An Introduction from the Hosts

This year’s symposium kicked off with a few opening remarks from the Loyola faculty to introduce both the International Law Review generally and the topics to be discussed by the various speakers over the course of the day.

Professor Margaret Moses, the faculty advisor for the International Law Review and the Director of Loyola’s International Law and Practice Program lead the charge by introducing the executive board of the Review and congratulating them on the commencement of another successful symposium.

Professor James Gathii then took the floor for a brief introduction to the topic of extractive industries in the global marketplace. Indeed, Professor Gathii is particularly well-placed to introduce the topic: he currently serves as an Independent Expert of the Working Group on Extractive Industries, Environment, and Human Rights Violations in Africa, an extension of the African Commission on Human and Peoples’ Rights.

Introduction to the Special ILR Symposium Issue

On February 8, Loyola’s International Law Review held its annual symposium on a current issue in international law. This year’s theme was the “international impact of extractive industries,” and scholars of very diverse backgrounds and specialties gathered to discuss and at times debate the various facets of this important, timely, and controversial topic. This special issue of the newsletter will focus on the guest speakers and their claims and proposals that were raised during the symposium.

The newsletter would like to extend its sincere congratulations and gratitude to Natnael Moges, the International Law Review’s Symposium Editor. Without his tireless efforts in organizing the lecturers’ appearances, the symposium would not have been possible, much less the incredible success that it was. His hard work is memorialized not only in this record of the symposium, but also in the International Law Review’s annual Symposium Issue, which will feature articles written by each of the guest speakers regarding their issue on which they spoke at the symposium. If any of the issues discussed below resonate with you, make sure to check out the upcoming issue of the International Law Review for more in-depth analysis on the topic.

Additionally, please keep in mind that the symposium takes place every spring at Loyola, so keep an eye out for topic and speaker announcements next year and join us for the 2014 International Law Review Symposium! We’ll see you there!
Professor Gathii underscored the importance of the issue by noting that everyone in the room who carried a mobile phone with them (which naturally included the entire audience) was an integral player in the international extractive industry, because these kinds of consumer electronics all depend upon the implementation of conflict minerals that are mined in and exported from various regions of Africa. Only with this realization as an constant underlying consideration can we truly appreciate the scope of the effects of extractive industries. The demand for consumer electronics has skyrocketed in modern times, and with it, the demand for basic minerals (e.g. wolframite) and their underlying elements (e.g. tungsten) has likewise skyrocketed. But behind that demand, there are many important issues that must be addressed as extractive industries continue to grow with exponential force.

The format of the symposium then went on to host three different panels, each with three different speakers addressing discrete categories of problems that have arisen in the pursuit of extracting and the supplying manufacturers with these base materials.

Panel I: Corporate Social Responsibility in Extractive Industries & Multi-Actor Agreements

The first panel approached the issue of social responsibility of extractive corporations in broad strokes. The three panelists that discussed these issues were Michael Bourassa, Sara L. Seck, and Ibironke Odumosu-Ayanu.

Michael Bourassa
Mr. Bourassa is an expert on corporate social responsibility (CSR) trends within the extractive industries and has authored several articles on the subject. He also serves with the CSR Practice group of his firm, Fasken Martineau, an important Canadian global mining firm. He discussed several attempts by the mining industries in Canada to exercise corporate social responsibility and discussed several groups in particular, including the Prospectors and Developers Association of Canada (PDAC), the International Council on Mining and Metals (ICMM), and the Mining Association of Canada (MAC). These organizations see varying degrees of success in achieving social responsibility goals.

On the other end of the spectrum are binding laws (or proposed binding laws) that would mandate compliance with certain standards or otherwise affect international mining corporations’ responsibilities in entering into and performing contracts with resource holders. In Canada, Mr. Bourassa, noted, there have been a few attempts to legislate these issues, including the controversial (and ultimately defeated) Bill C-300 as well as the Fighting Foreign Corruption Act.

Sara L. Seck
Professor Seck also addressed corporate social responsibility concepts, but began by discussing specific policies instead of organizations and laws. For example, one proposed method of serving corporate social responsibility is Free, Prior & Informed Consent (FPIC). Ms. Seck is a proponent of FPIC, which would require extracting corporations to obtain and retain a “social license” to operate or extract from the peoples local to the extraction site, not simply from their government.

Although she threw the full weight of her support behind FPIC, Ms. Seck fully acknowledged that the very concept of corporate social responsibility inhabits one only side of the debate, termed global environmental justice (i.e. human rights law). Of equal importance to balance is sustainable development law (i.e. environmental concerns). Because these two competing interests are naturally in conflict, Ms. Seck alleges, corporate social responsibility is a highly complex subject that poses more questions than scholars are currently able to answer. But concepts like FPIC can be important steps in the right direction, and should be given full consideration where possible.
Ibironke Odumosu-Ayanu

Professor Odumosu-Ayanu followed up with a complimentary suggestion that is very similar to FPIC in intent and application: multi-actor agreements. These agreements would engage local populations before extraction work could begin, in stark contrast to the current model, which merely requires that the extractive corporations enter into a contract with the national sovereign of the land on which extraction is meant to take place. By only involving those governments, extractive corporations encourage corruption in volatile political climates such as those in many African nations.

