

YEARBOOK ON  
INTERNATIONAL  
INVESTMENT  
LAW & POLICY  
2011–2012

EDITED BY  
*Karl P. Sauvant*

OXFORD  
UNIVERSITY PRESS

YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY

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P A R T T W O

SYMPOSIUM ON  
REGULATORY AND  
POLICY DEVELOPMENTS  
REGARDING FDI IN  
EXTRACTIVE INDUSTRIES

# INTRODUCTION TO SYMPOSIUM ON REGULATORY AND POLICY DEVELOPMENTS REGARDING FDI IN EXTRACTIVE INDUSTRIES

ERLEND BAKKEN AND ANDREA K. BJORKKLUND

This Symposium addresses regulatory and policy developments regarding foreign direct investment (FDI) in the extractive industries. Some of the submissions are mining-specific, while others focus on petroleum, but the issues covered should be of interest to those involved in the extractive industries overall. Furthermore, while they cover different topics, including fiscal reforms, the development of model agreements and issues regarding applicable law (including the use of stabilization clauses), and transparency, there is a common theme running through all submissions: Each focuses to some degree on the need for, and the importance of, establishing a sustainable legal infrastructure for FDI in the extractive industries. The importance of a sustainable legal infrastructure is easily exemplified by the many examples where host country governments have found access to natural resources to be more of a curse than a blessing (the “resource curse”).

What does “legal infrastructure” encompass? What does “sustainable” mean? These are questions that no doubt will remain on the agenda of lawyers, policy-makers, and civil society for some time to come. This Symposium only scratches the surface of the issues that could be covered.

These and related questions are on the agenda not only as academic issues, but also as concerns that are dealt with in practice on a running basis. There are also a growing number of actors with an interest in extractive industry projects, including local governments and local populations, in addition to non-governmental organizations and home country governments.

Greater transparency with respect to the agreements investors have made with host country governments has permitted greater scrutiny of both governments and investors. The breadth of interests in this area and the presence of crosscutting issues make the submissions for this Symposium highly relevant at what is a very important time for the extractive industries.

Coming back to what we understand about the importance of legal infrastructure, and first addressing sustainability in that context, we note that ensuring the existence of a stable and predictable legal infrastructure would go a long way towards solving the resource curse. There is, of course, no right or wrong answer as to what the perfect legal infrastructure must encompass; moreover, whatever regime is designed will likely (and probably should) evolve over time. A key challenge, as evidenced by several of the submissions, is to strike some form of balance, whereby there is sufficient predictability and return on an investment for *both* investors and host countries. To be able to assess fully whether there is such a balance, a certain degree of transparency is required.

With no intention of trying to be exhaustive, the legal infrastructure for FDI in the extractive industries can comprise (as exemplified in the submissions to this Symposium): the laws and regulations of the State in whose territory the natural resources are found; the contract or concession terms that apply to supplement the laws and regulations in place within the host country (including whatever law is chosen to govern such contracts or concessions terms); the laws and regulations of the home country for the investor, as well as any other applicable laws and regulations and international soft law arrangements, including what can be referred to as “modern international petroleum law” and other more generally applicable norms such as the OECD Guidelines for Multinational Enterprises.

At the same time as there are discussions on how best to achieve a sustainable legal infrastructure, there is also a clear evolution in that infrastructure. For players in the industry, the changing state of the law raises challenges. In a speech given in May 2012 at the University Club of Toronto, Peter Rees, Legal Director at Royal Dutch Shell plc, pinpointed some of the challenges facing the petrochemical industry, and arguably other extractive industries as well. He explained that “the legal judgments are becoming more and more entwined with the moral judgments,” and that “[h]ard law and soft law are getting more and more difficult to differentiate, and [] the industry is being held to account to both.”<sup>1</sup>

Such challenges should not be underestimated, but at the same time emphasize the need for a continued discussion on how best to create a sustainable legal infrastructure. In addition to what is addressed above, it is also clear that what is right for Norway will not necessarily be right for Nigeria, Brazil, or Indonesia. There is, for instance, no right or wrong answer as to whether a contract-based regime or a concession-based regime is inherently better: Much depends on the content of the law governing the concessions or the terms of the contracts. We note, however, that the trend (internationally, at least) seems to be toward more regulation by host country laws, with less “legislation by contract.” And, indeed, as a host country’s applicable regulatory and legal framework develops, it can attempt to ensure that investment agreements promote sustainability and balance. That framework cannot be put in place overnight; in the meantime, it is important that investment agreements be modified to promote sustainability.

We believe that this Symposium will contribute to ongoing debates on how best to develop a sustainable legal infrastructure.

Happy reading!

1. Peter Rees, “Global legal challenges facing the petro-chemical industry,” May 8, 2012, *available at* ([http://www.shell.com/home/content/media/speeches\\_and\\_webcasts/2012/rees\\_toronto\\_08052012.html](http://www.shell.com/home/content/media/speeches_and_webcasts/2012/rees_toronto_08052012.html)).