

**Property rights, negotiating power  
and foreign investment:**

**An international and comparative law study  
on Africa**

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## Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
APIX	Agence Nationale Chargée de la Promotion de l'Investissement et des Grands Travaux, Senegal
BIT	Bilateral Investment Treaty
BTC	Baku-Tbilisi-Ceyhan pipeline
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CGCI	Cellule de Gestion du Code des Investissements, Cameroon
CNPI	Centre National de Promotion des Investissements, Mali
COFACE	Compagnie Française d'Assurance our le Commerce Extérieur, France
COTCO	Cameroon Oil Transportation Company, Cameroon
CPI	Centro de Promoção de Investimentos, Mozambique
DCF	Discounted Cash Flow
ECHR	European Convention on Human Rights
ECMG	External Compliance Monitoring Group, Chad-Cameroon oil development and pipeline project
EEPCI	Esso Exploration and Production Chad Inc.
EIB	European Investment Bank
EMP	Environmental Management Plan
EU	European Union
Eximbank	Export-Import Bank of the United States of America
FAO	Food and Agriculture Organization of the UN
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GOC compensation	Compensation paid by the government of Cameroon, Chad-Cameroon oil development and pipeline project
GTZ	Gesellschaft für Technische Zusammenarbeit
HGA	Host Government Agreement
IAG	International Advisory Group
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ICSID	International Convention for the Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
IGA	Inter-Governmental Agreement
IIED	International Institute for Environment and Development
ILO	International Labour Organisation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
SADC	Southern Africa Development Community
TIC	Tanzania Investment Centre, Tanzania
TOTCO	Tchad Oil Transportation Company
UDEAC	Union Douanière et Economique des Etats de l'Afrique Centrale
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WGI	Worldwide Governance Indicators

## **1. Introduction**

## 1.1. The issue

In many parts of Africa, economic liberalisation and growing global demand for energy and commodities are fostering foreign investment in natural resource projects. Over the past decade, several countries have witnessed sizeable increases in investment inflows, particularly in resource-based sectors like mining and petroleum.<sup>1</sup> The growing interest of Western and Asian investors has led some commentators to talk of a “scramble” for Africa’s natural resources.<sup>2</sup>

Property rights are crucial in shaping the outcomes of these processes.<sup>3</sup> “Secure” property rights are considered to be an important component of an enabling “investment climate”, which is in turn seen as key to promoting investment.<sup>4</sup> The allocation, protection and regulation of property rights influence the way the risks, costs and benefits of an investment are shared. They also affect the balance of negotiating power among different stakeholders involved in an investment project – from the investor to people affected by the project.

For investors, the protection of property rights is a fundamental tool to manage risk and shelter their business interests from arbitrary host state interference. By linking effort and reward, property rights protection reassures investors that they will be able to reap the benefits of their investment (World Bank, 2005:79).

These issues are particularly important in energy, natural resource and infrastructure projects, “where investment is long-term, capital intensive and highly dependent on the exercise of government’s regulatory powers” (Wälde and Kolo, 2001:819). In these cases, once the bulk of the investment is made, the investor is a

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<sup>1</sup> A more detailed analysis of trends in investment flows to Africa is provided in section 2.1.3.

<sup>2</sup> See Ghazvinian (2007:15).

<sup>3</sup> Property rights are broadly defined here as “legal relations among people with regard to control of valued resources” (Singer, 1996:71). As will be discussed below (section 2.2), the protection of property rights under international law covers a broader spectrum of rights than what is typically dealt with under the law of property in most jurisdictions.

<sup>4</sup> World Bank (2005:19, 79-84 and 92-94).

“hostage” of the host state. On the one hand, the financial viability of the investment project depends on the investor’s ability to capture projected cash flows. On the other, the investor is vulnerable to host government action that may undermine such financial viability or even expropriate the investment altogether (Wälde and Kolo, 2001:819).

To address this situation, legal arrangements have been developed to protect foreign investment not only from outright expropriation, but also from changes in the regulatory framework that significantly affect the investment - for instance, through the “regulatory taking” doctrine under international law and in several national jurisdictions.

The protection of property rights is also an important avenue to secure the livelihoods of people affected by an investment project. Indeed, large-scale investment projects may result in permanent or temporary land takings; in lesser forms of interference with local resource rights, for instance rights-of-way or restrictions on land use; or in environmental degradation such as the pollution of water or damage to property. More generally, increased investment flows to areas that were previously of marginal outside interest tend to exacerbate competition for land and natural resources. In contexts where people significantly depend on these resources, as is the case in much of rural Africa, loss of rights or damage to resources may have far-reaching implications for local livelihoods – implications that are differentiated along status, wealth, age, gender and other lines.

The extent to which local resource users enjoy legally protected rights influences their chances of not being arbitrarily deprived of the resources on which they depend, of preventing damage to their property, and of obtaining adequate compensation if deprivation or damage occurs. Therefore, an effective protection of property rights is instrumental to the realisation of internationally recognised human rights, such as the rights to property and to an adequate standard of living.



Tensions and trade-offs may arise between different sets of property rights – from those of the investor to local resource rights affected by the project. Host state regulation to strengthen local resource rights may raise costs for ongoing investment projects - for example, through tightening compensation standards for land takings, in contexts where compensation costs are borne, in whole or in part, by the investor; or through requiring that local resource users be consulted about the investment project, which may delay project implementation. If the higher costs resulting from the regulatory change affect the commercial viability of the project, host state regulation may constitute a regulatory taking under international law, and require the host state to compensate the investor. Even if the regulatory change does not amount to a taking, it may still require payment of compensation if it violates host state contractual commitments to regulatory stability (“stabilization clauses”).

Several overlapping bodies of law may shape the protection of property rights in any given investment project – from the national law of the host state to international law. Relevant international law includes the norms of investment and human rights law. While the human right to property may protect, to varying degrees, the property rights of both foreign investors and local resource users, international investment law only applies to foreign investment. National law may include constitutional norms on the right to property and relevant provisions of the law of property, of sectoral legislation on land and natural resources, and of investment codes. Transnational contracts between the investor and the host state may include commitments on the expropriation of the investor’s assets and on regulatory stability, and provisions governing land takings during project implementation.

There are vast literatures about the international protection of foreign investment, the human right to property, and national law on investment, land and natural

resources in Africa. However, these literatures have tended to evolve in a rather compartmentalised way, with little cross-fertilisation being generated between them. The professional profiles of researchers and practitioners working on each of these areas are also different. As a result, much fewer attempts have been made to look at property rights in an integrated way – for example, analysing how the different sets of property rights involved in an investment project are legally protected under applicable law, whether national, international or transnational.

This is what this study seeks to do. The study explores how relevant national and international law protects the property rights of different stakeholders involved in foreign investment projects in sub-Saharan Africa, and the tensions that may arise between these different sets of rights. The core research question is: do different sets of property rights tend to enjoy differentiated legal protection; and, if so, does the legal protection of “stronger” property rights constrain efforts to strengthen “weaker” ones? To put it more bluntly - does foreign investment tend to enjoy stronger legal protection than affected local resource rights; and, if so, does this make it more difficult for host states to strengthen local rights?

This research question touches a key aspect of the legal framework regulating the growing investment flows to sub-Saharan Africa. It has both theoretical and practical implications. An investment project constitutes an arena characterised by different and conflicting interests, by diverse and evolving balances of negotiating power, and by major power asymmetries between different interests. Balances of power and power asymmetries are shaped by social, economic and political factors. Legal claims may themselves influence negotiating power, through providing assets that stakeholders may rely on in their negotiations and mutual relations.

Weak legal protection and negotiating power make local resource users vulnerable to arbitrary dispossession of their lands. In contexts where alternative livelihood opportunities are limited, this may result in destitution for potentially large

numbers of people. On the other hand, identifying the shortcomings in existing legal protection for local resource rights can provide practical insights on the reforms needed to maximise local benefit from increased investment flows.

From a theoretical standpoint, understanding the way and extent to which the law protects different and possibly conflicting sets of property rights in contexts characterised by power asymmetries enables an assessment of the extent to which differentiation in legal protection reflects, reinforces or counters those asymmetries. This analysis can provide insights for the broader and longstanding debate on the relationship between law and power - in a globalised world, does the law serve more powerful interests, can it be used to empower disadvantaged groups, or is it rather irrelevant?<sup>5</sup>

## **1.2. Scope and focus**

Given the breadth of the research question, defining the scope and focus of the study is of particular importance. This involves setting geographic and thematic boundaries, and sharpening the focus within those.

### ***1.2.1. Geographic scope and focus: Sub-Saharan Africa, covered and focus countries, sample treaties***

Geographically, the study deals with sub-Saharan Africa. It does not cover North Africa, due to historical, economic and cultural differences between this region and the rest of Africa. South Africa is also outside the scope of the study, given its historical specificities and higher level of economic development. Relevant legal materials from geographical areas other than sub-Saharan Africa are discussed either in a comparative perspective, or where they relate to the interpretation of

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<sup>5</sup> The debate on law and power is discussed in less crude terms in section 2.3.

legal norms of universal application (e.g., under international human rights or investment law).

From a human rights law perspective, the interest of sub-Saharan Africa is linked to the differentiation of international protection across regional human rights systems. For example, while there is substantial literature on the right to property under the European human rights system, the protection of that right under the African Charter on Human and Peoples' Rights (ACHPR) has received less attention. From an investment law perspective, standards of protection for foreign investment have mainly been discussed at a global level or with a focus on Latin America (for instance, with regard to the "Calvo doctrine" debate),<sup>6</sup> while less attention has been paid to sub-Saharan Africa.

The international law analysis examines the law applicable to twelve African countries ("covered countries"): Burkina Faso, Cameroon, Chad, Ghana, Kenya, Mali, Mozambique, Namibia, Nigeria, Senegal, Tanzania and Uganda (see Figure 1.1). Without any claims of representativeness, these countries were selected to reflect the continent's diversity of geographical areas,<sup>7</sup> cultural contexts, legal traditions,<sup>8</sup> and historical and political trajectories.<sup>9</sup>

This analysis covers customary international law as it applies to Africa; the global and regional human rights treaties ratified by the twelve covered countries; and a sample of twelve bilateral investment treaties (BITs) concluded by the covered

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<sup>6</sup> For recent contributions on Latin America, see for instance Shan (2007) and García-Bolivar (2007).

<sup>7</sup> East, West, Central and Southern Africa.

<sup>8</sup> Due to the colonial heritage, legal traditions of European origin (civil and common law) influence constitutions, law of property and natural resource law in Africa – as will be discussed in section 4.1.1.

<sup>9</sup> Fundamental political choices about the economic system affect the way foreign investment and property rights issues are dealt with by national law. At independence, countries like Kenya chose a "capitalist" path to development, while countries like Mozambique and Tanzania opted for socialist models. To varying extents, a wave of economic liberalisation in the 1990s led to a decline of state-centred models in most of the covered countries.

countries (one per country). As the negotiation of investment treaties is usually based on “model BITs” prepared by capital-exporting states, efforts have been made to ensure diversity not only of covered African countries but also of their counterparts.<sup>10</sup>

The national law analysis identifies key trends in the covered countries, but focuses on a smaller set of countries (“focus countries”): Cameroon, Chad, Mali and Mozambique. While the protection of foreign investors’ property rights in these four countries has evolved along broadly comparable trajectories, the protection of local land rights differs considerably. Chad and Cameroon have not fundamentally reformed the legal protection of local land rights since the 1960s (Chad) and 70s (Cameroon), while Mali and Mozambique are part of a recent wave of law reforms to strengthen local land rights.

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10 The investment treaties in the sample are: Accord entre le Gouvernement du Burkina Faso, d’une part, et l’Union Economique Belgo-Luxembourgeoise d’autre part, concernant l’Encouragement et la Protection Réciproques des Investissements, 18 May 2001, into force 13 January 2004; Treaty between the United States of America and the Republic of Cameroon Concerning the Encouragement and Reciprocal Protection of Investment, 12 March 1986, into force 6 April 1989; Accord entre le Gouvernement de la République Italienne et le Gouvernement de la République du Tchad en vue de Protéger et Favoriser les Investissements de Capitaux, 11 June 1969, into force 11 June 1969; Agreement between the Government of the People’s Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments, 12 October 1989; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, 13 September 1999, into force 13 September 1999; Accord sur l’Encouragement et la Protection Réciproques des Investissements entre le Royaume des Pays-Bas et la République du Mali, 13 July 2003, into force 1 March 2005; Treaty between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment, 1 December 1998; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Namibia, 26 November 2002, into force 1 October 2004; Agreement between the Government of the Republic of Korea and the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investment, 2 November 1992, into force 1 February 1994; Accord entre le Gouvernement du Royaume-Uni de Grande Bretagne et d’Irlande du Nord et le Gouvernement de la République du Sénégal pour la Promotion et la Protection des Investissements, 7 May 1980, into force 9 February 1984; Treaty between the Federal Republic of Germany and the United Republic of Tanzania Concerning the Encouragement and Reciprocal Protection of Investments, 30 January 1965, into force 12 July 1968; Accord entre le Gouvernement de la République Française et le Gouvernement de la République de l’Ouganda sur l’Encouragement et la Protection Réciproques des Investissements, 12 July 2003, into force 20 December 2004.

Differences among the four countries can be mapped along a spectrum ranging from Chad to Mozambique, with Mali and Cameroon being somewhere in the middle. In Chad, local land rights enjoy very weak protection under old and unclear legislation. In Mozambique, on the other hand, land legislation adopted in the late 1990s with considerable civil society mobilisation provides innovative arrangements for protecting local land rights - including the “customary” rights through which much of the rural population gains access to land. In Mali, “customary” land rights are also protected, though not to the same extent as in Mozambique. In Cameroon, “customary” rights as such are not recognised, though the legislation does provide some protection for local land rights.

The focus countries are all mainly civil law based: Cameroon, Chad and Mali are influenced by the French legal tradition,<sup>11</sup> Mozambique by the Portuguese one. The focus on civil law countries facilitates the comparative analysis by avoiding complications stemming from the different ways of conceptualising property rights in the civil and common law traditions.

### *1.2.2. Thematic scope and focus: Foreign investment in extractive industries*

Thematically, the study deals with foreign investment projects in the natural resource sector, with a focus on extractive industry projects. Fisheries and genetic resources are outside the scope of the study.

From a legal point of view, differentiating between foreign and domestic investment makes sense because of the special regime that foreign investment enjoys under international law. Differently to domestic investment, foreign investment is regulated and protected by international investment law, including a large and growing number of investment treaties. In some countries, it is also regulated by

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<sup>11</sup> The common law tradition applies in the English-speaking areas of Cameroon.

specific rules under domestic law (e.g. under Namibia's Foreign Investment Act 1990, as amended in 1993).

Looking specifically at foreign investment is also motivated by socio-economic and policy factors. In recent years, many African states have made policy efforts to attract foreign investment, and several countries have experienced substantial increases in foreign investment flows and stocks – as mentioned above and further discussed below. A study on foreign investment is therefore of policy relevance. In addition, limits affecting the internal capital market, local technological capacity, human capital and other factors tend to entail a correlation between investment size and foreign participation in most sub-Saharan African countries – with complex, large-scale projects typically involving foreign investment. This brings in economic clout and negotiating power that tend to outweigh those enjoyed by domestic investors.

The focus on extractive industries reflects the importance of this sector as a share of foreign investment to sub-Saharan Africa. Most of the foreign investment to Africa goes in extracting industries, although some countries have recently witnessed surges in foreign investment in the service sector as a result of large-scale privatisation schemes (UNCTAD, 2008:7-8). The degree to which foreign investment concentrates on the primary sector in the covered countries varies considerably - for example, ranging from 78.6% for Nigeria to 19.1% for Tanzania UNCTAD (2008:9).<sup>12</sup>

In all the four focus countries, extractive industries constitute a principal sector for foreign investment. Since 2003, Chad has become a major recipient of foreign investment following the development of oil reserves in the South of the country (UNCTAD, 2008:8). Chad is now a significant oil producer by African standards, ranking seventh among sub-Saharan Africa's top oil producers (Yager et al, 2007:1.16).

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<sup>12</sup> Data for Nigeria refers to 2005, data for Tanzania to 2001.

Similarly, Mali has witnessed considerable increases in investment inflows since the 1990s, particularly in the mining sector, and has become Africa's third-largest producer of gold (UNCTAD, 2008:409). While gold mining accounts for a major share of Mali's exports, GDP and government revenues, its socio-environmental impacts, including with regard to land takings, have started to be documented in the literature (e.g. Jul-Larsen et al, 2006:29-32).

In 2006, the extractive industries accounted for 62.2% of Mozambique's foreign investment inflows (UNCTAD, 2008:9). Mozambique accounts for 32% of Africa's aluminium output (Yager et al, 2007:1.3), and the Mozal aluminium smelter, completed in 2000, is one of Africa's largest investment projects. Gas extraction is ongoing in parts of the country, and a pipeline completed in 2004 transports gas from the Pande and Tamane fields to South Africa.

Extractive industries also constitute an important area for foreign investment in Cameroon, which is one of sub-Saharan Africa's main oil producers (ranking eighth, though considerably behind other major producers, according to Yager et al, 2007:1.16). The construction of a 1070-Km oil pipeline, mainly in Cameroonian territory, to transport oil from the South of Chad to the Atlantic coast makes Cameroon a strategic transit country, generates revenue through transit fees, and was associated with considerable problems concerning land takings - which will be discussed below.

### *1.2.3. Drawing on experience from the Chad-Cameroon oil development and pipeline project*

To illustrate the issues discussed, this study draws on experience from a specific investment project - the Chad-Cameroon oil development and pipeline project. This project entails two components:



- The development of oil fields in the Doba region of Southern Chad (the “Field System”); and
- The construction and operation of a 1070-Km cross-border pipeline transporting oil extracted in Chad to the Cameroonian port of Kribi, on the Atlantic coast (the “Export System”; see Figure 1.2). Most of the pipeline runs on Cameroon soil. The pipeline is buried one metre underground.

The concession for the Doba fields was granted to a consortium of international oil companies in 1988. In the early 1990s, discussions on a possible pipeline began, leading to a feasibility study and, in 1998, to host government agreements between the consortium and the governments of Chad and Cameroon. Complex financing arrangements involved the participation of the World Bank through different arms – the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC) and the International Development Association (IDA). Construction began in 2000, and was completed one year ahead of schedule in 2003. The pipeline is to be operated for 25 years, with an automatic renewal for a second period of 25 years and with the possibility of further renewals on renegotiated terms.

The choice of this project is motivated by several considerations. With an estimated total project cost of US\$3.7 billion,<sup>13</sup> this was at the time of its inception the largest private-sector investment in Africa,<sup>14</sup> and still remains a particularly high-profile one. The involvement of the World Bank and non-governmental organisations (NGOs) affected the dynamics underpinning the design and implementation of the project, and make this project particularly interesting for understanding those dynamics. In terms of timeframes, the project is recent, and yet enough time has passed since the negotiation of the legal instruments and the end of the construction

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<sup>13</sup> Overall project costs were reported to have increased to US\$ 4.2 billion by the end of the construction works (Gary and Reisch, 2005:23).

<sup>14</sup> Pegg (2005:7); IAG (2005:1).

phase. This provides an opportunity to assess how property rights issues were dealt with, within the context of a project that is still ongoing.

In addition, most of the laws and treaties applicable to this project are publicly available. Some key project documents are also publicly available as a result of the involvement of the World Bank (for instance, the Environmental Management Plan, which also deals with land takings). E-mail and telephone exchanges with key informants enabled access to the missing legislation and, even more significantly, to the confidential project contracts – without which the legal analysis would have been problematic.<sup>15</sup>

In terms of literature, this is probably the best documented foreign investment project in Africa to date. The vast literature on the Chad-Cameroon project includes academic literature in social science fields and in law,<sup>16</sup> as well as “grey literature” produced by development and campaigning organisations. An independent International Advisory Group (IAG), established to advise the World Bank on the development issues raised by the project, has published regular reports that provide an impartial and credible source of information.

### **1.3. Research methods**

The study combines doctrinal and comparative legal analysis with a socio-legal approach. The legal analysis constitutes the core of the study - the research question identified in section 1.1 could be tackled through legal analysis alone. A socio-legal approach supplements the legal analysis, and relates it to an analysis of power relations in foreign investment projects.

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<sup>15</sup> Two project contracts were published in the official gazettes of Chad and Cameroon. For the full references of project contracts, see section 2.2.4 below.

<sup>16</sup> E.g. Leader (2006).

### *1.3.1. Doctrinal and comparative legal analysis*

The doctrinal analysis uses interpretive methods to examine relevant sources of law and construct the protection of different sets of property rights involved in investment projects in Africa – from the investor’s property rights to affected local resource rights.<sup>17</sup> As the core research question involves a comparison of the “strength” of legal protection available to different sets of rights, the doctrinal analysis assesses such strength, based on indicators relating to takings by the state.<sup>18</sup> It also explores whether legal devices to shelter foreign investment from regulatory change may constrain host state regulation to strengthen affected local resource rights.

Going beyond what Twining (2000:33-41) terms the “Country and Western” tradition of comparative law,<sup>19</sup> this study uses comparative legal analysis in order:

- To compare the protection of the right to property under the regional human rights systems of Africa, Europe and the Americas;
- To compare the protection of the right to property under international human rights law as it applies to Africa, to that of foreign investment under international investment law, as it applies to the covered African countries; and
- To compare the legal protection of property rights in the national jurisdictions of the four focus African countries, including both an “internal” comparison between foreign investment and local resource rights in each country, and an “external” comparison of the legal protection across the four countries.<sup>20</sup>

The legal analysis relies on both primary and secondary sources (legal instruments and academic literature, respectively). As the research question cuts across different

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<sup>17</sup> On legal method, see e.g. McLeod (2002).

<sup>18</sup> See section 2.2.3.

<sup>19</sup> Whereby comparisons typically involve norms from the national legal systems of Western countries.

<sup>20</sup> On comparative law methods, see Zweigert and Kötz (1998:32-47); Collins (1991); Dannemann (2006); and Reitz (1998). I also benefited from attending a PhD candidate course on the methodology of comparative law, held at the University of Utrecht on 9-11 January 2008.

bodies of law (from international human rights and investment law to various branches of national law), the spectrum of primary sources used is quite broad.

In line with the scope and focus of the study, primary international law sources include customary law, global and regional human rights treaties ratified by the covered countries (including the ACHPR and its protocols), and the sample of twelve investment treaties concluded by the covered countries.<sup>21</sup> They also include relevant case law, namely the case law developed under the African Charter and under the sample investment treaties. Cases under the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) are considered in a comparative perspective.<sup>22</sup> The case law of international investment arbitrations from outside Africa is included in the analysis insofar as it relates to aspects of customary international law of universal application, and/or to the interpretation of treaty standards that are formulated in a similar way to those featuring in the sample investment treaties.<sup>23</sup>

The comparative analysis of national law mainly draws on national constitutions, relevant legislation and, to a much lesser extent, case law. Frequent travelling to several of the covered countries<sup>24</sup> and conversations with lawyers from these countries helped me identify, access and better understand relevant law as well as implementation challenges.

As project contracts typically contain provisions on property rights, the legal analysis would be incomplete if it did not cover contractual arrangements. This

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<sup>21</sup> See section 1.2.1 above.

<sup>22</sup> Although the ECHR and the ACHR do not apply to Africa, it is not uncommon for the African Commission of Human and Peoples' Rights to refer to case law developed by the European and American Courts of Human Rights (e.g. in the ACHPR case *SERAC and CESR v. Nigeria*, para. 59).

<sup>23</sup> As investment treaty negotiations tend to be based on "model BITs" prepared by capital-exporting countries, different investment treaties involving the same capital exporting country may present significant textual similarities even if the other state parties are from different continents.

<sup>24</sup> Particularly Burkina Faso, Ghana, Kenya, Mali, Mozambique and Senegal.

study analyses relevant provisions of the contracts relating to the Chad-Cameroon oil development and pipeline project.<sup>25</sup>

### *1.3.2. A complementary socio-legal approach*

While the doctrinal and comparative legal analysis constitutes the core of this study, it is accompanied by a complementary socio-legal approach.<sup>26</sup> The socio-legal component mainly draws on data available in the social science literature. It also draws on a small number of semi-structured interviews and on e-mail exchanges. The purpose of the socio-legal component is twofold.

First, it complements the legal analysis with an understanding of the extent and ways in which legal norms are implemented. This understanding helps address this study's core research question in a way that better reflects the legal protection *actually enjoyed* by different sets of property rights.

For example, while the legal analysis shows that private land ownership is legally protected in Cameroon and Mali, data from the social science literature shows that very little land has actually been registered due to constraints in access to the registration process; that as a result private land ownership remains rare, especially in rural areas, because registration is a precondition for ownership in the two countries; and that access to registration is particularly difficult for local resource users, who therefore only tend to enjoy the lesser legal protection granted to land use (rather than ownership) rights.<sup>27</sup>

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<sup>25</sup> The analysis of contractual arrangements benefited from my participation in the course "Global Contract Risk Management for the Oil and Gas Industry", organised for petroleum industry staff by the business information company MarcusEvans (Barcelona, 21-22 April 2008).

<sup>26</sup> On socio-legal research methods, see Banakar and Travers (Eds) (2005); and McCrudden (2006).

<sup>27</sup> As discussed in chapter 4.

The second purpose of the socio-legal component is to relate the comparison of the legal protection of different sets of property rights to an analysis of power relations in investment projects - exploring whether asymmetries in legal protection reflect, reinforce and/or counter power asymmetries. This component is based on a stakeholder and power analysis, i.e. an analysis to identify the stakeholders involved in an investment project and the power relations among them. This analysis focuses on relations between investors, local resource users and host states,<sup>28</sup> and draws on experience from the Chad-Cameroon oil development and pipeline project.

While the literature (including, in some cases, media reports) is the main source for the stakeholder and power analysis, a small number of interviews and e-mail exchanges with key informants provided additional information and facilitated access to documentation that is not publicly available. Informants included consultants involved in the preparation and/or implementation of the Environmental Management Plan for the Chad-Cameroon project (which as discussed also deals with land takings) as well as researchers and NGO staff involved in advocacy on the project. The interviews were mainly carried out by phone, and took place between August 2007 and March 2008.<sup>29</sup>

#### **1.4. Outline**

The next chapter discusses the key concepts that frame the analysis - namely, foreign investment, property rights and negotiating power; it develops a conceptual framework for assessing and comparing the strength of the legal protection of property rights; and it undertakes a stakeholder and power analysis to assess the

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<sup>28</sup> Due to space constraints, relations *among* local resource users are only touched upon insofar as they affect relations between local resource users, host states and investors.

<sup>29</sup> I would like to thank the following people for the information, documentation and/or contacts they provided: Phil Burnham, Katherine Cochrane, Peter Frankental, George Koppert, Korinna Horta, Sheldon Leader, Géraud Magrin, Samuel Nguiffo, Nikki Reisch, Andrea Shemberg, Pandora Snethkamp.

balance of negotiating power in a foreign investment project, drawing on experience from the Chad-Cameroon oil development and pipeline project.

Chapters 3 and 4 address the “first leg” of the core research question of this study – comparing the legal protection of property rights for foreign investment and local resource users under national and international law. Chapter 3 compares legal protection across the regional human rights systems of Africa, Europe and the Americas; and under international human rights law, on the one hand, and international investment law, on the other. The chapter also relates this legal analysis to the stakeholder and power analysis undertaken in chapter 2.

Chapter 4 first identifies key trends in the protection of property rights under the national law of the twelve covered countries, with a focus on the four focus countries. It then undertakes an “internal” comparison of the legal protection for foreign investment and local resource rights in each of the focus countries, and an “external” comparison across the focus countries. Finally, the chapter discusses the tailored arrangements developed for the Chad-Cameroon project.

Building on the “static” comparisons undertaken in chapters 3 and 4, chapter 5 deals with the “second leg” of the research question tackled by this study – assessing whether the legal protection of foreign investment may constrain efforts to strengthen affected local resource rights.

The chapter first identifies possible ways of strengthening local resource rights. It then assesses whether legal devices to ensure regulatory stability for foreign investment may affect the ability of host states to adopt these measures – namely, under the regulatory taking doctrine and under stabilization clauses included in investment contracts (using the clauses developed for the Chad-Cameroon project as examples). Finally, the chapter explores practical options to reconcile providing regulatory stability with maintaining host state ability to strengthen local resource

rights, especially where this is required to comply with evolving international human rights law.

Finally, the conclusion (chapter 6) summarises the key findings of the legal analysis, relates them to the evolving power relations characterising foreign investment projects, outlines their practical implications and options for change in law and practice, and spells out some contributions to the broader debate on the relationship between law and power.



## **2. Setting the scene**

## 2.1. Foreign investment

### 2.1.1. *The notion of “investment”*

This chapter discusses the three key concepts underpinning this study - foreign investment, property rights, negotiating power – thereby setting the scene for the analysis undertaken in the following chapters.

Foreign investment is defined here following internationally recognised definitions of foreign direct investment (FDI).<sup>30</sup> According to UNCTAD, FDI refers to investment made to acquire “a lasting interest and control” in an enterprise operating outside the economy of the investor, and with a view to having “a significant degree of influence on the management of the enterprise” (UNCTAD, 2006:293). FDI is distinguished from other forms of international movements of capital, namely “portfolio” investment, which refers to short-term capital flows linked to the sale or purchase of financial instruments.

Investment treaties typically define “investment” very broadly - usually, through a very broad formula like “every kind of asset”, and a non-exhaustive list of examples (OECD, 2008:50). The list tends to include for instance movable and immovable property, interests in companies and intellectual property rights (OECD, 2008:50). In addition, investment treaties usually specifically include business concessions under public law, including concessions to search for, extract and exploit natural resources, and more generally contractual rights (OECD, 2008:50). The twelve African BITs included in the study sample follow this approach - with the only exception of the (rather old) Chad-Italy BIT 1969, which contains no definition of “investment”.<sup>31</sup>

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<sup>30</sup> On the relationship between the international law definition of “investment” and the notion of FDI, see Sacerdoti (1997:306-307).

<sup>31</sup> See for instance article 1(b) of the Cameroon-US BIT 1986, article 1(a) of the Senegal-UK BIT 1980, and article 1(a) of the Ghana-China BIT 1989; Table 3.2 provides a comprehensive review of the twelve sample treaties.

A few arbitral awards have also contributed to clarifying the definition of “investment” under international law. The landmark case is *Salini Costruttori S.p.A. v. Morocco*, which concerns a civil construction contract. The jurisdiction stage of the arbitral proceeding hinged upon the question of whether the dispute concerned an investment rather than a commercial transaction. Only an investment dispute would have justified jurisdiction under article 25 of the International Convention for the Settlement of Investment Disputes (ICSID). The arbitral tribunal developed a test (the “*Salini test*”) that has been referred to in subsequent case law.

The arbitral tribunal first established that the contract was an “investment” within the meaning of the bilateral investment treaty between Italy and Morocco, under which the dispute was brought.<sup>32</sup> It then discussed whether the contract was an “investment” under article 25 of the ICSID Convention. For this to happen, the tribunal held that four conditions must be met: contributions by the investor; a certain duration of performance of the contract; a participation in the risks of the transaction; and a contribution to the economic development of the host state. The last condition was included on the basis of the preamble of the ICSID Convention, which refers to the objective of promoting development. The tribunal pointed out that these various elements may be interdependent, and that their presence must be assessed globally.<sup>33</sup>

The *Salini* award suggests several considerations. First, “investment” tends to be defined very broadly under international law – an issue that will be further discussed below. Second, the specific definition depends on applicable treaties, and different treaties may feature different definitions of investment. As a result, a difference may exist between the definition of investment for substantive and jurisdictional purposes. In ICSID arbitrations like *Salini Costruttori v. Morocco*, the notion of investment for jurisdictional purposes features an element (the

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<sup>32</sup> Para. 49 of the award.

<sup>33</sup> Para. 52. The tribunal concluded that the 36-month contract at stake was indeed an investment under the ICSID Convention (para. 58).

contribution to the development of the host state) that is usually absent in the definition of investment under investment treaties (including both the Italy-Morocco BIT involved in *Salini*, and the definition of investment under eleven of the twelve sample investment treaties covered by this study<sup>34</sup>).

However, the more recent *Biwater v. Tanzania* arbitration rejected a rigid application of the *Salini* test that would unduly restrict the scope of ICSID compared to BITs,<sup>35</sup> and called for “a more flexible and pragmatic approach [...], which takes into account the factors identified in *Salini*, but along with all the circumstances of the case”.<sup>36</sup>

Extractive industry projects, such as projects involving the exploration, exploitation and development of mineral or petroleum resources, or the construction, operation and maintenance of petroleum pipelines, are likely to satisfy the requirements stemming from the definition of “investment” under relevant investment treaties.

### ***2.1.2. “Foreign” investment: Issues of nationality and control***

The term “foreign” also raises important legal issues. This is because investors usually operate through subsidiaries established under the law of the host state. Technically, these subsidiaries are nationals of the host state. This follows the approach adopted by the *Barcelona Traction* judgement. In this case, the International Court of Justice (ICJ) held that, as a matter of international law, the country of nationality for legal entities (and hence the country having standing for diplomatic protection) is that of incorporation and/or seat, rather than the country of which shareholders are nationals.<sup>37</sup> In this view, shareholders are not entitled to diplomatic

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<sup>34</sup> As mentioned above, the Chad-Italy BIT 1969 contains no explicit definition of investment.

<sup>35</sup> Paras. 312-314 of the award.

<sup>36</sup> Para. 316.

<sup>37</sup> Para. 70 of the judgment.

protection unless a treaty provides so or the claim concerns shareholders' "direct rights", distinct from those of the corporation (e.g. right to dividends).<sup>38</sup>

As foreign investors typically act through locally incorporated subsidiaries, the strict application of this rule would jeopardise the effectiveness of the international protection of foreign investment. This issue is usually tackled by investment treaties, which may explicitly include "shares" in the definition of investment.<sup>39</sup> Arbitral case law has also eroded the application of this rule. In *Azurix v. Argentine Republic (Decision on Jurisdiction)*, for example, the tribunal stressed that at stake was not diplomatic protection but the investor's right to access arbitration in order to protect "the rights of investors, including shareholders, as determined by [...] the BIT".<sup>40</sup>

The ICSID Convention does not clarify the criteria for determining nationality, although it is generally accepted that this is determined on the basis of the country of incorporation or seat (*siège social*).<sup>41</sup> But under article 25(2)(b) of the ICSID Convention, international arbitration against a state party may be available not only to companies incorporated in another contracting state, but also to legal persons incorporated in the host state but *controlled* by nationals of another contracting state, *provided* that the parties have agreed to this.<sup>42</sup>

Investment treaties may provide an avenue for the parties to agree to such an extension. Treaties usually set tests for determining whether the investment can be deemed to have been made by a national of a state party in the territory of the other

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<sup>38</sup> Ibid., paras 90 and 47, respectively. See also the *Ahmadou Sadio Diallo* case, where direct rights were found to be at stake (paras. 50-67).

<sup>39</sup> Sornarajah (2004:11). See e.g. Mozambique-US BIT 1998, article 1(d)(ii); and Namibia-Netherlands BIT 2002, article 1(a)(ii). On the other hand, article 1(a) of the Kenya-UK BIT 1999 is silent on this issue.

<sup>40</sup> Para. 72.

<sup>41</sup> See *Tokios Tokeles v. Ukraine*, para. 42.

<sup>42</sup> In the words of the Convention, "[a]ny juridical person which had the nationality of the contracting State party to the dispute in that date and which, *because of foreign control*, the parties have agreed should be treated as a national of another contracting State for the purposes of this Convention" (emphasis added).

state – a condition for the application of the treaty. The most commonly used tests include the place of incorporation or seat, but the country of control may also be used in combination with the former tests (OECD, 2008:19 and 24-28). In other words, bilateral investment treaties may explicitly state that their provisions apply to subsidiaries owned or controlled by nationals of the state parties.<sup>43</sup> Investor-state contracts may also contain provisions along these lines.<sup>44</sup>

In *American Manufacturing & Trading Inc. v. Republic of Zaire*, an ICSID tribunal enabled a US parent company to bring a dispute against the host state under the US-Zaire BIT on behalf of its 94%-controlled subsidiary incorporated in Zaire. The respondent state had contested the capacity of the parent company to bring a dispute on behalf of its subsidiary.<sup>45</sup> Based on the wording of the US-Zaire BIT, the tribunal rejected this claim. It found that the parties had agreed under the BIT to treat local subsidiaries controlled by nationals of the other state as foreign companies. The US parent company could act in its own name and bring a dispute relating to its subsidiary in the host state.<sup>46</sup>

“Control” for the purposes of defining foreign investment is usually determined on the basis of percentage of ownership or voting power (OECD, 2008:24). Other factors may also be considered, however. In *Vacuum Salt Products Ltd v. Ghana*, the arbitral tribunal clarified that no particular percentage of share ownership can be identified in abstract terms, and that a case-by-case assessment is needed – even a minority share may suffice in presence of other sources of control.<sup>47</sup> Similarly, in the NAFTA case *International Thunderbird Gaming Corporation v. Mexico*, the tribunal held: “Control can also be achieved by the power to effectively decide and

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<sup>43</sup> See for instance article 1(b)(iii) of the Namibia-Netherlands BIT 2002.

<sup>44</sup> See for instance article 36(2) of the Convention of Establishment between the Republic of Cameroon and the Cameroon Oil Transportation Company (COTCO), signed on 20 March 1998, and regulating the construction and operation of the Cameroonian segment of the Chad-Cameroon oil pipeline.

<sup>45</sup> Para. 4.05 of the award.

<sup>46</sup> Para. 5.15.

<sup>47</sup> Paras. 43-44.

implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know-how and authoritative reputation".<sup>48</sup> Project-specific definitions of control may also be provided in relevant investment contracts.<sup>49</sup>

### *2.1.3. Foreign investment in Africa: Key trends*

Dominant economic analysis considers attracting foreign investment as a key step to promoting GDP growth in developing countries.<sup>50</sup> As a result, much emphasis in expert advice and government policy in Africa has been on investment protection as a means to attract foreign investment. For example, Collier (2007:153-156) argues that the poorest countries (the "bottom billion", as he puts it) need private capital for economic development, and proposes an "Investment Charter" to promote investment flows of those countries. The Charter would "preclude governments from strategies of confiscation".<sup>51</sup> While an Investment Charter is not on the political agenda at the moment, the general trend in Africa is towards establishing regulatory regimes more favourable to foreign investment.<sup>52</sup>

Partly as a result of increased global demand for energy and commodities like oil, gold, copper, aluminium and nickel (UNCTAD, 2008:1), recent years have witnessed substantial increases in foreign investment flows and stocks in several African countries (see Table 2.1 and Figure 2.1) - although not to the same extent as other regions like Latin America and South-East Asia (see Figure 2.2). These

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<sup>48</sup> Para. 180.

<sup>49</sup> For instance, the Convention of Establishment between the Republic of Cameroon and the Cameroon Oil Transportation Company (COTCO) defines "control" as "direct or indirect ownership of fifty percent (50%) or more of the voting rights of the controlled person" (article 2(3)). For a fuller discussion of control, see Muchlinski (2007:45-79) and Schlemmer (2008:75-81).

<sup>50</sup> World Bank (2005:19 and 24-31).

<sup>51</sup> At 153.

<sup>52</sup> UNCTAD (2008:23). This trend will be discussed in greater detail in chapters 3 and 4.

increases have occurred particularly during the 1990s and, even more so, since 2001 (UNCTAD, 2008:1).

In the covered countries, investment patterns present significant cross-country variation, with big shares of investment concentrated in countries having important petroleum and mineral resources, such as Nigeria (see Table 2.1). Countries like Chad, Ghana, Mali, Mozambique, Senegal and Tanzania, which received limited or very limited foreign investment until the early 1990s, now host sizeable stocks of foreign investment (see Table 2.1 and Figure 2.3). On the other hand, investment flows to Cameroon have stagnated (see Figure 2.3).

In addition, although within the global economy sub-Saharan Africa remains a marginal destination for foreign investment (as suggested by Figure 2.2), for many African countries foreign investment is increasingly important - as indicated by substantial increases of FDI-to-GDP ratios (see Table 2.1 and Figure 2.1).

As discussed, much of this investment is in natural resource projects, particularly extractive industries.<sup>53</sup> And indeed, global demand for Africa's natural resources has led to renewed interest in relations with Africa, as exemplified by the recent "Africa summits" hosted by China (November 2006), the EU (December 2007), India (April 2008) and Japan (May 2008).

Developments in Africa's petroleum sector illustrate these trends. While from a global perspective the share of petroleum supply originating from Africa is still relatively small, the petroleum sector in Africa is growing fast. While countries like Nigeria have been major oil producers for a long time, countries like Chad have more recently emerged as important producers. The growing interest in Africa's petroleum reserves is linked to the high world oil prices, which increase the commercial viability of petroleum activities in areas previously considered as

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<sup>53</sup> Section 1.2.2.



marginal due to the economics of extraction and transportation. It is also linked to the growing energy demand from emerging economies such as China, India and Malaysia;<sup>54</sup> and to the geopolitical interest of Western petroleum-importing countries to diversify their supply sources in order to respond to the instability in the Middle East,<sup>55</sup> or to limit their energy dependence on a small number of producing countries.<sup>56</sup>

While increased investment in natural resource projects generates government revenues, it also exacerbates competition for land and natural resources, as outside interest in previously marginal areas increases and as governments make resources available to prospecting investors. If appropriate conditions are not in place, this may result in loss of resource access and in significant loss of livelihoods for the local population - particularly in areas where demographic growth has already increased pressure on the land.<sup>57</sup> In this regard, macro-level figures such as investment-induced GDP growth tell only part of the story, as much depends on how the proceeds of that growth are shared. The extent to which local resource users enjoy legally protected property rights over the land and resources they depend on, and have the capacity to exercise those rights, is key to shaping the distributive outcomes of increased investment.

## **2.2. Property rights**

The second conceptual challenge for addressing the core research question identified in section 1.1 (comparing the strength of legal protection available to different sets of property rights involved in foreign investment projects, and

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<sup>54</sup> UNCTAD (2008:2); Financial Times (2006:1 and 3). On the growing role of Chinese energy interests in Africa, see Downs (2007).

<sup>55</sup> Favennec and Copinschi (2003:130).

<sup>56</sup> UNCTAD (2008:2); Financial Times (2006:2).

<sup>57</sup> E.g., on Chad, Magrin (2001:398); and Magrin and van Vliet (2005:89 and 100).

exploring possible tensions between these) relates to clarifying the notion of “property rights”, and developing a conceptual framework for assessing the “strength” of legal protection.

### 2.2.1. *The concept of property rights*

Property rights describe “legal relations among people with regard to control of valued resources”.<sup>58</sup> While the classical conception of property rights involved a direct relationship between a person and a thing, the more recent analytical jurisprudence has construed “rights to things” (rights “*in rem*”) as relations among people *with regard to* things.<sup>59</sup>

Property rights are a key mechanism for the allocation of scarce resources within society.<sup>60</sup> As such, they are among the key elements of every legal system, and a cornerstone of social relations. Their regulation performs important economic functions - as highlighted by the economic analysis of law.<sup>61</sup> In many contexts, property rights over resources such as land are also linked to social identity and to the collective sense of social justice.

So broadly defined, “property rights” provides a concept that encompasses:

- Not only ownership but a much wider range of rights;<sup>62</sup>

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<sup>58</sup> Singer (1996:71). Similarly, Munzer (1990:16) defines property rights as “relations, usually legal relations, among persons or other entities with respect to things”. Although the term “property rights” is associated by some with a specific school of thought (the “property rights school”; see e.g. Alchian and Demsetz, 1973) and with a neoliberal political vision, it is used here free of these connotations.

<sup>59</sup> Specifically, as indefinitely large numbers of similar relations between the right holder and all those who may enter into contact with him/her (“multital” rights; Hohfeld, 1913). For a critique of Hohfeld’s analysis, see Penner (1996).

<sup>60</sup> Waldron (1988:31-32).

<sup>61</sup> See e.g. Calabresi and Melamed (1972:1089), on the broader concept of “entitlement”. Besides allocative issues, the economic analysis of law sees property rights as a tool to tackle market failure (Coleman and Kraus, 1986:1335) and promote efficient resource use (Posner, 1992:32).

<sup>62</sup> “The relationship between property rights and ownership is that of genus to species” - ownership being part of the broader concept of property rights (Mattei, 2000:78). Ownership is “the greatest possible interest in a thing which a mature system of law recognizes”, and it can be deemed to exist where most of the “incidents” characterising it occur (Honoré,

- Rights over diverse valued assets such as natural resources, corporate structures and commercial goodwill;<sup>63</sup>
- Rights held by private actors (natural or legal persons), whether individually or collectively,<sup>64</sup> and by public-law bodies (the state, local government bodies, state-owned corporations regulated by public law); and
- Rights based on a range of legal systems, which in Africa include state law but also local (“customary” but continuously reinterpreted and adapted) systems of property rights.<sup>65</sup>

In the private law (law of property) tradition, property rights are distinguished from other types of rights by the fact that they establish legal claims enforceable against anyone (“*erga omnes*”). This feature distinguishes property rights from rights that can only be enforced against specific debtors (e.g. contractual rights, or tort-based claims).<sup>66</sup> In practice, it is recognized that the boundaries of the law of property are “indeterminate at the margin” (Munzer, 1990:24), and that they vary across legal systems. For instance, while leasehold is part of the law of property in the common law tradition, it constitutes a contractual relationship in the civil law tradition (Mattei, 2000:12).

The notion of property rights appears broader under those branches of law that regulate relations between private actors and the state - such as constitutional law, international human rights law and international investment law. In different ways and to different extents, these branches of law protect the property rights of private actors from arbitrary state interference. International investment law specifically protects foreign investment. Human rights law and, depending on the jurisdiction,

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1961:108; see also Munzer, 1990:23, who combines Hohfeld’s and Honoré’s approaches). Some have identified in the right to sell the defining feature of ownership (see e.g. Aristotle’s *Rhetoric*, I.5 1361a).

<sup>63</sup> On the object of property rights, see section 2.2.5 below. Intellectual property rights are outside the scope of this study.

<sup>64</sup> See article 17(1) of the Universal Declaration of Human Rights (UDHR): “Everyone has the right to own property alone as *well as in association with others*” (emphasis added).

<sup>65</sup> On customary systems, see chapter 4.

<sup>66</sup> Mattei (2000).

constitutional law protect the right to property, which can be construed as the human right to be able to hold property rights, and to not be arbitrarily deprived of them.

The broadening of the notion of property rights emerges in the case law of both human rights and investment law tribunals. So far, the right-to-property provision of the African Charter on Human and People's Rights (article 14) has not provided the basis for case law clarifying the boundaries of its protection. But the European Court of Human Rights has developed extensive case law on this. The Court has used a very broad notion of "possessions" protected under article 1 of Protocol 1 of the European Convention on Human Rights.<sup>67</sup> "Possessions" have been held to cover a very wide range of legal interests – effectively, "all manner of things which have an economic value" (Ovey and White, 2006:350). This includes not only disputed ownership over land,<sup>68</sup> but also rights based on contracts or licences,<sup>69</sup> welfare benefits,<sup>70</sup> and legal claims based on arbitration awards<sup>71</sup> or tort compensation.<sup>72</sup>

Similarly, international investment arbitrators have treated as takings of property not only host state interferences with ownership of physical assets such as land<sup>73</sup>

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<sup>67</sup> Although article 1 of Protocol 1 refers to "peaceful enjoyment of possessions", the European Court has interpreted it as equivalent "in substance" to the right to property (*Marckx v. Belgium*, para. 63).

<sup>68</sup> See for instance *Holy Monasteries v. Greece*, in which the Court held that "possessions" include untitled land rights acquired through adverse possession (para. 60).

<sup>69</sup> See for instance *Fredin v. Sweden*, concerning rights based on a license to exploit a gravel pit (para. 40).

<sup>70</sup> But only "[w]here an individual has an assertable right under domestic law to a welfare benefit"; *Stec and Others v. United Kingdom*, para. 51.

<sup>71</sup> *Stran Greek Refineries and Stratis Andreadis v. Greece*, concerning the deprivation of benefits deriving from a final and binding arbitration award (paras. 59-62).

<sup>72</sup> *Pressos Compania Naviera SA and Others v. Belgium*, relating to retrospective legislation that undermined proceedings for legal claims arising from collisions at sea attributed to the negligence of the pilots - claims that were held by the Court to constitute "possessions" within the meaning of article 1 of Protocol 1 (para. 31).

<sup>73</sup> For example, in the *de Sabla* case (at 602) and in *Tradex Hellas S.A. v. Albania*, paras. 52-54.

and industrial installations;<sup>74</sup> but also interferences with “all interests and rights which [...] may be evaluated in financial and economic terms”.<sup>75</sup> This goes well beyond rights *in rem*,<sup>76</sup> to include for instance rights derived from natural resource concessions,<sup>77</sup> and even expectations linked to market access.<sup>78</sup> Following this logic, arbitral tribunals have treated breaches of an investor’s contractual rights as takings of property, so long as those breaches involve the exercise of sovereign authority (e.g. regulation) rather than purely commercial conduct (e.g. delays in contract performance).<sup>79</sup>

In other words, the defining feature of property rights is seen in legal claims having an economic value. The “notion of property as a material ‘thing’” is considered “obsolete”, and replaced by a “contemporary conception which includes managerial control over components of a process that is wealth producing”.<sup>80</sup> In this sense, the notion of property rights susceptible of being expropriated is effectively tied to that of investment itself, which as discussed is usually defined in very broad terms by BITs. The former would form part of the latter, and indeed the two notions have converged to the point that, within international investment law, earlier use of the

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<sup>74</sup> *German Interests in Polish Upper Silesia (Merits)*, at 22. The ICJ held that both a disputed factory and the contractual rights directly related to it were covered by the rules on expropriation.

<sup>75</sup> *Libyan American Oil Company (Liamco) v. The Government of the Libyan Arab Republic*, at 189. Similarly, in *Amoco International Finance Corp. v. Iran*, the arbitral tribunal held: “Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, i.e. freely sold and bought, and thus has a monetary value” (para. 108).

<sup>76</sup> *Southern Pacific Properties v. Egypt*, para. 164.

<sup>77</sup> Among the many international awards, see e.g. *Liamco*, at 189.

<sup>78</sup> In *Pope & Talbot Inc. v. Canada (Interim Award)*, the investor claimed that Canada’s export control regime on soft lumber had “deprived the Investment of its ordinary ability to alienate its product to its traditional and natural market”, and alleged a violation of article 1110 of NAFTA, concerning takings of property (para. 81 of the award). The arbitral tribunal concluded that “the Investment’s access to the US market is a property interest subject to protection under Article 1110”; but found that Canada’s regulatory measures did not constitute an interference with business activities that was “substantial enough” to constitute a taking (para. 96).

<sup>79</sup> See for example *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, para. 7.5.4; *Parkerings-Compagniet AS v. Lithuania*, paras. 443 and 445; *Azurix v. Argentina (Merits)*, paras. 314-315; and *Biwater v. Tanzania*, paras. 458, 491-492, and 497 ff.

<sup>80</sup> *Methanex Corp v. US*, para. IV.D.17.

term “foreign property”<sup>81</sup> has effectively given way to the notion of foreign investment.<sup>82</sup>

In addition, international human rights and investment law have (in different ways and to different extents) tended to use a dynamic notion of property rights that emphasises economic expectations and capacity to generate income. For instance, the European Court of Human Rights held that “possessions” within the meaning of article 1 of Protocol 1 covers not only “existing possessions” but also “assets, including claims, in respect of which an applicant can argue that he has at least a ‘legitimate expectation’ that they will be realised”.<sup>83</sup>

An emphasis on economic expectations and the capacity to generate revenues also emerges from the case law of international investment arbitrators - as illustrated, for instance, by the treatment of expectations linked to market access as “property interests”;<sup>84</sup> and by the inclusion of respect for the investor’s “legitimate expectations” as a pillar of the “fair and equitable treatment” to which investors may be entitled under bilateral investment treaties.<sup>85</sup> Valuation methods used by international investment arbitrators when confronted with takings of income-generating assets also emphasise economic expectations. These methods include the concept of “going concern”, which entails going beyond the valuation of individual assets held by the company, to refer to the value of a company as a “unified whole, the value of which is greater than that of its component parts”;<sup>86</sup> and the “discounted cash flow” (DCF) method, which entails valuing assets on the basis of

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<sup>81</sup> See e.g. Herz (1941:243).

<sup>82</sup> On the “scope of protected property rights” under international investment law, see also Reinisch (2008:410-417).

<sup>83</sup> *Gratzinger and Gratzingerova v. Czech Republic*, para. 69. On the doctrine of “legitimate expectations” under the ECHR, see Allen (2005:50-57).

<sup>84</sup> *Pope & Talbot Inc. v. Canada (Interim Award)*, para. 96, discussed above.

<sup>85</sup> *Técnicas Medioambientales Tecmed v. Mexico*, para. 154. For a definition of “legitimate expectations”, see *International Thunderbird Gaming Corporation v. Mexico*, para. 147. See also *LG&E Energy Corp. v. Argentina*, para. 124; and *Azurix v. Argentina (Merits)*, para. 316-322.

<sup>86</sup> *Kuwait v. Aminoil*, para. 178. On the account taken by the *Aminoil* arbitrators of the investor’s “legitimate expectations”, see paras. 148-149, 158-163 and 178. See also *Amoco*, para. 231.

their projected cash flow discounted to present value. DCF has been used, in combination with other factors, by several arbitral tribunals.<sup>87</sup>

These approaches significantly expand what can be characterised as “property right”. They blur the distinction between property and contractual rights, which remains a cornerstone of the private law tradition. They also bring the notion of property rights closer that used in the “Law and Economics” tradition. Economists tend to not distinguish between “*erga omnes*” and other rights, and to use the notion of property rights with regard to any legal entitlement that has monetary value.<sup>88</sup>

This study uses the concept of property rights as it emerges from the international human rights and investment law traditions. This includes rights that would fall within the law of property, such as ownership, servitudes and use rights over land. But it also entails emphasising a dynamic notion of property rights as including economic expectations; and treating rights derived from contractual arrangements with the state (e.g. natural resource concessions) as property rights where this is in line with applicable law.

### ***2.2.2. The debates about property rights***

Throughout history, property rights have formed the object of much debate. In Plato’s *Republic*, for instance, Socrates includes among the basic principles of justice “not to take other people’s belongings and not to be deprived of their own”.<sup>89</sup> Locke considered the right to acquire private property through human labour as a natural law right, while Hobbes and Pufendorf linked it to the social contract. In liberal political theory, the protection of property rights from arbitrary state interference

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<sup>87</sup> E.g. *Aminoil*, paras. 151-164; *Phillips*, paras. 111-114; *Amoco*, paras. 227-242. For a more in-depth analysis of these aspects, see chapter 3 below.

<sup>88</sup> Candian et al (1992:164). See for instance Barzel (1989:2), who defines property rights as “the rights, or powers, to consume, obtain income from, and alienate [...] assets”.

<sup>89</sup> At IV.433e.

was seen as the bulwark of individual freedoms.<sup>90</sup> On the other hand, Rousseau saw property as the factor driving inequality among humans and deteriorating the state of nature. Proudhon famously stated that “property is theft”, while Marx and Engels called for the collective ownership of the means of production. Property rights systems remained at the centre of ideological confrontation for much of the 20<sup>th</sup> century – although this faded with the end of the Cold War.

Over the past 40 years, interest in property rights has been revived by legal arguments seeking to extend proprietary mechanisms to state-issued entitlements such as welfare benefits, licences and authorisations for business activities (the “new property” theory).<sup>91</sup> It has also been revived by economic analyses on the importance of secure property rights for economic development (e.g. North, 1981; de Soto, 2000;<sup>92</sup> Deininger, 2003;<sup>93</sup> World Bank, 2005:79) and for environmental sustainability (from Hardin’s “tragedy of the commons” argument,<sup>94</sup> to more recent works on the economics of common property,<sup>95</sup> through to empirical evidence linking secure property rights to sustainable use of natural resources<sup>96</sup>).

In this context, property rights issues have featured prominently in debates about the role of law in Africa’s development. While the so-called “Law and

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<sup>90</sup> Mattei (2000:14).

<sup>91</sup> As articulated by Reich (1964). On ECHR case law about the application of right-to-property provisions to state benefits, see section 2.2.1 above.

<sup>92</sup> De Soto (2000) argues that “formalising” property rights in developing countries, including through issuance of land titles, is key to economic development, as it creates greater incentives for right holders to invest in their land and enables them to gain access to credit through using land titles as collateral.

<sup>93</sup> Drawing on a vast body of literature on land rights in developing and transition economies, Deininger (2003:36-51) concludes that secure property rights are key to promoting agricultural investment.

<sup>94</sup> Hardin (1968:1244) argued that where a resource is held in common and exploited individually, incentive structures promote resource over-exploitation (the “tragedy of the commons”).

<sup>95</sup> E.g. Ostrom (1990).

<sup>96</sup> According to the World Bank, “farmers are less likely to plant trees and build terraces to protect against erosion [...] if their rights to land are insecure” (World Bank, 2005:81). The importance of secure property rights for sustainable land use is formally recognised in the UN Convention to Combat Desertification, several provisions of which deal with land tenure security (e.g. article 8(3)(c) of Annex I).



Development” movement subsided in the 1970s,<sup>97</sup> and while the significant limits of law reform as a tool for social change have been well documented,<sup>98</sup> the 1990s have witnessed a renewed interest in the role of law (and, within that, of property rights) in development processes. This renewed interest has translated into work on the rule of law,<sup>99</sup> on securing land rights in rural Africa,<sup>100</sup> and on developing legal frameworks to promote foreign investment.<sup>101</sup>

Property rights issues have also featured prominently in the work of the Commission on Legal Empowerment of the Poor, a UN-hosted body launched in 2005 to identify ways to help disadvantaged groups seize economic opportunities through better access to the law.<sup>102</sup> After two and a half years of work, the Commission issued its final report in June 2008 (Commission on Legal Empowerment of the Poor, 2008). The report identifies property rights as one of the four “pillars” of legal empowerment (together with access to justice, labour rights and “business rights”).<sup>103</sup>

### *2.2.3. The “strength” and “dimensions” of legal protection*

The core research question tackled by this study entails a comparison of the “strength” of the legal protection enjoyed by different sets of property rights. Assessing or even defining such strength is a complex task. Different indicators may

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<sup>97</sup> Key readings on the “Law and Development” movement include Trubek and Galanter (1974) and Merryman (1977).

<sup>98</sup> E.g. by Allott (1980:209-214), specifically looking at land law reform in Kenya.

<sup>99</sup> See for example Kaufmann et al (2006). On the limits of donor-funded rule of law programmes, see Carothers (2004:131-143) and Golub (2005).

<sup>100</sup> See for instance Hesselting (1992), Le Roy (1996), McAuslan (1998), Toulmin and Quan (Eds) (2000), Mathieu et al (2003), and Djiré (2007). For the author’s own work on this, see Cotula (2007a).

<sup>101</sup> See for example the lively debate about the extent to which BITs promote foreign investment to developing countries: e.g. Hallward-Driemeier (2003), Neumayer and Spess (2005), and Salacuse and Sullivan (2005).

<sup>102</sup> See the Commission’s website <http://www.undp.org/legalempowerment/>, last visited in October 2008.

<sup>103</sup> At p. 31-40.

be used for such assessment.<sup>104</sup> Every choice of indicators would give only a partial picture. In this study, the strength of legal protection is determined on the basis of indicators relating to safeguards against takings by the state - irrespective of the content of the rights in question.

This choice of indicators is in line with the overall approach to the concept of property rights followed here, which reflects the concept used in those branches of law regulating relations between private right-holders and the state (constitutional law, human rights law, investment law), rather than that used in the (privatistic) law of property.<sup>105</sup>

A focus on takings is also motivated by two other factors. First, it allows dealing with the great diversity of property rights typically involved in an investment project - from those of the investor(s) to local resource rights affected by the project. These rights have different content and objects – as will be discussed below (section 2.2.5). Focusing on safeguards against takings allows a comparison of the strength of legal protection across right-holders - irrespective of whether they hold a right over a piece of land or a right to exploit subsoil resources.

Second, a focus on takings is motivated by the diversity of national legal regimes regulating property rights in the covered countries. For instance, as will be discussed, private land ownership is protected in Mali and Cameroon but ruled out in Mozambique, where only land use rights are admitted. Yet ownership and use rights may both enjoy some level of protection against takings by the state - and it may well be that the “operational rules”<sup>106</sup> on takings are not that dissimilar in

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<sup>104</sup> For instance, Alchian and Demsetz (1973:17) affirmed: “The strength with which rights are owned can be defined by the extent to which an owner’s decision about how resource will be used actually determines the use”. If the probability is 1, then the right holder can be said “to own absolutely” the right in question.

<sup>105</sup> In constitutional provisions on the right to property, safeguards against takings tend to play a prominent role. For an analysis of relevant constitutional provisions in the twelve covered countries, see section 4.2.1 below.

<sup>106</sup> Mattei and Monateri (1997:11-13 and 25-29).

countries where property rights are qualified as ownership and in those where they are considered as use rights. Focusing on the safeguards against takings allows cross-country comparisons of the strength of property rights protection irrespective of the legal qualification of those rights under national law.

It is recognised that a focus on takings as a proxy to measure the strength of legal protection gives only a partial picture. For example, it does not cover issues relating to protection from damage to property, which is an important aspect of the protection of property rights in general and within the context of large-scale investment projects in particular. Limits linked to what a single study can cover nevertheless justify a focus on takings.

Indicators of the strength of the legal protection from takings can be grouped in three interlinked dimensions:

- General “rule of law” aspects – issues relating to the nature of the overall legal system as it affects the protection of property rights, including the independence of courts and government commitment to comply with the law and enforce judicial decisions;<sup>107</sup>
- “Normative content” aspects – the legal rules specifically concerning the protection of property rights from takings, including both substantive rules on the conditions for the legality of takings,<sup>108</sup> and the legal remedies available to those claiming a breach of substantive rules;
- Tailored arrangements through which states may strengthen the protection of some property rights beyond the provisions of generally applicable law.

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<sup>107</sup> On the concept of rule of law, see section 4.2. On the importance of enforcement for assessing the strength of property rights, see Firmin-Sellers (1995:867), writing on land rights in Ghana.

<sup>108</sup> In other words, whether a public purpose is required for takings of property, whether compensation must be paid and, if so, according to what standards, whether discrimination is specifically prohibited and whether the process must meet minimum standards - these aspects all affect the strength of the protection of property rights.

Another concept used in this study is that of “strengthening” of legal protection. By its very nature, “strengthening” is a relative concept: it implies a comparison between two diachronic situations, usually before and after an intervention (e.g. a law reform). In this study, strengthening of legal protection is assessed in the light of the same indicators used to determine the strength of legal protection - namely, the indicators relating to safeguards against takings. For example, tightening “normative content” by introducing a legal requirement to compensate right-holders for loss of property rights where this was absent is considered as strengthening of protection.

The study uses synchronic comparative legal analysis (e.g. among regional human rights systems, within and among the four focus countries) to provide insights on what shape a diachronic “strengthening” may take. For instance, the study identifies ways to strengthen the protection of property rights under the ACHPR system drawing on a comparison between the provisions of the African Charter and those of the ECHR and ACHR. While both the ECHR and the ACHR require payment of compensation as a condition for the legality of takings, the ACHPR does not. Introducing a compensation requirement in the ACHPR regime would “strengthen” the legal protection of property rights embodied in that regime.<sup>109</sup>

#### ***2.2.4. The “layers” of legal protection: Property rights and global legal pluralism***

The expansion of transnational economic relations brought about by globalisation has been accompanied by increasingly complex webs of legal arrangements. To describe these arrangements, several commentators have used the concept of “global legal pluralism”, a phenomenon characterised by “a variety of institutions, norms and dispute resolution processes located and produced at different structured sites around the world”.<sup>110</sup> In addition, contributions from legal

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<sup>109</sup> As discussed in section 5.1.

<sup>110</sup> Snyder (2002:10), quoted in Muchlinski (2007:43). For an analysis of different “sites” of regulation, see Muchlinski (2007:112-121).

anthropology (which developed the concept of legal pluralism in the first place<sup>111</sup>) have provided insights on the role of transnational social networks in promoting cross-fertilisation among legal systems, and of non-state-centred normative orders such as local customary systems or religious law.<sup>112</sup>

Property rights issues in foreign investment projects are typically regulated by multiple bodies of law. Legal arrangements are particularly complex in cross-border projects involving more than one jurisdiction. To deal with such complexity, this study examines property rights within a global legal pluralism framework, with a focus on state-centred law - whether international (treaties, custom), national (legislation, case law) or transnational (e.g. investor-state contracts). This focus reflects the predominant role that law ultimately rooted in the state (as opposed to religious or local customary systems) plays in the regulation of foreign investment

To begin with, a web of contracts usually regulates relations between the investor(s), the host state(s), lenders and other stakeholders. For instance, in the Chad-Cameroon oil development and pipeline project, concession contracts between the consortium of oil companies and the government of Chad regulate the exploration and development of the oil fields in Chad;<sup>113</sup> host government agreements (HGAs)

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<sup>111</sup> See, among others, Griffiths (1986), Falk Moore (1973), and Griffiths (1998).

<sup>112</sup> Von Benda-Beckman et al (2005:2).

<sup>113</sup> “*Convention de Recherches, d’Exploitation et de Transport des Hydrocarbures*” between the Republic of Chad on the one hand and the Consortium of Esso Chad Inc., Société Shell Tchadienne de Recherches et d’Exploitation and Chevron Oil Company of Chad on the other, signed on 19 December 1988, approved with Ordinance 041/PR/88 of 30 December 1988, and amended in 1993 (“*Avenant à la Convention de Recherches, d’Exploitation et de Transport des Hydrocarbures du 19 Décembre 1988*”, 19 May 1993) and 1997 (“*Avenant No. 2 à la Convention de Recherches, d’Exploitation et de Transport des Hydrocarbures du 19 Décembre 1988*”, 19 February 1997). The composition of the consortium subsequently changed, and currently involves US companies ExxonMobil (40%) and Chevron (25%), and the Malaysian company Petronas (35%). The Convention relates to the oilfields in the Doba region of Southern Chad (Komé, Miandoum and Bolobo). The construction of the Chad-Cameroon pipeline sparked renewed interest in oil exploration activities in Chad. As a result, in 2004 the consortium signed a new concession with the government of Chad for exploration and development operations outside of the three original oilfields: “*Convention de Recherches, d’Exploitation et de Transport des Hydrocarbures (Permis Chari Ouest, Chari Est, Lac Tchad)*” between the Republic of Chad and the Esso-Petronas-Chevron Consortium, signed on 10 May 2004.

between two joint ventures controlled by the consortium (TOTCO<sup>114</sup> in Chad and COTCO<sup>115</sup> in Cameroon), on the one hand, and the governments of Chad and Cameroon, on the other, regulate the construction and operation of the pipeline;<sup>116</sup> and loan agreements between the IBRD and the governments of Chad and Cameroon provide the terms and conditions for the IBRD loans to the two governments,<sup>117</sup> while IDA loans are regulated by separate loan agreements.<sup>118</sup> A large number of other contracts regulate relations between consortium members,<sup>119</sup> COTCO and TOTCO,<sup>120</sup> shareholders,<sup>121</sup> private and multilateral lenders,<sup>122</sup> service providers,<sup>123</sup> contractors, off-takers,<sup>124</sup> and other stakeholders involved. In addition, an Environmental Management Plan (EMP) was developed for the project,<sup>125</sup> and is cross-referenced in several project agreements.<sup>126</sup>

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<sup>114</sup> Tchad Oil Transportation Company.

<sup>115</sup> Cameroon Oil Transportation Company.

<sup>116</sup> The “*Convention d’Etablissement*” between the Republic of Chad and the Tchad Oil Transportation Company (TOTCO), signed on 10 July 1998 and approved with Law 015/PR/98 of 1998; and the “Convention of Establishment” between the Republic of Cameroon and the Cameroon Oil Transportation Company (COTCO), approved with Law 97-16 of 7 August 1997 and signed on 20 March 1998.

<sup>117</sup> Loan Agreement between the Republic of Chad and the International Bank for Reconstruction and Development, 29 March 2001 (Loan No. 4558CD); and Loan Agreement between the Republic of Cameroon and the International Bank for Reconstruction and Development, 29 March 2001 (Loan No. 7020CM). A separate Escrow Agreement between the government of Chad, the World Bank and other parties regulates the receipt and administration of oil revenues by the government of Chad.

<sup>118</sup> IDA-Chad Agreement, 20 March 2000; IDA-Chad Agreement, 7 July 2000; and IDA-Cameroon Agreement, 14 July 2000.

<sup>119</sup> “Chad Operating Agreement”, signed between consortium members on 7 April 2000.

<sup>120</sup> “Cooperation Agreement”, signed on 10 July 1998.

<sup>121</sup> E.g. the COTCO Shareholder Funding Agreement, signed on 29 June 2000 between the shareholders of COTCO and relating to the financing of the joint venture.

<sup>122</sup> E.g. the IFC-COTCO and IFC-TOTCO Investment Agreements.

<sup>123</sup> E.g. the COTCO Services Contract of 1 September 1988 between COTCO and EEPIC, whereby the latter provides personnel, material, equipment and other services to the former.

<sup>124</sup> See the “Three Fields Offtake Contracts” between consortium members and their respective off-takers.

<sup>125</sup> May 1999, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTREGINI/EXTCHADCAMPIPELINE/0,,contentMDK:21223592~menuPK:2091922~pagePK:64168445~piPK:64168309~theSitePK:843238,00.html>, last visited on 25 October 2008.

<sup>126</sup> For instance, in the IBRD-Cameroon and IBRD-Chad Loan Agreements (sections 4.01 and 5.01 of both). The EMP can only be amended with the consent of the World Bank (e.g. under section 4.01(i) of the IBRD-Cameroon Loan Agreement).

Several of these documents contain provisions specifically regulating property rights issues, for instance with regard to the protection of the investor's assets from expropriation,<sup>127</sup> or with regard to the taking of land for the purposes of the investment project.<sup>128</sup>

Beyond the contractual arrangements themselves and depending on the choice-of-law clauses included in applicable contracts, the national law of the host state(s) may regulate project implementation in the relevant country. For example, a prominent role for national law is envisaged by the ICSID Convention, which would apply to some of the investment disputes that may arise from the Chad-Cameroon project.<sup>129</sup> In ICSID arbitrations, tribunals must apply the governing law agreed by the parties in relevant choice-of-law clauses; lacking such agreement, the tribunal must apply "the law of the Contracting State party to the dispute [i.e. the host state] [...] and such rules of international law as may be applicable" (article 42).

The national law of Chad and Cameroon regulates important aspects of the Chad-Cameroon project. For instance, the construction and operation of the Cameroon segment of the pipeline is regulated, among other instruments and insofar as consistent with the COTCO-Cameroon Convention, by Cameroon legislation.<sup>130</sup> This

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<sup>127</sup> See for instance article 21(6) of the TOTCO-Chad Convention of Establishment.

<sup>128</sup> See e.g. articles 3(4)-3(6) of the 1988 *Convention de Recherches, d'Exploitation et de Transport des Hydrocarbures* between the consortium and the government of Chad; article 23 of the TOTCO-Chad Convention of Establishment; and article 27 of the COTCO-Cameroon Convention of Establishment. See also sections 4.01(a)(iv), (b) and (c) of the IBRD-Cameroon Loan Agreement, and sections 4.01(a), (c) and (d) of the IBRD-Chad Loan Agreement, which deal specifically with compensation for land takings. The EMP also regulates the taking of land, particularly in Volume 3 of the Chad Portion of the EMP (Chad Resettlement and Compensation Plan), and Volume 3 of the Cameroon Portion of the EMP (Cameroon Compensation Plan). The Cameroon Portion also features a Volume 4 containing the Indigenous Peoples Plan, which relates to the Bakola population in the South of Cameroon.

<sup>129</sup> The COTCO-Cameroon Convention of Establishment specifically provides for arbitration under ICSID; should the dispute not fall within the jurisdiction of ICSID, the arbitration would be regulated by the Arbitration Rules of the International Chamber of Commerce (article 36(2)). On the other hand, the 1988 and 2004 *Conventions de Recherches, d'Exploitation et de Transport des Hydrocarbures* and the TOTCO-Chad Convention of Establishment refer to the Arbitration Rules of the International Chamber of Commerce alone (articles 33 as amended, 33 and 32, respectively).

<sup>130</sup> Articles 13 and 30 of the Convention.

includes legislation on the construction and operation of pipelines (Law 96-14 of 1996), petroleum operations (the Petroleum Code 1999 and its implementing regulations), environment protection (Framework Law on Environment Protection 1997), and land relations (particularly Ordinances 74-1 and 74-2 of 1974, their implementing regulations, and Law 85-09 of 1985 on expropriation for a public purpose). Similarly, in addition to the 1988 and 2004 *Conventions de Recherches, d'Exploitation et de Transport des Hydrocarbures* between the consortium and the government of Chad, exploration and exploitation activities in Chad are governed by the law of Chad (article 4.1 of the two Conventions).

International law also applies to foreign investment projects. The investor-state contracts may provide that they are governed not only by the domestic law of the host state, but also by the “general principles of international law” and by the common practice widely applied by the relevant industry (e.g. under article 41 of the COTCO-Cameroon Convention of Establishment). The contracts may also provide that they prevail over domestic legislation in case of conflict (e.g. under article 30 of the same Convention); and that disputes between the parties be settled by international arbitration rather than by the domestic courts of the host state (e.g. under article 36 of that Convention).<sup>131</sup> In addition, as already mentioned article 42 of the ICSID Convention (where applicable) provides for the application of both the domestic law of the host state *and* international law. And even where it is not explicitly referred to, international law may still be applicable - for instance with regard to customary norms on the protection of foreign investment.<sup>132</sup>

International law contains norms on the protection of foreign investment from arbitrary host state interference - for instance, under customary international law, and under article III of the 1986 Cameroon-US BIT, which applies to the Chad-

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<sup>131</sup> For a discussion of the “internationalisation” of investment contracts, see *Texaco v. Libya* (paras. 40-45); and Muchlinski (2007:579-582).

