



**PRIVILEGING INVESTOR RIGHTS OVER
PUBLIC INTEREST IN INVESTMENT
AGREEMENTS: *THE HUMAN RIGHTS
IMPLICATIONS OF THE
CHAD/CAMEROON CONVENTIONS OF
ESTABLISHMENT***

**J C NWOBIKE
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CONVENTIONS OF ESTABLISHMENT***

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1. Introductory Remarks

This paper will consider to what extent investment agreements such as the Chad-Cameroon Conventions of Establishment impair the ability of the Governments of Chad and Cameroon¹ to regulate in the public interest and also their human rights implications for the citizens of the investment receiving countries. The Conventions of Establishment are investment agreements signed between a consortium of oil companies made up of US based Exxon Mobil, Chevron Texaco and Malaysia's Petronas and the Governments of the Republic of Chad² and Cameroon³ respectively. The Conventions of Establishment are to regulate the Chad Cameroon Oil and Pipeline Project estimated at US\$3.7 billion and which involves the construction of a 1, 100KM long export pipeline from the oil fields in Chad through the territory of Cameroon to an offshore loading facility. The objectives of the Chad-Cameroon project were set out in the Project Appraisal Document (PAD) as follows:

“...through environmentally and socially sound private investment in the petroleum sector: to increase Chad Government expenditures on poverty alleviation; and to increase Cameroon fiscal revenues available for financing priority and development expenditures in the context of the Government's strategy for economic growth and poverty reduction.”⁴

In view of the huge cost of the investment, the Conventions of Establishment, like other investment agreements incorporate clauses that will protect the investors' interests in the project. Whether the Chad Cameroon project's objective of poverty reduction can be achieved in the light of the provisions the Conventions of Establishment that gives priority to investor rights over the right of the host governments to regulate in the public interest is doubtful.⁵ It is the effect of such co-investor clauses on the human rights obligations of the host governments that will be subject of analysis in this paper.

Investment agreements usually have the dual purpose of first protecting investment flows and, second, encouraging economic cooperation and the promotion of higher levels of investment flows. Examples of rights and

¹ Hereinafter referred to as host governments to the Chad Cameroon Project.

² This Convention of Establishment is between the Republic of Chad and Tchad Oil Transportation Company (TOTCO), which represents the interests of the Oil consortium, 10th July 1998.

³ This Convention of Establishment between the Republic of Cameroon and Cameroon Oil Transportation Company (COTCO), which represents the interests of the Oil consortium, 7th August 1997.

⁴ . Report No. 19343, Project Appraisal Document for the Chad-Cameroon Oil and Pipeline Project, p. 4 (13th April 2000), Document of the World Bank and International Finance Corporation available at <http://www.worldbank.org/afrcproj/project/tdpppad.pdf> (Visited on 30th April 2005)

⁵ See Emily Wax, 'Oil Wealth Trickles Into Chad, but Little Trickles Down', *Washington Post*, Saturday, March 13 2004, p. A16 (argues that with the opening of the Chad-Cameroon pipeline the local community is yet to benefit from project. There are no jobs, no schools and HIV-AIDS drugs. Rather, crime has increased and more people have contracted the HIV virus because of increase in prostitution by the young poor women in the community).

protections granted to investors include: protection against discrimination, in the form of most-favoured-nation treatment and national treatment provisions; increasing market access for investors and investment; repatriation of capital and profit, bans on performance requirements and some investment incentives; and protection against the expropriation of investments. However, only a few of such investment agreements might include exceptions to allow some protection in the public interest, to protect public morals, public order, national security, as well as human, animal and plant life. Oloka-Onyango and Udagama in their consideration of the negotiations relating to the ill-fated Multilateral Agreement on Investment point out this trend of privileging investor rights over human rights in their report to UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities.⁶

The practice of privileging investor rights over the right of a State to regulate in the public interest has generated sustained opposition from developing countries and human rights groups alike. Indeed, the 2003 World Trade Organisation Ministerial Meeting held in Cancun, Mexico collapsed partially due to the strong opposition mounted by developing countries against the move by the developed nations led by the European Union to enact rules to regulate investments, which appeared to give more protection to investors rights thereby reducing the policy space available to States to regulate in the interest of their citizens.⁷ The UN High Commissioner for Human Rights has in several reports⁸ examined the relationship between trade, investment and human rights and has concluded that the current practice of putting the protection of investor rights at the heart of trade and investment agreements would have adverse consequences for human rights, as the ability of countries to regulate in the public interest is greatly impaired.⁹ Thus much of the debate in the context of investment liberalization has focused on achieving the right balance between States “right to regulate” in the public interest and investor rights to protect their investments.

II. Balancing Rights in Investment Agreements

The desire to balance investor rights with the right of States to regulate in the public interests featured prominently during various attempts to agree to multilateral rules on investment. Indeed, the failure to strike an appropriate

⁶ J. Oloka-Onyango and Deepika Udagama, *Working Paper on Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice*, UN Doc E/CN.4/Sub.2/1999/11, 17 June 1999.

⁷ *Bridges Weekly Trade News Digest*, Vol. 7 Number 28, 21 August 2003. It is worthy of note that at Doha Development Agenda of the World Trade Talks, investment, government procurement and competition policy were withdrawn and put into working groups.

