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Revising the Role of Contract in Development Cooperation

Abstract: Given the ongoing controversy over official development assistance (ODA) and the reduction to Australia’s commitment to aid funding, it is important that Australia’s ODA is effective and is perceived to be so. Among the diverse objectives identified by AusAID’s Office of Development Effectiveness Independent Review of Aid Effectiveness is the need to build local capacity. “Capacity building” is one of the Paris Declaration’s development assistance effectiveness principles, and several of the 2013 DAC Recommendations for AusAID refer to capacity building. Australia works with private contractors, governments of partner countries, civil society organizations and multilateral agencies. Partnering with multilateral organizations represents over 30% of Australia’s development assistance budget, and the DAC Report recommends further increases in partnering for sustainable capacity development. Because small, localized nongovernmental organizations (NGOs) can be flexible, sensitive to local needs, offer grassroots networks, potential specialization, and the ability to assist directly, a strong focus on local NGOs (LNGOs) is recommended to sustainably achieve the aim of capacity building. As is characteristic of the development assistance channel, LNGOs do not work in isolation; their work often involves partnering and cooperation. At a time of increasing multilateral aid and partnering, this study looks at issues of concern to LNGOs through the lens of contracting. Contract and the contracting process can provide critical, though sometimes overlooked, levers of control in the development assistance. The politics of contract law, however, assumes supportive infrastructures of both the government and the market. The utility of contract may take on different dimensions where the legal infrastructure for enforcement is limited and the cultural infrastructure for interpretation requires a pluralistic approach. By framing development assistance effectiveness as a contractual matter, this research adduces relevant threads of contract and organizational theory in its empirical analysis of contracting in development assistance. Semistructured interviews conducted with international and local NGOs and AusAID officials in Southeast Asia shed light on how LNGOs understand the contracting process,

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how they view contracts and agreements in partnering, what they perceive to be the important issues, and how contracts function. Local context matters nevertheless, this study suggests several common themes with interesting parallels to those in commercial contracting, including issues of control, information, allocation of risk and balance of power. From a theoretical perspective, controversy over the significance and meaning of contract has been part of the academic discourse for decades. This study contributes to better understanding of the role of contract in the development assistance context. Its implications extend to contract theory generally applicable in both commercial and noncommercial realms. From a practical perspective, this study suggests ways contract can better serve the aim of capacity building, and it informs the design of contracting processes better tailored to the actual objectives of contracting parties.

Keywords: development, aid, contract

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‘They should love our people. They should respect.

... You come, you are welcome, but you don’t come with your heart.’

U Maung Maung Soe Tint, Chairman of Myanmar NGO Network,
Chairman of Myanmar NGO Contingency Plan Steering Committee

1 Introduction

This research examines attitudes among nongovernmental organizations (NGOs) in Cambodia and Myanmar toward the role of contract in development cooperation initiatives. Emerging theoretical concepts about the role of contracts suggest that contracts and contracting processes can support capacity building by furthering coordination as much as control. If such a role is possible, then contracting offers untapped potential to reduce emphasis on the complex and difficult tasks of monitoring and enforcement in development cooperation.

Contract is a form of private regulation in which the parties themselves enjoy substantial power to fix the rules.¹ Access to property, the organization of

¹ H. Collins, “Regulating Contract Law,” in C. Parker et al. (ed.), *Regulating Law* (Oxford: Oxford University Press, 2009).

economic enterprises, and frameworks for transnational trade are all governed by contracts or contractual networks. On a practical level, parties negotiate, design, draft, and agree to contracts to establish standards for future conduct. On a theoretical level contract is “democracy’s private counterpart” that enables the pursuit of diverse social goals and private interests.² However, a University of Western Sydney study notes that the importance of contract has been underestimated in the context of contracting among NGOs.³

Contract as a means of developing frameworks for cooperation has been the subject of recent research in law, management, and organizational learning.⁴ While it is suggested that, “Redeveloping the contractual relationship from core principles down will have a significant and positive impact on both the government-NFPO relationship and the delivery of quality services...,”⁵ there are often impediments to the effective function of contract. Based on interviews with NGOs in the development context, this article describes not only attitudes toward contracting relationships but also the operation of contract, including inefficiencies arising from, *inter alia*, the nature of the contract itself, the contracting process, the positions of the parties, and the regulatory context.

The first part of the article outlines theoretical and empirical research about the role of contract, research that highlights the potential of contracting in the context of development cooperation to enhance understanding and cooperation despite the lack of certainty that contracting is traditionally thought to rely upon and protect. The second part of the article describes some of the challenges to the effectiveness of development spending in an era of multilateral spending and partnering, and it underscores the importance of local NGOs (LNGOs). These are the contracting relationships where development cooperation actually happens, and where capacity building and improved understanding and cooperation underpin successful outcomes. The next part of the article outlines the methodological approach and lays out the principal themes from the interviews,

2 B. Lomfeld and D. Wielsch, *The Public Dimension of Contract*, 76 *Law and Contemporary Problems*, (2013), 19. (Foreword) citing Henry S. Maine, *Ancient Law* 170 (15th ed., 1894) (1861).

3 Sidoti et al., *A Question of Balance: Principles, Contracts, and the Government-Not-for-Profit Relationship* (Public Interest Advocacy Center, University of Western Sydney, 2009).

4 G.K. Hadfield and I. Bozovic, *Scaffolding: Using Formal Contracts to Build Informal Relations to Support Innovation*, (2013), *The Selected Works of Gillian K. Hadfield*, available at: <<http://works.bepress.com/ghadfield/48>>; F. Lumineau, M. Frechet, and D. Puthod., *An Organisational Learning Perspective on Contract Design*, 9 *Strategic Organisation*, no. 1 (2011), 8–32, available at: <http://works.bepress.com/fabrice_lumineau/4>; D. Malhotra and F. Lumineau, *Trust and Collaboration in the Aftermath of Conflict: The Effects of Contract Structure* (2012), March 2012, the *Australian Multilateral Assessment (AMA)*.