<sup>132</sup> See, among the many international awards, *Revere Copper v. OPIC*, at 278-279; *AGIP v. People’s Republic of the Congo*, paras. 71-88; and *Kuwait v. Aminoil*, paras. 8-10.



Cameroon project.<sup>133</sup> International law also affirms human rights that must be respected in project implementation, including the right to property (e.g. under the African Charter on Human and Peoples' Rights, to which both Chad and Cameroon are parties). Finally, international law may provide arrangements for inter-state cooperation required in project implementation, for instance through an inter-governmental agreement (IGA) that regulates, among other things, transit rights, security issues and double taxation between host states.<sup>134</sup>

Local groups in the project area may gain access to natural resources on the basis of local ("customary" but continuously evolving) systems of property rights. In much of rural Africa, lack of financial resources and of institutional capacity in government agencies, lack of legal awareness, socio-political deals between government and customary chiefs and, often, lack of perceived legitimacy of official rules and institutions all contribute to limit the outreach of state legislation in rural areas. On the ground, local resource users tend to continue to apply local tenure systems based on usually unwritten rules and founding their legitimacy on "tradition".<sup>135</sup>

For instance, in Cameroon, only about 3% of the land has been formally registered and is held under private ownership (Egbe, 2001:32). This mainly concerns urban elites such as politicians, civil servants and businessmen (Firmin-Sellers and Sellers, 1999:1118). The vast majority of the rural population gains access to state-held lands ("*domaine national*") on the basis of local ("customary") systems of property rights.

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<sup>133</sup> Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment, signed on 12 March 1986, entered into force on 6 April 1989. On the other hand, there is no BIT between Chad and the US or Malaysia, nor between Cameroon and Malaysia.

<sup>134</sup> *Accord entre le Gouvernement de la République du Tchad et le Gouvernement de la République du Cameroun Relatif à la Construction et à l'Exploitation d'un Système de Transport des Hydrocarbures par Pipeline*, signed on 8 February 1996. While IGAs commonly feature provisions on property rights (e.g. affirming the mutual agreement between the states to make land available for project implementation), the Chad-Cameroon treaty does not tackle these issues - although article 2 includes in the "object" of the treaty "all measures to ensure the construction and operation" of the pipeline.

<sup>135</sup> A detailed analysis of these systems is beyond the scope of this study. Sections 4.1 and 4.2.3 briefly touch upon these systems, particularly as they interface with national law.

Although in Cameroon these systems have no legal value per se, they are applied on the ground as they tend to be more accessible to the local population.

These different layers of legal rules do not operate in isolation from one another, but are interlinked. Investment contracts are usually based on domestic law provisions that enable the host state to negotiate them (e.g. Chad's Petroleum Code 1962, as amended, with regard to the 1988 and 2004 concession contracts between the consortium and the government of Chad); while international law includes case law on their legal value and effects.<sup>136</sup> Local ("customary") resource rights may enjoy some degree of legal protection in the domestic legal system.<sup>137</sup> Foreign investors may use international norms to challenge domestic law measures,<sup>138</sup> while local resource users may rely on international human rights provisions to claim protection of their "customary" resource rights before national courts, international human rights institutions,<sup>139</sup> or other recourse mechanisms such as World Bank Inspection Panels.<sup>140</sup>

### ***2.2.5. Holders and objects of property rights***

Property rights may be held by private entities, including natural or legal persons such as corporations, and/or by public-law bodies such as the state, local governments or state-owned corporations regulated by public law. In the Chad-Cameroon project, property rights are held by the consortium of oil companies and their subsidiaries, for instance under the 1988 and 2004 concessions and the 1998

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<sup>136</sup> Discussed in section 3.3.

<sup>137</sup> See section 4.2.3.

<sup>138</sup> For examples of international arbitration proceedings brought against African countries, see section 3.3 below.

<sup>139</sup> E.g. in the case *Bakweri Land Claims Committee v. Cameroon*, brought before the African Commission on Human and Peoples' Rights and not concerning the Chad-Cameroon pipeline.

<sup>140</sup> The World Bank "Inspection Panel" is an independent mechanism to investigate complaints brought by two or more individuals that feel that their interests have been or could be harmed by World Bank-funded projects. In the Chad-Cameroon project, two panel proceedings were requested, one for Cameroon (*Cameroon: Petroleum Development and Pipeline Project*) and one for Chad (*Chad-Cameroon Petroleum Development and Pipeline Project*).

host government agreements; by the host states, under national law (on land, petroleum); and by a large number of people having individual or collective rights over land and natural resources in the oilfield areas of Chad or along the pipeline route.

Much ink has been spilled over the extent to which certain resource users like transhumant pastoralists can be said to hold property rights over natural resources. Grazing lands have long been viewed as “open access”,<sup>141</sup> which would exclude the existence of property rights. However, it is now accepted that common property must be distinguished from open access (Ostrom, 1990); and that, far from being open access, pastoral systems in Africa entail distinct property rights regimes centred on flexible and reciprocal arrangements, on collective and priority use rights, and on seasonal access to strategic resources.<sup>142</sup> Such collective property rights are protected under the international human rights law provisions on the right to property. Article 17 of the Universal Declaration of Human Rights explicitly affirms the right to hold property “alone as well as in association with others”. And while there is no international case law on this point in Africa, the Inter-American Court and Commission on Human Rights have consistently found that indigenous peoples’ collective rights over their ancestral lands are protected under the right-to-property provision of the American Convention on Human Rights.<sup>143</sup>

The valued resources that can form the object of property rights are also extremely varied. Traditionally, land was the main form of property. The profound transformations that have taken place in the modern economy have changed this. Valued resources today include, for instance, contractual entitlements, economic expectations linked to the realisation of legal claims, and corporate structures. This

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<sup>141</sup> See for instance the oft-quoted article by Hardin (1968:1244), which is based on the assumption that pastures not subject to individual or state ownership are “open to all”.

<sup>142</sup> Thébaud (2002:227 and 229-232).

<sup>143</sup> See for example the cases *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 148; *Maya Indigenous Communities of the Toledo District v. Belize*, para. 117; and *Sawhoyamaya Indigenous Community v. Paraguay*, para. 120.

has led to the significant broadening of the concept of property rights under international law, discussed in section 2.2.1 above.

In foreign investment projects in Africa, the valued resources forming the object of property rights are likely to be different for foreign investors and local resources users. For local users, the most important assets are usually land and surface resources – though in some places local artisanal mining may generate interest in subsoil resources as well. Investors are more likely to be interested in subsoil resources (minerals and petroleum) and in valuable surface resources (timber), rather than in the land itself – though land is crucial for investors in the agribusiness sector. In addition, investors are more likely to be interested in intangible assets, such as contracts and licences, corporate structures and commercial goodwill.

For example, a large-scale investment like the Chad-Cameroon project typically involves a great diversity of property rights:

- Ownership over petroleum resources in situ, typically vested with the host state under national law.<sup>144</sup>
- The right of the investor(s) to conduct petroleum exploration and exploitation operations,<sup>145</sup> and/or to construct, own and operate pipeline systems,<sup>146</sup> usually based on contracts with the host state or with state-owned enterprises. These rights typically involve several subsets of rights, such as: land use rights,<sup>147</sup> right to use other natural resources,<sup>148</sup> right to drill

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<sup>144</sup> For instance, under article 3 of Cameroon's Petroleum Code 1999, article 6 of Mozambique's Petroleum Law 2001, and article 3 of Mali's Hydrocarbons Law 2004. In Chad, state ownership is implicit in the legal provisions requiring licences, permits or concessions for petroleum exploration and exploitation operations, "even [if undertaken] by the owner of the surface area" (articles 1 and 18 of the Petroleum Code 1962).

<sup>145</sup> The 1988 and 2004 *Conventions de Recherches, d'Exploitation et de Transport des Hydrocarbures* give the consortium the right to undertake petroleum exploration and exploitation operations in the covered areas, including development, production, primary treatment and/or liquefaction, storage, transport, sale, transfer and export (article 3(1) of both Conventions).

<sup>146</sup> For instance, under article 6 of the COTCO-Cameroon Convention of Establishment, and article 6 of the TOTCO-Chad Convention.

<sup>147</sup> For instance, the right to occupy the land necessary for the execution of the petroleum operations under article 3(4) – (6) of the 1988 and 2004 *Conventions de Recherches*,

and extract petroleum resources, ownership rights over extracted petroleum,<sup>149</sup> right to construct installations (e.g. production and storage facilities) and carry out works as necessary to carry out petroleum operations,<sup>150</sup> ownership of pipelines, installations and equipment,<sup>151</sup> and “rights-of-way” ensuring access to resources or facilities and enabling transport.<sup>152</sup>

- Rights over land and natural resources in the oilfield area or along the pipeline, held by the host state and/or third parties such as local resource users. Third-party rights may be extinguished by the petroleum project, or may continue to exist during project implementation - which raises the need to regulate the interface between the investor’s and local property rights.<sup>153</sup>
- Rights over corporate structures, for instance with regard to shares in local subsidiaries held by the investor,<sup>154</sup> as well as rights relating to commercial goodwill and economic expectations.<sup>155</sup>

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*d’Exploitation et de Transport des Hydrocarbures*. See also article 47 of Chad’s Petroleum Code 1962.

<sup>148</sup> Such as the right to abstract water necessary to the petroleum operations, and the right to use stones, sand and other similar substances (article 3(2) (b) and (c) of the 1988 and 2004 *Conventions de Recherches, d’Exploitation et de Transport des Hydrocarbures*). See also the right to abstract water, extract laterite, cut down trees and clear the land to carry out construction, operation and maintenance works under article 27(6)(d) – (f) of the COTCO-Cameroon Convention of Establishment.

<sup>149</sup> For instance, article 3(1)(b) of the 1988 and 2004 *Conventions de Recherches, d’Exploitation et de Transport des Hydrocarbures* provides for the transfer to the consortium of ownership over extracted petroleum at the point of production at the wellhead.

<sup>150</sup> Article 3(1) of the 1988 and 2004 *Conventions de Recherches, d’Exploitation et de Transport des Hydrocarbures*.

<sup>151</sup> E.g. under article 27(10) of the COTCO-Cameroon Convention of Establishment.

<sup>152</sup> See for instance the easement (“*emprise foncière*”) established on lands along the pipeline route under article 27 of the COTCO-Cameroon Convention of Establishment.

<sup>153</sup> The Chad-Cameron project involved both permanent and temporary takings of land. Land temporarily taken for pipeline construction was to be returned to pre-construction users, subject to restrictions on land use (see e.g. sections 3.3 and 3.5 of the Chad Resettlement and Compensation Plan).

<sup>154</sup> Such as the 89% equity participation by the private sponsors in TOTCO, and their 85% participation in COTCO, the two joint ventures to build and operate the Chad and Cameroon segments of the Chad-Cameroon pipeline.

<sup>155</sup> Should Chad expropriate the 1988 and 2004 Conventions, international law would require it to compensate the consortium not only for the individual assets lost, but also for the overall “going concern”; see section 3.3.

### *2.2.6. The property rights protection matrix*

The multiplicity of “layers” of law identified in section 2.2.4 (international, national and local) requires examining the three “dimensions” of the protection of property rights identified in section 2.2.3 (rule of law, normative content and tailored arrangements) at different levels. Although as discussed these layers are interlinked, this study examines them in separate chapters for greater clarity.

A thorough treatment of rule of law issues would require a separate study. These issues are cursorily touched upon here with regard to domestic law (chapter 4). Due to space constraints, debates on the rule of law in international law are outside the scope of this study – although these systems are touched upon in chapter 4 insofar as they interact with national law.

Normative content aspects (including both substantive protection and legal remedies) are relevant at both national and international levels, and are analysed here in relation to both (chapters 3 and 4). Due to space constraints, a detailed analysis of local (“customary”) systems of property rights is beyond the scope of this study.

Tailored arrangements established for specific investment projects have legal anchors in both international law (which includes case law on the validity and legal effect of such arrangements) and national legislation (which may empower the government to establish them). They are briefly referred to in the chapter tackling international law (chapter 3), but are mainly dealt with in the chapter on national law (chapter 4).

Table 2.2 combines the three “dimensions” and the three “layers” in a matrix - the “property rights protection matrix”. This matrix provides the conceptual framework for comparing the strength of legal protection enjoyed by different sets of property rights involved in an investment project. It allows visualising possible relations

between different “dimensions” and “layers” - for example, where investors may try to offset weaknesses in the rule of law under the national legal system through safeguards in international investment treaties or tailored arrangements in investor-state contracts.

In the table, barred cells identify the areas that are beyond the scope of this study. Key findings of the analysis are summarised in the same matrix format in chapter 6 - in relation to legal trends at both national and international levels (Table 6.1), and to the Chad-Cameroon project (Table 6.2).

### **2.3. Negotiating power**

As this study relates the legal protection of different sets of property rights involved in an investment project to the balance of negotiating power between the holders of those rights, it is necessary to clarify the concept of negotiating power and its relationship with law, to identify the range of relevant players, and to discuss the evolving balance of negotiating power between them.

#### ***2.3.1. The concepts of power and negotiating power***

Power is the capacity to influence human behaviour. The concept of power has been at the centre of a vast and complex debate. Broadly speaking, two bodies of literature on power represent different ways of conceptualising it.

The first one is influenced by Weber’s definition of power as the capacity of one stakeholder to influence the behaviour of another even against his/her resistance. In this view, power is a capacity that stakeholders may or may not have (“powerful” and “powerless”), that is exercised (or not) intentionally, and that is inserted in a relationship of subordination between two or more stakeholders (“dominant” and

“subordinate”). Sanctions (e.g. coercion or threat of coercion), explicit or implicit, are the ultimate guarantor of compliance.<sup>156</sup> In practice, power relations are rarely so one-sided, and subordinates may exercise countervailing power to that of dominant stakeholders.<sup>157</sup> This basic model was further developed in a number of ways - for instance, in terms of capacity to alter the incentive structure to which other actors respond.<sup>158</sup>

The second approach focuses on the way power is exercised in society, rather than on the stakeholders involved in power relations. This body of thought has been much influenced by the work of Foucault, for whom power is not a capacity in the hands of a restricted number of people, but is diffuse throughout society. The most effective form of social control, according to this line of thought, is not the threat or use of coercion, but the production of “truths” and bodies of knowledge (“discourses”) which shape values and behaviour and which induce self-compliance. These processes are not consciously controlled by a dominant group or class, but unfold through interactions throughout society.<sup>159</sup> This second way of conceptualising power has been fruitfully used in a number of empirical studies.<sup>160</sup>

Following Scott (2001), this study takes the two ways of conceptualising power as complementary rather than as mutually exclusive. In the real world, “concrete patterns of power combine [coercive] and persuasive influence in various ways, forming both stable and enduring structures of domination and more fluid structures of interpersonal power” (Scott, 2001:12-13). On the one hand, coercion (or threat of coercion) is an important factor in power relations. On the other, power also unfolds through influence over mindframes rather than through intentional commands and sanctions, and usually involves complex interactions among

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<sup>156</sup> Scott (2001:2 and 6-8).

<sup>157</sup> Scott (2001:2).

<sup>158</sup> On the “incentive approach to power”, see Dowding (1996:54-58).

<sup>159</sup> Scott (2001:11-12).

<sup>160</sup> See for instance Flyvbjerg (1998) on a long-term urban redevelopment process in a Danish municipality; and Ferguson (1990) on development projects in Lesotho.



multiple interests with varying degrees of influence over one another, rather than dichotomised relations between the “powerful” and the “powerless”.

Within the broad concept of power, particularly relevant here is the notion of negotiating (or bargaining) power. This refers to power relations within the context of (broadly defined) negotiations among two or more stakeholders.<sup>161</sup> The concept of negotiating power has been particularly explored by the economic literature and by management studies, with regard to contexts as diverse as collective bargaining in labour relations, intra-household economics and the negotiation (or renegotiation) of natural resource contracts in resource-rich countries.<sup>162</sup>

Several factors influence the balance of negotiating power in any given negotiation process. First and foremost, differences in power relations within society tend to produce differences in the negotiating power of different stakeholders. This includes both “coercive” and “persuasive” sources of power - relating for instance to access to capital, technology or other resources; to information, skills, knowledge and know-how; to leverage in public decision-making; or to internalised perceptions about the relative economic efficiency and productivity of different forms of natural resource use.

Negotiating power is also influenced by social, economic and political factors specific to the relevant economic sector. For example, the negotiation and renegotiation of extractive industry contracts is affected by shifts in negotiating power linked to project and economic cycles.<sup>163</sup> In addition, negotiating power is influenced by factors relating to the negotiation process itself – for example, to what stakeholders and issues are included, excluded, and/or can be added to the negotiation through negotiation; what timeframe as well as terms and conditions

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<sup>161</sup> On the concept of bargaining power, see Lawler (1992:19-21).

<sup>162</sup> See e.g. Fagre and Wells (1982), Anandalingam (1987), Inkpen and Beamish (1997), and Ramamurti (2001).

<sup>163</sup> These issues are discussed in greater detail in section 2.3.3 below.

are to be followed for the negotiation process; and who has the power to decide on these issues.<sup>164</sup>

### 2.3.2. *Rule of power or power of rules? The great “law and power” debate*<sup>165</sup>

The relationship between law and power has been at the centre of a long-standing debate. On the one hand, law is shaped by power relations. Law-making is an inherently political process: laws are the outcome of negotiations between competing interests in society, and reflect power asymmetries between those interests. What is “legal” or “illegal”, which entitlements are legally protected, which protected entitlements entail access to effective redress - these are all decisions of legal policy likely to be shaped by power relations.

The idea that law reflects power relations in society has been discussed for millennia. In Plato’s *Republic*, Thrasymachus famously stated that “justice is nothing but the interest of the stronger”, as the law reflects the interests of more powerful groups.<sup>166</sup> The extent to which the law reflects power relations is also a key theme in Marxist theories of law,<sup>167</sup> and in the “Critical Legal Studies” literature.<sup>168</sup>

Empirical research in Africa has documented how powerful stakeholders may anticipate and manipulate the implementation of law reform; and how power influences the settlement of disputes, as litigants compete to mobilise “powerful institutions” in order to influence the outcome of dispute settlement.<sup>169</sup> Empirical research has also shown, for instance, how the social networks women belong to crucially shape their chances of success in divorce cases before customary courts,

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<sup>164</sup> On these aspects, see Vermeulen (2005).

<sup>165</sup> This heading paraphrases expressions used by Byers (1995:110) and Simpson (2000:439).

<sup>166</sup> *Republic*, at I.338d-e. Thrasymachus’ argument implies that justice equals to obeying the law. In Plato’s dialogue, Thrasymachus’ statement is subsequently challenged by Socrates.

<sup>167</sup> See Collins (1982).

<sup>168</sup> Despite much diversity, this literature tends to show that the law is not politically neutral but legitimises power structures (see e.g. Kennedy and Klare, 1984; Unger, 1986).

<sup>169</sup> See for example Lund (1998), drawing on fieldwork from Niger.

including due to greater confidence and ability to articulate their arguments, greater impartiality of the presiding customary authority, and differences in negotiating power within the divorcing couple linked to the degree of the wife's financial independence.<sup>170</sup>

At the international level, the absence of a global sovereign authority to enact and enforce law, the coexistence of legally equal but socio-politically unequal states,<sup>171</sup> and the rapid development of international law over the past 60 years have provided a fertile breeding ground for exploring relations between law and power. Since the 1940s, different stripes of "realists" have argued that international law is not the only or even the main factor shaping state conduct; that such conduct is influenced to a great extent by national interests and inter-state power relations; and that international law is mainly effective in areas where international cooperation pursues desirable goals without hindering the exercise of power.<sup>172</sup> Others have highlighted the indeterminacy of international law stemming from internal inconsistencies between contrasting concepts – namely between the "utopia" of imposing normative codes on state behaviour and the "apology" whereby the content of those codes is determined by state behaviour itself; the outcome of these inconsistencies is that legal arguments can be used "to justify whatever [...] position [...] one needs to justify".<sup>173</sup>

Developing country perspectives on international law have paid special attention to the relationship between law and power. Some legal scholars have argued that while in key areas like economic relations international law remains shaped by power, collective action by developing countries can bring about a different normative order based on justice rather than power (Sornarajah, 1997:35-36).

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<sup>170</sup> Griffiths (1998), drawing on fieldwork from Botswana.

<sup>171</sup> For an analysis challenging the principle of sovereign equality of states and highlighting the "legalised hegemony" under international law, see Simpson (2004).

<sup>172</sup> For a review of "realist" positions, see Byers (1995:127-136) and Steinberg and Zasloff (2006:71-76).

<sup>173</sup> Koskenniemi (1989:xxi). For a critical review of this thesis, see e.g. Scobbie (1991).

Developing country revendications for a New International Economic Order in the 1960s and 1970s were an attempt to do that – to use the majority that developing countries enjoyed in UN bodies to change the international economic system through reforming international law. Such an attempt failed largely because of real power imbalances between developed and developing countries, exacerbated in the 1980s by falling commodity prices and the debt crisis. At a deeper level, however, some have argued that, because the key concepts of international law (e.g. state sovereignty) are rooted in and shaped by the experience of colonial domination, the ability of international law to challenge power relations between developed and developing countries is constrained from the outset.<sup>174</sup>

But while power may shape law, legal claims can also influence power and negotiating power, through defining leverage in decision making and entitlements to valuable assets. The groundbreaking work of Mnookin and Kornhauser (1979) on family law in the US showed how family law rules create “bargaining endowments” that divorcing couples rely on in their negotiations for out-of-court settlement. As these authors put it: “[d]ivorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum: they *bargain in the shadow of the law*. Legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips - an endowment of sorts”.<sup>175</sup>

Similarly, Macaulay (1966) analyses how automobile dealers in the US overcame imbalances in their negotiating position vis-à-vis manufacturers through use of the legal system, including litigation and collective lobbying for legislative change.<sup>176</sup> In addition, writing on the resurgence of customary chiefs in South Africa, Oomen

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<sup>174</sup> Anghie (2004:8 and 312-313).

<sup>175</sup> Mnookin and Kornhauser (1979:968), emphasis added.

<sup>176</sup> Macaulay (1966), particularly chapter 3 (pp. 22 ff.).

(2005:210-212) describes how negotiations shaped by power relations inform dispute settlement, on the one hand; but also how legal rules are drawn on by litigants in those negotiations so as to affect their outcome, on the other. According to this author, the result is “intimate relations between law and power”: law within a given setting “is, on the one hand, a reflection of its power relations and, on the other, a crucial element in their constitution” (Oomen, 2005:211 and 247).

At the international level, some have argued that law is an important factor shaping state conduct, although its influence coexists with and is diluted by other forces (Henkin, 1979:337); and that while more powerful states can more easily influence the formation of customary international law, once fundamental legal principles are crystallised they can effectively constrain the exercise of state power (Byers, 1995:179).

With specific regard to foreign investment, Cheng (2005:470-499) argues that international investment law tends to shift power from the host state to the investor, to arbitral tribunals or to other stakeholders. Wälde (2008:85) notes that while legal devices have not prevented the recent wave of re-negotiations in the petroleum industry, they nevertheless act as “markers” setting the framework for those negotiations.<sup>177</sup>

This bird’s eye view of the debate suggests that law and power are closely intertwined, rather than separate entities; and linkages between them are bi-directional, with law both reflecting and shaping power relations. To capture this notion, Tuori (1997:10-18) developed a useful conceptual framework that isolates three interlinked aspects:

- Power *on* the law: exploring how power relations in society (from conscious political power to the cognitive, linguistic and ethical structures internalised by members of society) affect the content and implementation of the law;

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<sup>177</sup> These issues are further discussed below, chapters 3 and 5.

- Power *in* the law: power relations within the legal professions (e.g. between legislators, judges and scholars), and between legal professionals and “laymen” (e.g. between lawyers and their clients);
- Power *by* the law: how the law contributes to shape power relations through legal claims that create, strengthen, limit and/or legitimise power.

### ***2.3.3. Foreign investment and transnational power relations: A stakeholder and power analysis***

Although Africa has been integrated in the world economy since ancient times,<sup>178</sup> recent surges in foreign investment flows have increased opportunities for contact between more and less powerful interests. Large-scale investment projects constitute arenas characterised by different and conflicting interests (from transnational corporations to affected local resource users), and by asymmetries in the negotiating power underpinning those interests. Although the focus of this study is on relations between foreign investors and local resource users, these can only be properly understood within the broader network of power relations characterising investment projects. This section undertakes a stakeholder and power analysis of foreign investment projects, drawing on the example of the Chad-Cameroon oil development and pipeline project.

#### ***2.3.3.1. Investors***

An investment project is typically led by one or more “project sponsors”. Following the terminology of international investment law, these are referred to here as “investors”. In extractive industry projects, this usually involves one or a more mining or petroleum companies.

For example, the Chad-Cameroon project is led by three private project sponsors (ExxonMobil, 40%; Petronas, 35%; and Chevron, 25%), with consortium

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<sup>178</sup> Bayart (1993:18).

membership having changed over time.<sup>179</sup> Consortium members operate through a number of subsidiaries. Esso Exploration and Production Chad Inc. (EEPCI), a wholly-owned subsidiary of ExxonMobil, is the operator for the Field System. Two joint ventures were established under the law of Chad and Cameroon to build, own and operate the pipeline. The Tchad Oil Transportation Company (TOTCO) is a joint venture between the project sponsors (89%) and the government of Chad (11%); it owns and operates the pipeline segment in Chadian territory. The Cameroon Oil Transportation Company (COTCO) is a joint venture between the sponsors (85%), the government of Chad (5%) and the government of Cameroon (10%); it owns and operates the pipeline segment in Cameroonian territory. EEPCI provided management services to COTCO and TOTCO for the construction of the pipeline (Esty, 2004:75-76).

Typically, consortium members and their subsidiaries have a shared interest in maximising returns from the project, and in protecting their assets and interests from host state or third-party interference. But relations within the consortium are complex, as different consortium members may have different corporate policies and operational approaches, for example to assessing and managing risk; and as differences in worldviews, interests and negotiating power may exist between staff in parent and subsidiary companies, and between departments within the parent or subsidiary companies - for instance between the departments responsible for production and/or distribution and those responsible for environmental and social aspects.<sup>180</sup>

Consortium members engage in business relations with a range of other companies, including contractors and subcontractors, suppliers and service providers. When foreign nationals, these are also likely to qualify as “investors” under relevant

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<sup>179</sup> The 1988 concession with Chad was originally signed by ExxonMobil, Shell and Chevron. Shell subsequently ceded its share, while Elf Aquitaine entered the consortium from 1992 to 1999.

<sup>180</sup> For an analysis of intra-corporate relations in the Chad-Cameroon project, see van Vliet and Magrin (2007:7).

international investment law. While from the outside these different business entities may appear as a coherent group, divergences of interests tend to exist among them - for example, between contractors interested in executing construction works in a way that maximises their profit and minimises their liability, on the one hand, and consortium members interested in performance that meets agreed timeframes and specifications, on the other. Divergences of interest between different business entities may result in litigation or arbitration.<sup>181</sup>

### 2.3.3.2. Lenders

Lenders also play an important role, particularly in project finance transactions.<sup>182</sup> Lenders have an interest in a secure stream of income that ensures debt repayment. As a result, they may require certain conditions for the “bankability” of the investment project, including long-term contracts with contractors, suppliers, service providers and off-takers to stabilise quantities, prices, qualities and other parameters;<sup>183</sup> and contractual arrangements to protect the stability of the regulatory framework governing the investment project.<sup>184</sup>

In addition, lenders may require compliance with their institutional policies on social and environmental standards, which may influence relations between investor(s), host state(s) and people affected by the investment project. This includes internal corporate policies, the “Equator Principles”,<sup>185</sup> and World Bank safeguard policies.

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<sup>181</sup> For example, with regard to the Chad-Cameroon oil development and pipeline project, see the case *E.E.P.C. c. Etablissement C. et Autres*, concerning a legal dispute about debts originating from catering contracts linked to the Chad-Cameroon project, and litigated before the domestic courts of Chad.

<sup>182</sup> Private lenders may also be considered as “investors” under international investment law, particularly where relevant BITs include loans within the definition of investment. See e.g. *Ceskoslovenska Obchodni Banka AS (CSOB) v. Slovak Republic*, concerning government-guaranteed loans, and discussed by Sornarajah (2004:16). Project finance is a financing arrangement whereby creditworthiness and debt security are based (not on the investor’s assets but primarily) on projected cash flow (Hoffman, 2001:4).

<sup>183</sup> Hoffman (2001:175 and 232).

<sup>184</sup> Wälde and N’Di (1996:229).

<sup>185</sup> “The Equator Principles - A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing”. Adopted in 2003 and revised in



The Chad-Cameroon project was funded through both corporate finance (for oil operations in Chad) and project finance (for the construction of the pipeline).<sup>186</sup> Within the project finance component, loans were provided to COTCO and TOTCO by the International Finance Corporation (IFC), by commercial banks, and by two export credit agencies (COFACE<sup>187</sup> of France and US Eximbank<sup>188</sup>). The International Bank for Reconstruction and Development (IBRD) and the European Investment Bank (EIB) provided loans to the governments of Chad and Cameroon to pay for their equity participation in the project (Esty, 2004:77; Davis, 2003:218-219).

Although World Bank financing through both its IBRD and IFC arms contributed only a minor share of project costs, it was crucial in securing additional financing from the private sector - due to the perceived political risk mitigation provided by the Bank's participation (Esty, 2004:85). In addition to its direct support to the project, the World Bank (through its IDA arm) provided loans to the governments of Chad and Cameroon for projects to strengthen their capacity to ensure environmental supervision of the project (Davis, 2003:219).

The involvement of the World Bank entailed the application of its safeguard policies on a range of social and environmental aspects, including involuntary resettlement. IBRD/IDA Operational Directive 4.30 on Involuntary Resettlement, then in force, is specifically referred to in the project's 19-volume Environmental Management Plan (EMP).<sup>189</sup> The EMP deals with both environment protection and social standards, including with regard to land takings.

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2006, the Equator Principles are voluntary guidelines adopted by a number of commercial lenders ([www.equator-principles.com](http://www.equator-principles.com)).

<sup>186</sup> Esty (2004:77).

<sup>187</sup> *Compagnie Française d'Assurance our le Commerce Extérieur*.

<sup>188</sup> Export-Import Bank of the United States of America.

<sup>189</sup> For instance, in section 1.2.3 of the Cameroon Compensation Plan. In 2001, Directive 4.30 was replaced by Operational Policy 4.12 (revised in 2004, and last updated in March 2007).

World Bank involvement in the Chad-Cameroon project also resulted in the establishment of an Environmental Compliance Monitoring Group (ECMG) to monitor compliance with the Environmental Management Plan,<sup>190</sup> and of an International Advisory Group (IAG) to advise the World Bank and the governments of Chad and Cameroon on the development issues raised by the implementation of the project. In addition, the Bank required the government of Chad to enact the Petroleum Revenue Management Law (Law No. 001 of 1999). The Law provides for the bulk of oil revenues from the 1988 concession to be spent on priority sectors such as health, education and infrastructure (articles 7 and 8); and for 10% of oil revenues to be set aside in a “Future Generations Fund”, and spent on projects to support livelihoods once oil reserves have run out (article 9). Compliance with the Petroleum Revenue Management Law is required as a condition for World Bank lending under the IBRD-Chad Loan Agreement (sections 4.06 and 4.07).<sup>191</sup> The implementation of this legislation is overseen by a revenue oversight committee, which includes representatives of civil society organisations (articles 14 and 16).<sup>192</sup> In addition, oil royalties are to be paid by the consortium into an escrow account with a commercial bank in London, rather than directly to the government of Chad.

#### 2.3.3.3. *Host states*

Besides this bundle of business relations, investors (project sponsors) are engaged in contractual relationships (e.g. concession contracts, host government agreements) with the authorities of the host state(s). Host states may also hold an equity participation in the investment project - as illustrated, in the Chad-Cameroon project, by the equity participation held by the government of Cameroon in COTCO, and by the government of Chad in COTCO and TOTCO.

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<sup>190</sup> The ECMG was operated by a private engineering and consultancy firm.

<sup>191</sup> The Petroleum Revenue Management Law only applies to revenues under the 1988 concession, while operations under other concessions (e.g. the 2004 contract between the consortium and the government of Chad) are not covered (Pegg, 2005:12 and 18).

<sup>192</sup> *Collège de Contrôle et Surveillance des Revenus Pétroliers*. In terms of institutional capacity, resources and legal powers, however, the committee lacks teeth vis-à-vis the executive (Delescluse, 2004:48). In addition, there are no effective mechanisms to prevent co-optation of the civil society members (Esty, 2004:91).

For host states, large-scale investment projects can provide a valuable source of revenue. Over its first 25-year term, the Chad-Cameroon project was expected to generate about US\$2 billion for the government of Chad (about half its national budget) and US\$500 million for the government of Cameroon (Davis, 2003:220). Revenues for the government of Chad are likely to have further increased as a result of recent higher-than-expected hikes in world oil prices, although more recent price decreases may alter that.

The host state is typically composed of different structures representing competing interests (different ministries,<sup>193</sup> state-owned companies;<sup>194</sup> central, deconcentrated and decentralised agencies). The state acts through individuals (politicians, civil servants) whose behaviour is shaped by factors ranging from pursuit of the public good to self-interest (corruption, rent-seeking, protection of vested interests).

In projects involving more than one host state, different states may have competing and even conflicting interests, and the balance of negotiating power between them shapes how these interests are mediated. For instance, in a cross-border pipeline project, the oil-producing state (e.g. Chad) has an interest in minimising transit fees, while for transit countries (e.g. Cameroon) the transit fee is the main mechanism through which the project may benefit public finances.

There is a vast literature on the state in Africa. Scholars studying the nature of African states have proposed concepts such as “predatory” (Evans, 1995) and “patrimonial” (Sandbrook, 1993). A particularly insightful contribution was provided by Bayart (1993) with his book *The State in Africa: The Politics of the Belly*.

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<sup>193</sup> For example, those responsible for petroleum operations and those in charge of environmental protection.

<sup>194</sup> In Cameroon, the *Société Nationale des Hydrocarbures* pushed itself into being the lead government agency to deal with negotiations for the design of the EMP, while several government agencies played a role in the implementation stage (interview with a consultant involved in the design of the EMP, 13 August 2007). In Chad, on the other hand, a national oil company (the *Société des Hydrocarbures du Tchad*) was established only in 2006.

The book provides an extensive and sophisticated analysis of power relations underpinning the state in Africa - an analysis that cannot be properly summarised here.

In a nutshell, Bayart (1993) shows that, in much of Africa, different groups within national elites (from high government officials to business groups through to traditional elites) are engaged in relations ranging from confrontation to, more often, alliance or even “reciprocal assimilation”. Through these relations, national elites pursue strategies to gain and consolidate hegemony within the country. Seizing control of the state is central to these strategies. The state is the main vehicle to accumulate power and wealth, including through government jobs and opportunities for corruption. It is also a vehicle for national elites to consolidate their domestic position through “extraversion” strategies that involve mobilising resources from the external environment - for instance, diplomatic and military support, or economic resources in the form of trade and investment.<sup>195</sup> It is worth noting that although *The Politics of the Belly* covers the whole of sub-Saharan Africa, its author has worked extensively on Cameroon, and uses many Cameroonian examples in the book.<sup>196</sup>

This analysis sheds light on host state attitudes towards foreign investment, which may be seen as part of the “extraversion” strategies pursued by national elites. These may have direct vested interests in an investment project – for instance in terms of business opportunities through backward and forward linkages, or opportunities for rent-seeking or for consolidating internal positions of power through patron-client redistribution of part of the benefits.

In the design and regulation of an investment project, these considerations are likely to play a prominent role. For instance, the route of the Cameron leg of the Chad-

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<sup>195</sup> Bayart (1993), esp. at 74-80 and 150-179.

<sup>196</sup> E.g. at 150-153. On the high relevance of the analysis to Chad, see Magrin (2001:390).

Cameron pipeline is reported to have been affected by the Cameroonian president's wish for the pipeline to go through his region of origin for patronage purposes (Magrin, 2001:393). The political economy of the state in Africa is also likely to influence the extent to which host states may be willing and able to defend the interests of affected local groups vis-à-vis investors.

Internal divisions within the country may also have repercussions for investment projects. For example, a landmark book by Bates (1981) shows how government policy in Africa tends to favour politically vocal urban groups compared to the politically unorganised rural population. While this work focused on import substitution policies, now largely abandoned following structural adjustment programmes in the 1980s and 90s, its key insights still hold. Unequal political voice between urban and rural groups may result in government support to investment projects that benefit urban areas even if they negatively affect the rural population.

Similarly, geographical divides within the host state may have important implications. For example, Chad has long experienced internal tensions between the North and the South, with the government having been in "Northern" hands for the past few decades (Magrin, 2001:391 and 397). The oilfields feeding the Chad-Cameroon pipeline are located in the South of the country. These aspects may affect the relationship between the central government and local people affected by the project, including the extent to which the government is perceived as legitimate, the level of local resistance to the project and the degree of priority the government attaches to safeguarding the interests of local groups vis-à-vis the investor.

#### *2.3.3.4. Negotiating power between investors, lenders and host states: The concept of "obsolescing bargain"*

The balance of negotiating power between investors and host states varies considerably, for example due to differences in economic sectors (from petroleum to agribusiness), in negotiators' assets (e.g. due to cross-country variation in host state

endowments of resources and capacity), and in the nature of the wider interactions with the global economy (including e.g. competition between host states and between investors<sup>197</sup>). Negotiating power also evolves as a result of changing circumstances, of the unfolding of the different stages of project implementation, and of the economic and political cycles characterising the relevant industry (e.g. changes in prices and in availability of capital and technology).

In extractive industries, shifts in the balance of negotiating power during the lifetime of an investment project are captured in the notion of “obsolescing bargain”.<sup>198</sup> During the negotiation phase, a host state seeking to attract foreign investment to meet its capital and technology needs may be under pressure to accept terms favourable to the investor. In the Chad-Cameroon project, several factors including the high risk involved, the low quality of the oil, and the significant pipeline costs have all played a role in depressing the royalty rate (Gary and Reisch, 2005:38). But so have Chad’s dependence on foreign investment to develop its oil resources due to lack of capital, technology and know-how (Delescluse, 2004:44), its “inexperience with negotiating with one of the world’s largest companies” (Gary and Reisch, 2005:38), and its limited alternatives to oil as a major source of revenues (Delescluse, 2004:45).

However, once the bulk of the investor’s capital injection has taken place (e.g. after pipeline construction), the investor becomes a “hostage” of the host state: it depends on being able to operate the facility for sufficiently long a time and under the terms agreed in order to recover costs and gain profits, but is vulnerable to regulatory action on the part of the host state.<sup>199</sup> As a result, the balance of negotiating power tends to shift in favour of the host state. The vulnerability of the investor may be exacerbated by a change of government in the host state, and by the need for the

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<sup>197</sup> Muchlinski (2007:104-105).

<sup>198</sup> This concept was first developed by Vernon (1971:46-59), and has been discussed in a very vast literature (e.g. Moran, 1974). Within the law literature, see for instance Wälde and N’Di (1996:225) and Muchlinski (2007:105-106).

<sup>199</sup> Wälde and Kolo (2001:819).

new administration to be perceived by its constituents to “do something” about the investment terms accorded by the previous government and now claimed to be too favourable to the investor.<sup>200</sup>

In 2006 (two years into the operation phase), the government of Chad sought to obtain more benefits from the Chad-Cameroon project - including in light of the high oil prices and as part of a broader trend towards “resource nationalism” in oil-producing countries. The government alleged \$590million-worth tax irregularities on the part of the two minority members of the consortium, Petronas and Chevron, which together account for 60% of the consortium. The government also attempted to obtain a stake in the consortium for the newly established national oil company (*Société des Hydrocarbures du Tchad*).<sup>201</sup> The dispute was resolved through negotiation. Petronas and Chevron agreed to pay outstanding taxes for \$289 million, while the government dropped its demand for a stake in the consortium.<sup>202</sup>

Lenders also play a role in evolving balances of negotiating power between host states and investors. For example, the involvement of international financial institutions like the World Bank may affect the balance of power in post-construction stages, particularly where the host state is heavily dependent on World Bank lending. This is because the Bank may exert pressure on the host state to honour its commitment even when the negotiating power of the investor declines.

In the Chad-Cameroon project, this role is made explicit in the two Loan Agreements between the IBRD and the governments of Chad and Cameroon. Section 4.02(b) of both Loan Agreements commits the two governments not to

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<sup>200</sup> Wälde and N’Di (1996:224).

<sup>201</sup> “Chad Govt Seeks ExxonMobil Pipeline Renegotiation”, African Oil Journal, 27 August 2006, [http://www.africanoiljournal.com/8-27-2006%20chad\\_govt\\_seeks\\_exxonmobil\\_pipeline%20renegotiation.htm](http://www.africanoiljournal.com/8-27-2006%20chad_govt_seeks_exxonmobil_pipeline%20renegotiation.htm); “Chad oil tax row 'not asset grab'”, BBC News, 30 August 2006, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/business/5298594.stm>.

<sup>202</sup> “Chad, Oil Companies Resolve Tax Dispute”, African Oil Journal, 10 November 2006, <http://www.africanoiljournal.com/10-11-2006%20chad%20chevron%20and%20petronas%20resolve%20tax%20dispute.htm>.

unilaterally amend, suspend, repeal or abrogate any contractual provisions to which they are party - including the 1988 concession contract with the consortium and the HGAs with COTCO and TOTCO.

However, even the World Bank's negotiating power may decrease after the construction phase. Much depends on the continued relative importance of World Bank lending to host states – which may be decreased by the very implementation of a large-scale investment like the Chad-Cameroon project.

For instance, in 2006 the government of Chad unilaterally amended the Petroleum Revenue Management Law 1999, which had been adopted as a condition for World Bank lending. Law 002 of 2006 added security activities to the priority sectors for use of oil revenues, reduced the share of revenues subject to the scrutiny of the revenue oversight committee, and eliminated the Future Generations Fund.<sup>203</sup> In response, the World Bank suspended its loan to the government of Chad,<sup>204</sup> and froze the escrow account into which the consortium paid its royalties to the government.<sup>205</sup> However, the Bank could not prevent the consortium from paying royalties directly to the government, not least due to an imperfect alignment between project contracts.<sup>206</sup> Eventually, negotiations between the World Bank and the government of Chad led to a compromise on the utilisation of oil revenues.<sup>207</sup>

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<sup>203</sup> "World Bank Chief Condemns Changes to Chad Oil Law", African Oil Journal, 30 December 2005, [http://www.africanoiljournal.com/12-30-2005%20world\\_bank\\_chief\\_condemns\\_change%20to%20chad%20oil%20law.htm](http://www.africanoiljournal.com/12-30-2005%20world_bank_chief_condemns_change%20to%20chad%20oil%20law.htm).

<sup>204</sup> "World Bank Suspends Loans to Chad", BBC News, 6 January 2006, <http://news.bbc.co.uk/2/hi/business/4588412.stm>.

<sup>205</sup> "World Bank Freezes Chad's London Account", African Oil Journal, 13 January 2006, [http://www.africanoiljournal.com/1-13-2006%20world\\_bank\\_freezes\\_chad.htm](http://www.africanoiljournal.com/1-13-2006%20world_bank_freezes_chad.htm).

<sup>206</sup> While conditionalities relating to the Petroleum Revenue Management Law were included in the Loan Agreement between the IBRD and the government of Chad (sections 4.06, 4.07 and 5.01(d) of the Agreement; and section 2 of Schedule 5 annexed to it), no reference to them was made in the 1988 concession contract between the government of Chad and the consortium. As a result, the consortium could not legally suspend payment of royalties to the government.

<sup>207</sup> "Chad, World Bank Resolve Oil Dispute", African Oil Journal, 14 July 2006, <http://www.africanoiljournal.com/7-14-2006%20chad%20world%20bank%20resolve%20oil%20dispute.htm>.



In September 2008, new tensions about the use of oil revenues led to the World Bank withdrawing its support to the project, and to the government of Chad repaying in full all World Bank loans, thereby terminating the Bank's involvement and leverage.<sup>208</sup> These events suggest that the notion of "obsolescing bargain" may apply to international financial institutions as well as to investors.

#### 2.3.3.5. *Home states*

The home state where the investor's parent company is based may also play a role. Home states may have economic and geopolitical interests in an investment project, and power relations among home states may have reverberations for the project. The Chad-Cameroon project exemplifies a shifting geopolitical equilibrium concerning the influence of France in its former colonies,<sup>209</sup> the growing role of US interests in Francophone Africa,<sup>210</sup> and the increasing penetration of Asian investment in Africa.<sup>211</sup>

A formal role for home states may stem from insurance or loan guarantees provided to the project by public export credit agencies (e.g. US Eximbank in the Chad-Cameroon project). In addition to this "contractualised" role, home states may exert diplomatic pressures if "things go wrong" (for example, if the host state pushes a renegotiation), although recent years have witnessed a decrease in high-profile home state involvement to avoid politicisation of investment disputes (Wälde, 2008:83).

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<sup>208</sup> "World Bank Statement on Chad-Cameroon Pipeline", World Bank press release No. 2009/073/AFR, 9 September 2008.

<sup>209</sup> The government of Chad depends on France for military cooperation. In 1992, pressures from France led to the entry of French company Elf Aquitaine into the oil consortium, although Elf subsequently left in 1999 (Magrin, 2001:392). French lobbying was also reported to have played a role in the design of the pipeline route, making sure that the pipeline would run through the French-speaking part of Cameroon (Magrin, 2001:393).

<sup>210</sup> The oil consortium is dominated by US interests, namely ExxonMobil (40%, operator) and Chevron (25%).

<sup>211</sup> See the 35% participation in the oil consortium by the Malaysian company Petronas.

At a more general level, capital-exporting countries as a group have historically played an important role in shaping international investment law. Issues concerning the balance of negotiating power between capital-exporting and capital-importing countries are discussed below.<sup>212</sup>

#### 2.3.3.6. *Non-governmental organisations*

NGOs are increasingly playing a role in large-scale investment projects in Africa. The Chad-Cameroon project has attracted substantial interest from environmental, development and human rights NGOs, both international and in-country.

This resulted in several high-profile campaigning reports raising environmental, human rights and other concerns about the implementation of the project (including e.g. Centre pour l'Environnement et le Développement and Friends of the Earth International, 2001; Centre pour l'Environnement et le Développement et al, 2002; Amnesty International UK, 2005; Gary and Reisch, 2005; and Horta et al, 2007). It also resulted in two requests for World Bank Inspection Panels.<sup>213</sup> NGO lobbying hit some successes, for instance prompting increases in compensation standards. In Chad, for example, NGO pressure brought the compensation rate for a mango tree from 3,000 to 550,000 FCFA (Magrin and van Vliet, 2005:91).

While some efforts were made to present a united NGO front,<sup>214</sup> NGOs constitute a heterogeneous group. First, they have different agendas based on their mandate (from environment protection to human rights through to transparency in revenue management) and location (e.g. Northern and in-country NGOs may have different agendas, although in-country NGOs may receive funding from Northern organisations and as a result be influenced by their agendas).

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<sup>212</sup> Section 3.4.

<sup>213</sup> *Cases Cameroon: Petroleum Development and Pipeline Project and Chad-Cameroon Petroleum Development and Pipeline Project.*

<sup>214</sup> In Cameroon, NGOs established a coalition to campaign more effectively on the Chad-Cameroon project: the *Groupe de Concertation et d'Action*.

The stance taken by different NGOs is also likely to vary – from radical opposition to more nuanced approaches focused on raising applicable standards. In Chad, for example, some commentators have noted that the further away the NGO was from the ground, the more radical was its opposition to the project; while locally grounded NGOs tended to take more nuanced stances in light of the economic benefits that the project was hoped to bring to the local population (Magrin, 2001:386). Some national and international NGOs which did not campaign against the project, and worked as service providers to it - for instance for disseminating information about the compensation arrangements, or for implementing development activities funded by the project.<sup>215</sup>

*2.3.3.7. Stakeholders affected by the project: Pre-existing large-scale investment and local resource users*

In addition to these contractual and non-contractual relations among private and government entities, large-scale investments typically affect a number of other stakeholders, for instance through permanent or temporary land takings. In the Chad-Cameroon project, this issue has been particularly problematic in the oilfield area of Chad, although the (mainly temporary) land takings for the construction of the pipeline in Cameroon also affected a large number of people.

Affected stakeholders are extremely diverse. They may include pre-existing large-scale investments (e.g. agribusiness or mining concessions), whether domestic or foreign. With regard to the Cameroon leg of the Chad-Cameroon pipeline, the COTCO-Cameroon Convention of Establishment provides a special regime for the taking of such investments,<sup>216</sup> so as to reassure economic elites close to the ruling politicians that their interests would not be negatively affected by the project.<sup>217</sup>

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<sup>215</sup> For example, GTZ in Chad.

<sup>216</sup> Article 27(3).

<sup>217</sup> Interview with a consultant involved in the design of the EMP (2 August 2007).

The Chad-Cameroon project also affected a large number of local resource users like small-scale farmers and herders. An evaluation study commissioned by the IFC and EEPCCI found that, as of June 2006, about 1,640 households (some 12,000 people) had been affected by exploration and exploitation activities in the oilfield areas of Southern Chad alone; this number was expected to grow as land acquisition for additional wells continued (Barclay and Koppert, 2007:ii). In addition, over four thousands people were affected by temporary or permanent land takings for the construction of the pipeline in Cameroon alone.<sup>218</sup>

In the oilfield area of Chad, oil operations intervened in a context characterised by widespread poverty and food insecurity, by local livelihoods mainly based on rainfed agriculture (e.g. cotton, millet), and by increased resource competition between farmers and herders pushed Southwards by changes in rainfall patterns (Magrin, 2001:398). In such contexts, permanent or temporary land takings can have major impacts on local livelihoods. On the other hand, potential benefits to the local population (e.g. employment, service provision) are largely confined to the construction phase (Magrin and van Vliet, 2005:95).

Local resource users negatively affected by an investment project are by no means a coherent and homogenous group. They typically include different and possibly competing interests backed by unequal negotiating power. Important social stratification may exist, for instance on the basis of social status, wealth, gender or age. Different interests may also exist between the customary landholders who first cleared the land and those who borrowed, rented or otherwise accessed land through an arrangement with them. Internal divisions may be exacerbated by the higher stakes brought about by the investment project, as tensions may arise on the distribution of compensation payments, and as some groups (e.g. customary chiefs)

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<sup>218</sup> Endeley and Sikod (2007:111). Exact and reliable figures on pipeline construction are difficult to find, as this was not covered by the Barclay and Koppert (2007) evaluation, and as the periodic reports produced by EEPCCI provide data in the form of overall compensation paid rather than numbers of people affected.

may strike separate deals with investors and the state. As a result, different groups may bear differentiated shares of the impacts caused by the project.<sup>219</sup>

#### *2.3.3.8. Negotiating power between investors and local resource users*

Local resource users are engaged in relations with the investor and the host state. These relations may be influenced by the involvement of other stakeholders - such as lenders and NGOs.

Relations between foreign investors and local resource users are typically characterised by major power asymmetries - with the former typically being in a much stronger negotiating position than the latter. The Chad-Cameroon oil development and pipeline project involves two of the poorest countries in the world,<sup>220</sup> and some of the world's largest corporations.<sup>221</sup> The differences in negotiating power between the oil consortium and affected local resource users are enormous.

Several factors (summarised in Table 2.3) foster these power asymmetries. First and foremost, there are huge differences in access to capital, technology and other valuable resources, as well as to knowledge and know-how (e.g. legal expertise), skills (e.g. negotiation skills, or even basic skills such as literacy and numeracy<sup>222</sup>) and information (e.g. about the existence, location and value of subsoil resources).

Power asymmetries may be further entrenched by differences in the capacity to influence decision-makers and opinion formers, to draw power from other negotiating tables, and to mobilise "powerful" actors like home and host state

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<sup>219</sup> For example, on the gender-differentiated impacts of land takings in the Cameroon leg of the pipeline, see Endeley and Sikod (2007:189).

<sup>220</sup> In the United Nations "Human Development Index", Chad ranks 170<sup>th</sup> out of 177 countries, while Cameroon fares slightly better (144<sup>th</sup>) (UNDP, 2008).

<sup>221</sup> In a ranking of the world's top 100 non-financial transnational corporations by value of foreign assets, ExxonMobil ranks 6<sup>th</sup>, Chevron 14<sup>th</sup> and Petronas 55<sup>th</sup> (UNCTAD, 2008).

<sup>222</sup> In Chad, only 25.7% of the population above 15 years old can read and write; in Cameroon, the adult literacy rate is higher – 67.9% (UNDP, 2008).

governments or international financial institutions; by differences in social status and social relations, for instance with politicians and government officials; and by differences in the degree of internal cohesion, for instance where local groups are divided about proposed investment projects, or local elites (along status, wealth, gender, age and other lines) strike deals with investors and the state that may disadvantage other local resource users.

Widespread beliefs and internalised assumptions concerning the “modernity” and “backwardness” of different forms of natural resource use can also reinforce power asymmetries. For instance, pastoral resource use is commonly perceived as “backward” in many African contexts due to a lack of understanding of its economic and ecological rationale (Hesse and MacGregor, 2006:8-9), while foreign investment tends to be seen as a key element of “modernisation”.

But local resource users may also have levers to exercise (some degree of) countervailing power, to extents that vary in different project phases. Location dependency (i.e. the need for the investor to access a specific location e.g. due to distribution of subsoil resources) and vulnerability to local population activities capable of affecting the cost-benefit equilibrium of the investment project (e.g. sabotage, unauthorised abstractions from pipelines) tend to improve the negotiating power of local groups.<sup>223</sup> And while the negotiating power of local groups (and of the host state, for that matter) is undermined where the investor can easily demobilise assets and move activities elsewhere (“asset mobility”), local groups may have greater leverage if asset mobility is limited – as is usually the case in extractive industries.

The relative importance of “reputational risk” also affects the balance of negotiating power between the investor and local resource users. Where reputational damage

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<sup>223</sup> On these aspects, see Akpan (2005).

readily translates into financial losses, the investor may be under greater pressure not to act in a way that may undermine the earning power of its brand.

Host state action affects relations between investors and local resource users. In theory, host states may be expected to support local resource users, and “push upwards” the legal protection provided to local resource rights under national law or tailored arrangements. In practice, however, this is undermined by two important caveats.

First, tailored arrangements for land takings are typically negotiated at the design stage, when host states tend to be in a weaker negotiating position vis-à-vis the investor.<sup>224</sup> In addition, where different host states compete for investment, reforms to strengthen local resource rights may be constrained by concerns that investors prefer other countries with lower social standards costs - an issue that will be discussed later.<sup>225</sup>

More fundamentally, it cannot be assumed that host states will defend the interests of local resource users. As discussed, the social science literature suggests that state action may be driven by other concerns, such as the “extraversion” strategies of national elites or policy prioritisation favouring urban over rural interests.<sup>226</sup> In addition, different state agencies may have different agendas, and much depends on the balance of power between these agencies.

Host state attitudes not supportive of local resource users may also be linked to conflicts of interest between the different roles of the host state in the project: its role as the regulator; its vested interest in the investment project, as equity holder<sup>227</sup>

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<sup>224</sup> See section 2.3.3.4.

<sup>225</sup> Section 6.3.

<sup>226</sup> See section 2.3.3.3.

<sup>227</sup> See the equity participation of the governments of Chad and Cameroon in COTCO and in TOTCO.

and/or recipient of taxes, royalties and fees; and, possibly (though not in Chad-Cameroon), its interest in project output as off-taker.

Finally, host states may have genuine concerns about public finances, and about their ability to undertake public-purpose projects if compensation standards for land takings are too generous.

The overall result may be a deliberate government attempt to lower social standards. In the negotiation of the Cameroon Compensation Plan (part of the Chad-Cameroon EMP), the World Bank pushed for standards complying with its safeguard policies, which are more generous than Cameroonian law.<sup>228</sup> While COTCO endorsed this approach, the government of Cameroon resisted it for fear that its adoption would set a precedent for compensation schemes in future public-purpose projects.<sup>229</sup> As a result of this resistance, the Cameroon Compensation Plan emphasises that it only applies to the project, and that it results from the “specific nature” of this and the “special context” created by World Bank financing.<sup>230</sup>

Similarly, the government of Cameroon’s commitment to return temporarily taken land to pre-construction users, also included in the Plan, was the outcome of much pressure from the Bank.<sup>231</sup> More generally, while Cameroon government agencies made selective use of Cameroonian legislation to pursue government interests, they did not use similar strategies to maximise benefit for affected local resource users.<sup>232</sup>

NGOs and lenders may play a role in rebalancing asymmetries in negotiating power between investors, host states and local resource users. In the Chad-Cameroon project, World Bank involvement resulted in the application of higher social

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<sup>228</sup> As will be discussed in section 4.4.

<sup>229</sup> Interviews with two consultants involved in the design and/or implementation of the EMP (2 and 13 August and 20 September 2007).

<sup>230</sup> Section 1.2.1 of the Plan.

<sup>231</sup> Interview with a consultant involved in the preparation of the EMP (2 August 2007).

<sup>232</sup> Interview with a consultant involved in the design of the EMP (13 August 2007).



standards than those required by national law. The integration of these standards in the Environmental Management Plan, the establishment of institutions to monitor compliance with the Plan, the possibility of recourse to World Bank Inspection Panels, and behind-the-scenes pressure from the Bank all strengthened the position of local resource users, and resulted in more advantageous outcomes for them.<sup>233</sup>

NGO engagement also exerted pressure to raise social and environmental standards, through national and international campaigning and support to affected local resource users. As discussed, action by NGOs in Chad resulted in higher compensation values for some trees and crops.

However, where power asymmetries between investors, host state and local resource users are very significant and compounded by structural factors (e.g. major differences in access to capital, technology, knowledge, skills, information and social relations), the extent to which lenders and/or NGOs can help redress these asymmetries is limited.

Much depends on the leverage of NGOs and financial institutions. As discussed, the notion of “obsolescing bargain” may apply to lenders as well as investors. As a result, lenders’ capacity to influence host state action decreases after the construction stage. More fundamentally, changes in project design induced by lenders and NGOs may concern the “fringes” rather than the “core” of the investment project.

In this regard, a useful conceptual framework was developed by van Vliet and Magrin (2007), who use the example of the Chad-Cameroon project. These authors use the concepts of “centre” and “periphery” to refer respectively to the units that within each organisation are responsible for the core production/distribution function, on the one hand (e.g. extraction, development and exportation of oil); and

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<sup>233</sup> For a specific example from Cameroon, see Nguiffo and Djeukam (2008:43).

the units responsible for project legitimization, on the other, for instance through “innovation” in environmental and social impact assessment, or use of internationally renowned experts as project consultants.

According to these authors, the “periphery” of a stakeholder (e.g. the oil consortium) may engage with the “periphery” of other stakeholders (lenders, NGOs), while relations among the “centres” are rarer. Within each organisation, real power usually resides with the “centre”. The overall result is “green, social and innovative” peripheries working together on activities legitimising the project, with key decisions on the core business remaining in the hands of the respective “centres”.<sup>234</sup> The theme of a “two-speed” implementation of the Chad-Cameroon project, which has come up over and over in the periodic reports produced by the International Advisory Group from the very beginning of the project,<sup>235</sup> seems to reflect this analysis.

For example, an International Advisory Group (IAG) was established to advise the World Bank and the host states on the development issues raised by the project. This was meant to boost the poverty reduction credentials of the project; and to help legitimise World Bank involvement, which as discussed was seen as key to political risk mitigation. The IAG carried out regular field visits to both Chad and Cameroon, and issued periodic reports. While the IAG gained credibility through the perceived quality of its work, its ability to effect change in project implementation was limited – it was a purely advisory body, and some of its recommendations were ignored.<sup>236</sup>

#### ***2.3.4. Concluding remarks***

The foregoing stakeholder and power analysis illustrates how foreign investment projects in Africa tend to involve a diverse range of stakeholders and interests, as

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<sup>234</sup> Van Vliet and Magrin (2007:4).

<sup>235</sup> E.g. IAG (2001:3, 6, 19 and 22). See also Delescluse (2004:47) and chapter 4 below.

<sup>236</sup> Keenan (2005:398); Pegg (2005:23).

well as major asymmetries in negotiating power between these – including between foreign investors and local resource users, with investors usually being in a much stronger negotiating position.

The next two chapters examine the strength of the legal protection available to different sets of property rights associated with foreign investors and local resource users, and relate differences in legal protection to the asymmetries in negotiating power identified by the stakeholder and power analysis.

### **3. The international protection of property rights under human rights and investment law**

### 3.1. Property rights and international law<sup>237</sup>

For a long time and until World War II, international law only protected the property rights of foreign investors, while the property rights of nationals were left to national law. This focus reflected the recognition that foreigners are often in a disadvantaged position, as they hold assets in a state in which they have no formal political representation. Coupled with the desire of home states to protect the interests of their nationals abroad, this circumstance led to the progressive establishment of a body of international law on the protection of foreigners' property rights - first as part of the broader rules on the "treatment of aliens", then as part of international investment law.

After decolonisation, a new rationale for this body of law emerged. On the one hand, investment flows previously regulated by the domestic law of the colonial power were now subject – in principle – to the domestic law of newly independent states. Developing minimum international standards on the protection of foreigners' property rights was therefore crucial to protect the interests of investors operating in those states. On the other hand, protecting the property rights of foreign investors in developing countries was seen as key to promoting investment and economic growth in those countries.<sup>238</sup>

International rules on the property rights of nationals (which would protect local resource rights affected by investment projects) emerged after World War II with the development of international human rights law. Relevant human rights provisions include the right to property, and a range of other human rights - both

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<sup>237</sup> This chapter is an adapted version of Lorenzo Cotula, "Law and power in foreign investment projects: A comparative analysis of the international protection of property rights under human rights and investment law", forthcoming in *South African Yearbook of International Law 2008* and in *Transnational Dispute Management*. Section 3.2.2.2 builds on Lorenzo Cotula, "The Right to Food and Resource Access – Conceptual Links", in Lorenzo Cotula (Ed), 2008, *The Right to Food and Access to Natural Resources – Using Human Rights Arguments and Mechanisms to Improve Resource Access for the Rural Poor*, Rome, Food and Agriculture Organization of the United Nations.

<sup>238</sup> On the history of international investment law, see (Sornarajah, 2004:18-30).

individual (e.g. right to an adequate standard of living, including food; right to legal redress) and group rights (e.g. peoples' rights to freely dispose of their natural resources; indigenous peoples' natural resources rights).

This chapter examines the norms of international human rights and investment law on the protection of property rights. Following the conceptual framework developed in section 2.2 (Table 2.2), the focus here is on the "normative content" dimension of the property rights protection matrix, including both substantive protection and legal remedies. By comparing the strength of the legal protection of different sets of property rights involved in an investment project, the chapter explores whether differences exist in such protection and, if so, how these differences relate to power asymmetries.

The next section analyses the protection of the right to property under the African Charter on Human and Peoples' Rights, and compares it to the standards applicable under its European and American counterparts. Section 3.3 analyses the protection of property rights under international investment law, and compares it to that available under the African Charter. This analysis finds that the African Charter provides lower standards of protection than its European and American counterparts; and that international investment law provides stronger protection than that available under the European and American human rights systems and, even more so, under the African Charter. Section 3.4 relates this legal analysis to an analysis of power relations in foreign investment projects, while a brief conclusion summarises key findings.

## 3.2. The protection of property rights under human rights law

### 3.2.1. *The international human rights system*

Human rights are the fundamental rights and freedoms to which all human beings are entitled. The modern development of human rights law can be traced back to the 1789 Declaration of the Rights of Man and Citizen, and subsequent constitutional evolutions. At the international level, the development of human rights accelerated after World War II with the adoption of several key international instruments.

The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, is the cornerstone of international human rights law. Although not a legally binding treaty, it can be said to embody an authoritative interpretation of articles 55 and 56 of the United Nations Charter.<sup>239</sup>

The human rights affirmed in the UDHR are spelt out in a set of legally binding treaties, including the 1966 International Covenant on Civil and Political Rights (ICCPR) and its Protocols, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169 of 1989). The ratification of these treaties by the twelve covered countries has increased in the 1990s, although to date no African country has ratified ILO Convention 169 (as to the covered countries, see Table 3.1).

Human rights are also protected by regional systems: in Europe, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms

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<sup>239</sup> As argued in Cotula and Vidar (2003:4).

(ECHR) and its Protocols, and the European Social Charter; in the Americas, the 1969 American Convention on Human Rights (ACHR) and its 1988 Additional Protocol on Human Rights in the Area of Economic, Social and Cultural Rights; and in Africa, the 1981 African Charter on Human and Peoples' Rights (ACHPR) and its Protocols, including the 1998 Protocol on the Establishment of an African Court on Human and Peoples' Rights.<sup>240</sup> While these regional human rights systems present important commonalities, they also present differences in emphasis (e.g. with the ACHPR placing greater emphasis on economic, social and cultural rights, on the duties of individuals and on group rights) and in stage of development (e.g. with the African system having long lagged behind in the development of monitoring institutions).

With the only exception of Morocco, the African Charter has been ratified by all African countries, and provides a single human rights framework for the whole continent; the African Court Protocol has been ratified by about half the countries of the continent<sup>241</sup> (see Table 3.1 for information on the twelve covered countries). Sub-regional arrangements for economic integration in Africa have also made growing references to human rights - for instance, with regard to the SADC Charter of Fundamental Social Rights; but their importance in the human rights field remains limited, and they arrangements are not covered by this study.<sup>242</sup>

UN human rights instruments apply to Africa in two ways – directly (for the states that ratified them), and through the ACHPR system. This is because the ACHPR requires its monitoring institutions to “draw inspiration” from UN human rights instruments (article 60), and to “take into consideration as subsidiary measures” other international rules and principles recognised by African states (article 61). Similarly, the African Court Protocol defines jurisdiction with regard to the

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<sup>240</sup> Hereinafter “African Court Protocol”.

<sup>241</sup> [http://www.achpr.org/english/info/index\\_ratifications\\_en.html](http://www.achpr.org/english/info/index_ratifications_en.html). The African Charter applies to North Africa, though as discussed in section 1.2.1 this study is limited to sub-Saharan Africa.

<sup>242</sup> For an analysis of such arrangements, see Viljoen (2007:479-526).



interpretation and application not only of the ACHPR but also of other relevant human rights treaties ratified by the states concerned (article 3(1)); and empowers the Court to apply not only the ACHPR but also other relevant human rights treaties (article 7). On the other hand, the ECHR and the ACHR do not apply to Africa even indirectly. They are referred to here in a comparative perspective, and because the African Commission of Human and Peoples' Rights has in practice referred to ECHR and ACHR case law.<sup>243</sup>

As discussed, several internationally recognised human rights are relevant to the protection of property rights. This includes, first and foremost, the human right to property, which is affirmed in the UDHR and in the three regional human rights systems. In addition, property rights over natural resources are instrumental to the realisation of other internationally recognised human rights. Particularly relevant are peoples' right to freely dispose of their natural resources; the right to an adequate standard of living, including food and housing; the rights to respect for private and family life, to public participation, and to legal redress; the right to development; and indigenous peoples' natural resource rights under ILO Convention 169. While the right to property may in principle apply to both foreign investors and local resource users (although with qualifications discussed below), the other human rights are only relevant to local resource rights.

Due to space constraints, it is not possible for this study to carry out a detailed analysis of all relevant human rights. This chapter focuses on the human right to property - the human right that is most directly relevant to the protection of property rights. It also examines the implications for the protection of property rights stemming from two other human rights - one chosen as an example of social and economic rights (the right to food), the other exemplifying peoples' rights (peoples' right to freely dispose of their natural resources). While ILO Convention 169 contains provisions on indigenous peoples' rights which may be relevant to

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<sup>243</sup> E.g. *SERAC and CESR v. Nigeria*, para. 59.

protecting local resource rights, it is not dealt with here given the lack of ratification of this Convention in Africa, and the problems associated with identifying indigenous peoples in the African context.<sup>244</sup>

### **3.2.2. Substantive protection**

#### *3.2.2.1. The right to property*

The cornerstone of the international protection of the right to property is provided by article 17 of the Universal Declaration of Human Rights (UDHR), which states: “Everyone has the right to own property alone as well as in association with others” (article 17(1)); “No one shall be arbitrarily deprived of his property” (article 17(2)).

The open formulation of this provision is the result of considerable debate and disagreement among states.<sup>245</sup> The resulting vagueness can be partly addressed through clarifying the implications of the standard of “arbitrariness” included in article 17. For instance, while this provision does not explicitly require payment of compensation for takings of property, the “arbitrariness” standard has been interpreted as implicitly requiring payment of some form of compensation.<sup>246</sup> It can also be interpreted as implicitly requiring public purpose, non-discrimination and adherence to due process of law. Non-discrimination in enjoyment of the right to property specifically flows from the principle of non-discrimination stated in article 2 of the UDHR. It is worth noting that article 17 protects both individual and collective property rights (“alone as well as in association with others”).

Disagreement among states on the scope and protection of the right to property entailed that no right-to-property provision was included in either the ICCPR or the ICESCR. This exclusion has considerably weakened the protection of the right to

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<sup>244</sup> In Africa, because of the limited penetration of settlers of European descent compared to the Americas and Australasia, “most nationals are to varying degrees ‘indigenous’ in the original sense of the word” (Viljonen, 2007:280).

<sup>245</sup> On the *travaux préparatoires* of article 17, see Morsink (1999).

<sup>246</sup> In this sense, Krause (1995:151).

property under the UN human rights system; and although the number of ratifications of these instruments has increased substantially over the past two decades,<sup>247</sup> this has done little to strengthen the protection of the right to property.<sup>248</sup> Treaty provisions do exist on specific aspects of the right to property, for instance in relation to the natural resource rights of indigenous peoples;<sup>249</sup> to non-discrimination in property relations on the basis of gender and race;<sup>250</sup> and to the protection of civilian property and objects related to the survival of the civilian population within the context of armed conflicts.<sup>251</sup> But beyond such specific aspects, the protection of the right to property under the UN system is rather weak.

The weakness of the right to property under global instruments is partly compensated by its protection under regional human rights systems (where these exist). The European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (ACHPR) all recognise the right to property. However, differences in emphasis among these instruments result in the right to property enjoying considerably weaker international protection in Africa compared to Europe and the Americas. Before analysing the provisions of the ACHPR, it may be useful to briefly recall key elements of the protection of the right to property under the ECHR and the ACHR.

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<sup>247</sup> Including in Africa. Of the twelve covered countries, only Tanzania has not ratified the ICCPR, while Mozambique has not ratified the ICESCR (see Table 3.1).

<sup>248</sup> However, the 1990s witnessed some renewed interest in the right to property, as reflected for instance in the appointment of an "independent expert" on this right by the UN Commission on Human Rights; see the final report "The Right of Everyone to Own Property Alone as Well as in Association with Others", 25 November 1993, UN Doc. E/CN.4/1994/19, [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=160](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=160).

<sup>249</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169 of 1989), articles 13-19.

<sup>250</sup> Article 15 of the CEDAW; and article 5(d)(v) of the ICERD.

<sup>251</sup> E.g. article 53 of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War; article 58 of its Additional Protocol I of 1977 (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts); and article 14 of Additional Protocol II of 1977 (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts).

Article 1 of Protocol 1 of the ECHR protects “peaceful enjoyment of possessions”.<sup>252</sup> The European Court of Human Rights has interpreted this as equivalent “in substance” to the right to property.<sup>253</sup> The Court has also developed extensive case law on this right. First, it has taken a very broad definition of “possessions” to cover a wide range of legal interests - as discussed in section 2.2.4.

Second, the Court has interpreted the normative content of article 1 as including three different rules. The first one (the first sentence of the first paragraph) affirms the right to property. The second and third rules (the second sentence of the first paragraph and the second paragraph) qualify that right through expropriation for a public purpose and through “police powers” (regulation and taxation), respectively. These three norms are applied in conjunction with one another.<sup>254</sup> In so doing, the Court has developed a test of proportionality: in imposing limitations on the right to property under the second and third rules, a “fair balance” must be struck between the right to property of individuals and the interests of the community at large. In striking this balance, states enjoy a wide “margin of appreciation”.<sup>255</sup>

Third, although article 1 makes no explicit reference to payment of compensation for takings of property, the Court has clarified that this is an implicit requirement,<sup>256</sup> and that compensation must be “reasonably related” to the value of the property

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252 “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

On the negotiations that led to this provision, see Allen (2005), who discusses disagreements between states as to the scope of the provision, including linked to fears that it may restrict economic planning (Allen, 2005:17-28, esp. at 21).

<sup>253</sup> *Marckx v. Belgium*, para. 63.

<sup>254</sup> *Sporrong and Lönnroth v. Sweden*, para. 61. See also *James and Others v. United Kingdom*, para. 37; and *Lithgow and Others v. United Kingdom*, para. 106.

<sup>255</sup> *Sporrong and Lönnroth v. Sweden*, para. 69.

<sup>256</sup> *James v. UK*, para. 54; and *Lithgow v. UK*, paras. 109 and 120.

taken – without however necessarily representing the full market value.<sup>257</sup> States enjoy a wide margin of appreciation in determining standards of compensation.<sup>258</sup>

In the Americas, the right to property is stated in article 21 of the ACHR.<sup>259</sup> The ACHR and ECHR right-to-property provisions present some differences. For instance, differently to the ECHR, the ACHR text explicitly refers to payment of compensation – although in the ECHR this gap has been filled through case law. Overall, the ACHR provision features three rules that are essentially similar to the ECHR ones (affirmation of the right; limitation through regulation; limitation through expropriation).

