Queen's | LAW TradeLab uOttawa Faculté de droit Faculty of Law

International Trade and Investment Law Practicum

PERVERSE SUBSIDIES AND EXTRACTIVE INDUSTRIES

Internalizing Environmental Costs and Promoting Sustainable Development in Suriname and Guyana

26 April 2017, Kingston, ON

Submitted by

Madeline Davis, Lucy Sun, Dennis Beeby

To : Rowan Braybrook
Conservation International
2011 Crystal Drive, Suite 500
Arlington, VA 22202

TradeLab output is prepared on a pro bono basis by students as a pedagogical exercise. It is not professional legal advice and in no way establishes a client-attorney relationship.

TradeLab

International rules on cross-border trade and investment are increasingly complex. There is the WTO, World Bank and UNCTAD, but also hundreds of bilateral investment treaties (BITs) and free trade arrangements ranging from GSP, EU EPAs and COMESA to ASEAN, CAFTA and TPP. Each has its own negotiation, implementation and dispute settlement system. Everyone is affected but few have the time and resources to fully engage. TradeLab aims to empower countries and smaller stakeholders to reap the full development benefits of global trade and investment rules. Through pro bono legal clinics and practica, TradeLab connects students and experienced legal professionals to public officials especially in developing countries, small and medium-sized enterprises and civil society to build lasting legal capacity. Through 'learning by doing' we want to train and promote the next generation of trade and investment lawyers. By providing information and support on negotiations, compliance and litigation, we strive to make WTO, preferential trade and bilateral investment treaties work for everyone.

More at: https://www.tradelab.org

What are Legal Practica

Legal practica are composed of small groups of highly qualified and carefully selected students. Faculty and other professionals with longstanding experience in the field act as Academic Supervisors and Mentors for the Practica and closely supervise the work. Practica are win-win for all involved: beneficiaries get expert work done for free and build capacity; students learn by doing, obtain academic credits and expand their network; faculty and expert mentors share their knowledge on cutting-edge issues and are able to attract or hire top students with proven skills. Practicum projects are selected on the basis of need, available resources and practical relevance. Two to four students are assigned to each project. Students are teamed up with expert mentors from law firms or other organizations and carefully prepped and supervised by Academic Supervisors and Teaching Assistants. Students benefit from skills and expert sessions, do detailed legal research and work on several drafts shared with supervisors, mentors and the beneficiary for comments and feedback. The Practicum culminates in a polished legal memorandum, brief, draft law or treaty text or other output tailored to the project's needs. Practica deliver in three to four months. Work and output can be public or fully confidential, for example, when preparing legislative or treaty proposals or briefs in actual disputes.

The Joint International Economic Law Clinic
at the University of Ottawa and Queen's University

The University of Ottawa and Queen's University offer legal practica within the framework of a **Joint International Economic Law Clinic** that was established in 2017 by agreement between the law faculties of the two universities. The **University of Ottawa**'s bijural, bilingual Faculty of Law, situated in Canada's capital, has one of the richest selections of international law courses in the world. It offers specialized LLMs in international trade and investment law, global sustainability and environmental law, international humanitarian and security law, technology law, and health law. It has student clinics with real clients in these fields and is home to the internationally renowned Human Rights Research and Education Centre. **Queen's University** Faculty of Law provides students with a unique curriculum in international law. The International Law Programs at Herstmonceux Castle in Southern England offer summer courses in public international law and international business law. In their upper years, students can pursue further studies in a wide range of international law subjects and participate in moots on international trade law, public international law and commercial arbitration.

Table of Contents

1. Executive Summary ..... A
2. Introduction 1
2.1. Conservation International's Involvement in Suriname and Guyana 2
2.1.1. Extractive Industries in Guyana 3
2.1.2. Extractive Industries in Suriname 3
2.2. Purpose and Goals of Analysis 4
3. Perverse Subsidies 5
3.1. Defining Perverse Subsidies 5
3.2. Defining Hidden Subsidies 7
3.3. Perverse and Hidden Subsidies in Triple Bottom Line Accounting 9
4. Hidden Subsidies in the Extractive Industry 12
4.1. Environmental Harm 13
4.1.1. Case Study: Anvil Range Mining Corporation Faro Yukon Mine Closure 17
4.1.2. Case Study: Samarco Bento Rodrigues Dam Failure 18
5. Identifying Essential Elements in Regulatory and Contractual Frameworks, and the Costs of Implementation 21
5.1. Best Practices: Essential Cost-Reducing Elements 22
5.1.1. Prevention 23
5.1.2. Mitigation 28
5.1.3. Remediation 34
5.2. Existing Legislation and Agreements in Guyana and Suriname 37
5.2.1. Discussion: Guyana 38
5.2.2. Suriname: Discussion 45
6. Enforcement and Dispute Resolution Mechanisms 50

6.1. Domestic Enforcement Regimes 50

6.1.1. Case Study: Exxon *Valdez* Oil Spill 56

6.1.2. Case Study: BP Deepwater Horizon Spill 58

6.2. Contractual Dispute Resolution 60

6.3. International Centre for the Settlement of Investment Disputes Arbitration ("ICSID") 64

6.4. Alternatives to ICSID 68

6.5. Investment Treaties and Investor-State Dispute Settlement 72

1. Executive Summary

Suriname and Guyana host some of the most pristine rainforests in the world and are rich in biodiversity.[1] Both countries are covered to over 75 percent in rainforest, which is home to thousands of different species of flora and fauna.[2] They are also rich in natural resources.[3] Conservation International ("CI") has formed partnerships with the governments in both Suriname and Guyana to provide guidance on the sustainable development of the extractive industries. The primary sectors concerned are logging, mining, and oil and gas.

Recognizing that the development of these sectors will potentially offer significant economic benefits to Suriname and Guyana, TradeLab's memorandum makes recommendations with respect to legal frameworks and mechanisms that the governments of Suriname and Guyana can use to ensure the sustainable development of these sectors, and in particular, to protect the environment and biodiversity.

---

[1] Tsitsi Y McPherson, "Landscape Scale Species Distribution Modeling Across the Guiana Shield to Inform Conservation Decision Making in Guyana" (2014) 23 Biodiversity Conservation 1931 at 1943 [McPherson]; Bruno G Bordenave, Jean-Jaques de Granville, & Kate Steyn, "Quantative Botanical Diversity Descriptors to Set Conservation Priorities in Bakhuis Mountain Rainforest, Suriname" (2011) 167 Botanical Journal of the Linnean Society 94 at 95 [Bordenave et al]; Agnieszka Ewa Latawiec et al, "Suriname: Reconciling Agricultural Development and Conservation of Unique Natural Wealth" (2014) 38 Land Use Policy 627 at 629.

[2] *Ibid.*

[3] Dennis C Canterbury, "Natural Resources Extraction and Politics in Guyana" (2016) 3 The Extractive Industry and Society 690 at 691 [Canterbury]; Agnieszka Ewa Latawiec, "Suriname: Reconciling Agricultural Development and Conservation of Unique Natural Wealth" (2014) 38 Land Use Policy 627 at 634.

Our research first approaches the problem by conceptualizing the uninternalized costs that the extractive industries impose on their host countries as perverse, hidden subsidies. Perverse subsidies are costs borne by the government to remedy environmental damage associated with the development of the extractive industry. Because these costs are not internalized by the industry, the industry has no incentive to avoid environmentally destructive behaviour, which lends these subsidies their perverse character. The subsidies are hidden because they do not take the form of direct transfers of funds from the government to the industry. This memorandum thus seeks to identify where these costs arise and how the drafting of environmental regulation and concession agreements can internalize these costs so that they are not borne solely by the government.

Following a review of academic literature and industry guidelines, our research then identified five types of environmental impact: land costs, air and water quality costs, biodiversity costs, human costs, and climate change:

(1) Costs to the land includes damage and changes to natural landscapes both in the short and long term brought on by infrastructure developments associated with extractive industries.

(2) Costs to water and air quality includes chemical and pollutant damage to air and water quality that will impact local and regional biodiversity.

(3) Costs to biodiversity are closely related to changes in the land, as well as air and water quality concerns. As a result of these elements, the biodiversity of plants and animals in the area may shrink.

(4) Costs to human experience and living conditions includes changes to qualify of life that the individuals in the region will fact.

(5) Climate change includes the global environmental impact that the extractive industry has. Underlying all of the above concerns is the reality that extractive industries are a major cause of carbon emissions and pollution. This exacerbates all of the above concerns on a global scale.

In order for Suriname and Guyana to be able to draft environmental legislation and negotiate appropriate concession agreements, it is important to be aware of specific environmental concerns common across all extractive sectors.

Further review of academic literature, existing concession agreements, and environmental legislation led us to identify ten best practices or “essential elements” in environmental legislation and investment agreements, which help to minimize government responsibility for the costs of preventing, mitigating and remediating environmental damage in these areas. The following essential elements, or best practices, serve to prevent environmental damage:

(1) Environmental impact assessment: Requiring an environmental impact assessment be successfully obtained before the development project is approved;

(2) Monitoring mechanism: Ensuring mechanisms are in place throughout the development project which can assess ongoing environmental damage;

(3) Precautionary principle: Supporting actions being taken even when cause and effect relationships are not fully established scientifically.

The following essential elements serve to mitigate environmental damage:

(4) Transparency and information sharing: Ensuring that all obligations and decisions in environmental assessment and monitoring are clearly defined and communicated;

(5) Independent institutions and agencies: Requiring all decision-makers involved at each stage of an environmental administrative process must operate at arm's length from the investor or political and personal interests;

(6) Third-party stakeholder participation: Giving civil society and minority groups a chance to participate in decision-making on development projects impacting the environment;

(7) Regulatory flexibility and autonomy: Ensuring governments preserve their right to enact environmental regulations according to their usual political process;

(8) Incentives for corporate social responsibility: Encouraging any activity by extractive industries promoting or benefiting conservation.

Essential elements that address the remediation of environmental damage are as follows:

(9) Polluter pays: Ensuring that polluters pay the full costs of repairing any environmental damage resulting from its activity, including any costs of mitigation, prevention and control in which it can play a part;

(10) Compensation for victims of environmental damage: Guaranteeing that the investor will pay compensation for harm to persons, property and wildlife.

By including these elements in the regulatory frameworks and future concession agreements, the governments will have a starting point for negotiation where the costs of extractive industries are shifted back onto the private enterprise both in the regulation, and the agreement. We recommend that the governments of Guyana and Suriname take into account these best practices when they negotiate with foreign investors and include them in both regulatory and concession frameworks.

Finally, we have also recommended a dispute resolution scheme to be included in concession agreements to ensure compliance both with environmental regulations, as well as the terms of concession agreements. We recommend that the governments of Guyana and Suriname ensure that their concession agreements be enforceable against the investor, and that they include mechanisms to ensure that the investor will be able to pay damages in the case of a dispute. In particular, we recommend that Guyana and Suriname do not contract with shell companies, which have no assets to pay for damages.

We also recommend that the governments of Suriname and Guyana enact robust domestic legislation and regulations to provide enforcement options to prevent, mitigate or compensate environmental damage as required. A robust

set of tools allows governments the flexibility to choose the right option for each situation. The governments should also ensure that contractual agreements they enter into do not contain stabilization clauses that remove their ability to enhance domestic legislation.

2. Introduction

Environmental harm is inherent in the extractive industry. This memorandum will focus on the emerging extractive industry in the Co-operative Republic of Guyana ("Guyana") and the Republic of Suriname ("Suriname") in three key sectors: oil and gas, logging, and mining. The extractive industries represent new economic opportunities for the government and the residents of Guyana and Suriname, and the potential benefits in terms of economic growth as a result of their development is considerable. Yet these extractive sectors have a long history of environmental damage. The goal for this project is to propose legal and regulatory mechanisms which the governments of Guyana and Suriname can use to work with foreign extractive corporations to develop extractive industries in such a way that there is minimal damage to the environment.

This memorandum is structured as follows. First, the memorandum conceptualizes the ideas of "perverse subsidies" and "hidden subsidies", which draw attention to the respects in which governments are often left to pay for the environmental damage caused by the extractive industries. Next, it outlines the major form of environmental damage that are common across all three extractive sectors.

The memorandum goes on to propose a list of nine elements that should be included either in domestic regulation or in concession agreements with respect to environmental damage. These elements are aimed at preventing, mitigating,

and remediating environmental damage. Finally, the memorandum outlines options for enforceability of regulatory frameworks and concession agreements.