⁸ *Report of the UN High Commissioner for Human Rights on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights and Human Rights*, UN Doc E/CN.4/Sub.2/2001/13, June 2001; *Report of the UN High Commissioner for Human Rights on Globalisation and its Impact on the Full Enjoyment of Human Rights*, UN Doc E/CN.4/2002/54, 15 January 2002; *Report of the UN High Commissioner for Human Rights on Liberalisation of Trade in Services and Human Rights*, UN Doc E/CN.4/2002/9, 25 June 2002; *Report of the UN High Commissioner on Human Rights, Trade and Investment*, UN Doc E/CN.4/Sub.2/2003/9, 2 July 2003.

⁹ *Ibid.*

balance has contributed to the failure of several attempts to enact a multilateral agreement to regulate investments. The investment provisions in the 1948 Havana Charter which aimed to establish the still born International Trade Organisation, gave preference to the right of a State to regulate by providing significant leeway for the host country to set its own priorities when it came to investments. This provision was considered very controversial and played an important role in preventing the United States approval of the Havana Charter (and thus preventing the ITO from becoming a reality).¹⁰ In the 1970s, the United Nations Conference on Trade and Development (UNCTAD), which had been established to address particular needs of development in the framework of the international economic order, through its United Nations Centre for Transnational Corporations (UNCTNC) sought to develop a binding Code of Conduct on Transnational Corporations.¹¹ This effort attracted vehement opposition from some corporations

that were likely to be affected, creating severe difficulties for UNCTAD and ultimately leading to the closure of UNCTNC. It is worth mentioning that these early attempts to create international rules to regulate investments failed because the developed countries and corporations based in Organisation for Economic Cooperation and Development (OECD) Countries opposed such rules on the ground that the proposed rules would constrain the activities of transnational corporations as well enhance the right of host states to regulate in the public interest. Following the conclusion of the Uruguay Round of the World Trade Organisation talks in 1995¹² OECD countries, made up of developed countries only, launched negotiations for a Multilateral Agreement on Investment (MAI).¹³ The goal of the negotiations was to establish a more coherent and unitary structure for all investment agreements. The draft MAI had at its core the principles of most favoured nation, national treatment, protection against expropriation, state-to state and investor-state dispute mechanisms. These provisions generated unprecedented criticisms.¹⁴ MAI was seen as boosting significantly the rights of investors without introducing any countervailing obligations. In short, its vision conceptually privileged the “rights of investors” while negating investors’ responsibilities to the individual or the State. Moreover, the treaty proposed to place fairly extensive restrictions on domestic activity with regard to investment, which would amount to the imposition of serious limitations

¹⁰ Daniel Drache, “The Short but Significant Life of the International Trade Organisation: Lessons for Our Time”, Centre for the Study of Globalisation and Regionalism” *Working Paper* No. 62/00, University of Warwick, 2000, p. 20 available at <http://www.warwick.ac.uk/fac/soc/CSGR/wpapers/WP6200a.pdf> (visited on 1st May 2005). See also Americo Beviglia Zampetti and Torbjorn Fredriksson, “The Development Dimension of Investment Negotiations in the WTO: Challenges and Opportunities”, 4 *Journal of World Investment*, (2003), p. 399: “...the investment provisions of the Havana Charter proved to be among the most controversial, contributing to the downfall of the ITO project...”.

¹¹ See UNCTAD, *International Investments: A Compendium*, Vol 1: Multilateral Instruments, New York: United Nations, 1996, pp. 161 – 180.

¹² These talks culminated in the establishment of the World Trade Organisation.

¹³ The final draft is currently available at <http://multinationalmonitor.org/mai/contents.html> (visited 1st May 2005).

¹⁴ For an example of the of the criticism of the MAI and the process of its negotiations see Peter T. Muchlinski, ‘Human Rights and Multinationals: Is there a Problem’, 77 *International Affairs*, pp. 31-48, (2001).

on the sovereign ability of States to respond to domestic concerns, including those in the areas of labour, the environment and human rights. In this way, States faced the danger of being transformed into the handmaidens of investment as opposed to protectors of the people and in the process forced to contravene or relegate to a secondary position the obligations contained in a host of international human rights agreements. Lastly, the dispute resolution and expropriation provisions respectively raised concerns about the lack of transparency and the imposition of unjustifiable restrictions on host countries' freedom of action in the interests of development.¹⁵ In March 1998, after a period of sustained opposition and international campaign, the MAI negotiations were put on a slower track with no deadline by OECD ministers.¹⁶ In October 1998, the process was abandoned after France withdrew, mainly because the United States would not accept provisions that shielded French cultural industries from MAI rules.

Despite the failure of the MAI process, the developed countries, led by the European Union, have continued to pursue investment rules at the multilateral level. Indeed the proposed enactment of such investment rules at the WTO level has consistently generated heated exchange between developed and developing countries regarding the utility of having a multilateral framework for investment.¹⁷ Whereas developed countries make the case that international rules on investment benefit all parties, most developing countries counter such suggestion with the argument that multilateral rules on investment would undermine their sovereign right to pursue their own domestic development agenda. Accordingly, there is mutual suspicion between the opposing camps, with each party trying to second guess the motive of the other. The developed countries in seeking an agreement on investment rules want to protect their investments by insisting on pro-investor right clauses while developing countries in opposing such rules seek to retain their policy space to regulate domestically. To each side, the rights at stake are human rights and have intrinsic value, which deserves protection.