The Inter-American Commission and Court of Human Rights have developed case law on the right to property – albeit not to the same extent as the European Court. They have particularly done so in relation to the land rights of indigenous peoples. For instance, the Inter-American Commission clarified that “the right to property has an autonomous meaning in international human rights law”; and that the scope of this right is therefore not restricted to property rights formally recognised by domestic law, but includes entitlements based on customary law.<sup>260</sup> In addition, the Inter-American Court has clarified that the normative content of the right to property goes beyond the obligation for states to refrain from arbitrarily interfering with property rights: it also requires them to take proactive steps in order to

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<sup>257</sup> In *James v. UK*, the European Court held that Article 1 of Protocol 1 “does not guarantee a right to full compensation in all circumstances”; and that legitimate public-interest objectives “may call for less than reimbursement of the full market value” (para. 54). In *Lithgow v. UK*, the Court held that the proportionality rule (i.e. the need to strike a “fair balance” between the rights of individuals and the general interest) also applies to the standard of compensation (para. 120); and that compensation for nationalisation may be less than compensation for individual expropriations (para. 121).

<sup>258</sup> In *Lithgow*, the European Court held that national authorities have a margin of appreciation in determining compensation standards, so that the Court will respect the legislature’s judgement unless “manifestly without reasonable foundation” (para. 121).

259 “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. [...]”

<sup>260</sup> *Maya Indigenous Communities of the Toledo District v. Belize*, para. 117.

improve security of property rights vis-à-vis third parties, for instance through registration systems or other arrangements.<sup>261</sup>

As for the African human rights system, article 14 of the ACHPR affirms: “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”.<sup>262</sup>

While the right-to-property provisions of the ACHR and of the ECHR are broadly similar, article 14 of the ACHPR is less detailed and specific. While the ECHR and the ACHR clearly state that everyone has the right to use and enjoy his/her property,<sup>263</sup> article 14 of the ACHPR avoids clarifying who is the holder of the right to property; it does not refer to the key elements of this right (use and enjoyment of possessions); and it merely commits states to guarantee such right (i.e. “The right... shall be guaranteed”) without affirmatively stating it (i.e. “Everyone has the right...”). The approach followed in article 14 contrasts with the formulation of most other ACHPR provisions, which positively affirm rights and identify right holders (“every individual” in articles 5-11 and 15-17; “all peoples” in articles 19-24).

Unlike the ECHR and the ACHR, the ACHPR contains no explicit provision on regulation as a possible limitation of the right to property - although this may be considered as implicit. As for takings, like the ACHR and the ECHR, the ACHPR requires a “public need” or “general interest”. Non-discrimination in enjoyment of the right to property and in takings of property flows from the non-discrimination principle embodied in article 2 of the ACHPR (similarly to articles 14 and 1 of the ECHR and the ACHR, respectively). However, very importantly, unlike the ACHR

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<sup>261</sup> In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court found that, although Nicaraguan legislation did protect the resource rights of indigenous peoples, absence of specific procedures to secure these rights and lack of titles actually issued violated the right to property; paras. 140-155.

<sup>262</sup> See also article 13(3) of the Charter, which reads: “Every individual shall have the right of access to public property [...] in strict equality of all persons before the law”.

<sup>263</sup> See above for the exact formulation.

and the ECHR systems, the ACHPR does not require payment of compensation – it merely refers to the “provisions of appropriate laws”.<sup>264</sup> Lack of compensation requirements significantly weakens the protection of the right to property under the ACHPR compared to the ECHR and the ACHR.

The formulation of article 14 reflects the political disagreement among African states about the protection to be granted to the right to property - particularly at a time when those states were divided between “socialist” and “capitalist” paths to development. It also reflects the lesser status that this right enjoys in the ACHPR compared to the European and American human rights systems - a lesser status that is partly compensated by the African Charter’s emphasis on other rights, such as peoples’ right to freely dispose of their natural resources. This peoples’ right also contributes to protect local resource rights, and is absent in the European and American systems.

In addition, differently to the ECHR and the ACHR, the African Commission of Human and Peoples’ Rights has developed only limited case law on the right to property. The Commission referred to article 14 in *SERAC and CESR v. Nigeria* – but only to establish the implicit recognition by the African Charter of the right to housing, rather than to protect the right to property as such.<sup>265</sup> While the facts of the case (wanton destruction of houses) would have justified a finding of violation of the right to property, the Commission remained silent on this issue.<sup>266</sup> Violations of the right to property were alleged in *Bakweri Land Claims Committee v. Cameroon*, but the case was declared inadmissible due to non-exhaustion of domestic remedies.<sup>267</sup> So far, the Commission has found direct violations of the right to property only to reinforce findings of violation of other protected rights - for instance, with regard to

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<sup>264</sup> Although article 1 of Protocol 1 of the ECHR makes no explicit reference to payment of compensation, the European Court has clarified that this is an implicit requirement - see above.

<sup>265</sup> *SERAC and CESR v. Nigeria*, paras. 61-63.

<sup>266</sup> Viljoen (2007:247-248).

<sup>267</sup> Paras. 5 and 55.

loss of property within the context of mass expulsions<sup>268</sup> and of mass confiscation and looting,<sup>269</sup> and with regard to property restrictions supporting crackdowns on freedom of information (particularly the sealing up of the premises of publishing outfits).<sup>270</sup>

The limited ACHPR case law on the right to property has not resulted in significant clarification of the normative content of the right to property, parallel to the conceptual developments under the ECHR and ACHR. For instance, the Commission has not clarified the nature and scope of the legal interests protected under the ACHPR right-to-property provision. In contexts like those prevailing in sub-Saharan Africa, this is an important lacuna. Despite significant cross-country variations, much of the land in Africa is formally owned by the state, and accessed by local users on the basis of “customary” rules that are not necessarily recognised by state legislation.<sup>271</sup> Therefore, whether right-to-property guarantees apply not only to ownership rights backed by legal title but also to “customary” resource use rights makes a significant difference to the protection of local property rights within foreign investment projects.<sup>272</sup>

It is worth clarifying that the right to property protects the property rights of both nationals and non-nationals, and may protect both local resource users and investors. As for the latter point, the ECHR specifically protects the right to property of “every natural *or legal* person” (article 1 of Protocol 1, emphasis added). The case law of the European Court has upheld right-to-property claims brought by

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<sup>268</sup> *Union Interafricaine des Droits de l’Homme and Others v. Angola*, paras. 17 and 22.

<sup>269</sup> *Malawi African Association and Others v. Mauritania*, paras. 127-128.

<sup>270</sup> *Media Rights Agenda and Others v. Nigeria*, paras. 76-77 and 92. In this case, the Commission clarified that the right to property necessarily includes the right to have access to one’s own property (para. 77).

<sup>271</sup> As discussed in sections 4.3.2 and 4.3.3.

<sup>272</sup> Interpreting article 14 of the ACHPR broadly to include “customary” rights would be in line with the case law developed under other regional human rights systems; see the ACHR cases *Mayagna (Sumo) Awa Tingni* and *Maya Indigenous Communities of the Toldeo District*, and the ECHR case *Holy Monasteries v. Greece*, discussed above. It would also be in line with recent developments in the domestic law of some African countries (e.g., in Tanzania, the case *Attorney General v. Akonaay, Lohar and Another*, discussed in section 4.2.1).



corporations,<sup>273</sup> and by individuals in relation to interests they held in corporations.<sup>274</sup> On the other hand, the Inter-American Commission on Human Rights ruled out human rights claims by legal persons in *Mevopal SA v. Argentina*.<sup>275</sup>

While article 14 of the ACHPR does not explicitly refer to the right to property of legal entities (as noted above, this article makes no reference to the right holder), its open wording seems to enable this possibility. While most human rights, by their very nature, refer to physical persons (e.g. freedom from torture, right to health), the right to property raises no conceptual difficulties in being extended to legal entities. Even if the possibility of recourse to human rights instruments by corporations is precluded, as in the ACHR system, their claims may be brought by the physical persons having interests in the corporation. Ultimately, behind a corporation are shareholders.<sup>276</sup> However, things may be more complicated where it is not straightforward that interference with the property rights of the corporation also translates into interference with the property rights of its shareholders – whose property is the share itself rather than the corporation’s assets.<sup>277</sup>

As for nationality, human rights provisions on the right to property vest such right with “every person” (ECHR) or with “everyone” (UDHR, ACHR), or do not specify who the right holder is (ACHPR). In other words, differently to provisions concerning political rights, they do not restrict enjoyment of the right to property to

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<sup>273</sup> *Pine Valley Developments Ltd and Others v. Ireland*.

<sup>274</sup> *Lithgow v. UK*.

<sup>275</sup> Para. 17. The case concerned several human rights, including the right to property. The Commission based its decision on article 1 of the ACHR, which specifically states that the term “persons” as used in the Convention refers to human beings. It must be noted, however, that, differently to most other ACHR provisions, article 21 affirms the right to property with regard to “everyone” rather than “every person”. The Commission’s decision in *Mevopal* does not rule out the possibility of individual shareholders filing petitions with respect to interests they hold in corporations.

<sup>276</sup> In the ECHR system, as corporations can bring claims directly, shareholders can bring claims for damage to a company “only in exceptional circumstances”, when the company is unable to bring the claim directly; *Agrotexim and Others v. Greece*, para. 66.

<sup>277</sup> Allen (2005:84); Kriebaum (2008:9). See also the discussion at section 2.1.2 above.

nationals alone.<sup>278</sup> In addition, right-to-property provisions must be read in conjunction with non-discrimination norms.<sup>279</sup>

However, while non-discrimination provisions typically include “national or social origin” in their non-exhaustive lists of prohibited ground of discrimination,<sup>280</sup> nationality (i.e. citizenship) as such is not included. The *travaux préparatoires* of the UDHR show that the expression “national origin” refers to national groups within multi-national states rather than to citizenship, and is in this sense linked to other prohibited grounds of discrimination such as colour and race.<sup>281</sup> This interpretation of the expression “national origin” is also supported by article 1 of the ICERD: while this norm prohibits racial discrimination as including distinctions based on “national or ethnic origin”, it also clarifies that it does not apply to distinctions between citizens and non-citizens.

In addition, non-discrimination is widely interpreted as requiring not equality of treatment for all; but that equals be treated equally, and unequals unequally. Differences of treatment that are “reasonable” and “justifiable” are therefore not discriminatory.<sup>282</sup> Should differences of treatment between nationals and non-nationals be based on reasonable and justifiable factors, then differentiated treatment would be possible. For example, in *James v. UK* the European Court of Human Rights held that the reference to the general principles of international law for the purposes of determining the standard of compensation, embodied in article 1 of Protocol 1 of the ECHR, only applies to non-nationals. This is because those general principles “were specifically developed for the benefit of non-nationals”;

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278 Political rights like the right to vote only apply to “every citizen”; article 25 of the ICCPR.

<sup>279</sup> UDHR, article 2; ICCPR, article 2(1); ICESCR, article 2(2); ECHR, article 14; ACHR, article 1(1); ACHPR, article 2.

280 See all the provisions in the previous note.

281 In this sense, Vierdag (1973:100-101); and Morsink (1999:103-105).

282 See General Comment 18 of 1989 of the UN Human Rights Committee, which clarified that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant” (para. 13); and the ECHR case *Van Raalte v. The Netherlands*, which defines discrimination as “a difference in treatment... [that] has no objective and reasonable justification” (para. 39).

and because reference to them in Protocol 1 was not meant to extend their application to nationals (as confirmed, among other things, by the *travaux préparatoires*). As a result, standards of compensation may differ, with standards based on international law only applying to non-nationals. This difference of treatment does not constitute discrimination, according to the Court, as it is based on an “objective and reasonable justification”.<sup>283</sup>

### 3.2.2.2. *The right to food*

The right to food is recognized in article 25 of the UDHR,<sup>284</sup> and in article 11 of the ICESCR.<sup>285</sup> The meaning of these provisions has been clarified by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 12 of 1999.<sup>286</sup> While not binding per se, General Comments constitute the authoritative interpretation of legally binding treaty provisions, issued by the UN body responsible for monitoring the application of the treaty.

The normative content of the right to adequate food has been clarified further by the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security – adopted by the FAO Council in 2004 (“Right to Food Guidelines”).<sup>287</sup> The Right to Food Guidelines per se are not legally binding, but some of them reflect binding international law (for instance, the references to the Geneva Convention provisions on the protection of civilians within armed conflict; Guideline 16(2)); and other parts are intended to provide states with guidance on how best to pursue the progressive realization of the right to adequate food.

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<sup>283</sup> Paras. 58-66. The *James* ruling was followed in *Lithgow v. UK* (paras. 111-119).

<sup>284</sup> “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food [...]”.

<sup>285</sup> This recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate food [...]” (article 11(1)); and “the fundamental right of everyone to be free from hunger” (article 11(2)).

<sup>286</sup> “The Right to Adequate Food (Article 11)”, 12 May 1999, E/C.12/1999/5.

<sup>287</sup> Adopted on 23 November 2004, CL 127/10-Sup.1.

While General Comment 12 is authoritative because it has been adopted by the UN body responsible for overseeing the implementation of the ICESCR and because it is based on sound legal reasoning, the Right to Food Guidelines are authoritative because they have been adopted by states and express the political commitment of these to the realization of the right to food.

With regard to Africa's regional human rights system, the ACHPR does not refer explicitly to the right to food. However, in the case *SERAC and CESR v. Nigeria*, the African Commission on Human and People's Rights held that the right to food is "implicit" in the Charter, particularly in light of its provisions on the rights to life (article 4), to health (article 16) and to development (article 22).<sup>288</sup> Further, the 2003 ACHPR Protocol on the Rights of Women in Africa affirms women's "right to food security" (article 15).

Outside the African context, the right to food is absent from the ECHR, which focuses on civil and political rights; but it is recognised in the ACHR system under article 12 of the Additional Protocol on Human Rights in the Area of Economic, Social and Cultural Rights.<sup>289</sup>

In its General Comment 12, the CESCR clarified that "the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement" (para. 6). The right to adequate food does not mean that individuals and groups have a general entitlement to be provided food. It is primarily interpreted as the right to feed oneself in dignity, through economic and other activities. In other words, individuals and groups are responsible for undertaking activities that enable them to have access to food.<sup>290</sup>

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<sup>288</sup> Para. 67.

<sup>289</sup> "Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development".

<sup>290</sup> As argued in Cotula and Vidar (2003:24) and Cotula (2008d:17).

Nonetheless, the state has an important role to play in supporting these efforts. Under the ICESCR, states must “take steps [...] to the maximum of [their] available resources, with a view to achieving progressively the full realization of the [right to food] by all appropriate means” (article 2(1)). In other words, the key obligation of states is to “take steps” towards progressive realisation. This entails restrictions on measures that would worsen enjoyment of the right to food (“non-retrogression principle”); and the duty to take measures that improve enjoyment of that right.<sup>291</sup> This duty to take steps is further concretized by the wording of the ICESCR:

- The expression “to the maximum of [...] available resources”, which limits state discretion in resource allocation, and directs states to prioritise the realisation of the rights recognised in the Covenant over other policy goals.
- The expression “by all appropriate means”, which leaves states with wide discretion in deciding which measures to take but establishes a standard of “appropriateness” with which such measures must comply.<sup>292</sup>

The nature of the steps that states must take is defined by a well-established analytical framework followed by General Comment 12. According to this framework, states must take three sets of steps: “respect”, “protect” and “fulfil”. In turn, fulfil includes two sets of steps — “facilitate” and “provide”. The obligation to respect requires states to refrain from taking measures that affect access to food negatively. The obligation to protect requires states to take measures to ensure that third parties (e.g. individuals, enterprises) do not deprive right-holders of their access to food. The obligation to fulfil/facilitate requires states to support the efforts of individuals and groups to gain access to adequate food. The obligation to

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<sup>291</sup> Para. 9 of General Comment 12.

<sup>292</sup> See for instance the case *Government of the Republic of South Africa and Others v. Grootboom and Others*, decided by the Constitutional Court of South Africa. The case concerns the standard of “reasonableness” for measures to realize the right to housing under the South African Constitution.

fulfil/provide requires states to provide food “whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal”.<sup>293</sup>

These state obligations are of a different nature. The obligation to respect requires states to refrain from doing something (“negative obligation”), and is of immediate effect. The obligations to protect, to facilitate and to provide require states to take action (“positive obligations”), and may have important resource implications (e.g. the obligation to provide). They are therefore to be realised progressively and to the maximum of available resources — although for the very minimum core of freedom from hunger these obligations are of immediate effect.<sup>294</sup>

The normative content of the right to adequate food has major implications for the legal protection of local resource rights affected by foreign investment projects. In much of Africa, access to natural resources is a main source of food for the majority of the rural population. Land and water are central to food production. Forest resources provide a basis for subsistence harvesting as well as for income-generating activities (e.g. through timber production). There is therefore an important relationship between realising the right to food and protecting property rights over natural resources, particularly for food-insecure groups. Both General Comment 12 and the Right to Food Guidelines tackle this relationship.

In both cases, the focus is on access to food — regardless of the form that such access takes. The philosophy underpinning General Comment 12 is that the right to food may be exercised through direct food production; through income-generating activities (on- or off-farm) that enable procurement of food; or through combinations of both.

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<sup>293</sup> General Comment 12, para. 15.

<sup>294</sup> General Comment 12, paras. 6 and 17.

This philosophy emerges for instance from the statement that the right to food is realised when individuals or groups “have physical and economic access [...] to adequate food or *means for its procurement*”.<sup>295</sup> This applies to both food availability and accessibility. The availability of food may be assured through either direct food production or “well functioning distribution, processing and market systems that can move food from the site of production to where it is needed”.<sup>296</sup> Accessibility of food may be achieved through “any acquisition pattern or entitlement through which people procure their food”;<sup>297</sup> this would include both food production and procurement.

A similar approach is taken in the Right to Food Guidelines. Guideline 8 (“Access to resources and assets”) deals with access to natural resources such as land, water and genetic resources. Other natural resources (e.g. forests, grazing) must also be considered as included, however. This is in line with the more general wording of the first paragraph of Guideline 8 (“resources” and “assets”, at 8(1)) and with that of other Right to Food Guideline provisions (e.g. “productive resources” in Guideline 2, at 2(4)).

Guideline 8 calls for measures to secure land rights and, “as appropriate”, for agrarian reform to enhance land access for the poor (Guideline 8(b)). The Guideline also deals with income-generating activities in a food-procurement mode, however. It calls for measures to promote employment and self-employment (Guideline 8(a)). Similarly, Guideline 2 calls for a “holistic and comprehensive approach” to hunger resolution, including measures to ensure access to productive resources and to employment (Guideline 2(4)).

A useful way of conceptualizing the role of natural resources in the realisation of the right to food is provided by the “sustainable livelihoods” framework. This

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<sup>295</sup> Para. 6 of General Comment 12, emphasis added.

<sup>296</sup> Para. 12.

<sup>297</sup> Para. 13.

framework was developed - without any specific reference to the right to food - by authors such as Chambers and Conway (1992), Carney (2002), and Moser and Norton (2001). The sustainable livelihoods framework defines livelihoods as the capabilities, assets and activities through which households make a living (Moser and Norton, 2001:5-7) - which would include the capabilities, assets and activities to which people gain access to food.

Among other things, the sustainable livelihoods literature identifies five types of capital assets as the basis of household livelihoods: financial capital (e.g. income from employment or self-employment, pensions, credit, remittances from relatives abroad or in urban areas); human capital (e.g. skills, knowledge); natural capital (e.g. land, forests, water, genetic resources); physical capital (e.g. equipment); and social capital (e.g. networks of social relations). Household livelihoods depend on diverse and evolving combinations of these different assets (see Figure 3.1). In this context, access to natural resources is one of the five types of livelihood assets.

It is submitted here that interpreting the right to food in light of the “sustainable livelihoods” framework provides useful insights on the implications of that right for protecting local resource rights affected by investment projects. Interpreting the right to food through the prism of that conceptual framework suggests that the realisation of this right requires ensuring that individuals and groups enjoy access to appropriate combinations of different livelihood assets, so as to be able to obtain adequate food.

In other words, unlike the right to property, protecting local resource rights (access to natural capital, in the “sustainable livelihoods” language) is not the very core of the right to food, but a means to an end — the production or procurement of food. This end may also be achieved through other (complementary or alternative) means, such as through income from employment.



In practice, the relative weight of local resource rights as a means to realise the right to food varies depending on socio-economic — rather than legal — factors. Where natural resources are the main source of food availability and accessibility, where there are limited off-farm livelihood opportunities, and where the ability of markets to ensure access to food is constrained, then providing effective legal protection to local resource rights is a key element of the realisation of the right to food. On the other hand, where income from employment or self-employment is the main mechanism through which the majority of the population gains access to food, the relative importance of rights over natural resources diminishes considerably.

For instance, governments may pursue the realisation of the right to food through policy interventions in areas other than natural resources (e.g. through promoting off-farm diversification) if this is an effective strategy for improving the combinations of livelihood assets and their food access outcomes. However, *not* taking “appropriate” steps, to the maximum of available resources, in order to protect local resource rights from dispossession where this undermines access to food (e.g. because of a lack of alternative livelihood sources) would violate the right to food.

Where property rights are taken, the right to food may still be realised if those who have lost access to resources for direct food production earn new income that enables them to purchase food. But takings of property rights would violate the right to food if they are not compensated for by improvements in access to other capital assets such as income from employment, compensation schemes or safety nets; and if this undermines the availability and/or accessibility of food.

In other words, the right to food requires at the very minimum that takings of property rights be offset by improvements in access to other livelihood assets, so that those who lose out have access to at least the same quantity and quality of food as before the intervention. Although the legal texts affirming the right to food

(UDHR, ICESCR) make no mention of an obligation for states to pay compensation for takings of property rights, this obligation may still flow from the very logic of the human right to food, as interpreted through the prism of the sustainable livelihoods framework.

Compared to obligations to compensate relating to the right to property, the obligation to compensate stemming from the right to food differs in two respects. First, the obligation would only be triggered where takings of property rights render people food insecure. Second, the level of compensation would need to be determined on the basis not of the economic value of the property rights taken, but of what is necessary to restore people on a sustainable basis to at least the same level of food security as they enjoyed before the taking.

It must be noted that this interpretation has not been tested before international human rights bodies as yet. In *SERAC and CESR v. Nigeria*, the African Commission on Human and Peoples' Rights did find that the destruction and contamination of food sources (e.g. water, soil and crops) by the Nigerian government and by the Nigerian state oil company violated the right to food of the Ogoni people.<sup>298</sup> The reasoning followed by the Commission lends support to the interpretation proposed here with regards to takings of property rights. But a degree of uncertainty remains as to the likelihood that an international human rights body requested to decide a case involving arbitrary takings would follow this reasoning and find a violation of the right to food.

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<sup>298</sup> Paras. 67-69.

### 3.2.2.3. Peoples' right to freely dispose of their natural resources

Peoples' right to freely dispose of their natural resources is affirmed in both the ICCPR and the ICESCR.<sup>299</sup> It is linked to the principle of permanent sovereignty over natural resources, which is stated in UN General Assembly Resolution 1803 of 1962 (on "Permanent sovereignty over natural resources"),<sup>300</sup> and in the 1974 Charter of Economic Rights and Duties States.<sup>301</sup> While Resolution 1803 is not binding per se, it is widely seen as reflecting customary international law.<sup>302</sup> At the regional level, the right of peoples to freely dispose of their natural resources does not feature in the ACHR and the ECHR but has been further developed in Article 21 of the ACHPR.<sup>303</sup>

The exact meaning, scope and content of these provisions has been hotly debated — particularly from the 1960s through to the early 1980s, when newly independent developing countries claimed permanent sovereignty over natural resources as part of their revendications for a New International Economic Order — revendications that were resisted by industrialised countries.

None of the above provisions defines "peoples", the designated holders of this right. While General Assembly Resolution 1803 refers to the permanent sovereignty of

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<sup>299</sup> Article 1 of both Covenants affirms the right of all peoples to self-determination and states: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence".

<sup>300</sup> UN General Assembly Resolution 1803(XVII) of 14 December 1962 on Permanent Sovereignty of States over Natural Resources. Article 1 of the Resolution reads: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."

<sup>301</sup> Article 2(1) of the 1974 Charter of Economic Rights and Duties of States (UN General Assembly Resolution 3281(XXIV) of 12 December 1974) reads: "Every State has and shall freely exercise full permanent sovereignty [...] over all its wealth, natural resources and economic activities."

<sup>302</sup> See below, section 3.3.

<sup>303</sup> Article 21 of the African Charter states:

"1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.  
2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. [...]"

“peoples”, the 1974 Charter of Economic Rights and Duties of States refers to “every state”. As for the ACHPR, while sections (1) and (2) of Article 21 refer to “peoples”, section (4) refers to this right being exercised by “states parties”. The term “peoples” in the African Charter was deliberately left undefined in order to avoid controversy.<sup>304</sup> It seems susceptible to acquire different meanings, as virtually equivalent to “states” or as referring to distinct (e.g. ethnic, linguistic) groups within a state.<sup>305</sup>

In practice, the principle of permanent sovereignty has been mainly interpreted as referring to states — and was one of the key instruments used by developing countries in the 1960s and 1970s to assert their claims vis-à-vis industrialized countries and foreign investors. This predominant interpretation reflected the political will of developing country governments to assert control over natural resources not only vis-à-vis outsiders but also vis-à-vis their own people. Use of the term “sovereignty”, traditionally associated with statehood in international law, seemed to support this interpretation.<sup>306</sup>

However, the requirement that sovereignty over natural resources be exercised in the interest of the “well-being of the people” (article 1 of Resolution 1803) adds another dimension. Not only do states have a right vis-à-vis other states and foreign investors, they also have a duty towards their own citizens to use that sovereignty in pursuit of their well-being. Such “well-being” is to be interpreted in the light of internationally recognised human rights,<sup>307</sup> which include the rights to food and to property. In addition to its “external” dimension concerning relations between the host states and outsiders, the principle of permanent sovereignty has an “internal” dimension concerning relations between the host state and its citizens.

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<sup>304</sup> Viljoen (2007:243).

<sup>305</sup> Viljoen (2007:243).

<sup>306</sup> The principle of permanent sovereignty over natural resources is further discussed below, section 3.3.

<sup>307</sup> As argued by Leader (2006:664).

This internal dimension is illustrated by the ACHPR case *SERAC and CESR v. Nigeria*. In this case, the African Commission on Human and Peoples' Rights found that the government of Nigeria had violated Article 21 of the ACHPR because it failed to protect the right of the Ogoni people to freely dispose of their wealth and natural resources vis-à-vis interferences from third parties — namely from oil companies. According to the Commission, “the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis” — in violation of Article 21 (para. 58).

The *SERAC and CESR v. Nigeria* decision applies peoples' right to freely dispose of natural resources, as stated in the ACHPR, to groups *within* an independent state — the Ogoni people of Nigeria. It therefore tackles a different level compared to the dominant construction of “permanent sovereignty” — not relations between the state and outside entities, but relations between the state and its citizens. Peoples' right to freely dispose of natural resources has also been invoked with regard to protecting local land rights from government interference in the ACHPR case *Bakweri Land Claims Committee v. Cameroon* — although this complaint was declared inadmissible due to non-exhaustion of domestic remedies.<sup>308</sup>

It is this double level of operation that makes peoples' right to freely dispose of their natural resources a valuable international reference for the protection of local resource rights within foreign investment projects. Conceptually, this collective human right is in line with the typically collective nature of “customary” rights over natural resources in Africa - which will be discussed in the next chapter. By contrast, the right to property is rooted in the liberal political tradition and in individual property, although article 17 of the UDHR makes it clear that the right applies to both individual and collective property (“alone or in association with others”).

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<sup>308</sup> Paras. 5 and 55-56.

The problem is that the normative content and legal implications of the “internal dimension” of peoples’ right to freely dispose of their natural resources remain unclear. While this aspect of the *SERAC and CESR v. Nigeria* decision is centred on the obligation of states to “protect” this right from third-party interference, it may be argued that peoples’ right to freely dispose of their natural resources also entails a state obligation to “respect” – i.e. to refrain from arbitrarily interfering with this right. With regard to this obligation, Article 21(2) of the ACHPR explicitly states that peoples’ right to freely dispose of their natural resources entitles peoples to “lawful recovery” and “adequate compensation” in case of “spoliation” of their natural resources.

But, much remains to be done to clarify key elements of this right. The *SERAC and CESR v. Nigeria* decision did not involve a critical examination of what a “people” is. To date, the nature of the right holder remains unclear - what group can qualify as “people” and hold its government responsible for violations? Nor did the African Commission elaborate on the normative content of this right - what degree of local control over natural resources vis-à-vis their government are “peoples” entitled to? This indeterminacy undermines the effectiveness of this peoples’ right as a tool for protecting local resource rights within foreign investment projects.

While future case law may shed some light on the content and implications of this right, some commentators have remarked the decline of the concept of peoples’ rights in international human rights law - not only globally, but even in the ACHPR system, which has traditionally paid more attention to this concept. For instance, peoples’ rights received no mention in the human rights treaties adopted under the African Charter - such as the 2003 Protocol to the African Charter on the Rights of Women.<sup>309</sup>

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<sup>309</sup> Viljoen (2007:248).

### 3.2.3. Legal remedies

Access to effective remedies for claims of rights violations, and to a fair trial to determine on those claims, is a fundamental human right recognised in global and regional human rights systems.<sup>310</sup> Where individuals or groups feel that their human rights have been infringed, they can seek redress from domestic courts and, once domestic remedies have been exhausted, from international human rights institutions (e.g. ECHR, article 35(1); ACHR, article 46(1)(a); and ACHPR, article 56).

Given that the ICCPR and the ICESCR are silent on the right to property, the remedies provided by regional human rights systems are effectively the only international arrangements that can be relied on by individuals or groups claiming violations of that right.<sup>311</sup> Other human rights may open opportunities for recourse to UN human rights bodies, although such opportunities are limited in law (e.g. there is at present no complaint mechanism under the ICESCR, which recognises the right to food<sup>312</sup>) and in practice (in terms of access to global institutions for people living in rural Africa).

The focus here is on the legal remedies provided by the ACHPR system, examined in comparison with the ECHR and ACHR systems. ACHPR remedies are available for all the human rights examined in the previous section - the right to property, the right to food, and peoples' right to freely dispose of their natural resources. While for a long time the "justiciability" of social and economic rights was controversial, it is now accepted that such rights may form the basis of complaints to ACHPR institutions: the *SERAC and CESR v. Nigeria* case is primarily centred on social and

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<sup>310</sup> On the right to an effective remedy and to a fair trial, respectively, see articles 8 and 10 of the UDHR; articles 2(3) and 14(1) of the ICCPR; articles 13 and 6(1) of the ECHR; and articles 25 and 8 of the ACHR. As for the ACHPR, article 7 merges the protection of these two rights by stating the right of everyone "to have his cause heard", including the right to appeal to competent organs against acts violating fundamental rights.

<sup>311</sup> In the ECHR system, legal remedies and procedures had been significantly amended by Protocol 11 to the European Convention (adopted on 11 May 1994).

<sup>312</sup> In 2008, the UN Human Rights Council adopted an Optional Protocol to the ICESCR that sets up mechanisms for individual complaints (Resolution A/HRC/Res/8/2 of 18 June 2008). The Protocol will have to be adopted by the UN General Assembly, and is not yet in force.

economic rights (including the right to food) and on peoples' rights (including peoples' right to freely dispose of their natural resources).

Like other regional human rights systems, the African Charter requires exhaustion of domestic remedies as a precondition for filing petitions with international institutions - unless the domestic procedure has been "unduly prolonged" (article 56(5)). In several cases, the African Commission has refused admissibility of complaints due to non-exhaustion of domestic remedies.<sup>313</sup>

Exhaustion of domestic remedies requirements may significantly constrain access to justice for local resource users. In much of Africa, access to domestic remedies is plagued by limited judicial effectiveness and independence;<sup>314</sup> and by limited access to courts, especially for the rural population, due to lack of legal awareness, high costs coupled with inadequate legal aid, geographical distance of courts, long and cumbersome procedures, language barriers and socio-cultural factors.<sup>315</sup> However, the African Commission has interpreted exhaustion of domestic remedies flexibly, and has been prepared to lift it in exceptional cases.<sup>316</sup> In this regard, the African system displays greater flexibility than the ECHR and the ACHR, partly as a response to the significant constraints on access to justice in much of the continent.<sup>317</sup>

While both the ECHR and the ACHR have long had regional courts, the African Court of Human and Peoples' Rights held its first meeting in 2006. Before then, monitoring of compliance was undertaken by the African Commission of Human and Peoples' Rights alone. Besides inter-state complaints ("communications"), the African Commission can hear complaints brought by individuals and groups (articles 55-56 of the ACHPR). In these cases, the ACHPR does not set any

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<sup>313</sup> *Sana Dumbaya v. The Gambia*, para. 2; *Alfred B. Cudjoe v. Ghana*, para. 14; *Bakweri Land Claims Committee v. Cameroon*, para. 55.

<sup>314</sup> See section 4.1.2.

<sup>315</sup> On these aspects, see Cotula (2007a: 40).

<sup>316</sup> For instance, in *SERAC and CESR v. Nigeria*, where no effective domestic remedy was found to be available (paras. 40-41).

<sup>317</sup> Viljoen (2002:81-91).



requirements on standing, and complainants are not required to demonstrate a direct interest in the dispute (such as being the victim of the alleged human rights violations).<sup>318</sup> As a result, the ACHPR system is more “open” than the other regional human rights systems,<sup>319</sup> and NGOs have played a very active role in bringing complaints to the Commission.<sup>320</sup>

Apart from its more generous rules on standing and exhaustion of domestic remedies, however, the African Commission is on the whole a less effective monitoring institution than the regional bodies established by the ECHR and the ACHR. Lack of state cooperation tends to result in long delays. Even a “successful” and high-profile case like *SERAC and CESR v. Nigeria* illustrates this. The case relates, among other things, to environmental damage and loss of livelihoods caused by investment projects in the petroleum sector. First submitted in 1996, the case was repeatedly postponed due to obstruction from the Nigerian government. Only after the transition from military dictatorship to democratic elections in Nigeria did the case go ahead (and was decided in 2001). Even then, the Nigerian government took little part in the proceeding, and essentially held that the allegations concerned the old military government and that the new civilian administration had already taken remedial measures.<sup>321</sup>

In addition, differently to the ECHR and the ACHR, where Court proceedings lead to a binding judgement (under articles 46 of the ECHR and 68 of the ACHR), the Commission only issues non-binding decisions. These decisions do have highly persuasive authority.<sup>322</sup> However, they lack the legal enforceability that characterises binding judgements. In *SERAC and CESR v. Nigeria*, for instance,

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<sup>318</sup> *Bakweri Land Claims Committee v. Cameroon*, para 46.

<sup>319</sup> For instance, article 34 of the ECHR requires individuals or groups submitting complaints to claim to be the victim of the alleged human rights violations.

<sup>320</sup> Murray (2000:87-88).

<sup>321</sup> *SERAC and CESR v. Nigeria*, para. 30.

<sup>322</sup> Naldi (2002:10). Murray (2000:54-55) reports that the Commission itself has claimed on more than one occasion that its decisions constitute authoritative interpretation of the Charter - although this in itself does not make the decisions legally binding for the parties to a dispute.

having found that the government of Nigeria violated several provisions of the ACHPR, the Commission “appealed” to the government to stop violations, investigate past violations and ensure adequate compensation and restoration.<sup>323</sup> In addition, there is no effective follow-up monitoring of compliance by the Commission.<sup>324</sup> A recent empirical study of the outcomes of Commission decisions found that, in a sample of 44 communications, only six (14%) were “fully” complied with - the remainder being “not complied” (13 cases, 30%), only partly complied or otherwise falling short of full compliance.<sup>325</sup> In the 2006 “Resolution on the Importance of the Implementation of the Recommendations of the Commission on Human and Peoples’ Rights”, the Commission called on states to “respect without delay” its recommendations, and to indicate within 90 days the measures taken to comply and the difficulties encountered.<sup>326</sup>

The 1998 African Court Protocol, entered into force in 2004, has addressed some of these weaknesses. The African Court can now hear cases brought by the Commission or by states (article 5(1) of the Protocol); and by individuals and NGOs, but only if the complained state has made a specific declaration accepting this competence of the Court (articles 5(3)) and 34(6)). So far, only Burkina Faso has made such a declaration, however.<sup>327</sup> The prevailing lack of political will among African states makes it “relatively unlikely” that direct access to the African Court will play a major role in the future.<sup>328</sup> Given the reluctance of states to bring complaints against each other, the Commission is the most likely source of Court cases. Individuals and groups will only be able to have their case heard by the

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<sup>323</sup> *SERAC and CESR v. Nigeria*, *dispositif* of the decision. Similarly, in *Union Inter africaine des Droits de l'Homme and Others v. Angola*, the Commission found that Angolan government had violated several rights, including the right to property; and then merely “urge[d] the government of Angola and the complainants to draw all the legal consequences arising from the present decision” (para. 22). In *Malawi African Association v. Mauritania*, the Commission was more specific and “recommended”, among other things, that the government of Mauritania reinstate rights and compensate losses (paras. 144-150).

<sup>324</sup> Viljoen (2007:360).

<sup>325</sup> Viljoen and Louw (2007:4-8).

<sup>326</sup> Viljoen (2007:360).

<sup>327</sup> Viljoen (2007:439).

<sup>328</sup> Viljoen (2002:95).

Court through submitting it to the Commission first, and through relying on the Commission to submit it to the Court.<sup>329</sup> The Commission remains the only recourse for complaints against those countries that have not ratified the African Court Protocol (such as Chad or Cameroon).

The Court issues judgements that are final (article 28(2) of the Protocol) and binding (article 30). While this constitutes a major improvement, mechanisms to deal with non-compliance still appear weak. The Protocol merely requires the Court to specify non-compliance cases in its annual report to the Assembly of the African Union (article 31). The expectation is that the Assembly will exert pressure on violating states - which may or may not happen.

The ACHPR is silent on the types of remedies that the African Commission can grant. In practice, while on several occasions the Commission has merely urged the respondent state “to adopt measures in conformity with” its decision,<sup>330</sup> in other cases the Commission has made use of a wide range of more specific remedies - including calls for the cessation and investigation of violations, for restoration and for compensation.<sup>331</sup> However, these remedies are weakened by the non-binding nature of the Commission’s decisions. For instance, compensatory provisions do not determine the amount of compensation (e.g. in *SERAC and CESR v. Nigeria*), and are not legally enforceable as such. The African Court Protocol does empower the Court to “make appropriate orders to remedy the violation”, including “reparation” (presumably meaning restoration) and payment of “fair” compensation (article 27(1)). It also empowers the Court to adopt provisional measures “in cases of extreme gravity of urgency” - but only “when necessary to avoid irreparable harm

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<sup>329</sup> In Europe, the ECHR as amended enables individuals, groups and NGOs to directly submit cases to the European Court (article 34); in the Americas, on the other hand, only states and the Inter-American Commission can submit cases to the Court (article 61).

<sup>330</sup> Viljoen (2007:356).

<sup>331</sup> See for instance *SERAC and CESR v. Nigeria* and *Malawi African Association and Others v. Mauritania*.

to persons” (which may limit the application of provisional measures for right-to-property violations; article 27(2)).

Shortcomings in the effectiveness of human rights treaties to change state practice are highlighted by a recent quantitative study on both global and regional human rights treaties. The study suggests that “not only is treaty ratification not associated with better human rights practices than otherwise expected, but it is often associated with worse practices”.<sup>332</sup> In other words, countries ratifying human rights treaties were found to have in some cases *worse* human rights records than non-ratifying states. Part of the explanation for this had to do with the “position taking” function of treaty ratification: given the lack of robust enforcement mechanisms in human rights treaties and given the high costs of monitoring compliance, some states may ratify a treaty to “send a signal” to the international community even where they have no genuine commitment to human rights – and treaty ratification may ease off political pressures to improve human rights standards.<sup>333</sup>

#### ***3.2.4. Concluding remarks***

A comparative analysis of the right to property under the three regional human rights systems found that that the African Charter provides lower standards of protection than its European and American counterparts - in terms of both substantive protection (e.g. with regard to explicit compensation requirements for taking of property rights) and legal remedies (e.g. with regard to the binding nature of the decisions issued by regional human rights bodies, particularly for countries like Chad or Cameroon that have not ratified the African Court Protocol).

The right to property protects the property rights of local resource users and, to varying degrees, of foreign investors. While the ECHR system explicitly enables legal persons to bring complaints for alleged violations of the right to property, the

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<sup>332</sup> Hathaway (2002:1989).

<sup>333</sup> *Ibid.*, at 2004-2008.

ACHR system rules out this possibility, and the ACHPR system has not yet addressed the issue.

In addition, other human rights (e.g. the right to food, peoples' right to freely dispose of their natural resources) reinforce the international protection of local resource rights. Because of their nature, these human rights do not apply to foreign investors. But while these rights are affirmed in binding international treaties, some treaty provisions are rather vague, and their normative content has been developed by instruments the legal value of which is less straightforward - such as General Comments issued by UN treaty-based bodies or "voluntary guidelines" adopted by states or UN agencies (with regard to the right to food, for example). Similarly, the collective rights that would protect local resource rights remains ill-defined in terms of normative content and right holders (such as peoples' right to freely dispose of their natural resources), while ILO Convention 169 protects the natural resource rights of indigenous peoples but has not been ratified by any African country as yet.

The next section compares the international protection of property rights under the regional human rights systems, particularly the ACHPR, on the one hand, and under international investment law, as reflected in customary international and in the sample of twelve bilateral investment treaties, on the other.

### **3.3. The protection of property rights under investment law**

#### ***3.3.1. The sources and scope of international investment law***

While the human right to property applies to both nationals and non-nationals, international investment law only applies to the latter. Historically, international investment law has developed in relation to the treatment of "aliens". Application to non-nationals alone is reflected in the explicit wording of investment treaties (which protect investment by nationals of one state party in the territory of another),

and other international instruments.<sup>334</sup> The non-applicability of international investment law to nationals is widely accepted,<sup>335</sup> although recent arbitral awards suggest that domestic investors may, under certain circumstances, benefit from the protection of international investment law through establishing a subsidiary in another state. However, this option is unlikely to be available to local resource users in practice.<sup>336</sup>

In the 1960s and 1970s, there was disagreement between capital-exporting and capital-importing countries as to the standards of treatment required under customary international law. On the one hand, capital-exporting states claimed the existence of a “minimum standard of treatment” under customary international law, which would protect foreign investment from arbitrary treatment irrespective of the level of protection available to nationals under national law. On the other, capital-importing countries tended to deny the existence of an international minimum standard. Instead, they held that international law only entitled non-nationals to the same treatment applicable to nationals, in terms of both substantive protection and dispute settlement (“national treatment” principle).<sup>337</sup>

To overcome this impasse and clarify applicable standards of treatment, several capital-exporting countries signed investment treaties with relevant capital-importing countries – including African countries. More recently, investment treaties have also been established between African countries themselves. There has

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334 E.g. article 2(c) of the 1974 Charter of Economic Rights and Duties of States. On the other hand, the property rights provision of UN General Assembly Resolution 1803 of 1962 on Permanent Sovereignty of States over Natural Resources makes no reference to nationality (article 4). However, the focus on foreign investment underpinned the negotiation of this Resolution, and is reflected in the reference to “foreign investment agreements” in article 8 of the Resolution.

<sup>335</sup> See e.g. the ECHR cases *James v. UK* and *Lithgow v. UK*.

<sup>336</sup> In *Tokios Tokeles v. Ukraine*, the case was brought against Ukraine by a company incorporated in Lithuania but controlled by Ukrainian nationals. The jurisdiction phase hinged upon establishing whether the legal entity had Lithuanian nationality, and was thus a foreign investor covered by the Lithuania-Ukraine BIT. As this BIT referred to the place of incorporation as the sole criterion for determining nationality, the investor could avail itself of the protection offered by investment law, including under the Lithuania-Ukraine BIT (paras. 30, 37 and 38).

<sup>337</sup> For an overview of this debate, see Harris (2004:567-570).

been debate as to whether, the extent to which, and the areas in which the large and growing number of investment treaties presenting similar structure, key norms and even wording can be said to have shifted customary law itself.<sup>338</sup> The mere fact that similar norms feature in a large number of treaties is not enough to prove crystallisation into customary law, as treaties are specifically negotiated as *lex specialis*.<sup>339</sup>

As a result of this historical evolution, while in Africa human rights law is a system of uniform rules of general application (subject to differences in treaty ratifications), international investment law is based on customary law and a web of BITs. Its content therefore varies depending on the host and home states - even within the same host state, standards of treatment may vary depending on the investor's home country.

On the other hand, compared to human rights law, international investment law is less fragmented in regional systems. International arbitrators have commonly referred to earlier arbitral awards on the basis of the relevance of points of law, without limiting themselves to the geographical area involved in the dispute before them.<sup>340</sup> As a result, international investment law as it applies to Africa is influenced not only by past arbitrations directly involving an African country,<sup>341</sup> but also by arbitral developments in other parts of the world, insofar as these reflect customary law and/or may help interpret legal concepts at stake in an Africa-related dispute.<sup>342</sup>

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<sup>338</sup> On these aspects, see for instance Schwebel (2005); and Hindelang (2004).

<sup>339</sup> Muchlinski (2007:702).

<sup>340</sup> Although international arbitrations have repeatedly stated that they are not bound by precedent (for a review of case law, see Schreuer and Weiniger, 2008:1188-1195), arbitral tribunals do tend to refer to earlier awards to support their decisions.

<sup>341</sup> For examples of published arbitral awards concerning African countries, see e.g. *AGIP Company v. People's Republic of the Congo*; *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*; *Goetz et Consorts v. République du Burundi*; *American Manufacturing & Trading Inc. v. Republic of Zaire*; *Société Ouest-Africaine des Bétons Industriels (SOABI) v. République de Sénégal*; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*.

<sup>342</sup> For instance, the arbitral case law on regulatory takings and on "fair and equitable treatment" mainly originates from outside Africa but may be relied on in future arbitrations involving an African country.

The extent to which African countries have signed up to BITs varies substantially (e.g., in the covered countries, the number of BITs varies from six in the case of Kenya to 25 for Ghana; see Table 3.3); but, on the whole, the past two decades have witnessed a boom in the number of BITs. By December 2006, African countries had signed 687 BITs, up from 193 in 1995.<sup>343</sup> The twelve covered countries signed a total of 16 treaties in the 1960s, compared to 59 in the 1990s and 86 from the year 2000 on (see Figure 3.2).<sup>344</sup> Table 3.2 summarises key provisions featuring in the sample treaties.

### **3.2. Substantive protection**

#### *3.3.2.1. Direct and indirect takings*

A first area of legal protection under both customary law and the sample BITs concerns takings of property. Under international law, host states have the sovereign right to expropriate assets and regulate activities within their jurisdiction. This principle was affirmed in UN General Assembly Resolution 1803 of 1962, which is generally recognised as reflecting customary law.<sup>345</sup>

However, international law sets conditions with which expropriations of foreign investment must comply. Namely, takings must be non-discriminatory, for a public purpose, on the basis of due process, and against the payment of compensation. These requirements are spelt out in international instruments,<sup>346</sup> investment

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<sup>343</sup> UNCTAD (2008:24 and 26). These data include North Africa (e.g. 100 of the 687 BITs were signed by Egypt).

<sup>344</sup> Data from the UNCTAD website (<http://www.unctad.org/Templates/Page.asp?intlItemID=2344&lang=1>), integrated with ICSID (2007).

<sup>345</sup> Articles 1 and 4 of the 1962 Resolution on the Permanent Sovereignty over Natural Resources. See also *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, paras. 87-88; *Government of Kuwait v. American Independent Oil Co. (Aminoil)*, para. 90(2); *Sedco Inc. v. National Iranian Oil Company and the Islamic Republic of Iran*, at 186.

<sup>346</sup> For instance, article 4 of 1962 Resolution on the Permanent Sovereignty over Natural Resources requires payment of “appropriate compensation” and “public utility” as conditions for lawful expropriation (while it makes no mention of the non-discrimination requirement).



treaties,<sup>347</sup> and international judgments and awards.<sup>348</sup> Such requirements are widely regarded as being part of customary international law, although controversy still exists on the international standard of compensation.<sup>349</sup>

Compared to the human rights law protection of the right to property, these norms present similarities and differences. The non-discrimination and public purpose requirements apply under both human rights and investment law. The due process requirement may have its human rights equivalent in the rights to an effective remedy and to a fair trial.<sup>350</sup> However, as discussed, compensation requirements feature in the ECHR and ACHR systems but not in the ACHPR. Even in the ECHR and the ACHR, compensation standards differ from those emerging under international investment law.

Under investment law, different formulae have been used in various instruments and awards. General Assembly Resolution 1803 of 1962 refers to “appropriate” compensation (article 4). Several arbitral awards have used the standard of “full compensation”,<sup>351</sup> or “just compensation” representing “the full equivalent of the

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<sup>347</sup> See, for example, article 1110(1) of the North American Free Trade Agreement (NAFTA); article VI(1) of the ASEAN Investment Agreement; and article 13(1) of the Energy Charter Treaty. As for Africa, public purpose and compensation are required in all the twelve sample investment treaties; non-discrimination is required in all except for Chad-Italy 1969 and Tanzania-Germany 1965 (under Senegal-UK 1980, non-discrimination is implicitly required by reference to conformity with international law); due process is required in all treaties except for Chad-Italy 1969 and Kenya-UK 1999, although there are differences in emphasis (see for instance the specific emphasis on conformity with domestic legal procedures in Ghana-China 1989, and on judicial review in Senegal-UK 1980); see Table 3.2.

<sup>348</sup> For example, *German Interests in Polish Upper Silesia (Merits)*, at 20-24. See also *Amoco*, paras. 113-117. However, lack of public purpose and non-discrimination have rarely provided the ground for declaring a taking illegal. In *Amoco*, the arbitrators held that “States, in practice, are granted extensive discretion” in determining what constitutes public purpose (para. 145). This mirrors the approach followed under international human rights law (e.g., for the ECHR case law, see *James v. UK*). But, in *British Petroleum Exploration Company (Libya) Ltd v. Libya*, expropriation “made for purely extraneous political reasons” and “arbitrary and discriminatory in character” was deemed illegal (at 329).

<sup>349</sup> Dolzer and Schreuer (2008:91); Muchlinski (2008a:27).

<sup>350</sup> See section 3.2.3 above.

<sup>351</sup> E.g. in *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, at 225–226, at 225; *Amoco v. Iran*, para. 207; and *Metalclad Corporation v. United Mexican States*, paras. 118-119. On the other hand, in *Liamco*, the arbitrator used the standard of “equitable compensation” (at 210).

property taken”.<sup>352</sup> The formulae used in investment treaties vary from case to case (e.g. “just and equitable” compensation in the Mali-Netherlands and Namibia-Netherlands BITs), although they tend to refer to the “market”, “real” or “genuine” value (see Table 3.2). Recently, the so-called “Hull formula” (“prompt, adequate and effective” compensation), first proposed by US Secretary of State Cordell Hull in the 1930s, has been used in a growing number of investment treaties, including in Africa.<sup>353</sup> The Hull formula is generally interpreted as meaning payment without delay (“prompt”), in freely convertible and transferable currency (“effective”), and related to the market value of the property taken (“adequate”).<sup>354</sup> The latter element is explicitly clarified in several investment treaties.<sup>355</sup>

In principle, different standards of compensation apply to lawful and unlawful expropriations. For instance, lost profits (“*lucrum cessans*”) have been held to be only compensable for unlawful expropriations.<sup>356</sup> However, the borderlines in these traditional classifications are in practice blurred, as some arbitrators have applied the “full” compensation standard to both lawful and unlawful takings.<sup>357</sup> The exclusion of lost profits from compensation for lawful takings is eroded by future-oriented valuation methods typically used for income-generating assets. These methods are based on the ability to earn revenues, and thus incorporate an element of loss of future prospects. They include the concept of “going concern”, which entails going beyond the valuation of individual assets held by the company, to

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<sup>352</sup> *Phillips Petroleum Co. v. Islamic Republic of Iran*, paras. 104 and 106.

<sup>353</sup> E.g. Kenya-UK 1999, article 5, Cameroon-US 1986, article III; and Nigeria-Korea 1997, article 5. See also the formula “prompt and adequate” compensation used in France-Uganda 2003, and “adequate and effective” compensation in Burkina Faso-Belgium/Luxemburg 2001 (Table 3.2). For treaties outside the African context, see e.g. US-Uruguay BIT 2004, article 6.1.c; UK-Vietnam BIT 2002, article 5; Portugal-Turkey BIT 2001, article 5. On the re-establishment of the Hull formula as the increasingly dominant compensation standard under international law, see also Reisman and Sloane (2003:135).

<sup>354</sup> Harris (2004:596).

<sup>355</sup> E.g. “fair market value” in Mozambique-US 1998, article III, and in Namibia-Netherlands 2002, article 6; “genuine value” in Kenya-UK 1999, article 5; and “real value” in France-Uganda 2003, article 5 – see Table 3.2.

<sup>356</sup> *Chorzow Factory*, at 47; *Amoco*, paras. 189-206. See also *Biwater v. Tanzania*, para. 775; and Reisman and Sloane (2003:135).

<sup>357</sup> E.g. in *Sedco*, the tribunal deemed “full compensation” payable “whether or not the expropriation itself was otherwise lawful” (at 187). On this issue, see Wälde and Sabahi (2008:1065-1067).

refer to the value of a company as a “unified whole, the value of which is greater than that of its component parts”;<sup>358</sup> and the “discounted cash flow” (DCF) method, which entails valuing assets on the basis of their projected cash flow discounted to present value.<sup>359</sup> DCF has been used, although with adjustments and/or in combination with other factors, by several arbitral tribunals.<sup>360</sup>

Compared to these standards, the European Court has shown considerable deference to national authorities with regard to compensation. The Court has also made it clear that the ECHR-consistent “reasonable relationship” between the value of property and the amount of compensation may entail *less* than full market value - so long as a “fair balance” is struck between the public interest and individual rights. In other words, the amount of compensation appears to be one of the elements to be taken into account in the Court’s assessment of whether a fair balance has been struck.<sup>361</sup> While the Inter-American Court has not developed case law on the standard of compensation, article 21 of the ACHR explicitly requires “just” compensation - which arguably may be less than “full” compensation.

In addition, while the ECHR case law suggests that the public interest pursued through the taking may be considered in determining the amount of compensation,<sup>362</sup> this is not so under international investment law. For example, in *Compañia del Desarrollo de Santa Elena SA v. Costa Rica*, the arbitrators held that, while environmental considerations are important in establishing whether the taking pursues a public purpose and is thus lawful, they have no bearing on the amount of

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<sup>358</sup> *Kuwait v. Aminoil*, para. 178; see also *Amoco v. Iran*, para. 231. At para. 264, the *Amoco* award further clarifies the concept of going concern: “Going concern value encompasses not only the physical and financial assets of the undertaking, but also the intangible valuables which contribute to its earning power, such as contractual rights [...], as well as goodwill and commercial prospects”.

<sup>359</sup> On DCF, see Wälde and Sabahi (2008:1074-1075).

<sup>360</sup> E.g. *Kuwait v. Aminoil*, paras. 151-164; *Phillips*, paras. 111-114; *Amoco*, paras. 227-242. In *Metalclad*, the arbitrators held that, as the expropriated landfill was never operative, the discounted cash flow method was not appropriate in that particular case as “any award based on future profits would be wholly speculative” (para. 121).

<sup>361</sup> *James v. UK and Lithgow v. UK*.

<sup>362</sup> *James v. UK*, para. 54.

compensation awarded. This has to be calculated according to the same rules of international law as are applicable to any other expropriatory measure.<sup>363</sup>

These considerations suggest that the standard of compensation available to foreign investors under international law may be higher than that applicable under the ECHR (and ACHR) systems. This difference of treatment is implicit in the ECHR *James v. UK* case, where the claimant (a national) argued that the compensation standard available under international investment law had been incorporated in the ECHR through the reference to the general principles of law included in article 1 of Protocol 1 - an argument that as already mentioned was rejected by the European Court.

Differences in the strength of legal protection under human rights and investment law are substantially greater in Africa. As discussed, article 14 of the ACHPR does not require payment of compensation as a condition for the legality of takings - let alone set standards for the determination of its amount. Article 14 merely requires compliance with the "provisions of appropriate laws" - which include domestic law and, for foreign investors, international investment law. Nor have ACHPR monitoring institutions interpreted (yet) article 14 as *implicitly* requiring compensation, similarly to the ECHR case law. As a result, whether people affected by an investment project are entitled to compensation and, if so, according to what standards depends on domestic rather than international requirements.

This conclusion is only partly mitigated by the fact that other human rights may require states to compensate for takings of property rights. As discussed, the right to food may be interpreted as requiring payment of compensation where takings of property have a negative impact on food security - although this argument has not been tested before international human rights bodies as yet. With regard to the crucial issue of payment of compensation, the international protection of property

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<sup>363</sup> Paras. 71-72.

rights is significantly weaker under the ACHPR than under international investment law.

Another area where differences emerge between the human rights and investment law protection concerns regulatory takings – i.e. the test to establish whether a regulatory measure has interfered with enjoyment of property rights to such an extent that it must be deemed to constitute a taking. Investment law defines in very broad terms the “taking of property” to which the conditions for lawful expropriation apply. In establishing whether a taking has occurred, the government’s *intention* to expropriate and the form of government interference are “less important” than the *impact* of government action on the investor’s assets.<sup>364</sup> Such an impact may include loss of *value* caused by regulatory change, in particular where regulatory measures interfere with property rights “to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated”.<sup>365</sup> As a result, a taking may occur even where no formal transfer of ownership takes place, for instance where the investor is “deprived of fundamental rights of ownership” through regulation, provided that this deprivation is “not merely ephemeral” (“regulatory taking” or “indirect expropriation”).<sup>366</sup>

The inclusion of regulatory takings within compensable expropriation is explicitly affirmed in most recent investment treaties. A large number of treaties refer to both direct and indirect expropriation,<sup>367</sup> and some also refer to measures “tantamount,” or having effect equivalent, to expropriation.<sup>368</sup>

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<sup>364</sup> *Tippetts*, at 225–226. See also *Compañía del Desarrollo de Santa Elena*, para. 77. Similarly, in *Compañía de Aguas del Aconquija*, the arbitral tribunal held that “the effect of the measure on investor, not the state’s intent, is the critical factor” (para. 7.5.20, emphasis in the original).

<sup>365</sup> *Starrett Housing Corp. v. Iran, Iran-US Claims Tribunal*, at 154.

<sup>366</sup> *Tippetts*, at 225.

<sup>367</sup> For instance, all the sample treaties, with the exception of Tanzania-Germany 1965; see Table 3.2.

<sup>368</sup> See, for example, Senegal-UK 1980 (Table 3.2). Arbitral tribunals established under NAFTA rejected claims that “measures tantamount to expropriation” under article 1110(1) of the NAFTA treaty constitute a third, autonomous type of taking *in addition* to direct and indirect expropriation. See *Pope & Talbot Inc v. The Government of Canada (Interim Award*

Regulatory taking issues have been particularly explored in arbitral awards from the Iran-US Claims Tribunal and from the Americas – including NAFTA cases and a spate of arbitrations against Argentina. In line with the “global” nature of international investment law, these awards can be and have been relied on in arbitrations involving an African country.<sup>369</sup>

In *Metalclad v. Mexico*, a NAFTA arbitral tribunal held that expropriation includes “covert or incidental interference with the use of property” that deprives the owner of “reasonably-to-be-expected economic benefit”, in whole or in significant part.<sup>370</sup> The tribunal found that the arbitrary denial of a construction permit and the adoption of an “ecological decree” establishing a protected area in the project site amounted to indirect expropriation, as they prevented the operation of the investor’s waste management facility. The facility had obtained all of the necessary federal permits but was opposed by the municipality (which denied the construction permit) and by the state government (which issued the ecological decree).

The threshold for a finding of regulatory taking was further clarified in *Pope & Talbot v. Canada* (another NAFTA case). In this arbitration, the tribunal argued that, for a regulatory taking to occur, a “substantial deprivation” of property rights must be shown, whereby the investor “will not be able to use, enjoy, or dispose of the property”.<sup>371</sup> This “substantial deprivation” test seems equivalent to that of “radical

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*on Merits*), paras. 96 and 103-104; and *S.D. Myers Inc. v. Government of Canada (Partial Award on Merits)*, para. 286.

<sup>369</sup> For instance, see *Biwater v. Tanzania*, paras. 395 (reliance by the claimant), 438 (reliance by the respondent) and 456 (reliance by the tribunal itself). For an award involving an African country and finding regulatory taking, see *Goetz v. Burundi*, where the revocation of a free zone certificate was deemed to have “deprived [the] investments of all utility” (para. 124).

<sup>370</sup> *Metalclad Corporation v. United Mexican States*, para. 103.

<sup>371</sup> *Pope & Talbot Inc v. The Government of Canada (Award on the Merits of Phase 2)*, para. 100.

deprivation” used in *Tecmed v. Mexico*.<sup>372</sup> It was followed in several recent arbitral awards, including *CMS Gas Transmission Company v. Argentina*, which found that no expropriation had occurred;<sup>373</sup> *LG&E Energy v. Argentina*, which also found no expropriation;<sup>374</sup> *Siemens v. Argentina*, which found that host state measures did amount to expropriation;<sup>375</sup> *Enron v. Argentina*, which found no expropriation;<sup>376</sup> *Vivendi v. Argentina*, which found that expropriation had occurred;<sup>377</sup> *Sempra v. Argentina*, which found no expropriation.<sup>378</sup>

In *Methanex v. US*, another NAFTA case, the arbitral tribunal found that US legislation banning a gasoline additive constituted lawful regulation rather than expropriation. The tribunal held that non-discriminatory, public-purpose regulation adopted with due process is in principle “not deemed expropriatory and compensable.”<sup>379</sup> While *Methanex* seems to suggest that public purpose can be taken into account in establishing whether a regulatory measure constitutes a taking, most recent tribunals have focused on the *impact* of regulation (using the “substantial deprivation” test), and only considered public purpose afterwards to determine whether a taking was lawful.<sup>380</sup>

The ECHR system also features the notion that intrusive regulatory interferences may attract the obligation to pay compensation. In *Sporrong and Lönnroth v. Sweden*, the European Court found that the prolonged application of restrictions on construction, combined with the prolonged existence of a permit enabling authorities to expropriate, did not constitute a regulatory taking as such - but

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<sup>372</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, para. 115.

<sup>373</sup> *CMS Gas Transmission Company v. The Argentine Republic*, paras. 262-264.

<sup>374</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*. This tribunal held that the substantial deprivation test is “not satisfied where the investment continues to operate, even if profits are diminished” (para. 191).

<sup>375</sup> *Siemens A.G. v. Argentina*, para. 271.

<sup>376</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, para. 245.

<sup>377</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, paras. 7.5.11 and 7.5.34.

<sup>378</sup> *Sempra Energy International v. The Argentine Republic*, para. 284.

<sup>379</sup> *Methanex Corp. v. United States of America*, para. IV.D.7.

<sup>380</sup> E.g. *Siemens A.G. v. Argentina*, para. 271; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, paras. 7.5.11 and 7.5.34.

nevertheless required payment of compensation as it did not represent a “fair balance” between public and individual interests.<sup>381</sup> As discussed, the European Court is prepared to consider several aspects, including the nature of the public purpose, when determining whether such balance has been struck. In addition, the application of the “margin of appreciation” doctrine entails that the Court is likely to intervene only where the balance between public and individual interests is manifestly unfair.<sup>382</sup> This approach may be contrasted with that followed by most arbitral awards, where no consideration of a “fair balance” is required and the key test is an impact one - whether “substantial deprivation” has occurred.<sup>383</sup>

Again, the gap between human rights and investment law is greater in Africa. The African Charter is silent on regulatory takings, and the ACHPR case law has not addressed whether and under what circumstances regulatory measures may require payment of compensation.

### 3.3.2.2. *Other standards of treatment*

Besides protecting foreign investment from arbitrary takings, international investment law, including treaties, sets additional standards of treatment. These include “contingent”, or relative, standards, the content of which is determined with reference to standards applied to others; and “non-contingent” standards, which are determined in absolute terms irrespective of standards applicable to others.<sup>384</sup>

Contingent standards are typically embodied in investment treaties, which usually require a state party not to discriminate against investment from the other state(s). All the sample treaties feature a most favoured nation clause, and most of them

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<sup>381</sup> E.g. *Sporrong and Lönnroth v. Sweden*, para. 73.

<sup>382</sup> On these issues, see Mountfield (2002:142 and 146).

<sup>383</sup> In *Tecmed*, having established the negative economic impact of government action, the arbitrators did look into whether such action was proportional to the public interest pursued – a test that the tribunal explicitly drew from the ECHR case law (paras. 122-123). This approach has not been followed by subsequent arbitrators, however.

<sup>384</sup> On this distinction, see Vasciannie (2000:105-107).



include a national treatment clause (with the exception of Chad-Italy 1969 and Ghana-China 1989; see Table 3.2).

The “national treatment” language used in investment treaties should not lead to misunderstandings. In the 1960s and 1970s, capital-importing countries advocated national treatment as a “maximum” standard – foreign investors were to be treated like nationals, without privileged treatment.<sup>385</sup> In the formulation of recent investment treaties, on the other hand, national treatment is a “minimum” standard – foreign investors are not to be discriminated against, and are entitled to treatment at least equivalent (“no less favourable”) to that applied to nationals.<sup>386</sup>

The national treatment provisions included in BITs must be read in conjunction with other treaty norms, which commonly provide additional, non-contingent standards for the protection of investors’ property rights. These provisions include norms on direct and indirect takings, which were discussed above; on “full protection and security”, which require states to protect investments from third party interference, and which establish state liability for failure to take steps to that effect;<sup>387</sup> and on “fair and equitable treatment”.<sup>388</sup> If domestic protection falls short of such non-contingent standards, then national treatment must be topped up by measures to comply with those standards. Non-contingent standards thus create a minimum treatment to which covered investment is entitled, irrespective of the level of protection granted to nationals.

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<sup>385</sup> For instance, the 1974 Charter of Economic Rights and Duties of States affirmed the right of states to regulate foreign investment within their jurisdiction in accordance with their domestic law, and their right not to be compelled to grant preferential treatment to foreign investment (article 2(2)(a)).

<sup>386</sup> See for instance article 3(2) of the Namibia-Netherlands BIT 2002; article 3(1) of the Kenya-UK BIT 1999; and article II(1) of the Mozambique-US BIT 1998.

<sup>387</sup> See for instance *Asian Agricultural Products Ltd. v. Sri Lanka*, para. 72. On this obligation to protect, see also *American Manufacturing & Trading Inc. v. Republic of Zaire*, paras. 6.05-6.08.

<sup>388</sup> For the relevant provisions of the sample treaties, see Table 3.2.

The “fair and equitable treatment” standard deserves closer attention here. It features in most recent investment treaties (on the sample treaties, see Table 3.2). The interpretation of this standard has given rise to controversy, including with regard to its relationship with the minimum standard of treatment which capital-exporting states claimed was required under customary international law.<sup>389</sup> Fair and equitable treatment has been held to include procedural fairness (such as consistency and transparency of conduct),<sup>390</sup> stability and predictability of the regulatory environment,<sup>391</sup> and respect for the “basic expectations that were taken into account by the foreign investor to make the investment”.<sup>392</sup> The breadth of the “fair and equitable treatment” standard was however qualified in the NAFTA case *S.D. Myers*, where the arbitrators held that these standards would only be violated if the investment is treated in “such an unjust or arbitrary manner” that this treatment is “unacceptable” from an international perspective; in this assessment, arbitrators must observe a “high measure of deference” towards host state action.<sup>393</sup>

These non-contingent standards go beyond the protection of property rights available to nationals under international human rights law. “Full protection and security” may be compared to the obligation to protect the right of property from

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<sup>389</sup> For a brief overview of the different positions, see *Biwater v. Tanzania*, paras. 588-590. See also *CMS Gas Transmission Company v. The Argentine Republic*, para. 284; and in *Occidental Exploration and Production Company v. Republic of Ecuador*, paras. 188-190. Some treaty provisions explicitly link “fair and equitable treatment” to the minimum standard of treatment required under customary international law: see for instance fair and equitable treatment “in conformity with international law” in the Uganda-France BIT 2003 (article 3); and “in accordance with applicable national law and international law” in the Cameroon-US BIT 1986 (article III(4)). With regard to NAFTA, a 2001 Note of Interpretation issued by the NAFTA Free Trade Commission clarified that the expression “fair and equitable treatment” in article 1105 does not entail treatment beyond the minimum standard required under customary international law (section B(2) of the Note).

<sup>390</sup> *Tecmed*, para. 154.

<sup>391</sup> *CMS Gas Transmission Company*, para. 281; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (Decision on Liability)*, paras. 132-139. Both cases are based on the US-Argentina BIT, which states in its preamble that “fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment”; this wording was relied on by the arbitrators to argue that fair and equitable treatment includes regulatory stability. See also *Occidental Exploration and Production Company*, para. 183.

<sup>392</sup> *Tecmed*, para. 154. See also *LG&E Energy Corp. v. Argentina*, para. 124.

<sup>393</sup> *S.D. Myers Inc.*, para. 263. See also *International Thunderbird Gaming Corporation v. Mexico*, para. 194.

third-party interference, affirmed for instance in the ACHR case *Mayagna (Sumo) Awas Tingni v. Nicaragua*; and, implicitly, in the ACHPR case *SERAC and CESR v. Nigeria*.<sup>394</sup> But requirements concerning the stability and predictability of the regulatory framework, linked to “fair and equitable treatment”, seem to go considerably beyond the requirements linked to the regulatory taking doctrine, and are not mirrored by equivalent concepts concerning the human right to property - particularly under the ACHPR.

### 3.3.2.3. Tailored arrangements

Under international law, states may also grant additional, project-specific commitments not to interfere with the property rights of the investor, and to ensure stability of the regulatory framework governing them. Such commitments are typically embodied in foreign investment contracts – agreements concluded between a foreign investor and the host state for the purpose of an investment project.

This may include project-specific commitments on takings. For instance, the TOTCO-Chad Convention of Establishment (concerning the construction and operation of the Chadian segment of the Chad-Cameroon oil pipeline) enables the government of Chad to expropriate assets only “if circumstances or an emergency *imperatively* call for such measures” - which seems to go beyond the more general “public purpose” requirement under international law.<sup>395</sup>

In addition, commonly used stabilization clauses involve a commitment by the host state not to alter the regulatory framework governing the project, by legislation or any other means, outside specified circumstances (e.g. consent of the other contracting party, restoration of the economic equilibrium and/or payment of compensation).<sup>396</sup>

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<sup>394</sup> See above, section 3.2.1.

<sup>395</sup> Article 21(6), emphasis added.

<sup>396</sup> See e.g. article 21(3) and (5) of the TOTCO-Chad Convention of Establishment.

The legal value of tailored arrangement such as stabilization clauses was controversial in the 1970s due to their claimed inconsistency with the principle of permanent sovereignty of states over natural resources and with the right to nationalise and to regulate flowing from it. But the international case law suggests that stabilization clauses are lawful and have legal effect under international law.

In *Texaco v. Libya*, the arbitrator held that “the right to nationalise is unquestionable today” and part and parcel of state sovereignty;<sup>397</sup> but that contractual commitments not to nationalise are a manifestation and exercise of sovereignty — not its alienation. In other words, sovereignty encompasses the right of states not to exercise their right to nationalise and to enter binding commitments to that effect.<sup>398</sup>

This interpretation seems consistent with the wording of UN General Assembly Resolution 1803 of 1962, which solemnly affirmed the principle of permanent sovereignty over natural resources and at the same time stated that “[f]oreign investment agreements freely entered into by [...] sovereign States shall be observed in good faith” (article 8).

The view that stabilization clauses are lawful and produce legal effects was followed in *Kuwait v. Aminoil*. In this case, the arbitrators held that host states are entitled to enter such contractual commitments but that, because these entail a “particularly serious” limitation of the exercise of sovereign powers, they have “to be expressly stipulated for ... within the regulations governing the conclusion of State contracts ... and ... cover a relatively limited period”.<sup>399</sup> The legality and legal effect of stabilization clauses were also upheld in *AGIP v. Congo*,<sup>400</sup> in *Revere Copper*

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<sup>397</sup> Para. 59 of the award.

<sup>398</sup> Paras. 66-68.

<sup>399</sup> Para. 95.

<sup>400</sup> In this case, the arbitral tribunal held that, because of the stabilization clause in the underlying contract, “changes in the legislative and regulatory arrangements stipulated in the

*v. OPIC*,<sup>401</sup> and (implicitly) in the more recent cases *Methanex v. US*<sup>402</sup> and in *Duke v. Peru*.<sup>403</sup> This view reflects the dominant position in international arbitration awards.

In addition, the legal value of a stabilization clause may be reinforced by provisions in investment treaties, whereby a state commits itself to honour contractual undertakings *vis-à-vis* nationals of another state party (“umbrella clause”).<sup>404</sup> In *CMS Gas Transmissions v. Argentina*, international arbitrators held that umbrella clauses make *iure imperii* violations of contractual stabilization commitments (to the exclusion of purely commercial disputes arising out of a contract) a breach of the investment treaty.<sup>405</sup> For this to happen, the wording of the umbrella clause needs to be specific. In *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, the arbitrators found that the clause included in the Italy-Jordan BIT was not specific enough to render a breach of contract a violation of the BIT.<sup>406</sup>

The consequences of breaches of stabilization clauses have been tackled in some arbitral awards. While the *Texaco* award declared the illegality of an expropriation

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agreement simply cannot be invoked against the other contracting party” (para. 86); and a nationalization in breach of the clause is “irregular” (para. 88).

