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International Standards: A Professional Challenge for Natural Resources & Energy Lawyers

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SUMMARY

Cross-border investment, trade, financing and the sales of services and equipment in natural resources and energy is becoming subject to an increasing number of different forms of "soft-law" international standards, guidelines, codes and recommendations. These reflect economic and political globalisation, with its concomitant need for global regulation, but also the very early and inchoate status of global regulation. We are at the early stage of a development which will take its time and it is premature to predict where it will end.

Such global standards have a considerable indirect, and increasingly also quite direct, impact on cross-border natural resources and energy businesses. For the lawyer used to national laws, with a quite limited relevance of conventional international law, these developments pose professional challenges. It is easy – but professionally negligent – to ignore such developments as "fuzzy-woozy" and "airy-fairy" non-law. But they are increasingly and possibly quite generally now relevant in almost all investment disputes, many if not most commercial disputes, but also in mediated renegotiation and negotiation of deals. Compliance with international standards has become a significant challenge for management. Those companies which can manage compliance efficiently acquire relevant competitive advantages – and so do legal professionals in comparison with their conventional brethren.

Global standards work directly by incorporation or reference into treaties, contracts and regulation. They work indirectly by giving more specificity and substance to open-ended standards in the primary legal instruments, they legitimate

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legal argument and arbitral decision-making and they provide some protection from NGO campaigns operating through public opinion. But global standards are not easy to manage: Their origin, character, distinct language and enforcement mechanisms as well as their constituencies all enhance or detract from an international standard's legal and persuasive value. It requires therefore much more subtle, and politically more responsive lawyering to deploy such standards in the client's favour, to defend against application of such standards and, moreover, to participate effectively in the formation and application of such standards. New professions competing with conventional lawyering have emerged which focus on quasi-regulation, on the global level, by way of global standards.

Natural resources and energy are perhaps more sensitive to modern global standards. These industries are among the most globalised industries, but also the most politically vulnerable ones. The industry social and political "licenses to operate" depends to an increasing degree on compliance with such standards. New actors with significant intervention potential (primarily NGOs) focus on the political (and thereby in the end legal) legitimacy of natural resources and energy development; well-known players – such as international agencies, specialised government agencies with transnational alliances and multinational companies – change their character, alliances and mode of operation as well. The World Bank Extractive Review Process or the MMSD project (focused on mining) illustrate these issues which are now on the policy agenda – and which will translate themselves into specific corporate needs for inside and outside advice. Lawyers face here competing providers of such expertise. It is in their interest to develop strategies to respond to their client's emerging needs innovatively, both in terms of expertise available and in terms of their internal organisation and external relationship building.

INTRODUCTION: FROM "HARD LAW" TO "SOFT LAW" IN THE GLOBAL NATURAL RESOURCES & ENERGY INDUSTRIES

United States mining companies have had qualms about signing up to the UN Secretary General's new "Global Compact", a purely voluntary, not binding instrument by which companies promise to respect and built into their organisation environmental, social and other good-governance standards. Their concern is that this might in the end lead – whatever the non-binding nature of the UN Global Compact – to rules that would become in one way or another legally relevant for them. They are right. The conventional tool-box of a legal adviser to energy and resource companies investing or trading abroad consisted of national laws, mainly host state and home state law with, quite rarely and only for quite narrow issues (resource jurisdiction; management of host state political risk such as nationalisation) some elements of public international law. The corporate counsel took care of home state rules and some basic competence of dealing with special advice concerning host state and international law, a host state law firm advised on host state law and international law professors were engaged short-term for ad-hoc issues that rarely arose. This was a clear and simple scheme for

carrying out your work professionally. I assume it is still deeply anchored in our professional minds and ways of doing things.

But the situation has been changing. With a more global – that is connected – economy, comes a more global society. With a more global society, come expectations for correct standards of conduct reflecting the, even if fragmented, global community. Rules and standards – formal expectations of proper conduct – emerge that reflect rather the values – and fashions – of the global community than merely of nation states. There is hence a widely perceived need for universal standards, beyond the particular situation of individual countries, the traditional repository of regulatory sovereignty. But this need is still inchoate: International law, as a specific body of rules governing economic relations that transcend national borders, is not well developed. If it is in the legally binding form of bilateral or multilateral treaties, it is generally in open-ended language embodying compromise among quite different participants. If it is more specific – in sector-oriented rules for example or in rules created by particular transnational communities (eg environmental, safety, health-related) – it is often rather embodied in instruments that have not yet achieved the level of generally binding international law: Large numbers of multilateral environmental and human rights treaties, for example, do not achieve legal effectiveness as these products of quite specialised transnational communities, even if acting by national ministries, do not have enough general political support.[1] Rules and technical standards by international professionals, industry and other non-governmental organisations, will reflect the particular ideologies, competencies and interests of such organisations, but not command universal adherence. International organisation work is now replete with guidelines, codes of conduct, recommendations and other forms of normative instruments which try to command attention, but do not have neither the full force of international law nor universal acceptance. They can be qualified as "soft-law" – to contrast it with legally binding hard law. But this qualification is not always helpful in appreciating their nature and practical relevance: Some hard-law international treaty language is so open-ended, and so devoid of general acceptance and compliance mechanism, while some soft-law instruments – eg universally accepted and legitimated codes and guidelines[2] – carry a de-facto force of law and are disregarded only at considerable risk. For a natural resources and energy practitioner engaged in transnational work – investment, trade

[1] These are for example, the 1972 Stockholm Declaration in Report of the United Nations Conference on the Human Environment, UN Doc A/Conf48/14/Rev1 (1972); 1992 Rio Declaration on Environment and Development 31 ILM (1992); The Framework Convention on Climate Change 31 ILM (1992); The Convention on Biological Diversity 31 ILM (1992), 2002 Johannesburg UN World Summit on Sustainable Development; Declaration on Social Progress and Development Proclaimed by General Assembly Resolution 2542 (XXIV) of 11 December 1969 24 UN GAOR Supp (No 30) at 49 UN Doc A/7630 1969.

[2] Codex Alimentarius in WTO law: T Weiler "The Treatment of SPS Measures under NAFTA Chapter 11: Preliminary Answers to an Open Ended Question" (2003) 26 B C Int'l & Comp L Rev 229; IMO Guidelines on Provision of Financial Security In Case Of Abandonment of Seafarers. IMO Assembly Resolution A930(22) Adopted On 29 November 2001: http://users.skynet.be/p.woinin/sfIMO930.htm.

and goods and services, financing – life has therefore become much more demanding: There is binding international law, but often it is of quite limited practical relevance. But there are also now a large and constantly growing number of "soft-law" instruments which can, and at times unpredictably, acquire practical relevance. Their relevance is often hard to predict. The significance of such instruments may sometimes increase, but also diminish again. As everywhere in human life, there is an element of new situations and needs addressed by such instruments more flexibly than the more cumbersome instruments of conventional international law, but also an element of fashion, with its coming – and going – of topics considered vital at one stage, and then falling into disuse in the next. What is of lasting significance and what is only of transient character, is never easy to identify except after some time. For a practitioner, the temptation is great to dismiss all such "soft-law" as fuzzy-woozy fashion. But as I am trying to demonstrate, such dismissal is often risky, likely to do disservice to ones' clients and not up to the level of a world class natural resources and energy lawyer.

In this paper, I will discuss the role of international standards as they are relevant for the natural resources and energy practitioner, I will identify their current and prospective usage in transnational negotiation, (mediated) renegotiation and dispute management. I will also discuss some distinct features of the new players – mainly non-governmental organisations (NGOs), but also of well-established players – government agencies, international organisations and multinational companies. I will do this with the view of helping to identify emerging needs of clients – but also the competition from non-conventional providers of international regulatory expertise.

RELEVANCE OF INTERNATIONAL STANDARDS IN TRANSNATIONAL DISPUTE PRACTICE

Let me give some examples from my own international practice – largely now provision of expertise in various roles in the management of transnational disputes in the energy and resources field. First, to highlight and generalise, I have not encountered as yet a dispute where reference to international standards – beyond the safe ground of legally binding international law – has not been made, often in a way that significantly influences the resolution of the dispute. To understand the relevance of such referral to international standards one has to appreciate the position of the parties, and a tribunal in the case of arbitration, in transnational disputes. All players in such situations are under strong pressure to make their position, their argument and in a tribunal's case their decision, as legitimate as possible. International adjudication has limited political legitimacy in nation states and before the critical attitude of non-government organisations. Lawyers from a diverse group of professional communities and without as yet a prevailing cosmopolitan common culture meet. They have to make their arguments on the basis of international treaties which are inherently ambiguous, in need of interpretation and without settled interpretative jurisprudence. These open-ended

texts – just think of "fair and equitable judgement" in investment arbitration, or "international law as applicable to a dispute" or "commitment entered into by a government".[3] Given that the participating actors lack a common frame of reference – such as lawyers in a domestic system, they will search almost desperately for anything that appears to give an international authority to their arguments.

In addition, the limited legitimacy of international tribunals will make them very keen to demonstrate that their reasoning is compatible with an international standard that promises to confer some legitimacy. Even if not made transparent all the time, lawyers and judges wish their position to be seen as "fair and equitable"; again, international standards are relied upon to suggest such fairness as a homogeneous set of values is largely absent. Most arbitral awards of recent date highlight the need to base a decision not on the subjective value-systems of the decision-makers (as natural even in judicial decision-making the influence of cultural and subjective bias may be), but in "objective rules".[4] It is therefore most helpful for tribunals – and for the parties' counsel – to find an international instrument that appears sufficiently objective and universal to buttress a reasoning. If the international standards in the beginning only serve to add legitimacy and apparent objectivity to decision-making from which the subject element can not be eliminated, and if they are initially only used to support or even camouflage in essence more subjective decision-making, over time such habit of reasoning by reference to international standards acquires a power of its own.

In my experience, international tribunals will rarely if ever reject reference to international standards. They may sometimes not feel convinced of the legal value of such standards, but they will rarely have the confidence to reject their applicability outright. Even if the awards do not refer to standards explicitly, the tribunals will be quite keen to avoid holding that a decision can be interpreted as going to the contrary of pertinent standards. Going against an international standard outright with an award that becomes public[5] will expose the tribunal to criticism – from the losing parties, but also the interested public opinion (expressed mainly in the professional, academic and NGO-communities). That is something arbitral tribunals who are under pressure to place themselves into a presumed "mainstream" are as a rule anxious to avoid. A competent counsel can therefore no longer avoid in international arbitration to neglect relevant instruments of soft-law, either those that advance one's party's position or those that are adduced by the opponent.

[3] I am referring here for example to investment arbitration standards contained in the Energy Charter Treaty: www.encharter.org; NAFTA-based investment arbitration: www.naftaclaims.com and ICSID-based investment arbitration: www.worldbank.org/icsid.

[4] See P M Norton, "A Law of the Future or a Law of the past? Modern Tribunals and the International Law of Expropriation" (1991) 85 Am J Int'l L 474 discussing the use of judicial arbitral precedents as a basis of legitimising decisions where there are no unambiguously authoritative sources to cite.

[5] Arbitral awards in investment arbitration, in particular before the ICSID, but also in non-ICSID BIT cases, are increasingly publicly known and subject to public debate, see only: www.worldbank.org/icsid; www.naftaclaims.com; www.transnational-dispute-management.com.