2.1. Conservation International's Involvement in Suriname and Guyana

The governments of Suriname and Guyana are both in the process of industrializing their economies and developing the extractive industries to exploit their respective natural resources. Recognizing the importance of economic development in these regions, CI is working with the governments in Suriname and Guyana in order to advise them on the most sustainable methods for establishing extractive industries. Consistent with their global mission statement and goals, CI's goal for this project is to highlight the environmental and social costs that arise from the activities of these industries that governments are often forced to bear. These expenditures reduce the funds that are available for environmental conservation efforts and social programs.

The extractive industries encompass those sectors which extract raw materials from the earth for the purpose of consumption.[4] In both Suriname and Guyana, the main sectors of interest are oil and gas, mining, and logging.

[4] *Business Dictionary,* online ed, *sub verbo* "extractive industry".

2.1.1. Extractive Industries in Guyana

In Guyana, there is a longstanding presence of gold and diamond mining, primarily from Canadian mining companies, such as Guyana Goldfields and IAMGOLD, and Australian mining companies such as Troy Resources.[5] As of 2016, gold accounted for almost 60 percent of Guyana's total exports.[6]

More recently, oil and gas companies such as ExxonMobil, Esso, Hess and Nexen have established a presence in Guyana to exploit its newly discovered offshore oil reserves. According to *The Economist,* "by 2020 ExxonMobil, the world's largest private oil firm, expects to be pumping oil in Guyanese waters".[7] In June of 2017, ExxonMobil announced that it would invest $4.4 billion USD in the Liza Oil Development in Guyana.[8]

2.1.2. Extractive Industries in Suriname

Since 1980, there has been a developing petroleum industry in Suriname. The largest oil producing company in Suriname is Staatsolie Maatschappij

---

[5] "The Gusher in Guyana: Offshore Oil" *The Economist* (1 July 2017) 31, online: <http://go.galegroup.com.proxy.queensu.ca/ps/i.do?p=AONE&u=queensulaw&id=GALE%7CA497329319&v=2.1&it=r&sid=summon> [The Gusher in Guyana]; Cecilia Jamasmie, "Aussie Miner to Open Guyana's Second Largest Gold Mine," *Mining.com* (30 October 2015) online <http://www.mining.com/aussie-miner-to-open-guyanas-second-largest-gold-mine/> [Jamasmie]; United States, US Department of the Interior, US Geological Survey, "The Mineral Industries of Grench Guiana, Guyana, and Suriname" by Alfredo C Gurmendi and Staff (Virginia: February 2015) [Gurmendi].

[6] "Status of Guyana," *EITI* (website) online: <https://eiti.org/guyana> [Status of Guyana].

[7] The Gusher in Guyana, *supra* note 5; *ibid.*

[8] "ExxonMobil Makes Final Investment Decision to Proceed with Liza Oil Dvelopment in Guyana" (16 June 2017) *ExxonMobil* (website) online: <http://news.exxonmobil.com/press-release/exxonmobil-makes-final-investment-decision-proceed-liza-oil-development-guyana>; Status of Guyana, *supra* note 6.

Suriname N.V., a government-owned corporation.[9] A major portion of Suriname's economic activity comes from mining, with alumina, gold, and petroleum accounting for approximately 95 percent of Suriname's exports in 2012 and 35 percent of government revenues.[10]

2.2. Purpose and Goals of Analysis

Through its work with the governments of Suriname and Guyana, CI aims to promote the sustainable development and growth of the extractive industry in each country. To help CI achieve this goal, our research will:

(1) Identify and address environmental costs, and perverse and hidden subsidies associated with the development of extractive industry;

(2) Draft a set of recommendations for provisions in environmental regulation and concession agreements that:

a. Creates consistency within the legal frameworks to close exploitable loopholes; and
b. Protects the environment and biodiversity in Suriname and Guyana.

[9] Gurmendi, *supra* note 5.
[10] *Ibid.*

3. Perverse Subsidies

This section provides a conceptual framework for the remainder of this memorandum by defining two types of subsidies: perverse subsidies and hidden subsidies. These two concepts inform the discussion in the subsequent sections of this memorandum.

3.1. Defining Perverse Subsidies

Subsides are an economic concept broadly defined as “a type of incentive measure designed to encourage certain behaviour”. [11] Governments intentionally provide subsidies in a wide variety of forms. A perverse subsidy is a subsidy that incentivizes socially harmful conduct, e.g., a subsidy that leads to overuse of resources and environmental damage. [12] For the purposes of this research, we focus on the negative impacts that subsidized activities have on the environment.

Perverse subsidies take many forms, especially with respect to environmental and biodiversity impact. For example, they may be subsidies “that encourage behaviours which lead directly to biodiversity loss”,[13] such as direct government subsidies to fishing that leads to overfishing and the depletion of fish stocks. [14]

---

[11] Andrea Bagri, Jill Blockhus & Frank Vorhies, “Perverse Subsidies and Biodiversity Loss”, draft scoping paper for IUCN-The World Conservation Union and the Van Lennep Programme at 2 [Bagri, Blockhus & Vorhies].
[12] Sarah Robin, Rob Wolcott & Carlos E Quintela, “Perverse Subsidies and the Implications for Biodiversity: A Review of Recent Findings and the Status of Policy Reforms”, Presentation to the Vth World Parks Congress (September 2003) at 1 [Robin, Wolcott & Quintela].
[13] Bagri, Blockhus & Vorhies, *supra* note 11 at 3.
[14] Robin, Wolcott & Quintela, *supra* note 12 at 3-4

Another example are fossil fuel subsidies, such as direct grants to fossil fuel producers or alternatively, user subsidies.[15] These subsidies encourage additional production of fossil fuels, and lower the cost of consuming fossil fuels for the end consumer.

Subsidies may also be "biodiversity-perverse" because they "drain scarce public finances which could have been used for other purposes, for example, to conserve biodiversity".[16] James, Gaston and Balmford estimated an annual funding requirement of $317 billion for global biodiversity conservation; this amount is dwarfed by the global perverse subsidies which they identified, with estimates ranging from $950 billion to $1.45 trillion.[17] The opportunity cost of providing perverse subsidies is hence enormous: not only is the value of the subsidies sufficient to fund biodiversity conservation, but the excess funds could also be spent on other policy objectives that do not cause environmental harm.

Subsidies may also have perverse effects because they are frequently "blunt instruments which may undermine critical linkages between ecological, economic and social objectives".[18] Subsidies are often designed without regard to environmental impacts, considering instead only social or economic goals.

---

[15] Frans H Oosterhuis & Patrick ten Brink, *Paying the Polluter: Environmentally Harmful Subsidies and their Reform* (Cheltenham, UK: Edward Elgar, 2014) at 107; 112-13.
[16] Bagri, Blockhus & Vorhies, *supra* note 11 at 3.
[17] Alexander James, Kevin J Gaston & Andrew Blamford, "Can We Afford to Conserve Biodiversity?" (2001) 51:1 Bioscience 43 at 50 [James, Gaston & Blamford].
[18] Bagri, Blockhus & Vorhies, *supra* note 11 at 3.

As a result, they can have a negative net effect on society.[19] Subsidies may also lock in a biodiversity-unfriendly structures of political and power relationships.[20] In particular, subsidies tend to benefit particular special interest groups, who are often able to mobilize effectively to defend their interests.[21]

3.2. Defining Hidden Subsidies

Subsides that do not involve direct payments by governments may be termed hidden subsidies. Hidden subsidies are also called “externalities” in economic analysis. An illustrative example of a hidden subsidy is the permission for a company to pollute without any attached cost. The polluter emits pollution without having to pay anything for the environmental harm that the pollution causes, forcing the government (or the public) to bear that cost. Pollution is also a good example of how hidden subsidies can be internalized, removing the subsidy. The “polluter-pays principle”, first formulated by the Organisation for Economic Cooperation and Development, is a way of negating the hidden subsidy.[22] Under the OECD formulation, “The Principle means that the polluter should bear the expenses of carrying out [the costs of pollution prevention and control measures] decided by public authorities to ensure that the environment is in an acceptable state.”[23] The polluter-pays principle has been accepted elsewhere in international documents, most notably in the 1992 Rio Declaration

---

[19] *Ibid* at 5.
[20] *Ibid* at 3.
[21] *Ibid* at 5.
[22] See the historial discussion in Ling Zhu & Yachao Zhao, “Polluter-pays Principle – Policy Implementation” (2015) 45:1 Environmental Policy and Law 34 at 34-35.
[23] OECD, *The Polluter Pays Principle*, (Paris, 2008 : OECD Publishing) at 12-13.

on Environment and Development. Principle 16 of the Declaration states: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”[24]

When polluters fail to pay for the pollution or other analogous environmental damage, they leave the host state to pay for any clean-up or other associated costs. As a result, the company obtains a hidden subsidy: it does not have to internalize the clean-up cost, as the state will cover it. While permission to pollute may be the most common example of a hidden subsidy, this framework for externalized costs also applies to other hidden subsidies – for example, other types of environmental damage. The distinguishing characteristic of a hidden subsidy is that it is not a direct payment from a government to the subsidized entity; rather it obtains the subsidy indirectly. Making the previously subsidized entity pay for the cost of the damage it causes removes the hidden subsidy and forces it to internalize the full cost of its actions.

A tool for showing the impact of hidden subsidies is through accounting techniques. Traditional accounting techniques capture companies’ costs and profits. They do not consider any hidden subsidies that they may benefit from: since the company does not internalize the full cost of its activity, it does not

[24] Rio Declaration on Environment and Development, UNGA A/CONF.151/26 (Vol. I).

appear on the traditional balance sheet. Triple bottom line (“TBL”) accounting is designed to describe “economic, environmental, and social value of investment that may accrue outside a firm’s financial bottom line”.[25] In this way, triple bottom line accounting captures hidden subsidies by considering the environmental and social benefits and costs of an economic activity and showing them as part of its balance sheet. This concept will be discussed in more detail in the next subsection.

A subsidy can be both hidden and perverse at the same time. A hidden, perverse subsidy is a subsidy that an entity obtains without a direct payment, which also has an overall negative social impact.

3.3. Perverse and Hidden Subsidies in Triple Bottom Line Accounting

As mentioned above, the TBL accounting is one way of identifying perverse and hidden subsidies at the corporate level, through corporate accounting practices. It is an aspect of corporate social responsibility that focuses on new conceptions of a company’s bottom line. The concept was developed in the 1990s by John Elkington, who wanted to create a well-rounded framework that included considerations outside of those in traditional profit metrics. [26]

[25] Janet Hammer & Gary Pivo, “The Triple Bottom Line and Sustainable Development Theory and Practice” (2017) 31:1 *Economic Development Quarterly* 25 at 25 [Hammer & Pivo].
[26] Timothy F Slaper & Tanya J Hall, “The Triple Bottom Line: What is it and how does it Work?” (2011) Online: Indiana Business Review <http://www.ibrc.indiana.edu/ibr/2011/spring/article2.html> [Slaper & Hall].

According to economists Timothy Slaper and Tanya Hall, "the TBL is an accounting framework that incorporates three dimensions of performance: social, environmental and financial".[27] TBL attempts to assign monetary values to social and environmental aspects of the business in order to give a full picture of a company's performance and impact. It is only when a company engages in these types of calculations that it accounts for the full range of costs of doing business over time.[28] TBL forces companies to pay attention to areas outside of the traditional concepts of cost versus profit and highlights areas where they may be benefitting that would not traditionally show up on a balance books.[29]

TBL aligns well with the goals that CI has for the development of the extractive industry in Suriname and Guyana. Elkington created the system specifically in response to environmental concerns, and partially as a way of identifying and removing perverse and hidden subsidies from regulatory frameworks.[30] Because it creates new data sets and fosters transparency between the company, stakeholders, and the public, it creates a wider picture of company impact and considers areas where the company may have benefitted to the detriment of the environment. In this way, it can help to highlight the presence or absence of perverse or hidden subsidies. If implemented in the extractive industry, it will likely help to hold extractive companies accountable to a much more precise degree because there will be specific numerical data that the

---

[27] *Ibid.*
[28] "Triple Bottom Line" (2009) Online: *The Economist* [Triple Bottom Line].
[29] *Ibid.*
[30] Adrian Henriques & Julie Richardson, *The Triple Bottom Line: Does it All Add Up? Assessing the Sustainability of Business and CSR* (London: Earthscan, 2004) at 12 [Henriques & Richardson].

government or third-party stakeholders can use to demonstrate the cost of environmental and social damage.

