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Transnational Conservation Contracts

NATASHA AFFOLDER*

Abstract

Transnational environmental law is the subject of growing scholarly interest. Yet, much work remains to be done to fill in both the conceptual and empirical contours of this field. One methodological challenge that transnational law poses is the need to look beyond traditional sources of international and national law. This article contributes to efforts to understand transnational law's multilayered architecture by drawing attention to the use of transnational contracts as a mechanism to protect habitats and species. The diverse and proliferating examples of conservation contracts discussed in this article – which include forest carbon agreements, conservation concessions, debt-for-nature swaps, conservation performance payments, and private protected area agreements – reveal an ongoing and intensifying transnational attempt to use private contracts to address some of the most pressing issues of common concern. This article draws on fairness theory in both contract and international environmental law to argue for law's relevance in interpreting conservation's call for contracts.

Key Words

conservation agreements; environmental contracts; fairness; transnational law

I. INTRODUCTION

July, 2002: The Government of Guyana concludes a 30-year Conservation Concession Agreement with US-based Conservation International. Pursuant to the agreement, the conservation organization leases 200,000 acres of primary rainforest in the Upper Essequibo watershed, paying annual fees comparable to what a logging company would pay if the area was leased for forestry purposes.

January, 2009: Waigeo Island, Raja Ampats, Indonesia: Ecotourism company Papua Expeditions, with funding from a Chicago-based donor, concludes a Community Conservation and Ecotourism Agreement with the customary landholding groups. The agreement specifies the company's contractual financial obligations and the carefully defined conservation outcomes to be provided by the community.

August, 2010, Ecuador and the United Nations Development Program (UNDP) sign an agreement to establish a trust fund, which aims at financially compensating the South American country for refraining from oil drilling in its Yasuní National Park.

Transnational environmental law is being made by contract. Yet, the significance of these agreements as an aspect of transnational legal governance is easy to miss, as individual contracts are constructed as isolated, unrelated, one-off phenomena.

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The highly varied form and substance of these agreements further obscure the phenomenon of contracting as a collective practice or transnational instrument choice. The above narratives describe three anecdotal accounts of unrelated and distinct agreements to protect biodiversity. The object of this article is to argue that these disparate agreements are revealing of a more widespread, if little-noticed, turn to contracts as a mechanism of transnational environmental law. This article provides an introduction to one manifestation of this practice – transnational conservation contracts.

Transnational conservation contracts can be defined as agreements to conserve discrete areas of land or water, including valued, endangered, or critical habitat, between actors in more than one country. These agreements are transnational, rather than international, in the sense that they involve parties in different jurisdictions, but they are not constituted through the co-operation of states. While the legal status of these agreements differs dramatically, it is useful to situate these agreements within the growing field of transnational law, and more particularly as an example of transnational environmental law. Transnational conservation contracts thus take legal scholars beyond ‘current conceptual comfort zones’ of contemplating law as either domestic (state) or international (inter-state).¹ They reveal a density of interactions between international organizations, sub-state governments, multinational corporations, non-governmental organizations (NGOs), indigenous peoples, foundations, community groups, and individual landowners that transcend state borders. They evidence what scholars of global environmental politics have described as the ‘rescaling of environmental politics’² both beyond and within the state.

The choice of describing transnational conservation agreements as ‘contracts’ is a deliberate one. These agreements vary significantly. Some are legally binding; others are not. Many examples might more appropriately be described as pledges, or restrictive covenants, or commitments, or some more amorphously as ‘voluntary agreements’ or ‘hybrid agreements’. But speaking the language of contracting encourages a legal analysis of these agreements, which might otherwise not take place. As Karl Llewellyn explained in 1930, ‘contract comes to a lawyer as a term laden with connotations of doctrine and theory’.³ One of the consequences of the fact that conservation contracts largely escape the scrutiny of lawyers is that their legality is rarely investigated. Talking about these agreements as ‘contracts’ invites a closer look at the text of these agreements and their legality.

To date, transnational conservation contracts have been framed and debated as a market tool.⁴ They are emerging, in particular, as a favoured tool of certain United States-based conservation organizations who argue that global threats to biodiversity are sufficiently urgent to merit direct action such as ‘renting’ forests in

1 C. Scott, ‘“Transnational Law” as Proto-Concept: Three Conceptions’, (2009) 10 *German Law Journal* 859, at 876.

2 L. B. Andonova and R. B. Mitchell, ‘The Rescaling of Global Environmental Politics’, (2010) 35 *Annual Review of Environment and Resources* 255.

3 K. Llewellyn, ‘What Price Contract? An Essay in Perspective’, (1930) 40 *Yale Law Journal* 704, at 704.

4 See, e.g., OECD, *Handbook of Market Creation for Biodiversity: Issues in Implementation* (2004), which frames a number of conservation contracts as attempts to create markets for biodiversity.

foreign countries or trading debt for protected areas. The glacial pace of international treaty negotiations creates an appetite for quicker 'fixes' to transnational problems such as threatened-species extinctions or critical-habitat destruction. Conservation contracts emerge as one such fix. But discussion of these agreements has been largely limited to the conservation biology literature and to the policy literature generated by conservation groups that examines conservation agreements as a mechanism for providing direct payments for environmental services (PES). Current debates thus largely focus on a single question: do they work?

Framing conservation contracts within the context of transnational environmental law refocuses attention on a new set of questions. An initial exercise in lumping together diverse agreements is thus a precursor to the valuable analysis that follows. Creating a taxonomy of conservation contracts will allow for detailed inquiries into the legality of these agreements, and distinctions of form and substance, that may ultimately lead to drafting better agreements.⁵

Thinking about transnational conservation contracts as transnational environmental law refreshes the current debates beyond polarized visions of their effectiveness. It allows us to take the law more seriously in this context. It invites a closer scrutiny of legal content and function. Are these intended to be legal arrangements? Are they embedded within Anglo-American neo-liberal assumptions of party autonomy and freedom of contract? What choice of law is made? What are the mechanisms for dispute resolution? Are international biodiversity norms or standards directly or indirectly referenced? Is there an attempt to integrate other international legal norms? How do these agreements straddle the line between contract and property law? Do transnational conservation contracts trade away valuable property rights that communities and indigenous groups have only recently secured? Is learning taking place between contracts? How well are prototype contracts tailored to diverse cultural contexts? Transnational conservation contracts are not new. But what explains the seeming proliferation of contractual approaches?