III. Investor Rights as Human Rights

Investment agreements establish a set of rights and obligations between States in relation to their treatment of investors and investment. It is commonly stated that, in doing so, investment agreements establish a set of investors' rights. These rights includes the right to trade/ establishment of investment, to repatriate capital to home country, right to intellectual property, freedom from expropriation of investments by host governments, guarantees of non-discrimination, etc. Ernst Petersmann, a notable trade law expert has equated such investor rights to the rank

¹⁵ See Harvard Human Rights Program, "The Multilateral Agreement on Investment: A Threat to International Human Rights Protection Mechanisms", February, 1998, available at http://www.rfkmemorial.org/CENTER/mai_11398.htm (visited on 30th April 2005)

¹⁶ M.J. Trebilcock and R. Howse, *The Regulation of International Trade*, (2nd edition, Routledge, New York (2001) p. 362

¹⁷ The merits of a multilateral treaty on investment appears to be questioned by studies which have concluded that there is yet no evidence linking the conclusion of bilateral investment agreements with increases in FDI flows. See Mary Hallward-Driemeier, "Do Bilateral Treaties Attract Foreign Direct Investment? Only a Bit... and They Could Bite", *World Bank Policy Research Working Paper* No. 3121 (2003); UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, New York, United Nations, (1998).

of human rights and sees their protection by governments, especially those in developing countries, as a route out of poverty.¹⁸ This position has been strenuously rejected by human rights experts. According to Philip Alston, economic liberties, such as investor rights “cannot be equated to human rights in any broad sense familiar to the traditions of international human rights law. The only exception, albeit a potentially significant one, is the right of authors and inventors to the protection of their interests, recognised in Article 15 of the International Covenant on Economic Social and Cultural Rights.”¹⁹ Robert Howse concurring with Alston points to the inherent danger of such an approach in that governments can only pursue social and human rights objectives, where they can be shown as ‘necessary’ limits to market freedom, thus giving investor rights precedence over the right of a state to regulate.²⁰

From a legal perspective, it is important to distinguish investor rights from human rights. National, regional and international treaties recognize a wide range of civil, cultural, economic, political and social rights - known as human rights - that are fundamental to a life of human dignity. Investors’ rights, on the other hand, are instrumental rights: rights created and modified by States in order to meet certain economic and developmental objectives. In the words of Philip Alston, ‘human rights are recognised for all on the basis of the inherent dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons’.²¹ Thus investor rights are not an end in themselves but a means to an end. According to the UN High Commissioner for Human Rights investor rights as defined in investment agreements are instrumental rights, designed to meet some wider goal such as sustainable development, economic growth, stability, indeed the promotion and protection of human rights.²²

The significance of drawing a distinction between the investor rights and human rights is that it would allow State parties to investment agreements to comply with their respective human rights obligations by adopting a human rights approach to investment liberalisation. Such a human rights approach will set comprehensive objectives for the liberalisation process that go beyond commercial objectives, thus allowing the parties to seek trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals.²³ In effect, in negotiating and implementing trade and investment agreements, countries are

¹⁸ Ernst-Ulrich Petersmann, ‘Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of the Worldwide Organisations: Lessons from European Integration,’ *Jean Monnet Working Paper* 7/01, p. 7 available at <http://www.jeanmonnetprogram.org/papers/01/012301.html> (visited on 29th April 2005).

¹⁹ P. Alston, Resisting the Merger and acquisition of Human Rights by Trade Law: A reply to Petersmann, 13 *European Journal of International Law* 815 at 826 (2002).

²⁰ Robert Howse, ‘Human Rights in the WTO: Whose Rights, What Humanity?’ Comment on Petersmann, *Jean Monnet Working Paper*, No. 12/02 available at <http://www.jeanmonnetprogram.org/papers/02/021201.html> (visited on 29th April 2005).

²¹ P. Alston, “Resisting the Merger and acquisition of Human Rights by Trade Law: A reply to Petersmann”, note 19 at pp 826-828.

²² UN High Commissioner For Human Rights, ‘Human Rights and Trade’, paper presented at the 5th WTO Ministerial Conference, Cancun, Mexico, 10 – 14 September 2003, p. 19

²³ *Report of the UN High Commissioner for Human Rights on Liberalisation of Trade in Services and Human Rights*, UN Doc E/CN.4/2002/9, 25 June 2002, para 8.

obliged to give due consideration to their various human rights obligations and the impact such agreements may have on their ability to respect, protect and fulfil the human rights of their citizens.

IV. Primacy of Human Rights

The primacy of human rights in international law has long been recognized. The United Nations Charter refers to human rights in its second preamble paragraph

and lists human rights as the third of its purposes in Article 1, after maintenance of peace and security, and the development of friendly relations among nations based on equal rights and self-determination of peoples.²⁴ The Charter not only makes human rights an aim of the organization, it obligates all member states to take joint and separate action with the United Nations to achieve universal respect for and observance of human rights and fundamental freedoms.²⁵ Article 103 of the Charter provides that, “in the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

Importantly, States have recognized that the promotion and protection of human rights are their paramount responsibility. At the World Conference on Human Rights held in 1993 in Vienna, 171 States declared that the promotion and protection of human rights is the first responsibility of Governments.²⁶ They have also undertaken not to lessen standards of respect for human rights once achieved. This is known as the principle of non-retrogression. Article 30 of the Universal Declaration on Human Rights states that:

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth therein”²⁷

Consequently, States must ensure that their international human rights obligations are considered as a matter of priority in their trade and investment negotiations. This resonates with the position adopted by the UN Committee on Economic, Social and Cultural Rights on the occasion of the WTO Ministerial Conference in Seattle in 1999. On that occasion the Committee stated thus: “...Trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression. In this regard the Committee wishes to remind WTO members of the central and fundamental nature of human rights obligations.”²⁸

²⁴ Charter of the United Nations, UN Charter, preamble and Article 1.