Although TBL is an important move for fostering environmentally and socially responsible corporate and investor practices, it is important to note that it comes with a unique set of challenges. In particular, it is difficult to assign value metrics to natural capital, environmental damage, and human and social resources.[31] There is also no one recognized standard for determining what goes into the TBL, so the results of the calculation may vary depending on the metrics used by the companies that are conducting the analysis.

[31] Henriques & Richardson, *supra* note 30 at 12.

4. Hidden Subsidies in the Extractive Industry

As outlined above, hidden subsidies can be conceptualized as costs that arise from extractive activities that the government must pay. These subsidies become perverse when the subsidized activity has a detrimental impact on a socially desirable goal. In the context of this memorandum, the socially desirable goal is the conservation of the rich biodiversity in Suriname and Guyana. Although the costs that arise from the detrimental impact of the extractive industry are a direct result of the activities of the industry, the costs themselves are external to the actual investor state agreement. As outlined above, where the government must spend resources to mitigate environmental costs, there is an opportunity lost for those resources to be spent on other programs that would have produced a social benefit.[32] When these resources are used to mitigate or remediate environmental damage that the extractive industry has caused, the government effectively transfers the financial value of their remediation or mitigation efforts to the corporation, as opposed to the people of their country.

For the purpose of this assessment, we will conceptualize hidden subsidies with respect to the environment as two types of costs:

(1) Costs of prevention and mitigation: These costs arise before and during the various stages of industry operations. Prevention costs arise from

[32] Mark A Cohen, "A Taxonomy of Oil Spill Costs: What are the Likely Costs of the Deepwater Horizon Spill?" (2010) Resources for the Future 1 at 2 [Cohen].

conducting environmental impact assessments, conducting consultations and other activities that serve to estimate and assess potential environmental harms. Mitigation strategies involve establishing guidelines for extractive producers and taking precautions that minimize the damage before it happens.

(2) Costs of remediation: These costs concern the financial burden of remedying environmental damage once it has already happened.

4.1. Environmental Harm

Although each sector of the extractive industry presents unique environmental challenges, the major forms of environmental damage are common across all three. The detrimental impacts associated with the development and operation of extractive industries fall under five broad categories:

(1) Land damage: Land damage occurs through the construction of industrial infrastructure and artificial changes to the landscape of a region during the process of developing and operating a largescale project. These are typically easier to mitigate and are more of a concern during the life of the project.[33]

[33] Lyuba Zarsky, "Sustaining Development: Extrative Industries and Local Communities" online: (2013) World Pol Rev at para 16 <https://www.worldpoliticsreview.com/articles/13145/sustaining-development-extractive-industries-and-local-communities> [Zarsky].

(2) Water and air damage: These types of damage arise from trailing and chemical runoff, and air pollution during the life of the project and beyond. They are a concern for the long-term, as chemical runoff and heavy metal pollution in the water are much more expensive to mitigate than changes to the land and are potentially irreversible.[34]

(3) Biodiversity loss: This captures the impact of human industrial activity on regional flora and fauna as a result of changes to the land, water and air conditions.

(4) Human and social damage: This category encompasses the socioeconomic hardships that individuals and communities might face as a result of the development of new industries in their communities. Of particular concern is the loss of traditional ways of life, transmission of disease, and an increase in the prevalence of substance abuse. Indigenous Peoples in Suriname and Guyana tend to live in the interior of the countries, where logging and mining operations are concentrated. They risk displacement and a loss of their traditional way of life as a result of an increase of extractive activity.

(5) Climate change: Extractive industries are a major contributor to climate change, which has damaging implications across the globe but especially in

[34] *Ibid* at para 16.

regions that are dependent on natural resources. Developments to infrastructure leads to deforestation, and secondary processing is a source of carbon emissions.[35]

Each sector of the extractive industry in question (mining, forestry and logging, and oil and gas) share a set of common concerns related to environmental damage. Modern high-tech extractive projects require adequate infrastructure on a grand scale to operate efficiently.[36] Both the mining and logging industries create wide scale changes to the landscape that will ultimately have a negative impact on biodiversity.

Table 1 below is an aggregate of the primary environmental concerns across the major extractive industry sectors present in South America that we have identified in our research.

[35] Kristen Hund, Jolien Schure & Arend van der Goes "Extractive Industries in Forest Landscapes: Options for Synergy with REDD+ and the Development of Standards in the Democratic Republic of the Congo." (2017) 54 Resources Policy 97 at 97.
[36] *Ibid.*

AREA OF CONCERN	IMPACT
LAND	Line cutting during exploration[37]
	Road construction
	River landing construction
	Drilling programs
	Camp construction
	Storage
	Land clearing (soil erosion)
	Land disturbance
	Loss of or changes to tree species composition and diversity
	Canopy loss
	Fuel leakages
WATER & AIR	Tailings
	Chemical runoff
	Dust and pollutants in the air
BIODIVERSITY	Animals attracted to human generated waste
	Disruption of nesting areas
	Animals impacted by noise pollution
	Overhunting/overfishing to supply work camps
	Increase in human/animal conflicts
	Valuable/endangered plant and animal species threatened during mine construction
HUMAN	Increase in transmission of infectious diseases
	Loss of traditional cultural practices
	Long-term loss of traditional languages
	Substance abuse problems
	Displacement of Indigenous communities
CLIMATE CHANGE	Carbon emissions
	Deforestation

Table 1: External Costs of Extractive Industries by Area of Concern[38]

[37] According to the Ontario Ministry of Northern Development and Mines, "line cutting is often the first exploration work done on the claim. It involves cutting a main base line through the middle of the mining claim with a series of grid or wing lines running off the base line at 90-degree angles"; Ontario, Ministry of Northern Development, "Line Cutting" (article) online: < https://www.mndm.gov.on.ca/sites/default/files/line-cutting-activity-e.pdf>

[38] Canada, Her Majesty the Queen in Right of Canada, *A Mining Information Toolkit for Guyana* (Ottawa: Government of Canada, 2012)

4.1.1. Case Study: Anvil Range Mining Corporation Faro Yukon Mine Closure

Although situated in vastly different climates, Suriname and Guyana and the Yukon territories share the same environmental concerns. According to a report on the Faro Mine, “there’s an uneasy balance in the Yukon between protecting a pristine environment and encouraging resource development to create more jobs”.[39]

The Faro Mine was an open-pit zinc mine located in the Yukon Territories in the north of Canada. The last operator of the mine, Anvil Range Mining Corporation, abandoned the mine in 1998 following the collapse of global zinc prices and its subsequent bankruptcy. As a result, the cost of ensuring that the abandoned mine did not become an environmental disaster has fallen to the federal Government of Canada. Since 1998, the Canadian government has spent between 250 - 350 million CAD just to cover the cost of preventing further environmental damage, with an annual cost of 40 million CAD to run pumps to prevent tailings from seeping out of the site and into surrounding bodies of water and groundwater. At the earliest estimate, a clean-up process will not begin until 2022.

[39] Justin Giovannetti, “Two Decades after Closure of Yukon’s Faro Mine, a Cleanup Plan Takes Shape” *Globe & Mail* (2017) online: <https://www.theglobeandmail.com/news/national/two-decades-after-closure-of-yukons-faro-mine-a-cleanup-plan-takes-shape/article33484119/> [Giovanetti].

Because the clean-up project has yet to begin, it is impossible to assess what the final financial total will be. The Government of Canada has, however, indicated that the key features of the remediation of the site will include:

(1) Upgrading dams to ensure tailings stay in place;

(2) Re-sloping waste rock piles;

(3) Installing engineered soil covers over tailings and waste rock;

(4) Upgrading stream diversions; and

(5) Upgrading the contaminated water collection and treatment system.

Environmental experts have estimated that the clean-up will take approximately 15 years for the most intensive work, followed by a monitoring period of 20 years, all of which the Government of Canada and the Yukon must pay for. At present, the government has estimated that the cost of clean-up for the project will reach at least C$1 billion.

4.1.2. Case Study: Samarco Bento Rodrigues Dam Failure

In 2015, the Fundão Dam in Brazil collapsed, causing 43 million cubic metres of iron ore tailings to rush out into the water and onto surrounding land.[40] The dam was meant to contain the iron ore tailings generated by a Samarco Minerçao S/A mine, itself a subsidiary of Vale S/A and BHP Billiton.[41] The

[40] F F Carmo, “Fundão Tailings Dam Failures: the Environment Tragedy of the Largest Technological Disaster of Brazilian mining in Global Context” (2017) 15 Perspectives in Ecology and Conservation 145 at 145 [Carmo].
[41] Carmo, *supra* note 40 at 145.

collapse resulted in the deaths of 19 people.[42] Over a year later, 668 kilometres of watercourse from the Doce River Basin to the Atlantic Ocean was still contaminated.[43] Additionally, 806 buildings in the area surrounding the mine were hit by the contaminated tailings and of those, 218 were destroyed.[44]

The contamination has a disastrous impact on the biodiversity in the region, in particular, on the aquaculture in the Doce River. The Doce River has some of the most diverse aquaculture populations on the planet. Biologists estimate that there are many species in the River that are still undiscovered. According to Geraldo Wilson Fernandes et al, "entire fish populations died immediately after the discharges when the slurry buried them or clogged their gills."[45] Because there are potentially hundreds of species that have not yet been identified, it will likely be impossible to reach an accurate estimate of the biodiversity loss. Furthermore, because the collapse happened in 2015, the long-term impacts of the disaster are unknown. At present, the Brazilian government estimates that it will cost 20.2 billion reals (over US$ 6 billion) to restore the threatened Brazilian Atlantic rainforest ecosystems.[46]

---

[42] *Ibid* at 146.
[43] *Ibid.*
[44] *Ibid* at 147.
[45] Geralso Winson Fernandes et al, "Deep Into the Mud: Ecological and Socio-Economic Impacts of the Dam Breach in Mariana, Brazil" (2016) 14 Brazilian Journal of Nature Conservation 35 at 38 [Fernandes et al].
[46] *Ibid* at 36; Jenny Wiggins & Steve Yolen, "BHP, Vale Must Pay for Burst Dam Environmental Damage, Brazilian Court Rules" (20 December 2015) *The Sydney Morning Herald* online: < https://www.smh.com.au/business/bhp-vale-must-pay-for-burst-dam-environmental-damage-brazilian-court-rules-20151220-glrr2s.html> [Wiggins & Yolen].

Beyond the cost to the ecosystems, there was a real human cost as well. Nineteen people were killed by the slurry of tailings as they spilled out of the reservoir.[47] Furthermore, the aquaculture in the Doce River is a vital source of food and commerce for the local residents.[48] Most estimates of the environmental and ecological costs of the disaster fail to account for the loss of these resources for the local people.

Although there is an ongoing criminal case against several of BHP and Vale's executives, and Brazil has made a civil claim against them, most analysts expect that the final total BHP and Vale will pay will fall far short of the estimated 6 billion USD required for clean-up.[49]

[47] Carmo, *supra* note 41 at 146.
[48] Wiggins & Yolen, *supra* note 46.
[49] Peter Ker, "BHP Billiton One Year on from the Samarco Fundão Dam Disaster," (3 November 2016) *Financial Review* online: <http://www.afr.com/business/mining/iron-ore/bhp-billiton-one-year-on-from-the-samarco-fundo-dam-disaster-20161102-gsgpxy> [Ker].

5. Identifying Essential Elements in Regulatory and Contractual Frameworks, and the Costs of Implementation

As Guyana and Suriname continue to attract investors from extractive sectors, their ability to prevent biodiversity loss and environmental damage depends largely on the regulatory and contractual frameworks that they put in place. Regulatory frameworks include national legislation enforceable by the government within its jurisdiction, while contractual frameworks are the specific bilateral agreements signed between the government and the international investor. In Guyana's recent partnerships with international petroleum companies, its main regulatory framework is the *Environmental Protection Act*, while an example of a contractual framework is the *Petroleum Agreement* concluded with Esso, CNOOC Nexen, and Hess.[50] Suriname, on the other hand, is only beginning to create its first regulatory framework, as it is currently drafting an *Environmental Legislation* while it has already concluded several contractual frameworks, such as the *Mineral Agreement* signed with Suriname Gold Company LLC (Surgold), a wholly-owned subsidiary of NewMont Mining Corp registered in Delaware.[51] Both regulatory and contractual frameworks

---

[50] Guyana, *Environmental Protection Act*, Act No. 11 of 1996 [*Environmental Protection Act*]; *The Petroleum Agreement between the Government of the Cooperative Republic of Guyana and ESSO Exploration and Production of Guyana Limited, CNOOC Nexen Petroleum Guyana Limited, Hess Guyana Exploration Limited,* June 27, 2016 [*The Petroleum Agreement*]. All legislation and agreements are publically accessible.

