisis. Peter Leon, "Creeping Expropriation of Mining Investments: An African Perspective" (2009) 27 JENRL 598 at 643-44.

substantial compensation."[57] Citizens of these states ultimately bear the burdens of insufficient regulation of the impacts of FDI.

States often defend cases that involve allegations of regulatory expropriation following environmental regulation.[58] In *Compania del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, the tribunal expressed the view that:

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference. Expropriatory measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[59]

However, it is incomplete to suggest that states are unable to adopt sound environmental regulation that stand the test of regulatory expropriation in international law.[60] Rather, situations where state regulation would be expropriatory are not clearly defined, and this remains the case where investment treaties affirm the rights of states to regulate (as regulatory expropriation does not prohibit regulation *per se*).[61] Such affirmation, however, has not prevented challenges to state regulation. Hence, there remains a potential that rules on regulatory expropriation could impact states' regulatory choices.

Like regulatory expropriation measures, umbrella clauses in investment treaties are important in the regulation of foreign investment. Umbrella clauses may grant investors the ability to initiate a breach of contract claim before an international

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[57] Nikiema, *supra* note 43 at 2.

[58] *Compania del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, (ICSID Case No ARB/96/1), (2000) 15 ICSID Rev-FILJ 169 [*Santa Elena*]; *Metalclad Corporation v United Mexican States* (ICSID Case No. ARB(AF)/97/1), (2002) 5 ICSID Rep. 209, also reported at (2001) 16 ICSID Rev FILJ 168, (2001) 40 ILM 36; *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, (ICSID Case No ARB(AF)/00/2) (2004) 19 ICSID Rev FILJ 158, (2004) 43 ILM 133.

[59] *Santa Elena*, *ibid* at 192.

[60] See *Methanex Corporation v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, (2005) 44 ILM 1345. For a critique of the regulatory expropriation aspect of this decision, see Marlles, *supra* note 45 at 291-92.

[61] Nikiema, *supra* note 43 at 21.

arbitral tribunal through the dispute settlement clauses in investment treaties.[62] These umbrella clauses are useful in a consideration of domestic regulation of competing goals because they could allow for the internationalization of contract disputes. Professor Crawford identifies four interpretations of applicable umbrella clauses – those that operate by virtue of "a shared intent of the parties that any breach of contract is a breach of the BIT", those that arise through contract breaches committed while exercising sovereign authority, those that "internationalise investment contracts", and the perspective that umbrella clauses do not convert contract claims to treaty claims but "may form the basis for a substantive treaty claim."[63] Essentially, contract claims could become internationalized through umbrella clauses.

Domestic contracts also come to the fore in regulation issues where states bind themselves through stabilization clauses that can freeze regulation at a particular time.[64] Through stabilization clauses, states commit to not changing the regulatory framework in a manner that could affect the financial stability of investment projects for a period of time and also to paying compensation to investors if they undertake such regulatory changes.[65]

Waelde and Kolo express the view that investors are not concerned with environmental regulation as such.[66] The concern rather is with unexpected changes that do not conform to the investor's calculation, or as arbitral tribunals put it, to legitimate expectation.[67] Regulatory regimes that exist prior to investment are incorporated as part of the risk assessment of a project's viability.[68] What investors really seek with investment protection, according to Waelde and Kolo, is *inter alia*, relative stability for a period of time.[69] In *Tenicas Medioambientales Tecmed, S.A. v United Mexican States* (*Tecmed v. Mexico*), the tribunal noted that:

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[62]; See James Crawford, Treaty and Contract in Investment Arbitration" (2008) 24 Arb Int'l 351; Anthony C Sinclair, "The Origins of the Umbrella Clause in the International Law of Investment Protection" (2004) 20 Arb Int'l 411; Jonathan B Potts, "Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization" (2011) 51 Va J Int'l L 1005.

[63] Crawford, *ibid* at 367-68.

[64] Sometimes, these stabilization clauses could be included in legislation. See for example, *Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Decree* No 39 of 1990 as amended by the *Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Decree* No 113 of 1993.

[65] See Lorenzo Cotula, "Foreign Investment Contracts" (International Institute for Environment and Development Sustainable Markets Investment Briefings: Briefing 4); Lorenzo Cotula, "Regulatory Takings, Stabilization Clauses and Sustainable Development" OECD Global Forum on International Investment (March 27-28, 2008).

[66] Waelde & Kolo, *supra* note 55 at 819.

[67] *Ibid*.

[68] *Ibid*.

[69] *Ibid*.

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle.[70]

Although, at the time of concluding contracts, states may be committed to stabilizing regulation over a period of time, such stabilization is often unfeasible following a crisis that requires a determinative response. If ever warranted, stabilization clauses restrain government regulation of competing goals for they assume that the protection of investment trumps other goals that may be pursued. Hence, in addition to the international regime on foreign investment, stabilization clauses in foreign investment contracts may also constrain the nature of state regulation and the extent to which such regulation may introduce changes to the current framework.

Situating the multi-actor contract framework within the international law on foreign investment therefore has some implications. First, the preceding discussion of investment regulation and international investment law suggests that international law does not prohibit regulation of foreign investment. It curtails interventions into investment activities that do not comply with international investment law. Such curtailing has potentially serious implications for domestic regulation and for local communities. Nevertheless, if investors participate in multi-actor contract initiatives that have quasi-regulatory impacts or purposes, it may be difficult for investors to maintain that these contracts violate investment protection measures under the international law on foreign investment.

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[70] *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, (ICSID Case No. ARB(AF)/00/2) (2004) 19 ICSID Rev FILJ 158; (2004) 43 ILM 133 at para 154.

Second, the discussion demonstrates that there is scope for entertaining contract disputes in an investment treaty-centric international investment law/arbitration regime. However, the existing contracts that have been the subject of investment arbitration are investor-state contracts that have typically been used to challenge domestic regulation. Where treaties permit counter-claims, a multi-actor contract may serve as a state's defence to an investment claim that challenges a regulatory initiative. So far, the prevalent types of contracts in the investment regime have focused on states and investors. In fact at the domestic level, contracts define the relationships between states and foreign investors, although in investment arbitration facilitated by institutions such as the ICSID, investment treaties are prevalent. A more robust approach to contracts, that incorporates investors, states, and local communities, may present the much needed regulatory space in an investment regime that heavily focuses on select actors to the exclusion of others.

In sum, while states may adopt domestic regulation of FDI, such regulation is disciplined by rules of international investment law. Multi-actor contracts may be situated within the international investment regime in a manner that challenges some of the propositions of this regime, especially its state-investor centric nature, without violating dictates of international investment law. Hence these contracts have the potential to reconcile the interests of the major actors to a larger extent than is currently the case, facilitate amicable relationships among them, manage competing goals, and serve quasi-regulatory purposes. In addition, and more importantly, they could facilitate new rules on international investment law that account for the interest and perspectives of local communities.

C. Regulatory Examples from Nigeria's Oil and Gas Industry

Nigeria is a 'natural' choice for this brief study of managing competing goals in foreign investment for two reasons. First, it receives a significant inflow of foreign investment compared to many other countries in sub-Saharan Africa. Second, it encourages the exploitation of natural resources and as a result, encounters significant environmental challenges. The environmental degradation in Nigeria's Niger Delta is almost legendary.[71] The African Commission on Human and Peoples' Rights referred to the pollution and environmental degradation in Ogoniland, part of the Niger Delta, as "humanly unacceptable" and described the situation in Ogoniland as "deplorable".[72] This does not, however, mean that there is no regulation of

[71] Some of the challenges that the Niger Delta communities face are outlined in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Communication 155/96) African Commission on Human and Peoples Rights, 27 October 2001, online: ACHPR <http://www.achpr.org/communications/decision/155.96/>.

[72] *Ibid* at para 67.

environmental pollution in Nigeria's oil and gas industry.[73] Instead, in managing competing goals, the economic benefits of foreign investment are the predominant focus. The regulatory examples discussed here are drawn from the immediate (post) financial crisis era. They demonstrate that while the financial crisis received immediate regulatory response, longstanding problems encountered by local communities have failed to receive such an immediate and clinical response. The examples show that sometimes the problem is not the lack of regulatory capacity but the calculations based on interests that powerful stakeholders deem more important.

Regulation of Nigeria's oil and gas industry, which is the predominant extractive industry in the country, relies mostly on what Barton et al refer to as the criminal law model of regulation.[74] About three decades ago, Barton et al advocated a contract approach to the regulation of pollution, contrasting the contract model with the criminal model. Thompson and Rueggeberg note that "[t]he idea that the law of contract might supplement or replace regulatory action under statutes and regulation arose out of a detailed study of the system of environmental regulation in Canada."[75] According to Thompson and Rueggeberg, "[i]n a 1980 study … it was shown that negotiations and bargaining are major elements of the current regulatory practices in Canada, as government and industry strive for consensus as to the effects of development projects and as to the technologies that should be used to make these effects as beneficial as possible."[76]

Barton et al's contract model is based on statutory authority[77] where the responsible government branch enters into enforceable contracts with industry actors for pollution control.[78] According to the authors, significant negotiation on a case by case basis already existed at the time of writing providing the impetus for an improvement to the prevailing criminal law model.[79] They advocated retaining the criminal law model for deliberate acts of pollution that were committed with impunity. For them, the contract model would work better with "process pollution" that is "pollution that is a normal by-product of a desirable human activity."[80] The

[73] See for example, Lawrence Atsegbua, Vincent Akpotaire & Folarin Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Lagos: Ababa Press, 2004).