²⁵ See Articles 55 and 56 of the UN Charter.

²⁶ . World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23, 12 July 1993, para.1.

²⁷ Similar provisions are contained in Article 5(1) of the International Covenant on Economic Social and Cultural Rights.

²⁸ Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organisation (Seattle, 30 November to 3 December 1999) 26/11/99, UN Doc E/C.12/1999/9, 26 November 1999, para.8.

V. Nature of Human Rights Obligations of the Host Governments

The Republics of Chad and Cameroon as members of the United Nations have committed themselves to the respect and promotion of human rights as contained in the UN Charter and the 1948 Universal Declaration of Human Rights. In addition both countries have signed and ratified the following international human rights treaties:

- i) The International Covenant on Civil and Political Rights (ICCPR)
- ii) The International Covenant on Economic Social and Cultural Rights (ICESCR)
- iii) The Convention against Torture, Inhuman and Degrading Treatment
- iv) The Convention on the Elimination of all Forms of Racial Discrimination
- v) The Convention on the Elimination of all Forms of Discrimination against Women.
- 9
- vi) The Convention on the Rights of the Child

In addition to the above UN principal human rights treaties, the host governments have ratified the following core International Labour Organisation Conventions:

- Freedom of Association and Protection of the Right to Organise Convention (No. 87) 1948;
- Right to Organise and Collective Bargaining Convention (No. 98) 1949;
- Forced Labour Convention (No. 29) 1930
- Abolition of Forced Labour Convention (No. 105) 1957
- Equal Remuneration Convention (No. 100) 1951
- Discrimination (Employment and Occupation) Convention (No. 111) 1958
- Minimum Age Convention (No. 138) 1973
- Worst Forms of Child Labour Convention (No. 182) 1999

Alongside their international human rights commitments, the governments of Chad and Cameroon have regional human rights responsibilities. The two countries are parties to the African Charter on Human and Peoples' Rights²⁹ and have by virtue of Article 1 of the Charter acknowledged to respect, protect and promote the rights, duties and freedoms enshrined in the African Charter. The Constitutions of the host countries also contain human rights obligations. For instance the Constitution of the Republic of Cameroon while affirming its attachment to the fundamental rights enshrined in the UN 1948 Universal

Declaration of Human Rights, the Charter of the United Nations, the African Charter on Human and Peoples' Rights and all duly ratified covenants resolved:

“To harness our natural resources in order to ensure the well being of every citizen without discrimination, by raising living standards, proclaim our right to development as well as our determination to devote all our efforts to that end and declare our readiness to co-operate with all states desirous of participating in this national endeavour with

²⁹ Adopted in 1981. It is also known as the Banjul Charter, after the Gambia Capital, where it was signed.

due respect for our sovereignty and the independence of the Cameroonian State”.³⁰

The Chadian Constitution also reaffirms its attachment with the principles of human rights as defined in the UN Charter, UDHR and the African Charter.³¹ In addition Articles 17 to 48 of the Chad Constitution recognizes a range of civil and political, economic social and cultural rights.

The Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples’ Rights, recognize a series of civil, cultural, economic, political and social human rights carrying corresponding obligations on States - most of which can be affected, one way or another, by investment. Consequently, to the extent that investment affects these rights, the obligations on States in relation to individuals and groups should also be considered within the context of rights and obligations between States and towards investors. Each of the covenants in the international bill of rights has several provisions that are relevant to the Chad Cameroon project. The International Covenant on Civil and Political Rights has a number of provisions that come into play on the project. Amongst which are Article 6 on the right to life, Article 19(2) on freedom of expression and Article 22 (freedom of association). Also the International Covenant on Economic Social and Cultural Rights has several provisions that are applicable. They include Article 6 on the right to work, Article 7 on just and favourable conditions of work, Article 8 on trade union rights, Article 11 on adequate living standards, Article 12 on health and Article 15 on culture. In addition the African Charter in Article 24 guarantees all people shall have the right to a general satisfactory environment favourable to their development. Accordingly, at the very least, every international contractual commitment between States and non-State actors must not offend the substantive provisions in the ICCPR, ICESCR and the African Charter. The Committee on Economic, Social and Cultural Rights has adopted a classification of human rights obligations as the obligations to respect, protect and fulfill.³² The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights, which means that State officials and public agents do not do anything to violate people’s rights. The obligation to protect requires States to prevent violations of economic, social and cultural rights by third parties, meaning that a State is obliged to protect its citizens by preventing third parties from abusing rights. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures to enable people to enjoy their rights.³³

Following from the ratification of the various human rights instruments enumerated above, Chad and Cameroon as host governments to the project have

³⁰ . Constitution of the Republic of Cameroon, Law 96-06 of January 1996, preambular para. 3.

³¹ . Constitution of the Republic of Chad, 14 April 1996, preambular para. 8.

³² See for instance, General Comment 15 on the Right to Water, UN Doc E/C.12/2002/11, paras. 21-29, 20 January 2003.

