



**Monitoring International Investment Agreements at the
National Level**

Olivier De Schutter

CRIDHO Working Paper 2012/1



Université catholique de Louvain
Faculté de droit
Centre de philosophie du droit
Cellule de recherche interdisciplinaire en droits de l'homme
www.cpd.r.ucl.ac.be/cridho

La Cellule de recherche interdisciplinaire en droits de l'homme (CRIDHO) a été constituée au sein du Centre de philosophie du droit, Institut extra-facultaire de l'Université catholique de Louvain, par des chercheurs soucieux de réfléchir le développement contemporain des droits fondamentaux à l'aide d'outils d'autres disciplines, notamment l'économie et la philosophie politique. La CRIDHO travaille sur les rapports entre les mécanismes de marché et les droits fondamentaux, aussi bien au niveau des rapports interindividuels qu'au niveau des rapports noués entre Etats dans le cadre européen ou international.

CRIDHO Working Papers

Tous droits réservés.

Aucune partie de ce document ne peut être
publiée, sous quelque forme que ce soit,
sans le consentement de l'auteur.

The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), an extra-department Institute of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

CRIDHO Working Papers

All rights reserved

No part of this paper may be reproduced
in any form
without consent of the author

NOTE. This paper was published in a slightly modified form as chapter 6 of O. De Schutter et al. (eds), *Foreign Direct Investment and Human Development. The Law and Economics of International Investment Agreements*, Routledge, London and New York, 2012 (under the title of 'The host State: improving the monitoring of international investment agreements at the national level', pp. 157-188). The paper is part of a multi-year research project (2007-2012) conducted jointly by the CPDR-UCL and, within the KULeuven, the Institute for International Law (IIL) and the Centre for Institutions and Economic Performance (LICOS). The research was funded by the Interuniversity Attraction Poles Programme, Belgian State, Belgian Science Policy – Project IAP VI/06 (2007–2011).

ABSTRACT

The Executive, but also national parliaments, courts and civil society organisations, as well as local communities, have a key role to play to ensure that the arrival of foreign direct investment shall contribute to human development and to the full realization of human rights in the host country. International human rights law defines the basic standards that should inform the design of an adequate legislative, institutional and policy framework in this regard. Recent initiatives have also sought to clarify how domestic institutions and actors could contribute to this end. But there remains a tension between investors' rights and human rights of the local population, which is not fully overcome. Practical difficulties remain. And a range of questions remain unanswered, including the relationship between substantive standards allowing an external assessment of investment agreements or individual investment projects and procedural requirements of transparency and participation, and the institutional division of labour between the central authorities and the local communities more directly affected by the investment project. This chapter describes the applicable framework and the outstanding problems, examining in particular the dilemmas that national authorities face when confronted with conflicting expectations and different understanding between the general interest and the interests of the local communities affected by the investment.

I. Introduction: Stating the Challenge

There is no certain, necessary relationship between foreign direct investment (FDI) and human development in the country of destination. And whether FDI contributes to human development depends, to a large extent, on the quality of governance in the host State. Where negotiations with investors are conducted in full transparency, with the involvement of the communities directly affected, and with appropriate procedural safeguards to ensure that the public interest will be served and that the benefits will accrue to the population, FDI can be a powerful tool for human development. Conversely however, where investment treaties or host government agreements¹ are negotiated without parliamentary scrutiny and without participation of the local communities concerned, in weakly governed States, the consequences may be highly detrimental: some local elites may benefit, in particular through side-payments or by capturing the benefits from the investment, but the linkages to the local economy and the increase in fiscal revenues can remain minimal, and the situation of the local population worsen, not improve, in particular as a result of the increased competition for the natural resources on which they depend.

The importance of establishing robust mechanisms at domestic level to ensure that FDI will serve development goals has been acknowledged primarily in the context of the extractive industries. Mineral-rich but capital-poor countries, that depend on foreign technologies to exploit the resources in their subsoil, need foreign investors in order to do so. But the exploitation of mineral resources typically takes the form of large-scale projects in which a small number of individuals control vast amounts of wealth. The capture of the benefits can therefore be highly unequal, unless affirmative measures are taken to ensure that they will be fairly distributed across a large number. Moreover, natural resources are non-renewable: they are “assets in the ground” whose value depends on technology, market prices and political risk. The exploitation of mineral resources thus should be seen as the consumption of capital, rather than only of a stream of incomes.² The temptation is thus huge for those in power both to exploit those resources in order to create as much wealth as possible within the shortest possible time (for they do not know for how long they will stay in power), and to sell off the right to exploit resources to the highest bidder (in order to cash in immediately the equivalent of all future income streams that could result from exploiting the resource). In addition of course, as a result of these two factors combined, the leaders holding may be reluctant to cede it to rivals (for instance, by organising fair and transparent elections and accepting their results when they are voted out of office), simply because the exploitation of natural resources represents such an opportunity for fast personal enrichment. Together, these factors contribute to what came to be known as the “resource curse”: the paradox of countries that suffer from weak governance and poor human development, not only despite of, but *because of*, having a subsoil rich in natural resources.³

¹ In this chapter, the expression “investment treaties” shall refer to agreements concluded between States, and imposing obligations under international law (see Art. 2 § 1, a), of the Vienna Convention on the Law of Treaties (1155 UNTS 331), signed in Vienna on 23 May 1969); the expression “host government agreements” shall serve to designate agreements between one private investor and the host State : such agreements are often also called “concession agreements” in the extractive industry sector or when “the government transfers to the company the right to maintain, produce, or provide a good or service within the country for a limited period of time, but the government retains ultimate ownership of the right” (Nicholas Miranda, “Concession Agreements: From Private Contracts to Public Policy”, *Yale L.J.*, vol. 107 (2007), p. 510).

² M. Humphreys, J. Sachs, and J. Stiglitz, eds., *Escaping the Resource Curse* (New York: Columbia University Press, 2007), p. 8.

³ See, for instance, Paul Collier and Anke Hoefler, “On economic causes of civil war,” 50 *Oxford Economic Papers* 563 (1998), pp. 563--573; Jeffrey D. Sachs and Andrew M. Warner, “Natural resource abundance and

Much of the emerging literature on the risks and opportunities associated with the exploitation of mineral resources focuses on the importance of institutions in guiding the relationship between natural resources and growth. Whether the presence of natural resources is a curse or a blessing would depend, according to this analysis, on the strength of institutions, in particular those ensuring democratic accountability, as well as on the incentives for diversification beyond the exploitation of the resources.⁴ The analysis, however, should not necessarily be limited to the extractive industry. To the extent that a government in power at a certain moment in time adopts decisions related to an investment that shall have a lasting impact, generally far beyond its time in office, there will be a natural tendency to discount the long-term losses and to overvalue the short-term benefits, especially when, whether legally or illegally, such benefits disproportionately accrue to the elites controlling the State apparatus.

The question of accountability for the choices made by governments with respect to FDI arrival is raised even in the most unlikely contexts, where the said governments have a reputation for making decisions that benefit the populations. On 6 December 2011 for instance, President Ellen Johnson Sirleaf of Liberia visited communities affected by the development of a large palm tree plantation in the northwestern part of the country. The first African female head of State, Johnson Sirleaf was awarded the Nobel Peace Prize for her contributions to rebuilding the country after 14 years of civil conflict, and she had been recently re-elected at the head of the country. Her visit and that of the ministers of her government accompanying her were triggered by the protests against a large concession for palm oil development that went to a Malaysian company, Sime Darby, a subsidiary of a New York-based investment fund, to which the Liberian government had ceded a total of 1.6 million acres in 2009-2011.⁵ The rural communities affected by the first stages of implementation in northwestern Liberia complained that the salaries paid to those employed on the plantations were below the wages promised, and that the planting of palm trees led to environmental degradation. The response of President Johnson Sirleaf, as reported in the Liberian press, was this :

“When your government and the representatives sign any paper with a foreign country, the communities can’t change it. With that, the Constitution gives the government the authority to do so. Therefore if the government makes mistake, let us come back and talk it.” ... “You are trying to undermine your own government. You can’t do that. If you do so all the foreign investors coming to Liberia will close their businesses and leave, then Liberian will go back to the old days.”⁶

economic growth,” NBER Working Paper no. 5398 (originally 1995, revised 1997, 1999). For a useful literature survey, see Frederick Van der Ploeg, “Challenges and opportunities for resource rich economies,” CEPR Discussion Paper no. 5688 (2006).

⁴ See Thad Dunning, “Resource dependence, economic performance, and political stability”, 49 *Journal of Conflict Resolution* 451 (2005); Thad Dunning, “Crude democracy: natural resource wealth and political regimes,” in Robert H. Bates, Stephen Hanson et.al., eds., *Cambridge Studies in Comparative Politics*, (Cambridge and New York: Cambridge University Press, 2008).

⁵ Silas Kpanan'AYoung Siakor and Rachael Knight, "A Nobel Laureate's Problem at Home", *The New York Times*, 20 January 2012, see: <http://www.nytimes.com/2012/01/21/opinion/in-liberia-a-nobel-laureates-problem.html> (last consulted on 21 January 2012). The same op-ed piece claims that "Between 2006 and 2011, Mrs. Johnson Sirleaf granted more than a third of Liberia's land to private investors to use for logging, mining and agro-industrial enterprises. Today, more than seven million acres have become forestry and agricultural concessions."