This article is not the place to answer all of these questions. It is the place to introduce conservation contracts and to situate them within a wider discussion of the complex fairness challenges emerging in transnational environmental law.⁶ The article begins by situating transnational contracting within a wider discussion of transnational environmental law. The fact that many international environmental norms are now advanced through mechanisms outside treaty instruments gives rise to anxieties about the legitimacy, accountability, and fairness of the complex emerging architecture of transnational environmental law.⁷ Transnational environmental law is a helpful lens through which to assess conservation contracts, as it

5 For an illustration of the value of analysing the architecture of international agreements along lines of form and substance, see K. Raustiala, 'Form and Substance in International Agreements', (2005) 99 *AJIL* 581.

6 This article emerges from a workshop investigating diverse aspects of fairness in international environmental law, organized by the European Society of International Law's International Environmental Law Interest Group in Cambridge on 2 September 2010.

7 S. Bernstein, 'Legitimacy in Global Environmental Governance', (2005) 1 *Journal of International Law and International Relations* 139; S. Bass and S. Guéneau, 'Global Forest Governance: Effectiveness, Fairness, and Legitimacy of Market-Driven Approaches', in S. Thoyer and B. Martimort-Asso (eds.), *Participation for Sustainability in Trade* (2005).

takes seriously the challenge of understanding non-state law-making. It allows for thinking about these agreements *as law* – a new direction for research on conservation contracts.

Against this backdrop of transnational environmental law, I introduce transnational conservation contracts as a collective phenomenon. Section 2 of this article describes these agreements and discusses five types of contract: conservation concession agreements, conservation performance payments, forest carbon agreements, private protected area agreements, and debt-for-nature swaps. This is not an exhaustive survey of conservation contracts. It provides a positive rather than normative addition to literature on transnational environmental law.

The third and final section of the article seeks to deepen our understanding of conservation contracts by situating these agreements within legal debates on fairness. Drawing on insights from fairness theory in both contract law and international environmental law, I sketch an agenda for thinking about fairness in the context of transnational environmental law. By building on fairness theory in both private law and public international law, we are able to advance the study of transnational conservation contracts in a way that takes seriously the need for a close textual reading of contracts, but at the same time reveals the wider cultural and discursive shifts in play in turning to contracts to protect global biodiversity.

2. TRANSNATIONAL ENVIRONMENTAL LAW

Transnational environmental law is described in a new journal devoted to its analysis as ‘the study of environmental law and governance beyond the state. It approaches legal and regulatory developments with an interest in the contribution of non-state actors and an awareness of the multi-level governance context in which contemporary environmental law unfolds’.⁸

The study of transnational environmental law provides an opportune moment to assess areas of law that have developed and become important in practice, but that are obscured by a focus on either international law or domestic law. These issues are illuminated when one attempts to conceptualize and categorize transnational conservation agreements. Conservation agreements ill fit the conceptual dichotomies that traditionally animate international environmental law. This likely explains their invisibility in traditional accounts of international environmental law-making. They can be seen as both top-down and bottom-up approaches. They are public and private; state and non-state; formal and informal; hard and soft; local and international; law and non-law.

Transnational conservation contracts provide a useful opportunity to reflect on the relationship between transnational environmental law and international environmental law. This is a relationship that is far from linear. Transnational environmental law is generally conceived as something broader than international environmental law. Gregory Shaffer and Daniel Bodansky expansively

⁸ The first issue of *Transnational Environmental Law* will be published by Cambridge University Press in 2012; see <http://journals.cambridge.org/action/displayJournal?jid=TEL>.

conceptualize it as encompassing ‘all environmental law norms that apply to transboundary activities or that have effects in more than one jurisdiction’.⁹ But, as the example of transnational conservation contracts reveals, international environmental law and transnational environmental law can be closely enmeshed and are marked by a density of interactions.¹⁰

Transnational conservation contracts may attempt to implement norms articulated in environmental treaties. In some cases, these contracts shadow treaty obligations. Climate-change offset agreements reference the Kyoto Protocol; access and benefit-sharing agreements discuss obligations under the Convention on Biological Diversity. Conservation contracts also make explicit reference to other sources of international environmental standards, such as the Equator Principles, or the International Finance Corporation’s Performance Standards. An increased role for contract-based measures to promote tropical forest conservation will emerge through the Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD+) initiatives pursuant to the UN Framework Convention on Climate Change. These interactions between treaties and contracts risk being missed if contracts are not situated within the framework of transnational environmental law.

The diversity of conservation contracts, and of contracting parties, makes it difficult to generalize about issues of legality. Transnational law helps us in the task of thinking about these agreements as law and in interpreting their wider significance. Transnational-law theorists are making important inroads into defining and defending the terrain of transnational non-state agreements as law.¹¹ Graf-Peter Calliess and Peer Zumbansen suggest that the transnational challenge to legal theory comes at a moment when the fields of both public international law and private international law are already being forced to adapt to ‘increasingly decentralized and relativized law-making forums’.¹² Robert Wai argues for closer attention to transnational private law:

An appreciation of private law as concerned with the relationship among plural and transnational normative orders is obscured because subjects of private law and private international law are typically considered separately. When viewed together, a sense of the long-established task for private law of relating normative orders that challenge state boundaries becomes clearer.¹³

While Robert Wai focuses on examples of international business transactions, and Graf-Peter Calliess and Peer Zumbansen invoke studies of corporate and consumer transactions, their work can be usefully extended to the transactions for conservation

9 G. Shaffer and D. Bodansky, ‘Transnationalism, Unilateralism, and International Law’, (2011) *Transnational Environmental Law*, forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920470.

10 I have argued elsewhere for the need to resist the temptation to conceptualize international law and private governance as belonging to separate and parallel universes; see N. Affolder, ‘The Private Life of Environmental Treaties’, (2009) 103 *AJIL* 510.