[74] Barry J Barton, Robert T Franson & Andrew R Thompson, *A Contract Model for Pollution Contract* (Vancouver, Westwater Research Centre, 1984).

[75] Andrew R Thompson & Harriet I Rueggeberg, *Contracts in Environmental Management and Conservation in the North: Final Report* (Vancouver: Fraser Gifford, April 1986) at 1.

[76] *Ibid* at 1.

[77] Barton et al, *supra* note 74 at 35-36.

[78] Barton et al refer to "a contract made between the Waste Management Branch and the company as willing parties and forming the entire framework for the relationship between them." *Ibid* at 27.

[79] *Ibid* at 23.

[80] *Ibid* at 27.

review of the regulatory mechanisms adopted in Nigeria just before and after the global crisis of *circa* 2008 illustrates a focus on the criminal model. With the limited regulatory choices, where economic and other goals compete, the economic goals receive more immediate regulatory responses.

Since the onset of the recent global crisis, Nigeria's government has adopted immediate, reactionary regulatory measures. The responses in the financial sector have been mainly traditional coercive measures that generate public assurance that the government takes the situation seriously. The Central Bank of Nigeria replaced the Chief Executives of some banks injected capital into banks, and introduced a reform structure that will be integrated into the system over a ten year period.[81] The Asset Management Company of Nigeria was also created to provide liquidity and assist in capitalization of banks that the Central Bank had intervened in; a new Corporate Governance Code was drafted; and the International Financial Reporting Standards were adopted.[82]

For Nigeria's oil and gas industry, the government has not introduced many new regulatory mechanisms. This suggests that the regulatory status quo, which is not particularly favourable to local communities, is sufficient. There are several longstanding statutes on various aspects of the oil and gas industry which are not the focus of this discussion, as the focus here is on recently adopted or contemplated regulatory changes. Even though these longstanding statutes exist, they do not appear, or at least, the enforcement of these statutes does not appear to adequately address communities' concerns. The *Land Use Act*[83] and its impacts on peoples' land rights and environmental justice is an example.[84] Even though Nigeria has an *Environmental Impact Assessment Act*,[85] as Ako notes as recently as 2013, environmental impact assessments (EIA) are not effective for public participation because "the law is inadequate to ensure active public participation in the EIA process as the EIA Act sets a low threshold for project proponents to satisfy with regards to the dissemination of environmental information and local involvement in the decision-making process."[86] In addition, Ako adopts the view that the "major

[81] Sanusi, "Impact of the Global Financial Crisis on Nigeria", *supra* note 35 at 8-9. See also Sanusi Lamido Sanusi, "Global Financial Crisis Impact in Nigeria, Nigerian Financial Reforms and the Roles of the Multilateral Development Banks and IMF" (Submission to the House Financial Services Committee of the US Congress Hearing on the Global Financial Crisis, 16 November 2010), online: The Committee on Financial Services <http://financialservices.house.gov/Media/file/hearings/111/Sanusi111610.pdf>.

[82] Sanusi, "Impact of the Global Financial Crisis on Nigeria", *ibid* at 9-11.

[83] *Land Use Act*, Chapter 202, Laws of the Federation of Nigeria 1990.

[84] Rhuks T Ako, "Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice" (2009) 53 J Afr L 289.

[85] *Environmental Impact Assessment Act*, No 86 of 1992, Cap E12, Laws of the Federation of Nigeria 2004.

[86] Ako, *Environmental Justice*, *supra* note 6 at 32.

barrier to justice in environmental matters with relation to the oil industry is the legal framework regulating the oil industry."[87] The question therefore turns to recent mechanisms that the government has adopted to address some of these existing challenges. While some may argue that there are no significant changes to the oil and gas industry that warrant regulatory response, that position is inaccurate because there are several challenges in the industry, which versions of a Bill introduced in the federal legislature have sought to address.

The Petroleum Industry Bill (PIB) was introduced at the National Assembly (Nigeria's federal legislature) in 2007/2008 but it has yet to be passed.[88] The impetus for an Act that embarks on a substantial reform of the oil and gas industry in Nigeria is based on a Report submitted by the Oil and Gas Reform Implementation Committee which was established in 2000.[89] The Bill's long title outlines its purpose: to establish "a legal, fiscal and regulatory framework for the petroleum industry in Nigeria and for other related matters." The aim of the PIB is to consolidate the regulatory mechanisms related to Nigeria's petroleum industry. The Bill promises some novel regulatory structures for Nigeria's oil and gas industry but according to commentators, "Nigeria's long-awaited oil law, when it finally comes, looks likely to be a botched job that gives favourable tax terms to foreign oil firms while doing little to satisfy calls for transparency and reform of a corrupt and wasteful sector."[90] It is difficult to tell whether these changes to the Bill are coming on the heels of a (post) financial crisis dedication to courting foreign investment, or whether they are part of a negotiation or consultation process where investors' views are significantly accounted for. In the absence of enactment of the Bill, the rapidly-changing nature of its contents, and its wide purview, it suffices to note that the final contents of the Bill and its implementation will be a rich source of studies on regulatory effectiveness.

Unlike the PIB which has yet to be passed, it is noteworthy that the *Nigerian Oil and Gas Industry Content Development Act* (*Local Content Act*) was enacted in 2010 at a time when the Government was establishing other regulation to address the economic crisis. The Act, which was a subject of debate for many years

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[87] *Ibid*. at 38. At page 40, Ako notes that: "The legal framework regulating the oil industry is the major barrier to justice with provisions that define offences ambiguously and provide unnecessarily wide defences for polluters to avail themselves."

[88] The Petroleum Industry Bill 2012, online: Nigeria – National Assembly <www.nassnig.org/nass2/legislation.php?id=1530> ["PIB"].

[89] Dr Rilwanu Lukman, "Keynote Address by the Honourable Minister of Petroleum Resources on the Proposed Petroleum Industry Bill (PIB)" (Keynote Address delivered at Abuja, Nigeria 16 July 2009), online: Nigerian National Petroleum Corporation <http://www.nnpcgroup.com/Portals/0/pdf/SpeechByHonorableMinisterToIndustry.pdf>.

[90] Joe Brock, "Analysis: Nigeria Oil Bill Waters Down its Reforms", *Reuters Canada* (29 May 2012) online: Reuters <http://ca.reuters.com/article/topNews/idCABRE84S07220120529?sp=true>.

before its enactment, was introduced to increase local participation in the oil and gas industry. Enacting the Act at this time can be attributed to one of two reasons. First, the Act could have been enacted to balance the liberalized foreign investment regime with local participation in order to shield the country from external shock generated by a global crisis. Second, it is possible that the government decided to enact the Act at the time it did regardless of the existence of any global crisis in order to address an issue that the country had confronted for years. Regardless of the reasons, the timing of the *Local Content Act*, and its potential contribution to the regulation of the oil and gas industry, the Act demonstrates that the government is capable of adopting regulatory changes in the oil and gas sector. However, these changes are for the most part economically-focused.

Like many regulatory statutes in Nigeria, the *Local Content Act* created a regulatory agency – the Nigerian Content Development and Monitoring Board (NCDMB). The NCDMB is charged with implementing the provisions of the *Local Content Act*. The Act adopts a criminal law model of regulation. By section 68 of the *Local Content Act*, violation of the provisions of the Act is an offence punishable by a fine or cancellation of the project at issue upon conviction. However, the NCDMB has established guidelines that adopt more innovative approaches: providing for a multi-disciplinary compliance assurance taskforce [91] and a graduated sanction framework that distinguishes non-compliance based on its seriousness as well as allowing for notice of non-compliance, notice of demand for compliance, withholding approvals, denying participation in subsequent bids, and encouraging consultation, mediation, conciliation, expert determination, and arbitration. [92] The final step involves prosecution under section 68 of the *Local Content Act*. The regulatory mechanism created is one that encourages compliance and adopts a mostly non-confrontational stance in regulating firms that are interested in compliance. The impact of the substantial provisions of the Act regarding local content is, however, a different matter. It remains to be seen whether the NCDMB will follow through with this sophisticated compliance and enforcement framework.

For decades, Nigeria's regulation of gas flaring has also been an issue of major contention. [93] Gas flaring implicates issues directly related to investment and environmental integrity. The Government has recently returned to the issue of gas

[91] Nigerian Content Development and Monitoring Board, *Procedure for Establishment of a Compliance Assurance Taskforce*, online: NCDMB <http://www.ncdmb.gov.ng/images/downloads/guidelines/3rd-PARTY-MONITORING-TASK-FORCE-GUIDELINES.pdf>.