5 See Sidoti et al. (2009) *supra* note 3.

such as agency issues and the complexity of overlapping roles and accountabilities in the distribution of development spending, as well as the legal issues of contracting in this context, such as the infrastructure supporting contract and the standard form nature of the agreements. This part of the article concludes with a summary of the predominant concerns expressed in the interviews by LNGOs as participants in development cooperation. Finally, the article proposes ways to rehabilitate contracting in development cooperation to better address challenges to effective development spending.

2 The role of contract

Traditionally the role of contract has been to set up the agreed framework to carry out parties' expectations *ex ante* and to ensure adherence to the terms of the document in allocating risk. Legal theories of contract have evolved from these classical, formal origins, however.⁶ The theory of relational contracting, for example, emphasizes the dynamics of the long-term relationship and the agreement over time.⁷ Understanding contract in this way reorients the analytical focus according to context and purpose.⁸

Contracting serves as a means regulating relationships. As an early point of contact, it provides a framework for negotiation and can enable reliance where alternative sources of confidence may be lacking. During the course of performance, contract law supplies mechanisms of *ex post* governance, setting parameters for performance and supplying frameworks for planning and developing complex relations. The menu of standardized terms in a contract may include mechanisms for monitoring of agents, incentivizing performance, allocating risk, managing externalities and information asymmetry, and facilitating information search, entrepreneurship and interdependence. By policing opportunistic behavior contract can facilitate cooperation. It can support commitment and autonomy, can prevent oppression, and can facilitate loyalty and/or joint responsibility.⁹ Contract outlines methods of conflict management and

⁶ Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 Missouri Law Review (2010), 494–532, 498–501, available at: <<http://law.missouri.edu/lawreview/files/2012/11/Miller.pdf>>.

⁷ R. Kreitner, *On the New Pluralism in Contract Theory*, 45 Suffolk University Law Review, no. 91, (2012), 924.

⁸ P. Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 Law and Contemporary Problems, no. 2 (2013).

⁹ R. Kreitner, *Symposium: Contract as Promise at 30: The Future of Contract Theory: On the New Pluralism in Contract Theory*, 45 Suffolk U. L. Rev. 915 (2012).

resolution, with the potential to promote the long-term strength of the relationship. The contract is central to processes of negotiation, mediation, and litigation, and it helps the parties to predict outcomes of dispute settlement processes. At termination contract outlines the parties' rights and obligations.

Contract also extends beyond the parties to the relationship, serving as a guide to third parties such as suppliers and investors, lawyers, lenders, prospective business partners, and other third parties with an interest in the relationship. It generates information that facilitates trade and financing.¹⁰ A crucial role of contract is to inform courts and regulators, because, while contract is an important layer of self-regulation, it is also an instrument of public regulation by courts in interpreting the relationship, and a focal point of regulatory intervention, particularly disclosure. Thus, contract is heavily freighted with function and meaning in human interaction, “[A] framework for cooperation among societal agents.... an infrastructure that provides a means to carry out a range of collaborative projects.”¹¹ “Contract is the main legal institution for the future evolution of society.”¹²

Pluralistic approaches to contract theory recast the purpose of contract with reduced emphasis on control and greater importance on the role of contract in setting up frameworks for cooperation, learning and equitable sharing of risks and rewards.¹³ Management and economics literature documents the use of contract to encourage organizational frameworks that reduce transaction costs.¹⁴ Malhotra

10 *Ibid.*

11 *Ibid.*

12 B. Lomfeld and D. Wielsch, *The Public Dimension of Contract*, 76 *Law and Contemporary Problems* (2013), 19, (Foreword) citing Henry S. Maine, *Ancient Law* (15th ed., 1894), 170, (1861).

13 G.K Hadfield and I. Bozovic, *Scaffolding: Using Formal Contracts to Build Informal Relations to Support Innovation*. The USC Law and Economics Research Papers Series No. C12-3 (2013). See also D. Malhotra and F. Lumineau, *Trust and Collaboration in the Aftermath of Conflict: The Effects of Contract Structure*, the *Australian Multilateral Assessment (AMA)* (2012).

14 D. Agrawal and R. Lal, *Contractual Arrangements in Franchising: An Empirical Investigation*, 32 *Journal of Marketing Research*, no. 2(1995), 213. J.A. Brickley, *Incentive Conflicts and Contractual Restraints: Evidence from Franchising*, 42 *Journal of Law and Economics* (1999), 745. See also Lafontaine and Shaw, *The Dynamics of Franchise Contracting: Evidence from Panel Data*, 107 *Journal of Political Economy*(1999), 1041. F. Lafontaine and M.E. Slade, *Incentive Contracting and the Franchise Decision*, Chap. 5, in Kalyan Chatterjee and William F. Samuelson (eds.), *Game Theory and Business Applications* (2001). See also G.F Mathewson and Winter, *Territorial Restrictions in Franchise Contracts*, 32 *Economic Inquiry*, no. 2 (1994), 181. J. Bercovitz, *An Analysis of the Contract Provisions in Business Format Franchise Agreements*, International Society for New Institutional Economics (2000), available at: <<http://www.isnie.org/ISNIE00/Papers/Bercovitz.pdf>>, accessed 15 December 2009. S. Watson and G. Gunasekara, *Regulating Business Format Franchising: Familiar Solutions for Novel Problems*, 12 *New Zealand Business Law Quarterly* (2006), 174.

and Lumineau evaluate the effects of contract structure on trust and on the likelihood of continued collaboration; they distinguish between the control and coordination functions of contracts.¹⁵ Where norms and rules are lacking, private contract plays an important role in guiding the parties in the execution and performance of the agreement.¹⁶ This view of contract as a means to manage relationships has gained a place alongside the traditional view of contract as a tool principally for enforcement.