The same is true in non-litigious forms where rules are applied or where bargaining takes place "under the shadow" of rules that have a possible prospective relevance. In mediation of transnational disputes, for example, reference to accepted international standards fixes possible points on the settlement range which are easier for parties to accept – and to sell such acceptance to their usually critical domestic constituencies and detractors. Similarly, locked-in negotiations can much more easily be opened up and led to a constructive outcome if international standards define an agreement that is acceptable for both parties. Such an agreement on specific points does not always have to be reached if the issue can be settled to the satisfaction of both parties by reference to, or incorporation of, acceptable international standards. International standards have a further advantage: Their evolution in response to technical and societal change is usually much easier to achieve than multilateral treaties. Referral to an accepted international standard will therefore also take care of necessary modernisation, something that is not assured by reference to generally rigid international and in particular multilateral treaties.

International standards play therefore an increasing role for project developers, financiers and dispute resolution specialists: on abandonment of offshore oil platforms, on mine restoration, on health and safety, on emission standards, on dealing with indigenous communities, on mining in developing countries, on corporate governance, on minimum governance conditions for financing resource projects in developing countries.[6] Managing compliance with them has become a major element of managerial competence and competitive corporate advantage. Companies – as any institutions in the Western world in particular – have to learn, usually at great cost, how to arrange corporate organisation and procedures (from project planning to project implementation, due diligence, negotiation, dispute settlement) to both achieve the desired effect of compliance, while also minimising incumbent cost and distraction from key corporate objectives. An organisation that adds such standards compliance at the tail-end of its processes is likely to either underachieve compliance, and hence expose itself to numerous legal, public relations and other forms of regulatory and financial risk, or increase its compliance cost beyond the level of its competitors. The key is to understand properly the relevant standard/guideline, its origin, philosophy, its enforcement mechanism (formal and informal), its evolution and the relevant stakeholders/players, and then try to build compliance into the corporate organisation with the aim of minimising friction and unnecessary transaction cost.

The new relevance of such international standards also means that new players have to be taken into account. Such players may be part of the processes and institutions out of which the standards emerge, or part of a critical audience searching actively to focus the spotlight on companies which can be caught in

[6] A S Wawryk, "Adoption of International Environmental Standards by Transnational Oil Companies: Reducing the Impact of Oil Operations in Emerging Economies" (2002) 20 (4) JENRL 402; J Walker & S Howard, *Finding the Way Forward: How Could Voluntary Action Move Mining Towards Sustainable Development* (London: International Institute for Environment and Development, 2003); OGEL special issue on corporate social responsibility (forthcoming).

manifest non-compliance. Such players are typically NGOs, often in open or often rather tacit cooperation with governmental, intergovernmental or academic specialists, with channels of communications to competitors, domestic political parties, local communities and the ability, usually more effective than commercial companies, to mobilise public opinion. Nothing serves a NGO activist campaign better than catching a company in the act of promoting (through its public relations department) its pious support of benevolent international guidelines, while, at the same time, breaching (through its project managers on the coalface of the business) such guidelines. Hypocrisy is a normal fact of life which emerges out of the contrast between altitudes of our public proclaimed values with the muddling through unclean realities of the ground. But unmasking hypocrisy is the fodder for NGOs and the nightmare for corporate top management and its advisers.

To make my points more real, let me give you four very recent examples from my own dispute management practice:

Case No 1,[7] an investment arbitration under the Energy Charter Treaty, dealt with non-payment of a price premium committed to a foreign investor in a co-generation plant by a state energy monopoly in an East European country. The state enterprise forced the co-generator to accept only 75% rather than the promised 200 % of the normal electricity tariff. The legal issues here concerned the attribution of state enterprise conduct to the state under the Energy Charter Treaty, the legal validity of the "double-tariff" agreement under the "disciplines" of the ECT, such as national treatment/non-discrimination, observance of commitments (umbrella clause), relation of treaty with contract claims, most favoured-nation treatment duty and regulatory expropriation. These were difficult questions for the tribunal for which there was no directly applicable precedent. But the context of the dispute was influenced by a number of international instruments of various persuasive strength (statements by EURELECTRIC, the European electricity industry association; comparative studies by an expert group of co-generation; a directive and a draft directive of the EU promoting co-generation) which all agreed that co-generation required and merited a temporary price or investment support. The reason is that co-generation, as an environment-friendly form of electricity generation competes with competing power producers benefiting from not internalised external costs (eg safety and decommissioning in case of nuclear power) or depreciated Communist-era power plants. Its benefits in terms of much lower emissions harmful for the climate and in terms of much greater energy efficiency require and justify an initial support, as by the state assuming part of the investment cost or the consumers, by way of regulated electricity prices, supporting the operation through a tariff price premium.[8] Courts in the EU – such as the German Federal Court – had also supported the principle of a price premium for renewable energy. The arbitral tribunal could not rely directly

[7] Discussed in detail in Waelde/Hober, "The First Energy Charter Treaty Case", J of International Arbitration, December 2004 (forthcoming).

[8] See on the issue of initial and transitory support of non-conventional, but environment-friendly energies Steiner, Bradbrook and Waelde, input paper to the June 2004 Bonn conference on renewable energies, OGEL 3 (2004) at www.gasandoil.com/ogel.

on such international standards, anyway not in the form of a legally binding treaty, EU directive or Code of Conduct of an international organisation with a claim to universal acceptance and attention; but the uncontested availability of emerging international standards, all pointing towards the legitimacy and reasonableness of a price premium for co-generated electricity made it much easier for the tribunal to interpret and apply the quite open-ended investment disciplines of the Energy Charter Treaty in favour of the double-tariff premium commitment. If this commitment, on the other hand, had appeared outrageous, exploitation of inferior bargaining power and expertise of the host state, way out of line with international practice and not supported by authoritative industry, professional association and EU Commission recommendations, it is very doubtful that the tribunal would have felt comfortable in sanctioning the double-tariff premium commitment. The international standards here provide a context of "background music" with a subtle, and not often easily manifest or identifiable impact on the way the tribunal finds the law. Tribunals as international courts[9] wish to be seen as rather "going with the stream" of contemporary public opinion, of comparative practice in other countries and the expertise and judgement that emerges from authoritative and serious international industry and professional associations. International standards help the tribunal to find a solid footing to avoid the criticism of relying on its subjective personal sympathies on cultural biases. For the skilful advocate, such standards – if supportive – are therefore a powerful tool to persuade a tribunal – and a quite new tool for which many experienced litigators are not yet prepared and quite defenceless.

Situation 2: Another issue – which we can find in some past and probably also present and future situations – is to what extent a claimant has to provide full disclosure about its chain of material control up to the ultimate equitable owner in litigation. In many if not most past arbitral cases, there was no need to provide such full disclosure. The wide recognition of the principle of separate corporate personality without "piercing of corporate veils" except in very narrow situations of abuse of the corporate form to the detriment of creditors allows in principle that only one link in a more complex corporate chain of ownership and control appears as claimant. The remainder – in particular who ultimately calls the shots – could remain in an often convenient fog of offshore companies, bearer shares and trusteeship arrangements. But allowing such obscurity means that tribunals can become willing or unwilling accessories to corruption, money-laundering and other criminal activities, possibly even various mafias and organised crime. Tribunals in the past (in particular it seems Swiss ones) seem to have taken that risk when requiring a high threshold of proof for corruption, waiving any need for closer examination of ultimate ownership and control or minimising the applicability of public policy rules (anti-corruption, competition law) in international commercial arbitration.[10]

[9] See the references to "sustainable development" in the Gabcikovo-Nagymaros judgment of the International Court of Justice, ICJ/549/ 1997 http://www.icj-cij.org.

[10] T Martin, "International Arbitration and Corruption: An Evolving Standard" (2004) 1(2) TDM at www.transnational-dispute-management.com.

But is this still acceptable in a time when we have major international anti-corruption conventions, guidelines on the prevention of money-laundering, international cooperation against organised crime and terrorism? The OECD has over the last years developed codes on corporate governance, updated its guidelines on multinational companies with elements of transparency and disclosure from the OECD corporate governance code and developed detailed and specific guidelines against money-laundering which all rely on very extensive corporate disclosure of ownership and control.[11] Would therefore not be the persuasive argument that tribunals have a duty – as participants in the global economy, of which a very high ethical standard is required – to ensure they are not a tool in dubious operations when some elements of the case act as "red flags" suggesting a greater than normal likelihood of association with illegality in its various forms? The conventional counter-argument comes easily: These codes, guidelines, standards are not legally binding on the parties in a traditional way. The parties have not incorporated them in their contracts or the investment treaties invoked make no explicit reference to such soft-law indicators. But I suggest that modern arbitrators – let us discount the true dinosaurs – would have difficulty in not feeling uneasy about dismissing soft-law guidelines of corporate governance. There are legally proper entryways: The reference to international law in treaties or to national law (to include national and international public policy which is more open to soft-law rules) allows the tribunal to take into account rules which may not be part yet of directly applicable international public law, but are arguably part of the relevant rules in the international economy.

Situation 3: I find that in virtually all disputes I have been engaged in recently, one or both parties will point to "international practices". The party that hopes to gain from a favourable impact of such practices will emphasise them, the parties that fears to lose will try to emphasise the insulation of the relevant contract or domestic law from such practices. It will qualify such a comparative law and practices argument as of great theoretical and academic interest (the code for saying it does not matter), but not part of the body of law that is relevant for deciding the dispute. But large-value international disputes usually are not easy to decide based on what is well known of applicable domestic law or contract. Disputes tend to arise primarily because the applicable rules are difficult to identify and even more difficult to interpret and apply without ambiguity and openness to competing interpretative options. In such a situation of interpretative ambiguity, it is natural for the advocates and the tribunals to look for comfort – irrespective of the narrow scope of stare decisis – in how other respected tribunals, courts, regulators or international bodies – have reacted to the same or a similar issue and what reasoning they have used. This is again because tribunals fear nothing more than being accused of relying on subjective biases and positioning themselves out of the mainstream of current practice. Showing that all or most countries in a similar situation have reacted to a particular problem – say application of tax rules in the international petroleum industry to a specific

[11] www.oecd.org; a recent Unctad study surveys transparency, corporate governance and disclosure rules in various international instruments, usually of a soft-law character: www.unctad.org.

situation – will be something arbitrators may not always wish to mention in their own award, but it will have a mighty influence on them – and even more so if the arbitrators are known as open-minded and cosmopolitan among their peers. But not only comparison of domestic regulatory practices can help to provide comfort to tribunals that they are on the right way, but also standards developed by professional bodies – eg manuals on oil and gas accounting, sometimes (rarely) even opinions by professors with a particularly deep expertise and reputation in a specialised field. Such opinions – professional bodies, expert groups in intergovernmental organisations, our rare professor – enjoy a persuasive authority because (and to the extent) it is properly assumed that they have consulted widely, surveyed practices extensively, spent an amount of time, expertise and effort that is greater than available in a particular litigation, understood the economic and technical reasons behind particular solutions to such problems and are free from the particular focus and bias that characterises litigation.[12] Again, this is not necessarily a direct application of the applicable law and the contract/treaty at the core of the dispute (though we always have communicating channels between international practices and standards and the legal rules to be interpreted), but also and sometimes a favourable "background music": A persuasive advocate (and the writer of a respected arbitral award) will want to present his solution to an interpretative dilemma as something that informed and competent experts and relevant professional and intergovernmental bodies around the world would come to and which is in harmony, rather than in cognitive dissonance.[13]

Case No 4 is of recent date and has just been made public by the Attorney General of Kenya[14]. It is of interest as corruption is asserted – and also proved by evidence of claimant – a very rare and surprising occurrence; most corruption allegations are hard to prove and the issue then turns around the threshold of circumstantial evidence and indicators required for a prima facie proof. A Dubai businessman wanted to open up duty-free shops in Kenyan airports. According to his own testimony to the tribunal, he was advised by somebody close to the then Kenyan president, that a cash gift of 500 000 $ (or 2 M $)[15] in Kenyan Shillings would be appropriate and required to obtain the requisite permits. He left a brown briefcase with the cash in the Presidential villa before a courtesy meeting with the President. He later picked up the briefcase which was now filled with fresh corn. He later sued, before the ICSID (Case ARB/00/07 World Duty Free v Kenya), the government of Kenya for various alleged breaches of investment duties. The

[12] G Aksen, in R Briner, L Y Fortier, K P Berger, and J Bredow (eds), Law Of International Business And Dispute Settlement In The 21st Century, Liber Amicorum Karl-Heinz Böckstiegel (Cologne: Heymanns, 2001).