[92] Nigerian Content Development and Monitoring Board, *Proposed Sanctions for Non-Compliance with Provisions of the NOGCID Act*, online: NCDMB <http://www.ncdmb.gov.ng/images/downloads/guidelines/3rd-PARTY-MONITORING-TASK-FORCE-GUIDELINES-DRAFT-SANCTIONS.pdf>.

[93] See Ibironke T Odumosu, "Transferring Alberta's Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations" (2007) 44:4 Alb L Rev 863 [Odumosu, "Gas Flaring"].

flaring. On May 29, 2012, it was reported that the PIB, if passed by Nigeria's legislature, would mandate oil companies to stop the flaring of natural gas by the end of 2012.[94] The Bill was not passed before the end of 2012. The penalty for failing to end gas flaring is the payment of fines or in some cases of failing to lodge a gas flare report, three months imprisonment.[95] The payment of fines as a regulatory sanction for gas flaring has been in place for decades and has not addressed the problem of gas flaring in Nigeria. Perhaps, the government believes that the stiffer fines proposed, which are expected not to be less than the value of flared or vented natural gas, may provide some incentive for compliance. The Bill however, creates an exception to this framework. A licensee may flare gas with the permission of the Minister in special circumstances.[96] The strength of this framework may depend on how often the Minister decides to exercise this discretion. Apart from the proposed regulatory regime's fine structure, another potential impediment is the unrealistic nature of deadlines established for gas flaring, which is recognized by some environmental campaigners.[97] The regulatory approaches to be adopted by implementing the prohibition of gas flaring will also be an important study in regulatory governance.

Regarding a broader response to environmental challenges in recent times, the *National Climate Change Commission Bill* was introduced in 2008. The Bill has been stalled at the Committee Stage.[98] While there has been a significant amount of debate surrounding the PIB, not much is being said about the *National Climate Change Commission Bill.* In an economy dominated by an industry that significantly contributes to the emission of greenhouse gases, relying on traditional regulatory responses may be evidence of a naïve faith in the regulatory system. Perhaps, matters related to environmental regulation and matters that specifically impact local communities require a different form of oversight – significant involvement by local communities working within a multi-stakeholder approach.

The adoption of such multi-stakeholder approach might not be too far away on the horizon. In recent times, Nigeria's environmental regulators have experimented with a multi-stakeholder approach (although without much emphasis on local communities). A National Climate Change Research Support Group (a multi-disciplinary group of experts) was created to provide regular technical support

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[94] Ejiofor Alike, "Nigeria: PIB to Outlaw Gas Flaring by December", *This Day Newspaper* (29 May 2012).

[95] See PIB, *supra* note 88 at s 281.

[96] See PIB, *ibid* at s 277(2).

[97] Alike, *supra* note 94.

[98] See online: The National Assembly: <http://www.nassnig.org/nass2/billspro.php?search=climate+change&Submit=Search>.

to the Department of Climate Change at the Federal Ministry of Environment.[99] While this initiative is laudable, it must be noted that the group does not contribute to the enforcement of climate change regulation. Remarkably, the option of public participation recognized in Nigeria's National Policy on the Environment was implemented in at least one instance.[100] In 2009, the National Environmental Standards and Regulations Enforcement Agency and three other Government Agencies signed a Memorandum of Understanding (MoU) for a renewable two-year period with a Traders Association to address the dumping of electronic and electrical appliances. Of the 35-member Joint Task Force set up to implement the MoU, 20 members were from the Traders' Association. The Task Force was charged with a mandate that enables it to conduct inspections and surveillance, investigate, and recommend appropriate sanctions for offenders.[101]

Compared to the adoption of prompt financial regulatory responses particularly in banking when the global crisis occurred, major regulatory changes that could significantly alter Nigeria's foreign investment-dominated and somewhat crisis-prone oil and gas industry and potentially address competing goals, have not entered into force. However, there was at least one major change – the *Local Content Act* – and the regulatory approaches that the NCDMB proposed to adopt. The

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[99] Michael Simire, "Climate Change Response: Eggheads to the Rescue" *Africa Adaption Programme Newsletter* 4 (February 2012).

[100] The National Policy on the Environment (1998) s 6.6 notes as follows regarding public participation:

> In order to secure the involvement of the citizenry and assure its commitment to the principle of sustainable development, action will be undertaken to enlighten various levels of society on the essential linkages between environment and development. Action shall be taken to:
>
> a. ensure public input in the definition of environmental policy objectives;
>
> b. engage mass and folk media at all levels in the task of public enlightenment;
>
> c. review curricula at all levels of the educational system to promote the formal study of environmental concepts and sciences;
>
> d. boost environmental awareness and education through the involvement of indigenous social structures, voluntary associations and occupational organizations;
>
> e. secure public confidence in the administration of the environment, by demonstrating the resolve of government to enforce the environmental stewardship of government agencies and organs, corporate citizens and elite organizations;
>
> f. grant the citizenry access to environmental information and data thereby promoting the quality of environmental management and compliance monitoring;
>
> g. support the role of cognate NGOs, professional associations and other civic groups in activities designed to propagate environmental protection information, techniques and concepts.

[101] See "NESREA, CPC, SON Partner Alaba Traders on Sub-Standard Goods", online: National Environmental Standards and Regulations Enforcement Agency <http://www.nesrea.org/publicparticipation.php>.

NCDMB looks ready to implement some sophisticated regulatory approaches. These initiatives suggest that even though regulatory changes that have the potential to affect foreign investment and economic prosperity are slow, they are not impossible. Nevertheless, one has to agree that the *Local Content Act* is highly focused on the economy. Also, even though there have not been many recent changes to environmental regulation, some recent environmental regulations look ready for the participation of local communities. Essentially, the participation of local communities in regulatory initiatives is not completely foreign to Nigerian regulators. However, as the foregoing analysis demonstrates, regulation that competes with economic prosperity is not quickly adopted. Utilizing the public participation model recognized in the National Policy on the Environment through the adoption of enforceable, multi-actor contracts may be an impetus for adopting regulatory approaches that respond to the competing aims on either side of the scale.

D. Regulation, Contract and a Multi-Stakeholder Approach

i. Competing Goals and Regulatory Reform

Regulation, contracts, multi-stakeholder – these three words represent a perspective that may be viable for developing regulatory regimes that enhance the effective management of competing goals, especially where the regulatory initiatives impact foreign investment.[102] As discussed, the international foreign investment regime defines regulation that states may adopt mostly as regulation that fosters investment protection. To effectively manage competing goals in regulating foreign investment, contracts may be apposite. For the most part, existing private contracts are negotiated between investors and communities most likely to be affected by risks of investment projects.[103] These investor-local community contracts are mostly CDAs designed to provide funds and services for communities. Contracts between (regulated) firms and host communities are not particularly new. In natural resource projects, especially where there is an impact on the environment, foreign investors and local communities have been known to form environmental contracts that facilitate protection of the natural environment.[104]

These environmental contracts also include contracts between governments and investors. Many of these government-investor environmental contracts,

[102] Like most aspects of the economy, foreign investment generates some risk, for example, the risk of capital flight in the event that an economic crisis occurs. On the categorization of risk as ideal types – actuarial risk, socio-cultural and political risk – see Haines, *Paradox of Regulation*, *supra* note 24 especially at chapter 3.

[103] Natasha Affolder, "Rethinking Environmental Contracting" (2010) 21 J. Envtl L & Prac 155 [Affolder, "Environmental Contracting"]. See also Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework", *supra* note 9.

[104] Affolder, "Environmental Contracting", *ibid*.

particularly in European countries and the United States, are voluntary.[105] The utility of voluntary agreements in the environmental context and the limitations of that approach are not addressed here. Rather, enforceable investment-related agreements that also have regulatory or quasi-regulatory ramifications for the environment and other public interest-impacting areas are discussed here. The contribution of contracts to regulation is explored, recognizing that "[r]egulation is a complex social interaction".[106]

In a discussion of contracts as regulatory instruments, it is important to recall that another contract form – contracts between foreign investors and host countries – has been adopted for decades, especially in large infrastructure and natural resource projects.[107] African countries are familiar with these concession contracts but their potential as regulatory instruments has not been fully realized. The idea of the regulatory contract[108] as an "implicit" rather than a "formal legal" contract has been explored in literature.[109] Stern and Holder are critical of the explicit regulatory contract and they argue that it can only "solve the underlying problem" if it is "invulnerable to post-contractual opportunism".[110] To them, this requires "limits on sovereignty (e.g. extra-territorial appeals and enforcement) that governments are only willing to accept in extreme circumstances."[111] As a result, they argue that the "problem cannot be "solved"" but only "imperfectly managed."[112] Explicit contracts, for example, concession contracts, while useful as regulatory instruments, have been referred to as "seriously incomplete."[113] As such, Stern and Holder advocate for implicit regulatory contracts that have "an independent

[105] See generally, Kurt Deketelaere & Eric W Orts eds, *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (London, UK: Kluwer Law International, 2001).