The solution, she believes, is to require extractive transactions to have multi-actor agreements. After a quick rundown of current initiatives such as the Global Memorandum of Understanding and Impact and Benefit Agreements, Ms. Odumosu-Ayanu concluded that none of them appropriately involve indigenous peoples in decision-making or share the benefits of using their land with them. Multi-actor agreements can solve these issues.

Although some complications will need future resolutions, such as the interaction between multi-actor agreements and current legal regimes, Ms. Odumosu-Ayanu firmly believes that these agreements are the future of socially responsible extraction.

Panel II: The Need for Transparency in Extractive Contracts

The symposium’s second panel moved away from policy implications and purported future solutions and attempted to tackle the difficult issue of the lack of transparency in modern extractive transactions. The three panelists were Erika George, Peter Rosenblum, and Loyola’s own James Gathii.

Erika George

Professor George started off by imputing some startling facts about the effect of opaque extractive actions in particular nations. High availability of in-demand natural resources in a country, she noted, appears to be inversely proportional to the stability of that nation. The lecture focused largely on Nigeria, where corruption within the government runs rampant, and the Democratic Republic of the Congo, which is constantly rocked by conflict. Since these countries have healthy access to natural resources, they should be able to use those resources to stabilize and grow their economies. But the opposite seems to be the case.

Professor George’s solution is a proposed labeling scheme not unlike that done with imported goods’ country of origin in the U.S. Extractive corporations, she argues, should also be required to undergo reasonable country-of-origin inquiries with the ultimate goal of labeling their resources as those extracted in “conflict-free” areas or “not conflict-free” areas. Unless the resources are proven to be from a conflict-free area, they must be labeled “not conflict-free.” This is a simple transparency concept that is already in force with regards to labelled goods and could easily be modified to apply to extracted resources as well.

Peter Rosenblum

Professor Rosenblum discussed issues of contract transparency that have arisen in extractive industries throughout the world and was able to speak from personal experience about unusual contract practices in countries like Chad, Liberia, and the Democratic Republic of the Congo. He shared several anecdotes about contracts that were poorly drafted or referenced a non-existent body of law in its choice-of-law clause. He also found that many of these contracts are buried in drawers or tossed into corners of offices, never to be reviewed or consulted. These contracts appear to be mere formalities, but are not relied upon as binding by either party.

The optimal situation, however, is one in which extractive contracts are not only taken seriously, but are available for review and subject to real scrutiny. Professor Rosenblum did not suggest that the failures of
these contracts were necessarily matters of corruption or that they were intentionally obscured. Rather, he believes that in many instances, the contracts are hidden from public view because of a fear of being subjected to the criticisms of the international community, a fear which might stem from the lack of competency with which those contracts were drafted and executed. He has found during his travels that many nations that have contracted with extractive corporations are willing to share the contractual provisions with him if he merely asks. There is great potential to improve the transparency of sovereigns’ contracts with extractive corporations, but there must be a catalyst. Professor Rosenblum aims to be exactly that.

James Gathii

Professor Gathii analyzed the lack of transparency from a new angle: from the perspective of the indigenous local peoples that are adversely effected by the hidden contracts of their government with foreign corporations. Because of basic contract principles, these adversely impacted individuals have no remedy against either their own government or against the extractive corporation that has moved in on the land. The lack of remedy stems from concepts of privity; the local people are not parties to the contract and thus lack privity or standing to bring an action against either party.

Professor Gathii recommends, then, that the third-party beneficiary rule should find its way into matters of adverse effect upon these individuals. Because the contract between the government and the extractive corporation could be construed as one that is for the benefit of that nation’s constituency because it should serve to stimulate the economy of developing nations. That constituency, therefore, has some ancillary privity to the contract at issue.

The utilization of the third-party beneficiary rule in extractive contracts would have a positive transparency-promoting side effect as well, in that the substance of the contract would have to come to light in any proceedings that come before the courts in which the terms’ benefit to the third party are at issue.

Panel III: The Dodd-Frank Wall Street Financial Reform Act & The Cardin-Luger Amendment

The final panel was framed as a debate panel in which all three presenters engaged in a free form discussion and answered audience questions regarding § 1502 of the Dodd-Frank Act, which requires publicly traded extractive companies to disclose any payments made to foreign governments for the purpose of developing extracted resources from that nation. The panelists were David Hackett and Marinke van Riet. Loyola’s Professor Steven Ramirez moderated the discussion.

The panel discussed the Dodd-Frank Act as a general matter before turning to the inclusion of §§ 1502 & 1504, which have specific international implications. While both provisions are currently good law, they are both under review, and extractive industry is currently lobbying to have the provisions either struck down or heavily modified.

The panel analyzed the improved transparency requirements within these provisions of the Dodd-Frank Act, including provisions that require the performance of due diligence by corporations to determine the country of origin and the appropriate labeling of conflict materials.

Also discussed by the panel was the work of Publish What You Pay (PWYP), branch of the Revenue Watch Institute of which Ms. van Riet is the International Director. Both PWYP and § 1504 of Dodd-Frank were discussed as expansions on the Extractive Industries Transparency Initiative (EITI), a group that endeavors to improve transparency world-wide in the field of natural resource extraction.

The work of the EITI and PWYP are certainly steps in the right direction, and it stands to reason that the panelists’ proposals and solutions throughout the symposium may cross the desks of these powerful entities in the future. The day may be soon when the 2013 ILR Symposium, a source of serious academic work and thought, gave birth to history-altering global policy.