[13] "cognitive dissonance", a concept from psychology and cross-cultural communication (See D Flader, "Western Arrogance and Polish Resistance to These Strategies. A Cause of Severe Communication Problems in Intercultural Business Negotiations" (2004) 1 TDM means that people will always prefer a view that is in harmony with other views they have of the world. Taking a position that is distinct from the relevant peer groups always requires either cynicism, or a conscious distancing that is rare among the (usually quite non-rebellious) senior lawyers involved in international disputes.

[14] July 13, 2004 in statement to the Kenyan Goldemberg Commission.

[15] My intelligence is contradictory on this point.

claimant relies on the concept that corruption surrounding the formation of a contract makes it invalid[16]. But in the main it argued that the concept of international ordre public is to be developed out of jurisprudence, but even more so authoritative international conventions – including draft conventions. These treaties are as a rule not directly effective in domestic law. Nevertheless – and with the support of the ILA Committee on International Commercial Arbitration[17] – the claimant argues that the "weight of international authority" is overwhelming: the OECD anti-bribery corruption, the Council of Europe Civil Law Convention on Corruption and the OAS conventions against corruption and the UN draft Convention against Corruption[18] are cited as authoritative indicators of an "international ordre public" – though either not directly effective in national law (OECD Convention) or not even legally effective due to lack of sufficient number of ratifications or even finalisation (UN draft convention). The case has as yet not been decided, but it would be surprising if the tribunal will not be persuaded by the proof of corruption to reject the claim.

KEY PLAYERS

To understand and to deal with the challenges of international standards, one needs to understand the forces that create and later use them.[19]

Governments are – emphatically since 1648 – the traditional, sole and exclusive participants in the international law process. This role has been deeply impregnated into the mind-set of lawyers still possessed by the concept of nation state primacy in national and international law of the 19th century.[20] But the absolute hold of monolithic nation states of international law has loosened up over the last decades; nation states are less monolithic. Besides the international public law still and formally largely controlled by nation states, other sources of international law are emerging (and international soft-law is a major new source). First, while the government is still the formal representative of the country, the nation state is less monolithic than it was: There are now "subnational" actors with large degree of autonomy, among them federated states and provinces, independent regulatory agencies and formally independent judiciaries. These still create international law liability for the nation state (eg by the nation state's responsibility under investment

[16] The principle seems widely accepted, but usually the question is of the threshold required for proof of corruption or at least of circumstances which allow a prima facie proof of corruption: *Chitty on Contracts*, Vol I, 17-007; *Soleimany v Soleimany* [1999] QB 785.

[17] Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, London Conference, 2000 – published in finalised form by the ILA in (2003).

[18] www.uncitral.org.

[19] For a more extensive discussion: T Waelde, "International Energy Law: Key Concept and Players: A Preliminary Introduction" (2003) OGEL 1(4); also A J Bradbrook, & R L Ottinger, (eds), *Energy Law and Sustainable Development* (IUCN, Environmental Law Centre, 2003).

[20] T Waelde, Book Review of Dalhuisen On International Commercial Financial and Trade Law (2003) 52(2) ICQL 521.

treaties for the conduct of such subnational actors),[21] but I would question if the anomalous situation of an autonomous subnational authority creating liability without control by the national government can survive[22]. But the subnational issue raises one feature of governments that is most pertinent for international standards: Governments are more compartmentalised and less coordinated and focused than they used to be. The relevant specialised ministries and agencies – finance, economy, trade, environment, health, industry, energy regulation, central banks – play with increasing autonomy international games of their own. They are part of a system of transnational alliances which often count in fact more than the domestic political processes. When ministries of environment participate in international standard-setting, they are as much part of global environmental alliances (grouping other ministries, the specialised international agencies, professional and industry associations, NGOs) as they are part of a nation state government. International standards therefore tend to reflect often a partisan, single-issue orientation and get more easily into contradiction with the international rules "owned" by different transnational alliances (say the environmental rules and treaties versus the trade rules and treaties). There is a dilution of sovereignty not only because most (perhaps not the most powerful) nation states have lost bargaining power vis-à-vis global markets, but also because their own constituent parts are more internally divided and internationally allianced.

International Organisations are formally the slaves of the governments who set them up, finance them and govern them. They do act – the more specialised, the more directly relevant – as a collective regulatory response of governments to global regulatory challenges – climate change, safety of maritime and air transport, of nuclear power, of oil supply security, of trade liberalisation, of military security, of anti-drug, anti-corruption, anti-money-laundering or anti-terrorism policy.[23] It is within the intergovernmental network and supported by a more permanent, technically expert secretariat that most proper international organisation produced standards and guidelines are elaborated and formally sanctioned.[24] Multilateral treaties are losing relevance as a source of such authoritative rules. The reason is primarily that multilateral treaties are very complex, costly and time-consuming to negotiate. Ratification performance – in particular with respect to environmental and human rights treaties – very poor;

[21] J Crawford, (2003), The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge: Cambridge University Presss, 2002); T Waelde & P Wouters, "State Responsibility in a Libralised World Economy: State, Privilaged and Subnational Authorities under the 1994 Energy Charter Treaty: An Analysis of Art 22 & 23 ECT 23, 27 Neth YB of Int'l L 143, 182-86 (1996); Art XVII of the GATT.

[22] At the heart of many investment disputes is the question of state responsibility for such subnational actors: Argentine provinces (eg *Vivendi* case, www.worldbank.org/icsid); US states (*Methanex v US*); first ECT case, but also *Maffezini v Spain* and *Salini v Morocco* (state enterprises).

[23] Just see: www.wto.org; www.oecd.org; www.iea.org; www.iaea.org; www.un.org; www.uncitral.org; www.imo.org.

[24] See only the OECD guidelines on multinational companies, on corporate governance or the FATF guidelines against money laundering.

probably this reflects the weak domestic anchoring of such treaties mainly pushed by transnational alliances. They also tend to be obsolete once formally effective. Soft-law instruments have therefore acquired more of a role because they are less complicated to negotiate, easier to update and not in need of uncertain ratification procedures.

But international agencies also have a life and interest of their own. As all organisations keen to acquire more staff, funding, power and visibility, they can often manipulate delegates from governments who in many cases lack expertise, resources and interest or are often "co-opted" by the tactical deployment of consultancy contracts and other forms of patronage effective in particular on poorer countries. International agencies are politically twice insulated from elections – they are governed mainly by diplomats sent from their often politically insulated ministries. They lack political legitimacy and therefore will do a lot to try to gain greater acceptance. Often, this will means building alliances with activist NGOs – seems mainly the case for the UN – or in the more specialised agencies (IAEA, IMO, IEA etc) with industry lobbies, professional and industry associations. Producing international standards and codes has therefore become a major activity of international agencies. It promises effects and visibility, helps to cement alliances and justifies fund-raising.

Multinational companies are what move the global economy. In a 1970s "New International Economic Order" prism they were seen as adversaries of governments and proponents of "mere profit" exploitation at the expense of the nobler purposes of economic development. This has changed in the 1990s paradigm change towards privatisation and global liberalisation.[25] But in every economic crisis, so far only regional or country-based (Asian financial crisis of 1998, Argentina of 2001, Bolivia 2002; Indonesia of 1999+), multinational companies have rapidly become the most suitable vehicle for domestic political scapegoating. NGOs have also added to re-make multinational companies again an object for expressing Western guilt for the unequal distribution of wealth and power in the global society: They are held responsible for cooperating with corrupt and immoral governments – ie for the widespread malgovernance which is both a cause and symptom for underdevelopment; they are criticised for colluding with, or not objecting effectively enough, human rights breaches in developing countries. The logical consequence is to revert the 1970s call for multinational companies to abstain from intervention in domestic politics (eg ITT in Allende's Chile) into a renewed call for international companies to intervene actively, with their resources and presumed power, into the domestic affairs of developing countries to make these countries safe for the modern human rights and other governance standards (ESG: economic-social-governance) of the Western market economies. The "license to operate" is at present a fashionable term. It is a nebulous concept that does not have a legal meaning but rather expresses the idea

[25] T W Waelde in "A Requiem for the 'New International Economic Order': The Rise and Fall of Paradigm" in G Hafner, et al, (eds), *International Economic Law and a Post-Mortem With Timeless Significance, Liber Amicorum Seidl-Hohenveldern* (The Hague, Kluwer Law International, 1998) 77, 774.

that companies operations have to be socially and politically accepted by either the majority or perhaps more aptly those activists with significant influence over public opinion). The "license to operate" is particularly sensitive in natural resources where large, capital-intensive, mostly Western multinationals take away non-renewable resources from poor and badly governed countries, ie in NGO activist language "take away treasures and leave nothing but big holes". International standards are here both a way to make MNCs accountable for their conduct, but also a method to both express the (non-legal at least initially) requirements for both having – and losing – the social license to operate. Public opinion relevance and indirect legal significance come here in difficult to define combinations. Companies act to develop standards to maintain their "social license" as a tactic in their public opinion strategy, but then also have to deal with the implications of what may have been initially only a PR-response when it concretes into something that is legally relevant.

But for MNCs, standard-setting has also a function in its competitive strategies. Efficient management of standard compliance provides a competitive advantage. But even more so, influence on standard-setting allows a company to support standards it is better equipped to handle than competitors.[26] A large part of the work of industry associations and lobbyists – before the EU Commission in Brussels, before the WTO in Geneva for example – is taken up by providing early-feed back on emerging standards and on influencing standard-setting. MNCs and NGOs often find themselves in an alliance: Companies which are already subject to challenging standards in their home state, and thus have acquired a particular competence in compliance, will be in alliance with NGOs pushing for higher standards. The "labelling" movement – developing labels indicating higher environmental, energy-efficiency, employment and human rights practices to gain consumer preference – is therefore based both on NGO activism joined with business interest. Other standards such as those emerging in the CSR ("corporate social responsibility" field)[27] provide some public opinion benefits to companies, but also the potential of imposing a competitive handicap on competitors, often those in developing countries.