[51] Nationaal Instituut voor Milieu en Ontwikkeling in Suriname (NIMOS) Office of Legal Environmental Services, Milieuwet: Wet houdende regels voor duurzaam milieumanagement (Translated into English by online translator), accessed June 12, 2017; US Securities and Exchange Commission, *the Mineral Agreement*: https://www.sec.gov/Archives/edgar/data/1164727/000119312514285190/d755143dex102.htm. *The Mineral Agreement* is available publically while the draft *Environmental Legislation* was provided by Conservation International.

contain principles, requirements, and elements which seek to reduce environmental damage overall, but also externalize some costs, resulting in the types of hidden subsidies outlined in section 3 above.

This section analyzes the existing and developing regulatory and contractual frameworks in Guyana and Suriname, and involves a two-step analysis: first, we identify a list of “essential elements”, which include principles and requirements in environmental legislation and investment agreements which are necessary to ensure effective environmental protection; and second, we analyse the extent to which these “essential elements” are present in the regulatory and contractual framework for the extractive industries in Suriname and Guyana.

5.1. Best Practices: Essential Cost-Reducing Elements

International treaties, academic scholarship and non-government organizations have identified several essential elements in regulatory and contractual frameworks which reduce environmental damage. This section draws on the major international environmental texts, such as the *Convention on Biodiversity* and the *Rio Declaration*, as well as a literature survey of environmental law concepts. It is important to note that while these elements are considered critical, they are by no means exhaustive. In addition, each element is the

subject of a vast and sometimes contradictory body of research, and as such, this section only offers an exploratory analysis of these principles.

After identifying nine essential elements, this section considers the costs of implementing these elements. Governments will usually be responsible for paying any costs which are not explicitly allocated to the investor *ex ante*. The cost of implementing these elements must be acknowledged early on and be borne by the responsible investor, lest they become hidden subsidies paid by the government for the benefit of the investor. Furthermore, by considering these costs early on, governments can then control and predict the overall costs of any investment activity and engage in an informed cost-benefit calculation that weighs the economic benefits of an investment against the environmental damage that is likely to materialize in the long run.

The elements can be organized into three ways of adressing environmental damage: prevention, mitigation, and remediation

5.1.1. Prevention

Governments can guard against paying the costs of extractive industries by ensuring that unplanned environmental damage does not occur in the first place. Elements in environmental legislation and investment agreements which will prevent environmental harm include:

(1) Environmental impact assessment:

The International Association for Impact Assessment (IAIA) defines environmental impact assessments as "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made." [52] Environmental impact assessments guard against environmental damage by requiring investment projects to meet certain standards and conditions before they are given approval to proceed. To date, environmental impact assessments have been implemented in more than 100 countries and are widely recognized as an essential tool in any environmental protection framework.[53] Principle 17 of the Rio Declaration holds that "environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority".

While the exact structure of environmental impact assessments may differ from country to country, they all share common costs in implementation, part of which must be borne by the government and the other by the investor. The government must create administrative agencies, train practitioners, create and publish guidance on good EIA practice, and fund

---

[52] International Association for Impact Assessment, *Principles of Environmental Impact Assessment Best Practice*, 1999: online: <http://www.iaia.org/publicdocuments/special-publications/Principles%20of%20IA_web.pdf>.
[53] CM Wood, *Environmental impact assessment: a comparative review*, 2nd ed. (Harlow: Prentice Hall, 2003) [Wood].

research.[54] However, the hope is that these costs will outweigh the costs of repairing and compensating for environment disaster after it happens. Furthermore, by establishing an environmental impact assessment requirement, the investor bears the costs and responsibilities of ensuring their activities are modified to meet the standards imposed by the national authority in order to obtain a positive assessment. The costs of preventing environmental damage through an EIA are thus transferred in part from the government to the investor.

(2) Monitoring mechanism:

According to Article 7 of the Convention on Biodiversity, each Contracting Party has the responsibility to "[m]onitor, through sampling and other techniques, the components of biological diversity identified…paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for substantial use". Monitoring mechanisms can be implemented throughout the course of an extractive activity, in order to make sure that the risk of environmental damage does not exceed an expected amount.

Environmental monitoring can be conducted by the state, by employing scientists, non-governmental organizations, and creating software monitoring programs.[55] The responsibility for environmental monitoring can

[54] Stephen Jay et al, "Environmental impact assessment: retrospect and prospect." (2007) 27 Environmental Impact Assessment Review at 288 [Jay et al].
[55] Janick Artiola et al, *Environmental Monitoring and Characterization* (NP: Elsevier Science & Technology Books, 2004) [Artiola].

also be imposed on the investor, by requiring it to maintain an environmental management system. For instance, a Model Agreement on Investment for Sustainable Development produced by the International Institute for Sustainable Development suggests the following provision to ensure that investors monitor and management environmental risks throughout the course of a project:

> Article 14: Post-establishment obligations (A) Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies with over [250][500] employees, or in areas of resource exploitation or high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard. Emergency response and decommissioning plans shall be included in the environmental management system process.

Further research is required to determine the effectiveness of state or civil society-managed monitoring systems versus monitoring systems maintained by the investor. The costs of environmental monitoring are similar to those of creating an environmental impact assessment: capacity-building, training, and day-to-day operations. Regardless, if governments and investors are alerted to possible environmental damage before it happens, the government can more likely pass on the costs of the environmental damage to the investor through other elements discussed later in this section, such as the Polluter Pays principle.

(3) Precautionary principle:

Principle 15 of the Rio Declaration holds that "[i]n order to protect the environment…where there are threats of serious or irreversible damage,

lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". The Precautionary principle supports actions being taken even when cause and effect relationships are not fully established scientifically, as it recognizes that costs arising from unknown environmental degradation will potentially be greater.

One way to implement the precautionary principle is to impose an obligation on the investor to prepare an environmental management plan anticipating all possible environmental and social damage, and undertaking to perform certain actions to prevent, mitigate, or minimize these damages in advance. While the precautionary principle has been recognized as an important principle, and many regulatory and contractual frameworks are quick to include a provision affirming the principle, there remains a lack of clarity on what specific measures the precautionary principle actually mandates.[56]

This section will assess which regulatory and contractual frameworks explicitly affirm the precautionary principle, as it remains an additional cost-controlling legal mechanism which can reduce the unknown costs of environmental damage emerging in the future. More research is needed in this area to determine which other practical recommendations can be implemented on the basis of the Precautionary principle.

[56] Stephen Michael Dark & Shelley Burgin. "An examination of the Efficacy of the Precautionary Principle as a Robust Environmental Planning and Management Protocol." (2017) 60:12 Journal of Environmental Planning and Management.

5.1.2. Mitigation

Governments can also mitigate against long-term or incremental costs by imposing certain procedural and substantive obligations on investors. If investors are aware of these requirements, they must pay the cost of maintaining practices which reduce the costs incurred by the government in the long run. Some of these mitigating elements include:

(4) Transparency and information sharing:

Academic scholars and international treaties have recognized the importance of transparency in environmental decision-making. Principle 10 of the Rio Declaration holds that "[a]t the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes". A transparent process ensures that all obligations and decisions in environmental assessment and monitoring are clearly defined and communicated, as well as holds decision-makers accountable to civil society and stakeholders.[57] Transparency also ensures that participants and stakeholders have faith in outcomes, and maintain the integrity and fairness of the environmental protection system.[58] Finally, transparency

[57] Angus Morrison-Saunders & John Bailey, "Transparency in environmental impact assessment decision-making: recent developments in Western Australia." (2000) 18:4 Impact Assessment and Project Appraisal at 260 [Morrison-Saunders & Bailey].
[58] *Ibid*.

leads to information-sharing, which encourages participants to compare different practices and contribute towards improving environmental regulations overall.

The costs of ensuring transparency and information sharing are mostly administrative costs of publishing records and information related to the project, and creating and maintaining a forum whereby this information can be accessed by the public. These costs can be easily passed to investors by requiring that they are the ones responsible to keep and publish information. In turn, the government, citizens and stakeholders benefit by being able to monitor and reflect on the practices of the extractive activity, and escape the long-term consequences of potential corruption, secrecy, and environmental sluggishness.

(5) Independent institutions and agencies:

Since there is a possibility that corruption and bribe-taking may occur in large investment projects around environmental standards, decision-makers involved at each stage of an environmental administrative process must operate at arm's length from the investor or political and personal interests. The danger of allowing overlapping interests or potential opportunities for corruption is obvious: the entire environmental assessment or monitoring system could be compromised and rendered pointless. Environmental risks will not be fairly assessed, and the likelihood of environmental damage will be greater. In fact, investors will not assume the

full costs of ensuring that they meet pre-determined environmental standards.

The International Institute for Sustainable Development Model Agreement suggests the following wording for provisions which could mitigate the risk of corruption:[59]

> Investors and their investments shall not, prior to the establishment of an investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the host state, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment.
>
> …
>
> All host states shall ensure that (A) the offering, solicitation or acceptance of an offer, promise or gift of any pecuniary or other nature, whether directly or through intermediaries, to any public official of the host state, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment; and (B) any acts complicit in any act described in Paragraph (A), including incitement, aiding and abetting, conspiracy to commit or authorization of such acts; shall be made criminal offences in the host state and subject to appropriate criminal enforcement and sanctions. Host states shall make every effort to prosecute such activities in accordance with domestic law.

The costs of ensuring independent institutions and agencies can vary. The government can bear the costs of monitoring the actions of various government decision-makers and punishing those that act on perverse interests. The investor can be held liable for any actions by its agents to compromise the integrity of the environmental management process. More research is needed to discover the best method of ensuring independence, but it is certain that protections against corruption and bribe-taking mitigates

[59] *IISD* Model International Agreement on Investment for Sustainable Development, at 10.

against environmental and political disaster later arising from corrupt procedures.

(6) Third-party stakeholder participation:

Investment activities and environmental planning are increasingly important decisions which impact various groups in society. As a result, civil society and minority groups should have a chance to participate in decision-making on activities impacting the environment, as well as administrative and judicial proceedings against any polluters. In particular, principle 22 of the Rio Declaration emphasizes the importance of including indigenous groups, stating that "Indigenous peoples and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices". Third-party stakeholder participation also leads to different perspectives being considered in environmental decision-making, an increased acceptance of decisions, and local empowerment and learning.[60] Overall, the likelihood of environmental damage is reduced.

The Model Mining Agreement provides an example of implementing a "Community Development Agreement" within an investment agreement.[61] It reads:

> **22.1 Community Development Agreement**

[60] Lars Samuelsson & Lucy Rist, "Stakeholder Participation as a Means to Morally Justify Environmental Decisions" (2016) 19:1 Ethics, Policy & Environment at 78.
[61] MMDA 1.0 *Model Mine Development Agreement*, at 109.

> Within thirty (30) days after the effective date of this Agreement, the Company shall enter into Consultation and negotiations with the objective of concluding one or more community development agreements as described in this Section or agreements with communities impacted by the project, to promote sustainable development and enhance the general welfare and quality of life of inhabitants, as well as to recognize and respect the rights, customs, traditions and religion of the affected persons ("Community Development Agreement"). It is the objective of each of the parties hereto that the Mining operations shall be carried out in a manner that is consistent with the continuing economic and social viability of centers of population that have formed and which may form as a result of such operations during the term of this Agreement. Upon request of the State at any time the Company shall consult with the State and with the community mutually to establish plans and programs for the implementation of this objective and thereafter the Company shall cooperate with the State with regards to its effort concerning the realization of such plans and programs.
>
> Each Community Development Agreement shall be subject to Applicable law, and shall;
>
> 1. (a) Address both how local communities can take advantage of the development opportunities presented by the project, and how the project's adverse impacts can be mitigated;
> 2. (b) Serve as the agreement that specifies how the Company's obligation to spend funds for local development shall be met;
> 3. (c) Address environmental, social, and economic conditions during mining and after mine closure, and the eventual transition from a mining economy to a post-mining economy in the project Area as may be agreed upon among the parties to such Community Development Agreement

By promoting civil society engagement in environmental decision-making, the government ensures that all social and environmental perspectives are considered concurrently with negotiations with the extractive industry. While implementing third-party stakeholder participation will result in a lengthier and costlier decision-making process, this element minimizes potential conflict or unconsidered harms arising in the future. Investors can also be made liable for consulting with different groups and implementing their

suggestions, and as a result can share the costs of including extra players in the negotiations regarding their investment.