11 See G. Teubner (ed.), *Global Law without a State* (1996); F. von Benda-Beckmann and K. von Benda-Beckmann, ‘The Dynamics of Change and Continuity in Plural Legal Orders’, (2006) 53–4 *Journal of Legal Pluralism & Unofficial Law* 1; G. P. Calliess and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010).

12 Calliess and Zumbansen, *supra* note 11, at 7.

13 R. Wai, ‘The Interlegality of Transnational Private Law’, (2008) 71 *Law and Contemporary Problems* 107, at 108.

services that are the subject of this article. Transnational conservation contracts rarely exhibit a full rejection of state-based law. But they are situated in a complex world in which regulatory processes are not limited to state actors. These agreements open up space for thinking about 'law-making' in ways that challenge traditional assumptions and conceptions.

Conservation contracts reveal forms of law-making by non-state (or private) actors that are central to the study of transnational environmental law. Conservation concessions, payments for ecological services, and debt-for-nature swaps all signal a growing use of direct action by NGOs, distinct from campaigning roles.¹⁴ But greater untangling of the private actors involved is necessary. Private actors who are architects of these agreements, or parties to them, range from global NGOs to local community groups to corporations to foundations. In some cases, focus on the actors involved in these agreements obscures other important aspects of the agreements themselves. Drawing attention to the legal nature of these agreements invites a careful textual analysis that is rarely present in discussions of the politics of agreement-making. Further, focusing on agreements as legal texts draws attention to the fact that these contracts are not simply isolated agreements, but rather part of the wider architecture of transnational law.

3. TRANSNATIONAL CONSERVATION CONTRACTS

Are there sufficient patterns of commonality between conservation contracts to justify the study of something called 'transnational conservation contracts'? Is there any value in aggregating these diverse agreements? The limited literature on transnational conservation contracts addresses each type of contract as an isolated phenomenon. Forest carbon agreements are thus the subject of a literature distinct from that which analyses debt-for-nature swaps or concession agreements. This may be due to the fact that the literature exploring these agreements has largely developed in journals devoted to conservation biology. Viewing conservation contracts collectively as a non-comprehensive category of environmental agreement makes sense for at least three reasons: (i) contracts often involve repeat actors and architects (e.g., certain contractual approaches are favoured by specific conservation organizations such as Conservation International or The Nature Conservancy); (ii) there is a textual similarity between agreements due to the repeated use of prototypes and precedents; and (iii) a collective view of contracts reveals the integration of international legal norms within these agreements. This integration risks being missed if individual contracts are only viewed in isolation.

In this section, I draw attention to the phenomenon of transnational conservation contracts as a collective practice. I define transnational conservation contracts and describe the practice of contracting by introducing five categories of contractual approach: (i) conservation concession agreements; (ii) conservation performance payments; (iii) forest carbon agreements; (iv) private protected area and company

¹⁴ Andonova and Mitchell, *supra* note 2, at 262.

reserve agreements; and (v) debt-for-nature swaps. This list is not intended to be comprehensive; rather, it introduces the diversity of agreements that may be conceptualized as transnational conservation contracts. While I loosely describe these agreements as contracts, their legal significance extends beyond concepts of contract law to implicate notions of property ownership and, as I will argue, transnational environmental law.

Transnational conservation contracts are agreements that address the protection of discrete areas of land or water to achieve conservation objectives including the protection of valued, endangered, or critical habitat and involve actors in more than one country. Referring to contracts as conservation contracts is a reflection of the fact that many of the initiatives described in this article primarily seek to preserve or conserve biodiversity (rather than, for example, implementing regimes for sustainable use). Conservation is a 'social and political process by which natural resources . . . are managed to maintain biodiversity'.¹⁵ The history of conservation reflects the tensions that have emerged around this social and political process:

Activities that qualify as Conservation have, over the past 150 years, been implemented by, and often in the favour of, political and national elites. Over the past 50 years, however, as biodiversity loss has been constructed as an international problem, Conservation has also increasingly become the purview of international non-governmental organizations (NGOs), many of which have come to hold greater environmental authority than the governments of nation states. Often structured through class and racial bias, and ignorant of community-based practices for environmental management, contemporary conservation policy, practice and jurisdiction has emerged out of a past littered with struggles over sovereignty, competing ideologies of nature, conflicting use rights, and markedly inequitable power relations.¹⁶

The description of five categories of transnational conservation contract that follows reveals that conservation agreements are not a purely North–South phenomenon, but the North–South dimensions of this transnational phenomenon require further elucidation.

3.1. Conservation concession agreements

Conservation concessions centre on lease agreements; national authorities or local resource users lease public lands or resources to conservation groups who commit to use the lands for conservation purposes.¹⁷ The simplest forms of conservation concession are modelled after extractive-industry concession agreements, such as timber or mining concessions. Rather than mining or logging the concession area, the conservation investor pays the government for the right not to develop the land. The conservation group commits to protecting the lands for conservation purposes. Payments are calculated in a way that intends to compensate the landowner for

15 J. Alcorn, 'Big Conservation and Little Conservation: Collaboration in Managing Global and Local Heritage', (1995) 98 *Yale School of Forestry and Environmental Studies Bulletin* 13, at 15.

16 K. I. MacDonald, 'Community-Based Conservation: A Reflection on History', Working Paper: IUCN – The World Conservation Union, Commission on Economic, Environmental and Social Policy, 2003, at 3.

17 Environmental Law Institute, *Legal Tools for Private Lands Conservation in Latin America* (2003), 25.

forgoing extractive use of the land. The contract also typically includes norms and guidelines for monitoring and enforcing the protection of the site.

Global conservation organizations active in negotiating conservation concessions, such as Conservation International, tend to be repeat actors, negotiating agreements in multiple jurisdictions.¹⁸ In certain jurisdictions, concession agreements can only be concluded following domestic legal reforms, permitting the conclusion of such agreements. For example, in 2002, the Peruvian government included a new provision in its Forestry Law that allows conservation concessions to be adopted as a legal form of land use. The adoption of this law followed discussions between the Peruvian government and US conservation groups, who helped draft the legislation.¹⁹ International conservation groups have since signed concession agreements with the Peruvian government, including a 40-year concession agreement in 2006 between the Wildlife Conservation Society and the government of Peru to protect habitat for the endangered red uakari monkey.²⁰ The transplant of laws to facilitate the introduction of conservation concessions highlights the wider implications of contractual environmental governance – the shifts in contract and property law that occur to accommodate conservation contracts.