Non-governmental organisations (NGOs) are the most recent and new type of player in the formulation – and enforcement – of international soft-law. These organised international networks tend to consist of an organised headquarters, subsidiaries/branches in developing countries, usually in a financially dependent and subordinate position (much as a multinational company's quasi-colonial structure), a group of ideologically motivated "activists" and a network of contributing members and sympathisers.[28] There is a range between the much more professional ones (eg IUCN, a combination of a NGO and international

[26] N Roht-Arriaza, "Shifting the Point of Regulation: The International Organisation for Standardisation and Global Law Making on Trade and the Environment" (1995) 22 Ecology LQ 479.

[27] OGEL Special issue on Corporate Social Responsibility: OGEL 5 (2004) led by C Batruch and A Dias (forthcoming).

[28] G Shaffer, *Defending Interests: Public – Private Partnership in WTO Litigation* (Washington DC: Brookings Institutions Press, 2003).

organisation), Oxfam, Amnesty International on one hand and the more radical, activist ones – eg Greenpeace. Some NGOs – eg Citizenwatch – seem to be largely funded by and front for the Soros Foundation. There is no formal qualification for being a NGO – national charity law and UN registration provide a very limited amount of filtering. As a result, smaller NGOs come and go, activists from one to the other. They are often allied with and front for political (eg Christian fundamentalist groups in Sudan) or industry-trade union lobbies. The NGO world lives off the emotional and morality needs of Western educated middle classes to project their values into usually far-away situations and countries. They resemble in my mind the missionary movement of the 19th century which provided the ideological and emotional impetus behind the operations of colonisers, soldiers and traders – much as today in a world where there was a serious asymmetry of power between the developed countries and societies in a much earlier stage of development. There is little professionalism and quality control in most except the most established NGOs (eg IUCN, Amnesty, Oxfam and a few others). Sanctions – abuse of charity status, defamation and damage litigation – are rare – partly because activists can make the enforcement of law against them look exploitative and partly because they are rarely any assets with NGOs that come and go. In the more shady grounds of transitory NGO activism, operations look much like the boiler-room operators of financial fraud. While unmasking the major operators, in particular companies, is the NGO's major business, NGOs as a result suffer from a severe lack of political legitimacy (elections), commercial legitimacy (competition in markets) and in particular in terms of their internal governance, accountability and disclosure of financing and control over them. The regulation now operational in most developed countries to obtain greater transparency of political party financing and operations is surely needed with respect to NGOs.

NGOs, nevertheless, have an important function in the global society. They are among the very few organised networks that are relatively unimpeded by considerations of consensus politics, of bureaucratic restraint or academic pusillanimity. As a result, they can bring public opinion pressure on single issues – often where Western official positions are in practice severely compromised by vested interests (eg agricultural trade restraints against developing countries). Through a network of sympathisers, they can carry out investigative journalism and bring sordid conduct to light. NGOs are much better at deconstructive activity. Getting involved in constructive international policy-making requires a much sounder view of reality, the need of compromise and liberation from pious morality of a quasi-religious character.[29] NGOs operate mainly through their ability to mobilise critical public opinion. The press requires a constant stream of

[29] I would go so far to suggest that the support NGOs support in Western societies is largely due to the fading away of religion – the more the fading away of formal religion, the stronger, I suggest is the role of NGOs (eg rather in the more secularised Northern and Protestant Europe than in the Catholic south). Similarly, NGOs appeal to the current (or eternal) adolescent: Freed from the constraints of family and not yet constrained by the disciplines of the profession or the work-place, they allow a more exuberant expression of emotion and opposition.

critical news – the more scandalous, the better. NGOs provide such a stream, by investigation, with help from sympathising and dissatisfied insiders and by showcase activist campaigns where the elements of tangible outrage coupled with scandalous conduct (ie conduct that is far below the official line of a company – hypocrisy dramatically revealed). When challenged about the veracity of facts or the substantiation of value judgements, NGO activists – this is my personal experience – tend to disappear from the field and surface in a more sympathetic environment of like-minded co-religionists.

Standards are appealing in particular to the more constructive NGOs. They tend to be constructed – also very much in their presentation to public opinion – as a reaction to outrageous conduct. NGO influence is primarily of an indirect nature: They "expose" outrageous conduct which then leads to call for regulatory action. To move regulatory or quasi-regulatory action (ie adhortatory and without legally binding rules), NGO activists need to capture the ear of players more directly and formally in a position for quasi-regulatory action: National politicians, international and national agency bureaucrats keen to expand empires and acquire political legitimacy, industry and trade union allies looking for a competitive advantage from regulatory action handicapping their competitors. NGO influence is therefore similar to the influence exercised by industrial lobbies, but is played out rather in the open and by public campaigning than by inside persuasion. They then express very high levels of public morality – which includes an in-built clash with practicality. The higher the standards are, the more useful are they to continue campaigns to unmask hypocrisy and create and present scandals for public opinion outrage. NGOs are therefore often an engine pushing for international standards – and a watchdog for compliance, in particular where detectable non-compliance contributes to their strategy of serving up scandalous conduct and outrageous hypocrisy to an interested press and public opinion. Understanding the political dynamics of NGO campaigning helps NGO involvement in both formulation and monitoring of standards – but it also suggests the relative and limited authority of standards that emerge solely from within a NGO plus like-minded sympathiser context. Soft-law that emerges primarily from a NGO context tends to have a certain unreal character: It serves more the emotional and representational needs of NGOs than the purpose of having an effect on real-life. For this, much more compromise, expertise and moderateness in social-engineering ambition is required than NGO activists are usually able to live with.[30]

NGOs are not the only "non-governmental" actors relevant for international soft-law. The more technical and professional (not necessarily less significant) a standard, the more non-state organisations such as industry or professional associations come into their own. The raison d'etre of most industry association nowadays is to serve as a collective early warning body, but also as a collective instrument of companies in a particular industry to pro-actively develop standards on their own or at least influence the evolution of international standards so that

[30] T Waelde, Natural Resources and Sustainable Development: From "Good Intentions" to "Good Consequences" in Schrijver/Weiss 2004, Kluwer.

the interests of the members are served.[31] No international standard (rule, code, guideline, recommendation) will be of much effect in real-life if the expertise from industry is not properly utilised or if solutions are designed with which the main users of such rules are unwilling and unable to operate with.[32] On the other hand, industry-controlled solutions naturally play to the interests of the industry, and in particular to the lowest-common denominator of the industry association, usually leaving the expertise and competence of the most advanced members of the industry outside.

Developing countries need special mention. While enjoying (or suffering from) the trappings of independent statehood since de-colonisation in the 1960s, they have currently the weakest cards in the global game. Their repeated assertion of absolute sovereignty – unfettered by international obligations they may have assumed – is an understandable reaction to their pervasive institutional weakness. The distance in power and economic development from the advanced developed countries has probably not significantly changed over the last 200 years – apart from the large emerging economies such as China in particular, India and a few others. They remain in a state of significant underdevelopment with respect to the quality and strength of their institutions, their governance, their internal and external security and the competitive ability of their economies. The institutions of developed countries – notably the very much US-dominated World Bank – act as successors to the former colonial administrations, with a social-engineering mandate for economic development that seems to succeed rarely if ever. Within multinational companies (or NGOs), the developing country branches are subordinate outposts at the periphery, with the centre of gravity and power firmly anchored in a Western country. Their formal sovereignty is limited by global markets for whom most developing countries have little attraction (with the few exceptions mentioned), by financial dependence, by the modern good-governance intrusions made both by the international organisations, by the bilateral aid programs and by the influence of NGOs on both where intervention into domestic politics for human rights, environmental and many other good-governance reasons is now the rule. After the failure of the various economic independence movements of the 1960s and 1970s – in particular the "NIEO" – which all emphasised absolute state sovereignty, de-linking from the international economy and self-reliance, these developing countries are more integrated into the global economy, but with the weakest cards and very few remaining competitive advantages: Low labour costs count less, resources are less important in the much less resource-intensive growth in Western countries;[33] the Western-led NGO movement is now about to undermine the few advantages left in developing countries – availability of natural resources, low-quality production of goods and services, a regulation-free environment. Intellectually, developing countries in their dependence on the development theories of the international agencies (primarily now the World Bank) and the governance theories of the Western

[31] Roht-Arriaza, op cit n 26; Wawryk op cit n 6.

[32] T Waelde, "Effectiveness: The Holy Grain of Modern International Lawyers: The New Paradigm? A Chimera? Or a Brave New World in the Global Economy" (2002) OGEL 1.

[33] The 2003-2004 resource boom in primarily due to China and India.

middle-classes expressed by NGOs, have very little ability to reflect, study and express independently appropriate concepts for economic, social and political development. They are squeezed by concepts and pressures that all emanate from the North and rather express Northern values, circumstances and interests than their own.

The concept of "local" or "indigenous" communities has its separate role in diluting further the effectiveness of state power. State powers – as is generally recognised – in developing countries are weak: There is no proper rule of law, no effective judicial or administrative institutions. Ethnic divisions exist in many if not most developing countries and provide a powerful lever against good governance and development.[34] Influences from the developed and all-powerful "North" advocate the strengthening of local and indigenous communities (itself a most opaque term)[35]. Given the ethnic and social divisions and the weaknesses of substantive statehood, it is highly risky to accelerate pre-existing centrifugal tendencies by supporting, in effect, the autonomy of local communities against central government. While the term "local" or "indigenous" community carries with it a sense of neighbourly friendliness, of previous injustice crying for compensation and a close familiarity with specific conditions at the resource development site, it can cover as well situations of insurgency, of ethnic strife and domination, of drug-dealing[36] and banditism. Full focus of support – and control over mineral rent – for local communities can be a recipe for disaster: It generates financial resources for building up power of insurgent groups, weakens the government's often fragile grip over the area and encourages criminality. It is hard to see that development can occur by institutional anarchy. The well-meaning Northern powers – NGOs, development aid and international agencies – can easily advocate measures that look good in their intentions, when they don't have to carry the political consequences. What is really required is a strengthening of the competencies of government – central and decentralised – to integrate the ethnic and social forces into the overall fabric of state and society. This implies participation – but not control – by local groups – in particularly those affected, those with powers to affect the project and those operating within the institutional structure of the state in information, decision-making and advantages – both mineral rent by a local percentage and perhaps more so in employment and

[34] Amy L Chua, The Privatization-Nationalization Cycle: "The Link Between Markets and Ethnicity in Developing Countries" (1995) *Columbia Law Review* 95:223-303 (March); W Easterly, *The Elusive Quest for Growth- Economists Adventures and Misadventures in the Tropics* (MIT Press, 2001) (reviewed by T Walde on OGEL 2003).

[35] For a comprehensive discussion see N Usman, The Rights of Indigenous Peoples and Mineral Resource Development: Global Trends and the Nigerian Question. PhD Thesis, CEPLMP, University of Dundee, 2003; N Usman "Environmental Regulation in the Nigerian Mining Industry: Past Present and Future" (2001) 19(3) JENRL 230; The position of Luke Danielson, former director of the MMSD project is considerably more subtle and recognises the tension between supporting the state's good governance and strengthening the role of local communities see L Danielson "Sustainable Development and the Minerals Industry" (2004) OGEL 11(3).