³³ Maastricht Guidelines on Violations of Economic Social and Cultural Rights, Human Rights Quarterly, Vol.20 (1998) pp 691 - 705 para. 6 adopts similar classification of States obligations under human rights treaties.

obligations to respect, protect and fulfil the human rights of their citizens.³⁴ The obligation to respect requires the host governments to refrain from interfering directly or indirectly with the enjoyment of the human rights of their citizens while the obligation to protect includes the States' responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic social and cultural rights. Thus, it is arguable that the host governments are responsible for violations of economic social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of non-state actors.³⁵ The African Charter recognizes the regulatory responsibility of State parties when it provides in Article 1 that:

"The Member States of the Organisation of African Unity, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them"

Furthermore Article 2(3) of the Declaration on the Right to Development³⁶ establishes that "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-

being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".

The effect of these human rights commitments which Chad and Cameroon have signed up to is that they must at all times retain their sovereign ability to regulate domestically for the benefit of their citizens. It can be said that the host governments' right to regulate is in fact a duty to regulate.³⁷ Thus in the context of the construction and maintenance of the Chad Cameroon oil and pipeline project the host governments are obliged to regulate domestically in order to achieve their development objectives. This includes retaining the flexibility to introduce new regulations to promote and protect human rights when it is necessary to do so. Introducing new regulations to promote human rights is an important aspect of States' duty to protect and fulfil human rights. As economic, social and political conditions change, it is appropriate that in response States might introduce appropriate regulations strengthening protection for human rights. Accordingly, governments that enter into contracts that have the necessary consequence of limiting their freedom to adequately intervene in the interest of their population are in breach of their human rights obligations.

³⁴ . CESCR general Comment 14: The right to the highest attainable standard of health, UN Doc E/C.12/2000/4, para.33.

³⁵ . See Maastricht Guidelines on Violations of Economic Social and Cultural Rights, Ibid, para 18.

³⁶ Adopted by General Assembly Resolution 41/128 on 4 December 1986, by a vote of 146 to one against (United States), with eight abstentions, including Germany, Japan, and the United Kingdom.

³⁷ Report of the UN High Commissioner for Human Rights on Human Rights, Trade and Investment, UN Doc E/CN.4/Sub.2/2003/9, 2 July 2003, para. 31.

VI. Human Rights Impact of Chad Cameroon Conventions of Establishment

a. The Right to Regulate and Sovereignty

The host governments could be said to be in breach of their human rights obligations by entering into the Conventions of Establishments which have provisions on stabilisation of laws and which grant supremacy to the Conventions over all Chadian and Cameroonian laws, including human rights treaties that are in force in the territories of both countries. These stabilisation and supremacy clauses have the effect of limiting the sovereignty of the two countries thereby impairing their ability to intervene on behalf of their populations in keeping with their obligations under their respective constitutions and international human rights law.³⁸ The offending provisions of the Conventions of Establishment are the requirement of stabilisation of legal rules in Article 21.1 and 3 of TOTCO and Article 24 of COTCO and the Supremacy of the Convention of Establishment over domestic laws as stipulated in Article 30 of COTCO and Article 21.5 of TOTCO respectively.

The purport of the above Articles is that the host governments are obliged not to modify their laws in such a way as to adversely affect the rights and obligations of the investing oil consortium. In the case of Chad, the Convention of Establishment fixes December 19 1988 as the cut off date.³⁹ This means that no Chadian governmental action or law taken after 19th December 1988 will be applied to project unless the oil consortium gives their prior consent. For the government of Cameroon it has given its commitment to the effect that no legislative, regulatory or administrative measures contrary to the provisions of the Convention of Establishment shall apply to project.⁴⁰ Notwithstanding this commitment, in the event that the oil consortium is of the opinion that a legislative, regulatory or administrative measure affects its rights and obligations, the consortium may request the Government of Cameroon not to apply such a measure to its activities.⁴¹

The consequences of these “freezing the law” provisions are far reaching as the host governments’ sovereignty and ability to regulate are called into question. Firstly, the stabilisation and supremacy clauses in the Conventions of Establishment create a separate legal regime for the oil consortium involved in the project. Indeed laws that are generally applicable to the whole of Chad and

³⁸ The OECD Guidelines for Multinational Enterprises contain an extensive range of social obligations for corporations and investors including inter alia, a duty to contribute to the sustainable development of the countries in which they operate, to respect human rights or to refrain from seeking or accepting exemptions to local regulatory frameworks in the areas of environment, health and safety, labour, taxation, financial incentives or other issues. See OECD, *Guidelines for Multinational Enterprises* (Paris, OECD, 2000), Chapter II ‘General Principles’, para. 5 available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (visited 30th April 2005). See for example, Fleshman, M. “The International Community and the Crises in the Oil Bearing Communities-A Perspective on the U. S. role” Published in *Boiling Point* (CDHR, Lagos) 179-195 .

³⁹ . Article 21.3 of Chad Convention of Establishment.

⁴⁰ . Article 24.2 of the Cameroon Convention of Establishment.

⁴¹ Article 24.3 of the Cameroon Convention of Establishment.