⁶ "Ellen Ends Deadlock at Sime Darby Plantation in Grand Cape Mount", *Daily Observer*, 14 January 2012, see <http://www.liberianobserver.com/index.php/news/item/207-ellen-ends-deadlock-at-sime-darby-plantation-in-grand-cape-mount> (last consulted on 21 Jan. 2012).

The episode is illustrative in a number of ways. First, the response of President Johnson Sirleaf to the rural communities she visited suggests a reverse relationship between the protection of the rights of the local communities affected by an investment, on the one hand, and the attractiveness of a particular location for the investor, on the other hand. But that commonly held assumption only holds true when insufficient precautions were taken, at a sufficiently early stage, to ensure that the rights of the communities will be respected and their interests taken into account, and that they will participate in shaping the investment : in that case indeed, it may be true that correcting mistakes committed during the early stages of the process may be costly in terms of credibility and send the message to potential investors that their investments may not be safe or immune to challenge.

The lesson, however, is not that investments should proceed without all the appropriate safeguards, including participation of the local communities: it is, quite to the contrary, that a framework should be established to ensure that no such mistakes shall be committed, and that no investment shall be allowed to proceed unless adequate safeguards have been put in place. Indeed, it is now well established that FDI flows are encouraged where the country of destination respects civil and political rights, and therefore preserves social and political stability.⁷ This is consistent with surveys of managers of transnational corporations which indicate the importance of such stability for the choice of where to invest in foreign jurisdictions.⁸ Therefore, governments whose human rights records are good are rewarded by higher foreign investment flows.⁹ This constitutes an incentive for governments to ensure an investment-friendly environment by establishing an adequate legal framework for the benefit of their populations : the attractiveness of jurisdictions whose human rights record is good confers on them an advantage in the competition to attract capital, which is only partially offset by the fact that, in such jurisdictions, the wages will generally be higher.

Second, the episode illustrates one dilemma that is familiar to all those working at the intersection of foreign investment and human development. There is general agreement that investment should be channelled towards the fulfilment of human rights or, at least, should not lead to violations of such rights. But beyond that minimum standard, where should the public interest be determined? Should investments projects be screened for their contribution

⁷ This is the key result of empirical studies performed separately by Dani Rodrik and David Kucera. See Dani Rodrik, "Democracies pay Higher Wages", *Quarterly Journal of Economics*, vol. 114 (1999), pp. 707-738 ; David Kucera, "The Effects of Core Workers' Rights on Labour Costs and Foreign Direct Investment : Evaluating the 'Conventional Wisdom'", *IILS Working Paper No. 130* (2001). These studies and the study mentioned in the following note are cited by the helpful review of the literature made by Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, "The Effects of Multinational Production on Wages and Working Conditions in Developing Countries", *NBER Working Paper No. 9669* (May 2003), available at: <http://www.nber.org/papers/w9669> (last consulted on 21 January 2012). For a recent discussion of the various studies having sought to identify correlations or to establish causality links between respect for human rights and attractivity to foreign investment, see Matthias Sant'Ana, "Foreign Direct Investment and Human Development: Two Approaches to Assessing Impacts on Human Rights", *Human Rights and International Legal Discourse*, vol. 3, No. 2 (2009), pp. 229-262, esp. pp. 232-248.

⁸ Fabrice Hatem, *International Investment : Towards the Year 2001*, New York, United Nations, 1997.

⁹ As pointed out by Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, at p. 51 of the working paper cited above, this constitutes one of the most interesting results from the research by David Kucera for the International Labour Organization : "FDI is attracted to countries with a higher civil liberties index of one point (on a 10-point scale), controlling for wages, is associated with a 18.5 percent increase in FDI flows. When the negative impact of increased wages in democracies is factored in, a one-unit increase in the civil-liberties index raises FDI inflows by 14.3 percent. So even though democracies pay higher wages for a given level of worker productivity, they still provide an attractive location for foreign investors".

to the development of the country as a whole, or to the local communities most directly affected alone? If the latter, is there not a risk that the local communities will capture most benefits -- in terms not only of employment opportunities, but also of infrastructure creation and increased fiscal revenues --, and that opportunities for redistribution from the richest to the poorest regions shall be missed? Should it not be left to the central government, after all, provided it is representative of all components of society, to determine where the appropriate balance should be struck between the local development needs and the needs of the country as a whole? The question of who should determine the public interest is linked to the question of how to avoid the risk that short-term considerations will crowd out the longer-term concern for sustainable development: the more certain procedural requirements of representativity and accountability are met, the more the choices made by the competent authority should be trusted in principle, and the more they shall be immune to challenge.

Third, on the basis of which methodology should the balance be struck between the risks and opportunities, the advantages and liabilities, and the gains and losses that result from the arrival of investment? There are clear limitations to cost-benefit analysis, measuring economic impacts, if the aim is to assess the contribution of FDI to human development. Alternative valuations are available. But two questions emerge. One is how to combine the substantive dimension of such valuations (the type of measurement used) with the procedural dimension (the process through which the pros and cons of FDI projects are assessed). Approaches prioritizing the substantive component cannot be assimilated to approaches prioritizing the procedural dimension: it would be miraculous if the communities participating in shaping investment projects always made choices that were in perfect conformity with the calculations of the experts, based on the measurement tools that they develop. Since the two approaches cannot be considered as perfectly interchangeable, should they be ranked against one another? Or should they be used in combination? It has been suggested above that an inverse relationship should be established between procedural safeguards and substantive requirements -- that the more democratic accountability is ensured, the more the choices made by the authorities should be deferred to. How could such a relationship be established in practice? A second question is whether the economic valuation, in and of itself, makes it more difficult for communities consulted in the course of investment projects to reflect upon the reality of their needs and preferences -- in other terms, whether economic valuations preempt local-level deliberations that take into account the broader range of values that a community may seek to take into account in deciding whether or not to welcome a particular investment project.

These are some of the key questions that arise when governments are asked to assess the impacts of investment agreements on the enjoyment of human rights within their jurisdiction, and to provide the communities affected by any particular investment project with a right to be consulted and to have access to remedies where the investment may lead to a violation of their rights. This contribution offers to discuss these questions in three steps. First, it recalls the framework set by international human rights law. Second, it discusses how trade-offs could be managed, in the typical case where the arrival of FDI creates both winners and losers. Third, it reflects on the respective merits of a substantive approach and a procedural approach, and the relationship between the two. A substantive approach is one in which whether or not an investment should take place is decided on the basis of its contribution to human development as measures from a pre-defined scale. A procedural approach, by contrast, gives more weight to the result of deliberative processes within the communities affected. We shall conclude that each of these approaches has weaknesses, and that only by combining the two approaches can we arrive at satisfactory results: it is only through this

combination, it will be suggested, that the notion of "free, prior and informed consent" of the communities affected by the investment project can become both meaningful and workable.

It is against this background that the negotiation and conclusion of investment agreements should be assessed. Two types of agreements should be distinguished, however.¹⁰ First, bilateral or multilateral agreements may be concluded in order to attract investors, by guaranteeing them certain rights. In general, these treaties pertain to admission of investment (defining the conditions of entry of FDI into the country); they protect investors from various forms of expropriation, both direct and indirect (the latter often under the requirement of "fair and equitable treatment"); they include guarantees of "national treatment" (according to which investors enjoy a treatment similar to that enjoyed by the nationals of the host State) and "most-favored nation" (according to which they enjoy treatment similar to the best treatment accorded to investors from any other country), as well as provisions allowing the transfer and repatriation of profits (capital transfer provisions); and they have dispute settlement clauses allowing investors to challenge measures taken by the host State before international arbitral tribunals designated as competent to settle disputes between the investors covered by the treaty and the host State.¹¹ It is in order to ensure that the negotiation and conclusion of such treaties does not undermine human rights that this author has proposed, in his official capacity as Special Rapporteur on the right to food, the systematic preparation of human rights impact assessments in the course of such negotiations, according to a methodology that was presented at the nineteenth session of the Human Rights Council in March 2012.¹² Second, project-level investment agreements (often called Host Government Agreements (HGAs)) may be concluded, particularly for larger-scale investment projects that have a long duration, between the individual investor and the host Government. The Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises has proposed a set of Principles for Responsible Contracts to favor the integration of the management of human rights risks in the negotiations between Governments and investors¹³: like the above-mentioned methodology on human rights impact assessments, the presentation of these Principles demonstrates the growing interest for bridging the areas of investment and human rights, in part in order to ensure that the race to attract investors shall not result in the host State neglecting its duties to protect and fulfil the human rights of its population.

While a number of the requirements set out below relate to individual investment projects, and thus would only be relevant to the negotiation of HGAs, the relationship between the two cannot be ignored: in the conclusion of investment treaties, Governments should refrain from making commitments that will make it impossible for them to comply with requirements that apply at the investment project level,¹⁴ for instance because by entering into such treaties, they

¹⁰ See also *supra*, n. 1.