3.2. Conservation performance payments agreements

Conservation performance payments involve a similar approach to concession agreements but they do not centre on lease arrangements. Rather, performance payments involve the purchase of a well-defined environmental service (or land use likely to secure that service) with payments that are conditional on the performance of a biodiversity-related outcome such as habitat protection or species preservation.²¹ These payments are often made by foreign donors or conservation organizations to local communities or governments in low-income countries to secure the conservation of endangered ecosystems. The motivating idea is to steer economic development away from the most environmentally destructive forms (such as mining or oil and gas development) and to encourage individuals and communities to invest in activities that do not lead to habitat or biodiversity loss (such as ecotourism).

Conservation performance payments are used in both domestic and transnational contexts. In Sweden, for example, a performance-payment scheme was introduced to alleviate conflicts between carnivores and livestock. The programme, which issued payments for carnivore offspring, was designed to stabilize populations of wolves,

18 For a review of the activities of Conservation International with direct-payment contracts, see S. Milne and E. Niesten, *Direct Payments for Biodiversity Conservation in Developing Countries: Practical Insights for Design and Implementation* (2002).

19 K. Ellison, 'Renting Biodiversity: The Concessions Approach', (2003) (November) 4 *Conservation Magazine*, 20.

20 See, generally, Lago Preto Conservation Concession, available at www.mbowler.mistral.co.uk/lagopreto.

21 This definition is adapted from Sven Wunder's definition of payments for environmental services. S. Wunder, 'The Efficiency of Payments for Environmental Services in Tropical Conservation', (2007) 21 *Conservation Biology* 48, at 50.

lynxes, and wolverines.²² The payments are designed to offset the future damage the carnivores are anticipated to cause. International habitat reserve programs (IHRP) are an example of a transnational manifestation of this practice. Contracts pursuant to an IHRP require the outside agent (often an international conservation organization) to make periodic performance payments in exchange for local actors' ensuring that target ecosystems remain protected. Compliance monitoring ensures that target levels of species continue to be found in the ecosystem and payments are dependent on these targets being reached.²³ While individual contracts may contain specific provisions on monitoring and enforcement measures in the event of non-compliance, the degree to which these contracts are enforced in practice is unknown.

3.3. Forest carbon agreements

Forest carbon agreements are a type of performance-payment agreement. They reflect an approach of using markets to address the critical role of forests in helping to mitigate the growing threat from anthropogenic climate change. Forest carbon offset agreements are largely transacted between greenhouse-gas emitters in industrialized countries and sellers in developing countries. Forest carbon agreements are a growth area for transnational environmental law. But these agreements pose challenges for lawyers. Forest carbon is a new form of property. Voluntary markets have yet to conclude clear rules of property rights for forest carbon. States are still developing legal regimes to allocate property rights in forest carbon.²⁴ Further, the nature of existing forest carbon markets is such that carbon buyers and sellers are unlikely to be on unequal footing in terms of their commercial experience and legal representation.²⁵ Some United States-based NGOs have sought to 'level the playing field' between buyers and sellers by drafting prototype agreements for forest carbon-emission reductions purchases, modelled on US contract law.²⁶ These agreements seek to redress the one-sided legal drafting carried out by carbon purchasers.

Forest carbon agreements highlight legal issues relevant to many of the other contracts discussed in this article. In many cases, contracting takes place against a backdrop of unclear land tenure, including uncertainties arising from disputes between indigenous peoples and state governments. A legal context that emphasizes freedom of contract may be foreign to landowners signing these agreements. Critiques of forest carbon agreements further charge that these agreements allow 'the wealthy to sequester further wealth far out of proportion to the carbon sequestered',²⁷ that

22 A. Zabel and K. Holm-Müller, 'Conservation Performance Payments for Carnivore Conservation in Sweden', (2008) 22 *Conservation Biology* 247.

23 P. J. Ferraro, 'Global Habitat Protection: Limitations of Development Interventions and a Role for Conservation Performance Payments', (2001) 15 *Conservation Biology* 990, at 994.

24 See the Norton Rose Group, *Forest Carbon Rights in REDD+ Countries: A Snapshot of Africa* (2010); D. Takacs, *Forest Carbon: Law and Property Rights* (2009), 28.

25 S. Hawkins et al., *Contracting for Forest Carbon: Elements of a Model Forest Carbon Purchase Agreement* (2010), 1.

26 *Ibid.*, at 3.

27 D. Takacs, 'Carbon into Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law', (2009) 15 *Hastings West-Northwest Journal of Environmental Law and Policy* 39, at 42.

they are based on inadequate scientific knowledge of tropical forests,²⁸ that they are subject to leakage (that is to say that preserving forests in one location will lead to logging elsewhere), and that they are inadequately geared to protect biodiversity.²⁹

A significantly increased role for forest carbon agreements is contemplated under REDD+, a proposed performance-based mechanism under negotiation through the United Nations Framework Convention on Climate Change and as markets for carbon become legally entrenched. These developments are leading to inter-state agreements on forest conservation. For example, in 2009, Norway and Guyana signed a Memorandum of Understanding pertaining to forest protection.³⁰ This agreement provides for payments by Norway of up to US\$250 million during a five-year period ending in 2015 in return for Guyana's commitment to limit forest-based greenhouse-gas emissions and to protect its rainforest as an asset for the world. A careful reading of this Memorandum of Understanding reveals the extent to which the agreement is embedded within other forms of transnational law. Guyana is required under the agreement to show evidence of entering a formal dialogue with the European Union with the intent of joining its Forest Law Enforcement, Governance and Trade processes towards a Voluntary Partnership Agreement. Guyana also has to show evidence of its decision to enter a formal dialogue with the Extractive Industries Transparency Initiative (EITI) or an alternative mechanism that the two countries agree will advance similar aims to the EITI. These requirements, emerging out of a Memorandum of Understanding, again suggest the powerful transformative impact of contractual negotiations on domestic and transnational legal systems.