Contract can take on particularly interesting roles in situations of uncertainty and insufficiency of established norms such as in the context of innovative enterprise.¹⁷ As uncertainty drives contracting toward incompleteness, anticipation and provision for future contingencies in a way that courts can effectively interpret and enforce becomes more difficult.¹⁸ In the conventional framework this uncertainty would indicate a reduced reliance on formal contract law in favor of relational contracting mechanisms. Such extra-legal norms are not available, however, in the innovation context. They are similarly elusive in the context of development cooperation contracting, where parties may lack capacity to reach shared understandings, “In settings like this ...parties cannot rely on formal contract enforcement to support their arrangements ... and yet they also cannot rely on established relational norms because such norms are unlikely to exist.”¹⁹ In these situations formal contracting can provide, “essential scaffolding to support the beliefs and strategies that make informal means of enforcement such as reputation and the threat of termination effective.”²⁰ Where other norms may be lacking, as in development cooperation, formal contracts can help to structure relationships, enhance certainty, and foster cooperation.

The contracting process may also support experiential, vicarious, and inferential learning processes in the development of organizational knowledge.²¹ Further, contracts facilitate access to and transfer of information and resources, and interaction between the different parties through the successive stages of

¹⁵ D. Malhotra and F. Lumineau, *Trust and Collaboration in the Aftermath of Conflict: The Effects of Contract Structure*, the Australian Multilateral Assessment (AMA) (2012).

¹⁶ G.K. Hadfield and I. Bozovic, *Scaffolding: Using Formal Contracts to Build Informal Relations to Support Innovation*. The USC Law and Economics Research Papers Series No. C12-3 (2013).

¹⁷ *Ibid.*

¹⁸ Gilson, Sabel, and Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 Columbia Law Review, no. 431, (2009), 458–471.

¹⁹ G.K. Hadfield and I. Bozovic, *Scaffolding: Using Formal Contracts to Build Informal Relations to Support Innovation*. The USC Law and Economics Research Papers Series No. C12-3 (2013).

²⁰ *Ibid.*

²¹ F. Lumineau, M. Frechet and D. Puthod, *An Organisational Learning Perspective on Contract Design*, 9 Strategic Organisation, no. 1 (2011), 8–32.

negotiations. Contracts can also assist inter-organizational memory, facilitate experiential learning, store knowledge and shared memory, focus exchange of ideas, and guide complex negotiations.²² Where legal and market support for contracting relationships may be lacking, the contract itself and the contracting process play a role as a private mechanism for regulating, setting out the expectations of the parties and the parameters of the relationship and the basic structure of projects. There is growing evidence that contract is not solely, or even most importantly, an enforcement mechanism. In the absence of shared frameworks for understanding, contract has the potential to fill the gap. Where contract may have such potential, however, the question remains whether this potential is realized. This research explores attitudes toward and uses of contract and contracting processes in development cooperation, beginning with a brief introduction to cooperation among organizations in international development.

3 Aiming for effectiveness in development cooperation in an era of multilateral cooperation and partnering

3.1 Effectiveness in development cooperation

Official development assistance (ODA) is defined as a “transfer of resources on concessional terms... [which is] undertaken by official agencies; [with] the promotion of economic development and welfare as its main objectives (at least outwardly); and has a ‘grant element’ of 25 per cent or more.”²³ When viewed in terms of its overall value or as a portion of donor country budgets, foreign development spending can seem an insignificant issue. In 2012 members of the Development Assistance Committee of the OECD (Organization for Economic Co-operation and Development) provided USD125.6 billion in net ODA, representing just 0.29% of their combined gross national income.²⁴ In

²² *Ibid.*

²³ *Is it ODA? Fact Sheet*, available at: <<http://www.oecd.org/dac/stats/34086975.pdf>>.

²⁴ Development aid fell by 4% in real terms in 2012, following a 2% fall in 2011. See *Aid to Poor Countries Slips Further as Governments Tighten Budgets* (2013), available at: <<http://www.oecd.org/dac/stats/aidtopoorcountrieslipsfurtherasgovernmentstightenbudgets.htm>>.

this context, a Chinese saying that, “US aid is like beautiful moonlight on the river – ephemeral and really doesn’t exist” resonates perhaps too well.²⁵

Foreign development spending nevertheless polarizes opinion with emotive claims that aid is “dead,” that it fuels corruption, engenders dependency, and retards rather than stimulates economic development. Such assertions support proposals that developing trade is the answer. In the “*trade vs aid*” debate, Bauer, Easterly, Moyo, and others propose that structural aid should be radically reshaped, even in some cases scrapped altogether. The problems of foreign development spending, they argue, cannot be remedied through increased supply because resources are appropriated by the rich and powerful, including governments. Interventions on the demand side are said to be equally ineffective as the poor continue to be plagued by inefficiencies and marginalized by those same powerful actors.²⁶

Despite its challenges, development cooperation does serve a range of important substantive objectives, such as poverty alleviation and issues of human rights, gender, and the environment. It enhances the position of suppliers in developing country markets and supports political alliances between donor and recipient country governments as well as among interest groups in the recipient country.²⁷ Even critics concede that structural spending can promote opportunities, establish foundations for economic development, and foster more effective governance.²⁸ Generally speaking, it is in donors’ interests to give to increase stability, to protect the environment, health, and development of the global economy, and for purposes of international security and social welfare, as well as for intangible psychic benefits. Not only is it in donors’ interests to give, but also, it is in the recipients’ interests to put foreign development spending to use to address political, economic, and social inequities,²⁹ even if never to succeed perfectly in the effort.