(7) Regulatory Flexibility and Autonomy

Investors understandably want to predict and manage the risks of their investment in a foreign country, but over-management can lead to negative consequences for the environment of the host country. To ensure that it can respond to changing environmental conditions and concerns, governments must preserve their right to enact environmental regulations according to their usual political process and have it impact the activities of the investor even after the contract is signed.

The cost to the investor in agreeing to national regulatory autonomy is high as it requires accepting a certain amount of unpredictability and risk. However, the cost to the country if it is unable to create environmental legislation responding to a pressing new problem is just as high – environmental disaster could ensue.

(8) Incentives for corporate social responsibility:

While debates around corporate social responsibility require much more research and discussion than this section provides, within international investment agreements, any activity by extractive industries promoting or benefiting conservation should be encouraged. Under Article 11 of the Convention on Biodiversity, “[e]ach Contracting Party shall, as far as possible and as appropriate, adopt economically and socially sound

measures that act as incentives for the conservation and sustainable use of components of biological diversity".

As the national government continues to develop a relationship with extractive industries, it has the opportunity to provide incentives for the extractive industry to re-invest in national environmental or social projects. Incentives can come at a short-term cost to the government, such as monetary or future opportunity incentives, in the hopes that the corporate social responsibility project will yield greater benefits to the country in the long run. Incentives can also be imposed as a public requirement on the investor so that not undertaking a social project would affect public perception of the investor and loss of future opportunity to invest in the country. Regardless, the investor becomes responsible for assuming the long-term costs of improving the environment in some way.

5.1.3. Remediation

Finally, elements can be included in environmental legislation and investment agreements to remedy environmental damage. Governments can then protect themselves against the possibility of assuming direct environmental costs by controlling how environmental pollution is managed after it occurs. Some of these elements include:

(9) Polluter pays:

Principle 16 of the Rio Declaration holds that “the polluter should, in principle, bear the cost of pollution”. Simply put, the polluter pays principle recognizes that the polluter should pay the full costs of repairing any environmental damage resulting from its activity, including any costs of mitigation, prevention and control in which it can play a part. This is perhaps the principle underlying the implementation of every cost-controlling element outlined in this section, but nonetheless, it is imperative that national regulations and contract provisions clearly state that polluting investors will be responsible for the full cost of environmental damage that they may cause. While it seems like a simple solution, solidifying an agreement that polluters pay is the most direct way of ensuring that governments pass on the environmental costs of extractive activity to the polluter.

(10) Compensation for victims of environmental damage:

Similar to the polluter pays principle, regulations and concession agreements must include a provision guaranteeing that the investor will pay compensation for harm to persons, property and wildlife. Principle 13 of the Rio Declaration holds that “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage”. Without this simple yet explicit provision, governments or victims themselves may end up paying for injuries which were not caused by their own fault. In particular, if the polluter pays principle is tied to compensation for victims, polluters must directly compensate affected individuals for any damage they suffer.

5.2. Existing Legislation and Agreements in Guyana and Suriname

Table 2: Legislative and Concession Agreement Comparison below outlines the presence or absence of the ten essential elements discussed in the previous section in Guyana's *Environmental Protection Act,* the *Petroleum Agreement*, Suriname's Draft *Environmental Act*, and the *Mineral Agreement*.

ESSENTIAL ELEMENT	GUYANA'S *ENVIRONMENTAL PROTECTION ACT*	THE PETROLEUM AGREEMENT BETWEEN GUYANA, ESSO, ET AL	SURINAME'S DRAFT *ENVIRONMENTAL ACT*	THE MINERAL AGREEMENT BETWEEN SURINAME AND SURGOLD
Environmental impact assessment	X	X	X	X
Monitoring mechanisms	X		X	
Precautionary principle	X		X	
Transparency and information sharing	X		X	
Independent institutions and agencies	X			
Third-party stakeholder participation	X			
Regulatory Flexibility and Autonomy	N/A		N/A	
Incentives for corporate social responsibility		X		X
Polluter pays	X		X	
Compensation for victims	X			

Table 2: Legislative and Concession Agreement Comparison

5.2.1. Discussion: Guyana

In Guyana's new petroleum explorations, two main legal texts manage environmental risks: the *Environmental Protection Act* and the *Petroleum*

Agreement. There are notable differences between the environmental standards imposed in each.

Both the *Environmental Protection Act* and the *Petroleum Agreement* require investors to obtain a positive environmental impact assessment and conform their practices with the standards set by the Environmental Protection Agency.[62] The investor must bear the costs of this process, including submitting the application fee and a summary of the project with specific information. In fact, under the *Environmental Protection* Act, "all expenses of the environmental impact assessment…shall be borne by the developer."[63]

The *Environmental Protection Act* further contains detailed sections ensuring transparency and information sharing throughout the environmental impact assessment process. For instance, the Environmental Protection Agency is required to publish notice of any development project in at least one daily newspaper at the cost of the developer and make available to the public the project summary before any development project can begin to be assessed.[64] Furthermore, the environmental impact assessment (EIA) is mandated to be a public document which will be available five years after the end of the project.[65] The developer and individual conducting the EIA must also provide copies of

---

[62] *Environmental Protection Act*, *supra* note 50 at Part IV; *Petroleum Agreement*, *supra* note 50 at art 28.1.
[63] *Environmental Protection Act*, *ibid* at s 11(12).
[64] *Ibid* at s 11(6).
[65] *Environmental Protection Act*, *supra* note 50 at s 11(11).

information used in the course of the assessment to the public upon request.[66] All these measures ensure that the development project under assessment and the Agency decision is not kept confidential, so that both can be held accountable by the public and interested parties. However, most elements of transparency and information sharing in the *Environmental Protection Act* are confined to the impact assessment process, and it is uncertain whether information arising throughout the course of the project would be subject to the same degree of transparency. Furthermore, while the developer must pay the costs of the initial newspaper publication, all other "reasonable" costs of photocopying documents must be paid for by the requesting interested party. This could be a barrier to accessing the information for many people, and thus compromises the strength of these transparency and information-sharing sections.

The *Environmental Protection Act* also contains numerous sections encouraging third-party stakeholder participation. After notice of the project is published in the daily news, the public has twenty-eight days to make written submissions to the Environmental Protection Agency which will be considered by the Agency in approving or rejecting a project.[67] The developer and the person conducting the EIA are also required to consult "members of the public, interested bodies and organizations" during the course of the EIA, and the Environmental Assessment Board may conduct public hearings to recommend

[66] *Ibid*, s 11(9)(b).
[67] *Environmental Protection Act*, *supra* note 50, s 11(6).

to the Agency whether a project should be accepted or rejected.[68] These sections ensure that interested parties are able to participate in environmental decision-making around a project – though it is uncertain to what degree meaningful consultation takes place in practice. Furthermore, the costs of facilitation and consultation are borne by both the Agency and the investor, which indicates that the government must in part bear the costs of encouraging third-party stakeholder participation arising from an investment project.

By contrast to Guyana's national legislation, the *Petroleum Agreement* requires investors to comply with little other environmental regulatory processes beyond an impact assessment. There is no additional requirement of any mechanisms monitoring environmental damage, other than that "the Contractor shall notify the Minister…in the event of any emergency or accident arising from the Petroleum Operation".[69] There is no element of transparency and information-sharing, nor of third-party stakeholder participation. As such, the risk of environmental damages remains mostly unmitigated, and the investor does not have to pay for the costs of implementing these additional prevention and mitigation elements. Furthermore, the Guyanese government will most likely bear the costs of any environmental pollution arising from incidents which could have been prevented or reduced beforehand.

[68] *Ibid*, s 11(9)(a).
[69] *Petroleum Agreement*, *supra* note 50 at art 28.5.

Most troubling in the *Petroleum Agreement*, there is no element requiring the polluter to pay for the costs nor compensate victims of environmental damage. Article 28 only requires that "the Contractor shall take all reasonable measures in accordance with good international petroleum industry practice to remedy the failure and the effects thereof and shall where pollution occurs treat or disperse it in an environmentally friendly manner". By requiring only that the investor meets "good international petroleum industry practice" rather than the strict principle that the polluter should always pay, it is likely that they will evade some of the costs of environmental damage. Furthermore, while the *Environmental Protection Act* endorses the precautionary principle as well as the polluter pays principle, the *Petroleum Agreement* only requires that "the Contractor shall take necessary and adequate precautions, in accordance with good international petroleum industry practice, against pollution and for the protection of the environment and living resources in the environment".[70] The standard that the investor has to meet is thus "good international petroleum industry practice", rather than the strict principle mandated by the *Rio Declaration* and Guyana's *Environmental Protection Act*. The *Petroleum Agreement* thus fails to internalize the costs of extractive activities that it facilitates.

Finally, the *Petroleum Agreement* includes a "Stability of Agreement" Clause which could potentially deter environmental protection. Under this Article, if the Guyanese government enacts any new legislation which adversely affects the economic position of the investors, the government has to compensate the

[70] *Petroleum Agreement*, *supra* note 50 at art 28.3.

investor for any economic losses that are due to the new legislation. This clause creates two harmful effects: first, it disincentivizes the government from enacting new legislation, such as environmental legislation, because it will be unwilling to negatively affect the investors' economic position under the Agreement; second, it creates an obligation that the government, rather than the investor, will have to bear the costs of any actions increasing environmental protection and imposing additional standards on the investment project. Not only does this clause increase the risk of environmental harm in the future, it also requires the government to internalize the costs of any elements seeking to reduce environmental harm. For instance, the Model Mining Agreement contains examples of alternatives to this strict stabilization clause. One example it suggests is:

> 10.2 Stabilization
>
> (a) In the event of changes in any Law, the provisions of which are more favorable to Licensee, then such provisions shall apply to the Licensee if Licensee so requests.
>
> (b) In the event there occurs any change in the legislation of the Government or local legislation (including provisions relating to imposts, duties, fees, charges, penalties, and tax related legislation) after the date of this Agreement, and if in Licensee's sole and good faith opinion such change would have the effect of divesting, decreasing, or in any way limiting any rights or benefits accruing to Licensee under this Agreement or under current legislation, then the Parties shall, in good faith, negotiate to modify this Agreement so as to restore Licensee's economic rights and benefits to a level equivalent to what they would have been if such change had not occurred.

Another example is:

> Rights of Company Upon Expropriation.
>
> If the STATE or any agency, department, branch or subdivision thereof, any provincial or local government or any national, provincial or local quasi- governmental body causes an Expropriation of the Mine, or any portion thereof, the STATE shall pay to Company compensation that is fair, just and appropriate in a manner that is prompt, adequate and effective. Any such Expropriation shall be for a public purpose,

> nondiscriminatory and in accordance with Law. The compensation to be paid by the STATE pursuant to this Section 7.14 shall be equal to the fair value of the Mine or the portion thereof subject to Expropriation, based upon the most recent annual and life-of-mine plans developed by Company prior to the
>
> Expropriation and all other relevant circumstances, including the investment made by Company in the Mine, any penalties that may be incurred by Company as a result of such Expropriation, and additional resources not included in the most recent life-of-mine plan.

The first example allows the investor and the government to negotiate to modify the Agreement and agree on the compensation to be paid to the investor. The second example allows expropriation subject to the requirements of public purpose, non-discrimination, and legality, allowing the government more flexibility in enacting its own national legislation. However, more research is needed to determine the best approach to ensuring regulatory flexibility and autonomy – and in the absence of more research – it is advisable that governments negotiate completely out of these stabilization clauses.

5.2.2. Suriname: Discussion

In Suriname, the draft *Environmental Legislation* is the first regulatory framework established to manage environmental pollution. Suriname has signed investment treaties for mining and forestry with international investors, most of which remain confidential, but the *Mineral Agreement* signed with Surgold will be analyzed as an example of a contractual framework.

The draft *Environmental Legislation* contains several sections ensuring transparency and information-sharing, as well as creating monitoring mechanisms. For instance, according to Article 26, the President of Suriname must publish the National Environmental Policy in the National Gazette so that the public can be made aware of its contents.[71] The Environmental Authority must also maintain a national registry of environmentally contaminated areas, as well as keep public records of environmental permits and exemptions.[72] The Environmental Authority is also required to "monitor compliance with and implementation of the provisions of the Environmental Legislation" to prevent pollution.[73] Yet while these sections represent great first steps to creating accountability and monitoring practices in Suriname, there is no requirement that the costs of implementing these practices be borne by any project developer or investor changing the state of the environment. As a result, while the government is reducing the risk of environment harm in the future, it still

[71] Draft *Environmental Legislation*, *supra* note 51 at art 26.
[72] *Ibid*, at art 36.
[73] *Ibid*, at art 3.

provides a hidden subsidy to the investor in implementing these mitigating elements.