¹¹ For a more detailed discussion, see chapter 2 in this volume. And see also Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Hague and Boston, Martinus Nijhoff, 1995); or Ryan Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization', in Olivier De Schutter (ed), *Transnational Corporations and Human Rights*, Hart Publ., Oxford and Portland, Oregon, 2006, chap. 3.

¹² See Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the right to food: Addendum, UN doc. A/HRC/19/59/Add.5 (19 December 2011).

¹³ Addendum to the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators', 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

¹⁴ See Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, cited above, Principle 2 ("States must ensure that the conclusion of trade and investment agreements shall not impose

would have created certain "legitimate expectations" on the part of the investor (such as, expectations that the investor will obtain a permit to operate a facility),¹⁵ or because by imposing certain requirements on the investor, they would violate a "stabilization clause" or an "economic equilibrium" clause included in a pre-existing investment treaty. In other terms, the freedom of the host Government to regulate foreign investment by the conclusion of HGAs, in order to ensure that specific investment projects shall contribute to human development and to the fulfilment of human rights, should not be pre-empted by obligations imposed under investment treaties. For this reason, the normative framework set out below elates both to the negotiation and conclusion of investment treaties and to the negotiation and conclusion of HGAs, even though the relationship to investment treaties (as opposed to project-level agreements) may be only indirect.

II. The Normative Framework

This is not the place where to review the full range of human rights that could be affected either by the conclusion of an investment treaty, or by a particular investment project.¹⁶ The most frequently invoked human rights in the context of investment projects are the right to adequate food,¹⁷ the right to water¹⁸ -- particularly where land is ceded to a foreign investor or where water services are privatized¹⁹ --, and the right to health²⁰ -- in order to challenge the environmental consequences of the investment project that may have detrimental impacts on health²¹ --. In addition, the basic labour rights recognized under the core International Labour

obligations inconsistent with their pre-existing international treaty obligations, including those to respect, protect and fulfil human rights").

¹⁵ "Legitimate expectations" are expectations on the part of the investor that are reasonable and justifiable in the light of the conduct of the host State (whether consisting in actions or in omissions), and on which the investor is made to rely, "such that a failure by the host State to honour those expectations could cause the investor (or investment) to suffer damages" (*International Thunderbird Gaming v. Mexico*, UNCITRAL, Award, 26 January 2006, para. 147).

¹⁶ See, for an overview, Report of the High Commissioner for Human Rights, 'Human Rights, Trade and Investment', UN doc. E/CN.4/Sub.2/2003/9 (2 July 2003); and see Addendum to the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators', 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

¹⁷ The right to adequate food is recognized under Article 25 of the Universal Declaration of Human Rights (G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948)), and under Article 11 of the International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, G.A. Res. 2200(XXII), U.N. GAOR, 21st sess., Supp. No. 16, U.S. Doc. A/6316 (1966), 993 UNTS 3), as interpreted by the Committee on Economic, Social and Cultural Rights (General Comment No. 12: The right to adequate food (1999), UN doc. E/C.12/1999/5). These prescriptions are complemented 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 Member States of the FAO Council in November 2004, which are a set of recommendations addressed to States for the implementation of the human right to adequate food.

¹⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002): The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11 of 20 January 2003.

¹⁹ For an early study on this topic, that has gained prominence since, see M. Finger and J. Allouche, *Water Privatization -- Trans-National Corporations and the Re-Regulation of the Water Industry*, London, Spon Press, 2002.

²⁰ Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), UN Doc. E/C.12/2000/4.

²¹ See, e.g., Analytical Study on the relationship between human rights and the environment, Report of the High Commissioner for Human Rights, UN doc. A/HRC/19/34 (16 December 2011), para. 67 (recognizing that States may have human rights duties beyond their national territories where transnational corporations over which they

Organization (ILO) instruments are often invoked in this context. Such rights are also protected under general human rights law since a failure to comply with such rights can lead to violations of the rights to work and to an adequate standard of living, or to the right to safe and healthy working conditions, which are recognized under the International Covenant of Economic, Social and Cultural Rights.²²

Such rights, however, can only be effectively guaranteed and enjoyed in the context of investment projects, if combined with appropriate procedural safeguards. Four safeguards in particular are worth recalling, because of their key role in protecting local communities, and because their implications have not always been well understood. Two of these safeguards stem from the substantive norms of self-determination of peoples and of the right to development. Two other are more strictly procedural in nature: they are the right to information and the right to access to effective remedies.

1. The right to self-determination and the right to development

The right to self-determination of peoples and, specifically, the right of all peoples freely to dispose of their natural wealth and resources – as stipulated under Article 1 of both 1966 Covenants implementing the Universal Declaration of Human Rights²³ –, is one of the most under-rated and under-utilized norms in the international human rights system of protection. If taken seriously, self-determination means that the peoples, not governments alone, should be making the fundamental choices as to how the resources available should be used: in essence, it is a norm about participatory democracy, particularly in the context of the use, exploitation and allocation of natural resources.

The norm has been invoked, for instance, in order to protect indigenous communities or traditional groups from being deprived from equitable access to the resources on which they depend for their livelihoods. In *Apirana Mahuika et al. v. New Zealand*, the Human Rights Committee reads Article 1(2) of the International Covenant on Civil and Political Rights – in conjunction with Article 27 of the Covenant, that recognizes the rights of minorities – as allowing an arrangement about the management of fishing resources, noting that the Maori people ‘were given access to a great percentage of the quota, and thus effective possession of fisheries was returned to them’, and that the new control structure put in place ensures not only a role for the Maori in safeguarding their interests in fisheries but, in addition, their ‘effective control’.²⁴ The implication would appear to be that these provisions would be violated should any people be deprived of the use they make traditionally of the land and resources on which they rely.²⁵

may exercise influence contribute to environmental degradation, thus affecting human rights directly or indirectly).

²² International Covenant on Economic, Social and Cultural Rights, cited above, arts. 6 and 11. See also Report of the Special Rapporteur on the right to food, Agribusiness and the right to food, UN doc. A/HRC/13/33 (22 December 2009), paras. 13-20.

²³ International Covenant on Economic, Social and Cultural Rights, cited above ; and International Covenant on Civil and Political Rights (A/RES/21/2200A, 16 December 1966) (999 UNTS 171).

²⁴ Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, CCPR/C/70/D/547/1993 (2000), para. 9.7. The Human Rights Committee observed that ‘minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture[, which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority’: *General Comment No. 23: The rights of minorities (Art. 27) (Fiftieth session, 1994)*, CCPR/C/21/Rev.1/Add.5, August 4, 1994, paras. 1 and 3.2.

²⁵ A similar conclusion has been derived by the Committee on the Elimination of Racial Discrimination from Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination, which

This component of the right to self-determination should not benefit indigenous peoples alone. The requirements applicable to indigenous peoples are now extended to at least certain traditional communities that entertain a similarly 'profound and all-encompassing relationship to their ancestral lands' centered on 'the community as a whole' rather than on the individual : this, the Inter-American Court of Human Rights noted, applies for instance to the Maroon communities living in Suriname, which are not indigenous to the region, but are tribal communities of former slaves that settled in Suriname in the 17th and 18th century.²⁶

Indigenous or traditional communities have a special relationship to land. Yet, the right to self-determination is recognized to all "peoples", and its enjoyment should not be made conditional on these peoples being "indigenous". Indeed, the clearest illustration of how this relates to the regulation of foreign investors is provided by a case that did not relate, strictly speaking, to indigenous peoples. In Nigeria, local Ogoni communities complained that they were not protected from the negative impacts of the presence of foreign oil companies exploiting the subsoil of the Niger delta in disregard of the consequences on the surroundings. On the basis of a provision of the 1981 African Charter on Human and Peoples' Rights worded in terms very similar to those of Article 1(2) of the 1966 Covenants -- which recognizes the right of all peoples to "freely dispose of their natural wealth and resources" and prohibits depriving any people from its own means of subsistence --,²⁷ the African Commission on Human and Peoples' Rights affirmed a State violates its duties under the Charter if it allowed private actors, including foreign companies, to "devastatingly affect the well-being" of the peoples under its jurisdiction.²⁸ The Commission was explicit on the contribution that Article 21 of the African Charter on Human and Peoples' Rights was expected to make in getting rid of the remnants of colonialism. The origins of that provision, it recalled, "may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans

protects the right to property : this requires from States parties that they 'recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources' (CERD, *Concluding Observations : Guyana*, CERD/C/GUY/CO/14, 4 April 2006, para. 16).

²⁶ *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*, Judgment of June 15, 2005. Series C No. 124, paras. 132-133. See also *Saramaka People. v. Suriname*, Judgment of 28 November 2007, para. 86 (finding that 'the Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival').

²⁷ Article 21 of the African Charter on Human and Peoples' Rights (adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986), provides that: "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. 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law. 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. 5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources".

²⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), para. 58. For a comment, see C. Nwobike, "The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter", *African Journal of Legal Studies*, vol. 1 (2005), p. 129.

themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. [In adopting Article 21,] the drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society".²⁹

The right to development is another norm that may be highly relevant to the regulation of foreign investment in accordance with human rights. The idea of a right to development was first expressed by Kéba M'Baye in his 1972 inaugural lesson to the International Institute for Human Rights.³⁰ It was then explored in a detailed study authored by Philip Alston for the UN Secretary-General in 1978, prepared at the request of the Commission on Human Rights.³¹ The study emphasized both that measures adopted at domestic level and measures at international level should be mutually supportive and should go hand in hand, and that the realization of the right to development should be based on participation at all levels.³² In 1986, after five years of discussions within a Working Group established by the Commission on Human Rights,³³ the Declaration on the Right to Development was adopted by the UN General Assembly, defining it as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".³⁴ Since then, various working groups, task forces and independent experts have been trying to identify ways to overcome obstacles to the right to development, and to define criteria that would allow to measure progress in its realization. It is unnecessary here to recount this history in detail.³⁵ To us, what matters is one key implication of the right to development: that is, the requirement that the revenues from projects that are conducted in the name of "development" are used for the benefit of the local population, and that the communities affected by the project participate in shaping it.

The Declaration on the right to development adopted by the United Nations General Assembly in 1986 expects States to 'formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom'.³⁶ It sees development as a process which should benefit 'the entire population and [...] all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom', which implies that States ensure the adequate participation of the local communities concerned by investment projects, and that the decision-making

²⁹ Id., para. 56.

³⁰ Kéba M'Baye, *Le droit au développement comme un droit de l'homme*, Leçon inaugurale de la troisième session d'enseignement de l'Institut international des droits de l'homme, 3 July 1972, reproduced in *5 Revue des droits de l'homme* (1972), p. 503.

³¹ Commission on Human Rights resolution 4 (XXXIII), adopted on 4 February 1977.

³² The International Dimensions of the Right to Development As a Human Right in Relation with Other Human Rights Based on International Co-Operation, including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and the Fundamental Human Needs, Report of the Secretary-General, UN doc. E/CN.4/1334, 2 January 1979.

³³ Commission on Human Rights resolution 36 (XXXVII), adopted on 11 March 1981.

³⁴ UN General Assembly, resolution 41/128 of 4 December 1986 (adopted with only one negative vote (United States), and eight abstentions).

³⁵ For an excellent and well-informed account, by one key actor in this process, see recently Stephen P. Marks, *The Politics of the Possible. The Way Ahead for the Right to Development*, Dialogue on Globalization, Friedrich Ebert Stiftung, June 2011.

³⁶ Art. 2.3.

process is fully transparent.³⁷ The revenues gained from these agreements should serve to fulfil the rights of the population, consistent with the duty of States to ‘ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income’.³⁸

The conclusion was drawn by the Working Group on the Right to Development when it noted that the right to development had a direct impact on how FDI should support the fulfillment of the 8th Millennium Development Goal to develop a global partnership for development: that right, it stated, ‘implies that foreign direct investment (FDI) should contribute to local and national development in a responsible manner, that is, in ways that are conducive to social development, protect the environment, and respect the rule of law and fiscal obligations in the host countries. The principles underlying the right to development, as mentioned above, further imply that all parties involved, i.e. investors and recipient countries, have responsibilities to ensure that profit considerations do not result in crowding out human rights protection. The impact of FDI should, therefore, be taken into account when evaluating progress in Goal 8 in the context of the right to development’.³⁹ This argument is further strengthened by the obligation of all States parties to the International Covenant on Economic, Social and Cultural Rights to ensure the progressive realization of the economic and social rights, to the maximum of all available resources, as stated in Article 2(1) of the Covenant : it would be acting in violation of this obligation if it did not use the revenues made available to move as expeditiously as possible towards that goal.⁴⁰

Invoking the right to development as having to guide the negotiation and conclusion either of investment treaties, or of HGAs related to particular projects, also has a broader significance, that goes far beyond requiring that such instruments do not bring about, or favour, the violation of specific rights. The right to development imposes something more: that the agreement serve the development of the country as a whole, rather than only specific interests that stand to benefit from its implementation. As such, the right to development brings about a fundamental change of perspective in how host government agreements in particular are considered, including concession agreements for the exploitation of certain natural resources, such as minerals or forests. All too often, such agreements are seen as private contracts, in which efficiency is promoted by one party (the State) ceding to another the right to exploit certain resources for which that other party (the investor) disposes of superior knowledge or technology, and for its own profit, against a remuneration that contributes to public revenue and allows the Government to discharge certain duties towards its population. But because such agreements are seen as private contracts, they are concluded behind closed doors, and their legitimacy is primarily assessed based on the fact that they suit the interests of both negotiating parties. Instead, once we acknowledge the relevance of the right to development to the negotiation and conclusion of HGAs, the implication is that such agreements should be discussed in open fora, that requirements of public deliberation and transparency that are

³⁷ Preamble, para. 2. See also Art. 6.3. and 8.2.

³⁸ Art. 8.1. On the human rights-based economic development which is prescribed by the Declaration on the Right to Development, see M.E. Salomon, *Global Responsibility for Human Rights, World Poverty and the Development of International Law* (Oxford University Press, Oxford, 2007), pp. 129-132.

³⁹ Report of the Working Group on the Right to Development. 7th session (conclusions) E/CN.4/2006/26, para. 59.

⁴⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999) : The right to adequate food, E/C.12/1999/5, paras. 15-16. On the interpretation of this requirement under the Covenant, see further Committee on Economic, Social and Cultural Rights, An Evaluation Of The Obligation To Take Steps To The “Maximum of Available Resources” Under An Optional Protocol To The Covenant – Statement, UN Doc. E/C.12/2007/1 (21 September 2007).

generally associated with public regulation apply, and that the legitimacy of HGAs should depend on whether they promote the general welfare.⁴¹ It is to these procedural implications that we turn next.

2. The right to information and access to remedies

Although they have procedural implications, in that they imply a requirement to adopt a participatory approach to economic development, the rights of peoples to self-determination and to development primarily assert a substantive standard: they indicate the objectives that development should serve. Other norms are more directly procedural : they serve to define a set of conditions that must be present if participation is to be meaningful, and if governments are to be held accountable to their populations.

Regional human rights bodies have addressed the rights of communities to information on projects that will affect them.⁴² For example, after Chile was alleged to have refused to provide certain petitioners with all the information they requested⁴³ on a forestry company and a 180 million USD-worth deforestation project that they considered to be detrimental to the environment and to the sustainable development of the country, the Inter-American Commission on Human Rights took the view that this refusal occurred without the State ‘providing any valid justification under Chilean law’, in the absence of an effective judicial remedy; in addition, they ‘were not ensured the rights of access to information and to judicial protection, and there were no mechanisms guaranteeing the right of access to public information’. The Inter-American Court of Human Rights agreed. It noted that article 13 of the American Convention on Human Rights, which guarantees the right to freedom of thought and expression, ‘protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information [...]’.⁴⁴ The Court emphasized the relationship between the right of access to information held by the State and democratic accountability :

[T]he State’s actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question,

⁴¹ See in particular Nicholas Miranda, "Concession Agreements: From Private Contracts to Public Policy", *Yale L.J.*, vol. 107 (2007), p. 510.

⁴² For a discussion, see Luke Eric Peterson, “Human rights and Bilateral Investment Treaties: mapping the role of human rights law within investor-state arbitration,” *Rights & Democracy*, (2009), available at: <http://www.ddrd.ca/site/PDF/publications/globalization/HIRA-volume3-ENG.pdf>, p. 42.

⁴³ The request was filed with the Foreign Investment Committee, a public agency tasked with promoting investment and negotiating with foreign investors the conditions of their arrival. Under Chilean law, this Committee is ‘the only body authorized, in representation of the State of Chile, to authorize the entry of foreign capital under Decree Law [No. 600] and to establish the terms and conditions of the respective contracts’. It is linked to the President of the Republic through the Ministry of Economy, Development and Reconstruction.

⁴⁴ *Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights judgment, (ser. C) No. 151, September 19, 2006, paragraph 77.

investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.⁴⁵

As this case makes clear, access to information⁴⁶ may be seen as instrumental to the exercise of democratic accountability or, where violations are thought to have occurred, of remedies. Both of these prerogatives, however, are particularly difficult to exercise where they are used in order to reduce the margin of appreciation of the Executive in the negotiation of investment treaties, or when they serve to challenge the consequences of the presence of foreign investors for the local communities affected, in the context of the negotiation of HGAs.