²⁵ See <<http://www.brookings.edu/events/2013/03/14-myanmar-aid>> MP3, available at: <<http://e94516386dde43a790f1-3efc6a395eb32e640ae30c4edef7596c.r44.cf1.rackcdn.com/2226576635001.mp3>>, accessed 1 December 2013.

²⁶ P.T. Bauer, *Dissent on Development* (Cambridge, MA: Harvard University Press, 1972). See also W. Easterly, *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin, 2006). See also D. Moyo, *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (London: Penguin, 2009).

²⁷ B. Martens, *Why Do Aid Agencies Exist?*, 23 *Development Policy Review* (2005), 643–663.

²⁸ P.T. Bauer, *Dissent on Development* (Cambridge, MA: Harvard University Press, 1972).

²⁹ See table “What is aid for?” in A. Sumner and R. Mallett, *The Future of Foreign Aid: Development Cooperation and the New Geography of Global Poverty* (Basingstoke: Palgrave Macmillan, 2013), 37.

Effectiveness has become a central concern in the aid debate, especially at a time of increasing multilateralism and partnering. In 2010 Easterly and Williamson noted that the literature on development assistance effectiveness “is still at an early stage and is still undersupplying the public good of independent commentary on development assistance agencies’ performance.”³⁰ In recent years the body of research on effectiveness has grown significantly.³¹ Much of the work being done in this area is carried out or contracted by state aid or multilateral organizations themselves, so that some of the reports can be difficult to find, if they appear at all, in searches of the academic literature.³² There is also the question of objectivity in these self- or semi-self-evaluations. Along with the OECD, the US and European aid agencies have undertaken assessments of effectiveness. In 2006 Australia established its Office of Development Effectiveness, which conducts annual reviews of the Australian program. In late 2010 an independent panel was established to conduct a review of the development assistance program, the “Independent Review of Aid Effectiveness” (Independent Review).³³ Some of the key findings of the Independent Review address issues that will be at the center of this research such as the management of partnering arrangements.

30 W. Easterly and C.R. Williamson, *Rhetoric versus Reality: The Best and Worst of Aid Agency Practices* (2010), p. 8.

31 See, for example, J.B. Atwood, *Creating a Global Partnership for Effective Development Cooperation*, University of Minnesota’s Center for Integrative Leadership Conference on creating public value in a multi-sector, shared-power world, Paris: Organisation for Economic Cooperation and Development (2012). See also Busan Partnership for Effective Development Cooperation (2011): Fourth High Level Forum on Aid Effectiveness, Busan, Republic of Korea, 29 November–1 December 2011; available at: <http://www.dev-practitioners.eu/fileadmin/Redaktion/Documents/Post-Busan_03_2012/Busan_FINAL_EN.pdf?PHPSESSID=676429f1ff11085f8399f01af656fbbc>, accessed 27 March 2013; Cairo Consensus on Capacity Development (2011): Call to action; available at: <http://www.aideffectiveness.org/busanhl4/images/stories/hlf4/20110511/Call_to_Action.pdf>, accessed 14 March 2013); N. Keijzer, *Who’s the Boss? Strengthening the Effectiveness of Capacity-Development Support* (Bonn: DIE (Briefing Paper 15/2013)); M. Morris and J. Pryke, *Beyond Paris: 11 Innovations in Aid Effectiveness* (Canberra: Australia National University Development Policy Centre Discussion Papers, 2011) which added to the body of work prior to 2010 such as J. Faust and D. Messner, *Organisational Challenges for an Effective Aid Architecture – Traditional Deficits, the Paris Agenda and Beyond* (Bonn: DIE (Discussion Paper 20/2007)).

32 See OECD, *Aid Effectiveness 2005-10: Progress in Implementing the Paris Declaration* (Paris: OECD Publishing, 2011); Cecilie Wathne and Edward Hedger 2010. What does an effective multilateral donor look like? London: Overseas Development Institute, available at: <<http://www.oecd.org/dac/evaluation/publicationsanddocuments.htm>>; <http://www.cgdev.org/topics/aid_effectiveness>.

33 Independent Review of Aid Effectiveness (2011).

3.2 The rise of multilateral cooperation and partnering

Development cooperation spending often takes the form of bilateral development assistance, directly by one government to another, or multilateral development assistance, through international organizations like the World Bank, United Nations, and International Monetary Fund.³⁴ Development spending may also be channeled through NGOs such as World Vision, the Red Cross, and Oxfam through contracting and cooperation arrangements.³⁵

While bilateral development assistance accounts for the largest portion of government-sourced development assistance, multilateral organization assistance is of increasing importance.³⁶ AusAID reports that more than 30% of Australia's approximately AUD5 billion development assistance budget is delivered as multilateral organization funding emergency relief projects, refugee assistance, construction of railways, roads, and other development projects, as well as scientific research. The World Bank Group, Asian Development Bank, the World Food Programme, and UNICEF are AusAID's main multilateral partners.³⁷

34 Usually the largest share of a country's aid, often directed according to strategic political considerations. For example, Australia gives over 50% of its bilateral aid to our Pacific neighbors and less than 5% (check recent figures) to relieve the poverty in Africa. In 2013 Australia committed approx. AUD5 billion in bilateral aid to developing countries. In 2006–2007, the Australian Government committed about AUD400 million in multilateral aid.

35 The combined funds raised by all Australian non-government organizations (AUD871 million in 2006), sourced mainly from individuals and business donations, but includes some funding from government. In 2006–2007, the Australian Government committed AUD100 million in joint projects with non-governmental organizations.