[36] Note here the links in Bolivia and Colombia between indigenous groups, drug-dealing and insurgency.

businesses generated by the project. Empowerment of disenfranchised minorities or majorities[37] can be an instrument of such social and ethnic integration. I have proposed the allocation of formal mining titles as a measure of political integration and pacification in Colombia, both in the sense of giving responsibility by property rights to former guerrillas, but also in Hernando del Soto's sense of using formal property rights to activate the entrepreneurial potential of people outside the elite ethnic and class structure in Latin America.

When it comes to international standards, the situation of developing countries is most pathetic. The proliferation of international standards and soft-law rules seems to work almost everywhere against developing countries: High-quality standards of employment (child labour), human rights, safety, corporate governance and environment all help to build up and sustain the omnipresent competitive advantages of multinational companies; these, often in alliances with NGOs, have little practical difficulty in influencing such standards – usually describing their "best practices" anyway and in getting them accepted. Their fledgling competitors in developing countries are least able to overcome their handicaps: They are not participants in the standard-setting processes and institutions; if they are, they are underfunded and without relevant expertise and resources. Operating in the low-governance context of developing countries makes it trebly hard to adapt to and to comply with the increasingly rigid standards which are made for the values, circumstances and compliance capacities available in developed countries. Importing food, or simple manufactured products, into developed markets become more and more difficult as relevant standards – most with an anti-competitive effect against developing countries – become the most relevant modern day non-tariff trade barriers.

The current direction towards governance in the global economy by both formal treaty-based rules and even more so a proliferation of specific soft-law rules therefore can only cement the inherent handicap of most poor developing countries.

DO THE NATURAL RESOURCES AND ENERGY INDUSTRIES NEED A SPECIAL "LICENSE TO OPERATE" EXPRESSED IN MORE STRINGENT INTERNATIONAL STANDARDS

The natural resources and energy industries (oil, gas, mining, nuclear, electricity) are subject to the panoply of international codes, guidelines and standards in the same way as other industries – computing, telecommunications, tourism, car manufacturing and so on. There are soft-law standards specific for the resource/energy industries[38] but many of those are rather of a technical character reflecting mainly technical characteristics of the industries. What is of

[37] For example, the reasonably successful (in terms of social integration) Malaysian Bumiputra policy or the recent South African "Black Empowerment" policy see T Waelde "Mining Law Reform in South Africa" (2002) 17 Mining & Energy 10.

[38] Wawryk, op cit n 6; Other voluntary standards include Principles for the code of conduct of company operations within the oil and gas industry:

particular interest to us are soft-law rules which rather reflect a specific exposure of these industries to antipathy and resentment often activated in NGO campaigning. The natural resources and energy industries are quite distinct from many other industries:

- The resource industries are pulled by geological prospectivity which is unique among all other industries which are rather pulled by location close to markets, import restrictions and favourable factors of production. They are therefore drawn often to very poor (underdeveloped, weakly governed, highly corrupt) countries. Association with poverty, corruption and malgovernance is therefore almost inevitable, in particular if new deposits are to be developed.
- A widespread image is that the resource industries obtain the wealth of a nation and on depletion leave nothing but dislocation and large holes. This sentiment was strong in the NIEO decade of the 1970s/early 80s; it led to the policy response of having state-owned enterprises take over petroleum and mining extraction or to develop sophisticated fiscal instruments for selling the minerals in the grounds for the highest price possible.[39] This perception still persists though the solution of nationalisation and operation by state enterprises has been largely discredited for reasons of massive inefficiencies.[40]
- Present understanding is that the association of foreign petroleum/mining investment with underdevelopment is largely a function of weak governance. In theory, the resources extracted (of no value without extraction) should be converted into economic and social capital rather than having the mineral rent consumed by rentier states and rentier classes.[41] But in reality, such solutions propagated by the international agency social engineers rarely work: Those with power, appropriate mineral rent and friendly advice and guidance is of little strength compared to political realities.[42]
- Present understanding is also that availability of mineral rent is likely to exacerbate ethnic conflict for control over the power potential of the resource, fuel civil war ("blood diamonds in Angola") and turn attention from productive economic enterprise to political enterprise to get control over mineral rent.[43]

www.//oek/de/pdf/glob_coc_principles. Petroleum Industry Guidelines for Reporting Greenhouse Gas Emissions http:// www.opg.org.uk/pubs/349.pdf; IFC Sustainability and Environment Guidelines http://ifcln1/fcext/enviro.nsf; Australian Minerals Industry Code for Environmental Management: http//:www.naturalresources.org/mineral/generalforum/csr/docs/guidelines/AutralianMinerals;Kimberly Process and the World Diamond Council Resolution on Industry self Regulation: http://www.kimberlyprocess.com:8080/site/www_docs/related_docs_resolution_0210.pdf.

39 B Mommer, *Global Oil and the Nation State* (Oxford: Oxford University Press 2002); Waelde, Requiem, op cit n 25.

40 T Waelde, op cit n 30; in times of crisis (eg Argentina 2001-2004), operation by the state and state enterprises is still the instinctive reaction.

41 Waelde, ibid.

42 Easterly, op cit n 34, highlights also the inter-ethnic divisions in many poor countries (probably again both cause and effect) which make political management easier by sharing mineral rent spoils rather than by investing it.

Solid economic activities are crowded out – easy money is to be gained by controlling access of foreign investors to mineral rent.[44]

Most of these critical issues surrounding the role of natural resources in developing countries can be categorised under the "resource curse" concept.[45] It is therefore useful to refer to two recent policy study exercises undertaken, the MMSD project funded by "forward looking" mining companies and carried out with some independence by the Institute for Sustainable Development (ISD)[46] and the World Bank's "Extractive Industry Review" (EIR) completed in 2004.[47]

The *MMSD project* (Mining and Minerals and Sustainable Environment and Development)[48] was initiated and funded by a group of mining companies concerned over a widespread negative view of the mining industry, but also to identify best practices for sustainable development. The industry concern here was over the "social license to operate". Engagement with its critics, survey of best practices and very extensive stake-holder consultation were the key features. To develop a – relative – degree of independence, the project was carried out by the respected International Institute for Development. The ultimate study – emerging from many specialised studies, review, comments and regional and global consultations – helped to clarify a number of major misconceptions:

- The majority of people engaged in mining do not work for MNCs, but rather as artisanal small-scale miners and in industrial minerals
- The downstream part – refining, fabricating, recycling – may be more relevant in terms of improving environmental performance

It took – not surprisingly – a middle position between the radical NGO position (all mining of non-renewable minerals is harmful and should be ended) and the classic mining industry position (increased supply of minerals is needed for

[43] A S Khan Nigeria: *The Political Economy of oil* (Oxford: Oxford University Press, 1994); conflict diamonds study by UN: http://www.un.org/ecosocdev/geninfo/afrec/vol14no4/htm/diamonds.htm.

[44] Bernard Mommer is perhaps the current protagonist of an approach that simply focuses on squeezing as much money from foreign companies for access to resource development. The problematic implications of maximising mineral rent in an underdeveloped governance concept were, on the other hand, identified much earlier already by Norman Girvan, "Corporate Imperialism: Conflict and Expropriation: Transnational Corporations and Economic Nationalism in the Third World" (New York: Monthly Review Press, 1978).

[45] See P Stevens, "Resource Impact – Curse or Blessing? A Literature Survey" Vol 14 Article 1 CEPLMP Internet Journal June 2003 at: http//www.dundee.ac.uk/cepmlp/journal/html/vol13/article13-14pdf visited 26th June 2003 for a survey of literature discussing resource curse and related empirical evidences.

[46] www.iied.org/mmsd.

[47] For preparatory studies on World Bank, IFC and MIGA: OGEL 1(5) (2003) at www.gasandoil.com; regular reporting on the World Bank in the Financial Times 2004 and official information from www.worldbank.org.

[48] See www.iied.org/mmsd; Luke Danielson, Mining, Minerals and Human Welfare-The Tasks Ahead, APEC Mining Ministers meeting, Antofagasta 15-17 June 2004, in OGEL (forthcoming).

human consumption and mining should have in principle primacy over other land-uses).

The key finding was that attracting investment is a necessary condition, but not a sufficient condition for sustainable development to occur. It came up with a list of good-practices which in essence reflect modern good governance for mining:

- Contemporary good-governance ideas: Combating corruption – income transparency – effective state apparatus and rule of law
- "Informed consent": Participatory decision-making, in particular for local communities to ensure these share in the benefit, not only the – usually very localised – cost of mining. It rejected the fundamentalist idea that local and indigenous communities – itself a problematic concept – should obtain de-facto sovereignty over the resource at the cost of society and its agent, the state, at large[49] as an approach that would further the erosion of state capacities in developing countries
- Improved regulatory reform, with an attention on implementation, in particular environmental management and mine decommissioning
- Integrated (rather than distinct) impact assessments with public participation.

The MMSD initiative did not produce a set of relatively specific international guidelines.[50] It is a middle-of-the way report since it did not include neither mining industry diehards nor fundamentalist NGOs. For this reason, it is at this time the most reasonable and representative benchmark for a social, economic and environmental assessment and overall approaches by both mining companies and governments towards the industry. Perhaps, standards are evolving too rapidly at this time to come up with an integrated, one-size-fits all, global set of standards. But to the extent the final MMSD study does contain reasonably specific standards explicitly or implicitly, they could be the foundation for a second phase where specific standards are formulated, or even be relied upon in formal procedures (arbitration, litigation, legislation, regulation) which aim at relying on contemporary legitimate expectations of properly run mining operations. It would have been preferable if the MMSD project would have come up with a "Code of Conduct", but perhaps their system of very wide consultation with very widely defined stakeholders was just too vast and general to develop usable soft law. A Code of Conduct on Mining Policy is in my view something that should be developed and which would serve both the interests of the industry – to provide some immunity against criticism in case of well-run operations, but also most other stakeholders: Governments to provide a benchmark for regulation and a common regulatory front

[49] N Usman, op cit n 35.

[50] There are the UN Berlin guidelines (2002): http://mineralresourcesforum.org/workshops/Berlin/docs.guidelines.pdf on mining in developing countries; for a commentary on the earlier, 1990 version: T Waelde, "Environmental Policies Towards Mining in Developing Countries" (1992) JENRL 10(4) 327-351.

against divide-and-rule corporate strategies.[51] The MMSD final report exudes very much good will – perhaps a little bit too much good will as it prevents the report of identifying clearly and without white-wash the often antagonistic positions. It also places a lot of trust in the ability of international agencies (here primarily the World Bank), well-meaning mining companies and financial institutions to socially engineer development in institutionally severely underdeveloped countries to everybody's benefit. The MMSD report, in its humanistic philosophy, sees no fundamental differences of interest or opinion. With enough good will, the existing problems can be remedied. It is kind to everybody – and as a result the sharp tensions that exist – between consumers (in particular from the minerals-intensive industrialisation in China and India) and Western environmentalists, between local and country-wide powers, between idealistic NGOs and hard-rock mining companies, between respect for a developing country and intervention into its affairs, are glossed over rather than addressed.