Consider first the case of investment treaties. Such treaties are typically negotiated by the Executive, generally on the basis of model agreements that settle most of the non-essential issues such as national treatment and a most-favored nation clause, and that guarantee the investor a protection against expropriation (including indirect expropriation), a "fair and equitable treatment", and access to arbitral tribunals established under the rules of the 1965 International Convention on the Settlement of Disputes between States and the nationals of other Parties (ICSID)⁴⁷ or under the UNCITRAL Arbitral Rules.⁴⁸ In practice, there is little or no scrutiny of parliamentary assemblies of such agreements, and no involvement of civil society organisations. It may be argued that the absence of a public debate when such agreements are concluded is in tension with the right of every citizen to take part in the conduct of public affairs, as recognized under the International Covenant on Civil and Political Rights, and that such debate in principle should be conducted by freely elected parliamentary assemblies for approval to ensure that the free expression of the will of the electors shall be fully respected.⁴⁹ The Declaration on the Right to Development is also explicit on this requirement, since it stipulates that "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".⁵⁰

Consider next how most HGAs are negotiated and concluded. In addition to whatever investment treaties may provide, most important investments, particularly in the extractive industry sector, are the subject of investment agreements, negotiated between the foreign investor and the host State government. Such agreements too are often concluded outside any form of public scrutiny. Governments often seem to prefer confidentiality, in part because they fear that too much transparency would allow groups of citizens to veto agreements that would be in the interest of the country as a whole (although negatively affecting some groups of citizens), in part -- and more generally perhaps -- because they prefer to decide how to

⁴⁵ Claude Reyes et al. v. Chile, op.cit. paragraph 86.

⁴⁶ See also Human Rights Committee, General Comment 34. Article 19: freedoms of expression and opinion, UN Doc. CCPR/C/GC/34 (12 Sept. 2011), paras 18 and 19.

⁴⁷ 575 U.N.T.S. 159.

⁴⁸ The Arbitral Rules adopted by the United Nations Commission on International Trade Law (UNCITRAL) were adopted initially on 28 April 1976; they were revised in 2010. These Rules provide a comprehensive set of procedural rules upon which parties to disputes between States and foreign investors may agree for the conduct of arbitral proceedings.

⁴⁹ See Guiding principles on human rights impact assessments of trade and investment agreements, Addendum to the Report by the Special Rapporteur on the right to food to the nineteenth session of the Human Rights Council, UN doc. A/HRC/19/59/Add.5, Principle 1, commentary 1.2. (referring to Art. 25 of the International Covenant on Civil and Political Rights, cited above).

⁵⁰ Article 2, para. 3.

spend the revenues from the deal which is concluded. Yet, disclosure of the terms of the contract in order to allow for public scrutiny presents a number of advantages. First, being transparent about the negotiations generally strengthens the bargaining position of governments, who could invoke the fact that this would run counter to the expectations of civil society or to those of international donors, in order to refuse to make concessions to the investor.⁵¹ Second, by disclosing the terms of the agreement and ensuring adequate transparency, the State and the investor can reduce suspicion regarding the fairness of the contract terms and guard against unrealistic demands. Conversely, lack of disclosure can contribute to a loss of trust among interested individuals and communities in the project and even between the parties. These are among the reason why, in proposing a set of Principles on responsible contracts in 2011, the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises included a principle on transparency and disclosure of contract terms, according to which "The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications" (Principle 10).⁵²

In the absence of adequate scrutiny prior to the conclusion of investment treaties or agreements, access to remedies *post hoc*, for the communities who are negatively impacted by such agreements once they enter their implementation phase, might be seen as a substitute. Access to effective remedies is a general principle of human rights law, and it is one that is referred to both in the context of human rights impact assessments of investment agreements and in the context of the negotiation of host government agreements by the recent attempts by the Human Rights Council Special Procedures to bridge the areas of human rights law and investment law: the Guiding Principles on human rights impact assessments of trade and investment agreements note that, while States have a broad margin of appreciation as to how to assess the compatibility of trade and investment agreements they negotiate with their pre-existing human rights obligations, "as the issue [of compatibility] is ultimately a legal one, [...] courts may [...] have a role to play, for instance in hearing claims, based on the conclusions of the human rights impact assessment, as to whether the Executive may sign the agreement or should obtain further improvements, or as to whether it should denounce it"⁵³; and the Principles for Responsible Contracts note that, while individuals and communities impacted by project activities should have access to effective non-judicial grievance mechanisms, "such mechanisms should not impede access to remedy through judicial or other non-judicial processes available to individuals and communities impacted by the project"⁵⁴.

⁵¹ See Peter Rosenblum and Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries*, Washington, DC, Revenue Watch Institute, 2009, available at www.revenuewatch.org/news/publications/RWI-Contracts-Confidential.pdf ; and International Monetary Fund, *Guide on Resource Revenue Transparency*, Washington, DC, 2007, at 14 (' Little by way of strategic advantage thus seems to be lost through publication of contracts. Indeed, it could be argued that the obligation to publish contracts should in fact strengthen the hand of the government in negotiations, since the obligation to disclose the outcome to the legislature and the general public increases pressure on the government to negotiate a good deal').

⁵² Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators', 25 May 2011, UN Doc. A/HRC/17/31/Add.3 (paras. 60-64).

⁵³ Guiding principles on human rights impact assessments of trade and investment agreements, Addendum to the Report by the Special Rapporteur on the right to food to the nineteenth session of the Human Rights Council, UN doc. A/HRC/19/59/Add.5, Principle 4, commentary 4.3.

⁵⁴ Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators', 25 May 2011, UN Doc. A/HRC/17/31/Add.3, para. 55.

However, at this level too, a number of problems arise. Investment treaties protect investors from the adoption of regulations that amount to indirect expropriation, and situations may therefore arise in which the rights of investors are pitted against those of the individuals or communities whose rights are negatively affected by the investment -- which is why the Guiding Principles on Business and Human Rights insist that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts". The Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises notes in his commentary that :

Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.⁵⁵

Similarly, the Committee on Economic, Social and Cultural Rights has urged that human rights principles and obligations be fully integrated in negotiations related, for instance, to investment treaties.⁵⁶ The Sub-Commission on Promotion and Protection of Human Rights has asserted the centrality and primacy of human rights obligations in all areas, including international trade and investment.⁵⁷

As also implied by the comment from the Special Representative of the UN Secretary-General on the issue of business and human rights, quoted above, similar problems than those

⁵⁵ Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie - Guiding Principles on Business and Human Rights, UN doc. A/HRC/17/31 (21 March 2011), principle 9. The Principles were endorsed by the Human Rights Council in its Resolution 17/4, U.N. doc. A/HRC/RES/17/4 (16 June 2011).

⁵⁶ See, e.g., Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, Seattle, 30 November- 3 December 1999 (E/C.12/1999/9); Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The right to adequate food (art. 11)*, E/C.12/1999/5, at paras. 19 and 36 ("States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention"); Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 (2000), para. 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health"); Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (26 November 2002), paras. 31 and 35-36 ("States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water").

⁵⁷ Sub-Commission on Promotion and Protection of Human Rights, Human Rights as the Primary Objective of Trade, Investment and Financial Policy, U.N. Doc. E/CN.4/Sub.2/ RES/1998/12 (1998); Report of the Sub-Commission on its 50th Sess., U.N. ESCOR, 50th Sess., at 39, U.N. Doc. E/CN.4/Sub.2/1998/45 (1998).

affecting investment treaties restricting the ability of the State to protect human rights, may also affect host government agreements concluded between the investor and the host State. Such agreements are typically "internationalized" in that they provide that the law applicable to the investment is not municipal law alone, but either international law (especially the general principles of law as a source of international law⁵⁸), or municipal law "frozen" at the time the investment agreement is concluded.⁵⁹ The purpose of such "internationalization", as implicitly noted by prof. R.-J. Dupuy acting as the sole arbitrator in the well-known case of *Texaco Overseas Petroleum Co. v. Libya*,⁶⁰ is essentially to insulate the investor from the risks that would result if the investment were to be subject to the changing municipal law, that the host State -- one of the parties to the investment agreement -- would be allowed to modify at will. There is a logic to this: a contract that one of the parties can change unilaterally is not a binding in fact on that party. But the consequence is that it may be difficult for the groups aggrieved by the particular investment project to file claims against the investor, since the courts may be unwilling or unable to extend the protection of municipal law to the claimants, as this might engage the responsibility of the host State before international arbitral tribunals.⁶¹

One might argue of course, that where an investor seeks compensation for the losses inflicted as a result of a measure, whether or not of a regulatory nature, adopted by the host State, that State should be allowed to put forward its human rights obligations -- and the rights of the population under its jurisdiction -- in order to avoid having to pay compensation. Indeed, it might be said, the "fair and equitable treatment" that the investor has a right to, should not be conceived only as equity towards the investor, but also as calling for a balancing of the interests involved, including those negatively affected by the investment⁶²; and the same requirement is implicit in the notion of arbitrariness that serves to circumscribe prohibited forms of expropriation. It is true of course that the protection of the rights affected by the investment would then be made to depend on the State invoking them. As noted by Francioni, that not only "reproduces the paternalistic model of governmental espousal of private claims which does little to advance the individual right of access to justice"; it also would not fit the typical situation, where a State has made a choice -- to conclude a particular investment treaty or to allow a particular investment project to move forward -- "against the wishes of special segments of the population".⁶³ However, this is in part compensated by the increased role that

⁵⁸ Statute of the International Court of Justice, Article 38 § 1, c).