By contrast, in the *Mineral Agreement* signed with Surgold, there is no requirement of transparency nor monitoring procedures, undertaken by either the state or the investor. While Surgold "shall use reasonable efforts to minimize the negative impact of Operations on human settlements, forest, land, water quality and local flora and fauna",[74] there is no specific plan established in the Agreement for this purpose, and as such the "reasonable efforts" clause remains vague and difficult to enforce. The risk of environmental harm from mining activity remains largely unmitigated, and any harm may be very costly for the government.

The *Mineral Agreement*, however, does mandate that the investor procure and follow an Environmental and Social Impact Assessment (ESIA).[75] Presumably, Surgold is responsible for the costs of ESIA procurement and implementation, though the Agreement lacks detail on how the assessment will be paid for and enforced.

Similarly, under the draft *Environmental Legislation*, two separate environmental impact assessment procedures are created: one aimed at private projects (MEA), and another at government projects or policies (SEA).

---

[74] The *Mineral Agreement*, *supra* note 51 at art 19.2.
[75] *Ibid* at art 19.3.

The details of these procedures are not explicitly outlined in the legislation, and it is unclear, for instance, what information would be contained in the impact assessment or what requirements would have to be met by project developers to obtain a successful assessment. More regulations should be drafted in the *Environmental Legislation*, so that the costs of preventing environmental harm through an MEA can be fully borne by project developers and investors as they adapt their activity and undertake administrative procedures to meet the assessment criteria.

Unfortunately, Suriname's legislation does not contain any principle to the effect that victims of environmental damage must be compensated, nor that incentives should be provided for conservation efforts. Third-parties are also guaranteed very little participatory rights in environmental decision-making; Article 47 section 1 merely provides that "whoever's interests are directly affected by a decision made pursuant to this Act may submit written objection to the Director General of the Environmental Authority". Without these explicit elements, not only will the government assume the costs of extractive activities, rather than the investor, but the costs will likely be greater in the long run as the risk of environmental damage increases. However, the most troubling characteristic of Suriname's draft legislation is the lack of protection for independent institutions and agencies. No elements were identified in the legislation in this respect, and, in fact, most of the powers to appoint members of the Environmental Authority, disseminate environmental information to the public, and restrict information in environmental assessments on the basis of

"national security" vests in the President.[76] In particular, the Environmental Authority is to be funded from a variety of sources, including "national and international partners" which are never clearly defined. [77] Since the Environmental Authority Board is responsible for advising the President "on the environment in all matters", it is critical that the Environmental Authority is able to function independently from political or personal pressures.[78] In general, the draft legislation lacks detailed provisions that would ensure that it will be effective in preventing environmental degradation, as well as that the costs created by polluters in trying to prevent, mitigate, and remedy the degradation will be borne by the polluters themselves.

Furthermore, similar to Guyana's *Petroleum Agreement*, the *Mineral Agreement* contains a stabilization clause. Under Article 15.5, if the government of Suriname enacts new legislation which has a "negative effect" on Surgold, by preventing the exercise of any material right or materially increasing the burden of performance of any obligation, the government is required to restore Surgold to the position they would have been in if the new law had not been enacted.[79] However, under Article 15.5.4, the new legislation can be justified if it is for "the protection of the health and safety of the population of the Republic of Suriname" or "the protection of the human and natural environment of the Republic of Suriname".[80] While more research is needed to determine the

[76] The *Mineral Agreement*, *supra* note 51 at arts 6, 26, 34.
[77] *Ibid*, at art 15
[78] *Ibid*, at art 14.1
[79] *Ibid*, at art 15.5
[80] The *Mineral Agreement*, *supra* note 51 at art 15.5.4.

effectiveness of these exceptions in practice, these clauses give slightly more autonomy and flexibility to the government than the stabilization clause contained in the *Petroleum Agreement* concluded by Guyana. However, it is still recommended that the governments of Guyana and Suriname should avoid the inclusion of stabilization clauses in future agreements.

Perhaps the only robust element in the *Mineral Agreement* is the incentive established for corporate social responsibility. Under Article 19.5, after the Merian Right of Exploitation is granted, Surgold will establish and wholly fund a Community Development Fund "with the goal of funding projects dedicated to the sustainable development of the local community."[81] Third-party stakeholder participation is guaranteed, as the board of directors is composed of representatives from Suriname, Surgold, as well as an Indigenous Community. Transparency and monitoring of the Fund are ensured as the amount of funding and the implementation of the Fund will be published on the Project website. More research is needed to examine the success of this initiative in practice, but based on the text of the *Mineral Agreement*, Article 19.5 contains several critical elements aimed at mitigating environmental and social harm in the long run, as well as ensuring that the investor bears the entire cost of this project.

[81] *Ibid*, at art 19.5.

6. Enforcement and Dispute Resolution Mechanisms

The preceding section of this memorandum laid out considerations for designing and improving the regulatory and legislative frameworks for the extractive industries. This section considers the possible enforcement mechanisms available under legislation, contractual agreements, and international agreements to remedy any environmental damage.

Different enforcement options can serve different functions. Under legislative provisions, there may be the possibility of injunctive or preventative enforcement, which aims to stop environmental damage before it occurs or as it starts to occur, or the requirement of upfront bonds as a security. Both legislative and contractual dispute resolution can provide for compensation after damage has occurred through different mechanisms – one or both may be appropriate depending on the circumstances. However, these may not always be able to resolve every problem: for example, an environmental disaster may cause a company to go bankrupt, leaving a government with little opportunity to recover its remediation costs either contractually or through legislative enforcement. This was the case with the Faro Mine in the Yukon in Canada, outlined in the case study above.

6.1. Domestic Enforcement Regimes

Domestic enforcement regimes are at the core of each jurisdiction's environmental protection regime. They provide the mechanisms by which a

jurisdiction can demand accountability from corporations or individuals for the breach of their obligations under domestic legislation and regulations. In other words, they set out the remedies available to governments when companies breach their environmental obligations.

In Guyana, the Fifth Schedule of the *Environmental Protection Act* sets out an increasing scale of fines and imprisonment as penalties of up to two million dollars and five years' imprisonment, with the amounts doubling for any offender that is a body corporate.[82] These penalties may be imposed for, among other things, undertaking an activity that "causes or is likely to cause pollution of the environment unless the person takes all reasonable and practicable measures to prevent or minimize any resulting adverse effect", or for discharging contaminants above prescribed regulatory levels.[83] As part of an environmental authorization, the individual receiving the authorization may be obliged to provide financial assistance to Guyana for, among other things, "measures appropriate to prevent adverse effects upon and following the cessation or closing of the works".[84] In addition to fines and imprisonment under the Fifth Schedule, the Act also provides for the possibility of injunctions if a person has, is likely to, or is about to commit an offence under the Act.[85] Finally, two provisions of the legislation deal with orders to remedy environmental harms. Under certain conditions, the Environmental Protection Agency may issue an enforcement order (section 26) or a prohibition order (section 27), both

---

[82] *Environmental Protection Act*, *supra* note 50 Fifth Schedule.
[83] *Ibid*, at s 19.
[84] *Ibid*, at s 31(1)(c).
[85] *Ibid*, at s 47.

of which may specify remedies to correct and ameliorate any possible contravention of the Act.[86] Finally, in addition to the penalties laid out in the Fifth Schedule, section 43 allows for courts to issue additional orders. These orders may include taking action to remedy or avoid environmental harm from the offence, posting a bond to ensure compliance with the order, and compensating the Environmental Protection Agency for actions the Agency undertook as a result of the offence.[87]

Suriname's draft legislation also provides for criminal offences as a result of environmental damage, and for remedies. Article 48 sets out a list of environmental offences; the following sections provide for sanctions related to breaches of the legislation and regulations, including fines and imprisonment.[88] Notably, from the perspective of environmental conservation, Article 50(1)(g) provides for the penalty of reimbursement of any repair or cleaning activities that the Environmental Authority has undertaken to guarantee sustainable development.[89] The additional measures that may be imposed under Article 54 also include the imposition of an obligation to pay a security deposit in the event of an environmental crime.[90] Article 54 also applies, *mutatis mutandis*, to the provisional measures orders permitted under Articles 72–73. The legislation also provides for remedying pollution that had already taken place before the law comes into force. Article 39 gives the Environmental Authority the power to

[86] *Environmental Protection Act*, *supra* note 50, Fifth Schedule, at ss 26-27.
[87] *Ibid*, s 43.
[88] Draft *Environment Legislation*, *supra* note 51 at arts 48-50.
[89] *Ibid*, art 50(1)(g).
[90] *Ibid*, art 54.

compel the entity responsible for historical pollution to clean or remedy the environment to standards determined by the authority.[91] Notably, Article 39(3) also specifically states that, should the responsible entity neglect or refuse to clean the environment, then the Environmental Authority is authorized to do so, at the expense of the polluter.[92]

A key concern for domestic enforcement is the possibility that contractual provisions in concession agreements will defeat or limit the effect of any changes to domestic legislation to enhance environmental responsibility. As noted in the previous section, Article 32 of the *Petroleum Agreement* contains a series of clauses that limit the Government of Guyana's ability to act. Article 32.2 prevents the Government of Guyana from increasing any petroleum related fiscal obligation, including among other things royalties, any new taxes, or duties.[93] Article 32.3 states that if the Government of Guyana changes its laws in such a manner that it has a materially adverse impact on the benefits to the oil companies, then the Government of Guyana must take affirmative actions to restore the oil companies to the same economic benefit they would have received prior to the change in laws.[94] If the parties are not able to reach agreement on a remedial action to be taken by the Government of Guyana following a claim of a material adverse economic impact, then Article 32.4 provides for referral to arbitration after a negotiation period. In this case, the arbitral tribunal is authorized to modify the *Petroleum Agreement* to restore the

[91] Draft *Environment Legislation*, *supra* note 51 at art 39.
[92] *Ibid*, art 39(3)
[93] *Petroleum Agreement*, *supra* note 51 at art 32.2
[94] *Ibid*, art 32.3

investors to the original level of economic benefits, or, if that is not possible, to award damages fully compensating past and future losses caused by the change.[95] As discussed in the previous section, these provisions lock in the status quo and prevent the Government of Guyana from improving its environmental laws and regulations should those changes produce a material adverse economic impact on the oil companies.

The *Mineral Agreement* contains a similar stabilization provision in Article 15.5. However, Article 15.5.4 of the *Mineral Agreement* may provide some room for the Government of Suriname to take action:

> Notwithstanding the foregoing, nothing set forth in this Agreement shall be interpreted as preventing the Republic of Suriname from taking Unilateral Action, but without any obligation to take Corrective Action, if the Unilateral Action is necessary for:
>
> (a) the protection of the health and safety of the population of the Republic of Suriname or parts thereof; or
>
> (b) the protection of the human and natural environment of the Republic of Suriname; or
>
> (c) complying with international obligations arising out of treaties ratified by the Republic of Suriname.

[95] *Petroleum Agreement*, *supra* note 51 at art 32.4

> In respect of the application of such Unilateral Action to Surgold it should be offered sufficient room to ensure the observance thereof.[96]

This additional contractual term, which does not have an equivalent in the *Petroleum Agreement*, appears to allow the Government of Suriname to enact additional laws without having to compensate the mining company if they are for the protection of the environment. In other words, this additional clause keeps open the regulatory space for Suriname to enact a legislative framework to counter the effects of hidden subsidies, which the *Petroleum Agreement* effectively forecloses on Guyana.

An additional concern for enforcement is whether the corporation will have sufficient assets to pay any fines or for remedies that may be ordered. This concern is particularly acute in some sectors, such as mining, where the only assets a company holds is the mine itself: the disaster makes the mine worthless, and as a result the company has no assets.

Another way that a lack of assets may manifest itself as a problem is through contracting with shell companies. The concern with shell companies is that they have very limited or no actual assets – those are with another company in the

[96] *Mineral Agreement*, *supra* note 51 at art 15.5.4.

same corporate family. Prosecuting or bringing a claim against a shell company is then of limited or no effect, if the shell company has no assets that could be used to pay for the damage caused. The *Petroleum Agreement* raises this problem: while the corporate names of the contracting oil companies all state Guyana, the companies are all incorporated outside of Guyana in places where they are likely to have no assets and exist solely for tax purposes: Esso is "incorporated in Bahamas", Nexen is "incorporated in Barbados" and Hess is "incorporated in the Cayman Islands".[97] As a result, if there should be a breach of the agreement in the future, the Government of Guyana may encounter problems with recovery if those companies hold no actual assets.