<sup>401</sup> At 284.

<sup>402</sup> Although the case did not involve stabilization clauses, the tribunal stated: “As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable *unless specific commitments had been given* by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation” (para. IV.D.7, emphasis added).

<sup>403</sup> Although this award did not specifically discuss the legality and legal effect of the Legal Stability Agreement involved in the dispute, the tribunal found host state action to be in violation of the Agreement (para. 352), and awarded compensation (paras. 458 and 488).

<sup>404</sup> See Table 3.2 above for a review of umbrella clauses in the sample investment treaties. On umbrella clauses, see e.g. Dolzer and Schreuer (2008:153-162).

<sup>405</sup> Paras. 296-303. A degree of controversy on the legal effects of umbrella clauses still remains. On the relevance of the distinction between purely commercial disputes, on the one hand, and breaches of contract involving exercise of state sovereignty, on the other, in order to establish treaty violations, see also *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, paras. 72 and 78. For a review of recent arbitral case law on the legal effects of umbrella clauses, see OECD (2008:101-125).

<sup>406</sup> The umbrella clause of the Italy-Jordan BIT committed states parties to “create and maintain [ . . . ] a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor”. See also para. 126 of the award.

breaching a stabilization clause and ordered *restitution in integrum*, the majority of arbitral awards saw the main remedy in monetary compensation that takes account of the legitimate expectations generated by the presence of a stabilization clause.<sup>407</sup> Even in *Texaco*, the *restitutio* order could not be enforced, and the parties eventually settled for cash compensation.<sup>408</sup>

On the other hand, “ad personam” contractual commitments to strengthen the legal protection of property rights beyond generally applicable law are extraneous to the logic of human rights. A fundamental pillar of human rights law is the principle of equality in the enjoyment of human rights, which is embodied in all major human rights treaties. Strengthening the protection of a human right (e.g. the right to property) only for one or a few right holder(s) entering into a contract with the state is likely to violate that principle – unless the state can prove that such difference of treatment is “reasonable” and objectively “justifiable”,<sup>409</sup> a condition not required under investment law.

### 3.3.3. Legal remedies

Where property rights have been illegally interfered with, international investment law provides investors with a range of remedies – from “*restitutio in integrum*” (restitution in kind, i.e. restoration of the investor’s position before the illegal taking) to compensation for damage suffered. This is reflected in the oft-quoted PCIJ passage from the *Chorzów Factory (Merits)* case: “Reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed”; in this context, *restitutio* is the preferred remedy, while compensation is to be granted where *restitutio* is not possible and/or to remedy additional damage (at 47). Similarly, the ILC Articles on State Responsibility provide that reparation for

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<sup>407</sup> E.g. *AGIP*, at para. 88; *Liamco*, at 196-202; *Kuwait v. Aminoil*, paras. 148-149 and 158-159.

<sup>408</sup> See below.

<sup>409</sup> See section 2.3 above.

internationally wrongful acts may include restitution in kind, compensation and satisfaction (article 34).

However, in cases concerning wrongful host state compression of the investor's property rights, *restitutio* has hardly ever been granted by international arbitrators.<sup>410</sup> In practice, recovering property against the opposition of the host state is very difficult; even where that happens, running a business in that state may be virtually impossible.<sup>411</sup> A rare exception where *restitutio* was granted is *Texaco v. Libya*<sup>412</sup> – but even here *restitutio* proved unenforceable due to resistance from the host state. In practice, payment of compensation is the main remedy. Abundant arbitral case law and scholarly work exist on the international standard of compensation as a legal remedy for unlawful interference.<sup>413</sup> As discussed, while the African Charter lacks any rules on compensation standards, ECHR case law has tackled these issues – and, overall, compensation amounts awarded in expropriation arbitrations tend to be far higher than damages awarded by the European Court of Human Rights for breaches of Protocol I of the ECHR (Kriebaum, 2008:26).

As for dispute settlement mechanisms, in absence of host state consent to international arbitration, two institutions apply: settlement by the domestic courts of the host state;<sup>414</sup> and diplomatic protection, after exhaustion of host state domestic remedies.<sup>415</sup> However, the past few years have witnessed a major expansion of consent to/use of international arbitration as a means to settle investment

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<sup>410</sup> For instance, against the availability of *restitutio* to investors, see *BP v. Libya*, p. 347.

<sup>411</sup> Wälde and Sabahi (2008:1058-1060).

<sup>412</sup> Para V.3.

<sup>413</sup> See particularly Wälde and Sabahi (2008:1068-1093), and Muchlinski (2007:610-614).

<sup>414</sup> See UN Resolution 1803 of 1962, article 4.

<sup>415</sup> Exhaustion of domestic remedies is not required in exceptional cases, for instance where there are no “reasonably available local remedies to provide effective redress”, the investor is “manifestly precluded” from exercising them, or there is “undue delay” in the remedial process; articles 14 and 15 of the ILC Draft Articles on Diplomatic Protection 2006 (available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf), last visited in October 2008).

disputes.<sup>416</sup> This is partly due to the mushrooming of investment treaties, as such treaties usually provide for investor-state disputes to be settled by arbitration. All the investment treaties reviewed here include an arbitration clause, most commonly through the International Centre for the Settlement of Investment Disputes (ICSID).<sup>417</sup> In addition, arbitration clauses are a common feature of investment contracts.<sup>418</sup>

All the twelve covered countries have signed the ICSID Convention - most of them in the 60s and 70s, the remaining few (Mozambique, Namibia and Tanzania) in the 1990s (see Table 3.3).<sup>419</sup> In addition, between the late 1980s and the 1990s, most of the covered states have ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which facilitates enforcement of arbitral awards.<sup>420</sup>

Where the host state consents to arbitration through investment treaties, legislation or contracts, and depending on the wording of these provisions, disputes are usually settled by arbitrators *rather than* by domestic courts. In none of the twelve BITs analysed here is exhaustion of domestic remedies required.<sup>421</sup>

This is a significant difference compared to human rights treaties, where exhaustion of domestic remedies is the rule. This is illustrated by the *Saluka v. Czech Republic* arbitration, which was simultaneously brought before an arbitral tribunal and the European Court of Human Rights: the Court declared the complaint inadmissible

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<sup>416</sup> For examples of published arbitral awards concerning African countries, see above.

<sup>417</sup> E.g. Kenya-UK 1999, article 8; France-Uganda 2003, article 7; Mali-Netherlands 2003, article 9; Namibia-Netherlands 2002, article 9 – see Table 3.2.

<sup>418</sup> E.g. article 32 of the TOTCO-Chad Convention of Establishment.

<sup>419</sup> At the time of writing, Namibia had signed but not yet ratified the Convention.

<sup>420</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958. Of the 12 covered African countries, only Chad and Namibia are not parties; with the exception of the early ratifications/accessions of Ghana (1968) and Nigeria (1970), the other covered countries acceded between 1987 and 1998 (see Table 3.3).

<sup>421</sup> Article 9 of Burkina Faso-Belgium/Luxemburg 2001 enables investors to choose between domestic courts and arbitration.



due to lack of exhaustion of domestic remedies.<sup>422</sup> Direct access to international fora entails more effective legal remedies, especially in contexts where domestic courts lack effectiveness and/or independence - as in several African countries. The need to go through the African Commission before reaching the African Court (unless the state has consented to direct access to the Court, which only one country has done so far) compounds this conclusion.

In addition, international arbitration includes effective mechanisms for tackling non-cooperation on the part of the host state,<sup>423</sup> and leads to a binding and enforceable award under articles 53-54 of the ICSID Convention and under the 1958 New York Convention. This contrasts with the non-binding (albeit authoritative) recommendations of the African Commission on Human and Peoples' Rights, which have been the norm until the recent establishment of the African Court and which remain the final outcome for those states that have not yet ratified the African Court Protocol (such as Chad).

If the host state fails to comply with the arbitral award, the investor may seek to enforce it before the domestic courts of a third country where the host state holds interests ("pursuit actions"). Under the New York Convention, third-country courts must enforce arbitral awards - except where narrowly defined grounds invalidate the arbitral proceedings, or where enforcement would be contrary to the public policy of the third country (article V of the Convention). Legal action in third countries may involve seizing goods,<sup>424</sup> freezing bank accounts and/or taking other measures affecting host state interests in the third country, on the basis of the arbitral award declaring the illegality of host state conduct.<sup>425</sup> In many cases, pursuit actions have

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<sup>422</sup> Case discussed in Kriebaum (2008:12).

<sup>423</sup> Most arbitration clauses set up arrangements to enable the proceeding to go ahead even if the host states fails to appoint an arbitrator and to take part in the arbitration, for instance through providing for an impartial person to appoint a sole arbitrator.

<sup>424</sup> Including shippings of raw materials or processed goods produced by the host state with assets illegally taken from the investor.

<sup>425</sup> On experience with enforcing awards against African states before French and US courts, see Alexandroff and Laird (2008:1177-1180). In absence of a recognised arbitral

put pressure on the host state to comply with the award or to settle the case.<sup>426</sup> The host state may still decide not to comply - but this is likely to have major political and economic costs, for instance in terms of relations with the investor's home state, and of capacity to attract foreign investment.<sup>427</sup> As for human rights law, while the judgements of the African Court are binding, the legal consequences of state non-compliance remain unclear, and there is no experience with "pursuit actions" under the ACHPR.

This analysis suggests that international arbitration provides foreign investors with a more effective system of legal redress than that available under human rights law, particularly under the ACHPR. International arbitration may involve high costs (in terms of lawyers' fees and tribunal costs) and long timeframes (from the establishment of the tribunal through to jurisdiction phase, merits, damages, possible annulment actions and enforcement). Enforcement may in practice prove difficult even in countries that have ratified the New York Convention, particularly in lower income countries where the national legal system is weak.

But the timeframes involved in international arbitration are still likely to be shorter than those required for the exhaustion of domestic local remedies (which in itself may involve several stages of litigation) followed by proceedings before international human rights bodies (which in the case of countries that have ratified the African Court Protocol would usually involve proceedings before the Commission first and the Court then). And the chances of enforcing an arbitral award appear considerably higher compared to the judgements of the African Court and, even more so, to the recommendations of the African Commission.

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award declaring the illegality of host state conduct, pursuit actions would be made more difficult by the "act of state doctrine" established under the domestic law of several jurisdictions. Under such doctrine, courts of the forum state cannot question the legality of domestic legislation or government action of another country.

<sup>426</sup> Cheng (2005:513). Wälde (2008:82) notes that in the aftermath of the Libyan oil concession cases (*BP, Texaco, Liamco*), even Libya ended up settling - despite much international confrontation.

<sup>427</sup> Cheng (1005:499).

### 3.4. International law and negotiating power

Having compared the international protection of property rights available to foreign investors and affected local resource users, this section relates that comparison to power relations in investment projects – particularly to asymmetries in negotiating power between investors and local resource users.

As discussed, following a conceptual framework developed by Tuori (1997:10-17), the relationship between law and power may be analysed in the light of two interlinked aspects: power *on* the law - how power relations affect the content and implementation of the law; and power *by* the law - how the law contributes to shape negotiating power.<sup>428</sup> The legal analysis of the international protection of property rights undertaken in the preceding sections may be related to both of these aspects.

As for “power *on* the law”, power relations have shaped the evolution of international law over the past few decades. As states are a key actor of international law-making, differences in the balance of negotiating power between capital-exporting and capital-importing states are crucial in shaping international law. The key provisions typically included in investment treaties have been developed through bilateral negotiations characterised by power asymmetries favouring capital-exporting countries.<sup>429</sup> The “state practice” of different states also tends to have different weight in the crystallisation of customary law.<sup>430</sup> Beyond state-centred perspectives, the weight of US law schools and firms has fostered an “Americanisation” of international law – whereby “concepts that are inherently American become part of the common vocabulary and culture of the international legal practice”.<sup>431</sup>

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<sup>428</sup> Tuori also isolated a third aspect – “power *in* the law” – to address power relations within the law (for instance, within the legal profession; at 13-15); this aspect is not considered here.

<sup>429</sup> Sornarajah (2004:204-217).

<sup>430</sup> Byers (1995:115-116).

<sup>431</sup> Mattei (2003), quoted in Nader (2005:205).

In the 1990s, the negotiating power of African countries in the international arena was eroded by loss of influence of non-aligned countries after the end of the Cold War; by greater differentiation among developing country interests linked to differences in economic performance, natural wealth endowments and other factors; by tighter hegemony of neo-liberal economic theory; by the external debt crisis; and by pressure from international financial institutions. It is possible, however, that more recent competition for Africa's natural resources among large economies such as the US, the EU, China, India and Japan (see section 2.1.3) may pave the way to a future new shift in favour of African countries.

The evolution from earlier polarisations on applicable standards of treatment for foreign investment to the significant strengthening of its legal protection is in line with such interplay of and changes in power relations.<sup>432</sup> International law (customary law or, in default, investment treaties) has evolved in directions sought by capital-exporting countries – towards strengthening protection for overseas investment by their nationals. For example, the Hull formula of “prompt, adequate and effective compensation”, first affirmed by a US Secretary of State in the 1930s, has made its way in a large number of investment treaties – including several sample BITs.

In other words, while in the 1960s and 1970s, collective action by capital-importing countries within the context of the Cold War, coupled with the rise of developing country legal scholars challenging the Western domination of legal thought, resulted in a partial shift in international investment law, exemplified by the 1974 Charter of Economic Rights and Duties of States; over the past two decades, many African countries have embraced pragmatic arrangements for strengthening the international protection of foreign investment, including through signing up to investment treaties (as illustrated by Figure 3.2). Countries that used to advocate for

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<sup>432</sup> On the link between power relations and developments in investment law, see Sornarajah (1997:49-52).

“national treatment” as the maximum protection that foreign investors were entitled to<sup>433</sup> have more recently signed up to investment treaties that grant foreign investors higher standards of protection than those available to nationals under national law or international human rights law.

Combining the legal analysis of international law with the stakeholder and power analysis undertaken in section 2.3, the outcome of these dynamics is a system of international law that provides stronger protection for those property rights backed by greater negotiating power (foreign investment), compared to rights typically associated with weaker negotiating positions (local resource rights). In other words, asymmetries in negotiating power are mirrored by asymmetries in legal protection.

Interestingly, investment treaties negotiated by European countries (e.g. eight out of the twelve sample treaties) provide stronger protection of property rights than that available in Europe under the European Convention on Human Rights. This means that, formally, a European investor in Africa, covered by a relevant BIT, enjoys stronger protection than in its home country under the ECHR - although in practice its protection in Africa may be limited by practical constraints (e.g. with regard to the difficulty of enforcing arbitral awards).

This strengthening of the protection of property rights under international investment law seem to have been held in check when those devices have started to be relied on against Western countries. Although most investment treaties were primarily designed to promote investment by a richer to a poorer country, their formally reciprocal nature enables investors from poorer countries to challenge domestic legislation adopted by their richer counterparts. This has started to make some Western countries more wary of promoting a level of investment protection

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<sup>433</sup> All the twelve covered countries voted in favour of the 1974 Charter on the Economic Rights and Duties of States, except Mozambique and Namibia, which still had to gain independence.

that may undermine the ability of states to regulate in social and environmental matters.

For example, recent regulatory-taking litigation under NAFTA has exposed US and Canadian domestic legislation to challenges from foreign investors - with implications for the position of those countries on specific aspects of international investment law. The watershed cases that put a brake to the very broad interpretation of regulatory taking adopted in the NAFTA case *Metalclad v. Mexico* involved legal challenges to Canadian and US legislation (*Pope & Talbot v. Canada* and *Methanex v. US*). Not only did these awards more clearly circumscribe the conditions under which regulation may attract payment of compensation; they also prompted a new generation of US investment treaties that further clarify the boundaries between expropriation and regulation.<sup>434</sup> *Methanex* in particular is probably the most favourable arbitral pronouncement on host state regulation. As discussed, its approach to regulatory taking that takes account of public purpose as part of the test to establish whether a taking has occurred in the first place was not followed in subsequent cases brought against Argentina.

As for “power *by* the law”, recent research has shown how international investment law has promoted a significant shift in power relations among host states, foreign investors, arbitral tribunals and other actors.<sup>435</sup> Legal devices like arbitration provisions, safeguards against takings and umbrella clauses are at the heart of this power shift through four types of processes: “trigger”, whereby investors are vested with enforceable entitlements (through devices ranging from the regulatory taking doctrine under customary international law, to stabilization clauses embodied in investment contracts); “drain”, whereby the exercise of state sovereignty is constrained as a result of those entitlements (for instance, through preventing host

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<sup>434</sup> See, for instance, the US-Chile FTA 2003, Annex 10; the US-Singapore FTA 2003, Chapter 15; the US-Australia FTA 2004, Annex 11-B; the US-Morocco FTA 2004, Annex 10-B; and the US-Uruguay BIT 2004, Annex B.

<sup>435</sup> Cheng (2005).

states from taking action that would arbitrarily affect foreign investment, in breach of regulatory taking or stabilisation devices); “transfer”, whereby the power lost by host states does not “vanish” but is devolved to other actors such as foreign investors or arbitral tribunals (for instance, through dispute settlement by international arbitrators and “pursuit actions” putting pressure on the host state to comply or settle); and “restore”, whereby the host state is ultimately restored in its power (for instance through payment of compensation), but at a price that can be quite steep.<sup>436</sup>

While Cheng’s analysis does show a shift in power relations linked to international investment law, this branch of law offers no absolute sanctuary against determined action by the host state to renegotiate or even expropriate the investment. In the face of such determined action, the investor may prefer to accept a renegotiated arrangement with the host state and continue project implementation, rather than going to international arbitration and facing the high costs, uncertainty, rather long timeframes and possibly irreparable breakdown of investor-state relations associated with it.<sup>437</sup> In such renegotiations, legal claims provide “markers”, “magnetic points” that may be relied on by the investor or the host state, thereby influencing their negotiating power and possibly affecting negotiation outcomes.<sup>438</sup> Other factors such as attitude to risk (with more risk-adverse stakeholders being more likely to accept negotiated settlements rather than risking the uncertainty of litigation) and “strategic behaviour” (promises, threats, bluffs) may also influence negotiating power and outcomes.<sup>439</sup>

In other words, the progressive development of international investment law constrains host state action insofar as it has shifted the “magnetic points” (in

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<sup>436</sup> Cheng (2005:470-499).

<sup>437</sup> Wälde (2008, e.g. at 86). Negotiation may also occur at the different stages of arbitration proceedings - from commencement to the award; and the threat or existence of the proceedings and/or the legal claims determined in the award may themselves be a source of negotiating power. On these aspects, see Wälde (2008:70-71, 84 and 85-86).

<sup>438</sup> As argued by Wälde (2008:85).

<sup>439</sup> Mnookin and Kornhauser (1979:969-973), writing on divorce cases under US family law.

Wälde's expression) within which relations between foreign investors and host states evolve, and the respective "bargaining endowments" (in the expression used by Mnookin and Kornhauser) of these actors.

The international human rights protection of property as it applies to Africa involves similar processes of power shift as those identified by Cheng with regards to investment law – "trigger" (through the affirmation of human rights), "drain" (through constraining state action that violates those rights), "transfer" (through devolving greater power to right holders and to international human rights institutions), and "restore" (as even here the state may still take property insofar as it pays compensation). However, as shown in the analysis above the international human rights protection of property rights as it applies to Africa constrains host state action (and thus shifts power) to a significantly lesser degree than international investment law. For instance, while the ACHPR requires public purpose and non-discrimination for takings of property, it does not require payment of compensation, let alone determine criteria for its amount. This undermines the "trigger", "drain" and "transfer" effects and makes "restore" easier for the state.

Although the power of "naming and shaming" through international human rights complaints should not be underestimated, the relative weakness of human rights remedies compared to remedies under international investment law reinforces this conclusion. Even a "successful" and high-profile case like *SERAC and CESR v. Nigeria*, discussed above, illustrates this. The weak *dispositif* of this decision (whereby the Commission "appealed" for redress to be provided), coupled with long delays in processing the case and with the decision having been issued only after the Nigerian democratic transition, show that this is hardly a case where access to regional human rights institutions has in itself contributed to change government action. Like the limits in substantive protection, weaknesses in legal remedies tend to undermine the "trigger", "drain" and "transfer" effects.



This analysis suggests that while international investment law fosters significant power shifts between host states and foreign investors, the human rights protection of property rights as it applies to Africa shifts power relations between states and right holders to a considerably lesser extent. As a result, not only do local resource rights enjoy weaker international law protection than foreign investment; but also such differentiated protection has practical implications for the negotiating power of local resource users and foreign investors. Indeed, the extent to which these stakeholders can rely on legal processes to protect their property rights can affect their negotiating power and mutual relations.

### **3.5. The international protection of property rights in Africa: Universal principles and differentiated rules**

In 1955, a few years after the UDHR introduced international protection for the human right to property, the then Special Rapporteur on State Responsibility of the International Law Commission argued that nationality no longer played a role in the international protection of property rights. In his view, the then lively debate on “international minimum standard vs national treatment” as the benchmark for the treatment of foreign investment could now be superated by interpreting the minimum standard as consisting of internationally recognised human rights available to both nationals and non-nationals, including the right to property.<sup>440</sup> Two years later, his Second Report on State Responsibility proposed a draft article that sought to bring together the international protection of foreign investment with human rights standards along these conceptual lines.<sup>441</sup>

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<sup>440</sup> García-Amador (1955:344).

<sup>441</sup> “The State is under the duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by its nationals. These rights and guarantees shall not, however, in any case be less than the “fundamental human rights” recognised and defined in contemporary international instruments” (article 5(1)). Article 6 clarified that such “fundamental human rights” include the “right to own property”. UN Doc A/CN.4/106, in YBILC 1957 (II), p. 104-130.

Fifty years on, the branches of international law regulating foreign investment and human rights have evolved along different trajectories. They have always had different historical origins and philosophical underpinnings, and the protection of property rights they embody is based on different concepts and language. There have been some parallels, namely the progressive development of both human rights and investment law resulting from new human rights treaties (such as the 1998 African Court Protocol) and more widespread ratification of existing ones, on the one hand, and from the mushrooming of investment treaties and growing consent to international arbitration, on the other. There have also been some points of contact – like rare references to ECHR case law in investment arbitrations.<sup>442</sup> But the actual implications of these developments have differed.

Under international human rights law as it applies to Africa, new treaties and growing ratification of existing ones have not resulted in a significant strengthening of the legal protection of property rights. The protection of the human right to property has been undermined by its exclusion from the UN human rights Covenants, and has been more effectively pursued through regional human rights systems where these exist. However, the ACHPR provides considerably weaker protection compared to both the ECHR and the ACHR, and in relation to both substantive provisions and legal remedies.

On the other hand, within international investment law, earlier polarisations concerning the protection of foreign investment have given way to a significant strengthening of that protection through the mushrooming of bilateral investment treaties, the growing ratification of international instruments regulating international arbitrations between foreign investors and host states (e.g. the International Convention of the Settlement of Investment Disputes), and the

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<sup>442</sup> *Tecmed v. Mexico*, on proportionality between public purpose and means to pursue it; para. 122.

development of a vast case law of arbitral awards clarifying the nature and scope of that protection.

As a result, international investment law provides foreign investment with significantly stronger legal protection than that available under human rights law - with regard to both substantive provisions and legal remedies.

As for substantive standards, regional human rights systems in Europe and the Americas match most of the scope of protection granted to foreign investment under international law – although differences do exist, for instance with regard to the standard of compensation (which in the ECHR system may be less than what is deemed to be included in the “Hull formula” increasingly popular in investment law) and to the construction of regulatory takings (which in the ECHR system involves a more careful balancing of private and public interests than under the dominant approaches of investment arbitrators). In Africa, differences in substantive standards are more pronounced, as article 14 of the ACHPR does not require payment of compensation let alone set standards for determining its amount.

Similarly, remedies available under human rights law are less accessible and less effective than those available to foreign investors – particularly in the African context. Both human rights and investment law provide, under certain circumstances, for direct access for private entities (nationals or non-nationals) to international fora to settle disputes with a state (human rights bodies and international arbitration). However, where host states consent to international arbitration, foreign investors may usually access international processes directly. On the other hand, under human rights law, domestic remedies must be exhausted before filing petitions with regional institutions.

In addition, until the creation of the African Court on Human and Peoples' Rights in 2006, successful ACHPR cases only led to the non-binding decisions of the African Commission. Even after the establishment of the Court, the Commission is likely to continue to play a key role due to limits in the ratification of the African Court Protocol, and in direct access to the Court for individuals and groups. The non-binding nature of the Commission's decisions contrasts with the final and binding nature of international arbitral awards under international investment law. The judgements of the African Court are binding but sanction mechanisms for state non-compliance remain unclear - in contrast with the well established practice of "pursuit actions" under international investment law. Sociological studies on the limited effectiveness of human rights treaties to change government action compound this legal analysis.<sup>443</sup>

A more detailed, analytical comparison between international human rights and investment law is provided in Table 3.4. The table includes key indicators for both substantive protection (e.g. public-purpose, non-discrimination, due-process, compensation and other requirements) and legal remedies (forum, nature of remedy, legal output, strategies to ensure compliance), and enables to "visualise" differences in legal protection.

This differentiation of treatment does not necessarily amount to discrimination, as there may be reasonable grounds to treat nationals and non-nationals differently. Non-nationals may have greater need for protection – as they hold assets in a state in which they have no formal political representation. They may be more vulnerable to dispossession where political manipulations use them as scapegoats to channel political frustrations and defuse domestic tensions. In light of these issues, the European Court of Human Rights found in *James v. UK* that differences in treatment

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<sup>443</sup> E.g. Viljoen and Louw (2007) and Hathaway (2002), discussed in section 3.2.3.

between nationals and non-nationals were “reasonable and justifiable”, and thus non-discriminatory.<sup>444</sup>

Similarly, in *Hopkins v. Mexico*, the United States and Mexico General Complaints Commission held that more favourable protection of the property rights of non-nationals did not constitute discrimination. The Commission held: “It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens”.<sup>445</sup>

But when applied to foreign investment projects in Africa, this differentiated protection of property rights mirrors and reinforces the major power asymmetries that exist between investors and local resource users negatively affected by the investment. Foreign investors can rely on investment law to protect their property rights from arbitrary interference. Local resource users only enjoy the weaker protection provided by human rights law. The different strength of legal protection enjoyed by different stakeholders may affect their negotiating power and mutual relations.

It is possible that this situation may change over time - that the ACHPR protection of the right to property may be strengthened, and that existing differences in the strength of legal protection may be reduced. This would not necessarily require amending the African Charter. As discussed above, article 1 of Protocol 1 of the ECHR, like the ACHPR and unlike the ACHR, does not explicitly refer to payment of compensation - but this requirement was deemed to be an implicit requirement

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<sup>444</sup> Para. 63.

<sup>445</sup> *Hopkins (USA) v. United Mexican States*, at 47. In addition, in *North American Dredging Company of Texas v. Mexico*, the Mexico-US General Claims Commission affirmed: “Equality of legal status between citizens and foreigners is by no means a requisite of international law - in some respects the citizen has greater rights and larger duties, in other respects the foreigner has” (para. 16).

by the European Court in its case law. The landmark ECHR cases that affirmed such implicit obligation to compensate and established an (albeit open) standard of compensation came more than 30 years after the adoption of ECHR Protocol 1.<sup>446</sup> It is quite possible that, should a future dispute on this issue be brought before the newly established African Court on Human and Peoples' Rights, the Court may take a similar approach.

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<sup>446</sup> The *James* and *Lithgow* cases were decided in 1986, 33 years after the adoption of Protocol 1.

#### **4. The protection of property rights under national law**

The previous chapter analysed the protection of property rights under international law, and found significant differences in the protection available to foreign investment under international investment law, and to local resource rights under human rights law. Given the relevance of national law to regulating property rights issues in foreign investment projects (see section 2.2.4), addressing the core research question of this study (whether different sets of property rights involved in an investment project enjoy different degrees of legal protection) also requires an analysis of national law. This is the focus of this chapter.

While the previous chapter dealt with all the twelve covered countries, this chapter “zooms in” on the four focus countries (Cameroon, Chad, Mali and Mozambique), while also identifying key trends emerging across the covered countries. Although the chapter touches on all the three “dimensions” of the protection of property rights identified in section 2.2.3 (rule of law, normative content and tailored arrangements), the analysis focuses on normative content and tailored arrangements.

Due to the broad scope of the analysis (in terms of number of countries and covered legislation), the main text emphasises highlights, while more detailed information for each country is provided in tables accompanying the text. The need to keep the scope to a manageable level also entails that this chapter places particularly emphasis on extractive industry projects. A final caveat refers to the varying degrees of accessibility of domestic legislation and case law. While for some of the covered countries this was not a problem, for others it was a major challenge. As a result, the “picture” is more complete for some countries than for others.

The chapter finds that national law varies significantly across countries, including as a result of differences in legal tradition as well as political differences on the role of the state, its relationship with citizens and the role of private enterprise and foreign investment. But despite this variation, a recurrent trend is the central role of the



state in natural resource relations, including as a basis for opening up resources to foreign investment. Some countries have recently taken important steps to strengthen the legal protection of local resource rights. But reform efforts have been held in check when they were perceived to have negative impacts on investment flows. In addition, widespread weaknesses in the rule of law have mainly been tackled through creating tailored arrangements for foreign investment, which insulate investment from the national legal system of the host state. This leaves local resource rights vulnerable to shortcomings in the rule of law. Overall, these features of national legal systems seem to respond not only to a legacy of state control dating back to colonial times, but also to the political economy of the state in Africa as described by Bayart (1993).<sup>447</sup>

The next section recalls key features of national legal systems in Africa, with regard to legal stratification and pluralism and to rule of law issues. Section 4.2 tackles “normative content”: it identifies trends in the covered countries, and undertakes a comparative analysis within and across the focus countries. Section 4.3 discusses tailored arrangements, drawing on experience from the Chad-Cameroon oil development and pipeline project.

#### **4.1. National legal systems in Africa**

##### ***4.1.1. Legal stratification and pluralism***

In most African countries, the national legal system is still influenced by that of the former colonial power, and is the product of a long process of “legal stratification” (“customary” systems, Islamic influence, colonial legislation, several waves of post-independence law-making).<sup>448</sup>

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<sup>447</sup> See section 2.3.3.3.

<sup>448</sup> Mattei and Monateri (1997:149-153).

In the second half of the 19th century, a “scramble for Africa” brought much of the continent under European domination - mainly British and French, but also Belgian, German, Portuguese and, at a later stage, Italian. Despite much variation, the colonial legal order tended to build on the legal system of the colonial power. For instance, in much of Anglophone Africa, the “reception clause” adopted by colonial legislators provided for the application of the legislation, common law and doctrines of equity in force in England at a specified date (McAuslan, 2000:76-77). This historical legacy is reflected in the influence that legal concepts derived from the civil law and common law traditions still exert on the regulation of property in much of Africa (David and Brierly, 1978:515).

But the colonial legal order also had distinctive features compared to European legal systems – particularly with regard to the extensive and authoritarian role of the government administration. With the exception of settler colonies, colonial legal systems aimed to create a strong central apparatus for appropriating and extracting natural resources, rather than to provide strong protection for local property rights. This usually entailed the colonial state claiming ownership over most if not all the land, while creating mechanisms for settlers to acquire private ownership through land registration.<sup>449</sup>

Pre-existing (“customary”) systems of property rights were usually tolerated for regulating relations among locals – albeit to different degrees, and subject to “repugnancy clauses” that subordinated their application to consistency with colonial legislation, public order or other standards. In any case, customary systems continued to be applied de facto in much of rural Africa (Menski, 2000:402-408).

When most African countries gained independence in the 1960s and 70s, the colonial heritage (with its combination of European legal traditions and

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<sup>449</sup> For instance, in Francophone West Africa (*Afrique Orientale Française*), under the Decrees of 24 July 1906 and 26 July 1932.

authoritarian resource control) continued to exert influence. In much of Anglophone Africa, for instance, post-independence legislators provided for the continued application of the colonial-era “reception clause” (McAuslan, 2000:77). Since then, most countries have adopted law reforms on specific issues, rather than comprehensively overhauling the foundations of the legal system (McAuslan, 2000:77). Similarly, in Francophone Africa, the basic principles of French law continued to apply (McAuslan, 2000:77). Legal professionals continued to be trained using the textbooks and universities of the former colonial power (Mattei and Monateri, 1997:151).

As a result, differences in the conceptualisation and regulation of property rights between common and civil law are reflected in divides across Anglophone and Francophone Africa. In civil law systems, the law of property traditionally tends to emphasise a unitary concept of ownership having a coherent legal status, with limitations established by law for specific types of property being treated as exceptions; with only a restricted number of types of property rights being legally protected (the “*numerus clausus*” theory); and with lesser rights such as servitudes being seen as temporary compressions of ownership.<sup>450</sup> The law of property in common law systems, on the other hand, tends to emphasise the concept of “bundle of rights” – the range of multiple legal interests (“estates”) that can exist in a valuable asset.<sup>451</sup>

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<sup>450</sup> In the French legal tradition, this approach has its roots in the rhetoric of the French Revolution, such as the qualification of the right to property as “sacred and inviolable” in the 1789 Declaration of the Rights of Man and of the Citizen, and the formulation of article 544 of the 1804 Civil Code; in the German legal tradition, it has its roots in the conceptual work of the 19<sup>th</sup>-century Pandectist school (Mattei, 2000:15-16). The unitary concept of ownership has more recently been challenged in light of the diversity of legal regimes applicable to different types of property (e.g. Pugliatti, 1954).

<sup>451</sup> This conception of property rights has its roots in the historical evolution of feudal land tenure, under which all land belonged to the king, the king tenured the land to local lords, and these to a chain of tenants and sub-tenants (Mattei, 2000:10-11). The emphasis on the “bundle of rights” is epitomised in the Hohfeldian analysis of property rights discussed above, which has proved particularly influential in American jurisprudence (Candian et al, 1992:157).

Further legal stratification intervened to complicate the picture. During much of the Cold War, political and economic authoritarianism in many African countries (single party regimes, military dictatorships, ideological aversion to private ownership and enterprise) had major implications for property rights relations – further consolidating the authoritarian role of the state in control over natural resources and the national economy. Centralised control was less pronounced but not completely absent in those countries that followed a “capitalist” path to development (e.g. Kenya). State control was formally motivated by the need to promote development, but also reflected the strategies of national elites to use the state as a vehicle to maintain and reinforce their control over valuable resources.<sup>452</sup>

Democratic transition and economic liberalisation in several countries from the 1990s (e.g. Mali, Namibia, Nigeria, Tanzania) brought about new emphasis (or display of emphasis) on establishing the rule of law, including through greater respect for the independence of courts (as stated in most democratic constitutions). It also entailed new emphasis on strengthening property rights as a means to promote economic development. Several countries introduced private land ownership and/or strengthened use rights on state-owned land. The perceived need to attract foreign investment for national development has been an important factor in recent reforms, including rule of law interventions (e.g. programmes to strengthen the judiciary), property law reforms and sectoral legislation on investment and natural resources (e.g. land, mining). Donor agencies have also played a role, by imposing conditionalities or providing technical assistance.

Despite this succession of regulatory efforts, in much of rural Africa lack of financial resources and of institutional capacity in government agencies, lack of legal awareness, formal or informal socio-political “deals” between the state and “customary” authorities, and, often, lack of perceived legitimacy of official rules and institutions all contribute to limit the outreach of state legislation concerning

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<sup>452</sup> See section 2.3.3.3.

property rights over natural resources. As a result, the legal concepts enshrined in the statute books have penetrated local social relations only to a very limited extent, particularly in rural areas.

On the ground, local resource users tend to continue to gain access to natural resources through local systems of property rights, particularly with regard to land and surface resources. These local tenure systems are based on (usually unwritten) rules founding their legitimacy on “tradition”, as shaped both by practices over time and by systems of belief. Because of this, they are usually described as “customary” - and for easier reading this study follows this terminology.<sup>453</sup>

In reality, local systems of property rights have profoundly changed as a result of cultural interactions, population pressures, socio-economic change and political processes. “Custom” is being reinterpreted and “reinvented”,<sup>454</sup> with different actors using different interpretations to support their competing claims.<sup>455</sup> Customary systems have also been manipulated by decades of colonial and post-independence government interventions.<sup>456</sup> In many parts of Africa, the colonial and post-colonial integration of chiefs in the state administrative apparatus resulted in a reinterpretation of chiefly powers, often towards greater authoritarianism.<sup>457</sup> In addition, official interpretation of customary law through codification or judicial precedents tended to distort its content – as illustrated by the widely held colonial belief that customary systems only entitled local resource users to “usufructuary”

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<sup>453</sup> There is a vast literature on customary law in Africa: see for instance Gluckman (1965); Comaroff and Roberts (1981); Chanock (1985); and, for insights on the complex interaction between customary and state law, Griffiths (1998). Customary systems of property rights over natural resources are discussed both in more general works on customary law (e.g. Gluckman, 1965:75-112; Falk Moore, 1978), and in studies specifically devoted to the issue. Recent examples of the latter include Chauveau et al (2006); Lavigne Delville (2000); Mathieu et al (2000); Thébaud (2002); Ubink (2007). For the author’s own work on this, see Cotula (ed) (2007), and Cotula and Cissé (2006) and (2007).

<sup>454</sup> On the “invention of tradition” in Africa, see Ranger (1983:211 ff).

<sup>455</sup> For a more in-depth discussion of these processes and of the factors underpinning them, see Cotula with Neves (2007).

<sup>456</sup> As shown by Chanock (1985) and Mamdani (1996).

<sup>457</sup> See the concept of “decentralised despotism” developed by Mamdani (1996).

rather than ownership rights over land;<sup>458</sup> or by male-biased official interpretations of customary law.<sup>459</sup> This led to a gap between, on the one hand, the “juristic” re-elaboration of “customary law” used by lawyers and courts and, on the other, the customary rules followed by resource users on the ground.<sup>460</sup>

The use of the word “systems” to describe customary tenure should not mislead. While their degree of internal consistency varies, customary systems usually consist of “loosely ordered...repertoire[s] of norms”, rather than of systematised codes (Comaroff and Roberts, 1981:70). The content of customary rules and the nature and distribution of customary rights is often hotly contested, with different social groups putting forward competing interpretations, and with power relations shaping evolution in the content and application of customary law.<sup>461</sup>

As a result of the limited implementation of state law and of the continued application of customary rules, several systems may regulate property rights over natural resources in the same territory. In this context, the boundaries between state and customary law are considerably fluid,<sup>462</sup> and relations between them are of “semi-autonomy” – with each system producing and applying rules internally, while also being affected by rules emanating from other systems.<sup>463</sup>

#### ***4.1.2. Rule of law***

In comparing the legal protection available to different sets of property rights involved in an investment project, this chapter focuses on the “normative content”

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<sup>458</sup> For instance, in the 1921 Privy Council case *Amodu Tijani v. The Secretary of Southern Nigeria*, at 406-410. It is now accepted that customary rights do not easily fit Western legal concepts. For instance, although colonial authorities tended to refer to customary land rights as usufruct, customary rights are often hereditary, and thus differ from the “life interest” typically characterising usufruct under Roman law (Gluckman, 1965:85-86).

<sup>459</sup> Mackenzie (1996), writing on Kenya.

<sup>460</sup> E.g., on Ghana, Woodman (1996:44-45) and Date-Bah (1998:397).

<sup>461</sup> For an example from the Inner Niger Delta of Mali, see Cotula and Cissé (2006 and 2007), and Cotula (2008c).

<sup>462</sup> Griffiths (1998:613); Benjaminsen and Lund (2003:6).

<sup>463</sup> Falk Moore (1978:54-59 and 65-78).

and “tailored arrangements” dimensions identified in the property rights protection matrix (section 2.2.4). The matrix also identified another important dimension: the extent to which national legal systems uphold the rule of law.

It would be impossible to properly analyse rule of law issues in the twelve covered countries within the limited space available here - and such an analysis is beyond the scope of this study. But considerations relating to the rule of law may have significant implications for the other two dimensions, for instance through pushing investors to seek tailored arrangements for their investment as a way to compensate for shortcomings in the rule of law. This requires a brief reflection on how rule of law issues affect the protection of property rights, as well as stakeholders’ negotiating strategies with regard to these.

In its basic form, the rule of law refers to a system where the government “is bound by rules fixed and announced beforehand”.<sup>464</sup> In other words, the rule of law requires publicly available legal rules that are binding for all, including the government; and an equal right of all to have rules enforced by authorities independent of the government (Dam, 2006:16).<sup>465</sup>

Thus defined, the rule of law significantly influences the protection of property rights, for instance by affecting the extent to which right holders can trust courts to uphold their rights, and the government administration to ensure compliance with court judgements. In turn, this can have important implications on investment processes: it can influence decisions to invest in the first place,<sup>466</sup> and it can affect the

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<sup>464</sup> Raz (1979:210), developing a formulation first proposed by Hayek (1946:54).

<sup>465</sup> On the concept of rule of law, see also Fletcher (1996:11-27), Dworkin (1985:11), Fuller (1969:209-210) and Unger (1976:66-68 and 166-242). For a discussion of the rule of law with regard to property rights in the US, see Komesar (2001:156-173). For two contrasting views on the relationship between the rule of law and economic growth, see Kurtz and Schrank (2007:547-551) and Kaufmann et al (2007a:560-562). On the limits of donor-funded rule-of-law programmes in developing countries, see Carothers (2004:131-143) and Golub (2005).

<sup>466</sup> There is debate in the literature as to the weight of rule of law factors in investment decisions. Perry (2000:791-796) notes that different investors may have different levels of

terms and conditions of the investment, for instance by pushing the investor to seek tailored arrangements to insulate the investment from the national legal system. For local resource users, the rule of law affects their ability to enjoy legally recognised rights in practice, particularly with regard to their ability to challenge adverse government decisions and obtain legal redress by independent and effective courts.

A major challenge in tackling rule of law issues is devising adequate indicators to “measure” it – a crucial step for cross-country comparisons. The analysis here draws on two sets of indicators. The first indicator is qualitative, and concerns the extent to which national constitutions protect judicial independence. The sources for this indicator are constitutional texts, case law and available literature. The second set of indicators is quantitative, and draws on existing cross-country rankings and scorings on the rule of law, such as the World Bank “Worldwide Governance Indicators” and the Ibrahim Index of African Governance. The sources for this second set of indicators are data published by the World Bank and the Mo Ibrahim Foundation.

Most covered national constitutions solemnly affirm the principle of judicial independence, with the only exceptions of Kenya, Nigeria and Tanzania (see Table 4.1). All of the covered constitutions provide, to varying degrees, arrangements for guaranteeing such independence. This includes provisions on the appointment of judges,<sup>467</sup> their tenure of office,<sup>468</sup> their salary,<sup>469</sup> and other aspects. At the regional

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sensitivity to these issues - for instance with regard to size (with larger investors being better able to insulate themselves from a weak legal system) or nationality (with Western investors being more likely to attach importance to the legal system than Asian ones).

<sup>467</sup> Extensive powers of the executive branch in the appointment of judges may undermine judicial independence. The key issue here is the balance of power between the President and independent Judicial Service Commissions. See for instance article 37 of the Constitution of Cameroon, articles 150-153 of the Constitution of Chad, article 82 of the Constitution of Mali and article 222 of the Constitution of Mozambique.

<sup>468</sup> See for example article 222 of the Constitution of Mozambique and article 110 of the Constitution of Tanzania.

<sup>469</sup> For instance, under the 1992 Constitution of Ghana, salaries and other emoluments of judges cannot be varied to the judge's disadvantage (article 127): see Amisshah (1998:155).



level, article 26 of the ACHPR requires states “to guarantee the independence of the Courts”.

However, despite much cross-country variation, several countries have experienced difficulties concerning the effectiveness and independence of courts. These difficulties have their historical roots in the colonial system, where emphasis was (not on judicial independence to curb abuse of executive power but) on harnessing the judiciary as a means to enforce the colonial order.<sup>470</sup> More recently, government interference in the appointment and removal of judges, even in violation of constitutional provisions, has been documented in the literature.<sup>471</sup> In other words, the democratic transitions of the 1990s have resulted in elections becoming established as the way to choose those in power; but have not necessarily translated into tangible improvements in the checks and balances that underpin the rule of law.

The issue of judicial independence has emerged on many occasions before the ACHPR Commission, for instance in several cases where the “special tribunals” established in Nigeria in the 1980s were found in breach of article 26 of the ACHPR: *International Pen v. Nigeria*,<sup>472</sup> *Constitutional Rights Project (in Respect of Wahab Akamu, G. Adegan and Others) v. Nigeria*,<sup>473</sup> and *Constitutional Rights Project (in respect of Zamani Lakwot and others) v. Nigeria*.<sup>474</sup> The issue also emerged in *Bakweri Land Claims Committee v. Cameroon*, a case specifically concerning land rights. In *Bakweri*, the complainant alleged that it was impossible for them to bring disputes before domestic courts due to lack of judicial independence.<sup>475</sup> The Commission made no

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<sup>470</sup> Ajibola (1998:114), mainly drawing on the experience of Nigeria.

<sup>471</sup> See e.g. Eso (1998:122-126), mainly writing on Nigeria; and Amisshah (1998:137-138), providing examples from Ghana and Namibia.

<sup>472</sup> Paras. 94-95.

<sup>473</sup> Para.14.

<sup>474</sup> Paras. 13-14.

<sup>475</sup> Paras. 26-37.

finding on judicial independence, however, as it ruled the complaint inadmissible due to non-exhaustion of domestic remedies.<sup>476</sup>

The difficulties highlighted by this case law are reflected in the low scoring of the covered countries in quantitative indicators to measure the rule of law. For example, the World Bank “Worldwide Governance Indicators” (WGI) synthesise and aggregate governance data from a range of different organisations into six governance indicators; and, on this basis, produce country scorings (Kaufman et al, 2006). One of these six indicators measures “Rule of Law”. It is based on data from different sources and relating to matters such as property rights, enforceability of contracts (including government contracts) and judicial independence. Table 4.1 reports the 2006 “Rule of Law” scores for the twelve covered countries, expressed in a percentile ranking covering all countries of the world (with zero corresponding to the lowest score, 100 to the highest). Of the covered countries, only Ghana and Namibia are above a 50% score, while countries like Chad and Nigeria feature at the bottom with scorings below 10%.<sup>477</sup>

Also relevant is the Ibrahim Index of African Governance, recently developed by the Mo Ibrahim Foundation.<sup>478</sup> The Index is based on five categories of “public goods”, including “Rule of law, transparency and corruption”, which in turn features components on “Legal norms” and on “Judicial independence and efficiency”. The “Legal norms” component includes a “Property Rights Index”, values for which are expressed in percentages and under which all the covered countries score between 30 and 50%.<sup>479</sup> The “Judicial independence and efficiency” component includes a

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<sup>476</sup> Para. 54-56.

<sup>477</sup> World Bank website, at [http://info.worldbank.org/governance/wgi2007/sc\\_chart.asp](http://info.worldbank.org/governance/wgi2007/sc_chart.asp), last visited on 28 March 2008.

<sup>478</sup> Website of the Mo Ibrahim Foundation ([www.moibrahimfoundation.org](http://www.moibrahimfoundation.org)).

<sup>479</sup> The Index is based on the “Index of Economic Freedom” developed by the Heritage Foundation and the Wall Street Journal. A score of 30% indicates weak protection of property rights, extensive corruption, and highly inefficient and politically influenced judiciary; a score of 50% indicates a court system that is inefficient and subject to delays, possible corruption, and possible government influence on the judiciary ([www.moibrahimfoundation.org](http://www.moibrahimfoundation.org)).

“Judicial Independence Index”, the scaled version of which is expressed in percentages.<sup>480</sup> Scorings under this index for the twelve covered countries vary from 14.3% for Chad and Cameroon to 78.6% for Mali (see Table 4.1). This highlights the importance of avoiding generalisations and recognising cross-country diversity.

Scorings of this nature must be read with great caution. “Governance” and “rule of law” are complex concepts embedded in diverse socio-political contexts. Therefore, measuring them through quantitative scorings and comparing them across countries is bound to simplify complex realities. Pertinent criticism has been levelled at the Worldwide Governance Indicators. For example, Kurtz and Schrank (2007:542-543) criticised the indicators’ conflation of governance quality with policy preferences. According to these authors, while some indicators measure genuine governance issues like judicial independence, others reveal specific policy preferences - for instance, over the structure of private property rights. Coupled with the indicators mainly drawing on business surveys, this creates a systematic bias in favour of business.<sup>481</sup>

Perhaps even more fundamentally, scorings of this nature are based on a notion of rule of law that historically emerged in Western countries and was “exported” to Africa with varying degrees of success. As a result, they reflect a rather ethnocentric approach to ranking legal systems, and they make little allowance for diversity in the operationalisation of the rule of law. In this regard, Mattei and Monateri (1997:66-74) provide useful concepts by distinguishing between “rule of professional law”, whereby the legal system is separated from political and religious systems, and legal decisions are based on technical not political criteria; “rule of

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<sup>480</sup> The Index is based on the “Rule of Law” score developed by Freedom House. 100% relates to be highest scores in the African context, namely Cape Verde and Mauritius, both of which scored 14 in Freedom House’s index ([www.moibrahimfoundation.org](http://www.moibrahimfoundation.org)).

<sup>481</sup> This criticism is only partly addressed in the reply by the authors of the WGI (Kauffmann et al, 2007a:556-557; and Kauffmann et al, 2007b:570-571), who conclude: “We do not dispute the data sources capturing the views of businesspeople and commercial-risk rating agencies play a prominent role in our governance indicators (although certainly not an exclusive role, given our reliance on citizen surveys, NGOs, and multilateral organizations)” (Kauffmann et al, 2007b:571).

political law”, whereby legal issues may be subordinated to political objectives; and “rule of traditional law”, characterised by a strong link between law on the one hand and tradition and/or religion on the other. According to these authors, the rule of professional law (which essentially coincides with the widely accepted concept of “rule of law”) predominates in Western legal systems, while for historical reasons African legal systems tend to place greater emphasis on the “rule of political law”, with a significant substratum of “rule of traditional law” (Mattei and Monateri, 1997:71-73).

For the purposes of this study, however, these limitations do not remove the usefulness of rule of law indicators altogether. Such indicators can still give a sense of widespread *business perceptions* of the quality of governance, including with regard to the protection of property rights. Ultimately, it is these perceptions that may affect investment decisions and investor strategies to compensate real or perceived shortcomings in the rule of law with tailored arrangements for specific investment projects.

Insofar as weaknesses in the rule of law undermine the protection of property rights, they negatively affect both foreign investment and local resource rights. They create opportunities for arbitrary government interference with property rights, and they undermine the effectiveness of legal remedies. In turn, lack of reliable enforceability undermines the practical value of legal entitlements and the negotiating power of those cleaning them.

The key issue is the extent to which foreign investors and local resource users can insulate their property rights from shortcomings in the rule of law affecting the national legal system. Overall, these shortcomings tend to be less problematic for bigger players with enough negotiating power to insulate their property rights from the national legal system.

A concern to insulate investors' property rights from shortcomings in the rule of law underpins home states' negotiation of investment treaties, and investors' pursuit of tailored arrangements embodied in contracts with the host state. The previous chapter examined the safeguards provided by a sample of twelve investment treaties. These typically include dispute settlement through international arbitration instead of litigation before domestic courts. Similarly, stabilization, choice of law and arbitration clauses embodied in investment contracts are all means to insulate the investment project from the national legal system of the host state.<sup>482</sup> Under these clauses, the investment contract may be regulated, in whole or in part, by a legal system other than that of the host state, while investment disputes may be settled through international arbitration.

On the other hand, local resource users are far less able to insulate their property rights from the national legal system. This is exemplified by the plight of the Bakweri in the ACHPR case *Bakweri Land Claims Committee v. Cameroon*. As discussed, the complainant invoked shortcomings in judicial independence to justify its approaching the African Commission without first exhausting domestic remedies. The Commission declared the inadmissibility of the complaint, as doing otherwise would have effectively transformed it into a court of first instance - a concern the Commission showed to be aware of.<sup>483</sup> But this also highlights the difficulty for local resource users to "contract out" of their national legal system in a way similar to foreign investors. Of course, local resource users can access international institutions *after* having exhausted domestic remedies. But the investment in time, resources and effort that this requires, coupled with the shortcomings in the international remedies themselves (discussed in the previous chapter), make this route quite difficult.

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<sup>482</sup> See sections 2.2.4, 4.4 and 5.2.3.

<sup>483</sup> Para. 56.

Tailored arrangements for the protection of local resource rights within the context of a specific investment project have also been developed – particularly where the involvement of international financial institutions such as the World Bank requires compliance with the institutional policies of these bodies, and these policies provide for greater protection than that available under domestic law. However, such tailored arrangements mainly concern the “normative content” aspect of property rights protection, and they do not insulate local property rights from rule-of-law problems in the host state.<sup>484</sup>

In other words, shortcomings in the rule of law negatively affect all users of a legal system - whether large investors or local farmers. But important differences exist with regard to the ability of different stakeholders to respond to these shortcomings by insulating their property rights. In this regard, foreign investment enjoys a significant advantage over local resource rights.

#### **4.2. Normative content**

The “normative content” dimension of the protection of property rights is shaped by national constitutions, the law of property, investment codes and sectoral natural resource legislation. The next few sections examine these norms. Section 4.2.1 analyses national constitutions, while the following sections explore ordinary legislation. Section 4.2.2 discusses the predominant role of the state in natural resource relations and the limited spread of private land ownership in most covered countries. Section 4.2.3 examines the property rights held by local resource users. Section 4.2.4 looks at the protection of property rights for foreign investment, while section 4.2.5 brings together the different parts of the analysis through comparing the legal protection for foreign investment and local resource rights within and across the four focus countries. Section 4.2.6 summarises key finding.

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<sup>484</sup> As will be discussed in section 4.3.

#### *4.2.1. National constitutions*

All of the covered countries have had a succession of constitutions and constitutional amendments since independence. The last major wave of constitutional reform in Africa dates back to the 1990s, where many countries underwent democratic transitions. Some of the constitutions analysed here relate to that period (e.g. Ghana, Mali, Mozambique).

All the current constitutions of the twelve covered countries affirm fundamental rights relevant to the protection of property rights (for an overview of key provisions, see Table 4.2). In the Constitution of Cameroon, human rights provisions are only contained in the preamble, but article 65 makes the preamble “part and parcel” of the Constitution, while the UDHR and the ACHPR are annexed in full to the Constitution.

The right to property features in all the twelve constitutions - although with different emphasis. Historically, many constitutional right-to-property provisions are rooted in independence arrangements with the former colonial power. These arrangements aimed both to protect assets held by nationals of the former colonial power, and to promote political stability and economic development in the newly independent country.<sup>485</sup>

Current provisions in the twelve constitutions generally include some form of general affirmation of the right to property, either in positive terms (“Every person has the right...”: Ghana, Namibia) or in passive terms (e.g. the right to property is “guaranteed”: more frequent in civil law countries such as Burkina Faso, Cameroon, Mali, Mozambique and Senegal). In some cases, this affirmation is explicitly linked to the social function or utility of the right to property (Burkina Faso, Cameroon) (see Table 4.2).

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<sup>485</sup> E.g., on Commonwealth countries, see Allen (2000:5).

In most cases, constitutional provisions on the right to property are brief and focused on key principles, although in a few cases (e.g. Ghana) they provide much more detailed regulation of property relations. All the twelve constitutions provide safeguards against takings, which entail varying combinations of public purpose, compensation, judicial review and/or non-discrimination. Some constitutions establish standards for determining compensation (e.g. “just” compensation in Chad, Mali and Mozambique) and its timing (e.g. “prior” compensation in Chad and Mali, “prompt” compensation in Ghana and Nigeria), though others merely prescribe that compensation be paid according to the law (e.g. Cameroon) (see Table 4.2 for details).

While constitutional provisions on the right to property would in principle apply to both investors and local resource users, the extent to which resource rights based on customary rather than state law can be considered as protected by these constitutional provisions has been contested. As most of the rural population gains access to land through customary rights, the constitutional protection of these rights is particularly important.

The issue was discussed in the landmark Tanzanian case *Attorney General v. Akonaay, Lohar and Another*, in which the Court of Appeal held that customary land rights are “real property” protected by article 24 of the Tanzanian Constitution (on the right to property). The case involved a legal challenge to uncompensated expropriation of customarily held land. In the case, the Attorney General argued that customary land rights do not constitute “property” under article 24 of the Constitution. In so doing, the Attorney General relied on colonial-era case law stating that customary rights do not constitute property rights, and on the provisions of Tanzanian legislation vesting land ownership with the President. In addition, the Attorney General argued that customary rights could not be considered full-fledged property rights because they are typically not exclusive and non-transferrable. The Court rejected these arguments, affirming that rights to



occupy and use land are still real property, and that their deprivation requires payment of fair compensation.

Other human rights such as peoples' right to freely dispose of their natural resources (or equivalent formulations) and the right to an adequate standard of living may more easily lend themselves to protecting local resource rights regardless of whether they amount to full ownership recognised by national law. But these rights are more rarely included in the covered constitutions and, when they are, they tend to emphasise a state-centred perspective. For instance, the Constitution of Chad affirms state sovereignty over natural resources for the benefit of the nation, rather than a people's right to freely dispose of natural resources. Similarly, the constitutions of Ghana and Namibia commit the state to take action to improve living standards, rather than positively affirming a right to an adequate standard of living (see Table 4.2).

Given the importance of land and natural resources for the economy and society of most African countries, some constitutions feature specific and in some cases extensive provisions on land and natural resource rights (e.g. the Ghana, Kenya, Mozambique, Namibia, Senegal; see Table 4.2). In Mozambique, for instance, an explicit provision on local land rights acquired through inheritance or occupancy provides constitutional backing to the land legislation protecting the land rights of "local communities" (on which see below). Such constitutional backing is absent in countries like Chad, Cameroon and Mali.

In some cases, the constitution includes provisions on foreign investment, for example "guaranteeing" it (Mozambique), mandating the government to create the conditions for encouraging it (e.g. Ghana), and/or placing restrictions on foreigners' acquisition of long-term resource rights (Ghana, Namibia; see Table 4.2).

Beyond the text of constitutional provisions, a key issue affecting the strength of property rights protection concerns the extent to which right holders may challenge the constitutionality of legislation that negatively affects their property rights (Mattei, 2000:31). This varies across countries. In Mali, for instance, the Constitutional Court can only examine the constitutionality of legislative enactments before their promulgation, following the model of the 1958 Constitution of France (articles 86 and 88 of the Malian Constitution). On the other hand, the Constitutional Councils of Chad and Mozambique may strike down legislation in force as unconstitutional as well as give binding opinions on legislative enactments before their promulgation. In Chad, any citizen can raise constitutionality issues when involved in court or other proceedings, while in Mozambique constitutionality issues can be raised by a number of state organs and by 2,000 citizens (articles 170 and 171 of the Constitution of Chad, and articles 244-246 of the Constitution of Mozambique). In this regard, although the right-to-property provisions of these constitutions use similar language, constitutional protection is formally stronger in Chad (and, to a lesser extent, Mozambique) than in Mali.

#### ***4.2.2. Land and resource rights: State control and limited private ownership***

Beyond constitutional provisions, ordinary legislation also shapes the protection of property rights within natural resource investment projects. A key issue concerns the regulation of rights over natural resources, including land, minerals and petroleum. The way these rights are regulated varies significantly across countries, though the state tends to play a central role and private land ownership remains rare.

In the domain of subsoil resources, although differences exist between legal traditions (particularly common and civil law), in all the covered countries the state retains ownership of mining and petroleum resources. State ownership is based on

provisions embodied in the constitution<sup>486</sup> and/or in sectoral legislation like petroleum codes<sup>487</sup> and mining codes.<sup>488</sup> The state authorises commercial operators to explore, exploit and/or develop such resources, mainly through contracts (e.g. in petroleum, concessions or production sharing agreements). The centrality of the state in the allocation and regulation of property rights over subsoil resources is very much in line with trends prevailing in other regions of the world.

With regard to property rights over land, on the other hand, the situation is more diverse and complicated (see Table 4.3). The relative importance of state control and private ownership varies substantially across countries. This diversity reflects historical legacies rooted in colonialism and post-independence ideological confrontation. But even here the prevailing trend points to a central role for the state.

After independence, several African states nationalised land, and ruled out private land ownership altogether. Nationalisation was undertaken to promote agricultural development, and seize control of a valuable asset and source of political power. In Mozambique, land was nationalized at independence in 1975, and more recently under article 109 of the Constitution and article 3 of the Land Act 1997. Similarly, land was nationalised in Burkina Faso under the *Réorganisation Agraire et Foncière* 1984, though law reforms in the 1990s introduced private land ownership;<sup>489</sup> in Nigeria, where the Land Use Act 1978 vests land ownership with the governor of each federated state;<sup>490</sup> and in Tanzania, where land was nationalised at independence and where the more recent Land Act 1999 and Village Land Act 1999

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<sup>486</sup> E.g. article 98(1) of the Constitution of Mozambique and article 57 of the Constitution of Chad; see also section 44(3) of the 1999 Nigerian Constitution.

<sup>487</sup> E.g. article 3 of Cameroon's Petroleum Code 1999, article 6 of Mozambique's Petroleum Law 2001, and article 3 of Mali's Hydrocarbons Law 2004. See also section 1 of Nigeria's Petroleum Act 1969, article 3 of Senegal's Petroleum Code 1998, and section 4 of Tanzania's Petroleum (Exploration and Production) Act 1980.

<sup>488</sup> E.g. article 6 of Cameroon's Mining Code 2001; article 3 of Chad's Mining Code 1995; article 3 of Mali's Mining Code 1999; and article 4 of Mozambique's Mining Law 2002.

<sup>489</sup> Articles 4 and 5 of the *Réorganisation Agraire et Foncière*, as last amended by Law 014/96/ADP of 23 May 1996.

<sup>490</sup> Article 1.

vest land ownership with the president in trusteeship for all citizens<sup>491</sup> - although the Land (Amendment) Act 2004 introduced the possibility for the state to sell undeveloped land (section 5).

In Chad, Cameroon and Mali, most land is held by the state, but private ownership can be established through cumbersome procedures that (despite cross-country differences) involve first registering land with the state, thereby including it in its alienable private estate ("*domaine privé de l'état*"), and then a cession from the state to the requesting private entity, formalised in a land title and leading to private land ownership.<sup>492</sup> The cumbersome nature of these procedures means that few rural people have made use of them in the three countries (as will be discussed below), and most of the land is in practice held by the state. The legal arrangements through which the state holds land on behalf of the nation vary significantly across countries, and are beyond the scope of this study.

Some of the covered countries have enabled or promoted private property to a much greater extent. Kenya has long had a land titling programme to register private land, converting customary land rights into freehold (under the Registered Land Act 1963 and the Land Adjudication Act 1968). In Ghana, part of the land is owned by the state but most of it belongs to private entities such as customary chiefdoms, extended families and individuals.<sup>493</sup> In the 1990s, political democratisation and economic liberalisation have brought about law reforms introducing or strengthening the protection of private land ownership in countries that had previously ruled it out – such as Burkina Faso.<sup>494</sup>

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<sup>491</sup> Section 1(1)(a) of the Land Act 1999 and section 3(1)(b) of the Village Land Act 1999.

<sup>492</sup> For Chad, article 7 of Law 23 of 1967 and articles 21-23 of Law 24 of 1967; for Mali, articles 71-224 of the Land Code (*Code Domaniale et Foncier*) of 2000, as amended in 2002; for Cameroon, article 1 of Ordinance No. 74-1 of 1974 and Decree 76-165 of 1976, as amended in 2005. Senegal's Law 64-46 of 1964 provides for similar arrangements.

<sup>493</sup> Kasanga and Kotey (2001:13) estimate that 80 to 90% of all undeveloped land in Ghana is held under customary tenure.

<sup>494</sup> See above.

In Namibia, a legacy of settler colonialism has resulted in a dual land tenure system. “Communal land areas” mainly used by blacks are vested with the state “in trust for the benefit of the traditional communities residing in those areas”, to the exclusion of full ownership rights, and local resource users enjoy customary land rights and rights of leasehold allocated by customary chiefs and land boards, respectively.<sup>495</sup> On the other hand, ownership rights may be established with regard to commercial farmland, and the Agricultural (Commercial) Land Reform Act 1995 provides the basis for land redistribution in these areas.

Overall, the state remains the key player in land relations in much of rural Africa. With important country exceptions (e.g. Kenya), private land ownership tends not to be widespread even where it is formally recognised - particularly in rural areas. Where land registration is a pre-condition for the establishment and protection of private ownership (e.g. Cameroon, Mali), long, costly and cumbersome registration processes prevent access to ownership for most of the rural population. For instance, Egbe (2001:32) describes Cameroon’s registration process as “costly, cumbersome and painfully slow”, while Djiré (2007) documents the limited access to the registration process for local resource users in Mali. Research from rural Ghana (where a deeds rather than title registration system operates) has also documented major constraints in access to the registration process as a result of lack of legal awareness, high fees, language barriers, transport costs and long and cumbersome procedures.<sup>496</sup>

As a result, very little rural land is privately owned. The World Bank estimates that, across Africa, only between 2 and 10% of the land is held under formal tenure (Deininger, 2003:xxi). Available data from the covered countries confirms this picture. In Cameroon, for instance, only 3% of rural land has been titled and is held under private ownership (Egbe, 2001:32). In Mali, while more than half the

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<sup>495</sup> Articles 17, 19, 20 and 30 of the Communal Land Rights Act 2002, as amended.

<sup>496</sup> Kanji et al (2005:13).

provisions of the Land Code 2000 deal with private ownership rights, very little rural land has actually been registered – and is thus privately owned (Djiré, 2007).

The little registered land mainly concerns urban land (Deininger, 2003:xxi) and, in rural areas, land held by medium to large-scale investors and urban elites such as politicians, civil servants and businessmen (Firmin-Sellers and Sellers, 1999:1118, writing on Cameroon). Research from the Eastern and Western Regions of Ghana, for instance, shows that most deeds registration concerns mining and timber concessions as well as leases to agribusiness companies - for which access to the process is not an insurmountable problem (Kanji et al, 2005:13).

Similarly, research in a rural municipality not distant from Bamako (Mali) found that while the number of title deeds had increased exponentially between 1996 and 2005, most titles were held by urban-based civil servants (44.29%), followed by the state (35.44%) and by businesses (19.40%). Only 1.44% of titles were issued to farmers.<sup>497</sup>

Even where private ownership exists in practice as well as in the law, state institutions may retain important powers – for instance, through legislation requiring government approval for land transfers. In Kenya, the Land Control Act 1967 requires land transactions to be approved by Land Control Boards, which decide on the basis of economic and social criteria (e.g. prevention of uneconomic sub-division and of “markedly unfair” transactions, respectively).<sup>498</sup>

However, more recent land laws tend to allow and promote various forms of land transfers. Some commentators have noted a trend towards law reforms aimed at unleashing land markets (Maoulidi, 2007:2, writing on Tanzania). For instance, under Uganda’s Land Act 1998, land certificates may be sold, leased and

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<sup>497</sup> Djiré (2007:4 and 13-14).

<sup>498</sup> Sections 6(1) and 9(1).

mortgaged.<sup>499</sup> In Tanzania, the Land (Amendment) Act 2004 allowed the sale of undeveloped land (section 5) and introduced provisions to facilitate mortgaging of land (section 6).

#### ***4.2.3. Local resource rights: Varying but limited protection***

With much land vested in the state and with limited spread of private land ownership, rural people tend to enjoy use rights on lands held by the state. These use rights may be conditioned to productive land use, for instance under “*mise en valeur*” requirements found in the legislation of much of Francophone Africa (e.g. Cameroon,<sup>500</sup> Chad,<sup>501</sup> Mali<sup>502</sup> and Senegal<sup>503</sup>). Outside Francophone Africa, similar land use requirements are found for instance in Tanzania’s Village Land Act 1999 (section 29), although in Mozambique the Land Act 1997 does not condition the protection of local land rights to productive use.<sup>504</sup> Where productive land use is required, land management institutions may be mandated to monitor compliance and reallocate land to third parties if land is not deemed productively used (e.g. in Senegal, under article 15 of Law 64-46 of 1964).<sup>505</sup>

This legal regime, coupled with lack of clear legal definition of what constitutes “productive use” and with the ensuing broad discretion of government officials, may open the door to abuse. It therefore undermines the security of local land rights. This is particularly so for some groups whose resource use is often not

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<sup>499</sup> E.g., with regard to customary land rights, under article 9(2), subject to restrictions relating to consent by family members where applicable (article 40).

<sup>500</sup> Articles 15 and 17 of Ordinance 74-1 of 1974.

<sup>501</sup> Where “*mise en valeur*” leads to “temporary occupation rights” (article 7 of Law 23 of 1967).

<sup>502</sup> See for instance articles 45 and 47 of the Land Code 2000 (*Code Domaniale et Foncier*), which require “evident and permanent” productive use as a condition for the registration of customary rights.

<sup>503</sup> Articles 8 and 15 of Law 64-46 of 1964, and 18 of Decree 64-753 of 1964.

<sup>504</sup> Differently to land use rights allocated to investors, which are subject to compliance with the agreed investment plan within specified timeframes (article 18(1)(a) of the Land Act 1997).

<sup>505</sup> In Cameroon, on the other hand, the assessment of productive use is only required when an application for registered land title is made (article 14 of Decree 76-166 of 1976, last bullet point). See also articles 45 and 47 of Mali’s Land Code 2000.

considered as productive due to widespread misconceptions – such as pastoralists (Hesse and Thébaud, 2006:17).

Where land use rights are withdrawn, compensation tends to be paid for loss of improvements (crops, trees, buildings) but often not for loss of land rights - as land is held by the state. The expectation is that local resource users would gain access to land elsewhere – though this may not be straightforward where land is becoming scarcer due to demographic growth and other socio-economic change. However, in some cases compensation packages include provision of alternative land.<sup>506</sup>

In Cameroon, Law 85-09 of 1985 on expropriation only applies to private ownership – as opposed to use rights on the national land estate (the “*domaine national*”; section 2). Such use rights are taken through a different process (“*incorporation*”), which transfers land from the national land estate to the land estate privately held by the state (“*domaine privé de l’état*”). The incorporation procedure follows steps similar to expropriation, but entails compensation only for improvements – not for the land itself (articles 19-21 and 23 of Decree 76-166 of 1976). Ordinance 74-1 of 1974 requires improvements to be “evident” in order to enjoy legal protection (article 15(1)).<sup>507</sup> This may cause problems for pastoralists, whose resource use does not always entail permanent and clearly visible structures.

Similarly, in Chad, legislation relating to the compensation of land use rights dates back to the 1960s and appears confused and unclear - but limits compensation to loss of “permanent and evident” improvements alone (“*emprise permanente et visible sur le sol*”; Law 67-24 of 1967, articles 15 and 17). Compensation is limited to improvements alone also in Namibia (article 40 of the Communal Land Reform Act

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<sup>506</sup> On the resettlement programme for the oilfield areas of Chad, see section 4.3.2.

<sup>507</sup> “*Emprise évidente de l’homme sur la terre et [...] mise en valeur probante*”.



2002<sup>508</sup>), Senegal (article 32 of Decree 64-753 of 1964) and Tanzania (section 5(2) of the Land (Compensation Claims) Regulations 2001).

In Mozambique, the Land Act 1997 requires “just” compensation for takings of land use rights, without however specifying whether this includes loss of land or is limited to loss of improvements (article 18(1)(b)). As the land is owned by the state, this requirement must be interpreted as referring to improvements alone. Similarly, in Mali, the Land Code 2000 (*Code Domaniale et Foncier*) explicitly requires compensation for takings of customary land rights not amounting to full ownership (articles 43 and 47). The wording of Mali’s provisions is ambiguous, as it does not specify whether the compensation relates to improvements alone or must take into account loss of land. Administrative practice emphasises the former solution,<sup>509</sup> though some Malian jurists have interpreted these provisions as requiring compensation that reflects the market value of the *land* taken (Keita et al, 2008). In addition, Mali’s Pastoral Charter 2001 extends compensation requirements to loss of grazing rights (article 51), which receive no mention in the law of most covered countries. However, this last provision grants significant discretion to government authorities (as compensation is due “*si besoin en etait*”: “if needed”).

In some jurisdictions, part of the root cause for the limited protection of local resource rights lies in the weak legal recognition of “customary” rights – which are the entitlements through which most rural dwellers gain access to resources in much of Africa. Before analysing relevant legal provisions, it may be useful to briefly recall some key features of customary systems.

According to the dominant if somewhat stereotyped description of these systems, land and natural resources are usually held by clans, families or other socio-political

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<sup>508</sup> With regard to customary rights on communal lands, this provision seems to exclude a legal right to compensation, and to grant considerable discretion to the competent Minister with regard to compensation for loss of improvements.

<sup>509</sup> Exchange with a Malian lawyer (23 October 2008).

entities on the basis of diverse blends of group to individual rights, accessed on the basis of group membership and social status, and used through complex systems of multiple rights. In reality, customary systems vary considerably as a result of a range of cultural, ecological, social, economic and political specificities.<sup>510</sup>

Important differences exist, for instance, between pastoral and farming contexts. The former tend to emphasise collective rights over land, water and grazing, based on negotiated, flexible and reciprocal arrangements that enable herd mobility.<sup>511</sup> The latter also usually entail collective rights, but typically involve the allocation of farming rights over specific plots by the land management authority (e.g. a “chief”) to smaller family units. The nature of these smaller units and of the farming rights they hold vary considerably. Arrangements for pastoral and farming land may coexist in the same village, with different parts of village land being managed according to differentiated rules, and/or with fields being used for grazing after harvest.