36 Defined as “international institutions with governmental membership” these include organizations to which donors' contributions may be reported as multilateral ODA as well as organizations that serve only as channels for bilateral ODA (OECD, 2010), available at: <[http://www.oecd.org/dac/aid-architecture/DCD_DAC\(2012\)33_FINAL.pdf](http://www.oecd.org/dac/aid-architecture/DCD_DAC(2012)33_FINAL.pdf)>, p. 10

37 Though AusAID has now been subsumed into DFAT, the term AusAID is used in this article as AusAID was operational at the time the interviews were conducted. About AUD2.12 billion is currently committed to the World Bank Group, AUD222 million to the Asian Development Bank, AUD104 million to the World Food Programme, and AUD212 million to UNICEF over multi-year contracts. This total of about AUD2.7 billion appears to be over 50% of the total aid budget channeled through these four partners alone, but the source data provided in tabular form and includes multi-year contracts. See 2012 AusAID Senate Order Report, contracts entered into in 12 months prior to 31 December 2012, available from AusTender. To date the author has not succeeded in reconciling the tabular data with other annual figures released by AusAID. Further, it is not clear whether large sums channeled through other organizations such as the International Bank for Reconstruction and development (IBRD) (\$193 million) to support the IBRD's loan programs may or may not be included in the official calculation of the percentage of total Australian contribution to multilateral assistance. The Australian aid management cycle and the types of documents available are outlined at <<http://www.ausaid.gov.au/about/pages/>

The executive summary of the DAC Report notes a commitment to increasing funding to multilateral organizations in order to gain the benefit of specialist expertise and to extend reach and impact.³⁸ This is consistent with global trends; more than 200 multilateral agencies, including the United Nations, the World Bank, and global funds, receive about one-third of total ODA.³⁹ The Independent Review notes, “One of the most striking changes over the past five years has been the dramatic rise in the proportion of the program going through multilateral, NGO and government partners.”⁴⁰

Donor countries such as Australia provide development assistance through multilateral institutions because it is viewed as less political than bilateral assistance, emphasizing international cooperation over strategic and commercial interests of donor countries. Pooling of resources for large-scale programs that are beyond the capacity of donor countries through bilateral development assistance can coordinate donors’ efforts to address issues at regional and global levels, harmonizing efforts, and reducing donor burden.⁴¹ AusAID sees these partnerships with other donors as helping to maximize impact, geographic reach and influence, and ensuring effective representation in international fora, while

transparency-subpage.aspx>. The AusAID contracts list is available at: <<http://www.ausaid.gov.au/Publications/Pages/2012-calendar-year-ausaid-senate-order-report.aspx>>. What is less clearly explained in AusAID reporting is the extent of funding allocated to private, for-profit companies contracted to achieve Australia’s aid deliverables during the same period such as Building Resources across Community (\$243 million), Cardno (AUD414 million); Coffey International (AUD525 million); GRM International Proprietary Limited (AUD323); and URS Australia Proprietary Limited (AUD174). Further discussion of this interesting aspect of aid expenditure is beyond the scope of this article.

38 In March 2012, the Government published the *Australian Multilateral Assessment* (AMA) which assessed the effectiveness of key multilateral partners and made recommendations to guide engagement with multilateral organizations. OECD DAC PEER REVIEW OF AUSTRALIA, 2013, Memorandum Submitted to the OECD DAC by the Australian Agency for International Development (AusAID) Executive Summary.

39 When including earmarked funding provided to multilaterals, this goes up to two-fifths. Available at: <[http://www.oecd.org/dac/aid-architecture/DCD_DAC\(2012\)33_FINAL.pdf](http://www.oecd.org/dac/aid-architecture/DCD_DAC(2012)33_FINAL.pdf)>. See also Composition of Gross ODA Disbursements (2010) (excluding debt relief and contributions from EU Institutions, in constant 2010 prices), OECD (2012b) DAC Aggregate Statistics, OECD, Paris; OECD (2012b), OECD (2012c), Creditor Reporting System Database, OECD, Paris. The DAC report on multilateral aid provides a snapshot of the multilateral aid architecture and highlights issues such as fragmentation, multilateral effectiveness, reform processes and partner country views, available at: <http://www.oecd.org/dac/aid-architecture/multilateralaid.htm>.

40 Independent Review of Aid Effectiveness (2011), available at: <<http://www.aidreview.gov.au/publications/aidreview.pdf>>, p. 6.

41 Available at: <<http://aidwatch.org.au/where-is-your-aid-money-going/multilateral-aid/what-is-multilateral-aid>>, accessed 3 March 2013.

also preventing policy fragmentation and duplication of effort.⁴² Partnerships enable learning and leveraging from other's experience and they encourage innovation to ensure best practice and optimum results in program delivery.

At the same time that Australia is improving its engagement with civil society partners, it is "focused on improving the way the aid program engages with the Australian business community and promotes private sector-led growth in partner countries."⁴³ Over the past quarter century there has been an increasing role for government in managing contracts for the delivery of public goods and services. Though the Independent Review reports that the use of private contractors has been trimmed from about 40% in 2005 to about 20% of the development assistance budget,⁴⁴ Recommendation 10 provides that, "The aid program should increase its emphasis on private sector development and strengthening civil society."⁴⁵

42 See Australia's Aid Program, available at: <<http://www.ausaid.gov.au/makediff/ode/bilateral-partnerships/Pages/home.aspx>>.

A new *Civil Society Engagement Framework* was launched in June 2012. *Civil Society Engagement Framework: Working with Civil Society Organisations to Help People Overcome Poverty* (2012), available at: <<http://www.addc.org.au/content/resources/ausaid-civil-society-engagement-framework/983/>>.

The framework links increased funding to civil society organizations to their effectiveness, capacity, and relevance to Australia's development interests. OECD DAC Peer Review of Australia, 2013, Memorandum Submitted to the OECD DAC by the Australian Agency for International Development (AusAID) Executive Summary.

43 AusAID's *Private Sector Development Strategy* was released at a forum with business in August 2012. OECD DAC Peer Review of Australia, 2013, Memorandum Submitted to the OECD DAC by the Australian Agency for International Development (AusAID) Executive Summary.