[106] Carol Heimer, "Disarticulated Responsiveness: The Theory and Practice of Responsive Regulation in Multi-Layered Systems" (2011) 44 UBC L Rev 663.

[107] See Christopher T Curtis, "The Legal Security of Economic Development Agreements" (1988) 29 Harv Int'l LJ 317; Timothy B Hansen, "The Legal Effect Given Stabilization Clauses in Economic Development Agreements" (1988) 28 Va J Int'l L 1015; James N Hyde, "Economic Development Agreements" (1962) 105 Recueil des cours 271.

[108] On regulatory contracts, see generally J Gregory Sidak & Daniel F Spulber, "Deregulatory Takings and Breach of the Regulatory Contract" (1996) 7 NYU L Rev 851 (noting at 907 that: "The three components of the regulatory contract are entry controls, rate regulation, and utility service obligations."); Jody Freeman, "The Contracting State" (2000) 28 Fla St UL Rev 155.

[109] Jon Stern & Stuart Holder, "Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems: An Application to Infrastructure Industries in the Developing Countries of Asia" (1999) 8 Utilities Policy 33 at 39.

[110] *Ibid* at 38.

[111] *Ibid*.

[112] *Ibid*.

[113] *Ibid* at 39.

regulatory agency as the core mediating agency."[114] They note that "lodging concession contracts within a separate regulatory framework is a superior solution to trying to use them as a substitute for separate regulation."[115] The idea of the concession contract as a regulatory mechanism is therefore tempered by balancing its viability with the oversight of a regulatory agency.

Bakovic et al enunciate a "regulation by contract" perspective that is largely tariff-focused and exceeds the concession or licence agreement model.[116] Focusing on the privatization of electricity distribution, Bakovic et al advocate for a political contract, with the principles guiding the regulatory contract included in electricity laws of the country.[117] Regulation by contract insists on administration by an independent regulator but the contract "substantially limits the regulator's discretion".[118] For Bakovic et al, the "essence of regulation by contract is pre-specification, in one or more formal or explicit agreements, of the formulas that determine prices that a distribution company is allowed to charge for the electricity it sells."[119]

Here, a different view of the involvement of contracts in regulation is taken. The focus extends beyond tariff setting. Rather the focus is on peoples' agency in fostering a balanced allocation of risk between a focus on economic wellbeing and environmental cleanliness (and other social goals), which neither governments nor investors may be well placed to articulate in some circumstances. In this articulation of multi-actor contracts' quasi-regulatory functions, the contract envisaged is not a concession or other regulatory contract (as it is often perceived) between the government and the concessionaire. Rather it is a contract between the investor, the government as regulator, and the local communities impacted by investment activities, thereby giving the communities concrete, participatory rights to ensure a meaningful balance of competing goals. It provides some surveillance over the

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[114] *Ibid*.

[115] *Ibid*. They further note that: "Explicit contracts can provide a useful underpinning for the implicit regulatory understanding while avoiding the dangers of relying too heavily on an incomplete binding contract negotiated in circumstances of considerable uncertainty." *Ibid*. at 39.

[116] Tonci Bakovic, Bernard Tenenbaum & Fiona Woolf, "Regulation by Contract: A New Way to Privatize Electricity Distribution" (The World Bank Group: Energy and Mining Sector Board Discussion Paper 7, May 2003) online: <http://documents.worldbank.org/curated/en/2003/05/3057553/regulation-contract-new-way-privatize-electricity-distribution> [Bakovic et al, "Regulation by Contract"]. For a critique of the regulatory contract approach, see Tony Prosser, "Regulatory Contracts and Stakeholder Regulation" (2005) 76 Ann Public & Coop Econ 35. See also Rui Cunha Marques & Sanford Berg, "Revisiting the Strengths and Limitations of Regulatory Contracts in Infrastructure Industries" (2010) J Infrastruct Syst 334.

[117] Bakovic et al, "Regulation by Contract, *ibid* at 10.

[118] *Ibid* at 16.

[119] *Ibid* at 16.

actions of the investor and the government. This form of contract contributes to fulfilling the ideal of democratic governance. It also takes the regulatory aspect of contracting into account and does not advocate a choice between private contracts and public regulation. Rather, it straddles the public-private divide and the regulation-contract divide.

Although not necessarily advocating the use of contracts as regulation, Ayres and Braithwaite in crafting their responsive regulation approach note that it is important to include parties to be affected by a regulatory regime.[120] Haines puts it this way: "… there is a more explicit emphasis on the inclusion in a regulatory regime of those most affected by the *harm* rather than simply those who will be affected by the cost of the regulatory regime …. Under the notion of 'tripartism' the inclusion of community groups, consumers, nursing home residents, workers and unions are understood to have a key role to play in enhancing the integrity of any regulatory regime in raising standards."[121]

Tripartism as a method of regulation has been adopted in practice.[122] Professor Haines analyzes examples from Australia where local communities are formally included in dialogue and some decision-making regarding hazardous industries.[123] She notes that including local communities in regulatory compliance

[120] See Ayres & Braithwaite, *supra* note 8. For a more recent statement on responsive regulation, see Braithwaite, "Essence", *supra* note 1. The UBC L Rev published an issue on responsive regulation in 2011. For an introduction to that issue, see Cristie Ford & Natasha Affolder, "Responsive Regulation in Context, Circa 2011" (2011) 44 UBC L Rev 463. Other authors have proposed going beyond responsive regulation. See e.g. Robert Baldwin & Julia Black, "Really Responsive Regulation" (2008) 71 Mod L Rev 59. Baldwin & Black note that "to be *really* responsive, regulators have to be responsive not only to the compliance performance of the regulated, but in five further ways: to the firms' own operating and cognitive frameworks (their 'attitudinal settings'); to the broader institutional environment of the regulatory regime; to the different logics of regulatory tools and strategies; to the regime's own performance; and finally to changes in each of these elements," at 61.

[121] Haines, *Paradox of Regulation*, supra note 24 at 19.

[122] Ayres & Braithwaite, *supra* note 8 at 56 describe tripartism as follows: "tripartism is a process in which relevant public interest groups (PIGs) become the fully fledged third player in the game. As a third player in the game, the PIG can directly punish the firm. PIGs can also do much to prevent capture and corruption by enforcing … a metanorm – a norm of punishing regulators who fail to punish noncompliance." (Endnotes omitted.) At pages 57-58, they also note: "Tripartism is defined as a regulatory policy that fosters the participation of PIGs in the regulatory process in three ways. First, it grants the PIG and all its members access to all the information that is available to the regulator. Second, it gives the PIG a seat at the negotiating table with the firm and the agency when deals are done. Third, the policy grants the PIG the same standing to sue or prosecute under the regulatory statute as the regulator. Tripartism means both unlocking to PIGs the smoke-filled rooms where the real business of regulation is transacted and allowing the PIG to operate as a private attorney general." (Endnote omitted.) See also, Ian Ayres & John Braithwaite, "Tripartism: Regulatory Capture and Empowerment" (1991) 16 Law & Soc Inq 435 (this article is based mostly on the authors' chapter on tripartism in *Responsive Regulation: Transcending the Deregulation Debate*, *supra* note 8).

[123] Fiona Haines, "Vanquishing the Enemy or Civilizing the Neighbour? Controlling the Risks from Hazardous Industries" (2009) 18 Soc & Leg Stud 397 [Haines, "Vanquishing the Enemy"].

has "broad appeal".[124] To her, this method has potential with regards to reducing environmental damage, to enhancing regulatory compliance, and is also "a democratizing shift" that "aligns neatly with a move away from a 'command and control' orientation of government".[125] This form of participation is not without other effects for as Haines notes, there is a potential for "friction" with "institutionalized procedures" that define levels of risk because communities' participation may "unsettle existing definitions of risk and hazard".[126] Haines' work also reveals that the level of community involvement differed from site to site suggesting that even if local communities are formally involved in regulatory processes, they might not always actively participate.[127] This suggests that communities are not intended to replace government regulation and oversight. Their involvement is to enhance compliance and accountability. Remarkably, instead of antagonizing projects, involving communities permitted communities to shift from "'vanquishing the enemy', that is, eliminating industry from what was a growing residential suburb, to 'civilizing the neighbour'."[128] People who previously formed part of the protest group were now members of a "community liaison committee".[129]

Tripartism is only one aspect of responsive regulation. Ayres and Braithwaite set out their idea of responsive regulation in their seminal book *inter alia* as follows:

> Responsive regulation is not a clearly defined program or a set of prescriptions concerning the best way to regulate. On the contrary, the best strategy is shown to depend on context, regulatory culture and history. Responsiveness is rather an attitude that enables the blossoming of a wide variety of regulatory approaches …
>
> Responsiveness, like interactiveness, is not one of those notions such that if two people know what responsiveness is, they will come up with the same solution for the responsive regulator to implement in a particular situation. An attitude of responsiveness does generate different policy ideas that do transcend the divide between regulatory and deregulatory solutions. But for the responsive regulator, there are no optimal or best regulatory solutions, just solutions that respond better than others to the

[124] *Ibid* at 398.