While in many places customary systems are still effective in regulating resource access, in others they have been fundamentally weakened by increased resource competition, monetarisation of the economy, political interference and cultural change.<sup>512</sup>

A key recurring feature of customary systems is the primacy they tend to accord to the resource rights of the “first occupants” (or “autochtons”), i.e. those who first cleared the land or their descendants. People who come later (“allochtons”,

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<sup>510</sup> For key references on customary systems of property rights over natural resources in Africa, see section 4.1.1 above. Besides the literature, I draw my understanding of customary resource tenure and its interaction with state law from fieldwork I undertook in Mali (published as Cotula and Cissé, 2006 and 2007; and Cotula, 2008c); and from having coordinated a multi-country research project involving anthropologists, economists and lawyers from eight research institutions (“Changes in Land Access, Institutions and Markets in West Africa”, 2002-2005), the findings of which were published as Chauveau et al (2006) and Cotula (Ed) (2007).

<sup>511</sup> Thébaud (2002:229-232), writing on Burkina Faso and Niger.

<sup>512</sup> For example, on the erosion of customary systems in the Inner Niger Delta of Mali, see Cotula and Cissé (2006 and 2007), and Cotula (2008c).

“migrants” or “outsiders”<sup>513</sup>) must gain access to resources through arrangements negotiated with the first occupants. Although outright land sales have been documented in some places as dating back to the 19th century (e.g., on Ghana, see Amanor, 1999:4-5), customary arrangements between first occupants and outsiders (e.g. the “*tutorat*” in Francophone West Africa) traditionally entail a property rights component, which grants resource access to outsiders but falls short of an outright sale; and a broader component to regulate socio-political relations between the first occupants and the outsiders, with the latter pledging allegiance to the former and being integrated in the local group.<sup>514</sup> Under most such customary arrangements (as interpreted by the landholding group), outsiders will never achieve the same tenure status as first occupants. No matter how many generations go by, their resource rights will always be subordinate to their allegiance to the landholding group - although these relations are subject to contestations, particularly as land becomes scarcer.<sup>515</sup>

Customary systems of this type (albeit with significant local variance) are applied for instance in the oilfield development area of Southern Chad, i.e. in the areas directly affected by oil operations within the context of the Chad-Cameroon oil development and pipeline project.<sup>516</sup> For a visual representation of customary systems of property rights, see Figure 4.1, developed on the basis of evidence from the West African Sahel.

The extent to which rights acquired through customary systems are legally protected under national law varies across countries. In some jurisdictions, customary rights enjoy no legal protection. This includes some countries

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<sup>513</sup> “*Etrangers*” in French.

<sup>514</sup> Chauveau and Colin (2007:67-73).

<sup>515</sup> Chauveau and Colin (2007:68).

<sup>516</sup> For an ethnographic description of these systems, see Chad Resettlement and Compensation Plan, at 4-4 to 4-7. On customary land tenure in some of the areas affected by the pipeline route in Cameroon, see Endeley and Sikod (2007:65-74).

emphasising state ownership and control, and some endorsing or promoting private ownership.

In Cameroon, Burkina Faso and Senegal, customary rights have no legal status - although people without registered title enjoy some degree of legal protection in the form of use rights, based on administrative land allocations<sup>517</sup> or pre-existing occupation.<sup>518</sup> In Kenya, the above-mentioned land registration process entailed the conversion of customary land rights into ownership or other statutory rights.<sup>519</sup>

On the other hand, some countries have long protected customary land rights, including as a result of historical legacies. In Ghana, colonial attempts to suppress customary rights and vest “waste” land with the Crown were successfully resisted by customary chiefs and other interest groups. The colonial administration subsequently changed tactics, working to strengthen the customary land rights of chiefs and use them as an instrument for indirect rule (Amanor, 2005:103). Today, article 11 of Ghana’s 1992 Constitution specifically recognises customary law as a source of law, while article 267 regulates the role of customary chiefs in land administration.

As part of a recent wave of law reforms to strengthen local land rights, several countries have strengthened the legal protection of customary rights - even where land remains held by the state.<sup>520</sup> Customary rights are for instance protected as use rights in Mali,<sup>521</sup> Mozambique,<sup>522</sup> Namibia,<sup>523</sup> Tanzania<sup>524</sup> and Uganda.<sup>525</sup>

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<sup>517</sup> E.g., in Senegal, under articles 17-25 of Decree 64-578 of 1964.

<sup>518</sup> See articles 15 and 17 of Cameroon’s Ordinance 74-1 of 1974; article 505 of Burkina Faso’s Decree 97-054 of 1997; and article 15 of Senegal’s Law 64-46 of 1964.

<sup>519</sup> Registered Land Act 1963, section 27.

<sup>520</sup> Another route that some African countries (including Mali, Senegal and Tanzania) have taken to strengthen local resource rights involves decentralisation and the vesting of rights over land and surface resources with local government bodies. Due to space constraints, this issue is not covered here.

<sup>521</sup> Articles 43-48 of the Land Code 2000.

<sup>522</sup> Articles 12 (a) and (b), 13(2) and 14(2) of the Land Act 1997, which protect use rights based on customary law or good-faith occupation for more than ten years.

<sup>523</sup> Article 19(a) of the Communal Land Reform Act 2002.

But, even here, legal protection is usually limited or qualified. In those jurisdictions where customary rules are recognised as a source of law,<sup>526</sup> the Constitution and state legislation typically prevail over customary rules.<sup>527</sup> In addition, although in some countries customary rights and rights based on state law enjoy the same legal status and protection,<sup>528</sup> in others customary rights are protected as lesser forms of legal entitlement, which can be “upgraded” into ownership through undertaking land registration.<sup>529</sup> In some jurisdictions, the actual legal protection granted to customary rights remains vague and incomplete. In Mali, for instance, the Land Code 2000 devotes only a few provisions to customary rights (articles 43-48), and the implementing decree required to regulate the procedure for recording and taking these rights has not been adopted as yet.

In any case, legislation across the covered countries tends not to recognise the primacy that the first occupants usually enjoy under customary systems. On the contrary, the emphasis on productive use requirements as a condition for the protection of land rights may undermine the property rights of the first occupants in contexts where these have allocated land to outsiders. In such cases, because productive use is carried out by the outsiders rather than by the first occupants, the former are more likely to obtain legal protection than the latter. Undefined productive use requirements may also weaken the protection of local customary

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<sup>524</sup> Tanzania’s Village Land Act 1999 states that customary rights of occupancy have “equal status and effects” to statutory rights (section 18(1)).

<sup>525</sup> Article 9 of the Land Act 1998.

<sup>526</sup> E.g. under articles 11(1)(e), 11(2) and 11(3) of the Constitution of Ghana. In Tanzania, the Court of Appeal stated in *Maagwi Kimito v. Gibeno Werema*: “The customary laws of this country now have the same status in our courts as any other law subject only to the Constitution and any statutory law that may provide to the contrary”.

<sup>527</sup> As for inconsistency with the Constitution, see e.g. article 1(2) of the Constitution of Ghana and article 2(2) of the Constitution of Uganda. As for Tanzania, see the quote from the *Maagwi Kimito* case in the previous footnote, and the subsequent case *Ephrahim v. Pastory and Another*, in which the High Court invalidated a gender-discriminatory customary rule because inconsistent with the Constitution.

<sup>528</sup> E.g., in Uganda, under article 3 of the Land Act 1998; in Tanzania, under section 18 of the Village Land Act 1999.

<sup>529</sup> For example, under article 45 of Mali’s Land Code 2000.

rights vis-à-vis incoming investors, particularly in contexts where the resource use proposed by investors is seen as more productive than existing uses.

Even where customary rights are legally protected, local resource users typically have no control over valuable subsoil resources such as minerals and petroleum. Rights over these resources are squarely vested with the state. All the stronger protection may bring to local resource users is better conditions for takings of or damage to property rights.

Further, legally protecting the customary rights of local groups may not be enough to secure local resource rights in contexts where significant threats come from *within* local groups - particularly from customary chiefs. In many parts of Africa, chiefs are increasingly reinterpreting custom to claim “ownership” over common resources they were traditionally responsible for managing on behalf of their community.<sup>530</sup> Explicit claims of individual ownership or control on common lands have for instance been documented by interviews with chiefs in Ghana (Ubink, 2007:229),<sup>531</sup> as well as by the author’s own fieldwork in Mali (Cotula and Cissé, 2007:93). These reinterpretations of customary law are strongly contested by local resource users, but customary mechanisms for the accountability of chiefs are not or no longer working in practice (Ubink, 2007:230-236). This situation provides the breeding ground for the co-option of customary chiefs and local elites into strategic alliances with the central state and foreign investment, and make local resource users vulnerable to dispossession by foreign investment projects.<sup>532</sup>

Finally, the implementation of legislation strengthening the legal protection of customary land rights may not be assisted by the strong political will required for such legislation to have impact on the ground. In some cases, the legislation was

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<sup>530</sup> Because of the obligations towards the “subjects” linked to it, Gluckman (1965:90) qualified the legal position of customary authorities as “wardenship”.

<sup>531</sup> See also the Ghana High Court case *Total Oil Products Ltd. v. Obeng and Manu*, at 4.

<sup>532</sup> On Ghana, see Amanor (1999:19-20 and 131-132).

drafted with the support of donor agencies (e.g. Mozambique, Tanzania, Uganda) and/or under pressure from NGOs or social movements (e.g. the “Land Campaign” in Mozambique<sup>533</sup>). Having passed these reforms, some governments have prioritised implementation efforts on aspects other than strengthening local land rights, particularly promoting land access for larger operators perceived to be more productive and efficient or simply more closely linked to political elites.<sup>534</sup>

In Mozambique, for instance, a 2007 amendment to article 35 of the Land Regulation 1999 is reported to require that new collective registrations by “local communities” for land above 1000 ha be signed off directly by the President.<sup>535</sup> This administrative bottleneck suggests a limited government commitment to securing local resource rights, particularly in the face of concerns that stronger local rights may create impediments for resource access by large-scale investment.

#### *4.2.4. Protecting property rights for foreign investors*

National laws on foreign investment vary substantially across countries, reflecting broader differences in political orientation on issues like foreign ownership of strategic assets and the role of government regulation. In recent years, several African countries have adopted legal reforms to create an “enabling environment” for investment, particularly in order to attract foreign investment. This wave of law reform concerns investment codes and sectoral legislation such as land, mining and petroleum codes.

While some investment codes only apply to foreign investment (e.g. Namibia’s Foreign Investment Act 1990<sup>536</sup>), most formally cover both nationals and non-

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<sup>533</sup> Kanji (2002:13-14).

<sup>534</sup> Conversations with lawyers, government officials, NGO staff and researchers working in Mozambique, particularly on the occasion of a field visit to Massingir and Zavala districts (13-23 September 2008).

<sup>535</sup> Ibid. It was impossible to access the 2007 amending decree.

<sup>536</sup> As amended by the Foreign Investment Amendment Act 1993.

nationals.<sup>537</sup> But even here, minimum-size requirements<sup>538</sup> may exclude local resource users from the application of this legislation. In practice, investment legislation is usually conceived to attract and cater for the needs of foreign investment. This is particularly so in poorer African countries where shortages in internal capital supply entail a more direct correlation between investment size and involvement of foreign capital.

In several countries, petroleum and mining operations are excluded from the scope of the investment code. This is the case of Mali's Investment Code 1991, as amended (article 4), and of Mozambique's Investment Act 1993 (article 3(2)). A similar provision is embodied in article 17 of the Ghana Investment Promotion Centre Act 1994. On the other hand, the provisions defining the scope of application for Cameroon's Investment Charter 2002 do not explicitly exclude petroleum and mining (articles 6 and 7).

Key provisions of the investment codes of the twelve covered countries are summarised in Table 4.4. Other measures typically adopted to promote foreign investment include easing of legal restrictions on entry and operation,<sup>539</sup> establishing investment promotion agencies to facilitate inward investment,<sup>540</sup> privatising state-owned enterprises, removing controls on profit repatriation, and establishing tax

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<sup>537</sup> E.g. under Cameroon's Investment Charter 2002, as amended in 2004; Mali's Investment Code 1991, as amended in 2005; Mozambique's Investment Act 1993; the Nigerian Investment Promotion Commission Act 1995; and Senegal's Investment Code 2004; see Table 4.4.

<sup>538</sup> Such as the one applied under article 2 of the Tanzania Investment Act: 300,000USD for foreign investors and 100,000USD for domestic ones.

<sup>539</sup> E.g., in Ghana, the Ghana Investment Promotion Centre Act 1994 entailed a shift from discretionary approval by government authorities to automatic registration subject to meeting legal requirements; Muchlinski (2007:205).

<sup>540</sup> For example, Mozambique's Investment Promotion Centre (*Centro de Promoção de Investimentos*, CPI), established under article 4 of the Investment Act Regulations 1993; the Kenya Investment Authority, established under article 14 of Kenya's Investment Promotion Act 2004; Namibia's Investment Centre, established under article 2 of the Foreign Investment Act 1990; the Nigerian Investment Promotion Commission, established under the Nigerian Investment Promotion Commission Act 1995; and the Tanzania Investment Centre, established under article 4 of Tanzania's Investment Act 1997.



incentives.<sup>541</sup> Recent hikes in commodity prices have prompted some adverse tax or regulatory interventions by governments seeking to capture a share of the greater profits - as exemplified by the recent tax dispute between the government of Chad and the oil consortium for the Chad-Cameroon project.<sup>542</sup> Overall, however, the trend is towards establishing regulatory regimes more favourable to foreign investment.<sup>543</sup>

Within this broader package of measures, strengthening the protection of property rights is a key element of legislative efforts to promote investment. This includes two aspects:

- Norms concerning investors' acquisition and exercise of property rights over strategic assets such as business entities and natural resources; and
- Safeguards to protect the property rights acquired by the investor from arbitrary host state interference, including through regulating direct and indirect expropriation of the investor's assets.

This section explores these two aspects. Prohibitions of discrimination against non-nationals, including in relation to property rights, are relevant for both of these aspects. Non-discrimination provisions are included in some investment codes (e.g. articles 3 and 9 of Mali's Investment Code 1991, as amended; article 4 of Mozambique's Investment Act 1993; articles 9 and 10 of Senegal's Investment Code 2004) but not in others (e.g. Cameroon, Nigeria, Ghana), while in yet other cases non-discrimination is affirmed with regard to specific issues such as the capacity to acquire rights (e.g. under articles 5 to 8 of Chad's Investment Code 1987;<sup>544</sup> see Table 4.4).

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<sup>541</sup> On these measures, see UNCTAD (2008:21-22).

<sup>542</sup> See section 2.3.3.4.

<sup>543</sup> UNCTAD (2008:23).

<sup>544</sup> At the time of writing, a new Investment Charter was being discussed in Chad.

As for safeguards against arbitrary host state interference, while some of the covered codes do not contain explicit provisions on expropriation (e.g. Chad, Mali), most of them do (e.g. Mozambique; see Table 4.4). In most cases, these provisions provide the same level of protection as the Constitution (compare Tables 4.2 and 4.4), and in some countries investment legislation explicitly refers to constitutional standards (e.g. Namibia, Uganda; see Table 4.4). By and large, these provisions also reflect the rules of international law examined in chapter 3, which require public purpose, non-discrimination, compensation and due process as conditions of the legality of takings (compare Tables 4.4 and 3.3). Where investment codes do not apply to extractive industries, provisions on expropriation may be included in mining or petroleum codes, or in investor-state contracts.<sup>545</sup>

In some cases, investment codes seem to go *beyond* the constitutional protection. In Mozambique, for instance, investment may be expropriated only if “absolutely necessary for weighty reasons of national interest” (article 13 of the Investment Act 1993), while the Constitution only requires that takings occur for a “public need, use or interest” (article 82(2)). In Nigeria, while the Nigerian Investment Promotion Commission Act requires payment of “fair and adequate” compensation for takings (article 25), the Constitution only refers to “prompt” compensation, without setting *quantum* standards (article 44).

Most of the twelve investment codes provide direct access to investment arbitration (e.g. Cameroon,<sup>546</sup> Mali,<sup>547</sup> Mozambique<sup>548</sup>), although in some cases this depends on the terms of the investor-state contract or other instrument regulating the investment (e.g. the Convention of Establishment, under article 39 of Chad’s

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<sup>545</sup> See for article 21 of Mali’s model Convention of Establishment for the mining sector, approved with Decree 99-256 of 1999. See also article 21(6) of the 1998 TOTCO-Chad Convention of Establishment for the Chad-Cameroon pipeline. A tenure security issue of specific relevance to extracted industries is the existence of a reasonable legal entitlement for investors to obtain extraction rights after successful exploration. Due to space constraints, this issue is beyond the scope of this study.

<sup>546</sup> Article 11 of the Investment Charter 2002, as amended.

<sup>547</sup> Article 24 of the Investment Code 1991, as amended.

<sup>548</sup> Article 25 of the Investment Act 1993.

Investment Code; or the Certificate of Status Investment, under article 13(1) of Namibia's Investment Act). Several codes refer to ICSID (e.g. Cameroon,<sup>549</sup> Mali,<sup>550</sup> Mozambique<sup>551</sup>), although other arbitration mechanisms are also used (e.g. UNCITRAL, in Namibia<sup>552</sup>). Where arbitration is granted to both domestic and foreign investors, different tracks must usually be followed – for instance, in Nigeria, under section 26(2) of the Arbitration and Conciliation Act and the International Convention for the Settlement of Investment Disputes (Enforcement of Awards) Act.

The foregoing analysis concerns the protection of property rights once they have been acquired. The acquisition of property rights also deserves attention here. For a long time, many African countries restricted foreign investors' acquisition of property rights over strategic assets such as business entities and natural resources.

For example, several countries barred or limited foreign ownership of business entities in particular sectors. Recent years have witnessed legal reforms to ease or remove these restrictions (UNCTAD, 2008:22). In Mali, for instance, the Investment Code allows foreign investors to have full ownership of businesses,<sup>553</sup> while the Mining Code and the Hydrocarbon Law merely require "technical and financial capacities" as a condition for the allocation of subsoil rights (articles 14 and 6, respectively). A similar regime is in force in Chad.<sup>554</sup> In Nigeria, the Nigerian Enterprises Promotion Acts of 1972, 1977 and 1989, which reserved certain commercial and industrial activities to Nigerian citizens, were repealed by the Nigerian Enterprises Promotion (Repeal) Act 1995.<sup>555</sup> The Nigerian Investment

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<sup>549</sup> Article 11 of the Investment Charter 2002, as amended.

<sup>550</sup> Article 24 of the Investment Code 1991, as amended.

<sup>551</sup> Article 25 of the Investment Act 1993.

<sup>552</sup> Article 13(2) of the Foreign Investment Act 1990, as amended.

<sup>553</sup> On this point, see UNCTAD (2008:409).

<sup>554</sup> UNCTAD (2008:167). See also article 7 of the Mining Code and articles 5 and 6 of the Petroleum Code.

<sup>555</sup> Muchlinski (2007:184-186).

Promotion Commission Act 1995 authorises foreigners to have 100% equity participation in Nigerian enterprises (section 17).<sup>556</sup>

In some jurisdictions, sectoral legislation enables the state to acquire an equity participation in extractive industry projects when these enter the exploitation phase. For instance, under Mali's Mining Code 1999, the government has the right to acquire an equity participation of up to 20% in companies holding mining exploitation rights (article 42). This requirement does not exist in the legislation of other countries (e.g. the Mining Codes of Mozambique and Tanzania), while the privatisation of state-owned enterprises has opened new opportunities for foreign capital in several covered countries.

The acquisition of property rights over land is of particular importance for the topic of this study, as the investor's acquisition of land rights may entail the taking or compression of local land rights. The nature, scope and content of the land rights that investors - particularly foreign investors - may be vested with varies across countries. This diversity reflects diverging political orientations as to whether private land ownership is allowed altogether, and whether non-citizens may gain access to it.

For example, some of the non-focus covered countries restrict the acquisition of land ownership or of long-term use rights by foreigners. These restrictions may be entrenched in the Constitution (e.g. Namibia, Ghana; see Table 4.2). In Ghana, for instance, while nationals may own land, foreigners may not - they can only acquire land leases of up to 50 years (article 266 of the 1992 Constitution). Similar restrictions may also be embodied in land legislation. For example, under Uganda's Land Act 1998 non-citizens may only be given land leases for up to 99 years, and are

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<sup>556</sup> Quoted in Ekwueme (2005:179). While section 18 of the Act originally excluded the petroleum sector from this liberalisation (foreign investors could only participate in petroleum operations through joint ventures), an amendment in 1998 opened up the oil and gas sector to foreign ownership (Ekwueme, 2005:179).

barred from acquiring freehold rights (section 41). As foreigners' access to land ownership is not regulated by international law,<sup>557</sup> states have considerable room for manoeuvre in establishing such restrictions.

Legislation may also restrict certain forms of land use by non-nationals. In Uganda, foreign investors may not acquire land for the purpose of crop or animal production, but they may lease land for other purposes (article 10 of the Investment Code Act). In Tanzania, foreigners may acquire land use rights only for the purpose of an investment project under the Tanzania Investment Act (articles 19 and 20 of the Land Act 1999). In Namibia, the Agricultural (Commercial) Land Reform Act 1995 requires a government authorisation for the acquisition of land ownership by foreign nationals; this authorisation is conditioned, among other things, to the acquisition being for an investment eligible under the Foreign Investment Act.<sup>558</sup>

However, there is a trend towards the removal or easing of restrictions, and even towards measures to facilitate foreign investors' access to land. This trend refers both to the content of rights and to the process for obtaining them.

As for content, differences of treatment between nationals and non-nationals do not exist or are minimised in several of the covered countries. In Cameroon, Chad and Mali, for instance, both nationals and non-nationals may gain access to registered land ownership. In Mozambique, foreigners may acquire a renewable 50-year land use right, which for the first two years is conditional upon the implementation of an agreed investment plan (articles 17 and 18 of the Land Act 1997). Apart from its time-bound duration and its investment condition, the content of the land rights

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<sup>557</sup> Customary international law restricts the power of host states to take land rights already acquired by non-nationals (Hodgson et al, 1999:2). On the other hand, the power of host states to restrict foreign land ownership flows from the principle of state sovereignty over natural resources (see chapter 3 above).

<sup>558</sup> Article 58 of the Agricultural (Commercial) Land Reform Act 1995.

allocated to a foreign investor is the same as the right enjoyed by local resource users under the Land Act (i.e. it is a “right of land use and benefit”).<sup>559</sup>

Even where non-nationals are formally entitled to lesser forms of property rights compared to nationals (e.g. where land ownership may be held by the latter but not by the former), such differentiated treatment must be assessed in the light of the practical implementation of these norms. As discussed above, costly and cumbersome procedures for the acquisition of ownership may in practice prevent much of the rural population from having access to it. On the other hand, foreign investors tend to be better able to use available opportunities for access to property rights to their full potential.<sup>560</sup> In addition, ownership per se may not necessarily be an asset for certain investment projects, where access to land may be dealt with through servitudes like rights of way (e.g. for pipeline projects).<sup>561</sup>

As for process, efforts have been made to streamline the procedures that investors must go through in order to obtain access to land rights. National investment promotion agencies, for example, perform various roles in helping prospective investors to gain access to land - from facilitating investors’ dealings with government land agencies to playing a more direct role in allocating land to investors.

In countries like Mali, Mozambique, Ghana and Senegal, investment promotion agencies act as one-stop-shops, facilitating the acquisition of all necessary licences, permits and authorisations. Their direct role in facilitating land access focuses on helping investors in their dealings with other agencies. In Mozambique, for instance, while investment legislation makes no explicit mention of the role of the Investment Promotion Centre (CPI) in facilitating land access, the application form

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<sup>559</sup> Article 11. A 50-year limit on land leases held by non-nationals is also applied in Ghana. However, while in Mozambique private land ownership is ruled out for both nationals and non-nationals, in Ghana it is allowed for nationals only (article 266 of the Constitution).

<sup>560</sup> See section 4.2.2 above.

<sup>561</sup> E.g., on the Chad-Cameroon project, see section 4.3.1.

for prospective investors to seek government approval of the investment projects does mention, among possible areas where CPI assistance is sought by the investor, the “identification and licensing of land”.<sup>562</sup>

A more “hands-on” role is played by Tanzania's investment promotion agency, the Tanzania Investment Centre (TIC). Under the Tanzanian Investment Act 1997, the TIC is mandated, among other things, with identifying and providing land to investors, as well as with helping investors obtain all necessary permits (article 6). This entails identifying land not currently under productive use, and directly allocating it to investors. In order to perform this function, the TIC has set up a “land bank” - it has identified some 2.5 million hectares of land as suitable for investment projects.<sup>563</sup> Land is vested with the TIC and then allocated by this to the investor on the basis of a derivative title (under article 19(2) of the Land Act 1999). After the end of the investment project, the land reverts back to the TIC (article 20(5) of the Land Act).<sup>564</sup>

#### *4.2.5. Comparing the protection of property rights for foreign investment and local resource users*

The foregoing analysis of trends in national law highlighted the central role of the state in natural resource relations, the varying but often limited degrees to which local resource rights are legally protected, and the recent legislative efforts to strengthen the protection of investors’ property rights as a means to attract foreign

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<sup>562</sup> Available at [www.cpi.co.mz](http://www.cpi.co.mz), last visited in November 2007. See also the websites of Mali's *Centre National de Promotion des Investissements* (CNPI; [www.cnpi-mali.org](http://www.cnpi-mali.org)) and of Senegal's *Agence Nationale Chargée de la Promotion de l'Investissement et des Grands Travaux* (APIX; [www.investinsenegal.com](http://www.investinsenegal.com)). Cameroon's *Cellule de Gestion du Code des Investissements* (CGCI) and Chad's investment promotion agency do not seem to have a website.

<sup>563</sup> [www.tic.co.tz](http://www.tic.co.tz), particularly at <http://www.tic.co.tz/TICWebSite.nsf/2e9caf3e472ee5882572850027f544/729d4c075f2b03fc432572d10024bea6?OpenDocument> (visited in November 2007).

<sup>564</sup> Tanzania's Land (Amendment) Act 2004 introduced another land access arrangement - the establishment of joint ventures between foreign investors and local groups (under article 19(2)(c) of the Land Act, as amended).

investment. Building on such a trends analysis, this section compares the strength of legal protection available to foreign investment and local resource rights under the national law of the four focus countries – thereby addressing a key part of the research question identified in section 1.1.

As discussed,<sup>565</sup> the strength of the legal protection is measured with regard to the conditions for the legality of takings - irrespective of the nature and content of the property rights taken. The reasons for this approach are twofold: internally (within each country), foreign investors and local resource users may hold different types of property rights (e.g. ownership, land use rights, “rights of way” for the operation of pipelines); externally (across countries), different legal systems provide for different types of property rights. For instance, all land in Mozambique is owned by the state, and local resource users and foreign investors alike enjoy rights of “use and benefit”;<sup>566</sup> but private land ownership is admitted in Cameroon, Chad and Mali, where it is established through land registration. The focus here is on the extent to which the conditions for the legality of takings apply - regardless of the resources the substantive rights refer to (e.g. land, subsoil resources), and of whether these rights are qualified as ownership, use or other rights under national law.

Compared to chapter 3, this analysis has narrower scope, and only covers five indicators of the “substantive protection” part of Table 3.4: “public purpose”, “non-discrimination”, “compensation (duty to pay)”, “compensation (standard of)” and “due process”. The comparative analysis draws on the legal instruments discussed in the previous sections. For each country, a table provides an “internal” comparison of the legal protection available to local resource users and foreign investors (see Tables 4.5 to 4.8). Table 4.9 provides an “external” comparison of the protection of local resource rights across the four countries.<sup>567</sup>

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<sup>565</sup> Section 2.2.3.

<sup>566</sup> Articles 109 and 98 of the Constitution, and articles 11, 12 and 13 of the Land Act 1997.

<sup>567</sup> On the notion of “internal” and “external” comparisons, see section 1.3.



Overall, while at the international level the comparative analysis reveals clear differences in the degree of legal protection under human rights and investment law (with the latter only applying to foreign investment; see chapter 3 and Table 3.4), the results of the national-law “internal” comparisons are more nuanced. Formally, national legislation in the four countries does not differentiate to the same extent between foreign investors and local resource users in defining the strength of legal protection.

All the four focus countries feature constitutional provisions that protect the right to property, and that require public purpose, non-discrimination and payment of compensation for takings (see Tables 4.5 to 4.8). Such provisions would protect both local resource rights and foreign investment - though with some qualifications.

The Constitution of Chad explicitly states the principle of equality before the law *for all*, and grants non-nationals the same rights as nationals - with the only exception of political rights (articles 14 and 15). On the other hand, constitutional non-discrimination provisions in the remaining three focus countries are explicitly limited to nationals (article 1(2) of the Constitution of Cameroon; article 2 of the Constitution of Mali; article 35 of the Constitution of Mozambique). However, investment codes may compensate by prohibiting discrimination against foreign investment - namely in Mali (articles 3 and 9) and Mozambique (article 4). In Cameroon, Ordinance 74-1 of 1974 guarantees the land ownership rights of “all physical and legal persons” (article 1).

Public purpose requirements exist in all four countries for both local resource rights and property rights related to foreign investment. In Mozambique, however, as noted above the wording of the Investment Act 1993 appears more stringent than the constitutional clause - requiring not only that the taking occur for a public purpose but also that it be “absolutely necessary for weighty reasons of public interest” (article 13).

It is worth noting that in several jurisdictions certain types of investment projects are legislatively deemed to be for a public purpose, thereby triggering legislation for the taking of local resource rights. For instance, petroleum operations are deemed for a public purpose in Cameroon (articles 53-62 of the Petroleum Code 1999<sup>568</sup>), Chad (article 47 of the Petroleum Code 1962) and Mali (article 36 of the Hydrocarbons Law 2004). These explicit affirmations are designed to speed up land takings and pre-empt possible legal challenges questioning the public-purpose nature of private, profit-driven ventures. They reveal a prioritisation among different forms of natural resource use, favouring those resource uses that are perceived to be more economically profitable.<sup>569</sup>

On the other hand, the reverse case - where legislation explicitly states that takings of interests held by foreign investors for the benefit of local groups must be deemed for a public purpose - does not occur in any of the four countries. However, it can be argued that the realisation of the human rights of local resource users (such as the right to an adequate standard of living, including food) does constitute a public purpose that would justify the taking of investors' property rights - as explicitly recognised, outside the African context, by the Inter-American Court of Human Rights in the ACHR case *Sawhoyamaya v. Paraguay*.<sup>570</sup> This would also apply to the more stringent public-purpose requirement under Mozambique's Investment Act 1993, though this narrower provision would probably require a more careful case-by-case examination.

As for "due process", an aspect that differentiates protection for local resource rights and foreign investment is the possibility for foreign investors to have direct

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<sup>568</sup> See also article 28 of Law 96-14 of 1996, concerning the construction of pipelines from third countries and regulating the Chad-Cameroon project.

<sup>569</sup> As noted by Keita et al (2008), writing on mining in Mali.

<sup>570</sup> Para. 140. This case is discussed in section 5.1 below.

access to international arbitration to challenge the legality of takings.<sup>571</sup> Local resource users have no access to this redress mechanism, and must rely on domestic administrative or judicial recourses (see Tables 4.5 to 4.8).

Another interesting aspect of “due process” is the mandatory local consultation requirement under Mozambican legislation. Mozambique’s Land Act 1997 requires the consultation of local resource users (“local communities”, in the words of the Act) before resource rights can be allocated to investors; this applies to both customary rights and rights based on good-faith occupation (section 13). The purpose of the consultation is to ascertain that the land is “free” and “has no occupants” (article 13(3)). The expectation is that local resource users and incoming investors negotiate some form of social-investment or benefit-sharing scheme: although the Land Act is silent on this, article 27(3) of the Land Act Regulation refers to a “partnership” established between local users and investors applying for land; while article 27(2) of the same Regulation requires that consultation reports (often referred to as “Acta”) be signed by three to nine community representatives.

Although these provisions suggest a rather univocal direction of expected land transfers (from local resource users to investors, not vice versa), the local consultation requirement does provide a significant opening. Major shortcomings in design and implementation have been reported in the literature, however.<sup>572</sup>

As for design, the system is centred on a one-off consultation between the investor and local resource users. This is at odds with the long-term duration of allocations of land or resource rights to investors. In practice, several benefit-sharing

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<sup>571</sup> Under article 11 of Cameroon’s Investment Charter 2002 and article 115(2) of its Petroleum Code 1999 (depending on the provisions of the petroleum contract); under article 24 of Mali’s Investment Code 1991, as amended in 2005, and article 93 of its Hydrocarbons Law 2004; and under article 25 of Mozambique’s Investment Act 1993 and article 27 of its Petroleum Code. In Chad, the Investment Code 1987 merely authorises the Convention of Establishment between the government and the investor to provide for arbitration (article 39); while the Petroleum Code features a (rather vague) arbitration clause (article 74).

<sup>572</sup> Data on these issues was also collected during a field visit to Mozambique on 13-23 September 2008.

agreements emphasize one-off compensation for loss of land rights rather than long-term benefit sharing; and usually involve vague commitments and very small payments compared to the value of the land or resource rights acquired by the investor.<sup>573</sup> In addition, the outcome of the consultation process is a report rather than a legally binding contract. There are no established mechanisms to monitor compliance with the investor's commitments. No effective sanctions exist in case of non-compliance: non-compliance does not affect the investor's land or resource rights, as these become definitive<sup>574</sup> if the investor complies with the investment plan within two years (articles 25-27 of the Land Act 1997).

Besides shortcomings in design, the implementation of local consultations has been riddled with difficulties. For the government, the real priority is fast-tracking investment, and most investors and government officials see the consultation as an administrative step to allocate land to investors, rather than as a means to protect local land rights (Norfolk and Tanner, 2007:9).

In many cases, consultation processes only involve a few community members, usually customary chiefs and local elites who also monopolise the benefits.<sup>575</sup> A study of 260 consultation processes found that "women are rarely if ever actively involved".<sup>576</sup> Local groups typically lack the bargaining power and technical skills to negotiate with foreign investors on an equal footing. Written records of the consultation are often inadequate and sometimes do not reflect local views recorded elsewhere, while the wording is usually loose (e.g. vague promises to "create jobs") and hence difficult to enforce.<sup>577</sup> "Orchestration" of community consultations as a means to get formal clearance for land allocations to investors has also occurred.<sup>578</sup>

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<sup>573</sup> Norfolk (2004:26).

<sup>574</sup> But still time-bound to 50 years; see section 4.2.4.

<sup>575</sup> Norfolk (2004:26).

<sup>576</sup> Tanner and Baleira (2006:6).

<sup>577</sup> Tanner and Baleira (2006:6).

<sup>578</sup> Conversations with a public interest lawyer, an NGO officer and a private sector manager about a large natural resource project in Massingir District (16-18 September 2008), and with an international consultant working in Mozambique (10 October 2008).

In some documented cases, the consultation did not take place at all - or at least there is no record of it.<sup>579</sup>

Recently, government authorities have taken steps to reduce what are perceived as constraints on investors' access to resource rights. For instance, a 2001 Ministry of Agriculture directive set a 90-day time limit for the processing of investor land applications (including local consultation processes).<sup>580</sup> The tightening of the legal regime for local consultations may put pressure on the quality of these processes: meaningful consultation of large communities in contexts characterised by significant power asymmetries between investors and local groups would require sustained investment in time and effort to build local capacity.

Despite these shortcomings, Mozambique's local consultation requirement does provide an entry for local resource users to obtain compensation for loss of land, and participate in the benefits generated by the investment. In some cases, local resource users have managed to get a better deal through partnership agreements with incoming investors.<sup>581</sup> In addition, evidence suggests that local people are learning how to negotiate - for instance by holding out for higher prices for their assets.<sup>582</sup> Legal services organisations (e.g. development agencies, public interest law firms) are providing support to local groups to maximise the effectiveness of consultation processes.<sup>583</sup>

Similar consultation requirements do not feature in the legislation of the other three focus countries. The requirement under article 47 of Mali's Land Code that a "public enquiry" be undertaken to ascertain the existence of customary land rights for the purpose of land takings is the closest legal arrangement to Mozambique's consultation requirement. But Mali's public enquiry does not involve negotiations

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<sup>579</sup> Norfolk (2004:25).

<sup>580</sup> Kanji, et al (2005:9); Tanner and Baleira (2006:6).

<sup>581</sup> For two examples in the tourism sector, see Norfolk and Tanner (2007:29).

<sup>582</sup> Norfolk and Tanner (2007:29).

<sup>583</sup> As observed during a field visit to Massingir district (15-18 September 2008).

between local resource users, investors and the state. In addition, as discussed the implementing decree necessary to set out its procedure has not been adopted, and land takings are in practice handled differently across different investment projects.<sup>584</sup>

As for compensation, all the four national constitutions require payment of compensation for takings of property, without differentiating between local resource rights and foreign investment (Constitution of Cameroon, preamble; Constitution of Chad, article 41; Constitution of Mali, article 13; Constitution of Mozambique, article 82). The same goes for compensation standards - open constitutional formulae (e.g. “just and prior” compensation, under article 13 of Mali’s Constitution) apply to all takings of property rights (see Tables 4.5 to 4.8).

The more specific rules governing compensation depend on the nature of the property rights taken. In Cameroon, Chad and Mali, the discriminating factor is the existence of ownership, established through the land registration process. In all three countries, registered landowners are entitled to compensation for loss of both land and improvements - irrespective of whether they are local resource users or foreign investors. On the other hand, as discussed, takings of land use rights attract compensation only for loss of improvements like crops, trees and buildings - not for loss of the land itself.<sup>585</sup>

Although this legislation does not formally differentiate between local resource users and foreign investors, the protection enjoyed in practice is likely to differ. As discussed above, in much of rural Africa very little land is titled and privately owned, mainly by medium to large-scale operators - whether national or foreign. Most local resource users gain access to resources through “customary” use rights.<sup>586</sup>

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<sup>584</sup> As documented by Keita et al (2008), with regard to mining.

<sup>585</sup> E.g., in Cameroon, under article 23 of Decree 76-166 of 1976. On this issue and the ambiguity of Malian law on this point, see section 4.2.3.

<sup>586</sup> See above, section 4.2.2.

Therefore, where ownership is an asset for an investment project,<sup>587</sup> foreign investors are more likely to enjoy the stronger protection provided to private ownership, while local resource users tend to enjoy the more limited protection for use rights.

This differentiation may be compounded by problems with compensation rates for loss of improvements, which would apply to local resource users. For instance, in Cameroon, rates for trees and crops are set by outdated regulations,<sup>588</sup> have been significantly eroded by inflation, and no longer reflect market values.<sup>589</sup> In practice, evidence suggests that compensation amounts for local resource users significantly depend on non-legal factors such as the level of local resistance and the position taken by government officials (Keita et al, 2008, writing on Mali).

Significantly, article 51 of Mali's Pastoral Charter 2001 extends compensation requirements to loss of grazing lands, which receives no mention under the legislation of the other focus countries. In fact, requirements that compensable improvements be "permanent and visible" (Chad) or "evident" (Cameroon) may make it difficult for pastoralists to obtain compensation.<sup>590</sup>

While in Cameroon, Chad and Mali compensation issues depend on whether the land is privately owned or held under customary rights, as discussed above in Mozambique ownership over all land and natural resources is vested with the state (articles 109 and 98 of the Constitution; article 3 of the Land Act 1997). Private land ownership as such does not exist, and both local resource users and foreign investors hold "use and benefit" rights (articles 11-13 of the Land Act 1997). Local use rights are protected irrespective of whether they have been registered, and may be proved not only through registration but also orally (articles 13(2) and 14(2)).

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<sup>587</sup> For instance, as discussed oil pipelines do not require land ownership, and commonly involve "rights of way".

<sup>588</sup> Ministerial Orders No. 058 of 13 April 1981 and 013 of 18 February 1982.

<sup>589</sup> Interview with a Cameroonian lawyer (14 March 2008).

<sup>590</sup> See section 4.2.3.

This legal regime would avoid the de facto differentiation of treatment seen in Cameroon, Chad and Mali, differentiation derived from the fact that local resource users tend not to have registered land ownership. In practice, however, government officials in Mozambique tend to speak of registration as *creating* land use and benefit rights – a distortion of the clear language of the Act.<sup>591</sup>

The compensation rules applicable to takings of land use and benefit rights in Mozambique are defined by article 18 of the Land Act. In the case of local resource users, this provision would only apply should the consultation process fail to produce an agreement. Article 18(1)(b)) of Mozambique’s Land Act requires payment of “just” compensation, irrespective of the holder of the rights taken. However, termination of use rights allocated to investors for non-compliance with the investment plan within agreed timeframes and without “justified reason” does not entail payment of compensation (article 18(1)(a) and (2)).

As discussed, the Act does not specify whether compensation refers to improvements alone or loss of land as well - but as the land is owned by the state, compensation is likely to be limited to loss of improvements. In practice, emphasis in implementation is on community consultation rather than compulsory takings: some sort of benefit-sharing, however paltry, tends included in (possibly orchestrated) consultation reports, and it is on this basis that the land is usually allocated to investors.<sup>592</sup>

To sum up, the above analysis suggests major disconnections between law and practice. Formally, the legal protection available to land ownership held by foreign investors or local resource users is essentially equivalent - in contrast with the

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<sup>591</sup> Conversations with a government official and local resource users in Massingir district (15-18 September 2008), and with an international legal consultant working in Mozambique (22 September 2008).

<sup>592</sup> Conversation with an international legal consultant working in Mozambique (22 September 2008).



findings of the international law analysis undertaken in chapter 3. In some respects, however, foreign investors do enjoy stronger protection compared to local resource users - for example, with regard to more stringent public purpose requirements, under Mozambican law; and to the more effective redress mechanism provided by international arbitration, in the four countries. Asymmetries in the operation of public-purpose requirements also exist, namely with regard to legislative provisions that automatically qualify certain investment projects as public-purpose initiatives. On the other hand, the provision of Mozambique's Land Act for uncompensated termination of investors' land use rights in case of non-compliance with the investment plan without "justified reason", with no further clarification as to the circumstances that may meet these requirements, may expose investors to uncompensated takings.

In practice, differentiation in legal protection for foreign investors and local resource users tend to be greater as a result of the actual distribution of property rights. As discussed, foreign investors are more likely to have registered land titles and hold private land ownership where this is an asset for the investment project, while local resource users rarely enjoy land ownership rights and more commonly gain access to land through customary systems.<sup>593</sup> The legal protection available to local use rights tends to be considerably weaker than that for ownership rights, including with regard to the extent to which loss of land itself is compensated (it is not in Chad and Cameroon), and with regard to standards for determining the amount of compensation (which in the case of use rights may be based on outdated decrees that no longer reflect current market values - as in Cameroon). These differences in the protection available to ownership and to use rights may translate into differentiated treatment between foreign investors and local resource users.

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<sup>593</sup> In Mozambique, private land ownership is ruled out for both investors and local resource users.

Another insight provided by the above analysis is the different extent to which local resource rights are legally protected in the four countries. Broadly speaking, the laws of Mali and Mozambique tend to provide stronger protection than those of Cameroon and Chad (see Table 4.9). For instance, in Mali and Mozambique, customary land rights are legally protected. Under Mali's Pastoral Charter, differently to the other focus countries, compensation requirements explicitly extend to loss of pastoral resource rights. Mozambique's local consultation requirement may open the way to benefit-sharing arrangements that do not feature in the laws of Cameroon, Chad or Mali.

Yet the analysis also highlights how fragile the advancements in Mali and Mozambique are. Mali's Pastoral Charter qualifies the requirement to pay compensation for loss of pastoral resources with a formula that creates significant administrative discretion ("if needed"; article 51). In Mozambique, an "orchestrated" consultation report signed by three community members may be enough for local resource users to permanently lose their land, and for investors to gain access to it virtually for free.

#### ***4.2.6. Normative content and competing interests***

Overall, the analysis of the "normative content" dimension in the focus countries and, to a lesser extent, in the remaining covered countries reveals important cross-country differences but also some common trends.

First, the state tends to play a central role in the allocation of resources - although to different degrees and in different ways depending on the country context. This feature dates back to colonial times, and was usually continued or even reinforced by post-independence legislation. Economic liberalisation in the 1990s has partly eroded the centrality of the state in some jurisdictions - for instance, through the easing of regulation on the entry and operation of foreign investment, or the

introduction of private land ownership. But the state continues to play a central role in natural resource relations. This includes subsoil resources such as minerals and petroleum, in line with trends in other parts of the world; but it also applies to land, with much of the land being held by the central state in most of the covered countries (though with significant country exceptions such as Ghana and Kenya).

Second, the legal protection of local resource rights varies significantly across countries, but rarely provides right holders with strong safeguards within the context of takings to pave the way for foreign investment projects. Where land registration enables local resource users to acquire private land ownership, costly and cumbersome registration procedures make it difficult for poorer resource users to acquire ownership. In many jurisdictions, most local resource users only have use rights conditioned to productive land use. Recent reforms in some countries have strengthened local resource rights, including through legally recognising customary rights.

But even in these cases, local resource rights are vulnerable to dispossession due to vaguely defined productive use requirements, coupled with widespread perceptions about whether certain types of local resource use can be qualified as “productive”; to incomplete legal frameworks (such as Mali’s missing decree on the recording and taking of customary land rights); and/or to legal provisions that automatically recognise private investment as for a public purpose (as is commonly the case for petroleum legislation). Where national law qualifies land (or much of it) as owned by the state, local resource users may only be entitled to compensation for loss of improvements, not for loss of the land they may have used for generations.

Third, most of the covered countries have adopted legislative reforms to attract foreign investment, for instance through revising investment codes and sectoral legislation such as mining and petroleum codes. Strengthening the protection of property rights has featured prominently in this package of measures. So have

measures aimed at facilitating access to land and natural resources for foreign investors, including through mandating investment promotion agencies to help investors obtain land rights through one-stop shops or even direct land allocations.

This suggests that a main thrust of much recent legislation and government action has been on creating a favourable environment for large-scale (if not necessarily foreign) investment, including through granting the state strong powers in natural resource relations, and through keeping the legal protection of local resource rights in check. Some recent reforms curbing the protection of local resource rights were explicitly motivated by a concern that too strong a protection would make it more cumbersome for investors to gain access to land. This is illustrated by the experience of Mozambique, discussed above: the 2002 decree setting a time limit on processes for allocating land to investors, including the community consultation that investors are legally required to undertake; and the 2007 amendment to the 1999 Land Act Regulation, requiring that registration processes for community lands above 1000 ha be dealt with at the highest central government level.

These considerations are compounded by differences that may exist in the speed of law-making. In Mali, for instance, the Pastoral Charter 2001 (which as discussed protects pastoralists' resource rights) took several years to draft, and its implementing decree was only adopted in 2006; several years since the Land Code 2000 was passed, its implementing decree on the recording and taking of customary rights has not yet been adopted; while the Mining Code and Regulations 1999 were adopted within a short period of time.

These broad features of national legal systems seem to respond to two sets of concerns. The first one relates to widespread perceptions about the productivity of different types of resource use. While attracting foreign investment is widely seen as a strategic step to promote economic development, some forms of local resource use are perceived as unproductive and "backward". These perceptions are not always

backed up by solid economic evidence (e.g., on preconceptions about pastoral use, see Hesse and MacGregor, 2006:8-9).

In addition, large-scale investment offers opportunities for host states to collect taxes and royalties, thereby generating much-needed revenues for public finances. In practice, the extent of this effect may be reduced by the tax incentives deployed by host states in order to attract investment.

The second set of concerns relates to power relations – first and foremost, with regard to the political economy of the state in Africa, described by Bayart (1993) and discussed above (section 2.3.3.3). The central role of the state in resource allocation enables national elites to gain control over resources through manipulating state institutions; and, conversely, to maintain their grip on state institutions through using resource allocation as a tool for political patronage.

In this context, attracting foreign investment can be seen as part of the “extraversion” strategies deployed by national elites. Although the increasing liberalisation of investment regimes has reduced opportunities for rent-seeking, large-scale investment may still provide national elites with opportunities for business activities, political patronage and personal gain. Keeping local resource rights in check facilitates the unhindered deployment of these strategies by national elites. This is particular so in rural areas, while the politically more vocal urban elites tend to be better placed to use the costly and cumbersome procedures available to secure property rights (see the predominance of urban elites in the use of land registration in Cameroon and Mali, discussed above).

The extent and specific form of these features vary significantly across countries, depending on the socio-political historical trajectory of each country. In Ghana, for instance, colonial-era resistance by customary chiefs to centralisation of resource allocation resulted in the longstanding legal protection of customary rights - in

contrast with what happened in many other African countries. But this has not necessarily provided an effective safeguard for local resource users, as it was accompanied by the strengthening of the powers of customary chiefs to alienate lands to outsiders. In many cases, strategic alliances between foreign capital, government officials and customary chiefs have led to the co-option of chiefs in the taking of resource rights from their constituents.<sup>594</sup>

Elsewhere, productive use requirements imposed as a condition for the legal protection of local resource rights may undermine enjoyment of these rights in contexts where what constitutes productive use is ill-defined by legislation, large-scale investment is assumed to be more productive than local resource uses, and legal safeguards against land takings are limited in law and practice.

In addition to the political economy of the African state, other power factors may also be at play – namely, with regard to the role of “epistemic communities” of researchers, officials in government and development agencies, and policy-makers in shaping and disseminating “regulatory orthodoxies”.<sup>595</sup> This is illustrated by the role of misguided “tragedy-of-the-commons” arguments in influencing much policy on “common” pastoral land in Africa,<sup>596</sup> and of “orthodoxies” about the need for private property to promote economic development, in recent trends towards introducing private land ownership and promoting land markets.

Affirming that national legal systems tend to favour attracting large-scale investment over protecting local resource rights is not to say that a detailed comparison of the protection of property rights enjoyed by investors and local resource users reveals formally differentiated treatment. In fact, the analysis of national law from the four focus countries shows that equal property rights (e.g. land ownership) tend to enjoy substantially equal protection irrespective of whether

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<sup>594</sup> As shown by the work of Amanor (1999), discussed above.

<sup>595</sup> Wiber (2008:131 and 135).

<sup>596</sup> Thébaud (2002:224-235).

they are held by foreign investors or local resource users – although some important differences do exist, mainly with regard to investors’ access to international arbitration.

However, the picture is further complicated by the actual distribution of property rights. Data from the social science literature suggests that while foreign investors are more likely to hold registered land ownership (where this is permitted by national law and an asset for the investment project), few local resource users hold registered titles over their land due to procedural barriers, and most of them access land through local (“customary”) systems of property rights.

In other words, while for international law the “match” between differences in legal protection and the asymmetries in negotiating power discussed in section 2.3 stems from formal differences of treatment, for the national law of the four focus countries that match is mainly the product of the distribution of property rights: foreign investors are more likely to hold the rights associated with stronger legal protection, while local resource users tend to hold property rights with lesser legal protection.

A final point worth noting is the contrast between the approach prevailing in national legal systems and the key tenets of local customary law. While customary systems vary substantially depending on context, they usually affirm the primacy of the rights of the first occupants or their descendants vis-à-vis those who came later. If applied to foreign investment projects, this customary rule would favour local resource users vis-à-vis foreign investors.

But in none of the focus countries does national law reflect the primacy that local resource rights enjoy under customary systems. This applies not only to those countries that do not formally protect customary land rights (such as Cameroon), but also to those that do (e.g. Mali, Mozambique). Even when legally recognised, customary systems tend to be overpowered by national (state) law, both legally (in

terms of internal hierarchy of norms) and in practice (in terms of the ability of the state to rely on a more effective enforcement apparatus, and to co-opt customary elites).

#### **4.3. Tailored arrangements**

The preceding sections analysed the national legal context prevailing in the focus countries and, to a lesser extent, in the other covered countries. This legal context contributes to shape the protection of property rights in investment projects. However, tailored arrangements may establish a special regime for a given investment project. These arrangements are typically a response to the shortcomings of national legal systems discussed in the previous sections - such as real or perceived weaknesses in the rule of law or in the normative content of the protection of property rights.

Tailored arrangements may be embodied in special legislation, in contracts (e.g. between the investor and the host state) and/or in other project documents such as those relating to environmental and social impact assessments and management. These arrangements may provide stronger protection than that available under national law, whether for foreign investment and/or local resource rights.

Arrangements insulating the investment from aspects of the national legal system are common practice in large-scale natural resource projects, particularly in extractive industries. This may include choice of law, stabilization and arbitration clauses. On the other hand, tailored arrangements to strengthen the protection of local resource rights affected by the investment are less common. They are typically associated with the presence of lenders such as the World Bank (IFC, IBRD, IDA). The involvement of these lenders requires compliance with their institutional policies, which may be more “generous” towards local resource rights than national law.



Understanding the (differentiated) ways in which tailored arrangements may provide stronger protection than that available under generally applicable law is key to properly addressing the core research question of this study – whether foreign investment tends to enjoy stronger legal protection than local resource rights. This section discusses these issues, drawing on the Chad-Cameroon oil development and pipeline project.

#### ***4.3.1. Tailored arrangements on investors' property rights***

For the investor(s), tailored arrangements are usually based on investment contracts with the host state(s). In addition, in lower income countries and for very large investment projects, it is not uncommon for legislation to be adopted in order to create a special regime for an investment project, or to fill a gap in the legislation that would be applicable to that project. For example, in the Chad-Cameroon project, the 1997 amendment to the 1988 concession contract between the consortium and the government of Chad required the latter to insert two new provisions (article 43(1) and (2)) in the Petroleum Code, mainly to enable the subrogation in project rights and obligations by the lenders.<sup>597</sup> The borderline between tailored arrangements embodied in investment contracts and those established by legislation may be blurred, as the contracts themselves may be enacted into national law - which is the case for the COTCO-Cameroon and TOTCO-Chad host government agreements.

The tailored arrangements established for the Chad-Cameroon project are relevant to the protection of the investors' property rights in two main ways. First, they contain provisions to protect these property rights from adverse government interference, including through provisions on expropriation and stabilization clauses. Second, they regulate the investors' acquisition of property rights over land

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<sup>597</sup> At page 34 ("*Divers*") and in Annex A of the 1997 amendment (see section 2.2.4 above for the full reference).

and natural resources for the implementation of the investment project, and their relations with local land users.

As for the former, examples of contract-based tailored arrangements are provided by the 1988 and 2004 concession contracts with the government of Chad, and by the 1998 host government agreements with the governments of Chad and Cameroon. As mentioned in chapter 3, the TOTCO-Chad Convention of Establishment enables the government of Chad to expropriate TOTCO's assets only "if circumstances or an emergency *imperatively* call for such measures" (article 21(6), emphasis added). This seems to go beyond the more general "public purpose" requirement under Chad's Constitution and legislation.<sup>598</sup>

In addition, all the investor-state contracts relating to the Chad-Cameroon project feature stabilization clauses involving a commitment by the host state not to alter the regulatory framework governing the project outside specified circumstances – such as consent of the other contracting party, restoration of the economic equilibrium and/or payment of compensation (see e.g. article 21(3) and (5) of the TOTCO-Chad Convention of Establishment).<sup>599</sup> A stabilization provision is also included in article 74 of Cameroon's Law 96-14 of 1996, regulating the Cameroonian leg of the Chad-Cameroon pipeline.

These host state commitments are compounded by provisions included in the Loan Agreements between the IBRD and the governments of Chad and Cameroon. Section 4.02(b) of these two agreements requires the two host governments not to unilaterally amend, suspend or abrogate contractual provisions to which they are party.

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<sup>598</sup> Discussed above, section 4.2.5.

<sup>599</sup> These provisions are examined in greater detail in section 5.2.3 below.

Moreover, as discussed, all the investment contracts relating to the Chad-Cameroon project contain arbitration clauses providing for direct access to international arbitration (e.g. article 36 of the COTCO-Cameroon Convention of Establishment). While Cameroon is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Chad is not. As discussed in chapter 3, the New York Convention facilitates enforcement of arbitral awards in the domestic legal system of states parties.

From a national law perspective, stabilization and related clauses may be based on national legislation that empowers the host government to establish such arrangements. For example, Cameroon's Petroleum Code 1999 states that petroleum contracts "may provide for special regimes with regards to [...] the stabilization of economic and tax conditions".<sup>600</sup> Provisions of this type are far from unique. For example, Mali's Hydrocarbons Law 2004 provides for guarantees of legal, economic and financial stability to be included in petroleum contracts (article 7(4)(h)).

But despite such provisions, tailored arrangements like stabilization clauses may raise important constitutionality issues: does the executive have the power to enter into commitments that purport to prevail over future legislation adopted by parliament? What happens if parliament does adopt legislation affecting the economic equilibrium?

These issues are particularly relevant where the investment contract is not ratified by parliament and/or based on some form of legislative delegation by parliament. But even if parliament delegates or ratifies, its ability to bind itself on future legislative policy may be doubtful under constitutional law. And beyond issues of constitutionality, the extent to which national courts may be prepared to enforce

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<sup>600</sup> Article 114; see also article 12(r) of the Code. Chad's Petroleum Code 1962 does not contain a similar provision.

such tailored government commitments even where formally constitutional is likely to vary across jurisdictions.

These complex issues of legality and enforceability have not (yet) been raised with regard to the Chad-Cameroon project. However, case law and legislation from the United States and France suggest that the obligation to pay compensation stemming from a breach of tailored commitments on expropriation or regulatory stability is likely to be upheld by national courts.<sup>601</sup> Due to historical legacy and legal tradition, the legal solutions developed in France are likely to be influential in both Chad and Cameroon.

In addition, “choice of law” clauses in investment contracts may specifically refer to international law in addition to national law as the governing law of the contract (e.g. under article 41 of the COTCO-Cameroon Convention of Establishment). Even in the absence of such explicit reference, international arbitrators have held that stabilization clauses are regulated by international law.<sup>602</sup> As discussed, international arbitrators have consistently deemed stabilization clauses to be lawful and with legal effect under international law, and to create a legal obligation to pay compensation if breached.<sup>603</sup>

Therefore, in addition to national law remedies, international law provides investors with the substantive protection and legal remedies discussed in the previous

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<sup>601</sup> In the US case *United States v. Winstar Corporation*, the Supreme Court held the US government liable for damage suffered by financial institutions as a result of legislation contravening contractual commitments (not concerning stabilization) by the government (at 972, 1013 and 1022). The majority found that “a contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty”, and is therefore lawful and with legal effect (at 1000). In France, the government can unilaterally modify “administrative contracts” with private entities (i.e. contracts relating to a public service or reserving exceptional powers to the administration) but the economic equilibrium of the contract must be maintained (Bell et al, 1998:196-199). Reference to the French theory of “administrative contracts” was made in some international arbitrations (e.g. *Texaco*, paras. 54-57; and *Aminoil*, paras. 90-91).

<sup>602</sup> E.g. *Revere Copper v. OPIC*, at 278-279; *AGIP v. Popular Republic of the Congo*, paras. 71-88; and *Kuwait v. Aminoil*, paras. 8-10.

<sup>603</sup> E.g. *Kuwait v. Aminoil*, para 95.

chapter. And even where stabilization commitments are unconstitutional or unenforceable under national law, the host state may not be able to rely on the provisions of its domestic legal system to justify non-compliance with, or legal challenges to its international (contractual) obligations.<sup>604</sup> Yet, drawing an analogy between treaties and contracts, article 46 of the Vienna Convention on the Law of Treaties affirms the general principle that states cannot invoke domestic law rules, but makes an exception for “rules of [...] internal law of fundamental importance”. Arguably, constitutional provisions such as the principle of separation of powers are rules of fundamental importance, which the host state cannot violate through entering into contracts and which a diligent investor should be aware of.

In practice, tailored arrangements are not fool-proof. Stabilization clauses in the Chad concessions have not prevented the government of Chad from seeking a greater share of project benefits through a tax dispute with two minority consortium members. As discussed, the dispute was eventually settled through negotiation.<sup>605</sup> In the real world, much depend on the evolving balance of negotiating power among different stakeholders, and particularly between the investor and the host state – as will be discussed in the next chapter.

In addition to government commitments on expropriation and regulatory stability, the second area where tailored arrangements may be relevant to property rights concerns the investor’s access to land and other natural resources. These aspects are discussed here using the example of the Cameroon segment of the pipeline.

The COTCO-Cameroon Convention of Establishment explicitly states that the pipeline project is “for a public purpose” - thereby triggering the application of legislation on compulsory takings; and grants COTCO a “land easement” (“*emprise foncière*”, in French) for the construction, operation and maintenance of the pipeline

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<sup>604</sup> As held in *Revere Copper v. OPIC*, at 284.

<sup>605</sup> See section 2.3.3.4.

and its ancillary facilities.<sup>606</sup> The duration of the easement is tied to that of the contract – a first term of 25 years, automatically renewable for further 25 years, and susceptible to be further renewed under renegotiated terms.<sup>607</sup> The land easement entails a “right-of-way” over a strip of land 30 metres wide, adjustable up to 60 metres in “difficult areas”, during the construction phase.<sup>608</sup> During the operation phase, a narrower easement (between 10 and 15 metres) is kept for maintenance purposes.<sup>609</sup>

The easement gives COTCO the right to access, occupy and use the land, cut down trees, use water, extract raw materials, and carry out “the work necessary for the construction, operation and maintenance” of the pipeline system.<sup>610</sup> The land remains the inalienable property of the Cameroonian government, while the pipeline infrastructure is owned by COTCO.<sup>611</sup>

The easement enjoys strong legal protection from takings. This includes the protection available under the law of Cameroon, but also that under the tailored arrangements discussed above. As the pipeline is the only mechanism to export oil from the oilfield development area in Chad, the land easement is of vital importance to the operation of the Chad-Cameroon project. As a result, a taking of the easement would entail a taking of the whole project. Even lesser government interference with COTCO’s enjoyment of its rights over the land easement would trigger the application of the stabilization and arbitration clauses. The likely outcome is that the government of Cameroon would have to compensate COTCO and/or the consortium for the losses suffered.

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<sup>606</sup> Articles 7 and 27(1) and Annex VI of the COTCO-Cameroon Convention of Establishment.

<sup>607</sup> Article 3 of the COTCO-Cameroon Convention of Establishment.

<sup>608</sup> Article 27(2) and Annex VI of the COTCO-Cameroon Convention.

<sup>609</sup> Article 27(5).

<sup>610</sup> Article 27(6) of the COTCO-Cameroon Convention, and article 30 of Law 96-14 of 1996.

<sup>611</sup> Article 27(10) of the Convention, in line with the Petroleum Code 1999 (articles 54 and 63 ff).

### 4.3.2. Tailored arrangements for local resource rights

The Chad-Cameroon project also involved of a tailored regime for permanent or temporary land takings. As a result of the World Bank's involvement, the project had to comply not only with host state legislation but also with the more demanding World Bank safeguard policies – such as Operational Directive 4.30 on Involuntary Resettlement, then in force and now replaced by Operational Policy 4.12 on the same topic. The main thrust of World Bank policy in this regard is to minimise resettlement and to ensure that standards of living are at least restored to pre-resettlement levels.<sup>612</sup> Operational Directive 4.30 is specifically referred to in the project's EMP, for instance in section 1.2.3 of the Cameroon Compensation Plan. The Loan Agreements between the IBRD and the governments of Chad and Cameroon specify that the higher EMP standards apply also to oil projects other than the original project in Doba, if the oil is to be transported through the pipeline.<sup>613</sup>

Legally, much of the land temporarily or permanently taken for the Chad-Cameroon project was held by the state. In Chad, absence or rarity of land registration meant that land mainly came from the national land estate ("*domaine national*"), with 99% of all compensation estimated to be paid to customary land users on that estate rather than to private land owners.<sup>614</sup> Similarly, in Cameroon, less than 1% of all land surveyed for the Cameroon Compensation Plan was held in private land ownership,<sup>615</sup> and the little land privately owned mainly concerned large private estates.<sup>616</sup> Like in Chad, most of the land came from the national land estate ("*domaine national*"), where local resource users usually gain access to resources through customary systems.

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<sup>612</sup> See e.g. section 2 of Operational Policy 4.12.

<sup>613</sup> Section 4.05 of the IBRD-Cameroon Loan Agreement, and section 4.10 of the IBRD-Chad Agreement.

<sup>614</sup> Chad Resettlement and Compensation Plan, at page 4-1 and figure 6-1.

<sup>615</sup> Cameroon Compensation Plan, at 5-3.

<sup>616</sup> As noted by the World Bank Inspection Panel in the case *Cameroon: Petroleum Development and Pipeline Project*, para. 157.

The compensation schemes used in the Chad-Cameroon project are outlined in the compensation plans included in the EMP (Cameroon Compensation Plan and Chad Resettlement and Compensation Plan). The EMP also includes an Indigenous Peoples' Plan to tackle issues concerning the Bakola people ("Pygmies"), an indigenous people affected by the pipeline in Southern Cameroon.<sup>617</sup> As of 2007, \$18.3 million had been paid by the project in individual compensation (EEPCI, 2007:31).

Overall, the EMP offers a package that is considerably more generous than what is required under the domestic law of Chad and Cameroon. This is particularly case in Chad. In Cameroon, a clear procedure for compensation exists, though standards are below World Bank safeguard policies (as discussed below). In Chad, on the other hand, legislation on land takings and compensation is quite old and unclear.<sup>618</sup> The EMP provisions on compensation for temporary or permanent land takings constitute an innovative attempt to protect local resource rights in contexts where these enjoy weak legal protection under domestic law. In spite of this, important shortcomings have emerged in both design and implementation, which have affected the strength of protection of affected property rights. Such shortcomings have been at the heart of two requests for World Bank inspection panels.<sup>619</sup>

Arrangements for temporary or permanent land takings differed between oilfield operations in the "oilfield development area" of Chad, and pipeline construction; and between pipeline construction in Chad and in Cameroon.

In the oilfield development area, Chad's Petroleum Code and the 1988 concession contract required the consortium to negotiate with the holders of land titles or customary rights. The government would authorise land occupation by the

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<sup>617</sup> Due to space constraints, the specific issues concerning the Bakola people are not tackled here; on these issues, see Nguiffo and Djeukam (2008).

<sup>618</sup> See section 4.2.3.

<sup>619</sup> *Cameroon: Petroleum Development and Pipeline Project*, concerning Cameroon; and *Chad-Cameroon Petroleum and Pipeline Project*, concerning Chad.



consortium through a decree upon an amicable settlement between the parties. The 1988 contract also provides that, if no agreement is reached, the government may authorise the use of land and determine the amount of compensation. Compensation costs are borne by the consortium.<sup>620</sup>

On the other hand, along the pipeline route, the Petroleum Code and the 1998 TOTCO-Chad Convention of Establishment provide for the compulsory taking of land by the government and the subsequent allocation of a land easement from the government to TOTCO (article 23). Compensation was to be determined by amicable settlement or, failing this, by courts (article 23(6)) - though in practice amicable settlement was reached in all cases.<sup>621</sup>

In both cases, the consortium and/or TOTCO would pay compensation for loss of improvements on the national land estate - but not for the land itself. Compensation rates were determined on the basis of sociological market surveys.<sup>622</sup> The Chad Resettlement and Compensation Plan estimated that no herders would be affected;<sup>623</sup> that most farmers would only lose a minor portion of their fields, and would be compensated in cash or in kind at replacement cost;<sup>624</sup> and that some farmers (up to 150 households<sup>625</sup>) would lose a major portion of their fields and as a result be no longer "economically viable".<sup>626</sup> This latter group would be entitled to resettlement - i.e. to obtain compensation at replacement cost *and* to choose between physical resettlement on the one hand and training in agricultural techniques or in off-farm livelihood strategies on the other.<sup>627</sup> The training was meant to maintain or even improve living conditions despite the reduction in available land.

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<sup>620</sup> Article 3 of the 1988 concession contract.

<sup>621</sup> Chad Resettlement and Compensation Plan, at 4-4.

<sup>622</sup> Chad Resettlement and Compensation Plan, at 5-1.

<sup>623</sup> At 5-14.

<sup>624</sup> At 6-1. Surprisingly, the Plan does not provide an estimate of the total number of households expected to be affected by the project.

<sup>625</sup> At 5-2.

<sup>626</sup> As defined in Appendix B of the Plan.

<sup>627</sup> At 6-3.

In addition, a “community compensation” programme was established to offset permanent loss of communal land (community farmland or bush resources). It was provided in kind only, usually in the form of wells, schools, roads, market places or other infrastructure.<sup>628</sup> By its closure in 2005, the community compensation programme had provided 88 infrastructure projects.<sup>629</sup> Finally, land taken temporarily was to be reclaimed after construction and returned to “the community of originally using the land”.<sup>630</sup>

A recent evaluation commissioned by the IFC and by EEPCI (Barclay and Koppert, 2007) documented major shortcomings in the design and implementation of the Chad Resettlement and Compensation Plan with regard to land takings in the oilfield development area. First, the Plan “substantially underestimated” the land area needed by the project.<sup>631</sup> As of June 2006, 1,243 ha of land had been permanently taken in the oilfield development area, exceeding the Plan’s estimates by around 65%; an additional 1,698 ha had been temporarily acquired, nearly twice the area estimated by the Plan.<sup>632</sup> As a result, the number of affected households eligible for resettlement was estimated to have soared to 900, up from the 150 originally expected.<sup>633</sup> In some villages, this “greatly exacerbated pre-existing shortages of land”.<sup>634</sup> The total number of people affected by the project was estimated at 12,000 (some 1,640 households).<sup>635</sup>

Early claims that the number of affected people would far exceed estimates in the Chad Resettlement and Compensation Plan had been rather succinctly dismissed by the World Bank Inspection Panel on Chad; on that occasion, the World Bank

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<sup>628</sup> Chad Resettlement and Compensation Plan, at 7-1 and 7-2.

<sup>629</sup> IAG (2005:6).

<sup>630</sup> Chad Resettlement and Compensation Plan, at 7-5.

<sup>631</sup> Barclay and Koppert (2007:ii).

<sup>632</sup> Barclay and Koppert (2007:iii).

<sup>633</sup> Barclay and Koppert (2007:ii).

<sup>634</sup> Barclay and Koppert (2007:iii).

<sup>635</sup> Ibid.

management claimed that less than 500 people would be affected by resettlement.<sup>636</sup> The increase in households made non-viable as a result of land takings in the oilfield development area had also been noted during project implementation by the project's External Compliance Management Group; the Group recommended that the consortium develop a "land acquisition indicator" to monitor the situation - a recommendation which was not acted upon by the consortium.<sup>637</sup>

Second, while the Chad Resettlement and Compensation Plan required that households eligible for resettlement be given the choice between physical resettlement and agricultural or off-farm training, the evaluation study found that eligible households were not actually offered this choice - they were only offered training. This was deemed not to comply with the Plan.<sup>638</sup> In addition, the training was found "inadequate to restore the livelihood losses", as yield improvements and off-farm business opportunities were limited, and therefore could not be considered as an alternative to land replacement.<sup>639</sup> This issue was not tackled by the proceeding before the World Bank Inspection Panel on Chad.

Third, the return of land temporarily taken suffered major delays. In some cases, land had been occupied for four or five years, well above the maximum one year for which compensation was paid. This issue had already been picked up by the International Advisory Group back in 2005 (IAG, 2005:5), but no action was taken by the consortium. In addition, no compensation was paid for loss of livelihoods caused by the severance or fragmentation of land plots caused by project works.<sup>640</sup> Finally, the value of the in-kind community compensation was not related to the loss suffered. For instance, a community lost 14 ha of bush land and received a

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<sup>636</sup> *Chad-Cameroon Petroleum and Pipeline Project*, paras. 163-169.

<sup>637</sup> ECMG (2003:8).

<sup>638</sup> Barclay and Koppert (2007:iii and vi).

<sup>639</sup> Barclay and Koppert (2007:vii).

<sup>640</sup> Barclay and Koppert (2007:iii).

school and two wells, another one lost 150 ha and got a school and one well only.<sup>641</sup> Again, these issues did not feature in the proceeding before the Inspection Panel.

The evaluation study did find that people affected by the project tended to have higher standards of living than people not affected. However, it found that this effect was likely to be short term, as it was due to the one-off compensation that affected people received. As this source of income disappears, living standards were expected to go back to pre-project levels or even below.<sup>642</sup> This was even more likely given that compensation had not been used to gain access to alternative land, which was likely to prove a key problem in the longer term for an area where livelihoods are based on subsistence agriculture.<sup>643</sup>

The scheme operating in Cameroon differed in several respects from its Chadian counterpart. The Cameroon segment accounts for some 890 of the 1070 Km of pipeline.<sup>644</sup> It runs through very different ecological and social contexts (from the dry savannah in the North of Cameroon to the tropical rainforest in the South).<sup>645</sup> Differently to Chad, land takings were mainly temporary, as much of the land was meant to be returned after construction. In addition, no resettlement was expected to be required by the Cameroon Compensation Plan.<sup>646</sup>

Under Cameroon's Law 96-14 of 1996 and the Cameroon Compensation Plan, treatment of rights taken differed depending on the nature of those rights - from land ownership to use rights. The (rare) takings of privately owned land involved negotiations between COTCO and the owner; lacking an amicable agreement, the Minister in charge of lands could expropriate against payment of "adequate"

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<sup>641</sup> Barclay and Koppert (2007:vi).

<sup>642</sup> Barclay and Koppert (2007:iv).

<sup>643</sup> Barclay and Koppert (2007:vi).

<sup>644</sup> Cameroon Compensation Plan, at page 1-9.

<sup>645</sup> Cameroon Compensation Plan, at page 4-1.