3.4. Private protected area and company reserve agreements

Company-protected areas and privately managed reserves involve private forms of land ownership or management and may be the result of transnational conservation contracts. These agreements involve diverse non-state actors. In some cases, contractual provisions will require extractive-industry companies to put aside certain project areas for conservation purposes as part of permitting and project approval negotiations. In other cases, international foundations or conservation NGOs will purchase or donate funds to local NGOs to purchase critical habitats. The extent of privately conserved land is unknown, as these reserves and protected areas do not fall within international mapping initiatives such as the World Database of Protected Areas.³¹ The existence of privately protected areas is confirmed by the annual

28 A. Grainger, 'Uncertainty in the Construction of Global Knowledge of Tropical Forests', (2010) 34 *Progress in Physical Geography* 811, at 811–12.

29 O. Venter et al., 'Harnessing Carbon Payments to Protect Biodiversity', (2009) 326 *Science* 1368.

30 Memorandum of Understanding between the Government of the Cooperative Republic of Guyana and the Government of the Kingdom of Norway regarding Cooperation on Issues related to the Fight against Climate Change, the Protection of Biodiversity and the Enhancement of Sustainable Development (2009), available at www.regjeringen.no/upload/MD/Vedlegg/Internasjonalt/miljosamarbeid_utviklingsland/mou_norway_guyana.pdf.

31 S. Stolton and N. Dudley, *Company Reserves: Integrating Biological Reserves Owned and Managed by Commercial Companies into the Global Protected Areas Network: A Review of Options*, WWF International White Paper, August 2007, at 5.

reports of both private companies and conservation organizations that document their ownership and use of private lands for conservation purposes.

Countries have developed diverse legal mechanisms for recognizing private protected areas or reserves. Purchase agreements and conservation easements are examples of these legal mechanisms. In Latin America, for example, many countries have legally recognized the private reserve as a device to protect private lands and a number of conservation organizations are experimenting with the use of easements to provide for private land protection.³²

The creation and funding of private protected areas has long been a strategy of internationally minded conservation organizations intent on long-term protection of lands of conservation importance.³³ For example, in Costa Rica, land purchases became a critical aspect of 'save the rainforest' campaigns and led to the creation of globally recognized protected areas such as the Monteverde Rainforest.³⁴

While companies are also participants in private land conservation, the extent of 'company reserves' remains unknown. Corporate contributions to land conservation take diverse forms including the sale of land for conservation purposes, ownership and management of land for biodiversity conservation, and the management of land for conservation purposes in cases in which the company is not the direct owner.³⁵ One example of a company owning and managing land for conservation purposes is the Bushmanland Conservation Initiative in Namibia, where an agreement provides for private land protection by mining company Anglo Base Metals.³⁶

Private and company reserves are particularly significant for forest management and protection. Although much forest land remains owned by governments, it is often leased to international forest companies under long-term leases. Accordingly, conservation management may fall to these companies during their leasehold periods. For example, in January 2006, the Senepis-Buluhala Tiger Conservation Area in Indonesia was approved by the Indonesian minister of forestry. The peat swamp forest conservation area is habitat for the Sumatran tiger, but forest companies are granted concessions to manage the land. These companies will maintain ownership of the land under their concession licences but, according to a ministerial letter agreement, the companies are responsible for supporting the mission and activities of the Senepis conservation area in the future.³⁷

Distinct from funding and establishing private conservation areas is the practice of international conservation organizations contracting with national governments to establish national forests. Conservation International, for example, signed a 'biodiversity agreement' with the government of Equatorial Guinea to establish a National Forest. Under the agreement, the government commits to establishing

32 See, e.g., Environmental Law Institute, *supra* note 17, at 16, 21.

33 *Ibid.*, at 15.

34 L. A. Vivanco, *Green Encounters: Shaping and Contesting Environmentalism in Rural Costa Rica* (2006), 60.

35 Stolton and Dudley, *supra* note 31, at 16–20.

36 *Ibid.* The legal form of this agreement involved a 2006 memorandum of agreement between the Botanical Society of South Africa, Anglo Base Metals, and the Department of Tourism, Environment & Conservation, Government of Namibia.

37 *Ibid.*, at 19.

a National Forest and a National Conservation Trust Fund to permanently support the country's biodiversity conservation.³⁸

3.5. Debt-for-nature swaps

Debt-for-nature swaps are agreements through which foreign debt is purchased, donated, or released in exchange for conservation efforts to be undertaken by or on behalf of a debtor country. The emergence of these swaps is commonly traced back to the 1980s debt crisis and a proposal by Conservation International's Thomas Lovejoy.³⁹ In return for commitments to set aside land as nature reserves or to adopt sustainable management practices, debtor governments receive debt relief.

Debt-for-nature swaps divide into two broad categories: public (or bilateral debt-reduction programmes) and private (or commercial swaps). Commercial swaps are largely financed by private conservation organizations. Typically, swaps involve three or more parties: an international conservation organization that donates the funds, a conservation organization in the host country, and one or more government agencies in the host state.⁴⁰ Public swaps, on the other hand, are those concluded between debtor and creditor governments for the exchange of official debt.⁴¹

The first private debt-for-nature swap was concluded between the government of Bolivia and Conservation International in 1987. The funds were provided to Conservation International from a private US foundation.⁴² In the same year, the World Wildlife Fund (WWF) negotiated a swap with the government of Ecuador and another swap was concluded in Costa Rica with the facilitation of the Nature Conservancy, WWF, Conservation International, and several other foundations.⁴³ The late 1980s and early 1990s were also characterized by debt-for-nature swaps between these same three conservation organizations and a number of other countries, mostly in Latin America.