[125] *Ibid*. (references omitted). For a comprehensive discussion of the history of and "new generation" proposals for environmental regulation (especially in the United States), see Richard B Stewart, "A New Generation of Environmental Regulation?" (2001) 29 Capital UL R 21. There are several ideas on newer forms of regulation. See for example, Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge, UK: Cambridge University Press, 2002).

[126] Haines, "Vanquishing the Enemy", *supra* note 123 at 398.

[127] *Ibid* at 399.

[128] *Ibid* at 407.

[129] *Ibid*.

> plural configurations of support and opposition that exist at a particular moment in history.[130]

Responsive regulation has been severally debated[131] and critiqued.[132] For Ayres and Braithwaite, the ideas included in the responsive regulation model are not necessarily "universally applicable" for "responsiveness, after all, implies that there are no universal solutions."[133] As Braithwaite himself concedes, responsive regulation was developed in developed economies. So even though the responsive regulation approach acknowledges that there are no universal solutions, in developing regulatory frameworks, it is important to heed the warning that there are problems "associated with the strong tendency to transfer to Third World countries 'best practice' models of regulation rooted in the different economic, social and political conditions of developed countries."[134] In this regard, Braithwaite notes that the much debated idea of "responsive regulation"[135] that he developed with Ian Ayres "is an approach designed in developed economies" and "[m]ost of the critiques of it are also framed within the context of developed economies."[136] The success of tripartism, one of the component parts of responsive regulation, is also "culturally, institutionally, and historically contingent."[137] Multi-actor contracts, as a framework, are not envisioned as culturally or institutionally contingent. Rather, the contents of each contract may be context specific.

One of the differences between developed and Third World countries that Braithwaite takes on in his work considering the adoption of responsive regulation in Third World countries is that Third World countries work with the constraint of having less regulatory capacity compared to developed countries.[138] For Braithwaite, this challenge makes responsive regulation potentially apposite for Third World

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[130] Ayres & Braithwaite, *supra* note 8 at 5.

[131] See for example, the articles in (2011) 44 UBC L Rev.

[132] See for example, Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London; New York: Routledge, 2012), especially, chapter 7 titled: "The Integrated Theory of Regulation: A Critical Response to 'Responsive Regulation'". Highlighting aspects of responsive regulation like the "progressive enforcement pyramid" and "enforced self-regulation", Deva argues that (aspects of) responsive regulation is not well suited to the regulation of corporate human rights abuses, arguing instead for an "integrated theory of regulation."

[133] Ayres & Braithwaite, *supra* note 8 at 5.

[134] Martin Minogue &Ledivina Carino, "Introduction: Regulatory Governance in Developing Countries" in Martin Minogue & Ledivina Carino eds, *Regulatory Governance in Developing Countries* (Cheltenham, UK; Northampton, Mass: Edward Elgar, 2006) 3 at 6.

[135] Ayres & Braithwaite, *supra* note 8.

[136] John Braithwaite, "Responsive Regulation and Developing Economies" (2006) 34 World Dev884 [Braithwaite, "Developing Economies"].

[137] Ayres & Braithwaite, *supra* note 8 at 97.

[138] Braithwaite, "Developing Economies", *supra* note 136 at 884.

countries because it "mobilizes cheaper forms of social control than state command and control."[139] Hence the idea of "networked governance" appears to be one that is considered workable in Third World countries.[140] While networked governance appears attractive, commentators like Professor Affolder, in her discussion of the regulation of large projects, have cautioned against overstating the "degree of cooperation" among the relevant actors.[141] Even though networks are envisioned here more as the participation of governments (the regulator), investors (the regulated), and the affected communities (rather than non-governmental organizations (NGOs)), Professor Affolder's caution must not be taken lightly.[142] The argument here proceeds on the assumption that the danger of the failures of networks is reduced where instead of relying on NGOs to provide the external voice, the impacted communities are directly involved in contract processes. This does not however, suggest that divergences of opinion cannot exist between the regulator, the regulated, and the impacted communities.

The regulation of gas flaring in Nigeria provides a case in point. The government has set levels of acceptable gas flaring. Where these levels are exceeded, the industry actors in violation of the regulation are penalized with a fine.[143] Impacted communities disagree with the level of gas flaring and the regulatory response to exceeding these levels. As a result, an action[144] was initiated where it was argued *inter alia* that provisions of the *Associated Gas Re-Injection Act*[145] and

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[139] *Ibid*. Braithwaite notes that "[p]recisely because responsive regulation deals with the fact that no government has the capacity to enforce all laws, it is useful for thinking about regulation in developing countries with weak enforcement capabilities," at 888.

[140] *Ibid* at 890.

[141] Natasha Affolder, "Why Study Large Projects?: Environmental Regulation's Neglected Frontier" (2011) 44 UBC L Rev 521 at 531. She notes that "NGOs each have their own agendas in large project debates, and the single-issue focus of some of these groups may function to undermine the partnership potential of these networks ... ""constellations" of regulatory actors that appear as networks may not actually operate as networks. Their manifestation may reflect only an ephemeral convergence of interests. The points of disagreement between the state and the regulator and the non-state network partner may be so acute that the network functions to undermine the functioning of the regulatory pyramid rather than to enhance it." (Footnotes omitted.)

[142] For an aspect of governance that has been termed nodal governance, see Scott Burris, Peter Drahos & Clifford Shearing, "Nodal Governance" (2005) 30 Aust J Leg Phil 30 [Burris et al, "Nodal Governance"]; Peter Drahos, "Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach" (2004) 77 Temp L Rev 401. In "Nodal Governance" Burris et al reject the notion that governance is restricted to the state and its subdivisions. As the authors demonstrate, nodal governance, which is not always accountable, and which does not always provide positive spaces for all people, is "an elaboration of contemporary network theory that explains how a variety of actors operating within social systems interact along networks to govern the systems they inhabit." See Burris et al, "Nodal Governance" at 33.

[143] For a discussion of gas flaring in Nigeria, see Odumosu, "Gas Flaring", *supra* note 93.

[144] *Gbemre v Shell Petroleum Development Company Nigeria Ltd. & Ors.* (2005) AHRLR 151 (NgHC 2005) [*Gbemre*].

[145] Cap A25 Vol 1, Laws of the Federation of Nigeria 2004.

Associated Gas Re-Injection (Continued Flaring of Gas) Regulations are inconsistent with the right to life enshrined in the Nigerian Constitution and violate provisions of the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*.[146] This case involved the management of competing goals – attracting and retaining foreign investment, and maintaining human health and the ecological integrity of the environment.

There is a divergence of opinion between the regulator, the regulated, and the impacted communities on gas flaring issues, which the proposed PIB seeks to address by imposing significant fines for gas flaring. Investors argue that the production of Nigeria's oil involves the production of associated gas for which there are insufficient utilization outlets, hence the need for gas flaring.[147] In order to retain investment in oil and gas, the Government has not prohibited flaring. Rather it imposes fines for gas flaring that exceed specified levels. The local communities that are negatively impacted by gas flaring prefer to not have such activities continue. One of the options that local communities have is to file an action, which they did in *Gbemre v Shell Petroleum Development Company Nigeria Ltd. & Ors.*[148]

A healthy level of disagreement between government and community groups may help put the challenges of regulation in perspective. It may also position the so-called rationalism of government and the so-called utopianism of community groups such that their disagreements would allow for dialogue that fosters cooperation. A multi-actor contract could, for example, address proposed relocations of local communities from their land. Communities could decide whether and on what terms they will be relocated including compensation for such relocation. Rather than adopt a process where governments and industry decide peoples' relocation in arrangements to which communities are not privy, multi-actor contracts would facilitate local communities' participation at the negotiation stages, as well as at the dispute resolution stages if necessary. Such a contract would serve the purpose of accommodating competing goals. It would also add oversight by the local communities that are party to the contract, as they could insist that government should enforce the contract or regulations as prescribed under the contract. Having these communities at the negotiating table might enable all the actors to achieve greater balance amongst competing goals.

Networked governance also suggests a shift from the "regulatory state" to the "regulatory society".[149] Yet in the words of Ayres and Braithwaite, responsive

[146] Cap A9 Vol 1, Laws of the Federation of Nigeria 2004.

[147] See Odumosu, "Gas Flaring", *supra* note 93.

[148] *Gbemre*, *supra* note 144.