<sup>646</sup> At 1-6.

compensation for loss of both land and improvements.<sup>647</sup> On the other hand, where only use rights exist (as in the near totality of cases), the land was transferred from the national land estate ("*domaine national*") to the state's private land estate ("*domaine privé*") through the "incorporation" procedure, and compensation was paid for improvements alone - not for the land itself.<sup>648</sup>

Compensation legally due under Cameroon law was paid by the government of Cameroon ("GOC compensation"). This includes:

- Compensation for land and improvements in the case of privately owned land, and for improvements alone in the case of use rights on the national land estate ("*domaine national*"); the latter was based on valuation by Verification and Valuation Commissions applying compensation rates for crops and trees set by Ministerial Orders No. 058 of 13 April 1981 and 013 of 18 February 1982.
- Forest use rights for non-commercial purposes, for which payment of compensation is required by article 8 of the Forest Law 1994.

The official rates set in 1981 and 1982 had been eroded by inflation, and were usually below current market prices and replacement cost.<sup>649</sup> In addition, loss of crops and assets as a result of *temporary* land occupation and construction works and loss of common property resources (such as trees planted on the "*domaine national*") are not compensated under Cameroon law.

To overcome these problems, a "supplemental" compensation scheme was developed to meet the more demanding World Bank standards – which as discussed requires restoration of livelihoods at least to pre-project levels. Supplemental compensation costs were borne by COTCO ("COTCO compensation"). The supplemental compensation scheme:

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<sup>647</sup> See e.g. Cameroon Compensation Plan, at 3-6.

<sup>648</sup> *Ibid.*, at 1-6.

<sup>649</sup> Interview with a Cameroon public interest lawyer (14 March 2008).

- Topped up individual compensation rates to reach market or replacement values (based on market surveys);
- Provided compensation for crop losses resulting from *temporary* land occupation during construction (otherwise not compensable under Cameroonian law); and
- Provided community compensation for permanent loss of common property resources (customary land rights, forest use rights), and for the general disturbance suffered.<sup>650</sup>

While GOC compensation was in cash, COTCO compensation was in cash or in kind, as chosen by the recipient, in the case of individual compensation; and in kind only in the case of community/regional compensation. COTCO compensation rates were usually four to five times higher than GOC compensation - and in some cases even higher.<sup>651</sup> In-kind compensation usually entailed support for the provision of water points, schools, clinics or other infrastructure. Local and international NGOs have implemented development projects as part of the community compensation scheme.

There have been many complaints about delays in disbursement of compensation, about the amount of cash compensation and about the quality of equipment provided as in-kind compensation. These issues were raised in the two requests for World Bank Inspection Panels - both of which found the World Bank in compliance with the then applicable Operational Directive 4.30 on involuntary resettlement.<sup>652</sup>

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<sup>650</sup> Ibid., chapters 5 and 6.

<sup>651</sup> *Cameroon: Petroleum Development and Pipeline Project*, para. 160.

<sup>652</sup> *Chad-Cameroon Petroleum and Pipeline Project*, paras. 175 and 178; *Cameroon: Petroleum Development and Pipeline Project*, para. 161.

On the other hand, problems with compensation payments were documented in several project documents.<sup>653</sup> A recent sociological study in 27 communities along the pipeline found that about half the women and men interviewed felt that cash or in-kind individual compensation was inadequate, while more than 60% of the respondents were unhappy with community compensation due to low-quality equipment or incomplete delivery.<sup>654</sup> By October 2003, 4,414 grievances had been filed in Cameroon alone.<sup>655</sup> This is a remarkably high number, compared to the overall number of affected people in Cameroon (estimated at around 4,000), although the Inspection Panel found that a number of grievances reflected unfulfilled but unrealistic expectations to benefit from the project, rather than necessarily genuine complaints about the amount of compensation.<sup>656</sup>

By its very nature, the distribution of compensation payments reflects (or should reflect) pre-existing distributions of rights and land use patterns. In other words, higher compensation payments tended to go to those groups who “had more” before the project - and therefore more to lose from it. For example, with regard to gender, compensation amounts tended to be higher for men than for women. This is because more men than women were involved in the production of higher income-generating crops, while women tended to focus on food production for home consumption.<sup>657</sup> Women were also particularly affected by loss of access to common property resources in forest areas, as harvesting non-timber forest products is of particular importance to women.<sup>658</sup>

As most of the land in Cameroon was taken temporarily for the construction phase, the Cameroon Compensation Plan provides for the return of reclaimed land to its

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<sup>653</sup> E.g., on defects with structures built as part of the regional compensation scheme in Cameroon, see ECMG (2005:12); on local dissatisfaction with in-kind compensation, see IAG (2002:12).

<sup>654</sup> Endeley and Sikod (2007:119 and 125).

<sup>655</sup> ECMG (2003:12).

<sup>656</sup> *Cameroon: Petroleum Development and Pipeline Project*, para. 176.

<sup>657</sup> Endeley and Sikod (2007:116 and 189).

<sup>658</sup> Endeley and Sikod (2007:133).

pre-construction users, upon users obtaining an individual authorisation to cultivate from government authorities (*sous-préfet*).<sup>659</sup> Land use restrictions nevertheless apply, particularly with regard to planting trees or shrubs or ploughing deeper than 60 centimetres.<sup>660</sup> Reuse of reclaimed land is included in the monitoring indicators for the Plan.<sup>661</sup>

In practice, however, there have been delays in this process. According to the project's External Compliance Monitoring Group (ECMG), the return of land rights was progressing slowly - land that had long been reclaimed had not yet been returned to pre-construction users.<sup>662</sup> The above-mentioned sociological study in 27 affected communities found that three-fourths of farmers had discontinued cultivation in the easement area - either because they started farming elsewhere, or because they left the land fallow to regain fertility, or due to the cumbersome nature of the procedure to obtain the administrative authorisation to cultivate (Endeley and Sikod, 2007:56). Some of those who did resume cultivation did so without administrative authorization (ECMG, 2003:7), while many complained about poor productivity and the impact of the land use restrictions (Endeley and Sikod, 2007:134).

From a legal point of view, land restoration was based on a commitment on the part of the government of Cameroon to return land to pre-construction users. The change in legal status of the land brought about by the "incorporation" procedure was not reversed. Legally, the land was taken out of the national land estate ("*domaine national*") and moved to the private estate of the state ("*domaine privé de l'état*"). On both estates, local resource users enjoy rather insecure use rights on state-owned land. However, the level of insecurity is greater on the *domaine privé de l'état*.

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<sup>659</sup> At 3.5.

<sup>660</sup> COTCO-Cameroon Convention of Establishment, article 27(8)(d).

<sup>661</sup> At 7-5.

<sup>662</sup> ECMG (2005:7).



On the *domaine national*, a government land allocation to a third party requires the government to undertake the “incorporation” procedure and compensate local users for loss of improvements. On the other hand, the incorporation procedure is not applicable to the *domaine privé de l'état*. The state may simply allocate land rights to third parties. In other words, the change in legal regime entailed an uncompensated weakening of the protection of local property rights.

The grievance procedure differed for GOC and COTCO compensation. In the former case, as per Cameroon legislation, dissatisfaction with the work of the Verification and Valuation Commission may be expressed through administrative recourse leading to executive decision by the competent ministry; such decision can then be challenged before courts (on expropriation proceedings, see section 12 of Law 85-09 of 1985). In the case of COTCO compensation, complaints are filed with and evaluated by COTCO staff.<sup>663</sup>

The grievance procedure for COTCO compensation claims has been the object of much controversy. The World Bank Inspection Panel on Cameroon deemed the procedure “clear-cut and accessible”, and found it in compliance with World Bank Operational Directive 4.30 on involuntary resettlement.<sup>664</sup> But the panel did not tackle issues concerning the lack of impartiality of the procedure. As noted by Amnesty International UK (2005), it is COTCO staff that decides whether to accept or reject the complaint, and what action to take (e.g. whether to pay compensation, and how much). If the complaint is rejected, “the individual has no appeal to an independent forum” (Amnesty International, 2005:35). In addition, if compensation is offered, “there is no enforcement mechanism to ensure delivery” (Amnesty International UK, 2005:35). The sociological study by Endeley and Sikod (2007:119)

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<sup>663</sup> Cameroon Compensation Plan, at 6-13, 6-14 and 6-14. Complaints are filed with COTCO’s “Local Community Contacts”, who pass them on to the Grievance Management Team at COTCO headquarters in Douala (*Cameroon: Petroleum Development and Pipeline Project*, paras. 173-174).

<sup>664</sup> *Cameroon: Petroleum Development and Pipeline Project*, para. 176.

found that respondents were generally not satisfied with COTCO's handling of their complaints.

Concerns about impartiality are also applicable to the GOC compensation scheme. Taking procedures may involve inherent conflicts of interest, particularly where government bodies determine the amount of compensation – as in Cameroon. In these cases, the government effectively plays two roles. On the one hand, it decides on takings and foots, in whole or in part, the compensation bill; on the other, through the valuation process, it determines how much that bill is. This conflict of interest is further exacerbated where the state holds an equity participation in the investment project (as in Chad-Cameroon), and thus has a vested interest in the profitability of such project.

The existence of a judicial recourse does provide some safeguards, though its effectiveness must be assessed in the light of concerns about the independence of the judiciary in Cameroon. As discussed, these concerns have been expressed in the ACHPR case *Bakweri Land Claims Committee v. Cameroon*, although the African Commission did not specifically address them (the case was considered inadmissible due to non-exhaustion of domestic remedies).<sup>665</sup>

Interestingly, a completely separate regime regulated the taking of agribusiness or mining concessions in Cameroon. For these, the COTCO-Cameroon Convention of Establishment (article 27(3)) and the Cameron Compensation Plan (section 5.8) require COTCO to negotiate with the concessionaire the terms and conditions for the release of such land, including compensation (which is paid by COTCO). In case an amicable agreement cannot be reached, COTCO may either request the government of Cameroon to expropriate the concession, or modify the pipeline route or the siting of facilities. This procedure was used for instance in the case of a

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<sup>665</sup> See section 3.2 above. With regard to Chad, a recent article on *The Economist* (2008:68) stated that "Chad's justice system barely functions".

sugar cane plantation around Banjo.<sup>666</sup> The development of the special regime for larger-scale investors was needed in order to accommodate the needs of national elites close to the government and the military - which in turn was seen as a precondition for the successful implementation of the project.<sup>667</sup>

#### *4.3.3. Parallels and divergences*

The tailored arrangements discussed in the previous two sections extend the protection of property rights well beyond that available under the national law of Chad and of Cameroon. This applies to both investors and affected local resource users, and holds despite the shortcomings in the design and implementation of the EMP. To relate this analysis back to the core research question of this study (comparing the legal protection for different sets of property rights involved in an investment project), it is worth assessing parallels and divergences between the protection that tailored arrangements accord to investors and local resource users.

A first point worth noting is that, in Cameroon, petroleum legislation explicitly empowers the government to negotiate tailored arrangements with investors - for instance, with regard to the stabilization of tax and economic conditions.<sup>668</sup> In other words, establishing tailored arrangements for investment protection is part of the package of measures deployed by the state to attract investors. On the other hand, the legislation contains no mention of such a possibility with regard to protecting local resource rights affected by petroleum projects. In fact, interviews with consultants involved in the design of the EMP revealed that the development of a tailored regime for the taking of local resource rights was initially resisted by the Cameroonian government - and was accepted only after much negotiation and pressure from the World Bank. The government of Cameroon was concerned that a

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<sup>666</sup> Interview with a consultant involved in the implementation of the EMP (20 September 2007).

<sup>667</sup> Interview with a consultant involved in the design of the EMP (2 August 2007).

<sup>668</sup> See section 4.3.1.

tailored regime would “set a precedent” and make it more difficult for it to take land for subsequent projects.<sup>669</sup>

As for the content of the protection granted, parallels exist between the treatment of the different sets of property rights involved in the Chad-Cameroon project. For example, standards of compensation appear similar. On the one hand, the TOTCO-Chad Convention of Establishment requires that “just and equitable compensation” be paid to the affected “owners” of land expropriated during project implementation (article 23(6)). On the other, the same contract requires that “just and equitable” compensation be paid to TOTCO in case of nationalisation of its assets (article 21(6)). Clearly, what is “just and equitable” in factual circumstances as different as the taking of local land rights and the taking of the investment is likely to differ drastically - but the applicable abstract standards (justice, equity) are the same.

At the same time, the tailored regime also contains major differences of treatment. Given the vagueness of formulae like “just and equitable” compensation, much depends on the institutions and processes to determine compensation amounts, and to provide aggrieved parties with a legal remedy. The independence of these institutions and processes from government interference is key.

In the case of investors, the need for independence is met through dispute settlement by international arbitration. For local resource users in Cameroon, on the other hand, determination and complaints are within the responsibility of the government of Cameroon (which is in a conflict of interest between its roles of determining compensation and of footing part of the compensation bill), and of the courts of Cameroon (see the concerns about the lack of judicial independence in Cameroon, discussed above), in the case of the GOC compensation scheme; and

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<sup>669</sup> Interview with a consultant involved in the design of the EMP (2 August 2007). See section 2.3.3.8.

within the responsibility of COTCO (in a conflict of interest similar to that of the government of Cameroon), in the case of the COTCO compensation scheme.

Even the possibility of filing a complaint with a World Bank Inspection Panel, while improving the lot of local resource users through providing a useful legal pressure point (Nguiffo and Djeukam, 2008:43), does not grant access to a fully independent forum. Indeed, the Board of the World Bank must approve the hearing of complaints. In addition, the process only leads to recommendations to the World Bank management, and there are no mechanisms for the panel to follow up and monitor compliance. Beyond tailored arrangements, local resource users may ultimately resort to the African Commission and Court on Human and Peoples' Rights - but only after having exhausted domestic remedies, and with the challenges and difficulties discussed in the previous chapter.

In other words, the abstract formulae defining compensation standards are similar for investors and local resource users; but the processes to determine compensation amounts and challenge determination decisions are different. Differences of treatment per se are not necessarily problematic, as they may reflect differences in circumstances. But there is no reason why local resource rights would not deserve access to genuinely independent institutions to give proper meaning to the standard of "just and equitable" compensation provided by the COTCO-Cameroon Convention of Establishment.

The additional differentiation provided by the COTCO-Cameroon Convention of Establishment for different types of property rights affected by the pipeline project compounds this analysis. As discussed, article 27(3) of the contract provides a separate regime for the taking of agribusiness and mining concessions. This regime emphasises negotiations between COTCO and affected concessionaires. Only if an amicable settlement is not reached would the government of Cameroon intervene with an expropriation procedure.

Negotiation, rather than unilateral determination, may provide greater safeguards for affected property rights. In practice, however, unilateral determination may also involve some degree of negotiation between the decision-maker and affected right holders. In addition, negotiation may not lead to outcomes more favourable to local resource users in contexts characterised by major differences in negotiating power between local resource users, the government and investors.

Other factors also undermine the legal protection for local resource rights under tailored arrangements in ways not applicable to foreign investment. First, the scope of that protection excludes certain types of loss. Although the project's compensation schemes for local resource rights are more generous than national laws, some losses suffered by local resource users were left uncompensated. As discussed, in Cameroon this includes losses suffered through temporary takings as result of the *permanent* change in the legal regime of the land (from national land estate to the state's private land estate, with ensuing loss of tenure security), though coupled by government pledges to enable pre-construction land users to return; and as a result of the land use restrictions on restored land.

Second, the ability of monitoring institutions such as the ECMG and the IAG to effect change in project implementation so as to ensure compliance with tailored arrangements for local resource rights has proved limited. Some of the shortcomings in the compensation scheme documented by the evaluation study by Barclay and Koppert (2007) came as no surprise. They had already been raised during project implementation by the ECMG and the IAG – yet no practical action followed. For example, the recommendation put forward by the ECMG already in 2003 that the consortium develop a “land acquisition indicator” to monitor the higher-than-estimated land requirements in the oilfield development area was not acted upon by the consortium (ECMG, 2003:8). Similarly, delays in the return of reclaimed land were noted by the IAG in 2005 (2005:5), without practical consequences.

#### *4.3.4. Concluding remarks: Strengthening protection at two speeds*

The Chad-Cameroon oil development and pipeline project illustrates how tailored arrangements can strengthen the protection of property rights beyond the general protection granted by national law. This includes the property rights of the investors, in line with common practice in natural resource projects of this kind. It also includes the property rights of affected local resource users - a departure from common practice caused by the involvement of the World Bank. The tailored regime developed for local resource rights is innovative, as it features mechanisms to compensate loss of rights typically not covered by compensation schemes under national law (e.g. temporary takings, loss of common property resources).

The tailored regimes applicable to investors and local resource users present some interesting convergences - for instance, with regard to the standard of compensation ("fair and equitable" for both, under the TOTCO-Chad Convention of Establishment). However, the institutions and procedures that translate such standard into concrete compensation amounts in case of dispute differ. Investors enjoy access to an independent forum through the arbitration clauses included in the contracts with both Chad and Cameroon. On the other hand, local resource users do not enjoy access to a similarly independent forum - neither with regard to government compensation schemes, nor with regard to supplemental compensation paid by the consortium.

In addition, a central element of the tailored regime for local resource rights is the role of the ECMG in monitoring compliance with the EMP, and of the IAG in providing advice on development issues. Both of these monitoring institutions have raised issues concerning the taking of local resource rights during project implementation. But both have displayed little "teeth" in effecting change.

The result is a tailored regime that significantly strengthens safeguards for takings of local resource rights compared to national law; but that falls short of providing

safeguards comparable to those offered to the investors. This “two-speed” nature of the protection of property rights seems to reflect the “two-speed” implementation of the overall project, which was noted over and over in the reports of the IAG.<sup>670</sup>

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<sup>670</sup> See above, section 2.3.3.8.



**5. The dynamics of property rights: Tensions between strengthening local resource rights and ensuring regulatory stability for foreign investment**

### 5.1. The concept of "dynamic" analysis and trade-offs in the protection of property rights

Chapters 3 and 4 provided a "static" analysis of the protection of property rights in foreign investment projects. They compared the legal protection available to foreign investment and local resource rights at national and international levels – thereby addressing the "first leg" of the core research question identified in section 1.1. The analysis found that foreign investment tends to enjoy stronger legal protection than local resource rights under both national and international law, albeit in different ways and to different degrees: through formally differentiated treatment under international law, and mainly through the interplay between formal legal rules and the concrete distribution of property rights under national law.

This chapter builds on that analysis, but takes a more "dynamic" approach. The focus here is not on a "snapshot" of asymmetries in legal protection, but on how differentiated legal protections affect each other *over time*. Specifically, the focus is on whether the stronger protection enjoyed by foreign investment may constrain efforts to *strengthen* affected local resource rights – which is the "second leg" of the core research question tackled by this study.<sup>671</sup>

The concept of "strengthening" of legal protection is at the heart of this chapter. As discussed, it is a relative concept, as it implies a comparison between two diachronic situations (e.g. before and after an intervention). However, the synchronic comparative legal analysis undertaken in chapters 3 and 4 can provide useful insights on what shape a diachronic "strengthening" may take.<sup>672</sup>

For instance, at the international level, ways of strengthening the protection of property rights under the ACHPR are suggested by the comparison between the provisions of the African Charter and those of the ECHR and ACHR. While both

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<sup>671</sup> See section 1.1.

<sup>672</sup> On the concept of "strengthening" of legal protection, see section 2.2.3.

the ECHR and ACHR systems require payment of compensation as a condition for the legality of takings, the ACHPR does not.<sup>673</sup> Introducing a compensation requirement in the ACHPR regime would “strengthen” its legal protection. This would benefit local resource rights, while for foreign investment compensation is already required under international investment law.<sup>674</sup>

Introducing a compensation requirement would not necessarily require an amendment to the African Charter. As discussed above, article 1 of Protocol 1 of the ECHR, like the ACHPR and unlike the ACHR, does not explicitly refer to payment of compensation - but this was deemed to be implicit by the European Court in its case law.<sup>675</sup> It is possible that, should a future dispute on this issue be brought before the African Court on Human and Peoples’ Rights, the Court may take a similar approach.

It is also possible that the African Court may develop case law on the standard of compensation. Here too the Charter is silent. But so is the European Convention - and yet the European Court has developed case law on the standard of compensation, namely with regard to the “reasonable relationship” between compensation and market price required in *James v. UK* and in subsequent cases.<sup>676</sup>

It should be noted that, in Europe, the landmark case that affirmed the implicit obligation to compensate and established an (albeit open) standard of compensation came more than 30 years after the adoption of ECHR Protocol 1.<sup>677</sup> It would therefore not be surprising if the newly established African Court were to take steps along these lines in future.

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<sup>673</sup> See section 3.2 above.

<sup>674</sup> See section 3.3.

<sup>675</sup> See particularly the *James* and *Lithgow* cases, analysed in section 3.2.

<sup>676</sup> As discussed in section 3.2.

<sup>677</sup> The *James* case was decided in 1986, 33 years after the adoption of Protocol 1.

The fact that judgements of the African Court may have far-reaching implications for state obligations is in line with previous practice of the African Commission on Human and Peoples' Rights. For instance, in the case *SERAC and CESR v. Nigeria* the Commission found that human rights like the right to food and the right to water, which receive no mention in the African Charter, were implicitly recognised. In the same case, the Commission also contributed to clarify the normative content of some explicitly recognised rights, such as peoples' right to freely dispose of their natural resources; and the nature of state obligations with regard to economic, social and cultural rights.<sup>678</sup>

If future case law was to strengthen the protection of the right to property under the African Charter, states parties to the Charter would come under a legal obligation to ensure that their national legal system complies with the new international requirements - namely, that takings of local property rights in order to implement investment projects be deemed legal only where compensation is paid consistently with international standards.

Besides possible evolutions in international human rights law, the protection of local property rights may also be strengthened by national law measures. These may be made possible by shifts in the balance of negotiating power between host states and investors after the bulk of the capital investment is made - shifts captured by the concept of "obsolescing bargain".<sup>679</sup> Again, the comparative analysis undertaken in chapter 4 may provide useful insights on what these measures may look like.

For example, while in Chad there is no legal requirement to consult local resource users before land or resource rights are allocated to investors, such requirement does exist under Mozambican legislation. Law reform in Chad to introduce local

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<sup>678</sup> See section 3.2.

<sup>679</sup> See section 2.3.3.4.

consultation requirements would constitute a strengthening of the legal protection of local property rights.

Measures strengthening local property rights may have implications for the negotiating power of local resource users. The extent to which stronger legal protection translates into greater negotiating power must be assessed in an empirical way on a case-by-case basis. However, it is in principle accepted that, while the law must come to terms with existing power relations, legally defined rights and adequate capacity to enforce them can themselves be a source of negotiating power.<sup>680</sup> Legal rights provide “bargaining endowments” that stakeholders may rely on in their mutual negotiations (Mnookin and Kornhauser, 1979:968). In this sense and everything else being equal, and subject to greater complexity linked to social differentiation *among* local resource users, stronger legal protection of local property rights is likely to increase the negotiating power of local users.

First, stronger property rights may be used to redefine the negotiation arena – in other words, to open up new spaces for negotiation. For example, new legal requirements for mandatory local consultation open up the decision-making process to affected resource users. The extent to which this gives them real leverage depends on the terms and conditions of the consultation.

Second, stronger property rights may provide assets that can be used as a source of negotiating power within a given arena. On the other hand, if their property rights over natural resources are weak, local resource users would have little to bargain with in their negotiations with investors and the state. In this, detail is key. With regard to land takings, for instance, what matters to the negotiating power of local resource users is not only the general principle that compensation be paid; but also the detailed rules on what types of rights and of interferences must be compensated,

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<sup>680</sup> See section 2.3.2.

who determines the amount of compensation, and according to what standards and processes.

Different mechanisms to strengthen the protection of local property rights (e.g. tightening compensation requirements or “due process” requirements like local consultation) may be mutually reinforcing. In other words, the cumulative effect of these mechanisms on negotiating power may be more than the sum of that ascribable to each individual mechanism. For instance, local consultation requirements are likely to be more effective where complemented by tight rules on compensation: the threat of uncompensated expropriation if a deal is not reached is likely to undermine the negotiating power of local resource users in the consultation process. The mutually reinforcing nature of these mechanisms is visualised in Figure 5.1.

Regulatory change to strengthen local resource rights may negatively affect the economic equilibrium or even the commercial viability of an ongoing investment project - for instance, through more demanding compensation standards for land takings, in contexts where compensation costs are borne by the investor, in whole or in part; or through legal requirements that local resource users be consulted about the investment project, which may delay project implementation.

Where measures to strengthen local resource rights negatively affect an ongoing investment project, they may trigger the application of legal devices to manage regulatory risk - namely, the international-law doctrine of regulatory takings, and stabilization clauses that may be included in investor-state contracts.<sup>681</sup> As discussed in section 3.3, the regulatory taking doctrine entails that regulation undermining an investment’s viability may be deemed as a taking, and require the host state to pay compensation. Under commonly used stabilization clauses, the host government

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<sup>681</sup> A thorough analysis of the international-law standard of “fair and equitable treatment”, which may also be relevant, is outside the scope of this study.

commits itself not to change the regulatory framework in a way that affects the economic equilibrium of the project, and to compensate the investor if it does so.

The regulatory taking doctrine is “proprietary” in nature - it deals with takings of property rights, and with the conditions under which a regulatory change may be considered as a taking. It is a fundamental tool for the protection of investors’ property rights from host state interference. On the other hand, stabilization clauses are not a “proprietary” mechanism – they aim to manage regulatory risk through stabilizing the law governing the investment project.

The application of these legal devices may require the host state to compensate investors for losses incurred as a result of measures to strengthen affected local resource rights. But an obligation to compensate would make it more difficult for host states, particularly poorer ones, to strengthen local resource rights over the duration of an investment project. In other words, the allocation of risks and costs under the regulatory taking doctrine or stabilization clauses may create disincentives for host states to strengthen local property rights. This would take asymmetries in legal protection to a different level: not only would some property rights enjoy stronger protection than others; but also applicable law may undermine opportunities for strengthening weaker property rights.

The notion that trade-offs may exist between different sets of property rights involved in an investment project is reflected in the international case law. Two examples from the Americas illustrate this.

In the ACHR case *Sawhoyamaya v. Paraguay*, an indigenous community claimed the restitution of their ancestral lands. The government of Paraguay resisted this claim, partly because the land belonged to a German investor protected under a bilateral investment treaty between Paraguay and Germany. According to the government of

Paraguay, restituting the land to the Sawhoyamaya community would have required infringing upon the property rights of a foreign investor.<sup>682</sup>

The Inter-American Court of Human Rights noted that while the investment treaty did contain a provision on expropriation, it did not prohibit expropriation altogether - it merely subjected its legality to certain conditions, including public purpose. The Court held that the public-purpose requirement would be met where the compression of the investor's property rights is necessary to realise the human rights of third parties, including through land restitution to indigenous peoples aimed at realising their human right to property.<sup>683</sup>

While the *Sawhoyamaya* case provides an example of tensions and trade-offs between different sets of property rights, it refers to very different factual circumstances compared to those discussed here: it relates to competing land claims within the context of a land restitution process.

The ongoing *Glamis Gold Ltd. v. US* case (an investment arbitration within the context of NAFTA) provides a more directly relevant example. The *Glamis* case concerns *inter alia* a regulatory taking claim brought by a mining company in relation to intervened US regulation to protect the quality of and access to lands of particular cultural and spiritual value for a local Indian tribe. Although the land is owned by the federal government, the tribe claims it as its ancestral land. The investor claimed that the regulatory change undermined the commercial viability of the project, and sought compensation for regulatory taking.

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<sup>682</sup> Para. 115 (b) of the judgment.

<sup>683</sup> Para. 140. See also the ACHR case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, where the Inter-American Court of Human Rights required the government of Nicaragua to strengthen the property rights of the complainant (an indigenous group) *after* timber concessions had been issued to an investor. Measures ordered by the Court include delimiting, demarcating and titling collective lands, and abstaining from acts that may "affect the existence, value, use or enjoyment of the property" of the indigenous community (para. 173(4)).



The next few sections discuss these issues in greater detail. They assess the extent to which measures to strengthen local property rights may trigger an obligation for host states to compensate investors. They also identify possible ways to reconcile ensuring regulatory stability with maintaining host state capacity to strengthen local property rights, particularly where this is required by evolving international human rights law.

## 5.2. Regulatory taking doctrine and stabilization clauses vs regulatory change<sup>684</sup>

### 5.2.1. *The regulatory taking doctrine under international law*

As discussed in chapter 3, international law grants host states the sovereign right to expropriate assets and regulate activities within their jurisdiction; but also sets conditions for the legality of takings, including payment of compensation. Takings are defined in very broad terms, and the key test is one of *impact* (“substantial deprivation” of property) rather than of nature or intention of government action. As a result, regulatory measures may be deemed as takings of property under international law.<sup>685</sup>

Criteria to assess whether regulation amounts to a taking include whether the investor is in control of the investment, whether the government manages the day-to-day operations of the company, whether the government interfered with payment of the project dividends, and whether the investor retains full ownership and control of the investment.<sup>686</sup>

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<sup>684</sup> This section partly draws on research published as: Lorenzo Cotula, 2006, “Stabilization Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts”, 17 *Yearbook of International Environmental Law*; Lorenzo Cotula, 2008, “Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses”, 1(2) *Journal of World Energy Law & Business* 158-179; and Lorenzo Cotula, forthcoming, “Regulatory Takings, Stabilization Clauses and Sustainable Development”, *Journal of Investment Law*.

<sup>685</sup> Section 3.3.2.1.

<sup>686</sup> *Pope & Talbot Inc v. The Government of Canada (Award on the Merits of Phase 2)*, para. 100.

In addition, investor-state contracts may contain project-specific provisions on the taking of the investor's assets, for instance specifying compensation standards (e.g. under article 21(6) of the TOTCO-Chad Convention of Establishment).<sup>687</sup>

### *5.2.2. Implications for host state regulation to strengthen local property rights*

Where measures to strengthen local resource rights affected by an investment project result in "substantial deprivation" of the investor's property rights, the regulatory taking doctrine requires the host state to compensate affected investors. As discussed, this is likely to apply to regulatory changes that undermine the commercial viability of the investment project – a rather extreme situation.

Establishing whether this situation has materialised requires a case-by-case analysis. The assessment is likely to depend, among other things, on the nature of the project and of the regulatory change. It is conceivable, for instance, that raising compensation standards for land takings in contexts where compensation costs are borne by the investor may have a significant economic impact on ongoing investment projects that entail the taking of vast areas of land, and for which compensation costs account for a significant share of overall project costs (e.g. large-scale dams).

While these issues have not yet arisen within the context of natural resource projects in Africa, they have emerged in cases concerning mining operations in North America. Brief reference to this case law may help illustrate these issues. Two cases seem particularly relevant: *United Nuclear Corp v. US*, a US domestic case concerning uranium mining and decided by the US Court of Appeals (Federal Circuit); and *Glamis Gold Ltd. v. US*, a NAFTA case concerning gold mining, involving a legal

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<sup>687</sup> Sections 3.3.2.3 and 4.3.1.

challenge to US regulation and currently pending before an international arbitration tribunal.

*United Nuclear Corp v. US* concerns mining leases in the United States. United entered into two leases with the Navajo Tribal Council, which authorised it to conduct uranium mining on reservation land. The leases were approved by the Secretary of the Interior. United's exploration uncovered valuable uranium deposits. United then prepared a mining plan, which it submitted to the Secretary for approval, as required in order to begin mining. But the Secretary refused to approve without tribal consent, the tribe withheld consent, and in the end United's leases terminated for failure to begin mining within the specified timeframe. United claimed that the Secretary's refusal to approve the mining plan constituted a taking of its leases, for which it was entitled to just compensation.

The US Court of Appeals held that there had indeed been a "taking" of United's "property interest in the leases", and required payment of compensation.<sup>688</sup> The Court held that the decision of the Secretary of Interior not just to "consult" the Navajo tribe, as per previous administrative practice, but rather to seek their "approval" (effectively, granting them a veto power they did not have when the investment took place) led to an agreement not being reached and the mining lease expiring. As a result, the investor's assets and interests were virtually "taken".<sup>689</sup>

This taking met the conditions set by US case law for a "regulatory taking" to occur - namely the economic impact of regulation (which in this case was found to be "severe"), the interference with the investor's expectations (as tribal approval was previously not required), and the character of government action (no justification was given here for the decision to seek tribal approval).<sup>690</sup> The economic impact of

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<sup>688</sup> *United Nuclear Corp. v. US*, at 1433; see also at 1437 and 1438.

<sup>689</sup> *Ibid.*, at 1435-1438.

<sup>690</sup> *United Nuclear Corp v. US*, at 1435-1438. On this three-pronged regulatory taking test under US law, see *Penn Central Transportation Co. v. New York City*, at 124.

regulation test under US law seems to match the international law test on the “substantial deprivation” of property, developed in *Pope & Talbot* and subsequent case law.

The *United Nuclear* case comes from the US, which presents enormous differences in both legal culture and socio-economic context compared to African countries. It also concerns a domestic rather than a foreign investor, and was decided on the basis of domestic rather than international law. It does nonetheless illustrate the potential tensions that can occur between strengthening local resource rights on the one hand, and complying with rules on regulatory taking on the other - particularly with regard to jurisdictions where the government and/or investors are legally required to “consult” local resource users (in Mozambique, for instance).<sup>691</sup>

The ongoing<sup>692</sup> *Glamis Gold Ltd. v. US* case provides another example, although also from the North American context. The case concerns *inter alia* a regulatory taking claim brought by a mining company in relation to US regulation to protect the quality of and access to lands of particular cultural and spiritual value for the Quechan Indian Nation. Although the area is owned by the US federal government, the Quechan Indian Nation claims it as part of its ancestral land.<sup>693</sup> The area includes a high density of religious sites, including prayer circles, ceremonial places, shrines and other sites, linked by an ancient trail known as the “Trail of Dreams”.<sup>694</sup> The claimant holds mining claims in the area, and alleged that intervened administrative measures to protect the site through backfilling and site recontouring requirements

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<sup>691</sup> See section 4.2.5.

<sup>692</sup> As of 15 October 2008.

<sup>693</sup> *Glamis Gold Ltd. v. US*, Non-Party Submission of the Quechan Indian Nation, 19 August 2005, p. 1. In its submission, the Quechan Indian Nation refers to indigenous peoples’ right to property under customary and treaty international law, including with regard to articles 14 and 15 of ILO Convention No. 169, and irrespective of formal ownership of the lands (p. 10). The submission also refers to the ACHR case law on indigenous peoples’ right to property under article 21 of the American Convention on Human Rights, particularly the finding in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* that indigenous peoples’ right in communal property is protected even where such land is not held under deed or title or otherwise recognized by the host state (p. 11 of the submission).

<sup>694</sup> *Idib*, p. 1.

effectively destroyed the economic value of the investment - and thus constituted expropriation.<sup>695</sup>

The case is pending, and it is impossible to discuss the way the tribunal will address these issues. Yet the very existence of this dispute illustrates how tensions may arise between different sets of property rights (although here the Indian tribe does not formally have property rights on the land), and how measures to protect local resource users may lead to regulatory taking claims.

### **5.2.3. Stabilization clauses**

#### *5.2.3.1. Concept, content and effect*

Compared to the regulatory taking doctrine, stabilization clauses take government commitments to regulatory stability a step further. As mentioned in chapter 3, these clauses aim to “stabilise” the terms and conditions of an investment project, thereby contributing to manage regulatory risk. They feature in investment contracts between an investor and the host state. They involve a commitment by the host state not to alter the regulatory framework governing the project, by legislation or any other means, outside specified circumstances (e.g. consent of the other contracting party, restoration of the economic equilibrium and/or payment of compensation).<sup>696</sup>

Stabilization clauses are particularly common in large extractive industry projects in developing and transition economies. In these types of investment, high fixed costs require large capital injections in the early stages of the project, and long timeframes are needed for the economic viability of the project.<sup>697</sup>

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<sup>695</sup> *Glamis Gold Ltd. v. US*, Claimant’s Notice of Arbitration, 9 December 2003, paras. 20, 23 and 25.

<sup>696</sup> On stabilization clauses, see Paasivirta (1990); Nassar (1995); Wälde and N’Di (1996); Bernardini, (1998); Verhoosel (1998); Berger (2003); Faruque (2006); Maniruzzaman (2007); Muchlinski (2007:582-583); and Cameron (2007). For the author’s own work on this, see Cotula (2006), (2008b) and (forthcoming).

<sup>697</sup> Wälde and N’Di (1996:226).

Stabilization clauses come in all shapes and forms. Early stabilization clauses committed the host state not to nationalise, and/or required the consent of both contracting parties for contract modifications (“intangibility clauses”).<sup>698</sup> More recent stabilization clauses have evolved into diverse and sophisticated tools to manage non-commercial risk associated with the investment project.<sup>699</sup> Their scope has tended to broaden, so as to include changes in the regulatory framework falling short of expropriation or contract modification. This includes stabilization of specific aspects of the investment project, such as its fiscal regime<sup>700</sup> or its tariff structure.<sup>701</sup> But it also includes much broader commitments to stabilize the regulatory framework governing the investment project.

For instance, under the so-called “freezing clauses”, the applicable domestic law is the one in force at the time the contract is concluded, to the exclusion of subsequent legislation; while under “consistency clauses” the domestic legislation of the host state only applies to the project if consistent with the investment contract.<sup>702</sup>

“Economic equilibrium clauses” constitute another type of stabilization clauses. They link alterations of the terms of the contract to a renegotiation of the contract to restore its original economic equilibrium or, in absence, to the payment of compensation. In other words, differently to freezing clauses, economic equilibrium clauses stabilise the economic equilibrium of the contract rather than the regulatory framework itself: regulatory changes are possible so long as action is taken to restore the economic equilibrium. Parties are under an obligation to negotiate in good faith so as to restore the economic equilibrium following regulatory change;

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<sup>698</sup> As noted by Maniruzzaman (2007:45), a clause of this type was at stake in *Government of Kuwait v. American Independent Oil Co. (Aminoil)*, para. 88.

<sup>699</sup> Wälde and N'Di (1996:221).

<sup>700</sup> As in the arbitration *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation (OPIC)*, at 280.

<sup>701</sup> *CMS Gas Transmission Company v. The Argentine Republic*, paras. 145-151 and 161-162.

<sup>702</sup> Leben (2003:266-267); Wälde and N'Di (1996:261).

but they are not under an obligation to reach an agreement.<sup>703</sup> Economic equilibrium clauses may also empower arbitrators to determine adjustments to the contract if negotiations fail.<sup>704</sup>

In recent years, use of economic equilibrium clauses has increased, compared to other types of stabilization clauses such as freezing clauses,<sup>705</sup> mainly because of their greater flexibility and versatility.<sup>706</sup> Despite their relative decline, freezing clauses are still used, however. A recent survey of stabilization clauses found that freezing clauses are particularly common in sub-Saharan Africa, specifically in the extractive sector.<sup>707</sup> This may be due to the higher perceived regulatory risk in this continent.

But as with all contract negotiations, the balance of negotiating power between investors and host states is key. Stabilization clauses emerged at a time (until the 1960s) when investors in the natural resource sector enjoyed superiority in negotiating power over host states, linked to access to technology, resources, skills, know-how and information. Weakness of negotiating power, combined with the desire to attract investment, made host states sign up to stabilisation clauses.<sup>708</sup> While the fact that stabilization clauses are rarely used in contracts with Western states reflects the greater trust that investors may have in the domestic legal system of these states, it also reflects differences in the negotiating power of developed and developing countries vis-à-vis private investors.<sup>709</sup>

In addition, the very concept of stabilization clauses reflects the investors' awareness of the shifting balances of negotiating power characterising natural resource projects (captured in the notion of "obsolescing bargain"). For the investor,

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<sup>703</sup> See Berger (2003:1363-1368). See also Bernardini (1998:419).

<sup>704</sup> Bernardini (1998:420-421); Berger (2003:1370-1378).

<sup>705</sup> Cameron (2007:96).

<sup>706</sup> Maniruzzaman (2007:77).

<sup>707</sup> Shemberg (2008), para. 75.

<sup>708</sup> Wälde and N'Di (1996:222-223).

<sup>709</sup> Wälde and N'Di (1996:222-223).

stabilization clauses are a tool to attempt to “freeze” the contractual relationship as it is defined at the project stage - contract negotiation - in which the investor enjoys greater negotiating power. In other words, it is a tool to prevent host state action that, capitalising on the growing negotiating power of the host state over the duration of the project, seeks to alter the contractual relationship to the detriment of the investor.<sup>710</sup>

Stabilization clauses are also seen as important by lenders, particularly in project finance transactions.<sup>711</sup> Lenders are interested in a secure stream of revenue to ensure timely debt repayment. Host state regulatory change that undermines projected cash flows may affect the debt repayment schedule. Because of this, lenders may require tight stabilization clauses as a condition for the “bankability” of the project - which in turn increases pressure on the investor to extract such clauses from the host state.

The analysis in chapters 3 (section 3.3.2.3) and 4 (section 4.3.1) suggests that while stabilization clauses, even of the “freezing” kind, ultimately cannot prevent government interference, their breach creates an obligation to compensate, and their presence must be taken into account in determining the amount of compensation.

#### *5.3.2.2. Stabilization clauses in the Chad-Cameroon contracts*

Freezing, consistency and economic equilibrium clauses feature in the contractual arrangements for the Chad-Cameroon oil development and pipeline project. The COTCO-Cameroon Convention of Establishment commits the government of Cameroon to guarantee “the stability of the legal, tax, customs and exchange control regime” applicable to the project (Article 24(1)). This stabilization clause goes on to state:

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<sup>710</sup> Wälde and N'Di (1996:231). On “obsolescing bargain”, see section 2.3.3.4.

<sup>711</sup> Wälde and N'Di (1996:228-229). See also section 2.3.2.



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

Where COTCO is of the opinion that a legislative, regulatory or administrative measure which has been taken by the Republic of Cameroon adversely affects the rights and obligations of COTCO, Shareholders, Affiliates, Contractors, Sub-Contractors, Shippers or Lenders arising from this Convention, COTCO has the right to request that such measure not apply to the persons mentioned above with respect to activities undertaken under this Convention”.<sup>712</sup>

Article 30 of the COTCO-Cameroon Convention features a consistency clause. It states that Cameroonian legislation applies only if “not contrary to nor inconsistent with” the provisions of the Convention (article 30(2)). Similarly, while the applicable legal regime is defined by Law No. 96-14 of 1996 and its implementing regulations in force at the date of signature of the Convention as well as by the Convention itself, the provisions of the Convention prevail in case of conflict (article 30(1) of the Convention).

Similar provisions (though with significant variants) are included in the COTCO-Chad Convention of Establishment (article 21(3) and 21(5)) and in the 1988 and 2004 *Conventions de Recherches, d’Exploitation et de Transport des Hydrocarbures* between Chad and the oil consortium (article 34).

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<sup>712</sup> Article 24(2) and (3), emphasis added.

The TOTCO-Chad Convention of Establishment differs from the COTCO-Cameroon Convention because it combines use of freezing and economic equilibrium clauses. While under the first paragraph of article 21(3) of the Convention the government of Chad “guarantees” that no regulatory change adversely affecting TOTCO’s rights and economic benefits will be applied to TOTCO without its consent (similarly to the typical structure of freezing clauses), the last paragraph of the same article states that if such regulatory change intervenes without TOTCO’s consent then the parties must agree the necessary modifications to ensure that TOTCO enjoys the same financial conditions, charges and obligations as well as the same economic rights and benefits (along the lines of a typical economic equilibrium clauses). In addition, article 21(5) of the same Convention contains a consistency clause, whereby in case of contradiction or inconsistency between the Convention and the laws of Chad, the provision of the Convention prevail.

It is worth noting that the hybrid freezing/economic equilibrium clause included in the 1998 TOTCO-Chad Convention refers to regulatory change intervened after 1988 – i.e. after the signature of the 1988 *Convention de Recherches, d’Exploitation et de Transport des Hydrocarbures* between the consortium and Chad. This is 10 years before the signature of the TOTCO-Chad Convention containing the clause, which therefore appears to “freeze” applicable Chadian law not as it was in force at the time of signature but as it existed when the petroleum project began.

Following its amendment in 1997, a virtually identical hybrid freezing/economic equilibrium clause features in article 34(3) of the 1988 *Convention de Recherches, d’Exploitation et de Transport des Hydrocarbures* between the consortium and the government of Chad, while article 34(4) of the same Convention features a consistency clause. The 1997 amendment to the 1988 *Convention de Recherches, d’Exploitation et de Transport des Hydrocarbures* also inserted an article 34(5) that specifically stabilises the applicable law with regard to relevant international treaties. This provision reads:

“The Republic of Chad be responsible, in the exercise of its powers as State signatory of the UDEAC<sup>[713]</sup> Treaty or any other treaty or international convention, that no existing or future commitment made by it within the framework of such a treaty which may have the effect of aggravating, directly or as a consequence, the obligations and responsibilities imposed by this Convention or that would be likely to conflict with any of the measures of this Convention, is implemented within the framework of this Convention.

In the scenario where such implementation cannot be avoided, the Republic of Chad agrees to maintain the rights and economic advantages of the Consortium and its shareholders in the way in which they result from this Convention. For this purpose, the Economic and Fiscal Measures of this Convention shall be amended where necessary”.<sup>714</sup>

Finally, the 2004 *Convention de Recherches, d'Exploitation et de Transport des Hydrocarbures* between Chad and oil consortium, relating to the expansion of petroleum activities in new fields (“*Permis Chari Ouest, Chari Est, Lac Tchad*”), features an article 34(3) and (5) with virtually identical wording to the 1988 Convention, as amended in 1997.

#### ***5.2.4. Implications for host state regulation to strengthen local property rights***

Host state regulation strengthening local resource rights affected by an investment project may well fall within the scope of a broad stabilization clauses where regulatory change raises project costs - for instance, due to tighter requirements on compensation for takings of property, or to new local consultation requirements.

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<sup>713</sup> *Union Douanière et Economique des Etats de l'Afrique Centrale* (Customs and Economic Union of Central Africa).

<sup>714</sup> Article 34(5), unofficial translation.

The clauses used in the contracts for the Chad-Cameroon project go beyond tax or other specific matters to include *any* regulatory change that may adversely affect the investment – including, in principle, regulation to strengthen local property rights. Their formulation is not limited to arbitrary (e.g. discriminatory) regulatory change alone. In addition, the 1988 and 2004 concession contracts with Chad specifically include regulatory change linked to existing or future commitments under international *treaties* – which would seem to include, in principle, human rights treaties.

The likelihood of regulatory measures falling within a stabilization clause is even greater given recent arbitral announcements on the interpretation of stabilization commitments. In *Duke v. Peru*, the arbitral tribunal found that a tax-stabilization commitment covered not only amendments to the tax law, but also changes in its interpretation and application. The latter includes not only clear departures from duly established administrative practice, but also, lacking clearly discernible earlier practice, “patently unreasonable or arbitrary” interpretation or application - even in absence of actual *changes* in interpretation.<sup>715</sup>

As with regulatory takings, establishing whether a measure strengthening local property rights affects the economic equilibrium in a way that triggers the application of a stabilization clause is a matter of case-by-case analysis. Such assessment is likely to depend not only on the formulation of the stabilization clause, but also on the economic impact of the regulatory change.

But compared to the regulatory taking doctrine and despite significant variation across contracts, stabilization clauses tend to significantly lower the threshold beyond which host states must pay compensation.<sup>716</sup> Freezing clauses require payment of compensation for regulatory change regardless of the scale of its impact.

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<sup>715</sup> Para. 227.

<sup>716</sup> See Wälde and N'Di (1996:243).

Economic equilibrium clauses entail a shift from “substantial deprivation” of property rights to lesser impacts on the economic equilibrium of the project. Even the standard of “material impact”, used in some economic equilibrium clauses (though not in the hybrid freezing / economic equilibrium clauses featuring in the contracts with Chad),<sup>717</sup> appears to be significantly lower than the “substantial deprivation” test. What is required for this threshold to be met is not government interference that affects the very viability of an investment project but, rather, less intrusive forms of government action that affect the cost-benefit equilibrium of the investment.

Concerns about a possible “regulatory chill” flowing from stabilization clauses were first brought to the fore by Amnesty International UK (2003) with regard to the Baku-Tbilisi-Ceyhan (BTC) oil pipeline, which runs from Azerbaijan to Turkey. The HGAs for the BTC pipeline contain very broad stabilization clauses, and explicitly include social and environmental standards. For example, article 7(2) of the BTC-Turkey HGA<sup>718</sup> requires the government of Turkey to restore the economic equilibrium if this is affected “directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in Turkish Law (*including any Turkish Laws regarding Taxes, health, safety and the environment*) [...], including changes resulting from the amendment, repeal, withdrawal, termination or expiration of Turkish Law, the enactment, promulgation or issuance of Turkish Law, the interpretation or application of Turkish Law (whether by the courts, the executive or legislative authorities, or administrative or regulatory bodies) [...]” (article 7(2)(xi), *emphasis added*). Similar provisions are contained in articles 7(2), 9 and 20 of the BTC-Georgia HGA and of the BTC-Azerbaijan HGA.

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<sup>717</sup> See for example article 36 of the International Project Agreement for the West African Gas Pipeline, concluded on 22 May 2003 between Benin, Ghana, Nigeria, and Togo, on the one hand, and the West African Gas Pipeline Company Ltd, on the other.

<sup>718</sup> Host Government Agreement between the Government of Turkey and the MEP Participants, 19 October 2000.

The BTC clauses are very broad in that: 1) they define regulatory change in very broad terms, to encompass not only legislation but also judicial or administrative interpretation of existing legislation (and article 7(2)(vi) explicitly includes ratification of international treaties); 2) they cover both general legislation and discriminatory measures that target the investment project; and 3) they explicitly include regulation in health, safety and environmental matters.

In its report on the BTC pipeline, Amnesty International UK pointed out that, as a result of these clauses, if Turkey was to introduce a legal aid scheme to assist landowners affected by construction works “and ensure fairness in the process of land acquisition, then any resulting delay could well interfere with the economic equilibrium of the project, triggering the compensation clause in the [Host Government Agreement]. Turkey would have to pay a high price to the consortium if it wanted to secure fair compensation for the affected landowners and users”.<sup>719</sup>

Following that report, Amnesty International UK published another report that specifically looked at the stabilization clauses included in the Chad-Cameroon project. The report concluded: “[t]he stabilising conditions of the project agreements are sufficiently vague that they could be used in an attempt to undermine the requirement of progressive realisation of human rights. The agreements could discourage Chad and Cameroon from taking positive steps that would impose costs on the consortium without its consent, even if such steps are intended to advance human rights. Human rights law requires governments to take steps to improve people’s healthy environment and working conditions. At the same time, Chad and Cameroon are threatened under the investment agreement with penalties for breaching the ‘stabilisation of law’ provisions” (Amnesty International UK, 2005:30).

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<sup>719</sup> Amnesty International UK (2003:17-18).

A textual analysis of the Chad-Cameroon stabilization clauses confirms that measures to advance the human right to property or other human rights relevant to protecting the property rights of people affected by the project may well fall within the open wording of the Chad-Cameroon stabilization clauses. However, it is difficult to assess in abstract terms the extent to which the Chad-Cameroon stabilization clauses would have been triggered by measures that Chad or Cameroon could have adopted to strengthen local property rights during pipeline construction; or may still be triggered by measures that Chad may adopt to strengthen local property rights in the continuing and expanding petroleum operations in the South of the country.

In this project, compensation costs only constituted a tiny percentage of the overall project cost (0.1% according to Magrin and van Vliet, 2005:91). As a result, regulatory measures increasing compensation costs would seem unlikely to significantly affect the economic equilibrium of the project. But the Chad-Cameroon stabilization clauses do not require that impacts on economic equilibrium be “material”: even minor impacts would trigger the application of these clauses.

In addition, besides regulatory interventions that would raise compensation costs, other measures that would have the effect of slowing down project implementation (such as the introduction of new consultation requirements beyond those embodied in the Environmental Management Plan) may well result in delays capable of affecting the economic equilibrium, and may thus trigger the stabilization clauses.

This suggests that if, for example, the government of Chad was to adopt regulation to strengthen local property rights, including to comply with new requirements flowing from possible future ACHPR case law on the human right to property; if it was to apply such regulatory change to petroleum operations under the two

concession contracts; and if this was to adversely affect the project;<sup>720</sup> then the government of Chad would have to restore the economic equilibrium of the contract, or to compensate the consortium for the economic impact of such regulations. The wording of the stabilization clauses in the 1988 and 2004 concessions is such that ultimately it will be up to the consortium to choose whether or not to invoke those clauses.

The particular nature of this investment project, specifically with regard to the involvement of the World Bank's IBRD and IFC, may make it more unlikely that the consortium will rely on these provisions to challenge host state regulation aimed at advancing human rights. Following the evaluation report commissioned by the IFC and the consortium (Barclay and Koppert, 2007), which identified shortcomings in the resettlement and compensation programme for the oilfield area of Southern Chad,<sup>721</sup> the consortium issued a "Land Use Mitigation Action Plan" (EPCCI, 2007b). Among other things, this plan provides for measures to reduce land use impacts;<sup>722</sup> for improvements in individual and community compensation;<sup>723</sup> for a new compensation entitlement for third-party resource users that provide land to people affected by the project;<sup>724</sup> and for broader provision of replacement land for individual or village land taken.<sup>725</sup>

These improvements are a direct response to the recommendations of the evaluation report, and are meant to ensure full compliance with the original EMP. In some cases, however, they require additional funds, for instance for compensation and information dissemination.<sup>726</sup> In spite of this, reliance on stabilization clauses was not an issue here - not least because the improved regime originated from a report

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<sup>720</sup> The application of higher-than-national-law standards as a result of the World Bank's involvement reduces the likelihood of this happening in this specific project.

<sup>721</sup> See section 4.4.2.

<sup>722</sup> At 16-19.

<sup>723</sup> At 26 and 27-28.

<sup>724</sup> At 26.

<sup>725</sup> At 19-20.

<sup>726</sup> At 20. Lack of precise figures in the plan makes it difficult to have a sense of the scale of these additional costs.



commissioned by the IFC and the consortium itself, rather than from host state regulation. And indeed, it is not possible to infer from the consortium's response in this case how it might react to host state regulation that would unilaterally and normatively strengthen affected local resource rights.

While stabilization clauses may require payment of compensation for measures that fall short of the regulatory taking test, the amount of compensation payable for breach of a stabilization clause is not necessarily comparable to that payable for a regulatory taking. By definition, a regulatory taking entails a substantial deprivation of property rights, and the amount of compensation reflects this. On the other hand, stabilization clauses may trigger payment of compensation for lesser interferences in the economic equilibrium of the contract. Apart from extreme cases where breach of a stabilization clause amounts to expropriation, the aim is to compensate the investor not for a full expropriation, but for the actual damage suffered.<sup>727</sup> Compensation for lesser breaches of stabilization clauses is therefore likely to be lower than compensation for takings. On the other hand, in cases involving a regulatory taking, the existence of a stabilization clause may increase the amount of compensation for the taking beyond what would be payable under general international law, due to the legitimate expectations that such a clause generates.<sup>728</sup>

Overall, the foregoing analysis suggests that broad stabilization clauses may make it more difficult for host states to adopt measures strengthening local property rights, including as they are affected by foreign investment projects. This is because adopting such measures may require the host state to compensate investors. This requirement may place a significant burden on least developed countries with public finances in poor health. The result may be a "regulatory chill" on efforts to

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<sup>727</sup> In *Duke v. Peru*, the arbitral tribunal held that an investor suffering damage for breach of a tax-stabilization commitment is "entitled to be made whole for the damages suffered" (para. 458; on the ensuing calculation of the quantum, see paras. 460-488).

<sup>728</sup> See e.g. *Liamco*, at 196-202; and *Aminoil*, paras. 148-149 and 158-159.

strengthen local property rights, including as they are affected by ongoing investment projects.

Alternatively, host states may exclude ongoing investment projects from the application of the regulatory change. In other words, they may still adopt new regulation but insulate investment projects covered by stabilization clauses. This method raises issues for the coherence of the overall legal framework, as similar investment projects may be governed by different rules. It raises problems in light of two factors:

- The often considerable size of investment projects where wide-ranging stabilization clauses are used, both in economic terms relative to the host state's national economy, particularly in poorer developing countries, and in terms of possible social impacts including land takings;<sup>729</sup> and
- The usually long duration of investment contracts, possibly spanning several decades (for example, twenty-five years renewable in the COTCO-Cameroon and TOTCO-Chad Conventions<sup>730</sup>).

As a result of these two factors, applying new regulation only to future investment projects may delay the application of that regulation to a major share of economic activity for several decades.

From a human rights perspective, a selective application of regulatory change that ensures better protection of the right to property would also raise issues of consistency with the non-discrimination principle enshrined in human rights

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<sup>729</sup> See, for instance, the considerable importance of the Chad-Cameroon pipeline project for the national economy of Chad and the important concerns raised by civil society on the project's social standards in both Chad and Cameroon, discussed above.

<sup>730</sup> In addition, in the TOTCO-Chad Convention regulating the construction and operation of the Chadian segment of the Chad-Cameroon oil pipeline, applicable Chadian law is "frozen" at the date of signature of the 1988 Convention regulating petroleum operations in the oilfields, i.e. 10 years before the signature of the TOTCO-Chad Convention. As a result, the regulatory framework is effectively frozen for a total of 60 years (10 years, plus 25 years automatically renewable once).

treaties, as citizens more directly affected by an ongoing investment project would be granted a lower level of protection than others.<sup>731</sup>

Whether the outcome is “regulatory chill” or “selective regulation” that excludes ongoing investment projects, the operation of stabilization clauses may constrain the strengthening of local property rights affected by an investment project. This is particularly problematic in poorer developing countries where the national legal framework setting social and environmental standards at project inception may be not well developed. As discussed, Chad’s legislation regulating land takings dates back to the 1960s, is unclear in its formulation, and provides very limited protection against takings. In the Chad-Cameroon project, only the need to comply with the World Bank’s safeguard policies entailed the application of higher standards.

In making it more costly for host states to strengthen local property rights in line with evolving international law,<sup>732</sup> broad stabilization clauses may trigger tensions between different host government obligations — namely between the obligation to honour contractual commitments (*pacta sunt servanda*), possibly backed by umbrella clauses embodied in investment treaties, on the one hand, and the obligation to comply with evolving international human rights law, including its provisions on the right to property and other human rights relevant to local property rights, on the other.

In practice, legal claims are only part of the story in the long-term contractual relationships that typically characterise investment projects. Much depends on the balance of negotiating power between the different stakeholders involved in the project - foreign investors and host states, but also lenders, NGOs, local groups affected by the project, and others. Recent experience with renegotiation of

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<sup>731</sup> As argued by Amnesty International UK (2003:80).

<sup>732</sup> For instance, if the African Court on Human and Peoples’ Rights was to interpret article 14 of the African Charter as implicitly requiring payment of compensation along specified standards; see section 5.1 above.

investment contracts, particularly in the oil and gas sector, illustrates that even tight stabilization clauses may not prevent host state action backed by political determination and changes in the balance of negotiating power.<sup>733</sup>

These considerations on negotiating power do not affect the relevance of the above discussion on the constraints on host state regulation established by stabilization clauses. Legal claims based on stabilization clauses provide “markers”, “magnetic points” that may be relied on by the investor, thereby influencing its negotiating power and possibly affecting negotiation outcomes.<sup>734</sup> Although stabilisation clauses cannot ultimately prevent host state regulation or even expropriation, the fact that the investor is likely to obtain compensation should the dispute go to arbitration tends to strengthen the investor’s negotiating power. In other words, stabilization clauses “have a ‘functional value’ in that they strengthen the private contractor’s bargaining position. When a government knows that it will be publicly embarrassed by an arbitral ruling upholding the stabilisation clause and giving it its full effect, it will be willing to compromise”.<sup>735</sup>

More specifically, using concepts developed by Tai-Heng Cheng (2005), I would argue that broad stabilization commitments tend to shift negotiating power from the host state to the investor through the four types of process discussed in section 3.4 above: “trigger”, whereby investors are vested with enforceable entitlements; “drain”, whereby the exercise of state sovereignty is constrained as a result of those entitlements; “transfer”, whereby the power lost by host states does not “vanish” but is devolved to other actors such as foreign investors or arbitral tribunals; and “restore”, whereby the host state can ultimately restore its power (for instance through payment of compensation), but at a price that can be quite steep.<sup>736</sup>

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<sup>733</sup> See section 2.3 above.

<sup>734</sup> Wälde (2008:85). See also the concepts of “bargaining endowments” and of “bargaining in the shadow of the law”, developed by Mnookin and Kornhauser (1979:968) and discussed in section 2.3 above.

<sup>735</sup> Verhoosel (1998:456).

<sup>736</sup> Cheng (2005:470-499).

Besides relations between investor and the host state, stabilization clauses may affect other aspects of the balance of negotiating power, in a way that may also make new regulation more unlikely. First, governments are not monolithic entities - different agencies and even officials may have different agendas. For example, the ministries responsible for environmental protection and for petroleum operations, or the national oil company, may have different takes on new regulation proposals. The obligation to pay compensation under broad stabilization commitments may provide ammunition to those agencies resisting regulatory change, and undermine the negotiating power of those that are pushing for it.

The obligation to pay compensation may also affect negotiations between the host state and NGOs calling for tighter social standards to be applied to the investment project. The host state may more easily resist NGO demands by claiming that it has “tied hands” as a result of its contractual obligations. This is particularly an issue where, lacking genuine commitment to improving social and environmental standards, the host state is ready to use these concerns as a lever for renegotiating the distribution of control and economic benefits; but also to drop pursuit of those concerns once its higher-priority economic objectives are achieved.

#### ***5.2.5. Concluding remarks***

This analysis suggests that, from a legal point of view, the regulatory taking doctrine and stabilization clauses may create a “regulatory chill” in applicable social standards, thereby making it more difficult for host states to strengthen local property rights affected by the investment. The regulatory taking doctrine would only apply to rather extreme factual circumstances - although the US case *United Nuclear Corp. v. US* shows that this doctrine may still apply to regulatory change that strengthens local property rights. But the higher level of regulatory stability provided by the stabilization clauses analysed in this section has more far-reaching

implications, as it significantly lowers the threshold that triggers the obligation to compensate.

This conclusion does not change when the analysis of legal claims is brought together with an analysis of evolving power relations among stakeholders involved in an investment project, as the obligation to compensate may affect the balance of negotiating power between investor, host state and other stakeholders.

This obligation to compensate may create disincentives for host states, particularly poorer ones, to adopt regulation that strengthens local property rights, including as they are affected by investment projects. This may be particularly problematic where regulatory change is required by evolving international human rights law – for instance, if the African Court on Human and Peoples’ Rights was to clarify the content of article 14 of the African Charter as implicitly requiring payment of compensation for takings of property.

To frame it in the wording of the “second leg” of the core research question,<sup>737</sup> not only does applicable law tend to provide stronger legal protection to the property rights of foreign investors (as discussed in chapters 3 and 4); but it may also make it more difficult for host states to take measures that strengthen local property rights affected by an investment project.

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<sup>737</sup> See section 1.1.

### 5.3. Possible ways forward: Reconciling stability for foreign investment with strengthening local resource rights<sup>738</sup>

Investment contracts are carefully negotiated deals. Their provisions define a delicate economic equilibrium shaped by the allocation of rights, obligations and risks. The contract would be undermined if one of the parties could rely on a different body of law (including international law) to alter that equilibrium in an arbitrary way.

At the same time, freezing the regulatory framework, or requiring the host state to bear the costs of regulatory change, would lead to unsatisfactory situations where regulatory change is required by evolving international (human rights) law. This situation requires exploring options to reconcile the regulatory stability provided by stabilization clauses, itself a legitimate need for investors, with the need to enable measures strengthening local property rights if such measures are required by changes in applicable international law.

This section explores two such options: (1) limiting the scope of stabilization clauses through an explicit or implicit “compliance with international law” exception; and (2) adopting an evolutionary approach to the application of contract provisions, including stabilization clauses. These two options are complementary and mutually reinforcing. Their adoption would redefine the legal claims of the investor and the host state; but also, indirectly, shift the balance of negotiating power between these stakeholders. As a result, these options may ease some of the constraints on host state regulation discussed in the previous section.

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<sup>738</sup> This section builds on and further develops: Lorenzo Cotula, 2006, “Stabilization Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts”, 17 *Yearbook of International Environmental Law*; Lorenzo Cotula, 2008, “Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses”, 1(2) *Journal of World Energy Law & Business* 158-179; and Lorenzo Cotula, forthcoming, “Regulatory Takings, Stabilization Clauses and Sustainable Development”, *Journal of Investment Law*.

### *5.3.1. Limiting the scope of stabilization clauses*

The first option entails limiting the scope of stabilization clauses through exempting some types of host state regulation from their remit. Contractual practice with stabilization clauses developed as an attempt to shelter investors from arbitrary host state interference at a time when the bulk of the investment is made and the balance of negotiating power shifts in favour of the host state. Yet the gradual broadening of the scope of stabilization clauses has brought within their remit much more than just arbitrary treatment. The stabilization clauses used in the contracts for the Chad-Cameroon project are in no way limited to arbitrary (e.g. discriminatory) regulatory change. And as discussed, the clauses used in the BTC HGAs *explicitly* include both discriminatory treatment and regulation of general application.

A first way of reconciling regulatory stability with evolution in applicable social standards, including with regard to the protection of affected property rights, entails rolling back the scope of stabilization clauses to their original focus on arbitrary treatment. At the very minimum, this entails excluding regulation that genuinely pursues a public purpose from the remit of these clauses - even more so where such regulation is required by evolving international law.

The merits of this approach have first been discussed by Leader (2006). According to this author, state sovereignty is limited by the international obligation to realize fundamental human rights. In providing commitments to the investor, the host state cannot impair the human rights held by individuals and groups that may be affected by the investment project. Therefore, stabilization clauses are valid and with legal effect, but their scope is restricted in that they cannot impair the human rights held by third parties; and they cannot prevent genuine host state action to progressively realize human rights. In other words, this approach entails building a human rights exception into stabilization clauses, whether explicitly or implicitly;



host state regulation to promote the full realization of human rights is outside the scope of the stabilization clause.<sup>739</sup>

This approach may be broadened beyond the human rights field to encompass a broader range of international law obligations. It is accepted that host states may commit themselves not to exercise their sovereign *rights*, such as the right to nationalise. This argument was central in the reasoning developed by the *Texaco* arbitrator to reconcile stabilization clauses with state sovereignty.<sup>740</sup> It must also be accepted, however, that states may not contract out of compliance with their *obligations* under international law. Indeed, it is well established in international law that state sovereignty is not unlimited, but qualified, among other things, by international obligations concerning for example the realisation of human rights and the protection of the environment.<sup>741</sup> Therefore, states cannot commit themselves not to exercise rights they do not have – such as a right to exercise sovereignty in a way that does not take account of international obligations. In other words, states cannot commit themselves not to take measures that they are required to take under international law. On the basis of this reasoning, the scope of stabilization clauses is limited by a “compliance with international law” exception, whether explicitly or implicitly.

Another basis for integrating a human rights exception into stabilization clauses relates to the responsibility of business entities to respect human rights: compliance with evolving international human rights law is not only a legal obligation of host states, but also a responsibility of investors.<sup>742</sup>

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<sup>739</sup> *Leader* (2006:663-665 and 676-677).

<sup>740</sup> *Texaco v. Libya*, paras. 59, 66-68 and 73.

<sup>741</sup> In environmental matters, this is explicitly stated in Principle 2 of the 1992 Rio Declaration on Environment and Development.

<sup>742</sup> As reflected in the preamble of the UDHR, which refers to the “responsibility” of “other organs of society” .

This is affirmed in the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, a soft-law instrument adopted in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights. The Norms refer to a range of internationally recognised human rights, including the right to adequate food (section 12). Differently to earlier instruments,<sup>743</sup> they are not drafted as voluntary guidelines, as they purport to draw on existing international law (section 1);<sup>744</sup> however, the UN Human Rights Council regards them as a draft proposal with no present legal standing.<sup>745</sup>

The 2008 report of the UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises provides a conceptual framework for the business and human rights nexus. It reaffirms the “responsibility” of business to “respect” human rights, including through integrating human rights policies throughout business activities (which would encompass contractual negotiations with government).<sup>746</sup>

An example of *explicit* exception is provided, outside the African context, by the 2003 BTC Human Rights Undertaking. The undertaking is a unilateral commitment of the BTC consortium not to interpret the above-mentioned, sweeping stabilization clauses included in the BTC HGAs in a way that prevents host state regulation from pursuing human rights goals. The undertaking was published by the BTC

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<sup>743</sup> The OECD Guidelines for Multinational Enterprises 2000 state that enterprises “should”, among other things, “respect the human rights of those affected by their activities”; and “refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues” (General Policies 2 and 5).

<sup>744</sup> Resolution 2003/16 of 13 August 2003, UN Doc. E/CN.4/Sub.2/2003/L.11. On the UN Norms, see for instance de Schutter (2005:420-422 and 433-434), Vazquez (2005) and Muchlinski (2008b:654-642).

<sup>745</sup> Muchlinski (2008b:657-658).

<sup>746</sup> “Protect, Respect and Remedy: A Framework for Business and Human Rights”, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 7 April 2008, Doc. A/HRC/8/5, <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>, paras. 51-81, especially para. 62.

consortium as a response to pressure from human rights and environmental groups (including Amnesty International UK, 2003). While the undertaking is a unilateral commitment on the part of the consortium, it “constitutes a legal, valid and binding obligation” and cannot be revoked without the consent of the host states.<sup>747</sup>

Under the undertaking, the BTC consortium commits itself not to assert claims that are inconsistent with host state regulation, provided that this is “reasonably required by international labour and human rights treaties to which the relevant Host Government is a party from time to time [or] otherwise ... required in the public interest in accordance with domestic law in the relevant Project State from time to time, provided that such domestic law is no more stringent than the highest of European Union standards as referred to in the Project Agreements, including relevant EU directives ... those World Bank standards referred to in the Project Agreements, and standards under applicable international labour and human rights treaties”.<sup>748</sup>

The undertaking also commits BTC not to seek compensation under the economic equilibrium clause “in connection with ... any action or inaction by the relevant Host Government that is reasonably required to fulfil the obligation of the Host Government under any international treaty on human rights (including the European Convention on Human Rights), labour or [health, safety, and environmental standards] in force in the relevant Project State from time to time to which such Project State is then a party”.<sup>749</sup>

The BTC Human Rights Undertaking is an innovative tool seeking to ensure stability in the investment climate without jeopardising the ability of host states to adopt legislation in pursuit of human rights goals. It does not repeal the broad

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<sup>747</sup> The Baku-Tbilisi-Ceyhan Pipeline Company, “BTC Human Rights Undertaking,” 22 September 2003, sections 3(e) and 6. On the BTC Human Rights Undertaking, see de Schutter (2005:416); and Leader (2006:700-702).

<sup>748</sup> BTC Human Rights Undertaking, section 2(a).

<sup>749</sup> *Ibid.*, section 2(d)).

stabilization clauses embodied in the BTC HGAs. However, it commits the BTC consortium not to invoke these clauses against any regulatory measures that are genuinely pursuing human rights or environmental goals.

It is interesting to note that the BTC Undertaking itself makes no explicit reference to limiting the scope of the stabilization clause to arbitrary treatment alone. In practice, its provisions can still be used to distinguish arbitrary action from interventions that genuinely pursue a public purpose. First, the undertaking requires that regulation be “reasonably required” to comply with international obligations or to meet a public need. While this expression is admittedly vague, it can provide a legal basis for discerning the public purpose or arbitrariness of state action.

Second, the undertaking refers to international treaties as a benchmark to define whether government action falls within the “exception” established by the undertaking. In other words, new human rights or environmental regulation is within the scope of the exception only if it is in line with international standards. This is important to the investor since introducing exceptions to the stabilization clause creates the risk that such exceptions are used by the host state as a “Trojan horse” to introduce measures harming the investment project with only minimal links to (real or spurious) human rights or environmental concerns.

At the same time, the formulation of the undertaking effectively sets a cap on host state regulation: the host state is exempted from the obligation to compensate only if the regulatory change does not go beyond internationally recognised standards. This may not be an issue in countries where domestic legislation is significantly below international standards. But it may cause problems in areas where international standards themselves are not well developed - which is the case of the international protection of the right to property in Africa. It may also cause problems in cases where host state need to respond quickly to new (or newly

discovered) social or environmental hazards which are not yet tackled by international standards.

In addition, the undertaking is an ex-post tool, which was negotiated only *after* a very broad stabilization clause had been signed, and as a result of civil society mobilization against that clause. While the undertaking does emphasize its binding nature, questions remain as to the value that international arbitrators would attach to it should a dispute arise. This is particularly so given that, far from being a mutually agreed amendment to the investment contract, the undertaking is a unilateral commitment entered into by the investor alone. Arguably, integrating a “compliance with international law” exception in the contract itself and during the negotiation phase would have been a preferable solution.

An interesting example of this solution is provided by the economic equilibrium clause included in Mozambique’s Model Exploration and Production Concession Contract 2008. This specifically excludes non-discriminatory legislation concerning the protection of health, safety, labour or the environment, or the regulation of any category of property or activity - provided that social and environmental standards embodied in such legislation are “reasonable and generally accepted in the international petroleum industry”.<sup>750</sup>

It is interesting to note that Mozambique’s Model Concession Contract explicitly refers to discrimination as a ground for discerning what is within or without the scope of the stabilization clause (differently to the BTC contracts, which explicitly include non-discriminatory regulation). In Mozambique’s Model Concession Contract, the key factors to consider when determining whether a new regulatory measures falls within the exception are: 1) whether it is discriminatory; 2) whether it relates to specified issues, namely the protection of health, safety, labour or the environment, or the regulation of property (which would seem to include measures

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<sup>750</sup> Article 27(13).

to strengthen the protection of affected local property rights); 3) whether the measure is “reasonable” and its standards are generally accepted in the international petroleum industry.