While it is unclear whether these swaps have made a significant impact on the issues of deforestation and biodiversity loss, they have been significant in revealing the extent to which private conservation organizations can foster institutional innovations.⁴⁴ Debt-for-nature swaps have also become bundled within

38 Conservation International, Press Release, 'Conservation International and Equatorial Guinea Sign Agreement to Collaborate on Conservation', April 2006, available at Conservation International, www.conservation.org/newsroom/pressreleases/Pages/042506_ci_equatorial_guinea_agreement.aspx.

39 T. E. Lovejoy, 'Aid Debtor Nations' Ecology', *New York Times*, 4 October 1984, A31. On debt-for-nature swaps generally, see P. A. Sheikh, *Debt-for-Nature Initiatives and the Tropical Forest Conservation Act: Status and Implementation* (2010).

40 R. T. Deacon and P. Murphy, 'The Structure of an Environmental Transaction: The Debt-for-Nature Swap', (1997) 73 *Land Economics* 1.

41 S. Freeland and R. P. Buckley, 'Debt-for-Development Exchanges: Using External Debt to Mitigate Environmental Damage in Developing Countries', (2010) 16 *West Northwest Journal of Environmental Law* 77.

42 In 1987, Conservation International obtained a grant of \$100,000 from the Frank Weeden Foundation, which it used to purchase a debt of \$650,000 owed to a Swiss Bank by the government of Bolivia. In exchange for cancellation of the debt, the Bolivian government agreed to establish four conservation and sustainable-use areas covering over 4 million acres; see A. U. Sarkar and K. L. Ebbs, 'A Possible Solution to Tropical Troubles? Debt-for-Nature Swaps', (1992) 24 *Futures* 653, at 658, 659.

43 A. Lewis, 'The Evolving Process of Swapping Debt for Nature', (1999) 10 *Colorado Journal of International Environmental Law & Policy* 431.

44 C. Jakobbeit, 'Non-State Actors Leading the Way: Debt-for-Nature Swaps', in R. Keohane and M. Levy (eds.), *Institutions for Environmental Aid* (1996), 127.

wider social benefit programmes that aim to provide education, sanitation, famine relief, and health care services in return for the adoption of nature conservation measures.⁴⁵

Especially in the case of private swaps, enforcement of agreement terms has often proved to be difficult.⁴⁶ In practice, because of concerns regarding sovereignty of contracting states, most private contracts rarely contain clauses on remedies for default such as arbitration, choice of forum, choice of law, or waiver of sovereign immunity.⁴⁷

The above overview of five categories of transnational conservation contract is a preliminary effort to highlight the diversity of some of the types of conservation contract that are currently being negotiated. This overview also reveals some of the limits of current knowledge of contractual arrangements. Little is known about how many of these agreements are created and replicated. Even less is known about efforts to enforce these agreements, whether through judicial or non-judicial means. The difficulty of accessing the private texts of contractual agreements poses a significant (but not insurmountable) impediment to a full investigation of these contractual arrangements, and the wider fairness issues they invoke.

4. FAIRNESS AND TRANSNATIONAL CONSERVATION CONTRACTS: WHY LABELS MATTER

Fairness is a placeholder for a number of distinct concerns. In the context of transnational conservation contracts, these concerns collide with those often characterized as concerns about accountability, legitimacy, and transparency.⁴⁸ Different fields of law, however, frame fairness debates in distinct ways.

In this section, I draw on insights from fairness theories in both contract law and international environmental law to explore some of the particular fairness challenges posed by transnational conservation contracts. I am far from the first to suggest that contract law and international law are worthy of deeper cross-fertilization.⁴⁹ This cross-fertilization between public and private law, domestic and international law, is central to the task of articulating and conceptualizing transnational environmental law.

45 J. Kaiser and A. Lambert, *Debt Swaps for Sustainable Development* (1996).

46 T. Hamlin, 'Debt-for-Nature Swaps: A New Strategy for Protecting Environmental Interests in Developing Nations', (1989) 16 *Ecology Law Quarterly* 1065.

47 E. J. Gibson and R. K. Curtis, 'A Debt-for-Nature Blueprint', (1990) 28 *Columbia Journal of Transnational Law* 331.

48 For a thoughtful taxonomy of the 'anxieties' that accountability concerns encompass, see J. L. Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance', in M. W. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (2006), 115. On legitimacy, see D. Bodansky, 'Legitimacy', in D. Bodansky, J. Brunnée, and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007), 704.

49 See, in particular, R. E. Scott and P. B. Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (2006).

5. INSIGHTS FROM CONTRACT LAW

Transnational conservation agreements are not commonly framed as contracts. Yet, thinking about these agreements as contracts is helpful, as it forces a textual analysis—something that is rarely done—and because it invites an acknowledgement of the complex social and legal contexts of these agreements. More specifically, a legal or textual analysis of conservation agreements highlights important contractual issues such as privity of contracts, the nature of the parties and their expectations of creating binding legal relationships, the adequacy of consideration, terms of the contract, dispute resolution provisions, and issues of applicable law.

Thinking about conservation agreements as contracts forces an engagement with the private-law aspects of these agreements. A contract-law analysis invites careful analysis of unequal bargaining power. The principle of privity of contract means that non-parties do not have rights to enforce or alter these contracts. Are there any important third parties left out of the agreement who will, however, experience third-party effects? The lack of any repository of private contractual agreements of this nature means that the extent of contracting practices and the terms of conservation contracts remain unknown. This gives rise to key concerns about the transparency of these agreements and their negotiations.

Fairness in contract often refers to fairness between the specific parties rather than to the wider issue of promoting a more equitable distribution of power and wealth in society. This, in part, explains the tendency of courts to obliquely identify sites of procedural irregularity rather than directly addressing the unfairness of the contractual bargain.⁵⁰ The fact that courts are the major arbiters of fairness presents a further challenge to ensuring fairness in transnational conservation contracts, as there is no evidence that the courts are or will be used to enforce aspects of these transnational agreements.