6.1.1. Case Study: Exxon *Valdez* Oil Spill

In 1989, the *Exxon Valdez* oil tanker bound for California struck a reef in Prince William Sound, Alaska. It spilled 10.8 million US gallons of crude oil over several days and ultimately covered over 1000 miles of coastline and 11,000 square miles of the Pacific Ocean.[98] The area was a natural habitat for salmon, sea otters, seals, and various seabirds.

---

[97] *Petroleum Agreement, supra* note 51.
[98] Alan Taylor, "The Exxon Valdez Oil Spill: 25 Years Ago Today" (24 March 2014) *The Atlantic* online: < https://www.theatlantic.com/photo/2014/03/the-exxon-valdez-oil-spill-25-years-ago-today/100703/> [Taylor].

Costs	1989 Value (USD)	2018 Value (USD)
Cleanup	$2.1 billion[99]	$4.2 billion
Criminal Fine	$25 million[100]	$50 million
Restitution	$100 million[101]	$200 million
Civil/criminal settlement	$900 million - $1 billion[102]	$1.8 billion
Private Economic Damages	$500 million - $600 million[103]	$1 billion – $1.2 billion
Punitive Damages	$500 million[104]	$1 billion

Table 3: Valdez Disaster External Costs[105]

According to Mark A. Cohen's "A Taxonomy of Oil Spill Costs", the *Valdez* spill cost 630 USD per barrel spilled, not accounting for the disruption in other

[99] Cohen, *supra* note 32 at 4.
[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*

industries such as the salmon fishery. He estimates the total social costs at 3.7 to 3.8 billion USD in 1989, which would amount to 7.4 billion to 7.6 billion in 2018.[106] Exxon ultimately paid a total of 1 billion USD in natural resource damages for the spill. “A contingent valuation study conducted around the time of the spill estimated that the lower-bound estimate of the public’s willingness to pay to avoid the loss of wildlife from the *Valdez* spill was 2.8 billion [USD].”[107] This meant that at the time, the US government would have had to pay 1.8 billion USD in addition to what Exxon paid.

Although the damage was catastrophic, the *Valdez* spill does represent one instance where the government was able to bring both civil and criminal claims against ExxonMobil in their domestic courts. ExxonMobil did not, however, ultimately pay for the total cost of the clean-up and remediation of the spill. Nevertheless, this case demonstrates that it is possible for governments to be successful in resolving disputes through their own domestic courts.

6.1.2. Case Study: BP Deepwater Horizon Spill

In 2010, BP was at the forefront of what has since been deemed the biggest environmental disaster in American history: the Deepwater Horizon spill.[108] Following an explosion on an offshore oil rig, the Deepwater Horizon, 1300

---

[106] Cohen, *supra* note 32 at 4.
[107] *Ibid*.
[108] Nathan Bomey, “BP’s Deepwater Horizon Costs Total $62B” (14 July 2016) *USA Today* online: <https://www.usatoday.com/story/money/2016/07/14/bp-deepwater-horizon-costs/87087056/>.

miles of the Gulf of Mexico coastline was stained with oil. As of 2018, BP estimated that the costs for outstanding claims and clean-up efforts would hit $65 billion USD.[109]

Following the spill, BP agreed to a 20 billion USD settlement with the United States Justice Department. In addition, they were fined a 5.5 billion USD civil penalty, and 7.1 billion USD in claims brought under the *Oil Pollution Act* ["OPA"].

This case is also a good representation of the government being able to hold a company accountable for the pollution that it causes during the course of an environmental disaster. In this case, the United States Department of Justice used the domestic regulatory regime. Furthermore, under the OPA, affected third parties were able to make claims against BP. It is important to note that the United States has a very robust and longstanding tradition of government institutions that can keep organizations accountable for these kinds of disasters. Furthermore, the country has significant financial resources that may not be available to developing countries, so such an outcome outside the United States may be more difficult to achieve.

---

[109] Ron Bousso, "BP Deepwater Horizon Costs Balloon to $65 Billion" (16 January 2018) *Reuters* online: <https://www.reuters.com/article/us-bp-deepwaterhorizon/bp-deepwater-horizon-costs-balloon-to-65-billion-idUSKBN1F50NL>.

6.2. Contractual Dispute Resolution

Domestic enforcement regimes concern the enforcement of domestic legislation and regulations. By contrast, contractual dispute resolution will be relevant where a government has entered into contractual relations with one or more parties for some end – for instance, a mineral or forestry concession agreement. Contractual agreements, such as the *Petroleum Agreement*, will typically contain a dispute resolution clause to govern the resolution of disputes between the contracting parties. Dispute resolution clauses may involve one or multiple mechanisms acting sequentially or in tandem. Possible mechanisms include:

- **Negotiation;**
- **Mediation;**
- **Expert determination; and**
- **Arbitration**

Negotiation is a "process whereby the parties try to settle their disputes by reaching an agreement which is acceptable for both sides without the intervention of a third party".[110] Mediation, sometimes used interchangeably with conciliation, has a neutral third party assist the parties to reach an agreement to end the disputes between them. A mediator or conciliator does not settle the dispute through a binding decision, instead, the mediator's role is

[110] Diden Kayali, "Enforceability of Multi-Tiered Dispute Resolution Clauses" (2010) 27:6 J Intl Arbitration 551 at 553 [Kayali].

to encourage and assist the parties to reach a resolution themselves.[111] Unlike mediation or negotiation, expert determination results in a binding decision by a third party. It may also take the form of dispute boards to prevent and settle disputes between the parties. Expert determination does not require the use of an adjudicative process; typically, expert determination is confined to narrowly defined factual or technical issues.[112] Finally, arbitration is binding private dispute settlement that presents an alternative to national court systems. It has a binding effect as a result of national laws as well as international conventions, most notably the New York Convention,[113] which requires member states to recognize and enforce international arbitral awards.[114] Under Article III of the New York Convention, contracting states may not impose "substantially more onerous conditions or higher fees or charges on the recognition of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".[115] In other words, the New York Convention requires a court to treat an arbitral award the same way it would treat a domestic award – which is substantially easier to enforce than achieving recognition of a foreign court judgment and having that judgment enforced.

The *Petroleum Agreement* contains several of these dispute resolution mechanisms. Article 26.1 provides for a negotiation period prior to submitting a

---

[111] *Ibid* at 554.
[112] *Ibid* at 554; Gary Born, *International Arbitration: Law and Practice,* 2nd ed (2016: Kluwer Law International) at 5-6 [Born].
[113] 330 UNTS 38 (entered into force 7 June 1959)
[114] Katali, *supra* note 106 at 555
[115] New York Convention, art III.

dispute for arbitration.[116] Article 26.10 sets out the procedures for determination by sole expert of certain matters as specified elsewhere in the contract (for example, in Article 8.5).[117] Finally, Articles 26.3 and 26.4 lay out the procedures for arbitration, the focus of the remainder of this section.[118] Similarly, the *Mineral Agreement* provides for conciliation or mediation in Article 17.4, expert determination for certain subjects, under Article 4.4, and arbitration in Article 17.3.[119]

Arbitration clauses are a common feature of commercial contracts, such as in a concession agreement. Commonly cited reasons for preferring arbitration to litigation in national courts include neutrality of the forum, centralized dispute resolution in a single contractually selected forum (as opposed to jurisdictional disputes in litigation), the enforceability of awards under the New York Convention, the commercial expertise of arbitrators, party autonomy to decide procedures, cost, speed, and privacy of the dispute resolution compared with national courts.[120] In the case of agreements with states or state entities, such as in the *Petroleum Agreement*, arbitration offers the particular advantage of a neutral international tribunal to hear a dispute, as opposed to the national courts.[121] On the other hand, states may be reluctant to effectively cede their jurisdiction and sovereignty over a dispute to a third party arbitral tribunal, rather than have their own courts settle the dispute instead. These concerns are

---

[116] *Petroleum Agreement,* at art 26.1.
[117] *Ibid*, at arts 26.10; 8.5.
[118] *Ibid*, at arts 26.3-26.4
[119] *Mineral Agreement*, at arts 17.3; 4.4; 17.4.
[120] Born, *supra* note 76 at 7-13.
[121] *Ibid* at 13-14.

particularly acute with investor-state dispute settlement (ISDS), discussed below, but are also relevant to contractual arbitration. With regard to treaty-based investor-state dispute settlement, a key criticism is that it may cause "regulatory chill", by disincentivizing domestic reforms that may have positive impacts on the environment or other areas of public interest, if they have negative impact on foreign investors.[122] A related argument is that "allowing corporations to circumvent domestic courts and sue host-state governments…compromise[s] government sovereignty", taking away from a government's regulatory autonomy.[123] While those arguments are presented in the frame of ISDS, they operate in parallel for contractual disputes – the stabilization clause in the *Petroleum Agreement* discussed above produces much the same effect, and damages would be judged by an arbitral tribunal that may be less open to regulatory concerns than a national court would be. In addition to these concerns, it is worth noting that the arbitration clause in the *Petroleum Agreement* contains a waiver of immunity on the part of the Government of Guyana and its agents, enterprises, and assets, for the purpose of arbitration under the contract.[124] In other words, the state has already given up some of its ability to exercise its sovereign claims and immunities simply by entering into the agreement.

---

[122] Lise Johnson, Lisa Sachs & Jeffrey Sachs, "Investor-State Dispute Settlement, Public Interest and US Domestic Law" (2015) Columbia Center on Sustainable Investment Policy Paper at 4-5, online: <ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf> [Johnson, Sachs & Sachs]
[123] Nikesh Patel, "An Emerging Trend in International Trade: A Shift to Safeguard Against ISDS Abuses and Protect Host-State Sovereignty" (2017) 26:1 Minnesota J Intl L 273 at 279-80 [Patel].
[124] *Petroleum Agreement*, *supra* note 50 at art 26.3.

6.3. International Centre for the Settlement of Investment Disputes Arbitration ("ICSID")

Article 26.3 of the *Petroleum Agreement* calls for any disputes under the agreement to be submitted to the International Centre for the Settlement of Investment Disputes (ICSID) for arbitration, pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention).[125] In contrast, the *Mineral Agreement* calls for arbitration at the London Court of International Arbitration, discussed below.[126] It should also be noted that Suriname is not a member state of ICSID, and consequently does not have access to ICSID's dispute settlement system.[127]

ICSID is one of the five member organizations that makes up the World Bank Group.[128] Historically, the vast majority of cases submitted to ICSID were investor-state disputes under bilateral investment treaties.[129] This continues to be the case today: under ICSID's most recently published statistics (covering the period until the end of 2017), about 60 percent of ICSID disputes arose through bilateral investment treaties.[130] Only 16 percent of disputes arose

---

[125] *Ibid* at art 26.3
[126] *Mineral Agreement*, *supra* note 50 at art 17.3
[127] International Centre for Settlement of Investment Disputes, "Member States", online: <https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>
[128] International Centre for Settlement of Investment Disputes, "ICSID and the World Bank Group", online: <https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx>
[129] Antonio R Parra, *The History of ICSID*, (Oxford: Oxford University Press, 2012) at 322.
[130] World Bank, International Centre for Settlement of Investment Disputes, *The ICSID Caseload,* Issue 2018-1, (Washington: ICSID, 2018) online:

through an investment contract between an investor and a host state. In 2017 alone, these percentages were 69 percent and 10 percent, respectively.[131] The *Petroleum Agreement* falls into this minority category of contractual investments.