[149] Braithwaite, "Developing Economies", *supra* note 136 at 890.

regulation requires more than commitment from the state; it requires a strong state. Ayres and Braithwaite argue for "an interventionist state that redistributes power through enforcing participating rights for powerless groups and providing resources for them."[150] The state is a "social democratic state" that "actively redistributes both the wealth that enables market power and the participation rights that enable democratic power."[151] This is the point at which responsive regulation as couched by Ayres and Braithwaite hits an obstacle with commitments made under international foreign investment law. Interventionism and redistribution could easily offend the provisions of investment treaties to which states have committed themselves. However, where tripartism or variations of the notion is viewed as part of the democratic process, resistance from the forces of international investment law may be reduced. Indeed, international law itself may be changed. For, tripartism is "a route to a more participatory democracy, a more genuine democracy that does not make unrealistic demands of mass participation in all institutional arenas."[152]

Although it is not the primary goal of multi-actor contracts, adopting these tripartite contracts to manage competing goals could serve partly as a response to the limitations of government in regulation. It could specifically respond to government's regulatory limitations and fill gaps in realization that the government may be unable to do everything or may sometimes, for political or other reasons, be unwilling to do certain things. As Ayres and Braithwaite note, tripartism could be a response to regulatory capture,[153] which sometimes is a symptom of regulatory failure.

Yet, tripartism does not escape concerns of workability in practice. Cristie Ford expresses the following opinion:

> [I]njecting a meaningfully independent perspective into regulation, by way of tripartism, may be more challenging in practice than is sometimes realized. Regulators operate within a relatively narrow, insulated, and expertise-based band of human experience, characterized by relationships with sophisticated repeat players. In spite of their public-regarding mandate they may be cognitively predisposed against "outsiders" who either lack facility with the dominant jargon, or who take issue with assumptions that no one in the industry takes issue with. They are also

[150] Ayres & Braithwaite, *supra* note 8 at 18.

[151] *Ibid*.

[152] Ayres & Braithwaite, *supra* note 8 at 83. The authors continue, noting that they "do not envision a tripartism where most beneficiaries of regulation participate in PIGs, where most who do participate in PIGs will be interested enough to process the information made available to them, where the incumbency of PIG representatives is frequently contested … The vision of democracy is of extended periods of peaceful apathy punctuated by infrequent ringing of alarm bells occasioning gushes of grassroots participation, and even infrequent purges," at 84.

[153] Ayres & Braithwaite, *supra* note 8 at 54.

> more likely to share social, education, or experiential ties with industry actors than with others. Even well-informed activist shareholders may not receive the same measure of automatic regulatory respect. In short, it may be that a far greater push is required to force participation into regulatory conversations than is sometimes imagined by advocates and scholars of flexible regulation.[154]

The question remains though whether host and other communities impacted by extractive industries are "outsiders". While they may be outsiders to the regulatory process in situations where regulation only admits the regulator and the regulated, they are not outsiders to the impacts of the regulatory regime. In addition, the multi-actor approach does not substitute local communities for government regulators. Rather, it creates an enforceable oversight structure that could enhance regulation where the relevant contracts include regulatory or quasi-regulatory provisions. If standards are not complied with, communities could adopt dispute settlement procedures provided for under the contracts. But the question of the party who would bear the costs of such dispute settlement proceedings remains.

Examples of existing contractual models that could provide some guidance include Environmental agreements; and Impact and Benefits Agreements, the Global Memorandum of Understanding,[155] and other Community Development Agreements (CDAs).[156] Environmental agreements are particularly apposite for this discussion. Depending on how they are constructed, environmental agreements can vary in their composition of parties, their purposes, and their extent of legal and regulatory influence. In a survey of environmental agreements in the United States, Japan, and Germany, Rehbinder notes that some environmental agreements in Japan involve direct, formal participation from the local community.[157] Rehbinder's analysis of the reasons for concluding these environmental agreements is instructive. The reasons range from higher environmental standards on the parts of local governments and communities, to adjusting regulation to specific cases. For industry, these agreements are a "confidence-building strategy" to create relationships that can be leveraged in

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[154] Cristie Ford, "Macro- and Micro-Level Effects on Responsive Financial Regulation" (2011) 44 UBC L Rev 589 at 614-615.

[155] The Global Memorandum of Understanding (GMOU) is used in Nigeria. See Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework", *supra* note 9.

[156] Community Development Agreements (CDAs) are not mandated by law in all countries. For example, South African regulation does not mandate CDAs although there is a framework in place for addressing community development issues. See *Mining Community Development Agreements – Practical Experiences and Field Studies* (Washington DC: The World Bank, 2010) 20-21. Sections 116 &117 of the *Nigerian Minerals and Mining Act*, (Nigeria), No 20 of 2007 require the conclusion of CDAs.

[157] Eckard Rehbinder, "Ecological Contracts: Agreements between Polluters and Local Communities" in Gunther Teubner, Lindsay Farmer &Declan Murphy eds, *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (John Wiley & Sons Ltd., 1994) 147 at 152.

future disagreements that concern other matters.[158] Also for industry, these agreements are a form of corporate social responsibility.[159] In Japan, there is high "political acceptance" of these environmental agreements although the reasons vary for why each stakeholder adopts them.[160]

Environmental agreements concluded between industry actors and local communities exist in several countries.[161] Although the prevailing approach to environmental contracts has been the government regulator-industry model, scholars have noted the utility of engaging local communities. Without necessarily taking the leap to contracts that involve local communities, Orts and Deketelaere note that:

> [T]he emerging importance of local environmental contracting … suggests the need for vigorous development and involvement of local environmental and community organizations. … From an environmentalist perspective, this development may be positive in encouraging more people to become active in projects that encourage the appreciation of a sense of "place" within the natural environment. Moreover, some of the more intransigent kinds of environmental problems may demand a more local approach. Without local participation of community groups and local citizens, for example, it is difficult to see how problems such as nonpoint source water pollution can be addressed.[162]

Canada has adopted different formats of environmental agreements. Some Aboriginal communities are party to implementation protocols to main environmental agreements while others are party to the main agreements. The Ekati mine provides an implementation protocol example.[163] Aboriginal communities participated in negotiation of the environmental agreement for the Ekati mine.[164] However, they were not party to the eventual agreement concluded between the Government of Canada; the Government of the Northwest Territories, where the

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[158] *Ibid* at 153-154.

[159] *Ibid* at 154.

[160] *Ibid* at 155.

[161] As Affolder notes, environmental contracts may be concluded "between companies and regulators, companies and community groups, or companies and indigenous peoples." Affolder, "Environmental Contracting", *supra* note 103 at 156.

[162] Eric W Orts & Kurt Deketelaere, "Introduction: Environmental Contracts and Regulatory Innovation" in Deketelaere & Orts, *supra* note 105, at 33-34.

[163] See Canadian Institute of Resources Law, Independent Review of the BHP Diamond Mine Process (30 June 1997) 19-20, online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/bhp_1100100036029_eng.pdf>.

[164] Affolder, "Environmental Contracting", *supra* note 103 at 156.

Ekati mine is located; and BHP Diamonds Inc., the project proponent.[165] In later instances, Aboriginal communities in Canada have participated as parties to environmental agreements.[166] For example, local communities are party to the main environmental agreements in the De Beers Canada Mining Inc. Snap Lake Diamond Project's environmental agreement[167] and the Diavik Mine Project's environmental agreement.[168]

Even before the more recent Ekati, Snap Lake, and Diavik projects, there were examples of contract negotiations that involved local communities. Meinhard Doelle describes the circumstances surrounding the Dona Lake project, which led to series of agreements, some involving local communities, in the early 1990s.[169] Relying on Thompson and Reuggeberg,[170] Doelle identified *inter alia* the need for "a small number of parties with well-defined interests" in these contract negotiations.[171] He notes that the "process is perhaps best saved for instances where there is a special need for cooperation, where the parties are easily identifiable and limited in number, and where there is a reasonable expectation that agreement can be reached and that the process will not be used as a stalling tactic by any of the parties."[172] According to Doelle, the Dona Lake project was the first attempt to put Barton et al's[173] ideas into practice in Canada.[174] In the Dona Lake example, there was a main agreement that was concluded between Dome Exploration (Canada) Ltd. (now Placer Dome), the

[165] *Ibid*. See *Environmental Agreement dated as of January 6, 1997 between Her Majesty the Queen in Right of Canada and the Government of the Northwest Territories and BHP Diamonds Inc.*, online: Independent Environmental Monitoring Agency <http://www.monitoringagency.net/ResourceCentre/EnvironmentalAgreement/tabid/87/Default.aspx>.

[166] Affolder, "Environmental Contracting", *supra* note 103 at 169.

[167] *Environmental Agreement between Her Majesty the Queen in Right of Canada and the Government of the Northwest Territories and De Beers Canada Mining Inc. and Dogrib Treaty 11 Council and Lutsel K'E Dene Band and Yellowknives Dene First Nation and North Slave Métis Alliance* (2004), online: Snap Lake Environmental Monitoring Agency <http://www.slema.ca/wp-content/uploads/2011/02/De-Beers-Final-Environmental-Agreement-PDF1.pdf>.