⁵⁹ An alternative to either reference to the general principles of law as part of international law or to municipal law as it was at the time of the internationalized contract, is to include in the agreement an "economic equilibrium" clause ensuring that the investor will be compensated for any economic loss that would result from a regulatory change affecting the investment. See generally for an overview of such clauses and their impact on the ability for the host State to protect human rights, Sheppard, A., and Crockett, A., 'Stabilisation Clauses: A Threat to Sustainable Development?', in Cordonier-Segger, M. C., Gehring, M., and Newcombe, A. (Eds), *Sustainable Development in World Investment Law*, The Hague: Kluwer Law International, 2010, pp. 333-350; and *Stabilization Clauses and Human Rights. A research project conducted for IFC (International Finance Corporation) and the UN Special Representative of the Secretary-General on business and human rights* (by Andrea Shemberg), 11 March 2008.

⁶⁰ 104 *Journal de Droit international* 350 (1977), translated in 17 *ILM* 1 (1978).

⁶¹ For a detailed discussion, see Ryan Suda, "The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization", in O. De Schutter (ed.), *Transnational Corporations and Human Rights*, Hart Publ., Oxford and Portland, 2006, 73-160.

⁶² Francesco Francioni, "Access to Justice, Denial of Justice, and International Investment Law", in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in Investment Law and Arbitration*, Oxford Univ. Press, 2009, pp. 63-96, at 72-73.

⁶³ Francesco Francioni, "Access to Justice, Denial of Justice, and International Investment Law", cited above, at 72.

non-governmental organisations acting as *amici curiae* are allowed to play in the adjudicatory process before arbitral tribunals. In addition, unless another law has been designated applicable by the parties, the arbitral tribunal may have to take into account, as the law applicable to the dispute, not only the investment treaty or the investment agreement concerned, but also other relevant rules of international law.⁶⁴ It cannot be excluded, therefore, that international human rights law will be invoked in the context of an investment dispute, even where the respondent Government would be unwilling to raise the argument *sua sponte*.

Whether or not such an evolution will occur, bridging the gap between investment law and human rights law, arbitral tribunals in general have not given much weight to this argument. While there are exceptions to the rule -- to the extent that a "clean hands" doctrine, denying the investor protection were that investor to act in violation of human rights, sometimes has been alluded to by arbitrators⁶⁵ --, the general attitude has been to dismiss arguments based on human rights as irrelevant to investment disputes. This has been the case, at least, when the argument was that the obligations imposed on the host State under investment treaties or HGAs were such that they were an obstacle to that State discharging its duties towards its own population.

For instance, in *Azurix v. Argentina*, a U.S. company had obtained for its Argentinean subsidiary a 30-year concession to provide potable water and sewage services in the Province of Buenos Aires, investing about 550 million USD in the project. After the Province terminated the concession in 2002, Azurix initiated an ICSID arbitration against Argentina seeking approximately US\$600 million in compensation. The Tribunal considered, however, that the actions by the Province had been unreasonable and politicized, leading to violations of the U.S.-Argentina BIT. In the course of the proceedings, Argentina raised what it presented as "a conflict between the BIT and human rights treaties that protect consumers' rights", arguing that such a conflict "must be resolved in favor of human rights because the consumers' public interest must prevail over the private interest of service provider".⁶⁶ The argument was given short thrift by the Tribunal, which noted that "the matter has not been fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case. The services to consumers continued to be provided without interruption by ABA during five months after the termination notice and through the new provincial utility

⁶⁴ According to Art. 42.1 of the ICSID Convention: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties (or in the absence of such agreement) the law of the contacting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable' (emphasis added). Under Art. 35.1 of the UNCITRAL Arbitration Rules, the Tribunal 'shall apply the law which it determines to be appropriate', and arbitral tribunals consider that 'international law generally applies' (*Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, par. 196). Therefore, submission to international arbitral Tribunals not only removes the dispute from the sole province of the municipal law applicable in the host State: this "internationalization" also means that the body of international law rules may apply to the dispute, to the extent that such rules are relevant. As regards the interpretation of investment treaties, this may be justified on the basis of the prescription of Article 32, § 3, c), of the Vienna Convention on the Law of Treaties, according to which the interpretation of a treaty must take into account "any relevant rules of international law applicable in the relations between the parties".

⁶⁵ See *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 78 ("...the ICSID Convention's jurisdictional requirements -- as well as those of the BIT -- cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs" (Brigitte Stern, chair of the panel)).

⁶⁶ *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 254.

after the transfer of service".⁶⁷ In another case, Siemens has been awarded a contract for the setting up and management of a system for the processing of personal data in Argentina, inter alia for immigration control purposes. After the contract was revoked, it filed a claim for compensation. Argentina drew to the Tribunal's attention "that the constitutional reform of 1994 recognized a number of international instruments on human rights to have constitutional rank" and that "the human rights so incorporated in the Constitution would be disregarded by recognizing the property rights asserted by the Claimant given the social and economic conditions of Argentina".⁶⁸ The argument was, apparently, that the contract had to be renegotiated, in order for the country to be able to continue to provide basic public services to its citizens. This argument again was set aside by the Tribunal: "The Tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case."⁶⁹

At the same time, these cases should certainly not be taken as decisive. In both cases, the conflict between the human rights duties of the State towards its population and its duties towards the investor would appear to be quite weak, and human rights were invoked in conditions that the Tribunals concerned, for understandable reasons, could easily dismiss. But another major limitation of this route is that it is not one that is open to the direct victims: the individuals or communities negatively affected by investment projects. The claims of such victims are often barred before domestic courts. And because they have no direct access to investment tribunals, recourse to regional human rights courts have often shown to be the most effective route. As we have seen above, the 2001 case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* presented to the African Commission on Human and Peoples' Rights provides one illustration.⁷⁰ Another equally well-known example is the case of *Awas Tingni v. Nicaragua* presented to the Inter-American Court of Human Rights, which resulted in the Nicaraguan government having to annul a logging concession which it has conceded to a foreign company on land that the Awas Tingni claimed as its ancestral land subject to traditional tenure.⁷¹ These cases are promising, as they demonstrate the willingness of regional human rights bodies to impose on the State a duty to protect human rights even against foreign investors -- and whether or not investors claims rights protected under an investment treaty or a HGA concluded by the State⁷² --. However, reliance on human rights courts does not address satisfactorily the issue of fragmentation of international law: it is only a partial answer to the problem of conflicting obligations imposed on the host State, or to incentives pointing in the opposite direction.

III. Implementing the Framework: Dilemmas in Decision-making

⁶⁷ Id., para. 261. See also *Azurix Corp. v. Argentine Republic* (ICSID Case No. Arb/01/12), Annulment Proceeding, Decision of the Ad Hoc Committee, Sept. 1, 2009 (rejecting the claim by Argentina that the level of compensation awarded was excessively high).

⁶⁸ *Siemens v. Republic of Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 75.

⁶⁹ Id., para. 79.

⁷⁰ See above.

⁷¹ *Case of Mayana (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights (ser. C) No. 124 (judgment of 15 June 2005).

⁷² Indeed, the Inter-American Court of Human Rights has noted that the enforcement of bilateral investment or commercial treaties should always be compatible with the American Convention on Human Rights (signed in San Jose, Costa Rica, 22 November 1969, and entered into force on 18 July 1978, (1969) 9 ILM 101), indicating that the primacy of human rights obligations followed from the special nature of human rights treaties: the American Convention on Human Rights, the Court noted, "is a multilateral *treaty on human rights* that *stands in a class of its own*" (Inter-American Court of Human Rights, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C No. 146, para. 140).

The normative framework derived from international human rights law, as has been described above, raises a number of issues that go beyond the question of how the rights to participation or information, or of access to remedies, can be exercised in practice by communities who often will lack the effective capacity to do so.⁷³ Implementing the framework is not only difficult for practical reasons. It also raises a number of questions of principle, and is the source of dilemmas that have often been underestimated in discussions concerning the relationship between investment law and human rights law. Two interrelated problems in particular deserve to be mentioned: they are how to manage tradeoffs when the arrival of FDI creates winners as well as losers, and how to ensure reconcile participation of local communities with other values.

The problem of tradeoffs is perhaps the most difficult problem that domestic bodies shall be facing when seeking to reconciling the use of investment agreements and HGAs, providing security to the investor, with the human rights obligations of the host State -- including its duty to ensure the right to development --. The problem can be simply stated: the arrival of FDI in one country creates a range of employment opportunities, may benefit the local economy by certain linkages, and can bring benefits to the government by the increased tax revenues it will lead to and by the economic growth it will result in. But it would be neither realistic nor desirable to allow only investment projects that represent a Pareto-improvement, i.e., in which the situation of no one is worsened as a result. Transition costs are an almost unavoidable part of the arrival of FDI. In the short term at least, and prior to the adoption of compensatory measures, there will therefore be losers. Communities may be deprived from access to the natural resources on which they depend or have their livelihoods disrupted by the investment project, or may even have to be displaced. Workers, both self-employed and employees, may suffer from increased competition on the domestic markets -- particularly as FDI is often seen as a means to overcome trade barriers or the costs, including risks linked to currency exchange variations, implied in exporting goods to these markets. How are the benefits and the costs to be valued? How can the tradeoff be managed?