44 The Innovation Journal: The Public Sector Innovation Journal 14, no.2 (2009), article 3 notes that a study by Council of State Governments in the United States in 1997 found that 80% of all privatization activities in both state and local governments consisted of contracting out. DeHoog and Salamon (2002) found that direct provision of goods or services by government bureaucrats accounted for only 5% of the activity of the federal government in 1999. Even with income transfers, direct loans, and interest payments counted as "direct government", the direct activities of the federal government amount to only 28% of its activities. The authors observe that the main role of government is to manage its contractors....R. DeHoog and L. Salamon, "Purchase-of-Service Contracting," in Lester Salamon, (ed.) *The Tools of Government* (New York: Oxford University Press, 2002), pp. 319–339, See also Choi, Cho, Wright and Brudney, *Dimensions of Contracting for Service Delivery by American States Administrative Agencies: Exploring Linkages between Intergovernmental Relations and Intersectoral Administration*, 29 Public Performance and Management Review, no. 1 (2005), 46–66 which found that roughly 60% U.S. government agencies used contracts with other governments, 70% contract-out with non-profit entities, while 80% engage in contracts with private firms.

45 *Independent Review of Aid Effectiveness*, 10 Recommendation (2011), available at: <<http://www.aidreview.gov.au/publications/aidreview.pdf>>.

However, advisable this trend may be in other respects, increases in multi-lateral cooperation and partnering can complicate the management of development cooperation, resulting in favoritism toward certain multilateral organizations and funds.⁴⁶ Issues of agency may arise, such as a concern about the lack of accountability to recipients. Trubek observes that the trend toward the use of state action to empower the private sector implies consequences for the role of law such as more open-ended standards, individualized contracts, flexible legal regimes, and revisable partnerships, as well as more attention to agencies, regulation, state development banks as venture capitalists, conditional grants and loans, administrative law, and a problem-solving orientation in the legal profession over resorting to courts. State partnering with private actors may also mean higher levels of risk and a greater concern for effective use of discretion and alternative approaches to ensuring accountability.⁴⁷

The Independent Review notes that, “In several respects this shift (to multi-lateral aid) has been highly successful, but there is scope to make better use of existing partnerships and include new partners, particularly the private sector and community groups.”⁴⁸ Four of the seven 2013 OECD DAC Recommendations to AusAID address partnering and/or capacity development for local civil society organization (CSOs).⁴⁹ To the extent that Australia follows these

⁴⁶ For example, Australia gives more money to multilateral development banks such as the World Bank and the Asian Development Bank, where voting is weighted according to financial contributions, and less to the United Nations agencies where voting is equal and less of the money is returned to the donor countries. See <<http://aidwatch.org.au/where-is-your-aid-money-going/multilateral-aid/what-is-multilateral-aid>>.

⁴⁷ D.M. Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* (Madison: University of Wisconsin, 2010), available at: <https://media.law.wisc.edu/m/tyyyz/developmental_states_legal_order_2010_trubek.pdf>.

⁴⁸ Independent Review of Aid Effectiveness (2011), available at: <<http://www.aidreview.gov.au/publications/aidreview.pdf>>. 5. Proliferation and fragmentation: Transactions costs and the value of aid notes that Vietnam has been at the forefront of the process of organizing donors into partnership groups.

⁴⁹ They include developing a strategic framework for engaging with civil society partners, both policy and partnership mechanisms. AusAID is encouraged to learn from its experience delivering its aid program through joint arrangements, to assess its overall approach to capacity development; to continue to reflect on how to build greater, sustainable capacity; and to share further with the donor community its analytical work and experience on capacity development and governance in various contexts. DAC suggests Australia could also play a more active role in forging international consensus on key definitions and streamlining multipartner engagement in capacity development at both global and local levels. OECD DAC Peer Review of Australia, 2013 Memorandum, Submitted to the OECD DAC by the Agency for International Development (AusAID), available at: <<http://aid.dfat.gov.au/partner/Documents/dac-memorandum.pdf>>.

recommendations, there will be more contracting and partnering with multi-lateral organizations, more engagement with local CSOs, and increases in the challenges that these trends imply.

3.3 The importance of LNGOs

Development cooperation spending is a form of regulation.⁵⁰ NGOs regulate by setting standards, establishing best practices, campaigning for particular actions, and impacting upon regulatory efforts of international organizations and transgovernmental networks.⁵¹ In principle, development assistance should be centered around and directed toward the intended beneficiaries and their interactions in dealing with diverse collective action process problems, “Without this deeper analysis and programs focused on institutional change to facilitate the long-term improvement in the lives of beneficiaries, aid is likely to provide only short-term benefits.”⁵²

Local CSOs can play a significant role as they are often more rooted and sensitive to the needs of the local community. Australia’s *Civil Society Engagement Framework* report summarizes some of the benefits of partnering with local CSOs,

Delivering aid through civil society organizations enables us to benefit from these organizations’ grass roots networks, niche areas of specialisation and presence on the ground. These organizations are connected with local communities and are able to engage on policy issues and deliver assistance directly to those people who need it most....organization[and] can be more flexible and dynamic than other partners.⁵³

Development funds can often be delivered to and through these small organizations more directly and more effectively. Registration requirements that may restrict programming sectors and geographic areas, and often leave LNGOs with

⁵⁰ On the meaning of regulation see Julia Black, *Constructing and Contesting Legitimacy and Accountability in Poly Centric Regulatory Regimes*, 2 *Regulation and Governance*, no. 137 (2008), 139. On development as regulation see W. Baer and P. Cook (eds.), *The Regulation of Development and the Development of Regulation*, 45 *The Quarterly Review of Economics and Finance*, no. 2–3 (2005), 193–558.