THE WORLD BANK EXTRACTIVE INDUSTRY REVIEW (EIR)

The World Bank has undertaken, since 2000, a formal "Extractive Industry Review" (EIR) focusing on oil and gas and mineral resources, prepared for extensive, home-made reporting on the role of the World Bank Group.[52] Probably the main reason for the EIR has been the World Bank's quite extensive accommodation of "civil society", ie the large number of NGOs focused on environment, on human rights, on development and international organisations – largely critical of oil and gas development (though the problematic impacts are rather by consumption), to a lesser degree of mining development, of multinational companies, of developing countries with human rights' abuses, of international trade.[53] The World Bank may have bowed more to these – well-meaning, ideologically much focused – groups than is useful for an organisation which, after all, represents governments and has developing countries as its principal clients. But there has been visible dissatisfaction over the success of development policies in most World Bank client countries, including those with a large mineral or petroleum industry; one should perhaps add that the Word Bank has a most modest role and influence, if any, in the major petroleum producers (the

[51] It seems, for example, that we are currently re-experiencing a re-emergence of the instrument of royalties on production as a minimum depletion charge – eg developments in 2004 in South Africa, Peru and Chile, regularly reported on the GLOMIN internet forum (access requests, including to its archive, on www.cepmlp.org/journal.

[52] These studies – World Bank, IFC, MIGA – are available on (2004) OGEL 2 the extractive industry review studies and recommendations are available from the world bank: www.worldbank.org/ogmc. There has been continued reporting and discussion in particular in the *Financial Times*, including by the leader of the EIR, Emil Salim and Mark Moody-Stuart, former Chairman of Shell and now Chairman of Anglo-American in the first part of 2004.

[53] H O Bergesen *Dinosaurs or Dynamos?: The United Nations and the World Bank at the Turn of the Century* (London: Earthscan Publishers,1999) reviewed by T W, in: CEPMLP Internet journal http://www.dundee.ac.uk/cepmlp/journal/html/Reviews/review34.html.

OPEC countries, Angola, Russia, Mexico, Norway, UK. Its influence is rather in countries which are modest producers or which would like to be producers.[54] This lack of correlation between natural resource endowment, governance quality and true economic and social development is also visible in most – if not all – petroleum producers, and in particular the Arab petroleum producers.[55] Resource endowment seems to be negatively correlated with economic development. Availability of mineral rent tends to allow governments to buy off social forces to avoid economic, social and educational reform (Arab countries); it makes the people of the rich OPEC countries "lazy". Most money can be earned by hanging on to the wealth created by oil and gas development: middle-men-roles, local promoters and intermediaries charging large percentages for essentially oiling the wheels and facilitating obtaining E and P licenses and contracts rather than by true entrepreneurial development selling desired goods and services on local and foreign markets. Petroleum development has as a rule driven off alternative economic activities – primarily agriculture and manufacturing – something that is labelled "Dutch disease" with the overall social costs of petroleum development named "the resource curse".[56] The usability of mineral rent in situations of civil war and ethnic strife – Congo, Angola, Liberia, Sierra Leone, Colombia – points towards the ability of easily available mineral rent to pour oil on fire rather than oil to quieten the waves.[57]

NGO anti-petroleum and anti-mining activism and the widespread – and largely correct – perception of "resource curse" have therefore been the main drivers for the EIR. But one should be careful: Resources figure so prominently in every underdeveloped and poor countries not necessarily because the resource endowment have made them poor, but because there is so little else to do in poor countries. Chad is not poor because there is now oil exportation, but it is poor because of its geographical location, its climate and its ethnic division. Mineral rent can accelerate and fuel a pre-existing civil war (as in Sudan), but it can also provide resources to pay for the political costs of a peace settlement.[58]

The EIR – it seems erratically led by Emil Salim, a Suharto-era environment minister in Indonesia[59] – reflects all the quite correct observations that development of natural resources is generally of quite limited development benefit

[54] As the countries targeted in the 1990s by the World Bank petroleum investment promotion program.

[55] Jahangir Amuzegar, "Opec as Omen" (1998) 77 Foreign Affairs 95 Amouzegar, UNDP Arab Human Development Report: Creating Opportunities for Future Generations (2002) Foreign Affairs.

[56] *Oil Windfalls-Blessing or Curse* (Oxford University Press, 1988) available at http//:www-wds.worldbank.org/servlet/WDS_1Bank_servlet. See also Stevens, op cit n 45.

[57] On Conflict diamonds op cit n 43.

[58] C Batruch "The State of Peace in Sudan" (2004) OGEL 2.

[59] There have been tussles between Salim and World Bank staff seconded to the project who, naturally, tried to avoid too much criticism of the World Bank and conclusions that would not be acceptable by the World Bank and its main sponsors, both US, EU and developing countries. Dr Salim has also been reported to shift rapidly between contradictory positions depending on whose views captured him for a time.

if associated with low-quality governance. But so is any other policy in underdeveloped countries. Mere correlation with underdevelopment is in itself no reason to condemn a strategy based on natural resources. Historically, industrialisation has often been associated with the emergence of resource-based industries – in England, Germany, France, Western US, Canada and last not least in Australia. In difference to most developing countries, these countries had an effective rule of law, protection of property and a reasonably stable political system with homogeneous populations.[60] It is only in very few developing countries that such conditions, so far, seem replicated (eg in Botswana) while the major success in economic development over recent decades has been in the Asian city and other states and particularly in China, largely characterised by the absence of a significant role of resources, but also of development aid and international agencies. The EIR makes a number of largely accepted recommendations reflecting current thinking:

- Linking extractive industries to poverty reduction and sustainable development.
- Linking World Bank involvement in natural resources development to good governance, both by making good governance a condition and by emphasising good governance in project design, loan conditionalities, monitoring and appraisal; oil income transparency – a principle now supported by the Soros Foundation and several affiliated NGOs, the UK government and the World Bank – is identified as a key component of resource-specific good-governance measures.
- Compensating the much argued about climate change effect of oil and coal consumption by more emphasis on renewable energy and energy efficiency; nuclear energy – the least climate-risky energy industry is not surprisingly omitted, though Dr Salim reportedly had – logical – sympathies for the view that if one considers hydrocarbon-based energy responsible for climate change, then re-emphasis on nuclear energy is the most logical response.
- Acknowledgement of a greater role of affected communities – in terms of information and consultation, of "broad support" required, of compensation and of restraints on the action of security forces.[61]

The World Bank Management (June 4, 2004) largely accepted these recommendations, except the most controversial – and most pushed by the most radical NGOs: The recommendations for the World Bank to withdraw from oil and coal (ie the two most climate-risky hydrocarbon minerals). The World Bank accepted a certain limitation on "no-go areas" (biodiversity areas), but not the total withdrawal. It insisted on "staying engaged on a selective basis".

The recommendation for the World Bank to withdraw altogether from oil and coal did not make any political sense – even if the Bank itself has only a very modest role in these two hydrocarbon resources, and not at all with the major

[60] Easterly, op cit n 34.
[61] Here, compliance with US/UK voluntary principles on security and human rights.

producers. A recommendation for the World Bank to withdraw from oil and gas would have significantly reduced the legitimacy of new oil and coal investment – it would have sent out a signal that such investment should not have any longer a "social license". It would have reverberated throughout the financial markets. This is simply not practical at time when the world oil markets are shaky, when political and internal security affects the two main oil producers – Saudi Arabia and Iraq and when the whole world, in particular the EU, the US, but also China and India depend completely and without any middle-term chance of reversal, on external oil supplies. While the World Bank – like the UN – is a very suitable forum for the good-will expressions of the global community, it can not be altogether separated from the real and hard interests: That global oil supply is at risk, with a seriously dangerous impact on all the world economies – far more serious for global prosperity and poverty than all the aid industry's poverty eradication programs together and that the order of the day is rather increase of oil exploration and development than an end to it.

The World Bank EIR illustrates both proper concerns – coloured, naturally, by contemporary paradigms (sustainable development, good-governance and the idea that the problems of under-development can be solved by external social-engineering of difficult societies), but also the risk of comprehensive stake-holder consultation. Stake-holders, in the end, are those who already have power to influence, to disrupt and to make themselves heard. Activist NGOs – with no legitimacy or representativeness – seem to have acquired influence that in no way reflects their single-issue focus, their often transient nature lacking in political – or expertise-based – legitimacy. Would it not have been proper to have proper representatives of the developing countries – the Bank's major clients – dominate the review, rather than making them in effect rather objects – or victims – of a debate between the Western NGO, aid, development and corporate communities? The conclusions have a certain theoretical dimension: What difference would it make if the Bank withdraws from oil and coal where it so far had a very minor role, and mainly outside the principal oil producers – apart from diluting the good-governance impetus that might – and even this is open for debate – come from involvement of the international agencies, often not for their own – modest – financial contributions, but from the signalling effect of such contribution to other actors – regional and special public and private financial institutions. The Bank's involvement, in particular if it signals compliance with major current international standards, is a signal for large MNCs in Western countries that investment in developing countries resource projects is politically reasonably "safe". If such signalling capacity were to be withdrawn, large companies with reputational concerns would be discouraged, and companies from countries without exposure to NGO pressure (Russia, China, India, Malaysia for example) would gain a competitive advantage.

The EIR 2000-2004 must therefore be taken with a grain of salt. The World Bank presumably wanted a "green clearance" for its activities, with some more enhanced guidelines as the price to be paid for such clearance. It got recommendations that express the current wisdom of good-governance in

developing countries dealing with resources, but also the recommendation to withdraw completely from oil and gas which was not wanted and which rather reflected that radical NGOs – and rather developing countries – had most influence. It questions the wisdom of the Bank's extensive engagement with "civil society" to the detriment of its principal sponsors and clients – and the further decline in influence of poor developing countries now squeezed by their own underdevelopment and the neo-colonial structures developed between the international aid industry and "civil society". International development paradigms come and go – though the continued factor is the belief professed in the effectiveness of external social engineering of underdeveloped countries. Currently, this is expressed by the idea that if everybody supporting development would focus on good-governance, development will ultimately ensue. That is doubtful. Past recipes have not worked and have not narrowed the development distance between the rich and the poor – since 1820. Good-governance is probably not something that one can simply impose from the outside using foreign consultants and loan conditionalities. The security situation – internal and external, the geographical location and the difficulty of most poor countries of social integration of ethnic conflict is probably more important for development than any external aid in whatever form and under whatever philosophy. The fact that countries developed most dynamically when without significant aid input (Japan, China, Asian city states, Malaysia and Thailand) suggests that either such external aid has little influence – or that it is even counter-productive.