Cameroon are not applicable to the project and the consortium retains the right to choose which laws it wishes to obey. Secondly, the host governments may find it difficult to sign up to any human rights instruments that will enhance the protection of their citizens if such instruments are perceived to conflict with their contractual commitments under the Conventions, consequently affecting the host governments' willingness or capacity to introduce new measures to promote and protect human rights for fear of being exposed to claims for breach of contract. This would have a chilling effect on the host governments' regulatory capacity, conditioning State action to promote human rights and a healthy environment by the commercial concerns of investors. Furthermore, in the event that the host governments accede to a human rights instrument, they may be compelled by their contractual commitments under the Conventions of Establishment to enter reservations for the benefit of the consortium. Indeed a peculiar problem confronts the government of Chad in this regard. Since the Chad Convention of Establishment freezes all laws applicable to the project to those in force as at 19 December 1988, only the African Charter ratified in 1986 the UN Convention on Racial Discrimination of all the principal UN Human Rights treaties will be applicable to the project since it was ratified by the Republic of Chad in 1977. The other treaties such as the two International Covenants on Civil and Political Rights, Economic Social and Cultural Rights as well as the Convention on the Right of the Child, the Convention Against Torture and the Convention on the Elimination of all forms of Discrimination Against Women are not applicable given that they were ratified between 1990 and 1995, which clearly falls outside the cut off date of 19 December 1988.

Article 21.5 of the Chad Convention of Establishment and Article 30 of the Cameroon Convention of Establishment further erode the sovereignty of the two nations. In addition to listing domestic Chadian and Cameroonian legislations that will not apply to the project, the Articles in question gives supremacy to the Conventions of Establishment in the event of any conflict between the Conventions and the laws of the host governments. Article 30.2 of the Cameroon Convention states that

‘...all ordinary law provisions of the Republic of Cameroon which are not contrary to nor inconsistent with the provisions of this Convention shall apply to activities undertaken under this convention’.

It must be pointed out that while Article 21.5 of the Chad Convention makes similar provisions to that of Article 30.2 of the Cameroon Convention, it adds a qualification to the effect that the parties may decide otherwise, in which case the domestic law of Chad may prevail. However, the possibility of this escape route being taken is remote given the desire of the oil consortium and investors to ensure that their interests take a dominant status in the scheme of things.

The supremacy of the Convention clause clearly subordinates Chadian and Cameroonian laws, and the African Charter on Human and Peoples Rights to the provisions of the Conventions. Accordingly, in the event of a conflict between the provisions of the Conventions of Establishment and a commitment under a human rights treaty, the Conventions will prevail. Indeed, the Conventions of Establishment constitutes a hindrance on the ability of the host governments to comply with their human rights commitments.

b. Obligation to Make Use of Maximum Available Resources to Fulfil Human Rights

A related point of importance with potential human rights implications is the revenue stabilisation clauses in the Conventions of Establishment that have the effect of reducing the revenue due the Governments of Chad and Cameroon. Article 21.3(a) of the Chad Convention commits the government of Chad to a stabilisation of its tax regime in favour of the oil consortium to the exclusion of third parties. In addition, it exempted the project from taxes, fees and duties, obligations relating to profits tax, the right to retain abroad and repatriate to foreign countries any funds and foreign currencies. Similarly, under Article 30.2 of the Cameroon Convention, the Cameroonian government undertook to stabilise its tax, customs and exchange control regime as well as guaranteeing not to modify its fiscal regime in a manner as to affect the rights and obligations of the investing oil companies and their affiliates.

These revenue stabilization clauses may have grave implications for human rights. By undertaking to exempt the oil pipeline project from taxes, customs and exchange control regime, the revenue accruable to the host governments is significantly reduced. The consequence of which is that limited financial resources may constrain the ability of the host governments to comply with their obligations under Article 2(1) of ICESCR which requires State parties to take steps to the ‘*maximum of their available resources*’, with a view to achieving progressively the full realization of economic social and cultural rights. The UN Committee on Economic Social and Cultural rights has stated that:

‘Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’⁴²

A leading commentator on economic social and cultural rights commenting on Article 2(1) says that in societies where income is unevenly distributed, the requirement of equal opportunities and equal enjoyment of economic social and cultural rights may require more public expenditures, based on progressive taxation and other sources of state income.⁴³ Accordingly, the Governments of Chad and Cameroon have by virtue of their contractual commitments to the oil consortium denied themselves access to taxes, fees, duties and royalties which they would have been entitled to. Given this scenario, the possibility of the host governments meeting their minimum core human rights obligations under Article 2(1) ICESCR, which requires them to provide at the very least essential food stuff, essential primary health care, basic shelter and housing and basic forms of education,⁴⁴ increasingly looks remote. This situation not only impinges on the

⁴² . General Comment No. 3, Report of the Economic, Social and Cultural Rights, UN doc. E/1991/23, pp. 83 -87, para. 10.

⁴³ . Asbjorn Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in Asbjorn Eide, Catarine Krause and Allan Rosas (eds), *Economic Social and Cultural rights: A Textbook*, (2nd Revised Edition, Martinus Nijhoff Publishers 2001) 26.

⁴⁴ UN Committee on Economic Social and Cultural Rights, General Comment 3, on the Nature of State parties obligations under Article 2(1), 1990., para. 10.

sovereignty of the host countries it is contrary to the duty of the host governments to take immediate steps to ensure the progressive realisation of economic social and cultural rights.