1. The limits of cost-benefit analysis

Cost-benefit analyses, the classic response to such tradeoff problems, are hardly a suitable means to approach their human rights implications. The problem is not only that cost-benefit analysis substitute a consequentialist logic for a deontological logic, which may be incompatible with the very significance of fundamental rights as prerogatives that cannot be reduced to their "value" to the individual, as assessed in monetary terms. Nor is the only problem one of "incommensurability", i.e., the difficulty of assessing against one common metrics interests as different as the interest of the country as a whole in economic growth, the interest of some members of the local communities in benefiting from the employment opportunities resulting from the arrival of the foreign investor, or the interest of other members of those communities not to lose their access to the natural resources on which they depend.⁷⁴ These are real problems, that largely serve to explain the scepticism of many towards the reliance on cost-benefit analysis as a means to guide public choices. But other problems are more practical in nature: they concern the very feasibility of relying on this method to make the necessary tradeoffs.

⁷³ See, e.g., Olivier De Schutter and Peter Rosenblum, 'Large-scale Investments in Farmland: the Regulatory Challenge', *Yearbook of International Investment Law and Policy*, chap. 14 (2011), pp. 563-610.

⁷⁴ See, *inter alia*, Ruth Chang (ed.), *Incommensurability, Incomparability and Practical Reason*, Cambridge, Harvard University Press, 1997.

First, cost-benefit analysis relies on essentially two methods to value the interests (or rights) at stake. The 'revealed preference' approach infers valuations from observable market behavior. The 'hypothetical markets' method relies on surveys in which people are asked how much they would be willing to pay for a particular benefit, or how much they would be asking in compensation for a particular loss. However, both 'revealed preference' and 'hypothetical markets' methods fail to take into account that the willingness of the individual to pay for a certain advantage is a function, not only of the importance of that advantage to that individual (the extent to which that advantage may contribute to the self-fulfilment of that individual), but also to his or her ability to pay (or the economic necessities and other priorities for the individual with limited resources).⁷⁵ In other terms, in such decision-making processes, those who have the highest incomes shall in fact exercise a disproportionate influence on the outcome. Of course, in theory, this could be compensated by adequate transfer mechanisms: for instance, if the better-off persons would be willing to pay 1,000 for a particular industrial plant to be built (for instance, because this will allow them, as highly qualified workers, to obtain well-paid positions on the plant), and manage to impose a decision in favor of the plant being built against the opposition of the worst-off persons (who would be happy to receive 100 in compensation), a transfer of a sum X (between 100 and 1,000) from the better-off to the worst-off would be Pareto-efficient, improving the position of all without reducing the welfare of any.⁷⁶ But that's theory: in practice, particularly in weakly governed jurisdictions, such transfers do not take place, not least because the worst-off segments of the populations are often excluded from political decision-making.

Second, such valuations, whether they are 'contingent valuations' based on surveys or estimates of the 'willingness to pay' in the absence of markets, or whether they are based on the preferences exhibited by economic agents through the choices they make in the market, have been demonstrated to be strongly baseline-dependent, in the sense that the position already occupied by any individual will shape his or her estimation of the value of any regulatory benefits or sacrifices: Richard Thaler in particular has highlighted the importance of "loss aversion" in this regard, by which he referred to the tendency of agents to attach a greater value to what they risk losing than to what they risk not gaining from any particular policy change -- for instance, from the arrival of an investor.⁷⁷ The method therefore has a built-in bias in favor of the status quo, or of the preservation of the existing set of entitlements.

At the very least, these weaknesses inherent to cost-benefit analysis justify the position of sceptics who take the view that decisions as to whether the gains from any particular change are sufficiently important to compensate for the losses, should not be seen as purely economic valuations based on the methods outlined above. Of course, an alternative approach would be to let such decisions to be made by the parties concerned themselves, through negotiations that the State would be facilitating. It is true that in a world in which efficiency in the use of

⁷⁵ On the difference between actual consent and hypothetical consent and the resulting critique of the willingness-to-pay approaches in cost-benefit analysis, see H. M. Hurd, 'Justifiably Punishing the Justified', *Michigan L. Rev.*, vol. 90 (1992), pp. 2203 ff., at p. 2305; and Matthex Adler, 'Incommensurability and Cost-Benefit Analysis', *University of Pennsylvania L. Rev.*, vol. 146 (1998), pp. 1371 and ff.

⁷⁶ See Robert H. Frank, "Why Is Cost-Benefit Analysis So Controversial?", *Journal of Legal Studies*, vol. 29 (2000), pp. 913-930.

⁷⁷ Richard Thaler, "Toward a Positive Theory of Consumer Choice", *Journal of Economic Behavior & Organization*, vol. 1 (1980), pp. 39-60. See also See E. Hoffman and M. L. Spitzer, 'Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications', *Washington University Law Quarterly*, vol. 71 (1993), pp. 59 and ff.; M. Adler, 'Incommensurability and Cost-Benefit Analysis', cited above, at pp. 1396-1398.

resources would be all that mattered, and in which the transaction costs would be equal to zero, there would be strong arguments in favor of resources being allocated through a bargaining process between the parties concerned -- for this would lead to the most efficient allocation of resources, and all parties per definition would gain, since they would otherwise not have consented to whichever transfer may have taken place.⁷⁸ But in the real world, resources such as land and water are not just economic assets, that should go to the highest bidder because of a presumption that those willing to pay the most will use it most efficiently: in the real world, such resources are not reducible to their economic value, but access to such resources may also be an element of social citizenship or be constitutive of the identity of the community ; those who are ready to pay the most to acquire them may do so for purely speculative purposes, rather than in order to exploit the resources most efficiently ; and, most importantly, bargaining processes may be fraught with abuse because of the significant imbalances of power and negotiation skills between the parties.⁷⁹ Moreover, economic arguments in favor of a bargaining process in order to allow the parties to discover the most efficient allocation of resources through the process of negotiation, presuppose a predefined allocation of rights, a "baseline of pre-existing entitlements", that it is the responsibility of the State to define.

2. The procedural approach: the role of participation in managing investment

The Guiding Principles on Human Rights Impact Assessments of Trade and Investments address the question of tradeoffs through a procedural lens. This was considered to represent the most adequate way to combine an approach based on human rights with adequate deference to domestic level decision-making processes: there is no single way to balance advantages and disadvantages across different groups, according to this approach, and the key concern should therefore be that the procedure that was following in arriving at that balance complies with certain requirements.

Principle 6 of the Guiding Principles states that human rights impact assessments should be used to determine "both the positive and negative impacts of investment agreements, in order to strike the right balance between competing priorities".⁸⁰ It then formulates a number of conditions, including that (i) the tradeoffs should be decided through open and democratic processes, informed by a human rights impact assessment of the investment agreement⁸¹; (ii)

⁷⁸ See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁷⁹ These arguments are relevant, for instance, to discussions concerning titling schemes and the creation of markets for land rights, as a means to allocate access to land: see Olivier De Schutter, "The Green Rush: The Race for Farmland and the Rights of Land Users", *Harvard International Law Journal*, vol. 52(2) (2011), pp. 503-559, at pp. 526-532.

⁸⁰ Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, cited above, at paras. 6.1 to 6.7. While these Guiding Principles concern the negotiation and conclusion of investment agreements, including both investment treaties and HGAs, the impacts of the arrival of FDI may be difficult to anticipate at the stage of the conclusion of a treaty facilitating investment flows; in most cases, these impacts can only be addressed when particular investment projects are defined : it is at that level that the problem of tradeoffs will therefore have to be dealt with.

⁸¹ Indeed, the more the national or local deliberative processes will be open, inclusive and transparent, the more they will be trusted to achieve the right balance between conflicting priorities. The Committee on Economic, Social and Cultural Rights has stated that when assessing whether a State party has taken 'reasonable steps to the maximum of its available resources to achieve progressively the realization of the provisions of the Covenant', as required under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the Committee 'places great importance on transparent and participative decision-making processes at the national level' (Committee on Economic, Social and Cultural Rights, *An Evaluation Of The Obligation To Take Steps To The "Maximum of Available Resources" Under An Optional Protocol To The Covenant – Statement*, UN Doc.

priorities should involve effective participation of all stakeholders, including the poorest and most vulnerable segments of the population ; (iii) however tradeoffs are addressed, they should not result in or exacerbate unequal and discriminatory outcomes, as this would violate the principles of equality and non-discrimination, they should not worsen the economic situation of vulnerable groups, and they should never result in a deprivation of the ability of people to enjoy their basic human rights ; (iv) any tradeoff that results in a retrogressive level of protection of a human right should be treated as highly suspect. The document also notes that "to the fullest extent possible, solutions should be found under which losses and gains are shared across groups, rather than concentrated on one group. This suggests the need to identify mechanisms, such as mitigating measures, ensuring that those benefiting from the agreement will at least in part compensate those who are negatively affected, and that the latter will be protected".

This approach presents two major advantages: it is grounded in existing human rights law, and it does not preempt the outcome of deliberations that should take place at the national and local levels. In practice however, there are difficulties involved in implementing these recommendations. It is increasingly agreed that investment projects should only be allowed to proceed with appropriate participation of the communities affected. But how to balance the needs of the country as a whole, as determined at the national level, and the needs of the local communities, most directly affected by the arrival of the investment? Under which conditions should a veto power be recognized, in effect, to the local communities (as required, arguably, under international human rights law, as expressed by the requirement that the communities whose access to natural resources is affected by the investment project give their "free, prior and informed consent" to the project for it to be allowed to proceed)? If a determination is to be made at the national level, without a veto right being recognized to the local communities concerned, how can it be ensured that the rights and interests of these communities shall be effectively taken into account and, where rights are concerned, fully respected?