The BTC undertaking and Mozambique’s Model Exploration and Production Concession Contract illustrate ways of building explicit exceptions into stabilization clauses, whether *ex post* or *ab initio*. Explicit exceptions of this type remain rare - they are not included, for instance, in the Chad-Cameroon contracts. However, a “compliance with international law” exception must be deemed to have been included implicitly even in stabilization clauses where it does not feature expressly. This follows from the recognition that while host states can use stabilization clauses to commit themselves not to exercise their sovereign rights, they cannot use them to avoid compliance with their international obligations – as discussed above. In other words, what host states can commit themselves to with stabilization clauses is limited by their obligations under international law - including international human rights law.

At the very minimum, this implicit exception must be deemed to include changes in applicable standards flowing from the crystallisation of new norms of customary international law, and from the clarification or progressive development of the host state’s existing treaty obligations (e.g. through the case law of the African Court on Human and Peoples’ Rights). It should also include changes stemming from the ratification of treaties produced by international organisations of which the host state is a member - such as the United Nations or the African Union. Indeed, although the host state is strictly speaking not under an international obligation to ratify a treaty, doing so may be part of its responsibilities as member of the relevant organisation - membership that was (or should have been) well known to the investor when negotiating the investment contract.

While a “compliance with international law” exception limits the scope of stabilization clauses even where it is not explicitly stated, express formulation is likely to improve clarity and certainty in contractual relations - not only with regard to the existence of such exception but also to its scope and conditions. Both the investor and the host state stand to gain from greater clarity and certainty. In this respect, a change in contractual practice is desirable, and the BTC and Mozambique examples may provide a starting point to develop new contractual formulations.

### *5.3.2. Evolutionary approach*

“Compliance with international law” exceptions may be reinforced by another approach to enabling evolution of applicable social standards in investment contracts. This second approach relates to the content and interpretation of stabilization clauses, rather than their scope. It entails privileging those types of clauses that can more easily adjust to changes in applicable standards; and interpreting these clauses in an evolutionary way. This “evolutionary” approach may be used in conjunction with the first one - namely, with regard to changes in applicable standards that are *within* the scope of the stabilization clause.

The evolutionary approach must be clearly distinguished from the “*rebus sic stantibus*” doctrine, whereby agreed commitments may be revised following fundamental changes of circumstances. In relation to treaty (rather than contract) obligations, the latter doctrine is embodied in article 62 of the Vienna Convention on the Law of Treaties, and has been interpreted in a rather restrictive manner. In *Gabčíkovo-Nagymaros*, the ICJ rejected the claim put forward by Hungary that political changes and the emergence of new norms of international environmental law amounted to a fundamental change of circumstances enabling Hungary to withdraw from its treaty obligations towards Slovakia (concerning the construction and operation of a system of dams).

In its judgment, the ICJ held: “A fundamental change of circumstances must have been unforeseen; the existence of circumstance at the time of the Treaty’s conclusion must have constituted an essential basis of the consent of the parties to be bound of the Treaty [...] Moreover, the plea of fundamental change of circumstances [can] be applied only in exceptional cases”.<sup>751</sup> Because of this narrow interpretation, *rebus sic stantibus* is in most cases unlikely to provide a legal basis for regulation in violation of stabilization clauses.

However, having excluded the applicability of *rebus sic stantibus*, the ICJ in *Gabčíkovo-Nagymaros* turned to the issue of evolutionary interpretation. The Court held that, while new legal developments such as the emergence of new norms of international environmental law do not undermine existing treaty obligations, they must be taken into account in the implementation of those obligations. On this basis, the Court called on the parties to enter into negotiations to re-define the infrastructure project, particularly in relation to its environmental dimensions.

This evolutionary approach was followed in the recent *Iron Rhine* arbitration, in which the arbitral tribunal stated that the duty to prevent, or at least to mitigate, environmental harm applies not only to new activities but also to activities undertaken in implementation of existing treaties — in this case, the 1839 Treaty of Separation between Belgium and the Netherlands.<sup>752</sup>

The evolutionary approach applied to treaty obligations in the *Gabčíkovo-Nagymaros* and *Iron Rhine* cases may also be applied to contractual obligations.<sup>753</sup> Thus, following *Gabčíkovo-Nagymaros*, developments in international law are to be taken into account in the implementation of *existing* contractual obligations, particularly through the renegotiation of the terms of the contract.<sup>754</sup> This approach is in line

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<sup>751</sup> *Gabčíkovo-Nagymaros*, at para. 104.

<sup>752</sup> *Iron Rhine*, at para. 59.

<sup>753</sup> As argued by Kolo and Wälde (2004), at section 2.

<sup>754</sup> *Ibid.*, at section 2.



with the logic of economic equilibrium clauses, whereby regulatory change affecting the economic equilibrium of the contract requires the parties to renegotiate the contract with a view to restoring the pre-existing equilibrium.

The reasoning of the *Aminoil* arbitration may take the evolutionary approach even further. In this case, a majority of the arbitral tribunal upheld the binding nature of the stabilization clause and rejected the application of the *rebus sic stantibus* doctrine. However, the majority also recognized that the concession contract at stake “ha[d] undergone great changes since 1948” when it was first signed. In particular, the host state had introduced new elements in the contractual relationship, including successive levy increases and greater host government control in the management structure, and the investor had tacitly acquiesced to these changes. The result was not “a departure from [the] contract” but, rather, “a change in the nature of the contract itself, brought about by time, and the acquiescence or conduct of the Parties”.<sup>755</sup> The stabilization clause, argued the majority, was not isolated from the contract but was part of it. Therefore, the clause lost its “former absolute character”.<sup>756</sup>

In other words, according to this view, the legal force of a stabilization clause is to be assessed on a case-by-case basis, taking into account broader factors such as intervened changes in the contractual relationship based on the conduct and/or acquiescence of the parties.<sup>757</sup> This view broadens the concept of “renegotiation” to include also the combined effects of host government unilateral action and investor acquiescence. It may create some room for manoeuvre for host state regulation inspired by changes in international standards, such as in the areas of human rights law.

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<sup>755</sup> *Aminoil*, at para. 101.

<sup>756</sup> *Ibid.* at para. 100.

<sup>757</sup> See Nassar (1995:136).

Three factors, however, seem to limit the extent to which host states adopting new regulation can rely on this reasoning. First, the *Aminoil* reasoning does not seem to have been followed by international arbitrators to the same extent as those awards following a stricter approach (for example, *Texaco*). In *Aminoil* itself, one of the arbitrators (Sir G. Fitzmaurice) dissented, advocating for a stricter approach. Second, the concession contract at stake in *Aminoil* had a particularly long duration – sixty years. This duration was an important element in the reasoning of the arbitrators, who argued that, because of the restrictions they impose on state sovereignty, stabilization clauses “should only cover a relatively limited period”.<sup>758</sup> This circumstance has been used to distinguish subsequent cases from *Aminoil*, and to justify the application of a stricter approach to interpreting stabilization clauses covering shorter periods.<sup>759</sup> Third, the *Aminoil* approach still requires at least the “acquiescence” of the investor. Purely unilateral host government action actively resisted by the investor would be outside the scope of this approach.

On the other hand, contractual provisions on applicable “industry standards” may facilitate some degree of evolution in the interpretation of the contract. For instance, article 13 of the Cameroon-COTCO Convention of Establishment requires COTCO to conduct construction, operation and maintenance works in accordance not only with domestic legislation as specified in the contract but also with “the international technical and safety standards prevailing in the petroleum industry relating on the one hand to the management and the protection of the environment and on the other hand to the protection of the population”. Formulae of this type are commonly used in foreign investment contracts.<sup>760</sup>

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<sup>758</sup> *Aminoil*, at para. 95.

<sup>759</sup> See, for instance, the concurring opinion of Judge Browner in *Mobil Oil Iran Inc. v. Islamic Republic of Iran*, at para. 14. Here, the duration of the concession was twenty years. On this issue, see also Nassar (1995:136).

<sup>760</sup> For instance, see also article 19(8) of the International Project Agreement for the West African Gas Pipeline, cited above (section 5.2.4).

The weakness of these provisions is their vagueness — the wording is usually elusive and no international standards applicable in the petroleum industry have been clearly defined as yet. As a result, they offer limited or no possibility for enforcement by the host state. These vague investor commitments contrast with the far-reaching commitments that the host state tends to enter into, for instance, through the broad stabilization clauses examined in this study. Yet the elusive wording may also be a strength, as reference to standards external to the contractual relationship introduces an element of flexibility. This flexibility can enable evolution in applicable standards despite broad stabilization clauses. It may be argued that the content of the industry standards referred to in the contract must be defined in light of evolving international law, including human rights provisions relating to the protection of local resource rights affected by investment projects. Although this solution in itself does not enable the host state to regulate in breach of a stabilization clause, it may allow for international standards to apply to the project. It also sets a reference to be taken into account in any contract renegotiation process, and it may strengthen the type of “evolutionary” arguments applied in *Aminoil*, where substantial evolution in the overall contractual relationship within the context of a very long-term contract was held to have affected the strength of the stabilization clause itself.

Compared to freezing clauses, economic equilibrium clauses coupled with flexible environmental standards clauses appear to lend themselves more easily to adjustments in applicable standards aimed at bringing these in line with evolving international law. While freezing clauses aim to “freeze” the regulatory framework applicable to the project, economic equilibrium clauses aim to preserve the economic equilibrium of the contract. Regulatory changes which would violate freezing clauses may still be consistent with economic equilibrium clauses if they do not alter the economic equilibrium of the contract, or if the parties restore that equilibrium once it has been affected. In this sense, economic equilibrium clauses are more conducive to adopting an evolutionary approach than freezing clauses.

This is particularly the case where economic equilibrium clauses feature “de minimis” exceptions that exclude the application of the clause to adverse effects are below a minimum threshold. The requirement that adverse effect be “material” for the clause to be triggered, as under the WAGP IPA cited above, illustrates this. Evolution of applicable standards that affects the project to a lesser extent than what can be deemed to be “material” would not trigger the operation of the clause.

### *5.3.3. Concluding remarks*

This section has discussed practical options to reconcile investors’ legitimate need for regulatory stability with maintaining the capacity of the host state to adopt regulation strengthening affected local resource rights - particularly where regulation is required by evolving international law.

The scope of stabilization clauses must be deemed to be limited by a “compliance with international law” exception. Exceptions may be explicit, as in the BTC Human Right Undertaking and Mozambique’s Model Exploration and Production Concession Contract. But while express formulation improves clarity and certainty, a “compliance with international law” exception must be deemed to exist even in absence of express formulation. An evolutionary approach to formulating and interpreting stabilization clauses may also enable a degree of evolution in social standards - including with regard to the taking of local property rights. This evolutionary approach entails preferring economic equilibrium clauses over freezing clauses; featuring flexible social and environmental standards clauses, as well as more specific ones, in the contract; and building “de minimis” exceptions (e.g. “material” impact) into the threshold triggering the application of economic equilibrium clauses.

These options to reconcile regulatory stability with evolution in social and environmental standards make “business sense”. Integrating an explicit “compliance with international law” exception is good for business because such exception can be deemed to exist even where not explicitly stated in the contract. An explicit exception would increase certainty by clarifying what is within and without the scope of the stabilization clause. It may also provide the opportunity for international benchmarking along the lines of the BTC Undertaking. Similarly, providing for evolution in contract interpretation makes business sense given that in the real world circumstances change, and attempts to freeze the contract are unlikely to go far. The ongoing shift away from freezing clauses towards economic equilibrium clauses exemplifies this.

Looking at stabilization clauses in their broader context requires considering the incentives created by financing arrangements. As discussed, investors may feel under pressure to extract a broad stabilization clause as part of their efforts to raise finance for the project. In this regard, it may be useful to integrate the notion of social and environmental exceptions to stabilization clauses in relevant instruments adopted by lenders, such as the Equator Principles.<sup>761</sup>

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<sup>761</sup> The Equator Principles - A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing (<http://www.equator-principles.com/>).

## **6. Conclusion**

## 6.1. Summary of main findings

### 6.1.1. *Foreign investment, negotiating power and property rights*

In many parts of Africa, economic liberalisation and growing global demand for energy and commodities are expanding foreign investment in natural resource projects such as mining and petroleum. As discussed in section 2.1.3, these trends exacerbate competition for land and natural resources, as outside interest in previously marginal areas increases and as governments make resources available to prospecting investors.<sup>762</sup>

The stakeholder and power analysis of the Chad-Cameroon oil development and pipeline project undertaken in section 2.3.3 suggests that these developments are taking place in contexts characterised by major asymmetries in the balance of negotiating power – including between foreign investors and local resource users, with investors being in a much stronger negotiating position.

These asymmetries are underpinned, among other things, by differences in access to capital and valuable resources, as well as to knowledge, information and skills; by differences in social status and social relations; by differences in the capacity to influence key decision-making processes; and by the co-option of local elites by the government or incoming investors. Power asymmetries are exacerbated by the political economy of the state in Africa, which may result in government officials having a vested interest in not advancing or even in undermining the position of local resource users.<sup>763</sup>

Levers for “countervailing power” may reduce these imbalances, for instance linked to location dependency, reputational risk and project vulnerability to adverse local action. The involvement of international financial institutions and NGOs may also

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<sup>762</sup> The extent to which the ongoing financial crisis may affect increases in investment flows to Africa remains to be seen.

<sup>763</sup> See section 2.3.3 and Table 2.3.

affect the balance of negotiating power - although the extent of this in the long run is limited by the gradual weakening of the negotiating position of these institutions (in line with the notion of “obsolescing bargain”, originally developed for investor-state relations). Social differentiation among local resource users shapes differences in local interests, negotiating power and impacts.

In this context, the regulation of property rights constitutes a key lever for shaping investment processes and outcomes. As discussed in section 2.2.1, property rights can be broadly defined as “legal relations among people with regard to control of valued resources”.<sup>764</sup> They encompass ownership and other rights over diverse assets like natural resources and corporate structures, held individually or collectively by private actors (whether natural or legal persons) or public-law bodies, and based on a range of legal systems (from national to “customary” law).<sup>765</sup> This broad definition of property rights goes beyond the traditional classifications characterising the law of property, which typically limit the notion of property rights to legal claims enforceable *erga omnes*; and is in line with the approach followed by those branches of law that regulate relations between private actors and the state - such as international human rights and investment law.

Thus defined, property rights are an important tool to attract foreign investment and shelter it from arbitrary host state interference. They can also provide mechanisms for protecting local resource users from arbitrary dispossession, for giving them assets they can use in negotiations with government and investors, and for providing a basis for local participation in the benefits generated by the investment. The extent to which these effects materialise depends on the strength of the legal protection that different sets of property rights enjoy.

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<sup>764</sup> Following Singer (1996:71).

<sup>765</sup> See section 2.2.1.



### *6.1.2. Universal principles but differentiated rules: The varying strength of property rights involved in foreign investment projects*

While different criteria may be used to measure the “strength” of legal protection, the focus here has been on indicators concerning safeguards against takings by the state - irrespective of the content of the right in question. Section 2.2 developed a matrix to frame the analysis, including three different but interlinked “layers” of law (local to international) and three equally interlinked “dimensions” affecting the strength of legal protection - rule of law, including e.g. judicial independence and effectiveness; “normative content”, including both substantive rules (e.g. whether a public purpose is required for the legality of takings, or compensation must be paid and, if so, according to what standards) and legal remedies for alleged violations; and tailored arrangements through which states may strengthen the protection of some property rights beyond the provisions of generally applicable law. The three “layers” and “dimensions” were combined in the “property rights protection matrix”, which provides the framework for the legal analysis undertaken in this study (see Table 2.2).

The legal analysis has highlighted differences in the strength of legal protection enjoyed by different property rights involved in investment projects. This is the case at both national and international levels - although to different extents and in different ways.

Chapter 3 examined the legal protection of property rights under international law. It compared the protection available under human rights and investment law, using a sample of twelve investment treaties concluded by the covered countries. This analysis suggests that international law as it applies to Africa states universal principles (such as the solemn affirmation of the right to property of “everyone”) but embodies differentiated rules that provide stronger protection to some property rights compared to others.

The legal protection of foreign investment is established in binding norms (whether customary or treaty-based), and has been interpreted, clarified and expanded by an extensive case law of international arbitrations. While in the 1960s and 70s the protection of foreign investment formed the object of considerable debate between capital-exporting and capital-importing states, these polarisations have more recently given way to pragmatic ways to strengthen the protection of foreign investment, including through a booming number of bilateral investment treaties and through the growing ratification of international conventions concerning investment arbitration (such as the ICSID and New York Conventions). The outcome is a web of quite sophisticated legal arrangements that shape the strength of the substantive protection, and that establish perfectible but overall highly effective legal remedies.

International human rights law provides international protection to local resource rights affected by investment projects. But this protection is weaker compared to international investment law, in terms of both substantive standards (e.g. with regard to the lack of compensation requirements for takings of property under the ACHPR) and legal remedies (e.g. with regard to exhaustion of domestic remedies requirements, and to the non-binding nature of the decisions of the African Commission on Human and Peoples' Rights<sup>766</sup>).

In addition, while fundamental human rights are affirmed in binding international treaties, some treaty provisions are rather vague, and their normative content has been developed by instruments the legal value of which is less straightforward - such as General Comments issued by UN treaty-based bodies or "voluntary guidelines" adopted by states or UN agencies (with regard to the right to food, for example). Similarly, collective human rights that would protect local resource rights

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<sup>766</sup> Although the African Court Protocol addresses the second issue, countries like Chad have not ratified it, the Commission is likely to continue to play a key role even in ratifying states due to the mainly indirect access to the Court, and even binding Court judgements lack clear enforcement mechanisms in case of state non-compliance; see section 3.2.3.

(such as peoples' right to freely dispose of their natural resources) remain ill-defined in terms of normative content and right holders, while ILO Convention 169 protects the natural resource rights of indigenous peoples but has not been ratified by any African country as yet.

Human rights with weaker normative content (e.g. peoples' right to freely dispose of their natural resources) are the ones that would conceptually lend themselves more easily to securing the (usually collective) "customary" rights of local resource users in Africa. Despite its roots in liberal political theory and individual property, the right to property may also be used to protect collective local resource rights (see the expression "alone or in association with others" in article 17 of the UDHR), although some national case law suggests a degree of contestation as to the extent to which "customary" resource rights may be said to fall within the protection of the right to property.<sup>767</sup>

The overall result is an international legal framework that provides stronger protection to foreign investment than to local resource rights affected by investment projects (as summarised in Table 3.4). It is interesting to note that although this differentiation is particularly pronounced in Africa, it also exists in Europe and the Americas. Indeed, the legal protection provided by international investment law is stronger than that available under the ECHR or the ACHR (for instance, with regard to standards of compensation and to exhaustion of domestic remedies requirements), even if differences in legal protection are less pronounced than in Africa (where for example payment of compensation is not explicitly required at all). This means that, from a formal point of view, European investment in Africa may enjoy stronger international protection than it does in its European home country - although much depends on the content of relevant investment treaties,

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<sup>767</sup> E.g. in the Tanzanian case *Attorney General v. Akonaay, Lohar and Another*, discussed in section 4.2.1.

and a range of factors may constrain the actual enjoyment of that protection in practice.<sup>768</sup>

While this study has not looked at other regions of the world (e.g. Asia), the differentiation of treatment between the property rights of foreign investors and those of affected local resource users is likely to be even greater where no regional human rights system is in place. This is because the exclusion of the human right to property from the two 1996 UN Covenants weakened the protection of this right under global instruments. In Africa, Europe and the Americas, the human rights protection of property rights is mainly based on the relevant regional human rights system. Where no such system exists, differences in legal protection between international investment law and human rights law are likely to be even greater than those documented for Africa by this study.

Chapter 4 analysed the protection of property rights under national law. It identified key trends in the national legal systems of the four focus countries, and to a lesser extent of the other covered countries. It also undertook comparative analysis on the four focus countries, namely an “internal” comparison of the legal protection of property rights of foreign investment and local resource rights in each of the four countries; and an “external” comparison of the protection of local resource rights across the four countries.

The results of this analysis are more complex than those concerning international law, due to considerable cross-country variation and to usually less clear-cut differentiation of legal protection under national law. The national legal systems of the twelve covered countries vary considerably as to the way and extent to which they uphold the rule of law, regulate foreign investment as well as relations

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<sup>768</sup> See for instance the difficulties that may arise in enforcing an arbitral award in Africa, mentioned in chapters 3 and 4.

between citizens and the state, and protect local resource rights from arbitrary interference.

At the same time, some recurring features across the twelve countries illustrate how, despite some recent rhetoric about securing local resource rights, the emphasis in much legal policy has been on vesting control over valuable resources with the state, and on opening up resources to foreign investment. While in some jurisdictions restrictions remain on foreigners' acquisition of certain property rights over strategic assets such as land, the trend is towards the easing or removal of these restrictions. In addition, these restrictions concern the *acquisition* of property rights, not the *strength of their protection* once they have been acquired.

The comparative analysis on the four focus countries does not reveal formal differentiation of legal protection to the same extent as international law - with a few notable exceptions, for instance concerning access to international arbitration. But differences in protection arise from the distribution of property rights on the ground, as socio-economic factors make foreign investors more likely to hold those types of property rights that enjoy stronger protection.

For instance, data from the social science literature suggests that very few local resource users in the focus countries (and in Africa more generally) enjoy the legal protection associated with land ownership, including as a result of the inaccessibility of land registration processes (required as a precondition for the acquisition of ownership in jurisdictions like Cameroon and Mali). On the other hand, access to legal procedures tends to be less of a problem for investors, who tend to be better able to enjoy the legal protection available to them to its full potential.

Most local resource users tend to hold land use rights, often conditioned to productive land use. While the legal protection of these use rights varies

considerably across the four focus countries, in jurisdictions like Chad and Cameroon it is considerably weaker than the protection of ownership - as takings of customary land rights only entail compensation for loss of improvements. Legal provisions that automatically recognise investment projects as for a public purpose further undermine local resource rights. And while productive use requirements may be useful in promoting productivity and equitable resource access, their ill-defined content paves the way to abuse and undermines the resource rights of local people - particularly when outside interests associated with higher economic returns and greater negotiating power muscle in.

In recent years, some countries have adopted reforms that strengthen local resource rights – such as Mozambique’s requirement that investors consult and negotiate with local resource users before obtaining resource rights from the state. These reforms provide useful openings, though their impact is limited by shortcomings in design and implementation.

Beyond the content of national legislation and case law, the national protection of property rights is influenced by broader rule of law factors - for instance, by the extent to which an independent and effective judiciary upholds property rights. Rule of law issues are problematic in most of the covered countries, as evidenced by their poor scoring in international rankings concerning good governance and the rule of law. This situation undermines the protection of property rights for both foreign investors and local resource users. However, foreign investors may more easily opt out of the national legal system through choice of law, stabilization and arbitration clauses embodied in foreign investment contracts (as illustrated by the tailored arrangements set up in investor-state contracts for the Chad-Cameroon project).

Such tailored arrangements that strengthen the protection of foreign investment beyond generally applicable law are common practice in large-scale natural

resource projects, particularly in extractive industries. International case law exists that affirms the legal validity and effect of these arrangements, while national legislation may specifically empower the government to negotiate such tailored arrangements with incoming investors.

In some cases, involvement of international financial institutions has led to the establishment of a tailored regime that also strengthens the protection of local resource rights affected by the investment project. This was the case in the Chad-Cameroon project. In this project, innovative arrangements significantly raised the protection of local resource rights beyond what was required under the national law of Chad and Cameroon.

But even here, some losses were left uncompensated – namely with regard to the land use restrictions and to the tenure security effect of the change in legal regime for returned land, in Cameroon. Even more importantly, the special regime is not fully insulated from the national law of the host state (e.g. domestic courts continue to play a role), and access to effective and truly independent redress mechanisms remains an issue. In addition, despite these higher standards, project implementation has run into considerable problems relating to land takings, particularly in the oilfield development area of Chad - as evidenced by the recent evaluation commissioned by the IFC and the oil consortium.<sup>769</sup>

Overall, this analysis suggests that the legal framework regulating foreign investment in Africa - whether at national or international level, under generally applicable law or tailored arrangements - tends to provide stronger protection to the property rights of foreign investors than to those of local resource users affected by investment projects. In other words, efforts to shelter foreign investment from shortcomings in the rule of law in the national legal systems have resulted in the

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<sup>769</sup> Barclay and Koppert (2007), discussed in section 4.3.2.

creation of “legal enclaves”<sup>770</sup> for the benefit of foreign investment (e.g. through investment treaties, contracts and arbitration), while other sets of property rights are left with lower levels of protection.

Chapter 5 of the study complemented this “static” analysis with a more “dynamic” approach. It discussed the extent to which measures to strengthen the legal protection of local resource rights may be hindered by legal arrangements to shift regulatory risk from investors to the host state - particularly the regulatory taking doctrine and, to an even greater extent, stabilization clauses included in investment contracts. The regulatory taking doctrine would only apply to rather extreme factual circumstances - although the US case *United Nuclear Corp. v. US* shows that this doctrine may still apply to regulatory change that strengthens local property rights. But the higher level of regulatory stability provided by stabilization clauses like those used in the Chad-Cameroon contracts significantly lowers the threshold that triggers the obligation to compensate. This may create disincentives and constraints on host state regulation to strengthen the protection of local resource rights.

In other words, not only does the regulatory framework provide differentiated protection; it may also “freeze” that differentiation through legal arrangements devised to shelter foreign investment from adverse regulatory change. This is particularly problematic in contexts where the legal protection of local resource rights at the inception of an investment project is weak and presents considerable room for strengthening - which is the case under international human rights law as it applies to Africa as well as under the domestic law of several covered countries.

Table 6.1 summarises these findings, using the “property rights protection matrix” developed in chapter 2 (Table 2.2) and drawing on Tables 3.4 and 4.1-4.9. Table 6.2 applies the property rights protection matrix to a specific investment project - the Chad-Cameroon oil development and pipeline project.

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<sup>770</sup> This expression was first proposed by Daniels (2004:2).



### *6.1.3. Differences in the “capacity to claim”*

From a legal point of view, the protection of property rights is shaped by the applicable law (rule of law; normative content including substantive protection and legal remedies; tailored arrangements). In practice, the enjoyment of this legal protection depends on the capacity of property rights holders to make use of their rights (“capacity to claim”). This capacity is function of their awareness of available rights; of know-how to navigate legal institutions and procedures (from land registration to court litigation); and of the confidence, resources, information and social relations to use rights and procedures in practice.<sup>771</sup>

Different stakeholders involved in foreign investment projects typically have different capacity to claim. This capacity is influenced by factors similar to those identified in section 2.3 as shaping power relations (Table 2.3). These factors are briefly outlined in Table 6.3. They relate to assets ranging from literacy and the ability to speak the official language (in which the law is typically written), to the capacity to mobilise legal expertise, through to social relations in the government administration or the judiciary. They also include self-confidence, cultural acceptability of challenging the “authority”, as well as issues concerning the government and judicial system (e.g. nature of the procedures, geographic location of courts and of government institutions; see Table 6.3).

These diverse factors tend to affect foreign investors and local resource users in a differentiated way, thereby fostering differences in the capacity to claim - with the former usually being much better able to make the most of available legal protection than the latter.

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<sup>771</sup> This concept builds on and further develops the concept of “legal empowerment” used by Giovarelli and Scalise (2007:4).

For instance, foreign investors and local resource users typically have different degrees of legal literacy/awareness, and different capacity to mobilise legal expertise. Legal awareness is notoriously limited in rural Africa, where a substantial part of the population is illiterate and does not speak the official language used by the law. This affects different groups in a differentiated way, for instance with illiteracy rates being higher for women than men. Access to courts tends to be hindered by economic, geographical, linguistic and cultural barriers. In many contexts, using legal processes to defend one's rights is not perceived as culturally appropriate, and a tradition of deference to authority entrenched from the colonial era may make it more difficult for local resource users to challenge government decisions affecting their property rights.<sup>772</sup>

Foreign investors may also feel at a disadvantage before national courts, as these operate according to rules and legal tradition they may not be familiar with. Yet investors are more likely to be able to afford professional legal assistance, and to "contract out" of domestic dispute settlement through international arbitration.

Issues concerning the capacity to claim are relevant under both national and international law - although their relative importance varies between these two levels. Under international law, differentiation in legal protection is entrenched in the content of the law itself. It reflects differences between the standards of protection embodied in human rights and investment law. Differentiation in capacity to claim reinforces these differences - but is not the main driver of the differentiated protection.

On the other hand, the legal analysis undertaken in chapter 4 suggests that *formal* differentiation in legal protection is much less pronounced under the national legal systems of the covered countries. In countries like Cameroon, Chad and Mali, land ownership rights are formally protected regardless of whether they are held by

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<sup>772</sup> On barriers to access to justice in least-developed countries, see Anderson (2003:16-20).

foreign investors or local resource users. The problem is that local resource users tend to lack the capacity to make the most of this legal protection. Evidence from Cameroon and Mali (discussed in chapter 4) shows that very few people in rural areas have registered land ownership, mainly due to long, costly and cumbersome land registration procedures. For foreign investors, these barriers in access to registration procedures are much less problematic due to the greater financial resources they have at their disposal.

In addition, in countries where legislation has been adopted to strengthen local property rights over land and natural resources, significant challenges have affected its implementation. The so far disappointing results of the mandatory consultation process required under Mozambique's Land Act (discussed in chapter 4) are very much linked to limits in the capacity to claim of local groups standing to benefit from the process.

To sum up, not only does the legal framework regulating foreign investment in Africa tend to provide stronger protection to foreign investment than to local resource rights; but also foreign investors tend to be better able to make use of available legal protection than local resource users. The challenge is not only addressing asymmetries in formal legal protection, but also strengthening the capacity to claim of disadvantaged stakeholders, namely local resource users.

#### ***6.1.4. Imbalances in power, imbalances in law***

This analysis suggests that the current expansion of investment flows to sub-Saharan Africa is taking place in contexts characterised not only by power asymmetries between different stakeholders involved in or affected by investment projects; but also by differentiated legal protection of the property rights of these stakeholders, and by differentiated capacity for stakeholders to make the most of their legal protection.

Going back to the core research question identified at the beginning of the study,<sup>773</sup> the analysis finds that foreign investment tends to enjoy stronger legal protection compared to affected local resource rights, particularly but not only under international law; and that, under particular circumstances, the legal protection enjoyed by foreign investment may make it more difficult for host states to strengthen local property rights if this negatively affects ongoing investment projects.

The issue here is not so much one of discrimination. As discussed in chapter 3, differences of treatment do not constitute discrimination if they are motivated by reasonable and objective justifications. Several grounds have been used to justify stronger legal protection for non-nationals. Non-nationals hold assets in countries where they have no political representation, and may be more vulnerable than nationals to arbitrary dispossession brought about by political manipulation - for instance, where host state officials are in search of a scapegoat to defuse internal crises. Also, the types of property rights at stake for foreign investors and local resource users tend to be different. Differentiation in the protection of property rights for nationals and non-nationals was accepted as legitimate by international tribunals in cases as diverse as *Hopkins v. Mexico* (an investment law arbitration from the Americas) and *James v. UK* (a human rights case under the ECHR).<sup>774</sup>

But when applied to relations between foreign investors and local resource users in large-scale investment projects in Africa, the differentiation of legal protection mirrors and reinforces imbalances in the negotiating power of those stakeholders. This has both theoretical and practical implications: theoretical, because it provides insights on how the law relates to power relations in a globalised world; practical, because a weak legal protection makes local resource users vulnerable to arbitrary

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<sup>773</sup> Section 1.1.

<sup>774</sup> See section 3.5.

dispossession, which, combined with limited alternative livelihood opportunities, may result in widespread destitution.

The next section discusses the implications of these findings for the broader debate on the relationship between law and power. The subsequent two sections discuss a few implications for legal policy and practice.

## **6.2. The law and power debate revisited**

The findings summarised in the previous section may provide insights for ongoing debates on the relationship between law and power. A first step concerns the need to broaden the scope of the analysis beyond inter-state relations alone, which with a few important exceptions has been the focus of much debate about power and (international) law.

The stakeholder and power analysis undertaken in section 2.3.3 identified a wide range of stakeholders typically involved in investment projects. Many such stakeholders are non-state actors - from investors to lenders through to affected local resource users. In addition, far from constituting a monolith, each of these stakeholders expresses different and even competing internal interests, backed by varying degrees of internal negotiating power.

Within this complex web of power relations, the study has focused on relations between foreign investors and local resource users, while recognising that these relations are affected by their interplay with other stakeholders. With regard to these relations, the study has found that the law mirrors and reinforces asymmetries in the balance of negotiating power.

It mirrors them, because the property rights that are expression of more powerful interests (foreign investment) enjoy stronger legal protection; and because more

powerful interests tend to be better able to make the most of the legal protection available to them (“capacity to claim”). The establishment of “legal enclaves” for foreign investment (e.g. through investment treaties, contracts and arbitration) reflects the efforts of host states to attract the capital, technology and know-how that are perceived to be needed for economic development; but it also reflects the greater ability of interests associated with foreign investment to obtain stronger protection.

Over the past few decades, power relations have shaped the evolution of international law. This applies to the balance of negotiating power between states - a central actor of international law-making - and specifically between capital-exporting and capital-importing countries. As discussed, since the 1990s this has tended to favour capital-exporting countries - bearing in mind though that the lines between the two groups of states are increasingly blurred, with some developing countries having become major capital exporters; and that the balance of negotiating power may shift again in future as a result of the growing competition between large economic blocs (US, EU, China) for access to Africa’s natural resources.<sup>775</sup> It also applies to other forms of power relations, for instance with regard to the role of US law firms and schools in the “Americanization” of international law (identified by Mattei, 2003, and discussed above).

As a result, international law has evolved towards a degree of legal protection for foreign investment that is even stronger than that applicable to the right to property under the European and American human rights systems. As discussed in section 3.4, these developments have been held in check when investment law has started to be relied on against Western governments. This is illustrated by the more cautious approach to regulatory taking followed by the arbitrators in the NAFTA case *Methanex v. US* compared to the earlier *Metalclad v. Mexico* award.<sup>776</sup>

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<sup>775</sup> See sections 2.1.3 and 4.2.6.

<sup>776</sup> See section 3.4.

At the national level, the relative weakness of local resource rights vis-à-vis incoming investment reflects the power relations underpinning the political economy of the state in Africa. As discussed, the central role of the state in resource allocation enables national elites to gain control over resources through manipulating state institutions; and, conversely, to maintain their grip on state institutions through using resource allocation as a tool for political patronage.

In this context, attracting foreign investment is part of the “extraversion” strategies deployed by national elites and analysed by Bayart (1993).<sup>777</sup> Although the increasing liberalisation of investment regimes has reduced opportunities for rent-seeking, large-scale investment may still provide national elites with opportunities for business activities, political patronage and personal gain. Keeping local resource rights in check facilitates the unhindered deployment of these strategies. This is particular so in rural areas, while the politically more vocal urban elites tend to be better placed to use the costly and cumbersome procedures available to secure property rights (see the predominance of urban elites in the use of land registration in Cameroon and Mali, discussed above).

More diffuse forms of power are also at play, as illustrated by the role of transnational “epistemic communities” in the spread of legal models across countries.<sup>778</sup>

The balance of negotiating power also affects the development of tailored arrangements for the protection of property rights. Investors are more likely to extract broad host state commitments on regulatory stability (stabilization clauses) when negotiating with African countries rather than with OECD countries, including because of the differences in negotiating power between OECD and

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<sup>777</sup> See section 2.3.3.3.

<sup>778</sup> See section 4.2.6.

African countries.<sup>779</sup> In the Chad-Cameroon project, a special regime for land takings that strengthened protection beyond national law requirements was pushed forward by the involvement of the World Bank, and reinforced by the advocacy of national and international NGOs - against initial resistance from the host states.<sup>780</sup>

This suggests that a possible future power shift in favour of African countries in their relations with investors and/or capital-exporting states would not necessarily benefit local resource users. Much depends on the nature of government in these countries. The growing interest of Asian economies in Africa's resources increases options for African states and enables them to diversify the geographical origin of incoming investment. This may make African states better able to resist the type of pressure exerted by the World Bank and NGOs in the Chad-Cameroon project, which resulted in the establishment of a special regime for land takings that presented shortcomings but was still considerably more generous than the national law of Chad and Cameroon.

These issues are compounded by other avenues through which power relations shape the development of legal norms. For instance, local, "customary" systems of property rights are evolving as a result of changes in political and socio-economic contexts. This evolution takes place without clear procedural norms that regulate law-making ("secondary" norms in the Hartian sense). As a result, it is ultimately the balance of power between different local stakeholders that shapes legal change. Many customary chiefs are claiming greater powers or even outright ownership over the resources they used to hold in trust for their group, claims that are often resisted by other group members. The concentration of stronger powers in the hands of customary chiefs paves the way to agreements between the central

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<sup>779</sup> As noted by Wälde and N'Di (1996:222-223) and empirically documented by Shemberg (2008, para. 75), discussed above (section 5.2.3).

<sup>780</sup> See sections 2.3.4 and 4.3.4.



government, foreign investment and local chiefs that enable access to resources for the investment, benefit the chiefs but dispossess local resource users.<sup>781</sup>

The influence of power relations concerns not only the content of the law but also its application. This is illustrated by the consequences of state non-compliance with their obligations on property rights. Ultimately, even legally binding decisions may not be complied with. The key is the extent to which there are legal and non-legal (economic, social, political) incentives that encourage states to comply. Investors may respond to a host state refusal to comply with an arbitral award with “pursuit actions” - seizing assets or freezing bank accounts in third countries.<sup>782</sup> But a refusal to comply may also cause significant reputational damage to a host state. In a globalised world, states openly defying final awards are likely to be shunned by investors and lending institutions. This provides a major incentive for states to comply or otherwise settle. On the other hand, while a failure to comply with human rights obligations or decisions may also cause reputational damage, this is likely to have lesser economic consequences. Apart from extreme cases where they result in sanctions or consumer-driven boycotts, human rights violations are unlikely to have major impacts on investment flows.

The fact that differentiation of legal protection *reflects* existing balances of negotiating power illustrates the concept of “power *on* the law” used in the conceptual framework developed by Tuori (1997) and followed here.<sup>783</sup> But differentiation of legal protection does not just mirror existing power imbalances - it also *reinforces* them. This is because legal claims can themselves be a source of power, by providing “bargaining endowments” that stakeholders may rely on in their mutual negotiations (Mnookin and Kornhauser, 1979:968).

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<sup>781</sup> See section 4.2.3.

<sup>782</sup> See section 3.3.

<sup>783</sup> See section 2.3.2.

With regard to international law, section 3.4 showed that investment law has brought about shifts in negotiating power between investors and host states, through the “trigger”, “drain”, “transfer” and “restore” effects isolated by Cheng (2005:470-499); and that, because of its weaker legal protection, human rights law has produced comparable shifts in the negotiating power between local resource users and the state only to a much lesser extent. In addition, national law in several jurisdictions gives local resource rights only limited and conditioned legal protection. In this context, weakness of property rights undermines the negotiating power of local resource users vis-à-vis the government and incoming investors.<sup>784</sup>

Commitments on regulatory stability (such as stabilization clauses) protect the economic equilibrium of the contract even after economic factors shift the balance of negotiating power between the investor and the host state - thereby ring-fencing the deal reached when that balance was more favourable to the investor. As discussed in section 5.2.4, by placing legally enforceable limits on state action these commitments undermine the negotiating power of the host state vis-à-vis the investor, and of local resource users and NGOs vis-à-vis the host state.

The mechanisms through which legal arrangements affect the balance of negotiating power illustrate the notion of “power *by* the law”, in the conceptual framework developed by Tuori (1997). In theory, the “power *by* the law” effect could act in favour of disadvantaged stakeholders - in this context, local resource users. For this to happen, local resource users would need strong legal protection for their property rights, and adequate “capacity to claim” in order to exercise them effectively.

Some legal arrangements do provide valuable entries for local resource users. For example, the local consultation required by Mozambique’s Land Act 1997 as a condition for the allocation of resource rights to investors provides an opening for

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<sup>784</sup> See section 5.1.

local people to have more control over the resources, and a legal basis for benefit-sharing or social-investment schemes. But making these legal arrangements work in practice is very difficult - as illustrated by the disappointing results of experience with consultation processes in Mozambique.<sup>785</sup> These difficulties are due to major power asymmetries both between local resource users and investors, and within local groups (see the problem of elite capture and co-option of customary chiefs).

In addition, current legal arrangements are such that the “power *by* the law” effect mainly works in favour of more powerful interests, namely those associated with foreign investment. They grant foreign investors stronger property rights protection, in a “static” sense; and they constrain the ability of host states to strengthen affected local resource rights, in a “dynamic” sense.

Even if legal protection *per se* was the same for foreign investment and local resource rights, its implications for negotiating power would still differ as a result of the different economic value of the objects of property rights. Everything else being equal, higher values would translate government interference into higher compensation amounts and costs. This applies to different local resource users – for instance, where compensation is limited to improvements alone, between users having valuable trees or crops and users having no such valuable improvements on their land, including due to different environmental conditions.<sup>786</sup> But it applies even more to differentiation between investors and local resource users. As discussed, some of the tailored arrangements for the Chad-Cameroon project refer to the same standard of “just and equitable” compensation for both the investor and affected local resource users. Yet compensation amounts determined on this basis would probably differ drastically due to the enormous differences in economic value of the respective objects of property rights. Steeper costs associated with

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<sup>785</sup> See section 4.3.5.

<sup>786</sup> I owe this point to a conversation with an NGO officer in Mozambique (18 September 2008).

compensating more valuable assets are likely to have more significant implications on the balance of negotiating power.

Power relations also exist *within* the law. While Tuori (1997:13-15) uses the expression “power *in* the law” to describe relations between different legal institutions (e.g. between government and judiciary), the focus here is on how the interplay between different bodies of law affects the relationship between law and power.

Far from being a monolith, the legal framework regulating property rights in Africa includes different bodies of law. An investment like the Chad-Cameroon oil development and pipeline project is regulated by international law (e.g. human rights, investment law), including global norms, regional instruments (e.g. the ACHPR) and bilateral treaties (e.g. the US-Cameroon BIT); by several branches of the national law of the host states (from constitutional to petroleum through to land law); and by transnational contracts. It may also have implications for local (“customary” but continuously reinterpreted) systems of property rights.

These bodies of law have different orientations with regard to the protection of property rights. Some of them are deliberately oriented towards protecting the property rights of foreign investors (e.g. international investment law). Others may more easily lend themselves to protecting local resource rights (e.g. human rights law). The interplay between these bodies of law defines the strength of legal protection that different stakeholders may rely on. In turn, the nature of that interplay is shaped by formal hierarchies of norms, and by the extent to which these norms have “teeth”.

Hierarchies of norms – the focus of “formalist” legal analysis – are relevant for example to relations between national legislation and local (“customary”) systems of property rights. Where customary norms are recognised as a source of law, the

national constitution (in Ghana, for example) and/or case law (e.g. in Tanzania's *Maagwi Kimito* and *Pastory* cases) typically provide for the prevailing of national constitution and legislation over customary norms.<sup>787</sup>

Hierarchy issues also exist *within* international law – between human rights and investment law, for instance. Under the Vienna Convention on the Law of Treaties, norms of jus cogens prevail over other international law (articles 53 and 64). But while it may be argued that several human rights are part of jus cogens (e.g. freedom from slavery), it is doubtful that the right to property is, not least given the absence of such right from the two UN Covenants.

Another reference for hierarchies between norms of international law is article 103 of the UN Charter, which states that the Charter prevails over other international obligations. The Charter explicitly refers to the promotion of human rights as a fundamental goal (articles 1(3) and 55). It may be argued that the UDHR (which does protect the right to property) constitutes an authoritative interpretation of these provisions. However, the implications of this reasoning for hierarchy between human rights and investment law have not yet been tested before human rights courts or arbitral tribunals.

One aspect that was discussed in chapter 5 relates to the hierarchy between international human rights law and investment *contracts*. In this regard, it may be convincingly argued that international human rights law prevails over investment contracts; that host states cannot “contract out” of their human rights obligations under international law; and that therefore the scope of stabilization clauses must be interpreted as limited (whether explicitly or implicitly) by the international obligations of the contracting state.<sup>788</sup>

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<sup>787</sup> See section 4.2.

<sup>788</sup> See section 5.3.1.

But while hierarchy provides the focus of much legal analysis, it is not enough to explain “power *in* the law”. In practice, a key factor is the relative strength of the legal protection granted by different bodies of law - in terms of both substantive rules and legal remedies. The body of law endowed with tighter substantive rules and with more effective legal remedies - in other words, the body of law “with more teeth” - is more likely to pull the overall balance of legal entitlements in a certain direction. De facto differences in the capacity of relevant authorities to enforce legal instruments are also important. In this sense, while as a general rule there is no hierarchy between the international human rights norms protecting the right to property and international investment law protecting foreign investment, the analysis undertaken in chapter 3 shows that the latter tends to have more teeth than the former.

In other words, power permeates relations between different legal systems (e.g. between national law emphasising the role of the state in resource allocation, and “customary” systems affirming the primacy of the resource rights of first-occupants); and between different bodies of law within the same legal system (e.g. within international law, between human rights law rules providing high principles not backed by effective enforcement mechanisms, and investment law rules providing more effective substantive protection and legal remedies).

The aggregate result of the power “on”, “by” and “in” the law effects is that in the area of property rights and foreign investment in Africa the law works to reflect and reinforce imbalances in power relations. The findings of this “law and power” analysis are visualised in Figure 6.1.

This analysis also raises the following needs with regard to future research on the relationship between law and power:

- The need to go beyond inter-state relations, to include a range of non-state actors and to tackle power relations within each of these actors;

- The need to take a pragmatic approach to the analysis of law, which in the real world of transnational investment projects typically cuts across national and international law and, within each of these, across different bodies of law (e.g., within national law, from constitutional law to investment law through to land law);
- The need for a solid conceptual framework for tackling relations between power and law - not only in terms of bi-directional linkages between the two, but also in terms of penetration of power within the legal arena itself.

### **6.3. Some considerations of legal policy**

A few considerations of legal policy may help identify areas for practical action to address the asymmetries in legal protection highlighted by this study. In terms of policy, the legal protection of foreign investment can be and has been justified on two main grounds.

The first ground is that foreign investors may be more vulnerable than nationals to arbitrary treatment by the host state, because they lack political representation and because they may fall victim of political manipulation by the host state in search of a scapegoat to defuse internal crises.<sup>789</sup>

The argument about lack of political representation mainly relates to the circumstance that foreigners do not have the right to vote. The strength of this argument is reduced in contexts where much of the local population does not exercise the right to vote due to lack of IDs and other constraints; and where foreign investors wield greater influence than most nationals through high-level relations with the political establishment and other influential stakeholders (e.g. international financial institutions involved in the project). “Affiliation” between national politicians or senior civil servants and national entrepreneurs competing with a

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<sup>789</sup> See e.g. *James v. UK*, para. 63. See also Wälde (2008:64).

foreign investor may result in the latter losing out.<sup>790</sup> But lack of political representation alone does not equate to lack of voice, and a narrow focus on the existence of the right to vote alone is too formalistic an approach to assess political influence.

The second leg of this first ground seems more pertinent: foreign investors are often viewed with suspicion by the local population, and opportunistic politicians may turn on them in search for local consent, particularly in times of crisis. This is even more so given the shift in the balance of negotiating power between the investor and the host state that takes place with the progression through the stages of the investment project – a shift illustrated by the concept of “obsolescing bargain”.<sup>791</sup> It would be unfair to the investor if the legal system allowed for it to be “lured” by host state commitments which the state could then renege when socio-economic and political factors enable it to do so. At the same time, establishing legal safeguards against arbitrary treatment does not necessarily require the creation of legal enclaves for foreign investment alone. It may also be done and in many countries it is effectively done through reforming the general legal system applicable to both nationals and non-nationals.

A final aspect of the “vulnerability” argument relates to the fact that higher economic stakes require stronger and usually more sophisticated legal protection. Investment projects such as the construction of a cross-border oil pipeline require major injections of capital, high levels of risk and long timeframes to recover costs and make profits. They also typically involve complex transactions between a range of stakeholders (e.g. project sponsor, lenders, contractors, host state). Arbitrary treatment may therefore result in significant economic losses for the investors.

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<sup>790</sup> Wälde (2008:64).

<sup>791</sup> See section 2.3.3.4.



Everything else being equal, however, this consideration applies to both foreign and domestic investors. In addition, it is true that the economic losses incurred by local resource users in case of arbitrary dispossession are likely to be much lower than those suffered by dispossessed investors: the economic value of the property rights of local resource users tends to be immensely smaller than that of the property rights of the investor. This is illustrated by the tiny percentage of overall project value constituted by the aggregate cost of land compensation in the Chad-Cameroon pipeline.<sup>792</sup> However, this analysis refers to absolute values. In relative terms, the loss suffered by local resource users may be much higher than that suffered by the investor. For local resource users, the loss of a small plot of land may entail the destruction of their entire livelihood system, and make them vulnerable to hunger and destitution. Therefore, the “vulnerability” argument makes local resource users at least as deserving of legal protection as foreign investment.

The second ground to justify the legal protection for foreign investment relates to the need for African countries to attract capital, technology and know-how in order to promote economic development. The emphasis in this argument is not on the vulnerability of investors, but on their capacity to contribute to development in the host state - as reflected for example in the preamble of the ICSID Convention.<sup>793</sup> Its basis is the premise that an enabling investment climate, including effective protection of property rights, is important to promoting investment.

Statistical analysis has been used to test this premise in a range of contexts - and bilateral investment treaties have received particular attention in this debate. Overall, empirical evidence of the extent to which property rights protection promotes investment is mixed. Salacuse and Sullivan (2005:111) find “strong evidence to show that [bilateral investment treaties] both protect and promote FDI”, particularly in developing countries. Similarly, Neumayer and Spess (2005:1582)

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<sup>792</sup> See chapter 5.

<sup>793</sup> “ Considering the need for international cooperation for economic development, and the role of private international investment therein [...]”.

conclude that “developing countries that sign more BITs with developed countries receive more FDI inflows”. But other studies have reached different conclusions. Tobin and Rose-Ackermann (2005:31) conclude that BITs have little impact on FDI flows, while Hallward-Driemeier (2003:22) finds “little evidence that BITs have stimulated additional investment”. Perry (2000:791-796) notes that different investors may have different levels of sensitivity to legal systems - for instance based on their size (with larger investors being better able to insulate themselves from a weak legal system) or nationality (with Western investors being more likely to attach importance to the legal system than Asian ones). And even those studies suggesting that BITs do matter do not provide conclusive evidence that the same effect could not be reached through reform of the legal system as a whole rather than through establishing legal enclaves for foreign investment such as BITs.

There is a lively debate on the role played by externalities in this context. Some commentators argue that signing up to investment treaties and arbitration can over time generate positive externalities for the legal system as a whole. This is because these instruments enable investors to challenge arbitrary treatment by the host state in a way that may not be possible under the national legal system. By entrenching tighter discipline on government action, these legal enclaves may pave the way to more far-reaching processes to strengthen the rule of law in the domestic legal system.<sup>794</sup>

On the other hand, others have argued that the establishment of legal enclaves for foreign investment makes such broader reforms *less* likely. While investors may have a rational incentive to push for such broader reforms to protect their own interests, the fact that they are able to obtain special regimes to protect these interests removes that incentive.<sup>795</sup> Ginsburg (2005:121) found that the adoption of BITs was correlated with subsequent declines in the “Rule of Law” scoring under

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<sup>794</sup> On the role of BITs as “engines” for rule of law reform, see Wälde (2008:93-94).

<sup>795</sup> Tobin and Rose-Ackerman (2005:5).

the World Bank's Worldwide Governance indicators.<sup>796</sup> According to this author, this finding "suggests that, under certain circumstances, the presence of international alternatives might undermine the quality of the local legal system" (Ginsburg, 2005:121). In other words, rather than reforming the national legal system (e.g. through strengthening the effectiveness and independence of the judiciary), which would benefit foreign investors and local resource users alike, host states can "get away" with leaving the system as it is while creating legal enclaves for foreign investment that provide tighter substantive rules as well as more effective and independent fora for legal redress.

This line of conduct seems in line with the political economy of the state in Africa discussed by authors such as Bayart (1993).<sup>797</sup> National elites may realise that providing safeguards for foreign investment is the price to pay for attracting capital, which they may benefit from in terms of business and/or rent-seeking opportunities. Yet elites in government may not be willing to relinquish power within the domestic order - relinquishment that may come for instance with a more effective and independent judiciary.<sup>798</sup> Legal enclaves may therefore be instrumental to the "extraversion" strategies deployed by national elites, as they would enable them to attract foreign capital while not giving up power within the domestic order.

In terms of legal policy, both grounds for protecting the property rights of foreign investors (protecting "vulnerable" investors, and attracting investment to promote development) are likely to be best served by reforms that tackle the legal system as a whole - i.e. through law reform of general application rather than through special regimes for foreign investment alone. This would not only protect and attract foreign investment; it would also promote investment by nationals, including local resource users - in line with the considerable body of evidence showing that more

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<sup>796</sup> On which see section 4.1.

<sup>797</sup> See above, section 2.3.3.3.

<sup>798</sup> As noted by Daniels (2004:15).

secure property rights over land and natural resources tend to encourage investment and to promote increases in production and productivity.<sup>799</sup>

Admittedly, strengthening the legal protection of property rights through reforms of general application is a much more demanding endeavour than establishing special regimes for foreign investment. Special regimes can be established in a relatively short time, through negotiating treaty and/or contractual arrangements, and through pegging dispute settlement under these arrangements to existing international arbitration rules and institutions. On the other hand, reforming domestic legal systems is bound to take more time – due not only to technical reasons, linked to the sheer size of the challenge, but also to the likely resistance of vested interests that stand to lose from reform.

The second ground for protecting foreign investment (its potential development contribution) is also at the heart of another interesting issue of legal policy, this time relating to the legal protection of affected local property rights. Whether the taking of these rights is to build a hospital or a school, or to pave the way to a commercial venture such as an oil pipeline, the standards of protection for the rights taken (e.g. compensation requirements, legal remedies) are the same. The only condition is that the taking be for a public purpose. Yet this safeguard may be of limited value in contexts where foreign investment is uncritically assumed to contribute to economic development in the host state (and, in this sense, to be in the public interest), and where domestic legislation or investment contracts explicitly qualify the investment project as a public purpose one (e.g. under article 27 of the COTCO-Cameroon Convention of Establishment).

That a transfer of resources from a private stakeholder to another (rather than to the state) may under certain circumstances constitute a public purpose is widely accepted. This occurred for example in the ECHR case *James v. UK*, where the

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<sup>799</sup> For a review of this evidence, see Deininger (2003:36-51).

European Court of Human Rights found that legislation facilitating the acquisition of property by tenants pursued goals of social justice in line with public purpose requirements.<sup>800</sup> Attracting investment to promote development may well be considered as a public purpose, particularly in countries that more acutely need capital, technology and know-how. Investment may also generate public revenues through royalties, taxes, dividends and other income sources. Yet two caveats need to be made.

First, the ECHR case law on striking a “fair balance” between individual rights and collective interests suggests that, from a human rights perspective, the fact that an investment project is a strategic to promoting economic development would in itself not be enough to justify a compression of the right to property. Much depends on the terms and conditions under which the taking occurs, including for example (in the ECHR system) with regard to payment of compensation.

Second, these considerations do not dissipate the differences between a project genuinely for the public benefit (such as a hospital or a school) and a commercial project mainly benefiting a profit-driven organisation while also generating wider benefits to the economy and public finances. These differences are not reflected in the legal protection available to local resource users. Although some legal systems do embody arrangements for local resource users to be consulted and to participate in the benefits generated by investment on their land (in Mozambique, for instance), this is not a requirement under international human rights law nor under the national law of most covered states.

Some may argue that strengthening the protection of local property rights beyond what can be realistically achieved in a given society may constrain investment flows to countries that badly need them. It may make it more difficult for host states to attract investment, and it may divert investors to countries that have less

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<sup>800</sup> Paras. 46-47 of the judgment.

demanding regulatory frameworks. Debates along these lines have been prominent in countries that have taken steps to strengthen the protection of local property rights - for instance, in Mozambique, with regard to the legal requirement that prospective investors consult local resource users before resource allocations to investors can be made.<sup>801</sup>

At a more general level, similar debates have also taken place in other contexts. As discussed in chapter 3, the right-to-property provision of the ECHR system formed the object of much debate during negotiations. On that occasion, some countries explicitly manifested the concern that a strong right-to-property provision may hinder the economic planning required for economic development.<sup>802</sup> As a result of these concerns, the European Convention itself featured no provision on the right to property, which was left to a special protocol concluded a few years later. Even that protocol makes no explicit reference to a general obligation to compensate for takings; such an obligation has been established only as a result of ECHR case law.

But would stronger legal protection of local property rights undermine government efforts to attract investment? This is a complex issue, and it is impossible to do justice to it in the limited space allowed here. A few thoughts may help reframe the issue, however. First, in much government policy, attracting investment is not an end in itself. It is a means to an end - promoting development so as to improve the living conditions of the population. Attracting investment is therefore only part of the story - the other part being defining its terms and conditions so as to maximise its beneficial impacts on local development and living conditions. The protection of local property rights is a key element of this: if local resource users are arbitrarily dispossessed of their property rights in a way that undermines their right to property, their right to food and other fundamental human rights, it is hard to see how the investment benefits local living conditions.

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<sup>801</sup> See chapter 4.

<sup>802</sup> See section 3.2.

In other words, strengthening the protection of property rights for local resource users can indeed constrain government action - in line with the very logic characterising much of human rights law. And constraints on government action may mean that some economic opportunities are missed - some investors may prefer other countries where procedures for obtaining resource rights are simpler, quicker and less costly. But a stronger protection of local property rights is a key tool to maximise the benefits of those opportunities that are seized.

Second, simplistic and generalised assumptions about investors preferring to work in countries with weak legal protection of local rights must be questioned. The costs to comply with existing law are likely to be a factor in investment decision-making, but perhaps even more important to investors are safeguards against arbitrary treatment *in future*. In extreme cases where the local population internalises costs associated with investment projects (e.g. uncompensated takings, environmental degradation) and receives little or no benefits from them, the risks to the investment may increase as a result of peaceful or non-peaceful action against the investment's infrastructure or personnel. In this sense, providing an adequate level of protection to local property rights affected by investment projects may lead to win-win situations that benefit both local resource uses and investors.

It may also be useful to briefly refer to the Coase theorem - one of the pillars of the "Law and Economics" and "New Institutional Economics" literatures. In a nutshell, that theorem shows that, *in the absence of transaction costs*, market forces will push economic actors to negotiate arrangements that (re-)distribute property rights in a way that *maximises economic efficiency - irrespective of the original allocation of property rights*. In other words, if property rights are allocated to those economic actors that are better able to make efficient use of resources, these actors are likely to go ahead with their activities; if on the other hand property rights are allocated to less

efficient users, then more efficient ones will be able to “buy them out” through compensating them for losses while still generating profit.<sup>803</sup>

Applying this reasoning to relations between foreign investors and local resource users in Africa, it may well be argued that those better able to generate higher monetary returns (in many cases, extractive industry investors) will be in a position to “buy out” local resource users and still make profits as well as generate wider benefits for the economy as a whole (e.g. through contributing revenues to public finances). The Coase theorem suggests that whatever the original allocation of property rights between foreign investors and local resource users, the final outcome may be expected to be the same - the investor should be able to maintain or acquire the property rights it needs to implement the investment project.

In the real world, however, transaction costs do exist, and in some cases they may be very high. Large-scale investment projects involving the taking of the land rights of many people are typically associated with high transaction costs - and the cost of administering the process (consulting and negotiating with local landholders, processing cases, disbursing compensation, and dealing with complaints) may be higher than compensation costs themselves.

More fundamentally, the Coase theorem is concerned with economic efficiency. While different property rights allocations are expected to result in the same efficiency-maximising outcome, the distributive implications of different allocations are likely to be very different. Allocating strong property rights to local resource users is likely to produce more favourable distributive outcomes for that group – at the very minimum, local resource users will have greater say in the process, and will obtain adequate compensation for any loss suffered.

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<sup>803</sup> Coase (1960). There is a huge literature on this theorem, which cannot be dealt with here due to space constraints.



Overall, this analysis calls for action to strengthen the protection of property rights through general law reform rather than through legal enclaves for foreign investment alone. In emphasising the differences in the legal protection available to foreign investment and local resource rights, the case made here is not that foreign investment enjoys too strong a protection, but that local resource rights enjoy too little. As reform to strengthen the rule of law is not sufficient to shelter local property rights from arbitrary dispossession within foreign investment projects, there is also a need for change in law and practice to strengthen the normative content of the legal protection of local resource rights, as well as its enjoyment in practice. The next section discusses some possible steps for doing so.

#### **6.4. An agenda for action**

The foregoing analysis suggests that moving away from legal enclaves for foreign investment towards creating a level playing field in which property rights enjoy a minimum level of legal protection irrespective of who holds them can not only provide continued safeguards for foreign investment but also promote domestic investment as well as a more equitable distribution of the costs and benefits generated by the investment.

This requires interventions to address weaknesses in the rule of law. As discussed, these affect local resource users more than foreign investors, as the latter tend to be better able to insulate their property rights from the national legal system. This is illustrated by the arguments put forward by the Bakweri community in their ACHPR complaint for the alleged dispossession of their lands, with regard to lack of judicial independence and legal redress in Cameroon.<sup>804</sup> Weak rule of law also pushes investors to negotiate tailored arrangements like stabilization clauses, which

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<sup>804</sup> *Bakweri Land Claims Committee v. Cameroon*, paras. 29-37. The complainant claimed that “in Cameroon, the judiciary is neither free nor impartial with the result that justice tends to be dispensed in a discretionary manner” (para. 29); and that “judicial officers serve at the President’s pleasure” (para. 31).

as discussed may undermine the ability of host states to strengthen local property rights over time.

Experience with rule of law programmes in developing countries has produced mixed results.<sup>805</sup> Emphasis has frequently been on technical issues alone, in contrast with the political issues raised by the redistribution of power that rule of law programmes are likely to entail. Besides dealing with technical issues such as training the judiciary and restructuring its organisation, strengthening the rule of law requires politically savvy tactics for dealing with resistance from vested interests. This may entail supporting those groups that advocate for checks and balances on government action, or that in themselves constitute sources of these – including “civil society” organisations such as producer associations, trade unions, community-based organisations, non-governmental organisations and other players.<sup>806</sup>

In any case, strengthening the rule of law is likely to take time - it is not just about re-drafting legislation, it also requires changes in behaviour and attitudes that cannot happen overnight. In addition, it is likely not to be enough where the actual content of the law provides only limited protection to the property rights of local resource users - for example, where international human rights law does not require payment of compensation for compulsory takings of local resource rights. Because of this, action to improve the rule of law must be accompanied by measures to strengthen the normative content of the legal protection enjoyed by local resource users, as well as the capacity of these users to make the most of that protection.

In this regard, the notion of legal empowerment provides a useful conceptual framework. As discussed in section 2.2.2, recent years have witnessed considerable debate about legal empowerment, and much of this debate has specifically focused

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<sup>805</sup> See Carothers (2004).

<sup>806</sup> As argued by Golub (2005).

on property rights. A UN-hosted Commission on Legal Empowerment of the Poor released its final report in June 2008 (Commission on Legal Empowerment of the Poor, 2008), and identified property rights as one of the four “pillars” of legal empowerment (together with access to justice, labour rights and “business rights”).<sup>807</sup> The concept has also attracted attention and work from a civil society perspective.<sup>808</sup>

Broadly speaking, “empowerment” means enabling disadvantaged groups to have greater control over decisions and processes that affect their lives.<sup>809</sup> Legal empowerment refers to using legal processes to promote the empowerment of disadvantaged groups. It is underpinned by the concept of “power *by* the law” discussed in this study, as it involves using legal processes as a tool to redress power asymmetries in favour of disadvantaged groups. Compared to the concept used in the report of the Commission on Legal Empowerment of the Poor,<sup>810</sup> this study emphasises to a greater extent the centrality of power in the concept (and etymology) of legal empowerment.

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Legal empowerment requires legal frameworks that protect the interests of disadvantaged groups, and an adequate “capacity to claim” of these groups. Its promotion usually involves a combination of law reform to strengthen the rights of disadvantaged groups, and efforts to strengthen their capacity to claim. Figure 6.2 summarises some possible ways for doing so. While it is acknowledged that legal empowerment is multi-dimensional and involves different areas of law, the focus here is on property rights issues.

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<sup>807</sup> At p. 31-40.

<sup>808</sup> Including Golub and McQuay (2001) and Golub (2005); and, for the author's own work, Cotula (2007) and (2008a).

<sup>809</sup> On the concept of empowerment, see Alsop et al (2006), especially at p. 1 and 9-28.

<sup>810</sup> “Legal empowerment is the process through which the poor become protected and are enabled to use the law to advance their rights and their interests, vis-à-vis the state and in the market” (Commission on Legal Empowerment of the Poor (2008:26).

As for law reform, this study has identified several practical ways in which legal change can strengthen the protection of local property rights. These differ from those proposed by earlier exercises - such as the recommendations embodied in the report of the Commission on Legal Empowerment of the Poor. For a start, these recommendations mainly focus on national law,<sup>811</sup> although reference is also made to regional and global “Compacts” on legal empowerment.<sup>812</sup> Yet the analysis undertaken in chapter 3 above illustrates several ways in which reforming international law can provide a key role in strengthening the protection of local property rights.

For instance, introducing a compensation requirement in the ACHPR right-to-property provision would strengthen the legal protection of local property rights (while the protection of foreign investment would remain unchanged, as payment of compensation is already required by customary international law and all the sample investment treaties). As discussed,<sup>813</sup> this would not necessarily require an amendment to the African Charter. In the ECHR system, the lack of an explicit compensation requirement was tackled through case law: the European Court found that such a requirement was implicit in article 1 of Protocol 1 of the ECHR.<sup>814</sup> It is quite possible that, should a future dispute on the right to property be brought before the African Court on Human and Peoples’ Rights, the Court may take a similar approach.

It is also possible that the African Court may develop case law on other human rights that are relevant to the protection of local property rights but the impact of which is currently undermined by an unclear normative content - such as peoples’ right to freely dispose of their natural resources. In other words, the recent establishment of the African Court creates concrete opportunities for developing

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<sup>811</sup> Commission on Legal Empowerment of the Poor (2008:64-68).

<sup>812</sup> At p. 84 and 86-87.

<sup>813</sup> Section 5.1.

<sup>814</sup> See particularly the *James and Lithgow* cases, analysed in chapter 3.

human rights law under the ACHPR system in a way that strengthens the rights of local resource users.

These ideas are not necessarily alternative to the “Global Legal Empowerment Compact” proposed by the Commission on Legal Empowerment of the Poor.<sup>815</sup> This proposed Compact would be “ideally based on regionally agreed compacts”, and would reaffirm in “understandable” terms “that the core rights of legal empowerment are human rights”.<sup>816</sup> According to the Commission, the proposed Compact may be complemented by, or take the form of a “Declaration on Legal Empowerment” to be adopted by the UN General Assembly.<sup>817</sup>

It is possible that, should it be adopted, such a compact or declaration may create new momentum for policies and programmes to support legal empowerment. But it is also worth emphasising that international human rights law already provides relevant binding norms; and that tailored, practical measures to tighten up those norms may be more effective than new, grand declarations with little teeth.

At the national level, measures to strengthen local resource rights inevitably vary across countries. Where legal and non-legal barriers constrain access to the legal procedures necessary for the acquisition of legally protected property rights (e.g. land registration), lowering those barriers is a key step. This may require simplifying procedures, and reducing monetary and transaction costs - one of the key recommendations coming out of the work of the Commission on Legal Empowerment of the Poor.<sup>818</sup> Practical ways to improve access to land registration were identified by comparative research from Ethiopia, Ghana and Mozambique, and include devolving responsibilities to the lowest administrative level, using simple and affordable technology, bridging language barriers, and minimising the

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<sup>815</sup> At p. 86-87 of its report.

<sup>816</sup> At p. 86.

<sup>817</sup> At p. 87.

<sup>818</sup> P. 66 of the report.

formal and informal costs involved in registration (Kanji et al, 2005:26-27). Also, legally protecting land use rights irrespective of registration, like in Mozambique, is a useful step in contexts where access to land registration remains limited and inaccessible.

Besides tackling procedural barriers, however, a central issue (and one strangely neglected in the report of the Commission on Legal Empowerment of the Poor) relates to the strength of legal protection enjoyed by these rights. In this regard, it must be noted that the debate on establishing private ownership rights in Africa is longstanding, complex and often polarised between opposed ideological positions – particularly those emphasising the alleged economic benefits of creating individual land ownership rights as a key step to promoting capitalistic development,<sup>819</sup> and those stressing the specificity of land relations in rural Africa, the safety net function of (often idealised) “customary” tenure systems and the alleged extraneity of full ownership rights in such customary systems.

The focus on “ownership” in this debate is not necessarily helpful. Clear, long-term and enforceable use rights may offer a strength of legal protection that does not significantly differ from full ownership - particularly in those countries where land is nationalised, and private land ownership does not exist at all (e.g. Mozambique). Full ownership rights may still be withdrawn (“expropriated”), but only under restricted conditions (typically payment of compensation, non-discrimination, public purpose and due process). The strength of legal protection enjoyed by use rights vis-à-vis withdrawals from the state depends on the extent to which the safeguards typically found in expropriation of ownership rights also apply to withdrawals of use rights.

Where the legal protection of “customary” land rights is weak, strengthening that protection is a key step in that direction - as customary rights provide the main

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<sup>819</sup> E.g. de Soto (2000).

mechanisms through which the rural population gains access to resources in much of Africa. The comparison between the law of Chad, Cameroon, Mali and Mozambique provides some insights on possible ways to do this. For example, in Chad, customary land rights may be strengthened through law reform to introduce local consultation requirements along the lines of Mozambique's legislation.

In addition, where continued enjoyment of local resource use rights is subject to administrative ascertainment of vaguely defined "productive resource use" requirements (such as the so-called "*mise en valeur*" found across Francophone West Africa, including Chad, Cameroon and Mali), the strength of those use rights tends to be undermined. Productive use requirements are particularly problematic for certain types of resource use that are traditionally not deemed as "productive enough" for the purposes of land legislation - such as, in many parts of Africa, pastoralism (Hesse and Thébaud, 2006:17).

In other words, where recognition of ownership is not an option, reducing the number and scope of conditions attached to the legal protection of use rights, such as productive use requirements, and extending to these the safeguards for expropriation (compensation, non-discrimination, public purpose and due process) can still go a long way towards strengthening protection of local property rights.

Given the transnational nature of foreign investment projects, options for legal change are not limited to national or international law. Investment contracts and other project-specific arrangements also contribute to shape the strength of legal protection, and may constrain host state efforts to strengthen the protection for local property rights - as discussed in section 5.2.<sup>820</sup>

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<sup>820</sup> These issues are outside the scope of the report of the Commission on Legal Empowerment of the Poor.

Section 5.3 discussed various possibilities to ease these constraints. First, the scope of stabilization clauses must be deemed to be limited by a “compliance with international law” exception. Exceptions may be explicit, as in the BTC Human Right Undertaking and in Mozambique’s Model Exploration and Production Concession Contract. But while express formulation improves clarity and certainty, a “compliance with international law” exception must be deemed to exist even in absence of express formulation.

In addition, an evolutionary approach to formulating and interpreting stabilization clauses may also enable a degree of evolution in social standards - including with regard to the taking of local property rights. This evolutionary approach entails preferring economic equilibrium clauses over freezing clauses; featuring flexible social and environmental standards clauses, as well as more specific ones, in the contract; and building “de minimis” exceptions (e.g. “material” impact) into the threshold triggering the application of economic equilibrium clauses.

Finally, as investors may feel under pressure to extract broad stabilization clauses as part of their efforts to raise finance for the project, it may be useful to integrate the notion of social and environmental exceptions to stabilization clauses in relevant instruments adopted by lenders, such as the Equator Principles.<sup>821</sup>

In addition to — and perhaps even more than — legal reform, the analysis on the “capacity to claim” highlights the need for sustained investment in building local capacity to engage with the law. Such investment would maximise benefits from *existing* legal arrangements, which are currently underexploited. For example, in Mozambique, a legal requirement that investors consult local people is mainly applied as a process whereby locals give up their land rights and obtain largely one-off compensation (e.g. schools, clinics).<sup>822</sup> But that requirement could equally be

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<sup>821</sup> See section 2.3.

<sup>822</sup> See section 4.2.5.



used as the legal basis for joint-venture agreements, whereby local groups retain their land rights and contribute them in exchange for an equity share in a joint venture with the investor - thereby obtaining greater oversight of and benefit from the investment.<sup>823</sup>

Building local capacity may involve a range of activities aimed at tackling the three elements of the “capacity to claim” identified above - legal awareness, know-how, and capacity to exercise rights. For example, legal literacy training and rural radio programmes can increase legal awareness; legal clinics and paralegals programmes can strengthen know-how; while exercise of rights can be enhanced by the provision of legal advice, assistance and representation, including for example support through the land registration process or in negotiations with government or investors, and public interest litigation (see Figure 6.3).

In many parts of Africa, legal services organizations have developed innovative ways to provide these types of support.<sup>824</sup> Supporting this local innovation is key to making legal empowerment a reality.

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<sup>823</sup> For example, the Mozambican NGO Centro Terra Viva is working to develop such arrangements in the tourism sector (<http://www.ctv.org.mz/>).