By extension, these provisions of stabilisation and supremacy threaten the right to self determination⁴⁵ in the host countries to the project. The right to self determination which is amply provided for by international human right instruments such as the ICCPR, ICESCR are in Africa, more seriously strengthened by the provisions guaranteeing peoples rights in the African Charter for Human and Peoples Rights.⁴⁶ As Professor Osita Eze notes these obligations are imposed on States parties to the African Charter to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies, so as to enable their peoples to fully benefit from the advantages derivable from their natural wealth and resources. The primary objective being to create a united front against imperialism and promotion of self reliance and not dependence.⁴⁷

c. Labour rights

The Conventions of Establishment entered into by the Governments of Chad and Cameroon with the oil consortium may have adverse impact on the protection and promotion of labour rights of the citizens of host countries working on the pipeline project. For instance Article 23.12(a) of the Chad Convention of Establishment in an attempt to protect the project from any form of disruption forbids: “any person to undertake activities which may interfere with the construction, operation and maintenance of the TOTCO Transportation System.” The provision may be interpreted as giving the oil consortium the liberty to deal “as it deems fit” with any person, including workers trying to protect or improve their conditions of service by organizing or calling for a strike. As a recent report on the project has indicated, Chadian and Cameroonian workers have been complaining about unacceptable conditions of labour: They have been hired without contracts and even, where there are contracts, it is usually on a temporary contract and on short time basis; they work for twelve hours a day and some of them below minimum wage.⁴⁸ Given this scenario, the host governments are under a duty to intervene on behalf their citizens by ensuring that the oil consortium operations are in compliance with relevant labour legislations protecting the rights of workers. This intervention is predicated on the host governments’ obligations arising from ICESCR and the core ILO conventions that seek to protect the right to freedom of association, collective bargaining, protection from forced labour and child labour as well as discrimination in employment. But concern by these governments of the financial consequences of intervening, in the light of their contractual obligations,

⁴⁵ See Article 20 of the African Charter. This provision roundly agrees with the preambles to the two UN Covenants of 1966.

⁴⁶ See generally, Articles 19-24 of the African Charter for the protection of Peoples Right to Equality, Self determination, Free disposition of Natural Resources, Development, Peace and Satisfactory Environment.

⁴⁷ Osita C. Eze, “African Concept of Human Rights” in *Perspectives on Human Rights*. 1992. (FMJ Lagos, 1992) p. 24.

⁴⁸ . *Broken Promises: The Chad Cameroon Oil and Pipeline Project; Profit at any Cost?* Friends of the Earth International, p. 14 (June 2001) available at www.foei.org/ifi/chad2.html (visited on 1st May 2005)

will likely deter them from acting in accordance with their human rights commitments. Once again, investor interests trumps the public interest.

d. Freedom of Speech and Association

The right of the population to protest against the adverse impact of the Chad Cameroon project on such issues as health, environment, labour, compensation could be curtailed by Article 27.12 of the Convention. It appears to give the Oil consortium the liberty to act as a paramilitary power in the event of any type of resistance on the project. Article 27.12 provides thus:

‘In case of emergency, in and particular in case of immediate danger for people or the environment, COTCO [subject to certain compensation requirements set out in Art 17] is allowed, under its sole responsibility to have access to any private or public land, whatever its status or location, for the purpose of investigating the causes of or remedying the emergency or the situation of danger, without prior authorisation, and with the possible assistance of the public or private emergency services.’

The terms “situation of danger” and “investigating” are not defined, leaving the way open for repressive State/company action against the host population, in the event, for instance they organise a rally or peaceful demonstration against the oil pipeline project in order to bring attention to the violation of their human rights. The right to free speech and association is protected under the International Covenant on Civil and Political Rights⁴⁹ as well as the African Charter.⁵⁰ Given the history of violent repression of demonstrations by governments in Africa against their citizens protesting the activities of multinationals, the provisions of Article 27.12 may further endanger the right to free speech and association, which the host governments have committed themselves to protecting. The human rights abuses suffered by the Ogoni people in the wake of their protest against the exploration activities of Shell that adversely affected their social and environmental rights are well documented.⁵¹

e. Property Rights

The Conventions of Establishment may contribute to the violations of the human rights of the local population playing host to the project. The project will impact negatively on the property and land rights of the citizens, particularly the indigenous population of the host countries. The provisions of Article 27 of the Cameroon Convention and Article 23 of the Chad Convention may make the right to property illusory. They require the host governments to take all measures including expropriation, eviction and release to acquire land for the purpose of the pipeline project, which project is said to be for ‘public purpose’. Although, the Conventions make provision for the payment of compensation, doubts have been expressed as to the adequacy of the compensation paid to the landowners.⁵² In the

⁴⁹ See Articles 18, 19, 21 and 22.

⁵⁰ See Articles 9, 10 and 11.

⁵¹ See Human Rights Watch, *The Price of Oil* (1999) (discussing Shell’s support for the Nigerian government’s human rights abuses during the oil exploitation process) available at <http://www.hrw.org/reports/1999/nigeria/> (visited 2nd May 2005).

⁵² Delphine Djiraibe, Korinna Horta and Samuel Nguiffo, *The Chad-Cameroon Oil and Pipeline Project: A Call for Accountability* 13-14 (June 2002) available at

case of Chad, Article 23.6 of the Convention stipulates that in the event that no agreement on compensation is reached with the land owners, the compensation payable shall be fixed by a Chadian government decree (Decree No. 187 of 1967). This clearly rules out an option to pursue a claim for compensation through the judicial process. Furthermore, the host governments having undertaken to provide the land for the project may be inclined to adopt all measures available to them, including the use of force and intimidation against landowners, in order to meet their contractual commitments to the consortium. The actions of the governments, though justified under the terms of the Conventions of Establishment will be in contravention of their human rights obligations. It will be recalled that the governments of Chad and Cameroon having recognized in their respective Constitutions the rights protected under the 1948 UN Declaration on Human Rights as well as the African Charter on Human and Peoples' Rights, are under an obligation to protect the property rights of their population. Article 17 of the UDHR guarantees everyone the right to own property alone as well as in association with others and prohibits arbitrary deprivation of property. While Article 14 of the African Charter on Human and Peoples' Rights states that the right to property shall be guaranteed, and this right can only be encroached upon in the general interests of the community and in accordance with the provisions of appropriate laws. In addition property rights of indigenous people are protected under Article 16 of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169). Additionally