From a practical perspective of the practitioner – legal, financial, investor, commercial, managerial – of international resource and energy investment the World Bank's EIR, however, is something that needs to be taken on board: The influence of NGO campaigning, the fact that dubious deals in weak countries (eg mining in Congo, oil in Angola or Myan-Mar) have even less expectations of legal support on the international level and the link made between good-governance and politically accepted linkage between governance quality and resource development mean that "red flags" should be placed over investments in such questionable circumstances – which may be most of the world's current promising petroleum and mineral investment opportunities. Companies that go into such business have to realise the political risk – which is different from the traditional host state risk (nationalisation or regulatory risk). Sensitivity to the concerns reflected in the World Bank EI, compliance with such standards as there are, pro-active development of such standards, engagement with influential NGOs, efforts to help develop formal processes of consultation with local communities and powers, perhaps encapsulated in time-consuming consultation exercises with identifiable stake-holders and formal (but adaptable) agreements may buy some – but never a perfect – political protection. The less a country is well governed, the more a new investment would not measure up to the good-governance, poverty eradication and environmental standards formulated in the World Bank EIR, the more red flags – for executives, shareholders, investors, financiers and lawyers – are raised. Management of multiple-red flag situations is very difficult, and perhaps special companies will emerge who are more

competent to manage such situations and less exposed to the political risk of visible involvement in multiple red-flag host state situations.

Both MMSD and the World Bank EIR have not been able to come up with clear guidelines for investors and their communities. Perhaps it is just too difficult at present to come up with such global guidelines – the World Bank Foreign Investment Guidelines of 1990 – badly in need of updating – may not be politically feasible at present. But the conclusions and recommendations of both provide enough insight to sensitise the corporate and professional world for the political risk of a new character now emerging, and they give some indications – though as yet of an inchoate character – of how to manage such risk.

KEY CONCEPTS TO IDENTIFY THE NEW POLITICAL RISKS OF RESOURCE AND ENERGY INVESTMENT IN POOR COUNTRIES WITH LOW LEVELS OF GOVERNANCE

In the following, I will try to identify out of the prior survey some key principles or prescriptions and discuss their applicability by investors in natural resources and energy:

Sustainable Development:[62] This is the overarching principle on which everybody seems to agree – because its meaning is so wide and because everybody can use this principle for its interests. What one can infer is that resource and energy investment should not be undertaken if depletion of a non-renewable natural resource is not compensated by creation of economic and social capital in the host society: Employment, creation of infrastructure of a lasting value, training and payment of taxes to a government that has a reasonable governance capacity and does not just waste the mineral rent earned.

Governance Quality: Resource investment is much easier to justify if it is in countries with a reasonable governance quality. There are now quantitative measurements available; the World Bank has committed itself under the EIR to work on better governance indices. The most easily available index that could act as a – simplistic – proxy is Transparency International's annual corruption perception ranking. If such investment takes place in countries with low governance quality, "red flags" emerge. Investors should in such cases be much more cautious to ensure that resource development is – realistically – of help rather than a hindrance to development purposes. The best way to justify in such cases mineral investment is to demonstrate that it contributes to, rather than diminishes, the quality of host state governance. The more an investment gets associated with forces than can be qualified as rather detracting than developing governance (eg the Congolese non-compliance with the Kimberley process

[62] Waelde, Sustainable Development and Natural Resources, 2004 op cit n 30; M Pinto in F Weiss et al *International Economic Law with a Human Face* (The Hague: Kluwer Law International, 1998).

guidance on "conflict diamonds"), the more its "license to operate" gets questionable.

One would assume – as do most of the international standards discussion – that corruption is absolutely prohibited as is the message coming from the many recent anti-corruption instruments (supra). The problem, however, is always in the detail. What about an investment that would help to bring education, training, infrastructure and employment, that substantially helps poverty eradication, but that can not be undertaken without substantial donations to the President.[63] The issue is really here how to deal with the contradictions that arise in reality – though little perceived in the international debate – between the main principles. An approach that focuses on "good intentions" and "good rules" would require an absolute abstention from any dubious payments, while an approach that looks rather towards consequences would require a balancing act that always contains subjective elements of valuation and relative weighting.[64] What about donations to national leaders – presidents, governors, mayors and domestic community leaders – which are standard national practice and without which projects simply can not function. Or what about donations and consultancy contracts to NGOs – sometimes apparently required – to manage their opposition against such projects?[65] It is here that pious resolutions on the moral high ground of international resolutions clash with reality. Can one distinguish between donations to slush funds for purposes of political patronage by leaderships – common everywhere, noticeably in the US in the form of campaign contributions – and payments for purely personal enrichment? What if it is simply not possible to carry out an otherwise sensible project? There is a large contrast here between the official rules of international, aid and commercial organisations and reality on the ground.[66] They all piously proclaim the prohibition of patronage and the need for domestic counter-part contribution, but then all – who remain in the business – have found ways of artificially contriving such counterpart contributions and to channel resources in cash and in kind to local counterparts to win their interest and support.

Poverty Eradication: This has become one of the currently principal goals for the World Bank after its EIR. But there will be few extractive industry projects where some poverty eradication does not take place: Employment, purchase of domestic goods and services and some training in industrial skills of use in other areas of small-scale entrepreneurship and employment. Mining companies have over the last twenty years developed a better understanding of employing (and

[63] See the ICSID *World Duty Free v Kenya* case, op cit, on TDM 2 – 2004.

[64] Waelde, Effectiveness of International Economic Law, 2001, op cit n 32.

[65] I rely here on a confidential account of up to 20 M $ program of research consultancies given in the context of an OPIC project to buy the acceptance of otherwise vigorously opposed NGOs to a dam project.

[66] I remember managing EU assistance projects. The project manager in the formal meeting advised us explicitly that we could not use local consultants and any breach would be sanctioned by formal blacklisting. He then took me aside and said: And if you don't use local consultants, you will have no local support and power base. The project will fail. We will hold you responsible for project failure and you will be blacklisted.

training) local people, of enhancing the "retained" economic value by linkages. The new emphasis probably means that such programs have to be emphasised, they have to be specifically reported and made public, they should be part of the special attention of management and should be set up in consultation with representatives of the local communities. Again, what about tension between poverty eradication and, for example, transparency – the most typical example is when the representatives of the local communities – much more human than painted in international resolutions – insist that they themselves, plus their relatives, clan- and tribal members are favoured? Real-life operations can never live up to the lofty international resolutions. The main message is that poverty eradication must be seen as a management function that must not be just assumed, but also be actively managed and made visible.

Energy-Efficiency and Renewable Energy: It is very difficult to see what oil or coal operators can do in this field. The possible (but not certain) climate effects of hydrocarbons arise out of consumption, not development. The promotion of environment-friendly is mainly the task of governments who must eliminate subsidies to hydrocarbons (eg tax-exempt aviation fuel), internalise external cost and create a favourable market regulation to encourage better energy. But companies should place the issue on the agenda of management, both to make their contribution to energy efficiency within their possibilities which should be good cost control anyway and to see it as part of their social license tasks to invest, and to be seen investing, to a reasonable extent in renewable energy, eg wind or solar electricity generation for project needs.

Environmental quality: It goes without question that environmental damages imperil seriously the social acceptance of mining and [67]petroleum development everywhere. Derelict mining and petroleum sites appear like a terrestrial version of hell at times.[68] But this principle is not without tensions: Developed world standards may not always be appropriate in developing countries where the economic effects – poverty eradication, employment, linkages – are more important than other land-uses – eg tourism in the former gold mining area of the Gastein Valley in Austria. An unquestionable imposition of global standards on developing countries risks destroying the few competitive advantages left to the poor countries – something that is never compensated by international aid pouring into the country.

Transparency and Disclosure is the order of the day. Companies will reduce their political vulnerability if they disclose all payments they make to government, political leaders (including to community leaders – current debate has very much idealised local and indigenous community sacrificing an understanding of reality). But there are costs and contradictions as well: BP is reported to have lost valuable E and P contracts in Angola which went to its competitors because it made public its payments in direction to the political leadership of Angola. Is Angola better off

[67] Note the discussion on disclosure for international arbitrators by Jan Paulson "Vicarious Hypondria and Institutional Arbitration" (1990) 6 J of Intl Arbitration 226.

[68] Lake Maracaibo; the valley of Rio Tinto north of Seville (mining operations were nationalised by the government of Spain and then abandoned).

because BP was replaced by less scrupulous companies? Is it more important to stick to the principle than look at the impact in reality? Full transparency will also increase the covetousness of those left out from oil company donations and can exacerbate inter-ethnic conflict over the distribution of mineral rent. Is that something we have to accept – at the value of satisfying the Western countries' current moral values? Transparency is a valuable instrument, but no panacea. I have no ready answer. Some methods of dispute management operate better if covered by confidentiality. If transparency invades such areas, the method of dispute management will often migrate to where discretion still reigns.

Public Participation and informed consent by those affected by an operation seems both a principle of modern governance, but also an expression of practical wisdom. Decisions take longer to take and formalise, but they hold up better in the long term if the main "real" stakeholders are consulted and negotiated with. But tensions abound here as well: First, it is quite difficult to distinguish legitimate stakeholders from those who set themselves up as their self-appointed representatives. Second, what is the difference of buying-out opposition to the detriment of those with less of a voice and less power of disruption? Thirdly, the danger is of undermining the anyway weak powers of formal institutions in underdeveloped countries by supporting centrifugal tendencies that abound in developing countries. The right approach may be to use the leeway available in existing institutional procedures to a maximum to consult with those really affected – ie those bearing the cost of the development – and to seek to nudge government officials towards solution which provide a role and a benefit (but not all benefits) to local people.[69]

In practice, numerous conflicts between these principles are likely to occur. But one can perhaps summarise what is required as a process of balancing the conflicting objectives and of increasing attention and sensitivity to the extent a project is located much more in situations of bad than good governance. Red flags then appear. They require a management decision fully aware of the political risk – and of the need to take preventative measures to reduce the risk and set up systems to deal with risks if they materialise. "If you sup with the devil you need a long spoon" should be a motto when dealing with volatile powers in turbulent states. Investors can not invoke successfully international law – in particular treaty-based investment arbitration – to protect their property and contract rights if such rights have been acquired in ways that are in contradiction to the emerging standards of international soft law. One can not pick from international law what protects, but ignore quite clearly discernible authoritative international principles that caution against involvement in repugnant situations.

[69] Another anecdote: In 1982-83, I advised the Surinamese government on mining law. I suggested a right of consultation and consent by the "Bushnegers", ie communities that have formed from escaped slaves in the 19th century and live in the jungle and are weakly integrated into national society. The deputy leader of the opposition, Sergeant Harb, said to me: "They have no right of consent. If they object, they will be crushed." (He was imprisoned on the orders of his chief some weeks later, and shot while trying to escape).

PRACTICAL MANAGEMENT OF INTERNATIONAL STANDARDS

We are only at an early stage of understanding well the role of soft-law international standards for international business – here in the natural resources and energy industries. They are usually not directly binding law, but neither can they be ignored. In this last section, I will first draw together some basic lessons about the legal and practical relevance of international standards; then, I will make some practical suggestions on how to identify and assess the practical and legal weight of such standards in negotiations, renegotiations and in particular in, primarily arbitral, litigation.