Contract-law scholars are quick to acknowledge that contracts are embedded in the ‘social practices and norms in which they arise’.⁵¹ This presents particular challenges for understanding transnational conservation contracts as the product of a set of particular market and social realities. What does it mean, in a transnational context, to understand contracts ‘as complex, societal arrangements that visibilize and negotiate conflicting rationalities and interests’?⁵²

A significant challenge posed by transnational conservation contracts is to understand the extent to which these purportedly *transnational* agreements remain embedded in Anglo-American neo-liberal frameworks of freedom of contract, party autonomy, and liberal individualism. These principles operate as guiding assumptions underlying classical contract law,⁵³ yet they may not ‘travel well’ across

50 For a more complete discussion of the case law on this point, see H. Collins, *The Law of Contract* (2003), Chapter 13.

51 *Ibid.*, at 25.

52 P. Zumbansen, ‘The Law of Society: Governance through Contract’, *Comparative Research in Law and Political Economy Research Paper 2/2007*, i.

53 The term ‘classical’ contract law, as used here, refers to a body of rules formulated in Anglo-American legal contexts in the nineteenth century. An analysis of the degree to which modern contract law departs

different cultural contexts.⁵⁴ Importantly, the reverence afforded to written contracts by US contract law may not be justified in a cross-cultural context.⁵⁵ Moreover, in certain countries, the contractual form may be considered ‘unnecessary, sometimes offensive, when rules of loyalty and mutual obligation structure the business environment’.⁵⁶ Guiding rules that are appropriate for individuals as contracting parties may not transfer well to situations in which governments or communities are contracting parties.⁵⁷ We know that a small number of United States-based conservation groups are the repeat authors of many conservation concession agreements as well as other transnational conservation agreements. We do not know the extent to which these agreements remain intractably rooted in American contract-law traditions.

There are also dangers implicit in framing conservation agreements as contracts. One such danger is that invoking private law risks depoliticizing these agreements. Framing conservation contracts as a private-law tool may forestall an inquiry into the degree to which these agreements advance the wider public interest. A view of private law as ‘the repository of our most persistent illusions about the autonomy of law from politics’ is difficult to fully escape.⁵⁸ Legal realists have long been fighting a war to re-politicize contract law and to highlight the political stakes at issue, including in ‘merely technical’ questions of contract interpretation.⁵⁹ Thinking about contracts as legal texts must not deflect from the larger questions that these agreements raise. Why are companies and conservation groups the key actors in defining which global habitats receive protection? What factors explain the unequal geographic distribution of these agreements? What mechanisms for accountability are included in these agreements? Is the anti-democratic nature of these often top-down, imposed agreements justified by the urgency of the need for protecting endangered species and threatened habitats? These questions also come to the fore by situating conservation contracts within the wider debates shaping international environmental law.

from these underlying assumptions for reasons of distributional fairness in different jurisdictions is beyond the scope of this article. Yet, the assumptions of freedom of contract and sanctity of contract continue to hold a dominant place in contract-law doctrine. The focus in this section on Anglo-American principles of contract law reflects the fact that US conservation organizations are the principal architects of transnational conservation contracts.

- 54 C. Leonard, ‘Beyond the Four Corners of a Written Contract: A Global Challenge to US Contract Law’, (2009) 21 *Pace ILR* 1, at 3. Leonard draws here on William Twining’s work on legal concepts that ‘travel well’ and ‘travel badly’; W. Twining, ‘Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context’, (2005) 1 *International Journal of Law in Context*, 5.
- 55 Leonard, *supra* note 54, at 6.
- 56 P. Pattison and D. Herron, ‘The Mountains Are High and the Emperor Is Far Away: Sanctity of Contract in China’, (2003) 40 *American Business Law Journal* 459, at 487–8.
- 57 A. Schwartz and R. E. Scott, ‘Contract Theory and the Limits of Contract Law’, (2003) 113 *Yale Law Journal* 541, at 550 (arguing, analogously, that rules that are appropriate for individuals too often are applied to sophisticated business parties).
- 58 E. J. Weinrib, ‘Corrective Justice and Formalism: The Care One Owes One’s Neighbors: Corrective Justice’, (1992) 77 *Iowa Law Review* 403, at 403.
- 59 D. Kennedy, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’, (2001) 1 *European Review of Private Law* 7, at 7.

6. INSIGHTS FROM INTERNATIONAL ENVIRONMENTAL LAW

Fairness theories in international environmental law are a product of the wider fairness debates being waged in international law. It is thus not surprising that fairness theory in international environmental law has developed within a state-centric paradigm. In the context of international climate-change law, fairness is often framed as an issue of 'how *countries of the world* shall allocate the burden of addressing global climate change'.⁶⁰ The principle of common but differentiated responsibilities focuses on how *states* are incongruently situated.⁶¹ Eli Louka, Thomas Franck, and scholars writing within the Third World Approaches to International Law (TWAIL) tradition have, in articulating theories of fairness, directed their theorizing to public international environmental law, largely leaving aside private environmental governance.⁶² Yet, important insights from their work can deepen our understanding of transnational conservation contracts. Thomas Franck's detailed scholarship on fairness expounds a theory in which nations comply with international rules because of the fairness of the rules themselves. This fairness speaks to considerations of both fair process (legitimacy) and distributive justice.⁶³

TWAIL theorist Bhupinder Chimni argues that a global imperial state is being developed by a 'transnational corporate class' and this state is replacing not the structures of government, but the functions.⁶⁴ Chimni's concern about the usurpation of government function by non-state actors resonates with the practice of environmental contracting and the key roles of non-state actors as the contracting parties to conservation contracts. There is a definite tension between conservation contracts, which are often debated behind closed doors and announced through a news conference, and emerging best practices of inclusive, transparent, and participatory international environmental decision-making.⁶⁵ To justify the democratic deficits associated with conservation deal-making, the urgency of protecting endangered species and places is frequently evoked.

Theories of consent are foundational in both international law and contract law. Who is giving consent in transnational conservation contract settings? Are women negotiating these agreements? Ciaran O'Faircheallaigh, who has been present during the negotiations of many agreements between indigenous communities and mining companies, points to the challenges in knowing whether women are excluded from these negotiations or whether their interests are neglected:

60 F. Soltau, *Fairness in Climate Change Law and Policy* (2009), i (emphasis added).

61 See, e.g., L. Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime', (2000) 9 *Review of European Community and International Environmental Law* 120; D. French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities', (2000) 49 *ICLQ* 35.