Under the Washington Convention, ICSID arbitrations contain their own enforcement mechanism, distinct from the New York Convention. Awards under the Washington Convention are more easily enforced than the New York Convention: Article 53(1) of the Washington Convention states, "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." [132] Article 54(1) continues: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[133] The New York Convention provides for a similar enforcement mechanism, in Article III, but subject to more (although still narrow) exceptions: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the

<https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf> at 10.
[131] *Ibid* at 25.
[132] Washington Convention, at art 53(1).
[133] *Ibid,* at art 54(1)/

conditions laid down in the following articles."[134] The grounds for refusing to enforce an award are laid out in Article V of the New York Convention.[135]

There has been considerable difficulty for states to successfully bring claims or counterclaims against investors in contractual arbitration at ICSID. Several cases have at least shown the possibility of doing so, without being successful on the merits. In 1976 Gabon had begun proceedings against a French company over the construction of a hospital ward.[136] That case settled without a ruling. In *Klöckner v Cameroon*,[137] the company brought a claim against Cameroon for alleged contract violations, and Cameroon counterclaimed against the company for the failure of a joint venture due to the company's mismanagement. While the Tribunal ultimately rejected Cameroon's claim on the merits, it allowed for the consideration of both the investor and state claims.[138] Since *Klöckner*, a limited set of other cases have also involved direct state claims or considered the possibility of counterclaims. In 2013, Peru filed a claim against an energy company under an electricity transport agreement; that case settled within months of being filed.[139] Two cases involving state claims have reached the award step, at least on jurisdictional grounds. In *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and*

---

[134] New York Convention, *supra* note 115 at art III.
[135] *Ibid*, at art art V.
[136] Gabon v Société Serete S.A. (1976) (International Centre for Settlement of Investment Disputes Case No. ARB/76/1).
[137] *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (1983) (International Centre for Settlement of Investment Disputes Case No ARB/81/2).
[138] Thomas Kendra, "State Counterlaims in Investment Aribtration – A New Lease of Life?" (2013) 29:4 Arbitration Intl 575 at 581 [Kendra].
[139] Republic of Peru v Caravelí Cotaruse Transmisora de Energía S.A.C. (2013)(International Centre for Settlement of Investment Disputes Case No. ARB/13/24).

others,[140] East Kalimantan, a province of Indonesia, attempted to bring a claim against a group of companies over a contractual obligation to sell shares to Indonesian participants. In that dispute, the tribunal found that nothing in the Washington Convention prevented states from appearing as the claimant:

> Given that the main basis for jurisdiction is an arbitration clause contained in a contract, the Tribunal finds that nothing in the ICSID Convention prevents a State or its subdivisions or agencies from appearing as claimant in an arbitration based on a contract. The question might receive a different response if the basis for jurisdiction were an investment treaty which, in principle, reserves the right to bring an arbitration to investors and does not grant substantive protections to States.[141]

However, despite finding that nothing in the contract prevented a State from appearing as the claimant in a contractual arbitration, the tribunal nevertheless concluded that East Kalimantan's case failed as the tribunal did not have jurisdiction to hear the case under Article 25 of the Washington Convention.[142] The lone arbitration that did reach a decision was *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*.[143] This arbitration was a contractual dispute initiated by Tanzania's state-owned electricity utility and a respondent corporation which had agreed to construct and operate a generating facility in Tanzania. The state-owned utility brought a claim for alleged breaches of contract; the tribunal concluded the contract remained valid and set a reference tariff for electricity generation.[144] In other words, although rare, there is some evidence to suggest that the Government of Guyana would

---

[140] Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others (2009) (International Centre for the Settlement of Investment Disputes Case No ARB/07/3).
[141] *East Kalimantan* at para 174.
[142] *East Kalimantan* at para 218.
[143] Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited (2001) (International Centre for the Settlement of Investment Disputes Case No ARB/98/8).
[144] *Ibid* at 25–26.

be able to pursue a claim against the companies in the *Petroleum Agreement*, or any similar future agreements, through ICSID arbitration should the government believe that the investors have breached the terms of the agreement. While successful claims have been rare, the possibility exists for a successful claim to be made.

6.4. Alternatives to ICSID

The *Petroleum Agreement* also contains an alternative mechanism for states to initiate claims against an investor. Article 26.4 of the *Petroleum Agreement* states that if the Secretary-General of ICSID refuses to register a dispute, or the arbitrators rule that a dispute is outside of ICSID's jurisdiction, then any party may submit a dispute for arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL rules), with the American Arbitration Association administering the dispute.[145] In other words, should, pursuant to the discussion above, ICSID refuse jurisdiction under a potential claim by Guyana, then the claim could potentially be brought under the UNCITRAL rules.

The choice of secondary institution in the *Petroleum Agreement*–the American Arbitration Association–may not be preferable to all governments; one of the chief reasons for arbitration is the idea of a neutral forum. States may not necessarily be comfortable with an institution, which, for example, in the

[145] *Petroleum Agreement*, *supra* note 50 at art 26.4

Petroleum Agreement, is based in the United States, as is Esso's parent company.

Another potential alternative arbitral institution is the Permanent Court of Arbitration (PCA). The PCA is based in The Hague, Netherlands and dates back to 1899 as a mechanism to settle disputes between states.[146] However, the PCA also has significant experience acting as an arbitral institution for other arbitrations, such as contractual arbitration and investor-state arbitrations, particularly under the UNCITRAL rules referred to in the *Petroleum Agreement*. The UNCITRAL rules also reference the PCA as their backstop appointing authority, should the parties fail to agree on an appointing authority themselves.[147] In other words, institutionally the PCA may be better suited to arbitrating a contractual dispute arising from a concession agreement, while still having the same sort of international prestige that ICSID derives from its association with the World Bank. The other major ramification of shifting away from ICSID as the arbitral institution of choice is shifting from the Washington Convention enforcement provisions to the New York Convention enforcement provisions, described above.

The *Mineral Agreement* contains an arbitration clause referring to a third arbitral institution, the London Court of International Arbitration (LCIA).[148] As with ICSID, the LCIA has its own set of rules (the "London Rules"), whose use is

[146] https://pca-cpa.org/en/about/introduction/history/
[147] UNCITRAL Rules, at art 6. See especially Articles 6.2, 6.4 and 6.5.
[148] *Mineral Agreement*, *supra* note 51 at art 17.3

called for in the *Mineral Agreement*. One of the distinctive features of the London Rules compared with UNCITRAL Rules or ICSID rules is that Article 30 of the London Rules explicitly calls for confidentiality as a general principle with respect to all awards, materials and documents not otherwise in the public domain, and the LCIA does not publish awards without the prior written consent of all parties and the tribunal.[149] The LCIA website goes further and states "the LCIA does not publish Awards, nor parts of Awards, even in redacted form".[150] By contrast, both ICSID and the PCA may publish information (in full or redacted), or keep documents confidential, which better serves the essential element of transparency identified in an earlier section.

This section has so far considered contractual arbitration solely between two parties: the state and the investor. An additional area to explore is the possibility of allowing third parties to bring claims under a contractual agreement. At present, participation by third parties in arbitral proceedings is limited to allowing third parties to submit *amicus curiae* briefs to the tribunal.[151] For a third party to have its views heard, there must already be a proceeding underway. Why might third party claims be desirable? It is possible that a government might choose to prioritize its commercial relationship with an investor to the detriment of those affected by the development. In that scenario, allowing affected third parties to bring claims would be another method to ensure compliance with the terms of an agreement. As Forcese points out, the benefits

[149] LCIA Arbitration Rules, at art 30.
[150] LCIA, "Frequently Asked Questions", online: <www.lcia.org/Frequently_Asked_Questions.aspx >
[151] See e.g. ICSID Arbitral Rules, Rule 37.

of such a system to affected third parties would be obvious: “access to an international system of adjudication removed from the perhaps corrupted national courts of host States and unencumbered by the jurisdictional concerns that arise when the courts of home or third States are deployed to adjudicate extraterritorial claims”.[152]

However, such a system would also be inherently complicated. Even in Forcese’s proposal, the system would be limited to certain third parties only: “those with more fundamental complaints, indexed against existing international expectations”, as opposed to “plain-vanilla contract disputes with suppliers”. [153] In addition, even in the context of discussing third party participation through amicus briefs, some concerns have been raised as to the impact that allowing third parties to participate would have on the efficiency of the process, as well as the loss of confidentiality and privacy in the arbitral process, which may be important factors in choosing arbitration initially.[154] Those concerns would also be relevant with any proposal to expand third party rights to allow for a limited ability to bring claims. More fundamentally, arbitral proceedings typically involve the parties having some role in selecting the arbitrators. For instance, the *Mineral Agreement*’s arbitration clause provides that Surgold and Suriname shall each be entitled to select one arbitrator.[155]

---

[152] Craig Forcese, “Regulating Multilateral Corporations and International Trade Law” in Daniel Bethlehem et al, eds, *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 723 at 741 [Forcese].
[153] Forcese *supra* note 152 at 741.
[154] Eugenia Levine, “Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation” (2011) 29:1 Berkeley J Intl L 200 at 219-220 [Levine].
[155] *Mineral Agreement*, *supra* note 51 at art 17.3.2.

These procedures would have to be redesigned to account for the presence of a third party bringing the litigation, in addition to the two contracting parties. The possibility of third parties bringing claims is a nascent idea that has not been well developed nor seen in practice to date. This discussion introduces the idea, but further research into this area is required.

6.5. Investment Treaties and Investor-State Dispute Settlement

A final potential method for dispute resolution is under bilateral investment treaties (BITs). As discussed above, the majority of ICSID's caseload comes from disputes under BITs. One of the distinguishing features of treaty-based investor-state arbitration, such as under ICSID, is asymmetry in the right to bring claims. In the context of investment treaty arbitration proceedings, the general consensus in the literature is that only investors may bring claims, not states: "governments currently cannot initiate IIA-based [international investment agreement-based] arbitral proceedings against foreign investors".[156] Similarly, Hoffmann notes: "It is a well-acknowledged fact that investment treaties are intended to protect the rights of the investor—it is an 'asymmetric' agreement which is not based on reciprocity between the investor and the State."[157] Under these types of proceedings, only an investor would be able to bring a claim against a state, and not the other way around. There is

[156] Karl P. Sauvant & Guines Unuvar, "Can host countries have legitimate expectations?", (2016) Columbia Center on Sustainable Investment Working Paper No 183 at 2.
[157] Anne K Hoffmann, "Counterclaims in Investment Arbitration" (2013) 28:2 ICSID Rev 438 at 447.

some dissent against this consensus in academic literature on this point as to the ability of a state to bring, at the least, a counterclaim in response to a claim against it.[158]

This debate has also been reflected in two BIT-based investment arbitrations: *Spyridon Roussalis v Romania*[159] and in *Antoine Goetz & Consorts and SA Affinage des Metaux v Burundi*.[160] *Roussalis* concerned a dispute over a share purchase agreement by Roussalis and subsequent investments: the claimants alleged indirect expropriation of the investment through the government's actions, while the government counterclaimed that the claimaint had failed to make post-purchase investments. The majority of the tribunal in *Roussalis* found it did not have jurisdiction to hear the state counterclaim; however, one member of the tribunal dissented on this point and would have found that the tribunal did have jurisdiction to hear the claim.[161] In *Antoine Goetz*, the claimants alleged Burundi acted in violation of a BIT as well as an earlier ICSID arbitration; Burundi counterclaimed on the basis that one of the affected companies had not respected the relevant operating conditions. The tribunal considered Burundi's counterclaim against the investors, finding it did have jurisdiction to hear the counterclaim, including by reference to the dissenting opinion in *Roussalis*. However, the tribunal ultimately rejected Burundi's counterclaim on the merits.[162] These two cases have seemingly opened the

---

[158] Yaraslau Kryvoi, "Counterclaims in Investor-State Arbitration", (2012) 21:2 Minn J Intl L 216; Kendra, *supra* note 138; Hoffmann, *supra* note 156 at 438-443.
[159] (2011) (International Centre for the Settlement of Investment Disputes Case No ARB/06/1)
[160] (2012) (International Centre for the Settlement of Investment Disputes Case No ARB/01/2)
[161] See Hoffman, *supra* note 156 at 438-41.
[162] *Ibid* at 441-43.

door slightly for the possibility of state counterclaims under a BIT; however, the struggles states have encountered in contractual arbitral proceedings are even more pronounced here. While *Roussalis* and *Antoine Goetz* at least consider the possibility of a successful state counterclaim, it remains a remote possibility for success.

In the cases of Guyana and Suriname, these already remote options are not likely to be relevant to any disputes. According to the Organization of American States, Suriname has only signed a single BIT that is currently in force, with The Netherlands.[163] Guyana only has three BITs currently in force, with China, Germany and the United Kingdom.[164] Even if the dispute fell under one of these BITs, the general consensus is that Guyana or Suriname would have no ability to bring claims against foreign investors.[165] However, the cases that have potentially opened the door a sliver are recent, and further analysis will be necessary to examine how these ideas could be explored in future arbitral awards. These considerations may be more relevant for other governments Conservation International works with.

[163] Organization of American States Foreign Trade Information System, "Information on Suriname: Bilateral Investment Treaties", online: <http://www.sice.oas.org/ctyindex/SUR/SURBITS_e.asp>
[164] Organization of American States Foreign Trade Information System, "Information on Guyana: Bilateral Investment Treaties", online: <http://www.sice.oas.org/ctyindex/GUY/GUYBITS_e.asp>
[165] See e.g. Sauvant & Unuvar, *supra* note 156 at 2; Hoffmann, *supra* note 156 at 447.