[168] *Environmental Agreement between Her Majesty the Queen in Right of Canada and the Government of the Northwest Territories and Diavik Diamond Mines Inc. and Dogrib Treaty 11 Council and Lutsel K'E Dene Band and Yellowknives Dene First Nation and North Slave Métis Alliance and Kitikmeot Inuit Association* (8 March 2000), online: Environmental Monitoring Advisory Board <http://www.emab.ca/Portals/0/Documents/diavik_enviro_agree.pdf>.

[169] Meinhard Doelle, "Regulating the Environment by Mediation and Contract Negotiation: A Case Study of the Dona Lake Agreement" 2 J. Ent'l L & Prac 189.

[170] Thompson & Rueggeberg, *supra* note 75.

[171] Doelle, *supra* note 169 at 191.

[172] *Ibid* at 212.

[173] Barton et al, *supra* note 74.

[174] Doelle, *supra* note 169 at 193.

local communities, the Federal Government and the Government of Ontario, and other sub-agreements.[175]

Doelle identifies some of the challenges with these agreements including the absence of many of the communities' initial expectations, and "almost non-existent…legally significant commitments in the main agreement."[176] Writing many years later, Fidler and Hitch note that one of the agreements, between the Osnaburg Nation and Dome Exploration, later failed.[177] According to Fidler and Hitch, the "failure was correlated with the paternalistic approach the proponent took, with decision making solely in the hands of industry and little consultation with the Osnaburg Nation."[178] They contrast this, however, with more recent agreements, which in their view include provisions that better represent the position of local communities.[179]

Essentially, including local communities that are directly impacted in decision-making through enforceable contracts may not address all the challenges that the multiple actors face. The process must allow for robust interaction to take place in order to negotiate and incorporate the interests and perspectives of the relevant actors.

In addition to environmental agreements that include local communities as parties, CDAs typically involve local community participation. CDAs, which are not without significant limitations, are not quintessential regulatory instruments but they provide a platform for the extension of the investor-community contract model to the area of regulation.[180] The intention is not to suggest a community development contract perspective, but to show through references to these agreements that

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[175] *Ibid* at 197-198.

[176] *Ibid* at 198.

[177] Courtney Fidler & Michael Hitch, "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice" (2007) 35 Environments J49 at 61.

[178] *Ibid* at 62.

[179] *Ibid* at 60-61.

[180] Literature on Canadian Impact and Benefit Agreements, a type of CDAs, suggest that the focus of these instruments is mainly benefits provision including training, employment and business opportunities. They also demonstrate that industry-community agreements already exist. See Irene Sosa & Karyn Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada" (Canadian Environmental Law Association, 2001); Janet Keeping, "The Legal and Constitutional Basis for Benefits Agreements: A Summary" (1999-2000) 25 Northern Perspectives; Sandra Gogal, Richard Riegert & JoAnn Jamieson, "Aboriginal Impact and Benefit Agreements: Practical Considerations" (2005) 43 Alb L Rev 129; Ken J. Caine & Naomi Krogman, "Powerful or Just Plain Power-Full?: A Power Analysis of Impact and Benefits Agreements in Canada's North" (2010) 23 Organ & Environ 76.

investor-community agreements already exist in some areas. A Model Mine Development Agreement sponsored *inter alia* by the International Bar Association Section on Energy, Environment, Natural Resources and Infrastructure Law includes a clause that mandates CDAs.[181] One purpose of the CDA listed in the Model Mine Development Agreement is to "address environmental, social, and economic conditions during mining and after mine closure …".[182] Such clauses could be apposite for developing effective regulatory frameworks based on community involvement. Article 27.2 of the Model Agreement also provides a forum for the settlement of disputes.[183]

Contracts that involve local communities as active parties in aspects of decision-making concerning investment activities exist in various forms. These contracts are formed in recognition of the position that scholars have advanced on the need for participation from local communities in the extractive industries. Government policies and laws also support this view. Hence, there is a strong basis for advocating for a multi-actor contract perspective that incorporates actors who are directly relevant. What this perspective contributes that many of the existing contracts do not share is that all three relevant actors are directly involved as part of a single contract. In addition, unlike many regulatory contracts between investors and regulators, these contracts are meant to have enforceable provisions. Also, and importantly, they are not conceived as instruments that replace government regulation, for communities are likely to lack the expertise to regulate these complex competing goals. Rather, they serve as democratic modes of governance that have the potential to contribute to the effective management of competing goals and enhance regulation given that both the regulator and the regulated have entered into an enforceable contract with the beneficiary for *inter alia* the management of competing goals.

The multi-actor contract perspective has the potential to be particularly advantageous in unstable economic situations because it allows oversight at times when governments might choose to focus on economic stability to the exclusion of other important issues. It is based on the recognition of communities' agency; it partly responds to governments' regulatory challenges and failures; and, in the specific context of investment regulation, it addresses limitations in policy space generated through commitments made in international investment law. In addition, communities' involvement would foster monitoring and encourage reporting by

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[181] *Model Mine Development Agreement* (MMDA 1.0) 4 April 2011, online Model Mining Development Agreement Project: <http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf>.

[182] *Ibid* at Article 22.1(c).

[183] It states as follows: "A natural citizen of the State who has a claim or dispute regarding the Project may submit such claim or dispute for resolution under Applicable Law, or under an applicable customary law dispute resolution mechanism recognized under Applicable Law. The Company consents to the jurisdiction of local institutions for these purposes."

industry and regulatory agencies. Since communities are often in close proximity to natural resource projects, they are well placed to file reports of discrepancies with the regulator as well as monitor the effectiveness of the regulators and hold them accountable. And as Haines notes, instead of seeing investors as the "enemy" to be 'vanquished', local community-involved arrangements have the potential to create amicable relationships that have eluded many extractive industry projects.[184] Multi-actor contracts do not however preclude a situation where communities may refuse to contractually engage with industry actors who perpetrate egregious activities.

ii. Multi-Actor Contracts and Investment Regulation: Issues for Further Research

It has been argued severally that in order "to promote economic and social welfare" state regulation "needs to be both *effective* and *efficient*."[185] If regulation needs to be both effective and efficient, the question is whether multi-actor contracts are able to *contribute* to these goals. Regulation is not cheap. Effective regulation comes at a financial cost for governments and these costs take on a significant dimension when one considers the needs of some less economically-established countries.

The discussion here raises several issues with regards to the effectiveness and feasibility of involving local communities in decision-making on foreign investment projects through binding contracts. Further research will determine the specific contents of these contracts and their specific contributions to regulation. It suffices here to outline some of the issues for further research and preliminary responses to these issues.

First, involving citizens in direct participation raises the concern of placing burdens on citizens, for example, with regard to negotiating or enforcing contracts through judicial action where necessary. In such an instance, existing environmental and other similar agreements may provide some guidance on the level of responsibility placed on citizens and the responsiveness of communities to these responsibilities. The internal structures of each local community as well as the decision-making processes that these communities adopt are also critical issues that require dedicated attention. One cannot overemphasize the "considerable obstacles to

[184] Haines, "Vanquishing the Enemy", *supra* note 123.

[185] Colin Kirkpatrick & David Parker, "Regulatory Impact Assessment and Regulatory Governance in Developing Countries" (2004) 24 Pub Admin & Dev 333 at 334 (Emphasis in original). The authors continue: "Effective in the sense of achieving its planned goals and efficient in the sense of achieving these goals at least cost, in terms of government administration costs and the costs imposed on the economy in terms of complying with regulations."

effective participation" that local communities face.[186] Overcoming these obstacles in the context of the multi-actor contracts is a major issue for further research.

Second, some might express concern that the local communities do not have the expertise to regulate the day-to-day activities of business. The approach discussed here does not envisage local communities undertaking such a role. Regulators would retain their mandates and would continue to be charged with the ultimate responsibility of regulation. What multi-actor contracts add to regulation is to permit persons affected by regulation to serve as overseers of broad picture issues, for example, the adequate balancing of competing economic benefits and other environmental and social goals. This way, they serve to oversee both investors and government. While local communities may not have the expertise to regulate business or environmental issues, multi-actor contracts would give them the opportunity to demand that contract terms should be fulfilled. For example, local communities are well placed to spot gas flares, oil spills, dumping of toxic waste and so on. Where actions of this nature occur, they could respond appropriately based on the terms of their contracts.

Third, given the contractual nature of the arrangement, to what extent are parties allowed not only to breach contracts but to terminate contracts and bring an end to contractual relationships? Responses to this question may depend on the terms of the parties' contracts. The contracts may include terms that provide for termination, for example, for egregious and persistent breach of contract. However, even if the contracts are terminated, it does not suggest that regulation will come to an end. The legislative regime for regulation will continue unabated in this case.[187] The response may also depend on the domestic laws applicable to contracts in each jurisdiction. Under the common law applicable in Canada for example, parties to contracts may breach the terms of their agreements with consequences determined by the parties or by the judiciary.[188] A contract may also be terminated where the breach goes to the root of the contract and the party not in breach elects to disaffirm the contract.[189] The extent to which these general contract rules would affect contractual arrangements to facilitate the balancing of competing aims depends on the contents of the contracts as well as the laws of the relevant jurisdiction.