⁵¹ D. Brakman Reiser and C. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 *Brooklyn Journal of International Law*, (2011), 1011–1073.

⁵² C.C. Gibson, *The Samaritan’s Dilemma: The Political Economy of Development Aid* (Oxford: Oxford University Press, 2005).

⁵³ Available at: <<http://www.usaid.gov/au/ngos/Documents/civil-society-engagement-framework.pdf>>, accessed 15 June 2013.

better reach than international NGOs (INGOs). It is also worth noting that economic sanctions in Myanmar from the late 1990s until 2012 created pressure to reach development impact goals in the absence of government institutional support, so that INGOs and the UN turned to local organizations to carry out sector-based projects.⁵⁴ As one interview respondent puts it, “LNGOs can reach where big ones cannot.”

For sustainability and capacity development, local ownership is necessary.⁵⁵ While building capacity of LNGOs is an important objective, it appears one that is not yet being fully realized. Among CSOs “there is variability in management capacity and quality assurance processes, [these] need to be assessed and, in some cases, improved before aid funds can be provided.”⁵⁶ Easterly and Williamson point to the fact that beneficiaries lack a voice and argue for more independent academic checks on agencies.⁵⁷ According to Guskey, “Lack of organization support and change can sabotage any professional development effort, even when all the individual aspects of professional development are done right.”⁵⁸

4 Research method

Theory suggests a revised set of roles for contract, while trends in practice indicate increased partnering and significant roles for LNGOs. The aim of this research is to examine the role played by contracts and contracting processes in interactions among NGOs in development cooperation. Studies of contract in law often extend or refine underlying economic theories.⁵⁹ This research, however, examines attitudes toward contracting. The focus is on the development context, where the legal infrastructure for enforcement and the cultural infrastructure for understanding and interpretation are both limited. Rather than seeking to adduce information about contracting relationships to develop or explain a

⁵⁴ “Bridging the Gap between Donor Community and Local Organisations in Myanmar”, prepared for the Local Resource Centre (LRC), Yangon, 13.

⁵⁵ C.C. Gibson, *The Samaritan's Dilemma: The Political Economy of Development Aid* (Oxford: Oxford University Press, 2005).

⁵⁶ *Civil Society Engagement Framework: Working with Civil Society Organisations to Help People Overcome Poverty* (2012), available at: <<http://www.addc.org.au/content/resources/ausaid-civil-society-engagement-framework/983/>>.

⁵⁷ Easterly and Williamson (2010) *supra* note 30.

⁵⁸ T.R. Guskey, *Does It Make a Difference? Evaluating Professional Development*, 59 *Educational Leadership* (2001), 45–51.

⁵⁹ G. Farr, *Contracts as Organisations*, 51 *Arizona Law Review* no. 1 (2009).

theory, this study adopts a pluralistic approach, drawing upon agency theory and transaction cost economics, as well as theories of contract in its interpretation of legal frameworks for partnering arrangements.

This research involves two phases. Simply examining the written documents does not reveal attitudes about contracting or the full extent of their impact. Therefore, the first phase of this research surveys attitudes toward the use of contract and the contracting process through interviews with management personnel in LNGOs and INGOs. This pilot study involved semistructured interviews with INGOs and LNGOs and AusAID officials in Cambodia, Myanmar, and Thailand in order to determine how LNGOs understand the contracting process, how they view contracts and agreements in partnering, what they perceive to be the important issues, and how contracts function.

Further analysis of the agreements collected in connection with these interviews is reserved for the next phase of this research, which will focus on the documents themselves to examine how contracts and related documentation serve the aims of each contracting party (and their shared interests) with respect to principal agent problems such as free riding, asymmetric power relationships, and information problems. LNGOs in Cambodia and Myanmar became the focus of this pilot study because of the importance of development assistance to both countries, the large numbers of LNGOs in concentration in the urban centers of Phnom Penh and Yangon, the accessibility of other aid organizations and government agencies, the relative geographical accessibility of both centers to Australia and to each other, the responsiveness of LNGO personnel to initial communications, and the absence of dominance of activity of any particular religious group. Communications were also conducted in the early stages of the research with aid recipients in the Philippines, Thailand, Vietnam, and the South Pacific; these communications indicated similar concerns to those that arose among the interview subjects.

There has been no attempt in this study to distinguish the practices of one donor country from another, though it appears that the uses of contract and contracting processes are likely to be driven more by the donor side than that of the recipients. Donors involved in this study were organizations based in Italy, Norway, Scotland, Australia, the European Union, Germany, and the United States. A study of the differences in donor attitudes toward contracting is beyond the scope of this project may well be a future direction for related investigation; it is first hoped that this analysis of the role played by contracts and contracting processes will help to inform better management of contracting by LNGOs on a general level, rather than focusing on specific characteristics of particular donor countries and organizations. A brief introduction to the two countries where the interviews with NGO and LNGO personnel were conducted is provided here for contextual purposes.

Myanmar has a population of approximately 51 million people. About 25% of the population is estimated to live below the poverty level; an estimated 70% are rural and rely on agriculture. Its 2014 GDP was approximately USD65 billion. GDP growth has been accelerating over the past 4 years from 5.9% annual increase in GDP in 2011 to 8.5% increase in 2014. Major contributors to Myanmar's economy include oil, gas, hydropower and gems.

Myanmar has undergone a period of transition and major reforms since 2011 when a civil government replaced the military dictatorship that had been in place from 1962. The country's geostrategic importance can be seen in its natural resources, its proximity to large regional powers, and its assumption of the ASEAN chair in 2014. Elections are scheduled for 2015.