62 T. Franck, *Fairness in International Law and Institutions* (1995); E. Louka, *International Environmental Law: Fairness, Effectiveness and World Order* (2006); B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) 15 *EJIL* 1.

63 Franck, *supra* note 62.

64 Chimni, *supra* note 62.

65 Mechanisms for improving public participation in international law-making are the subject of significant scholarly interest; see, e.g., J. Ebbesson, 'The Notion of Public Participation in International Environmental Law', (1997) 8 *YIEL* 59.

These are not easy questions to answer. Many agreements are confidential, and the negotiations that lead to them even more so. . . . Even where it is possible for researchers to gain access to formal negotiations, many critical decisions are taken away from the negotiating table, and the way decisions are revealed in a negotiation may indicate little about who was and was not influential in making them.⁶⁶

Theorizing about fairness in international environmental law brings into particular focus concerns about procedural fairness. Scholarship on fairness gravitates towards procedure as the site of most significant potential for fairness reforms.⁶⁷ What is often lacking is a determination of the end that procedural fairness ought to serve. Procedural fairness thus often fails to reference distributional fairness. The very concept of transnational conservation contracts poses fairness problems. Agreements for conservation performance payments, for example, may delink conservation from community development and deprive local communities of their own legitimate aspirations for land use. In other words, contractual mechanisms as market instruments allow the international conservation community to 'buy off' resistance to conservation initiatives – creating 'tree museums' and, in the process, keeping local populations at subsistence levels of income and economic development.⁶⁸

A further fear is that it becomes the foreigners' agenda for conservation that dominates and ultimately replaces or erases the conservation agenda of the local community. The very framing of contracts as instruments of conservation can be problematic in a North–South context, as these agreements promote a view of environmental concerns as discrete issues, rather than inseparable from economic realities.⁶⁹ Further, contracts can perpetuate problematic assumptions of 'dark and poor peasant masses destroying forests and mountainsides'⁷⁰ until deals with developed-country conservation organizations bind them to a different reality. These agreements can thus feed into problematic but prevalent assumptions that developing countries are too busy addressing the demands of poverty alleviation to seriously attend to environmental protection.⁷¹

Transnational conservation contracts represent the purchasing power of a transnational elite and the power of the market to decide to offset environmental damage, when the price is right. Law is not neutral in this process. Further empirical work is needed to trace the extent to which powerful states (or non-state actors within powerful states) use conservation contracts as a mechanism for exporting legal norms. This article has pointed to several examples in which domestic-law reforms have been necessary to pave the way for conservation contracts. Other agreements, such as the Memorandum of Understanding between Guyana and

66 C. O'Faircheallaigh, 'Indigenous Women and Mining Agreement Negotiations: Australia and Canada', in K. Lahiri-Dutt (ed.), *Gendering the Field: Towards Sustainable Livelihoods for Mining Communities* (2011), 87, at 88.

67 See, e.g., R. Mushkat, *International Environmental Law and Asian Values: Legal Norms and Cultural Influences* (2004), 91; J. Razzaque, 'Human Rights to a Clean Environment: Procedural Rights', in M. Fitzmaurice et al. (eds.), *Research Handbook On International Environmental Law* (2010), 284.

68 F. Van Dyke, *Conservation Biology: Foundations, Concepts, Applications* (2008), 411.

69 B. Richardson, 'Environmental Law in Postcolonial Societies: Straddling the Local–Global Institutional Spectrum', (2000) 11 *Colorado Journal of Environmental Law & Policy* 1, at 2.

70 K. Mickelson, 'Critical Approaches', in Bodansky, Brunnée, and Hey, *supra* note 48, at 278.

71 P. F. Steinberg, *Environmental Leadership in Developing Countries* (2001).

Norway on forest conservation,⁷² mandate participation in transnational legal processes such as the Extractive Industry Transparency Initiative. These examples of domestic and transnational legal reforms speak to the deeper, and less apparent, public significance of contractual agreements.

7. CONCLUSION: FAIRNESS AND TRANSNATIONAL ENVIRONMENTAL LAW

The aim of this article is to flag the emergence of transnational conservation contracts as a phenomenon deserving of wider empirical and theoretical study. It argues for the relevance of law in interpreting both individual contracts and the practice of contracting. Conservation contracts provide an opportunity to think about fairness in transnational environmental law in a way that extends rather than simply recycles fairness thinking in domestic and international law. These fairness concerns reflect the lingering discomfort that accompanies a move away from state-based negotiated forms of environmental governance. Fairness in transnational environmental law means adjusting to roles in which non-state actors are not just campaigners, but are the principal architects of environmental agreements; where access to information is threatened by private agreements and closed-door negotiating processes; where identifying sources of authority and channels of accountability becomes complicated. Fairness concerns in transnational environmental law thus often centre on the risks that arise from a rescaling of environmental governance and the consequent impact of private contracts on constituencies that have little say in their negotiation.

Transnational conservation contracts are but one example of a turn to contracts as a mechanism for governing transnational issues generally, and environmental issues more specifically.⁷³ Negotiated contracts between polluters and regulators are developing as a regulatory option in Europe and in a number of other countries.⁷⁴ Climate contracts are advocated as a 'second-best' but practical approach to address global warming.⁷⁵ Supply-chain contracts increasingly govern environmental standards and food safety.⁷⁶ It is time for lawyers and legal scholars to step up their critical engagement with transnational conservation contracts. Absent this engagement, we will continue to witness law's marginalization to the 'merely technical' issues of contract law.

72 See the discussion accompanying note 30, *supra*.

73 On governance through contract as a dominant mode of transnational regulation, see C. Scott, F. Cafaggi, and L. Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation', (2011) 38 *Journal of Law and Society* 1, at 15.

74 E. W. Orts and K. Deketelaere (eds.), *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (2001).

75 E. W. Orts, 'Climate Contracts', (2011) 29 *Virginia Environmental Law Journal* 197, at 205.

76 F. Cafaggi, 'Private Regulation, Supply Chain, and Contractual Networks: The Case of Food Safety', Florence: EUI Working Paper, 2010.