<sup>824</sup> See for example the various chapters contributed by legal practitioners in Cotula and Mathieu (Eds) (2008).

## **7. Annexes**

## 7.1. Tables and figures

### 7.1.1. Tables

**Table 2.1. Foreign investment in Africa (selected countries)**

	FDI Flows (million of dollars)			FDI Stock (millions of dollars)			FDI Stock as percentage of GDP (%)		
	1980-5 (annual average) (1)	1990 (1)	2005 (2)	1980 (3)	1990 (2)	2005 (2)	1980 (3)	1990 (3)	2003 (3)
<i>Sub Saharan Africa</i>	897	850	17,934	27,724	35,023	179,216	10.9	12.0	27.7
Burkina Faso	1	2	19	18	39	68	1.0	1.4	3.9
Cameroon	154	32	18	330	1044	1072	4.9	9.4	13.9
Chad	10	10	705	121	250	3857	11.7	14.3	109.3
Ghana	10	15	156	229	319	2073	5.2	5.4	23.2
Kenya	26	26	21	386	668	1113	5.3	7.8	7.5
Mali	4	-1	159	16	229	915	0.9	1.7	16.1
Mozambique	1	0	108	15	42	2386	0.4	1.7	42.6
Namibia	NA	NA	349	1994	2047	2440	86.4	80.9	39.1
Nigeria	210	588	3403	2405	23,786	34,806	3.7	28.3	42.6
Senegal	9	2	54	150	258	1126	5.0	4.5	15.3
South Africa	83	-5	6379	16,519	9,207	69,372	20.5	8.2	18.5
Tanzania	8	-2	473	47	388	6029	0.8	0.1	32.9
Uganda	1	0	258		6	1830	0.9	2.2	26.8

Based on data from UNCTAD (1992) (1), (2004) (3), and (2006) (2).

**Table 2.2. The property rights protection matrix**

"Dimensions" of legal protection	"Layers" of legal rules		
	International	National	Local
Rule of law	X		X
Normative content <ul style="list-style-type: none"> <li>• Substantive protection</li> <li>• Legal remedies</li> </ul>			X
Tailored arrangements			X

**Table 2.3. Sources of power asymmetries between investors and local resource users**

Economic capital	- Access to capital, technology and other valuable resources.
Human capital	- Knowledge, know-how and expertise; - Negotiation and other skills; - Self-confidence.
Political capital	- Influence over decision-makers and opinion formers; - Capacity to mobilise “powerful” actors (e.g. home and host state governments, lenders, NGOs) and/or to draw power from other negotiating tables; - Internal cohesion/divisions.
Social capital	- Status; - Information asymmetries; - Contacts/social relations.
Cultural factors	- Internalised assumptions, values and attitudes – e.g. ideas on the “modernity” and “backwardness” of different forms of resource use.
Investor exposure	- “Location dependency”: Extent to which the project depends on a specific location e.g. due to availability of valuable resources (e.g. petroleum); - Vulnerability to local activities capable of affecting the cost-benefit equilibrium of the project (e.g. sabotage); - Relative importance of the project to the investor; - “Asset mobility”: Ease with which the investor can demobilise assets and move elsewhere; - Relative importance of reputational risk to the investor.
Coercion	- Access to a coercive apparatus – e.g. capacity to mobilise the police or military forces of the host state to further one’s interests.

**Table 3.1. Ratification of key human rights treaties by the 12 covered countries**

Country	ICCPR	ICCPR Protocol 1	ICESCR	ILO Convention 169	ACHPR	ACHPR African Court Protocol (1)
Burkina Faso	1999	1999	1999	No	1984	1998 (Yes)
Cameroon	1984	1984	1984	No	1989	No (No)
Chad	1995	1995	1995	No	1986	No (No)
Ghana	2000	2000	2000	No	1989	2004 (No)
Kenya	1972	No	1976	No	1992	2004 (No)
Mali	1974	2001	1976	No	1981	2000 (No)
Mozambique	1993	No	No	No	1989	2004 (No)
Namibia	1994	1994	1995	No	1992	No (No)
Nigeria	1993	No	1993	No	1983	2004 (No)
Senegal	1978	1978	1978	No	1982	1998 (No)
Tanzania	No	No	1976	No	1984	2006 (No)
Uganda	1995	1995	1987	No	1986	2001 (No)

Notes: (1) In brackets, whether accepted the Court's jurisdiction to receive complaints from individuals and groups

**Table 3.2. Property rights protection under selected investment treaties (article numbers in brackets)**

Treaty	Broad definition of "investment"	Most-favoured nation (MFN) and national treatment (NT)	"Fair and equitable treatment"	"Full protection and security"	Taking: concept	Taking: conditions	Taking: standard of compensation	"Umbrella" clause	Arbitration
Burkina Faso-Belgium/Luxemburg 2001	Yes (1(2))	MFN (3(3), 4(5), 5(5), 10)	Yes (3(1))	"Constant" protection and security (3(2))	Direct/indirect (4)	Imperative public purpose, due process, non-discrimination, compensation (4)	"Adequate and effective"; "real value" (4)	Yes (8(2))	Investor to choose between domestic courts and arbitration (UNCITRAL, ICSID and others) (9)
Cameroon-USA 1986	Yes (1(b))	Yes (II(1))	Yes (II(4))	Yes (II(4))	Direct/indirect (III)	Due process of law, public purpose, non-discrimination, compensation (III)	"Prompt, adequate and effective"; "fair market value" (III)	Yes (II(4))	ICSID (VII)
Chad-Italy 1969	No	MFN (V); not NT	No	No	Incl. "similar measures" and measures with "analogous effect" (IV)	Public interest, compensation (IV)	Equivalent to value (IV)	No	ICSID (VII)
Ghana-China 1989	Yes (1(a))	MFN (3(2)); not NT	"Equitable treatment" (3(1))	"Protection" (3(1))	Incl. "similar measures" (4)	Public interest, non-discrimination, under domestic legal procedure, compensation (5(1))	Equivalent to value (4(2))	No	Ad hoc arbitration (9)
Kenya-UK 1999	Yes (1)	Yes (3)	Yes (2(2))	Yes (2(2))	Incl. measures equivalent effect (5)	Non-discrimination, public purpose, compensation (5)	"Prompt, adequate and effective"; "genuine value" (5)	Yes (2(2))	ICSID (8)

Treaty	Broad definition of "investment"	Most-favoured nation (MFN) and national treatment (NT)	"Fair and equitable treatment"	"Full protection and security"	Taking: concept	Taking: conditions	Taking: standard of compensation	"Umbrella" clause	Arbitration
Mali-Netherlands 2003	Yes (1(a))	Yes (3(2))	Yes (3)	Yes (3(1))	Direct/indirect (6)	Public purpose, due process, non-discrimination, compensation (6)	"Just"; "real value" (6)	Yes (3(4))	ICSID (9)
Mozambique-USA 1998	Yes (I(d))	Yes (II(1))	Yes (II(3)(a))	Yes (II(3)(a))	Direct/indirect and tantamount (III(1))	Public purpose, due process, non-discrimination, compensation (III(1) & (2))	"Prompt, adequate and effective"; "fair market value" (III)	No	ICSID and others (e.g. UNCITRAL) (IX)
Namibia-Netherlands 2002	Yes (1(a))	Yes (3(2))	Yes (3)	Yes (3(1))	Direct/indirect (6)	Public purpose, non-discrimination, due process, compensation (6)	"Just"; fair market value (6)	Yes (3(4))	ICSID (9)
Nigeria-Korea 1997	Yes (1(1))	Yes (3)	Yes (2(2))	Yes (2(2))	Direct/indirect, incl. measures equivalent effect (5)	Public purpose, non-discrimination, accordance with laws, compensation (5)	"Prompt, adequate and effective"; "market value" (5)	Yes (2(3))	ICSID (8)
Senegal-UK 1980	Yes (1(a))	Yes (3(1))	Yes (2(2))	Yes (2(2))	Incl. measures equivalent effect (5)	Conformity with international law, public purpose, judicial review, compensation (5)	"Prompt, adequate and effective"; "market value" (5)	Yes (2(2))	ICSID (8)
Tanzania-Germany 1965	Yes (8(1))	Yes (2)	Yes (1)	Yes (3(1))	Expropriation (3)	Public benefit, due process, compensation (3)	"Equivalent of the investment expropriated" (3)	Yes (7(2))	No
Uganda-France 2003	Yes (1(a))	Yes (4)	Yes (3)	Yes (5(1))	Direct/indirect if "effect of dispossession" (5(2))	Public purpose, due process, non-discrimination, compensation (5)	"Prompt and adequate"; "real value" (5)	No	ICSID (7)

**Table 3.3. International investment law signed or ratified by the 12 covered countries**

Country	No of BITs signed (1)	New York Convention (2)	ICSID Convention (3)
Burkina Faso	13	1987	1966
Cameroon	14	1988	1967
Chad	12	No	1966
Ghana	26	1968	1966
Kenya	6	1989	1967
Mali	15	1984	1978
Mozambique	21	1998	1995
Namibia	11	No	No <sup>825</sup>
Nigeria	19	1970	1965
Senegal	20	1994	1967
Tanzania	14	1964	1992
Uganda	17	1992	1966

Sources: (1) <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1>, last checked 1 September 2007 and updated to 1 June 2006, cross-referenced and integrated with ICSID (2007), not all signed BITs in force; (2) [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html), last read on 12 December 07; (3) <http://www.worldbank.org/icsid/constate/c-states-en.htm>, as of 9 May 2007.

<sup>825</sup> Signed 1998, not yet ratified.



**Table 3.4. International human rights and investment law on the protection of property rights, as it applies to Africa**

	Human rights law	Investment law <sup>826</sup>
<b>Substantive protection</b>		
Public purpose	Required by ACHPR; arguably implicit in UDHR	Required (customary law and all sample BITs)
Non-discrimination	Required by the ACHPR and UDHR non-discrimination provisions <sup>827</sup>	Required (customary law and most sample BITs)
Due process	Not required by ACHPR; arguably implicit in UDHR	Required in most sample BITs
Compensation (duty to pay)	Not required by ACHPR; arguably implicit in UDHR <sup>828</sup>	Required (customary law and all sample BITs)
Compensation (standard of)	Not required <sup>829</sup>	Several formulae, usually emphasising market value; “prompt, adequate and effective” compensation increasingly used; public purpose does not affect amount of compensation; well-established valuation methods (e.g. DCF)
Regulatory stability and predictability	Not developed <sup>830</sup>	Regulatory taking doctrine; broadly interpreted “fair and equitable treatment”
Obligation to “protect” from third party interference	Not developed under ACHPR <sup>831</sup>	“Full protection and security” in most sample BITs
Tailored state commitments not to interfere with property rights	Not practiced; likely to violate non-discrimination in enjoyment of rights	Stabilisation clauses in investment contracts deemed valid and with legal effect

<sup>826</sup> Customary law and twelve sample BITs.

<sup>827</sup> Required under the ECHR and the ACHR. Gender and race discrimination are prohibited under the CEDAW and the ICERD, respectively.

<sup>828</sup> Required for the “spoliation” of peoples’ right to freely dispose of their natural resources (although the indeterminacy of holder and content of this right limit the practical implications of this requirement); and, arguably, for takings of property rights that affect food security, under the right to food. Required under the ECHR and the ACHR.

<sup>829</sup> “Adequate” compensation for peoples’ right to freely dispose of their natural resources. Under ECHR case law, “reasonably related” to (but possibly less than) the market value; the nature of the public interest pursued may be taken into account in determining the amount of compensation.

<sup>830</sup> Case law on regulatory takings (though not on regulatory stability and predictability beyond that) has been developed under the ECHR, though these rules are less stringent than under the case law of international arbitrations.

<sup>831</sup> Required for peoples’ right to freely dispose of their natural resources (*SERAC and CESR v. Nigeria*). Case law on the obligation to protect the right to property has been developed under the ACHR.

	Human rights law	Investment law
<b>Legal remedies</b>		
Forum	Domestic courts first, international bodies then - African Court if state consented, but in most cases African Commission which (for countries parties to the African Court Protocol) may then submit to the Court)	Directly international arbitration if the host state consents (usually so in BITs); domestic courts and diplomatic protection otherwise
Nature of remedy	Range of remedies – declaration of illegality, restoration (if possible), compensation, etc	Range of remedies – but mainly compensation
Legal instrument	ACHPR Commission (non-binding) decisions only, until 2006; the same and/or ACHPR Court judgments, 2006 on	Binding and enforceable awards
Strategies to ensure compliance	Lack of robust sanctions in case of non-compliance	“Pursuit actions” put pressure on the host state to comply

**Table 4.1. Rule of law indicators**

Country	Independence of courts in the Constitution (1)	Rule of law WGI scoring 2006, in percentile rank (2)	Ibrahim Property Rights Index 2005 (3)	Ibrahim Judicial Independence Index 2005 (3)
Burkina Faso	Yes (129)	41.0	30%	42.9%
Cameroon	Yes (37(2))	13.8	30%	14.3%
Chad	Yes (146)	6.2	30%	14.3%
Ghana	Yes (127)	51.0	50%	85.7%
Kenya	No <sup>832</sup>	15.7	50%	57.1%
Mali	Yes (81)	46.2	30%	78.6%
Mozambique	Yes (134 and 217)	33.8	30%	42.9%
Namibia	Yes (78(2))	56.7	30%	71.4%
Nigeria	No <sup>833</sup>	8.1	30%	28.6%
Senegal	Yes (88)	45.7	50%	71.4%
Tanzania	No <sup>834</sup>	42.9	30%	71.4%
Uganda	Yes (128)	39.0	30%	50.0%

(1) Article numbers in brackets refer to the affirmation of the principle; other provisions may regulate the appointment and tenure of judges as well as other aspects that significantly affect judicial independence.

(2) Source: [http://info.worldbank.org/governance/wgi2007/sc\\_chart.asp](http://info.worldbank.org/governance/wgi2007/sc_chart.asp).

(3) Source: [www.moibrahimfoundation.org](http://www.moibrahimfoundation.org). See main text for explanation of the meaning of these scorings.

<sup>832</sup> No explicit affirmation of principle – although the Constitution does contain provisions on tenure of office for judges (article 62) and on the Judicial Service Commission (article 68), which have implications for the independence of courts.

<sup>833</sup> While article 6 on judicial powers is silent on independence, some Constitution provisions do have implications for judicial independence - e.g. with regard to the appointment of Supreme Court judges (article 231).

<sup>834</sup> But see articles 110 on tenure of office and 112 on appointment by the Judicial Service Commission.

**Table 4.2. National constitutions in selected African countries (article numbers in brackets)**

Country	Right to property – affirmation	Right to property – taking	People’s right to freely dispose of their natural resources	Right to adequate food/standard of living	Right to legal redress	Specific provisions on land/resource rights	Provisions on foreign investment
Burkina Faso (1991, amended in 1997, 2000 and 2002)	It is “guaranteed”, linked to “social utility” (15(1))	Public purpose, “just” and prior compensation (15(3))	Natural resources belong to the people and are to be used to improve their living conditions (14)	No	Right to initiate or join collective legal action (30)	No	No
Cameroon (1972, amended in 1996)	“Guaranteed to every person by law”; not to be exercised against public interest (preamble) <sup>835</sup>	Public purpose and compensation according to the law (preamble)	No	No	Rights to a fair hearing (preamble)	No	No
Chad (1996, amended in 2005)	Private property is “inviolable and sacred” (41(1))	Public purpose, just and prior compensation (41(2))	State sovereignty over natural resources for the benefit of national community as a whole (57)	No	No	State sovereignty over natural resources for the benefit of national community as a whole (57)	Foreigners enjoy same rights as nationals except political rights (15)

<sup>835</sup> Article 65 of the Constitution of Cameroon states that the preamble is “part and parcel” of the Constitution.

Country	Right to property – affirmation	Right to property – taking	People’s right to freely dispose of their natural resources	Right to adequate food/standard of living	Right to legal redress	Specific provisions on land/resource rights	Provisions on foreign investment
Ghana (1992)	Right of “every person”. Interference only “in accordance with law” and if “necessary in a free and democratic society” (18(1) and (2))	Specified public purpose grounds; under a law; prompt, fair and adequate compensation; judicial review (20)	No	State to take “all necessary action ... to provide adequate means of livelihood” (36(1))	Right to legal redress (33)	Extensive provisions on land and natural resources (257-269); public lands and minerals vested in the president on behalf of the people (257).	To be encouraged (36 (4)); no freehold (or leasehold longer than 50 years) in land to non-nationals (266)
Kenya (1963, as amended) <sup>836</sup>	Only in relation to taking (75)	Specified public purpose grounds; prompt and full compensation, judicial review (75)	No	No	Right to legal redress (84)	Extensive provisions on “Trust Land” (Chapter IX)	No
Mali (1992)	It is “guaranteed” (13)	Public purpose; just and prior compensation (13)	No	No <sup>837</sup>	Not explicit, arguably implicit	No	No

<sup>836</sup> At the time of writing, a new Constitution was being discussed.

<sup>837</sup> The “right to food security” is affirmed in Mali’s Framework Law on Agriculture of 2006 (*Loi d’Orientation Agricole*, article 8).

Country	Right to property – affirmation	Right to property – taking	People’s right to freely dispose of their natural resources	Right to adequate food/standard of living	Right to legal redress	Specific provisions on land/resource rights	Provisions on foreign investment
Mozambique (1990, amended 2004)	Recognised and guaranteed (82(1))	Public need, use or interest; just compensation (82(2))	No	No	Right to legal redress (69 and 70)	Ownership of land and natural resources rested with the state for use in the national interest (98, 102 and 109). The state determines conditions for use and enjoyment of rights over land (110), and protects land rights acquired through inheritance or occupancy (111)	The state “guarantees” foreign investment, which is to operate within the framework of its economic policy (108(1)). Foreign investment is authorised in all territory and economic sectors, except those sectors reserved to the state (108(2))
Namibia (1990)	“All persons” have the right to “acquire, own and dispose of” property (16(11))	Public interest, just compensation, in accordance with law (16(2))	No	State to “promote and maintain” “an acceptable level of nutrition and standard of living” (95(j))		Land and natural resources belong to the State unless “lawfully owned” (100)	Is encouraged (99); Parliament may restrict acquisition of property by non-nationals (16(11))

Country	Right to property – affirmation	Right to property – taking	People’s right to freely dispose of their natural resources	Right to adequate food/standard of living	Right to legal redress	Specific provisions on land/resource rights	Provisions on foreign investment
Nigeria (1999)	“Every citizen” has the right to acquire and own immovable property (43)	Manner and purposes prescribed by law; prompt compensation; judicial review (44)	No	No	Right to legal redress (46)	Minerals and petroleum vested with the federal government (44(3))	No
Senegal (2001, as amended)	It is “guaranteed” (15(1))	Public necessity, just and prior compensation (15(1))	No	No	Not explicit, arguably implicit	Access to land for men and women determined by law (15(2))	No
Tanzania (1977, as amended)	“Every person” is entitled to own property and to protection of their property (24(1)); and has a duty to respect others’ property (27(1))	Under law providing for “fair and adequate” compensation (27(2)); public interest (30(2)(a) and (b))	No	No	Right to legal redress (30(3))		

Country	Right to property – affirmation	Right to property – taking	People’s right to freely dispose of their natural resources	Right to adequate food/standard of living	Right to legal redress	Specific provisions on land/resource rights	Provisions on foreign investment
Uganda (1995)	“Every person” has right to own property (26(1))	Public purpose; under a law; prompt, fair and adequate compensation; judicial review (26(2); cf. also 237(2)(a) specifically on land takings)	No	State to ensure that all Ugandans enjoy food security (preambular para. XIV)	Right to legal redress (50)	State to regulate land tenure and use in furtherance of sound justice (para. XI); and to protect land and other resources (para. XIII). Extensive provisions on land and natural resources (237-245)	Non-citizens may acquire land leases (not ownership) (article 237(2)(c))



**Table 4.3. Land and natural resource rights in selected African countries<sup>838</sup>**

Country	Land ownership	Local land rights – Nature	Local land rights – Recognition of customary rights	Local land rights – Conditions for legal protection	Ownership of subsoil resources (minerals, petroleum)
Burkina Faso	State - all land not privately registered; private (but in practice rare)	Range of interests, incl ownership (but in practice rare)	No. Those using land at entry into force can continue to do so <sup>839</sup>	Productive use	State
Cameroon	State - all land not privately registered; private (but in practice rare)	Range of interests, incl ownership (but in practice rare)	No. Those using land at entry into force can continue to do so	Productive use	State
Chad	State - all land not privately registered; private (but in practice rare)	Range of interests, incl ownership (but in practice rare)	Customary right-holders can continue to use land; <sup>840</sup> “rural concessions”	Productive use	State
Ghana	State and private	Range of interests, incl ownership	Yes	Registrable but protected even if not registered	State
Kenya	State and private	Range of interests, incl ownership		Registration	State
Mali	State and private	Range of interests, incl ownership (but in practice rare)	Yes	Productive use	State
Mozambique	State	Use rights	Yes	Registrable but protected even if not registered	State

<sup>838</sup> Issues concerning land takings are dealt with separately in Tables 4.5 to 4.9 below.

<sup>839</sup> Except for the *terres aménagées* e.g. irrigated land.

<sup>840</sup> Customary rights are prescribed if not exercised for 10 years. Expropriation procedure applies to ownership alone, but deprivation of customary rights requires compensation.

Country	Land ownership	Local land rights – Nature	Local land rights – Recognition of customary rights	Local land rights – Conditions for legal protection	Ownership of subsoil resources (minerals, petroleum)
Namibia	State and private	Customary and leasehold rights in communal areas; range of interests incl ownership on commercial farmland	Yes		State
Nigeria	State governors	Use rights			State
Senegal	State	Use rights allocated by local governments	No	Productive use	State
Tanzania	State	Use rights allocated by local governments	Yes	Productive use	State
Uganda	State and private	Customary, freehold, “mailo”, leasehold	Yes	Registrable but protected even if not registered	State

**Table 4.4. Investment Codes in selected African countries (article numbers in brackets)**

Country	Legislation	Scope of application	Non-discrimination on grounds of nationality explicitly stated	Privileged tax regime	Property rights protection clauses	Arbitration
Burkina Faso	Investment Code 1995, amended in 1997	Nationals and non-nationals; Excludes mining		Yes, for minimum investment size and graduated according to size		
Cameroon	Investment Charter 2002, amended in 2004	Nationals and non-nationals (3)	No	Yes – to be clarified in secondary legislation (19)	Yes – the state “guarantees” property rights (10)	Refers to Cameroon’s ratification of the ICSID Convention (11)
Chad	Investment Code 1987	Nationals and non-nationals	With regard to specific issues (e.g. capacity to acquire rights; 5-8)	For industrial sector, graduated according to nature/size of investment, incl. stabilisation of regime (12-36)	No	To be defined in Establishment Convention with investor (39)
Ghana	Investment Act	Nationals and non-nationals; Excludes mining and petroleum (17)	No	Reference to tax and other legislation (23)	Yes – expropriation only “in the national interest for a public purpose” and against payment of compensation (28)	For all investors. For foreign investors, mechanisms depend on investment treaties or agreement between the parties ( 23)

Country	Legislation	Scope of application	Non-discrimination on grounds of nationality explicitly stated	Privileged tax regime	Property rights protection clauses	Arbitration
Kenya	Investment Promotion Act 2004	Nationals and non-nationals, but partly different terms	No	Not in the Act	No	No
Mali	Investment Code 1991, amended in 2005	Nationals and non-nationals (3); Excludes mining and petroleum (4)	Yes (3 and 9)	Yes, graduated according to investment size (11 ss)	No	For foreign investors (24)
Mozambique	Investment Law 1993	Nationals and non-nationals (2(1)); Excludes mining and petroleum (3(2))	Yes (4)	Tax and customs incentives (16)	Yes – expropriation only if “absolutely necessary” for national interest and against “just and equitable” compensation (13)	For foreign investors (25)
Namibia	Foreign Investment Act 1990, amended in 1993	Foreign investors (1(1))	Yes (3(2))	Not in the Act	Yes – expropriation only according to the Constitution; “just compensation” without undue delay and in freely convertible currency (11)	For foreign investors, depending on terms of the Certificate of Status Investment (13)

Country	Legislation	Scope of application	Non-discrimination on grounds of nationality explicitly stated	Privileged tax regime	Property rights protection clauses	Arbitration
Nigeria	Nigerian Investment Promotion Commission Act 1995, as amended	Nationals and non-nationals	No	Not in the Act	Yes – expropriation only for public purposes and against “fair and adequate compensation” (25)	For all investors (26)
Senegal	Investment Code 2004	Nationals and non-nationals (1(6)); Extractive industries explicitly included (2)	Yes (9 and 10), including re: access to property rights (9)	Yes for minimum investment size and graduated according to size (15 ss)	Yes – expropriation for public purpose and against prior and fair compensation (4)	For foreign investors (12)
Tanzania	Tanzania Investment Act 1997	Nationals and non-nationals, above (differentiated) minimum size (2); Limited application to mining and petroleum (2)	No	Reference to tax and other legislation (18)	Yes – takings only under due process of law and against “fair, adequate and prompt compensation” (22)	For foreign investors (23)
Uganda	Investment Code Act	Foreign investors (1(f) and 9)	No	Yes (21-26)	Yes – reference to Constitution; “fair market value” (27)	For foreign investors (28)

#### 4.5. "Internal" comparison of property rights protection: Cameroon

	Local resource rights	Foreign investment
Public purpose	<p>Public purpose (<i>utilité publique</i>, Constitution, preamble).</p> <p>If land ownership (titled land), general interest ("<i>objectifs d'intérêt general</i>" - Ordinance 74-1 of 1974, article 12; Law 85-09 of 1985, article 1).</p> <p>Large-scale investments have been explicitly deemed to be in the public purpose to justify takings of local land rights (e.g. under Law 96-14 of 1996, concerning the construction of pipelines from third countries; see also articles 53-62 of the Petroleum Code, Law 99-013 of 1999); in which case, the costs of making the land available are borne by the holder of petroleum rights (article 55(2) of the Petroleum Code 1999).</p>	<p>Public purpose (<i>utilité publique</i>, Constitution, preamble).</p> <p>If land ownership (titled land), general interest ("<i>objectifs d'intérêt general</i>" - Ordinance 74-1 of 1974, article 12; Law 85-09 of 1985, article 1).</p>
Non-discrimination	<p>Equality of citizens (article 1(2) of the Constitution).</p>	<p>Investment Charter 2002 applies to all Cameroonian and foreign investors (article 3).</p> <p>The state "guarantees" land ownership rights of "all physical and legal persons" (Ordinance 74-1 of 1974, article 1).</p>
Compensation (duty to pay)	<p>According to law (Constitution, preamble).</p> <p>If ownership (titled land), duty to compensate under expropriation procedure (article 2 of Law 85-09 of 1985).</p> <p>If use rights (on untitled land in the national land estate), compensation for improvements alone under "incorporation" procedure (article 23 of Decree 76-166 of 1976).</p> <p>Only 3% of the land titled (Egbe,</p>	<p>According to law (Constitution, preamble).</p> <p>The state "guarantees" investors' property rights (Investment Charter, article 10).</p> <p>If ownership (titled land), duty to compensate under expropriation procedure (article 2 of Law 85-09 of 1985).</p>

	2001:32), mainly medium to large scale investment (Firmin-Sellers and Sellers, 1999:1118).	
Compensation (standard of)	<p>Not in Constitution.</p> <p>If expropriation of land ownership (titled land only), compensation related to the "direct, immediate and verifiable damage caused by the dispossession", including land, crops, buildings and "any other type of development" (article 7 of Law 85-09 of 1985).</p> <p>For loss of improvements (e.g. crops and fruit trees), compensation based on rates fixed in ministerial orders dating back to 1981 and 1982, which no longer reflect current market values.</p> <p>Only 3% of the land titled (Egbe, 2001:32), mainly medium to large scale investment (Firmin-Sellers and Sellers, 1999:1118).</p>	<p>Not in Constitution.</p> <p>If expropriation of land ownership (titled land), compensation related to the "direct, immediate and verifiable damage caused by the dispossession", including land, crops, buildings and "any other type of development" (article 7 of Law 85-09 of 1985).</p>
Due process	<p>Not in Constitution.</p> <p>Determination by government Valuation and Verification Commissions (Law 85-09 of 1985).</p> <p>Remedies: administrative recourse first, courts if no satisfaction (article 12 of Law 85-09). Complaints cannot halt the expropriation process (Law 85-09 of 1985).</p> <p>Only 3% of the land titled (Egbe, 2001:32), mainly medium to large scale investment (Firmin-Sellers and Sellers, 1999:1118).</p>	<p>Not in Constitution.</p> <p>For land takings, determination by government Valuation and Verification Commissions (Law 85-09 of 1985).</p> <p>Remedies: arbitration under Investment Charter 2002 (article 11). Domestic law remedies also available (administrative recourse first, courts if no satisfaction; article 12 of Law 85-09).</p>

#### 4.6. "Internal" comparison of property rights protection: Chad

	Local resource rights	Foreign investment
Public purpose	Public purpose ( <i>utilité publique</i> , article 41 of the Constitution); public interest ( <i>intérêt public</i> ) required for land ownership and for use rights (Law 67-25 of 1967, article 1). Granting of petroleum rights amounts to an "implied declaration of urgent public purpose" (Petroleum Code, Order 7-PC-TP-MH of 1962, article 47).	Public purpose ( <i>utilité publique</i> , article 41 of the Constitution); public interest ( <i>intérêt public</i> ) required for land ownership and for use rights (Law 67-25 of 1967, article 1).
Non-discrimination	Equality before the law for all (Constitution, article 14).	Equality before the law for all (Constitution, article 14). Apart from political rights, non-nationals enjoy the same rights as nationals (Constitution, article 15).
Compensation (duty to pay)	Required by Constitution (article 41). Required for land ownership and use rights (Law 67-25 of 1967, article 1). Individuals or groups holding customary rights on public land are entitled to compensation for improvements alone (Law 67-23 of 1967, articles 4 and 7). Compensation due for takings of ownership and customary rights; and for the creation of pipeline-related easements for private ownership (Petroleum Code 1962, articles 47, 57).	Required by Constitution (article 41). Required for land ownership and use rights (Law 67-25 of 1967, article 1).
Compensation (standard of)	"Just and prior" (" <i>juste et préalable</i> ", Constitution, article 41). If granting of petroleum rights in areas encumbered by customary rights and if no amicable settlement, amount of compensation determined by government decree (Petroleum Code 1962, article 47).	"Just and prior" (" <i>juste et préalable</i> ", Constitution, article 41).



<p>Due process</p>	<p>Not in Constitution.</p> <p>If dispute on compensation amount in expropriation procedure (for titled land), the president of the competent court decides based on expert opinion; appeal is possible (Law 67-25 of 1967, articles 5-6).</p> <p>For use rights on untitled land, compensation determined by a commission (Law 67-25 of 1967, articles 16-17).</p> <p>Any disputes relating to compensation decided by the civil courts (e.g. in petroleum operations, Petroleum Code 1962, article 58).</p>	<p>Not in Constitution.</p> <p>If dispute on compensation amount in expropriation procedure, the president of the competent court decides based on expert opinion; appeal is possible (Law 67-25 of 1967, articles 5-6).</p> <p>Arbitration possible under the Petroleum Code (article 74) and/or as provided in the Convention of Establishment with the investor (under article 39 of the Investment Code 1987).</p>
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#### 4.7. "Internal" comparison of property rights protection: Mali

	Local resource rights	Foreign investment
Public purpose	Public purpose ( <i>utilité publique</i> , article 13 of the Constitution). For customary land rights, public purpose (Land Code, article 43). For pastoral rights, general interest (Pastoral Charter, article 51). Petroleum operations may be declared to be for public purpose (article 36, Hydrocarbons Law 2004).	Public purpose ( <i>utilité publique</i> , article 13 of the Constitution).
Non-discrimination	Non-discrimination between citizens (Constitution, article 2).	
Compensation (duty to pay)	Required by Constitution (article 13) and by Hydrocarbons Law 2004 (article 34; also articles 39-40). Not only for ownership (titled land), but also for customary land rights (Land Code, article 43), including pastoral rights (but only "if needed"; Pastoral Charter 2001, article 51). Costs for compensation borne by petroleum operator (article 42, Hydrocarbons Law 2004).	Required by Constitution (article 13).
Compensation (standard of)	"Just and prior" (" <i>juste et préalable</i> ", Constitution, article 13, and, on customary land rights, Land Code, article 43). For pastoral rights, if possible in the form of alternative pastoral resources (Pastoral Charter, article 51).	"Just and prior" (" <i>juste et préalable</i> ", Constitution, article 13).
Due process	Not in Constitution. A public enquiry (" <i>enquête publique et contradictoire</i> ") establishes the existence of customary land rights ( <i>Code Domanial et Foncier</i> , article 47). Once established, the expropriation procedure applies to the " <i>purge</i> " of customary rights ( <i>Code Domanial et</i>	Not in Constitution.

	<p><i>Foncier</i>, article 47), as well as to the taking of pastoral rights (Pastoral Charter, article 51).</p> <p>Remedies: conciliation by administrative authorities, courts if failure (Land Code, article 225; Hydrocarbons Law 2004, article 41).</p>	<p>Remedies: International arbitration (article 24, Investment Code 1991, as amended in 2005; article 93, Hydrocarbons Law 2004).</p>
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#### 4.8. "Internal" comparison of property rights protection: Mozambique

	Local resource rights	Foreign investment
Public purpose	Public need, utility or interest (Constitution, article 82(2)).	Public need, utility or interest (Constitution, article 82(2)). "Absolutely necessary for weighty reasons of public interest" (Investment Act, article 13).
Non-discrimination	Non-discrimination among citizens (Constitution, article 35).	Non-discrimination on grounds of nationality (Investment Act, article 4).
Compensation (duty to pay)	Required by Constitution (article 82 (2)) and Land Act (article 18(1)(b)).  Land rights equally protected irrespective of titling (Land Act, article 13(2)). Petroleum concessionaire to compensate for loss of or damage to property (Petroleum Law 2001, articles 17(f) and 20(4); see also Model Exploration and Production Concession Contract 2007, article 27.6).	Required by Constitution (article 82 (2)). Land Act (article 18(1)(b)) and Investment Act (article 13). Termination of use rights for non-compliance with the investment plan within agreed timeframes and without "justified reason" does not entail payment of compensation (article 18(1)(a) and (2)).  No expropriation, including regulatory taking (Model Exploration and Production Contract 2007, article 27.11).
Compensation (standard of)	"Just" (" <i>justa</i> ") - Constitution, article 82 (2)) and Land Act (article 18(1)(b)).	"Just" (" <i>justa</i> ") - Constitution, article 82 (2)) and Land Act (article 18(1)(b)). "Just and equitable" (Investment Act, article 13).
Due process	Not in Constitution. Mandatory community consultation before allocations of land rights to third parties (Land Act, articles 13 and 24).  Remedies: Judicial review.	Not in Constitution.  Remedies: direct access to international arbitration (Investment Law, article 25; Petroleum Law, article 27).

**Table 4.9. "External" comparison of the legal protection for local resource rights**

	Cameroon	Chad	Mali	Mozambique
Public purpose	<p>Public purpose (<i>utilité publique</i>, Constitution, preamble). If land ownership (titled land), general interest ("<i>objectifs d'intérêt général</i>" - Ordinance 74-1 of 1974, article 12; Law 85-09 of 1985, article 1).</p> <p>Large-scale investments have been explicitly deemed to be in the public purpose to justify takings of local land rights (e.g. under Law 96-14 of 1996, concerning the construction of pipelines from third countries; see also articles 53-62 of the Petroleum Code, Law 99-013 of 1999); in which case, the costs of making the land available are borne by the holder of petroleum rights (article 55(2) of the Petroleum Code 1999).</p>	<p>Public purpose (<i>utilité publique</i>, article 41 of the Constitution); public interest (<i>intérêt public</i>) required for land ownership and for use rights (Law 67-25 of 1967, article 1).</p> <p>Granting of petroleum rights amounts to an "implied declaration of urgent public purpose" (Petroleum Code, Order 7-PC-TP-MH of 1962, article 47).</p>	<p>Public purpose (<i>utilité publique</i>, (article 13 of the Constitution). For customary land rights, public purpose (Land Code, article 43). For pastoral rights, general interest (Pastoral Charter, article 51).</p> <p>Petroleum operations may be declared to be for public purpose (article 36, Hydrocarbons Law 2004).</p>	<p>Public need, utility or interest (Constitution, article 82(2)).</p>

	Cameroon	Chad	Mali	Mozambique
Non-discrimination	Equality of citizens (article 1(2) of the Constitution).	Equality before the law for all (Constitution, article 14).	Non-discrimination between citizens (Constitution, article 2).	Non-discrimination among citizens (Constitution, article 35).
Compensation (duty to pay)	<p>According to law (Constitution, preamble).</p> <p>If ownership (titled land), duty to compensate under expropriation procedure (article 2 of Law 85-09 of 1985).</p> <p>If use rights (on untitled land in the national land estate), compensation for improvements alone under “incorporation” procedure (article 23 of Decree 76-166 of 1976).</p> <p>Only 3% of the land titled (Egbe, 2001a:32), mainly medium to large scale investment (Firmin-Sellers and Sellers, 1999:1118).</p>	<p>Required by Constitution (article 41).</p> <p>Required for land ownership and use rights (Law 67-25 of 1967, article 1).</p> <p>Individuals or groups holding customary rights on public land are entitled to compensation for improvements alone (Law 67-23 of 1967, articles 4 and 7).</p> <p>Compensation due for takings of ownership and customary rights; and for the creation of pipeline-related easements for private ownership (Petroleum Code 1962, articles 47, 57).</p>	<p>Required by Constitution (article 13) and by Hydrocarbons Law 2004 (article 34; also articles 39-40).</p> <p>Not only for ownership (titled land), but also for customary land rights (Land Code, article 43), including pastoral rights (but only “if needed”; Pastoral Charter 2001, article 51).</p> <p>Costs for compensation borne by petroleum operator (article 42, Hydrocarbons Law 2004).</p>	<p>Required by Constitution (article 82 (2)) and Land Act (article 18(1)(b)).</p> <p>Land rights equally protected irrespective of titling (Land Act, article 13(2)).</p> <p>Petroleum concessionaire to compensate for loss of or damage to property (Petroleum Law 2001, articles 17(f) and 20(4); see also Model Exploration and Production Concession Contract 2007, article 27.6).</p>

	Cameroon	Chad	Mali	Mozambique
Compensation (standard of)	<p>Not in Constitution.</p> <p>If expropriation of land ownership (titled land only), compensation related to the “direct, immediate and verifiable damage caused by the dispossession”, including land, crops, buildings and “any other type of development” (article 7 of Law 85-09 of 1985).</p> <p>For loss of improvements (e.g. crops and fruit trees), compensation based on rates fixed in ministerial orders dating back to 1981 and 1982, which no longer reflect current market values.</p> <p>Only 3% of the land titled (Egbe, 2001a:32), mainly medium to large scale investment (Firmin-Sellers and Sellers, 1999:1118).</p>	<p>“Just and prior” (“<i>juste et préalable</i>”, Constitution, article 41).</p> <p>If granting of petroleum rights in areas encumbered by customary rights and if no amicable settlement, amount of compensation determined by government decree (Petroleum Code 1962, article 47).</p>	<p>“Just and prior” (“<i>juste et préalable</i>”, Constitution, article 13, and, on customary land rights, Land Code, article 43).</p> <p>For pastoral rights, if possible in the form of alternative pastoral resources (Pastoral Charter, article 51).</p>	<p>“Just” (“<i>justa</i>”) - Constitution, article 82 (2) and Land Act (article 18(1)(b)).</p>

	Cameroon	Chad	Mali	Mozambique
Due process	<p>Not in Constitution.</p> <p>Determination by government Valuation and Verification Commissions (Law 85-09 of 1985).</p> <p>Remedies: administrative recourse first, courts if no satisfaction (article 12 of Law 85-09). Complaints cannot halt the expropriation process (Law 85-09 of 1985).</p>	<p>Not in Constitution.</p> <p>If dispute on compensation amount in expropriation procedure (for titled land), the president of the competent court decides based on expert opinion; appeal is possible (Law 67-25 of 1967, articles 5-6). For use rights on untitled land, compensation determined by a commission (Law 67-25 of 1967, articles 16-17).</p> <p>Any disputes relating to compensation decided by the civil courts (e.g. in petroleum operations, Petroleum Code 1962, article 58).</p>	<p>Not in Constitution.</p> <p>A public enquiry ("<i>enquête publique et contradictoire</i>") establishes the existence of customary land rights (<i>Code Domanial et Foncier</i>, article 47). Once established, the expropriation procedure applies to the "<i>purge</i>" of customary rights (<i>Code Domanial et Foncier</i>, article 47), as well as to the taking of pastoral rights (Pastoral Charter, article 51).</p> <p>Remedies: conciliation by administrative authorities, courts if failure (Land Code, article 225; Hydrocarbons Law 2004, article 41).</p>	<p>Not in Constitution.</p> <p>Mandatory community consultation before allocations of land rights to third parties (Land Act, articles 13 and 24).</p> <p>Remedies: Judicial review.</p>



**Table 6.1. The property rights protection matrix - Summary findings**

Dimensions of legal protection	"Layers" of legal rules	
	International	National
<b>Rule of law</b>	X	<p>Cross-country diversity. Weak rule of law undermines property rights protection for both foreign investors and local resource users – but foreign investors are better equipped to opt out of the national legal system.</p> <p>Source: Table 4.1.</p>
<p><b>Normative content</b></p> <ul style="list-style-type: none"> <li>• Substantive protection</li> <li>• Legal remedies</li> </ul>	<p>Stronger substantive protection and more effective legal remedies under investment law (applicable to foreign investment) than under human rights law (applicable to local resource users and, under certain circumstances, to foreign investment).</p> <p>The regulatory taking doctrine may constrain host state regulation strengthening local property rights if this undermines the investment's viability.</p> <p>Sources: Table 3.4 and section 5.2.2.</p>	<p>Cross-country diversity. In many jurisdictions, emphasis on affirming state control and opening up resources to foreign investment.</p> <p>With exceptions (e.g. on arbitration), the strength of legal protection tends not to formally favour foreign investors over local resource users. But the concrete distribution of property rights can result in differentiated treatment: local resource users tend to hold those property rights that enjoy weaker protection.</p> <p>Ill-defined productive use requirements, incomplete legislation and/or norms recognising private investments as public-purpose initiatives make local resource rights vulnerable to dispossession.</p> <p>Sources: Tables 4.2-4.9.</p>

<b>Tailored arrangements</b>	<p>Contractual commitments strengthening protection of foreign investment commonly used, explicitly enabled by the national law of some countries, and held as lawful and with legal effect under international law. Broad stabilization clauses may constrain host state efforts to strengthen local resource rights affected by the investment.</p> <p>Tailored regimes for local resource rights may feature in social/environmental impact assessment/management documents, especially where required by lenders (e.g. World Bank); but are overall less effective at insulating the project from national law and providing independent redress.</p> <p>Sources: Sections 4.3 and 5.2.</p>
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**Table 6.2. The property rights protection matrix – The Chad-Cameroon project**

Dimensions of legal protection	"Layers" of legal rules	
	International	National
Rule of law	X	<p>Low scoring in international rankings and indexes for Cameroon and, even more so, Chad (see Table 4.1). Problems with judicial independence in Cameroon raised in the ACHPR case <i>Bakweri v. Cameroon</i>.</p> <p>Partial insulation of the investment project from national law eases problems for investors - through reference to international law in choice-of-law clauses (COTCO HGA); through stabilization clauses (COTCO and TOTCO HGAs, concession contracts); and through international arbitration (COTCO and TOTCO HGAs, concession contracts).</p>

<b>Normative content</b>	Substantive protection	<p>For local resource users, protection under human rights law, including the ACHPR right to property provision: public purpose, non-discrimination, compliance with law - but no reference to compensation.</p> <p>For the investor, protection under investment law including relevant BITs (US-Cameroon) and customary law. Public purpose, non-discrimination, payment of compensation including rules on compensation standards (“prompt, adequate and effective compensation” under the US-Cameroon BIT).</p> <p>The regulatory taking doctrine may constrain host state regulation strengthening local property rights if this undermines the investment’s viability.</p>	<p>Public purpose, non-discrimination and payment of compensation for takings of ownership. But only a tiny share of the land is held as private ownership (3% in Cameroon), mainly by elites (e.g. pre-existing investors).</p> <p>Most local resource users enjoy use rights on state-held land, and are entitled to compensation for improvements but not for the land itself. In Cameroon, outdated compensation rates for takings of use rights no longer reflect market values.</p>
	Legal remedies	<p>For local resource users, domestic courts and, after exhaustion of domestic remedies, ACHPR institutions. While African Court judgements are binding, the decisions of the African Commission are not (Chad is not a party to the African Court Protocol). Even for binding judgements, no clear enforcement mechanisms for non-compliance.</p> <p>For the investor, direct access to international arbitration under the contracts with Chad and Cameroon; binding and enforceable awards; possible “pursuit actions”.</p> <p>For other investors negatively affected by the project (e.g. pre-existing agribusiness concessions), international arbitration where provided, domestic courts and diplomatic protection otherwise.</p>	

<p><b>Tailored arrangements</b></p>	<p>For the investor, stabilization, choice of law and arbitration clauses in project contracts insulate the project from adverse changes in law. Very broad stabilization clauses may constrain host state efforts to strengthen local property rights affected by the investment. Expropriation clause in TOTCO-Chad contract features more stringent public purpose requirements than under national law.</p> <p>For local resource users: World Bank involvement entailed higher compensation standards than those applicable under Cameroon or Chad law. But this regime includes uncompensated losses (e.g. restrictions on land use, change in land tenure regime), does not fully insulate the project from national law, and access to independent redress remains an issue. Significant problems with implementation, especially in the oil producing area of Chad.</p> <p>Pre-existing investment (e.g. agribusiness concessions) negatively affected by the project is compensated according to special rules under the COTCO-Cameroon HGA.</p>
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**Table 6.3. Factors affecting the “capacity to claim”**

Human	<ul style="list-style-type: none"><li>- Literacy and ability to speak the official language;</li><li>- Legal awareness;</li><li>- Self-confidence.</li></ul>
Economic	<ul style="list-style-type: none"><li>- Capacity to mobilise good-quality legal expertise/assistance.</li></ul>
Political	<ul style="list-style-type: none"><li>- Enjoyment of civil and political rights (e.g. freedom of assembly, association and expression) and capacity to use them to exert pressure on decision makers;</li><li>- Internal cohesion/divisions.</li></ul>
Social	<ul style="list-style-type: none"><li>- Information about rights and procedures;</li><li>- Contacts/social relations, including in government administration and in the judiciary.</li></ul>
Geographic	<ul style="list-style-type: none"><li>- Distance of government institutions and of courts, and transport/transaction costs to reach them.</li></ul>
Cultural	<ul style="list-style-type: none"><li>- Internalised beliefs concerning the “appropriateness” of using legal processes to defend one's rights;</li><li>- Deference to authority flowing from history/tradition.</li></ul>
Procedural	<ul style="list-style-type: none"><li>- The degree of complexity and level of cost of judicial, administrative and other procedures to claim/use/enforce rights.</li></ul>

### 7.1.2. Figures

Figure 1.1. Covered and focus countries

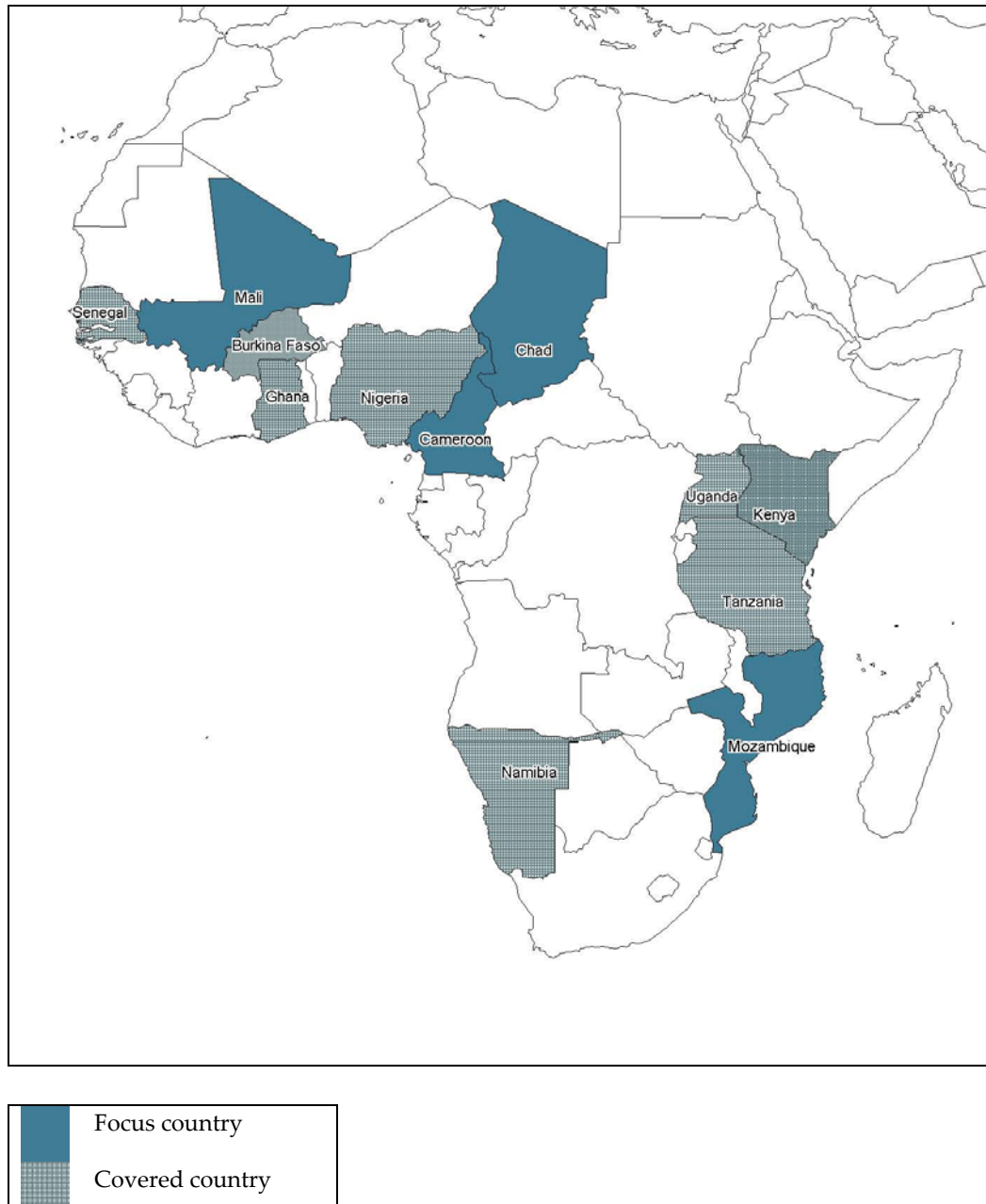
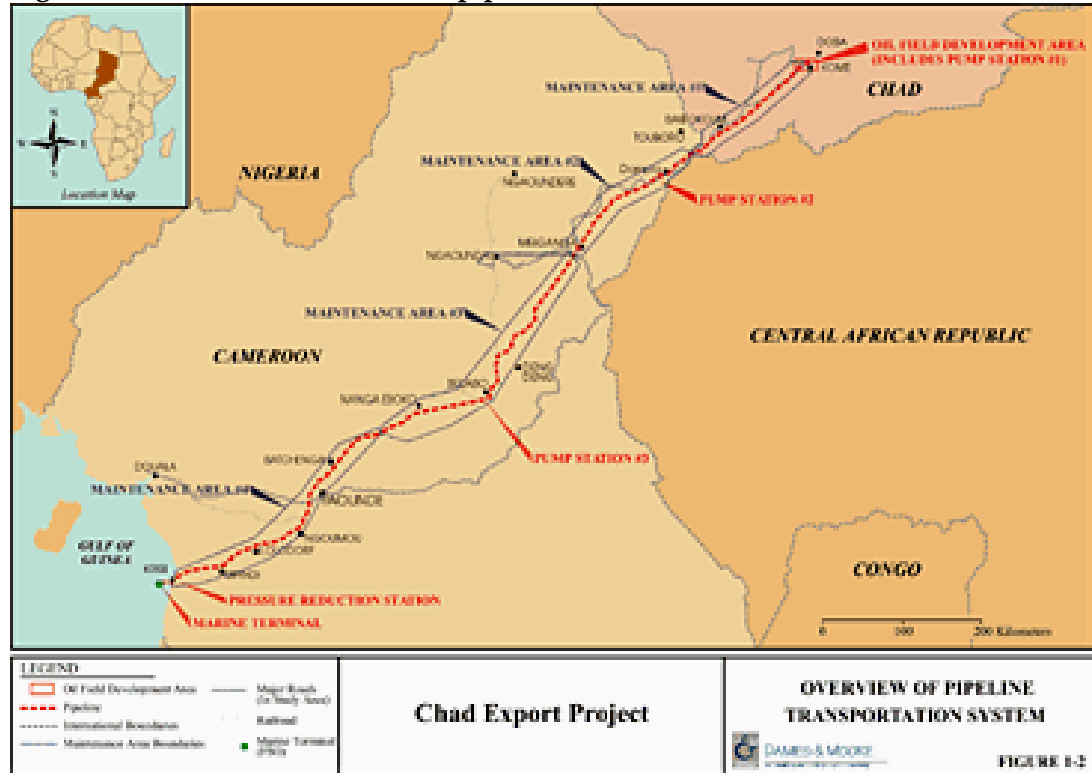


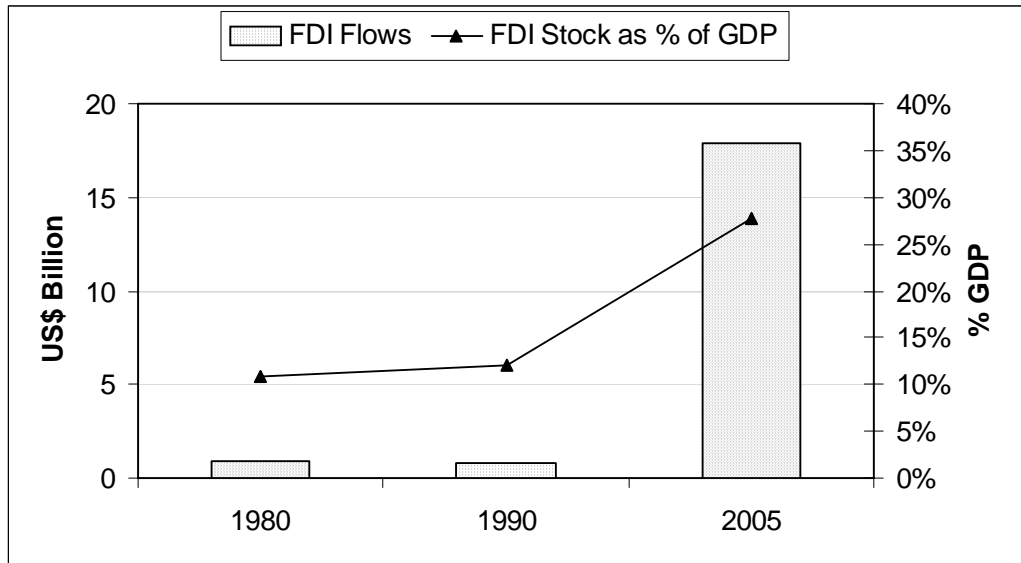
Figure 1.2. The Chad-Cameroon oil pipeline



Source: EEPIC (2007)

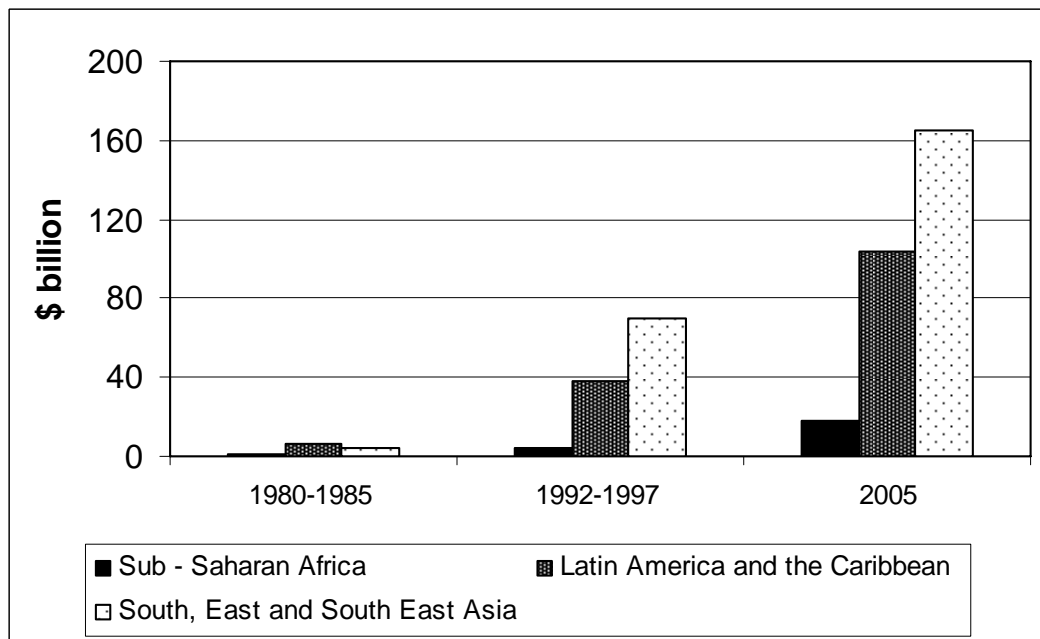


**Figure 2.1. Foreign investment in sub-Saharan Africa**



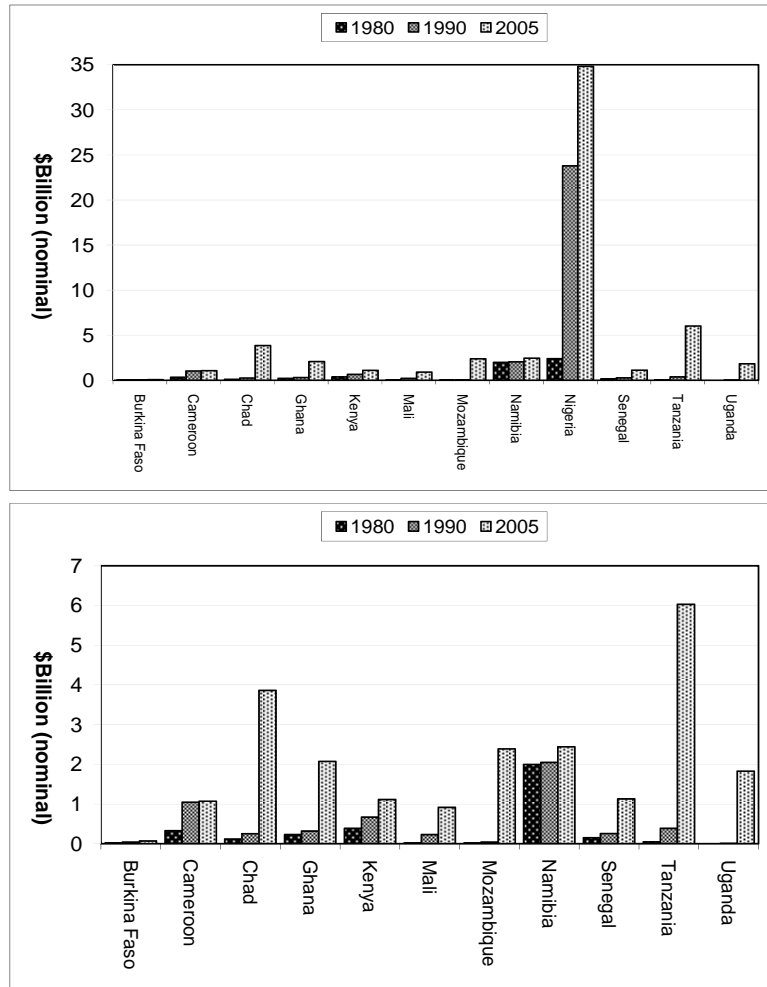
Based on data from UNCTAD (1992), (2004) and (2006).

**Figure 2.2. FDI flows to Africa, Latin America and South, East and South-East Asia**



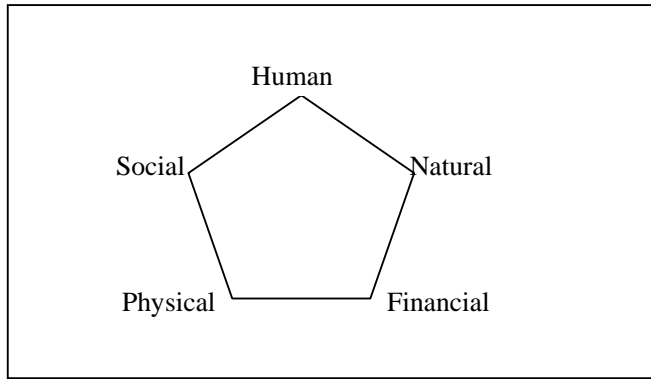
Based on data from UNCTAD (1992), (2004) and (2006).

Figure 2.3. FDI stock in selected African countries (with and without Nigeria)



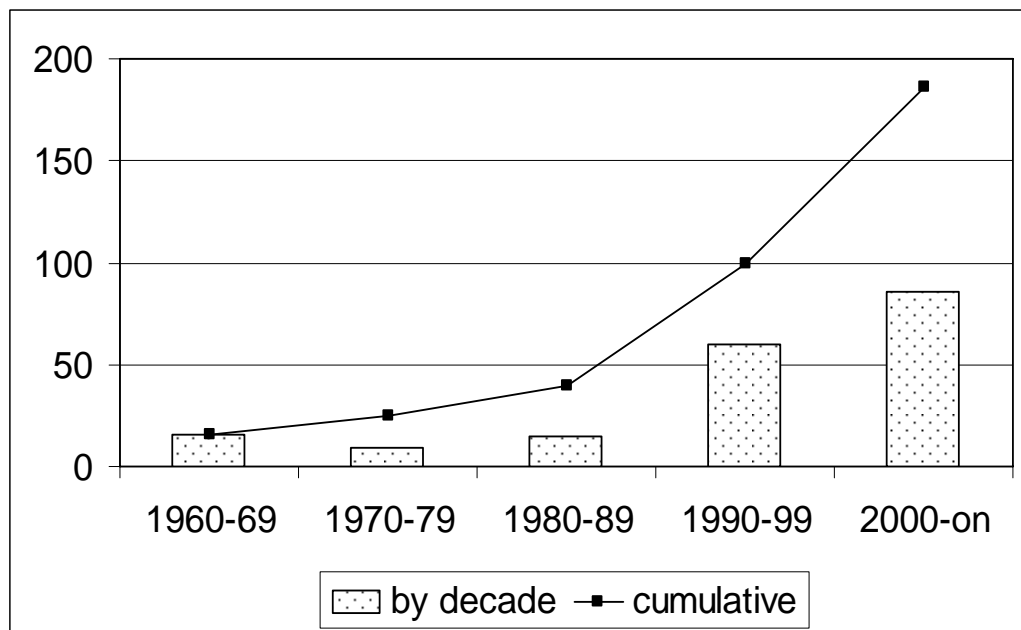
Based on data from UNCTAD (1992), (2004) and (2006).

**Figure 3.1. The “capital asset pentagon”**



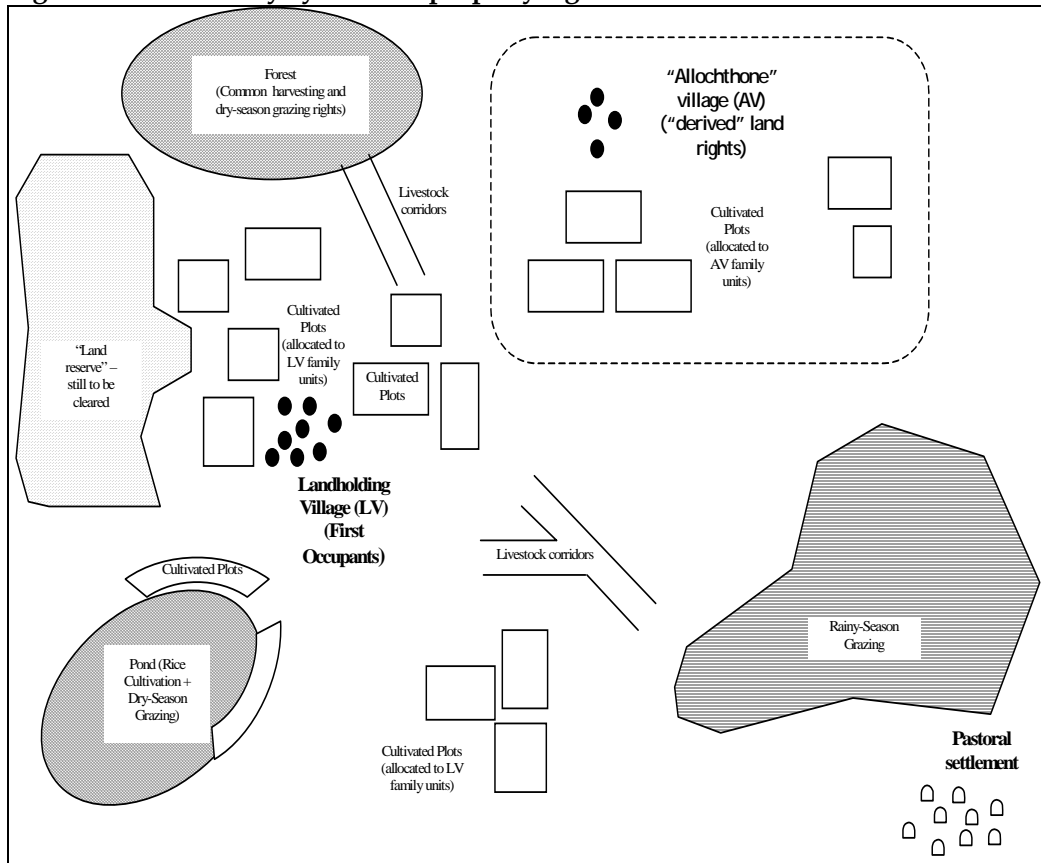
After Moser and Norton (2001:7)

**Figure 3.2. Number of BITs concluded by the 12 covered countries, by decade and cumulative**



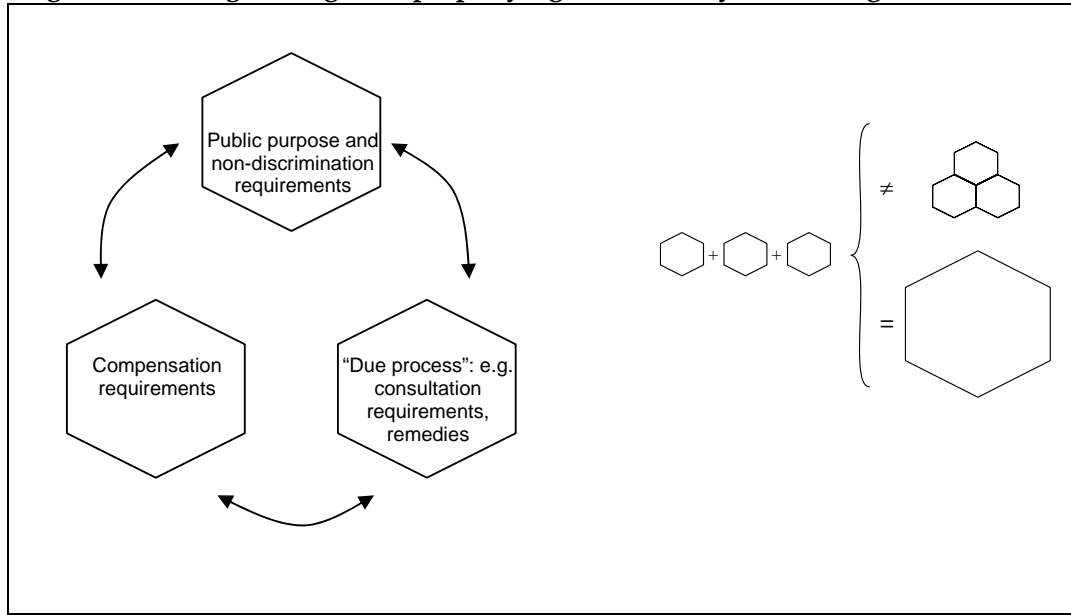
Data source: UNCTAD web site (as of November 2007), integrated with ICSID (2007)

**Figure 4.1. Customary systems of property rights in the West African Sahel**

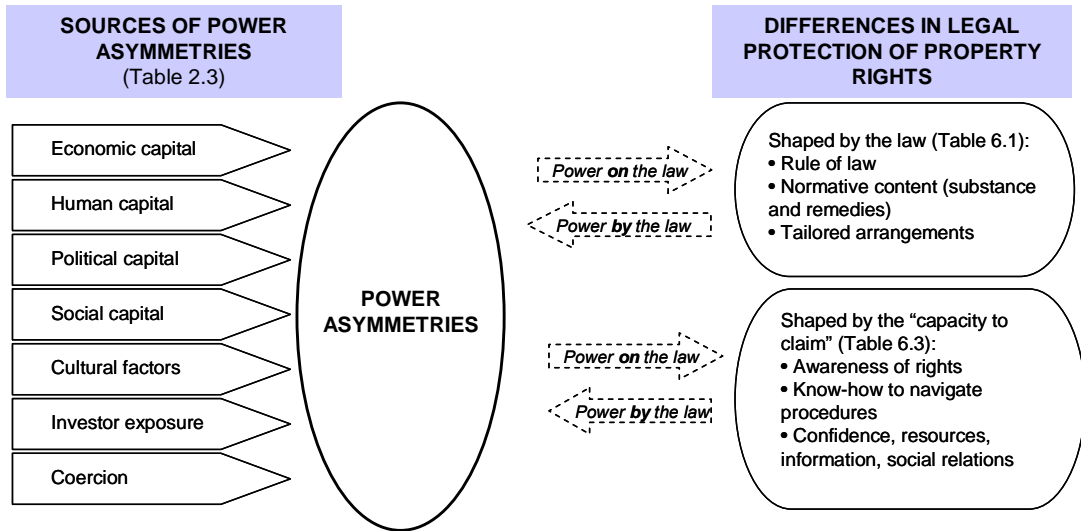


Source: Inspired by diagrams developed by Tanner (2002:14) and Thébaud (2004:II-36).

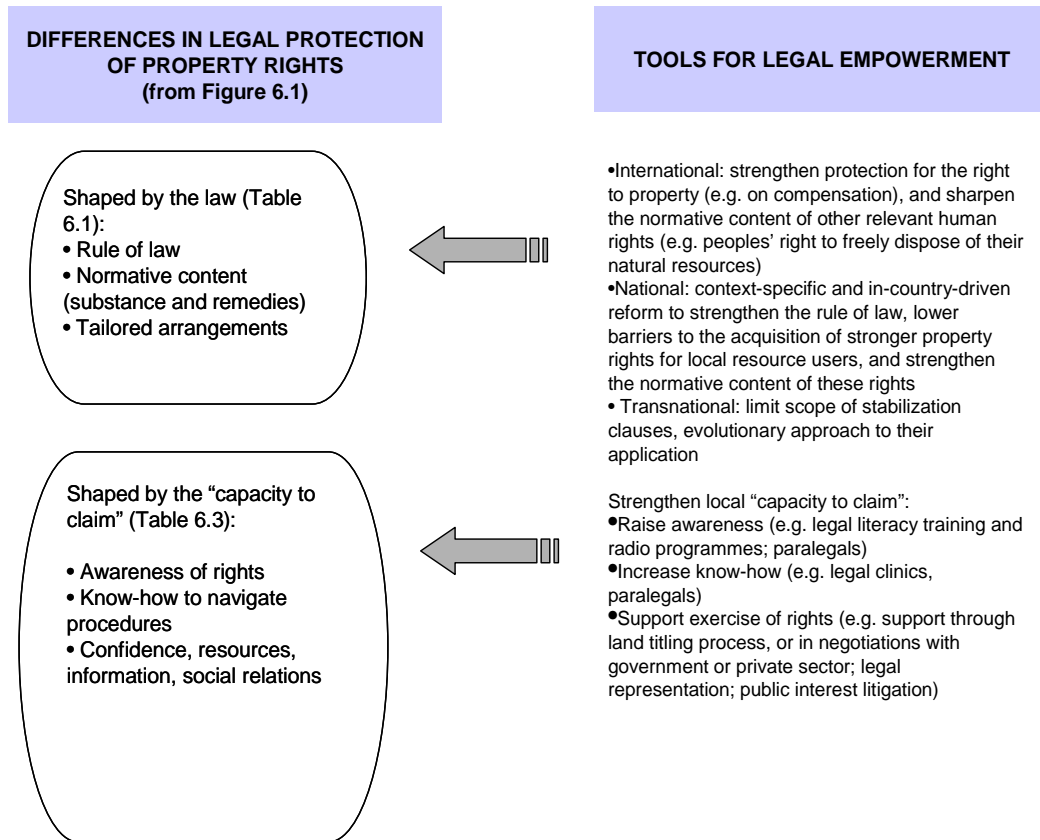
**Figure 5.1. Strengthening local property rights: Mutually reinforcing mechanisms**



**Figure 6.1. Imbalances in power, imbalances in law**



**Figure 6.2. An agenda for action**



## 7.2. References

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- 2007 Lorenzo Cotula, *Legal Empowerment for Local Resource Control: Securing Local Resource Rights within Foreign Investment Projects in Africa*, London, IIED, <http://www.iied.org/pubs/display.php?o=12542IIED&n=1&l=29&k=local%20resource%20control>.
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