International standards come, as we have seen, in many shapes and hues. One can perhaps distinguish the following types of legal impact:[70]

- International standards of a more technical or a more legal-regulatory character can acquire a direct and formal legal binding effect if legal instruments refer to them or incorporate them. Contracts, treaties, national regulation or the quite rare direct regulation by international organisations often refer to or incorporate such standards. If they refer to external standards, that is usually the more flexible (and unpredictable) method as the standard as it evolves is used to define the treaty's obligations. A referral to an evolving or periodically updated standard has the advantage of building modernisation into the treaty, something that is much harder to achieve with classic means – eg modification of treaties, negotiation of additional protocols or collective interpretation purporting to be binding. A treaty can also incorporate and import an international standard; in that case, there is a risk that the incorporated standard is frozen while the external standard evolves.
- International standards can have an effect close to the one achieved by explicit referral when a treaty's or contract's reference to an open-ended and not clearly defined standard of conduct (eg good oilfield practices; practices common in the international oil and gas industry; negligence; best practices) leads to a search for a more specific, pre-existing and authoritative technical, professional or industry-wide set of rules. Lawyers will always look for a set of rules that is objective or at least can be presented as objective to avoid the accusation of filling open-ended principles in legal instruments with their subjective sentiment. The first reaction to applicability of an open-ended legal standard or principle in the legal instrument (contract; treaty; regulation) will be to look for precedent and if not available, to some formulation of relevant rules that can be presented as sufficiently independent and based on professional expertise.
- Modern treaties, in particular multilateral treaties, are the result of protracted bargaining with normally uses extensively compromise formulas that by themselves are devoid of much specific meaning and content – much like the formulations one finds in UN General Assembly resolutions. Use of

[70] H Baade "The Legal Effects of Codes of Conduct for Multinational Enterprises" in N Horn "Normative Problems of a New International Economic Order" (1982) 16 *Journal of World Trade Law* 338.

formulations as "fair and equitable" in investment treaties and similar formulations in trade and environmental treaties in effect delegate the process of "making" – rather than simply "finding" – the law to the adjudicatory bodies set up by treaty. Again, such adjudicatory bodies will in legal tradition and culture have to at least pretend that the specific rules to be developed do not reflect their personal subjective sentiments, but are based on rules that the relevant international communities find authoritative, persuasive, relevant and reasonable. Availability of such international standards (rules, codes, guidelines, recommendations, resolutions) will therefore always be relevant in the process of developing specific law out of open-ended principles.

- International soft-law standards may also at times constitute customary international law. Continued state practice with a sense of legal obligation ("opinio iuris") is one of the sources of international law. A voluntary code that reflects widespread practice among the lead countries, which is referred to frequently, little challenged and which can be said to reflect also a sense of not just doing it, but feeling one has to do it ("opinio iuris") thus qualifies as customary international law.[71] While this is not controversial, arguments have been made that authoritative international soft-law may grow more rapidly than traditional international custom into customary law if it represents widespread practices and normative expectations of the international community. There is usually an element of wishful and ideological thinking in such claims – some international soft-law never "gathers force" and never coalesces into customary or otherwise binding international law. The "international community" tends to be what like-minded transnational alliances suggest want it to be – usually at the exclusion of dissent. But tribunals seeking to come to an acceptable decision, with a need to find political legitimacy, with treaty formulations that itself yield little substantive guidance, will be compelled to look for guidance from international instruments. Even if the formal legal character may be imperfect, they will help a tribunal if they can be qualified as persuasive, applicable and authoritative.

- International standards may have a legal significance even if they do not even contain a regulatory claim: Standards may often be nothing than a description of current – and not necessarily "best" – practice. But even then, they describe "practices of the industry" which can help to give a more specific understanding to "good oilfield practices" and establish for many activities a "floor" below which conduct is no longer acceptable and may give rise to negligence claims.

This leaves us with the question of how to assess international soft law embodied in standards, codes, guidelines and similar instruments for its applicability in dispute resolution. It would be naïve to expect that any instrument that calls itself by one of the soft-law labels is automatically an instrument that merits full attention and possibly a decisive influence over the legal regime

[71] Some of these soft law standards that hold this potential are for example, the 1972 Stockholm Declaration, 1992 Rio Declaration. See P William & D Nelson "Developing an Environmental Model: Piercing Together the Growing Diversity of International Environmental Standards and Agendas Affecting Mining Companies" (1996) 7 *Colorado Journal of International Environmental Law & Policy* 247.

deciding on a dispute. It is not easy to develop a systematic approach. But there is a range between authoritative and universally accepted standards on one side, with an effect often greater than mealy-mouthed international treaties and claims of attention of a transient, sectarian and partisan character, with little input from relevant professional expertise. In the following, I will try to provide some criteria to assess the weight and authority of international standards. Such assessment is an emerging tool of international advocacy.

- Standards that are produced by universal international organisations in their area of specialisation, using extensive resources of expertise and diplomacy over a longer period of time and which are explicitly framed in formal instruments and widely accepted by the main players (in particular governments and the subjects of quasi-regulatory claims) should be accorded the highest ranking. This is not the case of transient UN General Assembly resolutions nor of many similar instruments issued at the end of international conferences to produce a tangible result, but it should be the case of certain non-treaty human rights instruments,[72] of formal Codes and Guidelines issued by specialised international organisations within their mandate.[73]
- Standards that come from international organisations grouping the "leading countries" may not be universal, but they will command respect given the professionalism of the relevant international agency staff involved and the expertise and political support of the major countries. This is, for example, the case of the OECD Guidelines on Multinational Companies (2000) and Corporate Governance.
- International standards that are prepared within the UN system – which is the most universal international organisation, can not necessarily claim universal authority and persuasiveness if they are the outcome of specialised conferences, the outcome of bargaining or even unanimous consent by like-minded transnational alliances. One needs here to look very carefully at how the standards were arrived at, what degree of reasonably independent mainstream professional expertise went into them, how much such standards express current practice, how much respect the organisation and the interest groups pushing the standard command among governments in general (not just individual, often not well coordinated specialised government agencies forming part of a transnational alliance grouping) and how much such standards have been prepared with the input of the main users. UN conferences are expected to end with some sort of international standard (code, guidelines, decision, recommendation named after the place of the conference). The professionalism and extent of consultation deployed in preparation often varies; the UN agency often rather seeks to push its agenda in association with like-minded government agencies and non-governmental organisations, through not representative co-optation and patronage mechanisms. The distance between "aspirational" goals over description of current good

[72] UN Declaration etc A Kabir: Social Responsibility and the Role of Governments in Mineral Resource Development (CEPMLP forthcoming PhD Thesis, 2005).

[73] For example IMO guidelines on offshore decommissioning, MA Ayoade *Disused Installations and Pipelines* (The Hague: Kluwer Law International, 2002).

practices may be so large, the standards so unrealistic and the objectives illusionary in practice that the "X-City Declaration" is likely to be forgotten instantly. Such standards may therefore just be transient claims for attention and pandering to activists – but, if such standards are more of this, if they input of the main users (government agencies, companies, professions) is mainstream and representative and if the result both describes good current practices, reasonable aspirations, politically responsive and meets a current, widely felt regulatory need, then such standards may over time become authoritative and persuasive, less because of the process of formation than by their quality and responsiveness to currently acutely perceived needs.

- International standards developed by professional and industry associations are likely to be realistic, describe well current practice, accommodate to some extent external challenges (to foreclose formal regulation) and be well informed. On the other hand, they will also and perhaps inevitably reflect the particular "guild" and industry interests on the lowest common denominator of the group. But if such transnational organisations (eg the International Bar Association) produce sensible rules, in a way that makes practical sense, responds to external challenges efficiently and subtly and provide a widely welcomed disciplining effect, they can grow into the most effective forms of international regulation. The IBA Ethical Rules for Arbitrators (1987 – developed for arbitrator independence in 2004[74]), for example, have become the most relevant professional rules. Professional association rules probably are the more effective the more they contribute the association members' expertise and the more they reflect a true and widely perceived need of regulation to avoid external challenges.

- The same considerations apply to industry association rules. These are likely to involve most relevant expertise; but they can also express competitive strategies – to propose rules that promote the association's and its lead companies' interest, to prevent entry and competition from outsiders. Industry self-regulation often aims at taking the wind out of the sails of public regulatory initiatives. This is not wrong per se, but may indicate the absence of public-policy factors. But industry self-regulation, more than public regulation, can give indications on which rules will work.[75]

- There are, finally, many instruments that claim regulatory character but are prepared by groups that neither represent the main targets of the regulatory claims, nor have political legitimacy (by election and formal government office) nor economic legitimacy (by competition and commercial performance). These may emerge from religious, NGOs or other non-state actors. In principle, such claims to rules have little if any legitimacy; they tend not to be based on quality controlled mainstream professional expertise; they will have little involvement of

[74] Also IBA Rules on Taking Evidence, www.Ibanet.org.

[75] The Hayekian concept that codification should follow – and not anticipate – the emergence of rules in market competition, ref M Streit, "Constitutional Ignorance, Spontaneous Order and Rule Orientation: Hayekian Paradigm from a Policy Perspective" in Stephen F Frowen (ed), Hayek: *Economist and Social Philosopher* (New York: St Martins Press, 1997).

the principal stakeholders. In consequence, they should be seen mainly as political programs. If such claims to political attention succeed or not, depends on how they respond to contemporary needs, perceptions and aspirations. If successful, they will at least provide the impetus for a wider and more representative effort. In many or most other cases, they will be transient. In very few cases would such more political manifestos merit legal argument.

I have just sketched out some types of international standards and the way they can be managed in legal argument. The well established methods of dealing with legal precedent – stare decisis – both in common law and civil law countries[76] – will help to distinguish the more relevant and persuasive international standards from the less persuasive ones. There is also an inter-temporal perspective: Older standards will lose their appeal as they get superseded by more recent ones; more special rules will be more relevant as more general rules[77] – and no clear rule applies to the conflict of older special with more recent general principles. On the other hand, older standards can trump more recent ones – and this is perhaps a difference to treaty interpretation – if they have acquired a large following, ie have been adopted in practice and possibly become part of customary international law, a qualification that one will normally deny to quite recent soft-law principles.

There is in this field – as in other areas of law (regulation, treaties) – also the concept of "regulatory competition" at work:[78] It is not only the intrinsic legal character, or the persuasive weight identified by the criteria elaborated here, which decides on how much persuasive authority advocates or a tribunal should allocate to an international soft-law standard, but also a very factual criterium: To which extent has a particular standard/code been able to develop respect and a following? In the marketplace of ideas, it is not only the legal qualification which counts, but to which extent the market players accept or don't accept a regulatory claim. Weighty multilateral conventions or authoritative rules[79] by senior international bodies do not have an effect by their mere existence, but because and to the extent they are taken serious. Rules elaborated by small task forces of professional associations – with no legal weight – may and probably often do trump UN resolutions, Codes and even multilateral treaties – basically because they respond to real needs of the relevant players rather than being a construct of diplomats and activisits out of touch with the area they purport to regulate.

Managing international standards in natural resources and energy investment and trade is therefore no exact science. But much of the core methodology of the legal process can be used to identify the proper weight and influence to such international soft-law in negotiating and resolved transnational disputes.

[76] J Esser, Grundsatz und Norm, Tuebingen 1998; Baudenbacher in Texas J Intl Law 1996; Rick Ladbury and I M Paterson "The Influence of Continental European Law on Australian Commercial Law" (1997) 25 Int'l Bus Law 21.

[77] Methods of Treaty Interpretation see R Jennings & A Watts (eds), *Oppenheim´s International Law* (9th ed) (UK Longman, 1992).

[78] A Ogus, "Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law" (1999) 48 ICLQ 405-418.

[79] For example some specialised arbitration rules developed by international arbitral institutions, eg PCA rules on environment and resource arbitration.

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