property rights are protected in Article 5(d) (vi) and (vii) of the Convention on the Elimination of all Forms of Racial Discrimination and Articles 15(2) and 16(1)(h) of the Convention Elimination of all Forms of Discrimination against Women. Although the above provisions do not include an independent property right, they prohibit discrimination, or provide for equality of treatment as regards the enjoyment of property rights where such rights are guaranteed. In this context, mention should be made of Article 26 of the International Covenant on Civil and Political Rights providing for an independent right to equality before the law and equal protection by the law.

Linked to the above is the question of the public consultation. A study on the Chad-Cameroon project has found that there was inadequate public consultation on the project. The study points to the fact that "consultations" in the oil producing region usually take place in the presence of armed military guards and that the Bakola indigenous population suffered adversely as a result of the inadequacy of the consultation.⁵³ It is a fundamental requirement of international human rights law that indigenous people participate in the planning of development project and that governments must examine the social, spiritual, cultural and environmental impact of planned development project on the affected population before giving their approval.⁵⁴

www.environmentaldefense.org/documents/2134_chad-cameroon.pdf (visited 1st May 2005).

⁵³ . Ibid. See also Just Earth: "Oil Pipeline threatens Local Communities and Fragile Ecosystem" at <http://www.amnestyusa.org/justearth/chad-cameroon.html> (visited 1st May 2005).

⁵⁴ . Section 7 (2) and (3) of the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27th June 1989 entered into force on 5th Sept 1991).

In the light of these commitments to protect the property rights of their citizens, the host governments will be in breach of their obligations where they fail to ensure that in the acquisition of land for the project, adequate compensation is paid, as well as avenues for redress are provided for individuals and groups in the event of dispute arising from inadequate compensation. Failure to safeguard the property rights of those impacted by the project will amount to discrimination as their right to property is not given the same adequate protection accorded to those parts of the population not affected by the project.

VII. Concluding Remarks

In this paper the point has been made of the tendency for investment agreements to privilege investor rights at the expense of the right of States to regulate in the public interest. This practice has continued to generate controversy whenever attempts are made at the multilateral level to enact rules to regulate investments. The disagreement between developed and developing countries as to the potential benefits of such an agreement continues to plague the WTO talks. For developing countries fear that such an agreement, regardless of its benefits will reduce the

policy space they have to take decisions that will further their economic and social development and ultimately their right to development. The Chad Cameroon Conventions of Establishment with their potential negative effect on the sovereignty of the Republics of Chad and Cameroon and their attendant human rights implications appears to confirm such fears.

What is the way forward? It may be said that the host governments are faced with one of two choices, namely respecting their contractual commitments to the oil consortium or upholding their obligations under the various international human rights instruments. As the Conventions of Establishment stand, the host government are, because of the possible financial penalties, more likely to comply with their contractual commitments rather than their human rights obligations. This situation may be done away with an amendment of the contentious Articles in the Conventions of Establishment. Such an amendment would state clearly that the international human rights obligations of the host governments are invulnerable and that in the event of a conflict between the contractual commitments under the Conventions of Establishment and their international human right obligations, the latter would prevail. Such an amendment may read as follows:

“provided always that the provisions of this Convention of Establishment shall not inhibit the exercise of the normal regulatory powers of the host government in compliance with its international human rights obligations and the exercise of such powers shall not amount to a breach of her commitments under the Convention of Establishment.”

The insertion of such a human rights clause⁵⁵ will put the promotion and protection of human rights at the core of the Conventions of Establishment rather

⁵⁵ A group of experts meeting at Tilburg University, the Netherlands suggested the inclusion of a human rights clause in various operational and loan agreements between the World Bank, IMF and Member Countries of those International Financial Institutions. See Tilburg Guiding Principles on World Bank, IMF and Human Rights, paras 30 and 31 in

than as an exception. This approach will resonate with the position taken by the UN High Commissioner for Human Rights that States should consider including an explicit reference to the promotion and protection of human rights among the objectives of investment agreements, either in the preamble or in the body of the agreement.⁵⁶ Such a reference while not creating new obligations for the parties to an agreement would recognize the potential for investment to affect the enjoyment of human rights. Recognizing this link would be an important step in avoiding

dwnward pressure on human rights protection in the process of the implementation of the Chad-Cameroon project as it reinforces the right and duty of the host governments to regulate in the public interest. In this regard it is relevant to note that the Declaration on the Right to Development emphasizes that States have the “right and duty to formulate appropriate development policies that aim at the constant improvement of the well-being of the entire population and of all individuals”.

William Van Genugten, Paul Hunt and Susan Mathews (eds), *World Bank, IMF and Human Rights*, (Wolf Legal Publishers 2003)

⁵⁶ Report of the UN High Commissioner for Human Rights on ‘*The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*’, UN Doc E/CN.4/Sub.2/2001/13, 27 June 2001, paras. 21 and 22.