Although these questions cannot be addressed in sufficient detail here, it is important to emphasize the complementarity of the processes that take place at the national level (and which determine the investment policy of the country as a whole) and the processes that take place at the local level (involving the local communities directly affected by the arrival of investment). It is clear that decisions cannot be made centrally without ensuring that the rights of the local communities are fully respected, and their interests taken into account: indeed, that is the very purpose both of human rights impact assessments being prepared, and of ensuring that the communities concerned have a right to participate in the decision-making process, to seek and obtain information, and to seek remedies against any decision affecting them. But it should be equally clear that, for local processes to be effective -- i.e., for the local communities directly affected by the investment project to be able to truly express their preferences --, a national framework for investment is required.

The reason for this is, in part, that the choices made by one community cannot be analyzed or understood in isolation from the choices made by the other communities in the same jurisdiction. Consider two communities, A and B, who within the same country, are confronted to the question of whether a particular investment project should be encouraged. Suppose that each community is proposed a choice between (i) receiving some support from the central government to develop itself, without any risks resulting from the arrival of

E/C.12/2007/1, 21 September 2007, para. 11). This illustrates the interplay between the substantive and procedural dimensions implicated in assessing whether investment agreements comply with the requirements of human rights.

investment, and (ii) hosting an investment project with the attendant risks. In the absence of adequate safeguards against risk, the community will be relatively risk-averse. The choice of each community will therefore go to the least risky option, (i), unless the benefits expected from the investment are valued even higher than the level at which the risk is valued. If, for example, the absence of risk is valued at 1,000, and the benefits to be expected from the arrival of the investor are valued at 500, the choice for the least risky option is perfectly understandable.

But the choice is changed significantly once we incorporate concerns, within each community, that the other community will fare better if the investment goes to that other community. To make such a supposition, there is no need to posit "envy" or any such psychological disposition of the members of the community: it is enough to presuppose, as seems reasonable, that where an investor comes in a region, this will lead to a "cluster effect" in which, thanks to a number of spillovers both upstream (towards suppliers of materials, local workforce and service providers) and downstream (towards retailers and consumers), the region in which the investment is located will be advantaged in comparison to other regions of the same country⁸². This advantage is in part due to the fact that the benefits linked to the arrival of investment *primarily accrue to the region where the investment is located, who gain disproportionately in comparison to the other regions*: for instance, more resources will go to the region where the investment is located, because of the need to create infrastructures; increased incomes in the region concerned lead to higher public revenues from taxes, allowing a better delivery of public services; suppliers of industrial plants created thanks to foreign investment will benefit from technology transfers, allowing them to improve their competitiveness⁸³; and the best qualified workforce will be attracted to the region concerned. We may assign a value to the premium going to the region where such a cluster emerges (thus draining resources from other regions) at, say, 1,200. 1,200 thus represents the value lost by the region where the investment is not located.

The existence of such a premium changes the matrix of the choices open to communities A and B. Deciding in isolation, each community, per hypothesis, had more reasons to oppose the investment proposed (which was too risky) than to support it ; and each therefore would choose for the statu quo (valued, for instance, at 2,000, including 1,000 that represents the value associated with the absence of risk). But now, the two communities compete with one other. If community A makes the "safe" choice of not agreeing to the arrival of the investor, but community B in another region of the country does receive the investment, the rewards of community A are equal to 2,000 (the statu quo including the absence of risk) minus 1,200 (the loss from resources it would otherwise be able to preserve if the region receiving the investment were not attracting such resources), with a net total of 800. In that scenario,

⁸² Clusters have been defined as "networks of production of strongly interdependent firms (including specialized suppliers), knowledge producing agents (universities, research institutes, engineering companies), bridging institutions (brokers, consultants) and customers, linked to each other in a value adding production chain" (Joung Hae Seo, *Regional Innovation System and Industrial Cluster: Its Concept, Policy Issues and Implementation Strategies*, paper prepared for the National Workshop on Sub-national Innovation Systems and Technology Capacity Building Policies to Enhance Competitiveness of SMEs, held in Beijing, China, on 27-30 October 2006, p. 5, available at: www.unescap.org/tid/mtg/siscbp_seo1.pdf (last consulted on March 15th, 2012)). Clusters are one phenomenon that, in his well-known "national diamond" he uses as a theoretical framework to describe the factors that lead to a nation's competitive advantage, Michael E. Porter addresses in his book, *The Competitive Advantage of Nations*, Free Press, New York, 1990. See also Johannes Bröcker, Dirk Dohse, and Rüdiger Soltwedel (eds), *Innovation Clusters and Interregional Competition*, Springer Verlag, 2003.

⁸³ See, e.g., John Paul MacDuffie and Susan Helper, "Creating Lean Suppliers: Diffusing Lean Production through the Supply Chain", *California Management Review*, vol. 39 (4) (1997): 118-52.

community B did accept the risks associated with the investment, but the costs of such risks are more than compensated by the additional benefits it receives from being the only region to receive investments: if this premium is 1,200 as we have supposed, the situation of community B is 1,000 (statu quo reduced by the risk) + 500 (direct benefits from the investor's arrival) + 1,200 (premium going to the region where the cluster emerges as an indirect benefit from the investor's arrival), with a net total of 2,700.

But if each of the communities, not knowing whether the other community will decide to allow the investment to proceed, agrees to the investment, because of its fear that it will otherwise lose out to the other, the situation of each community is that it will take a risk (representing a loss of 1,000 in comparison to the statu quo) that is only partially compensated for by the gains from the investment (valued at 500), and this net less is not offset by the benefits that would accrue from being a "cluster region" draining resources from the other parts of the country. In this scenario, the net situation of each community will be valued at 1,500, *less than in the absence of any investment in any of the regions concerned*. In other terms, once a specific premium attaches to the fact that one region of the country attracts an investment (such a premium reflecting the fact that this region will be advantaged in comparison to the other regions having made a different choice), we are faced with a classic prisoners' dilemma, in which the choice that is optimal from the individual point of view of each community is not optimal from the collective point of view of both communities:

		Community B	
		Does not agree to the investment	Agrees to the investment
Community A	Does not agree to the investment	2,000 for each	2,700 for B 800 for A
	Agrees to the investment	800 for B 2,700 for A	1,500 for each

This not only shows the kind of problem that can emerge from valuations that are not context-sensitive, and that do not take into account, in particular, how institutions matter and influence upon choices. It also serves to illustrate the difficulty of having communities make choices independently of the choices made by others. It thus highlights importance of a framework for investment set at the national level, rather than only at the level of each constituent unit within States, in order to ensure that the benefits of investment are maximized and the potential risks or costs minimized.

IV. Conclusion

A number of initiatives have recently been adopted in order to ensure that international investment works for the benefit of human rights, not only by ensuring that the arrival of investment shall not result in human rights violations, but also by placing an important emphasis on the rights of participation and of information, and on access to remedies. This represents a significant progress in comparison to approaches that, in the past, simply prioritized the growth in GDP encouraged by the the arrival of FDI, or trusted the determinations made by the host Government without requiring that certain procedures be followed that improve transparency in decision-making and that ensure that the rights and interests of the communities affected by the investment will not be sacrificed in the name of attracting investment to the country.

But considerable problems remain at the level of implementation. Substantive requirements, such as the need to ensure that FDI shall contribute to the realization of human rights and to human development, must be combined with procedural requirements of transparency, participation, information, and access to remedies. National-level decision-making must be combined with an adequate role for local-level decision-making. Only by recognizing the complementarity of these different dimensions shall a workable domestic governance framework for investment emerge. That framework should take into account that the substantive requirements imposed on FDI cannot be distinguished from the procedural safeguards that are increasingly imposed: the more transparent, open and participatory the decision-making processes by which investment treaties are negotiated and HGAs concluded, or specific investment projects authorized, the less there will be reasons for courts or other independent bodies to intervene to suspend or block the investment concerned. Similarly, the framework for investment should recognize the complementarity of the setting of priorities at the national level and the need for participation at the local level, by the communities most directly affected: just like decisions at the national level must include a careful consideration of the impacts for the local communities (an objective served by human rights impact assessments and the recognition of participatory rights), decision-making processes at the local level must be organized taking into account the interdependency of choices made by each community coexisting in a same jurisdiction -- an interdependency that requires that each community makes a choice concerning the proposed investment without having to fear that it will be made worse off if another community, in another part of the country, makes a different choice, leading to a collectively sub-optimal outcome in which each community seeks to attract investors by renouncing the imposition of strong conditions that could maximize the benefits to the local economy while minimizing the negative impacts. President Johnson Sirleaf of Liberia may have been wrong to say that local communities should not create obstacles to the implementation of a policy decided by the central government. But it would be equally naive to suggest that the local communities should decide for themselves what is in their best interest, as if the central government had no role to play in ensuring that investment works for human development.