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[186] Marcus B Lane & Tony Corbett, "The Tyranny of Localism: Indigenous Participation in Community-based Environmental Management" (2005) 7 J Environ Pol Plan 141 at 155.

[187] Barton et al, *supra* note 74 at 28-29, 36 advocate retaining a permit system under statute to which parties may refer in cases where they are unable to reach a (voluntary) agreement. The permit system may also provide a system to which the parties may revert in cases where their contracts are terminated for persistent breach or other reasons.

[188] On contract termination in Common Law Canada, see generally, John D McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc, 2005); Bruce MacDougall, *Introduction to Contracts*, 2nd ed, (Toronto: Lexis Nexis Canada Inc, 2012).

[189] See McCamus, *ibid* at 641-43; MacDougall, *ibid*. at 137-19, 301.

Fourth, concerns about the rigidity of regulatory regimes do not necessarily affect the multi-actor contract framework. Concerns that these contracts may not be amenable to diverse regulatory scenarios is limited and almost non-existent. The very essence of a flexible approach to regulation is to adopt perspectives that work for any particular situation. This approach is amenable to balancing competing goals of different types. To the extent that some technical details or other circumstances not appropriate for this approach are confronted, the approach would not be adopted.

Fifth, concerns that contracts of this nature may not be in the wider public interest other than in the interest of the immediate stakeholders could also be raised. As noted earlier, it is necessary to continue to operate statutory schemes with innovative regulatory approaches separate from the multi-actor contracts. As a result, regulators remain under a mandate to appropriately consider the broader public interest. The multi-actor contracts would provide a layer of protection for communities impacted directly in a manner that the broader public is not. As discussed in other works that provide details of the multi-actor approach, there would be a requirement for contract registration with an institution that could ensure that the broader public continues to enjoy an adequate level of regulatory protection.[190]

Sixth, one of the potential challenges of incorporating local communities in contract negotiation is that these communities will negotiate with governments and industry actors that have sophisticated contract negotiation teams. Governments and industry actors have significant resources and expertise that they draw from in contract negotiation. Given that communities are not currently involved in many of these types of contract negotiation, they would not initially possess the same level of expertise as the other parties. Hence there is need for further research on how these communities may garner the necessary resources and expertise. Potential options include government funding for local communities to hire negotiating teams and the provision of resources for community mobilization and meetings to determine the views that diverse members of communities may hold. In addition, it is necessary to situate these contracts within an external framework, perhaps a regional organization or an independent domestic body that has the responsibility to ensure that negotiation is free and fair. Transparency in negotiation would also facilitate a free and fair process. It is also necessary to guard against the capture of local communities throughout the process and to appropriately navigate the sometimes inevitable cultural and other differences in order to better manage disagreements and foster amicable relationships. These are all issues that require further research.

Finally, and perhaps, most importantly, some communities may completely reject proposals for extraction of natural resources from their communities. Current legal responses depend on the status of local communities – indigenous or non-

[190] Odumosu-Ayanu, "Multi-Actor Investment Agreement Framework", *supra* note 9.

indigenous.[191] For indigenous communities, the *United Nations Declaration on the Rights of Indigenous Peoples* recognizes indigenous communities' rights to free, prior and informed consent (FPIC).[192] The extent to which the national governments of countries have adopted the FPIC principle varies from country to country.[193] Canada for the most part has only proceeded with recognition of the duty to consult.[194] Many African countries, for their part, resist recognizing some groups' claims of indigenous status.[195] Irrespective of state reluctance to fully embrace FPIC, the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has noted that "indigenous individuals and peoples have the right to oppose and actively express opposition to extractive projects…"[196] In addition, he notes that "[s]tates should not insist, or allow companies to insist, that indigenous peoples engage in consultations about proposed extractive projects to which they have clearly expressed opposition."[197]

A complete discussion of FPIC is beyond the scope of this article. Nevertheless, a brief response is apposite. There is no use for contracts in the face of complete local community opposition if at the very foundation of the contract structure lays the principle that all the parties should be able to express their views and have the other stakeholders fully consider those views. Where a community

[191] On indigenous people and international law, see generally, S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (Oxford; New York: Oxford University Press, 2004); James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich, 2008); Steven Curry, *Indigenous Sovereignty and the Democratic Project* (Aldershot, UK: Ashgate, 2004); James Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of what Rights Indigenous People have in Lands and Resources" (2005) 22 Ariz J Int'l & Comp L 7.

[192] Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295, 13 September 2007, states: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." Article 19 also states: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

[193] On FPIC, see generally, David Szablowski, "Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector?: Examining the Challenges of a Negotiated Model of Justice" (2010) 30 Can J Devp Stud 111.

[194] See generally, Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009).

[195] Odumosu-Ayanu, "Oil and Gas Decision-Making", *supra* note 11.

[196] James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples" (1 July 2013), UN General Assembly, A/HRC/24/41 at para 19.

[197] Anaya, *ibid* at para 25. Anaya continues: "The Declaration and various other international sources of authority, along with practical considerations, lead to a general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent," at para 27.

expresses fundamental disagreement with an extractive project, contract negotiation is not the answer. Multi-actor contracts may be conceived as agreements that incorporate the parties' views and interests where they at least agree that a project may proceed but need to negotiate the terms under which the project is executed. If the foundational legal framework for multi-actor contracts adopted in any given jurisdiction requires that multi-actor contracts must be concluded before an extractive project can be undertaken, the duty to consult communities which is recognized in some jurisdictions, is transformed to the right to consent before projects commence. The ramifications and impacts of the multi-actor contracts are ultimately context-specific.

E. Conclusion: Potential Contributions of the Multi-Actor Framework to Investment Regulation

Ultimately, this article adopts a modest and measured view of the potential contributions of multi-actor contracts as primary regulatory instruments. In essence, while they may serve regulatory roles, they are not conceived primarily as regulatory instruments. This view may evolve as further research is conducted on the subject and if there is any practice to explore the concrete contributions of the multi-actor contract mechanism. Nevertheless, some potential contributions of this approach to effective regulation of foreign investment and the management of competing goals are outlined below.

First, multi-actor contracts are viewed as primarily applicable in extractive industries and other tangible projects that have a close connection with host and impacted local communities. These industries have the potential to implicate multiple goals that have different impacts on different stakeholders. As discussed, there is a strong economic goal with foreign investment in the extractive industries as well as a major risk that these projects will have significant impacts on the environment and the lives of local communities. In order to achieve the gains of extractive industry projects, host communities are often displaced and sometimes not adequately compensated or relocated to comparable locations as promised.[198] A properly and carefully negotiated multi-actor contract would account for diverse interests and ensure that these communities have recourse under a contract framework that concretely recognizes their rights.

Second, actors tend to carefully protect issues that are important to them. In protecting their interests, they act as quasi-regulators on the actions of others. For example, even though we tend to think of governments as regulators of FDI, they often are also regulated to the extent that foreign investors hold governments

[198] See generally, UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (New York; Geneva: United Nations, 2007) 150.

accountable by insisting that they comply with a prescribed legal agenda. In cases where governments fail to effectively enforce regulation, or in order to achieve robust regulatory purposes, having directly involved stakeholders taking an active part in extractive industry decision-making through multi-actor contracts would prompt better regulatory initiatives and enforcement.

Third, multi-actor contracts could directly serve as regulatory instruments. This would depend on the context and contents of each contract. In addition, the clauses in such contracts would need to be situated within broader statutory frameworks for effective legal foundations. However, the relevant actors must exercise some caution. There is a need for research on whether and how multi-actor contracts can serve as regulatory instruments as some regulatory contracts between governments and industry already do. Some of these government-investor regulatory contracts have suffered from shortcomings, and some reservations include the voluntary nature of these regulatory contracts and the absence of concrete legislative background.[199] In order to conclude multi-actor contracts that serve directly as regulatory instruments, further research is necessary.

Recent events and developments often trigger the adoption of new regulatory responses and sometimes, new regulatory approaches. This article has examined the potential contributions of multi-actor contracts to the management of competing goals in foreign investment regulation. In order to arrive at more definite conclusions, there is a need for praxis on this subject. Barton et al[200] suggested the industry-government regulatory contract for Canada and it was tested in practice. As well, the multi-actor approach requires further academic research as well as practical study. In spite of the limitations that international law on foreign investment sometimes places on foreign investment regulation, there is a need to share "instructive stories" in order to improve regulation. The multi-actor contract framework is an example of an approach with the potential to generate "instructive stories" that can improve not only regulation but also foster more amicable relationships in the foreign investment regime.[201]

[199] See generally, Deketelaere & Orts, *supra* note 105.

[200] Barton et al, *supra* note 74.

[201] Braithwaite, "Essence", *supra* note 1 at 520.