Myanmar was essentially closed to foreign development aid prior to 2011. The scale and pace of development cooperation has increased dramatically in recent years, providing an opportunity to apply and test principles of effective development partnership. Net ODA to Myanmar in 2012 was USD504 million.⁶⁰ Aid from Australia to Myanmar was approximately 81.5 million from 2013 to 2014 and is estimated to be approximately 90 million from 2014 to 2015. Though it has limited experience with development cooperation in a context of rapid transformation and reforms, the Myanmar government aims to retain autonomy in managing and balancing foreign development assistance and investment.⁶¹

Cambodia has a population of approximately 15.5 million, with a GDP of approximately 17 billion. About 20% of the population subsists below and another approximately 20% just above poverty level.⁶² After a period of very high rates of economic growth between 2004 and 2007, GDP growth has been relatively steady from 2011 to 2014 at approximately 7% per annum. Important contributors to gross domestic product are garment manufacturing, services, construction, and wood processing.

Cambodia's government is a constitutional monarchy. Elections in 2013 were considered to be seriously flawed. Cambodia needs effective judicial and legal system and good corporate governance environment to encourage foreign direct

⁶⁰ OECD World Banks Stats, available at: <<http://www.oecd.org/dac/stats/documentupload/MMR.JPG>>. see also Development Assistance Committee of the Organisation for Economic Co-operation and Development, Geographical Distribution of Financial Flows to Developing Countries, Development Co-operation Report, and International Development Statistics database, Net official development assistance and official aid received (current US\$), available at: <<http://data.worldbank.org/indicator/DT.ODA.ALLD.CD>>.

⁶¹ The Changing Aid Landscape in East Asia: The Rise of Non-DAC Providers, May 2014, the Asia Foundation, 40–42.

⁶² Overview of Australia's aid program to Cambodia, available at: <http://aid.dfat.gov.au/countries/eastasia/cambodia/Pages/home.aspx>.

investment. While Cambodia may be less important geopolitically than Myanmar, it is a key ally to China in Southeast Asia and chaired ASEAN in 2003 and 2012.

Net ODA to Cambodia in 2012 was USD807 million.⁶³ Australian assistance was AUD76.7 million in the year 2013 to 2014 and is projected to be 79 million in 2014 to 2015. While Cambodia has been heavily dependent on development assistance, in recent years the country has performed better in integrating and diversifying into the world economy. The success of development assistance is evidenced by the fact that according to the 2011 Paris Declaration survey five of the thirteen 2005 Paris Declaration targets have been met in Cambodia while a further four areas have seen progress.⁶⁴ The report notes that potential areas for faster progress on aid effectiveness include strengthening local ownership and improving the quality of technical cooperation.⁶⁵ These interviews explore participants' understanding of partnering processes, the issues that are important to them in entering these agreements, and the significance of contract. A qualitative method is appropriate for this purpose as it allows a holistic approach to accessing perception and meaning in order to understand, describe, and explain contracting processes from the perspective of study participants. Rather than testing a hypothesis, this study takes an inductive approach to data analysis. The methodology is based on the constant comparative method according to Maykut and Morehouse,⁶⁶ drawing upon the work of Glaser and Strauss⁶⁷ and Lincoln and Guba.⁶⁸

Face-to-face semistructured interviews were chosen to best address need for sincerity, as well as language and cultural barriers, to understand context, and to engender trust. It is more difficult to build rapport by phone or internet, and respondents may be more likely to distrust motive. Face-to-face interviews allow for evaluation of nonverbal communication. Interviews were of 1-h duration on average, with some closed-ended questions to start, and more open-ended questions to follow, which suited this context characterized by cultural difference, and helped to build rapport.

63 OECD World Banks Stats, available at: <<http://www.oecd.org/dac/stats/documentupload/KHM.JPG>>.

64 Romilly Greenhill, *The Age of Choice: Cambodia in the New Aid Landscape* (London, Overseas Development Institute, 2013), p. 10.

65 *Ibid*, pp. 10–11.

66 P. Maykut and R. Morehouse, *Beginning Qualitative Research: A Philosophic and Practical Guide* (Routledge, 1994).

67 B. Glaser and A. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine Publishing Company, 1967).

68 Y.S. Lincoln and E.G. Guba, *Naturalistic Inquiry* (1st ed., Newbury Park: Sage, 1985).

A total of 15 NGOs participated in the interviews. Of these 11 were LNGOs (two had a second follow-up interview); and four were INGOs. Members of two civil society support organizations were also interviewed, as were four AusAID officials and two consultants. In total 17 interviews were conducted of NGO personnel and 8 interviews of others for a total of 25 interviews. Throughout this article direct quotes from the interviews appear in italics.

5 Interview findings

The development cooperation picture varies by region, country, and context.⁶⁹ Myanmar and Cambodia are obviously distinct in geographic, demographic, sociopolitical, and economic terms. Nevertheless, the interviews carried out in this research suggest several common themes about partnering processes and the significance of contract. While development spending is appreciated and welcome, there are important challenges. The interviews suggest concerns about the delivery of development spending that center around two organizing rubrics. These are discussed in the following sections, Part A and Part B. Part A outlines issues of agency in the contracting relationship, such as overlapping roles, complexity of the interactions, and alignment of interests and communication. Part B canvasses issues involving the legal status and roles in contracting and partnering, including legal capacity to contract and legal significance of contracts, the legal infrastructure supporting contracting relationships, and the standard form nature of the agreements.

5.1 Issues of agency in the contracting relationship

The relationship of an LNGO with its immediate source of funding, which often takes the form of an INGO, is interpreted here through the lens of agency theory and the role of contract in addressing agency issues. Agency theory contemplates an economic relationship beyond that of a simple exchange of goods or services; it deals with maximizing the utility of contractual relationships between principal and agent and reducing the costs of inefficiencies.

⁶⁹ J. Kerlin, *Defining Social Enterprise Across Different Contexts: A Conceptual Framework Based on Institutional Factors*, 42 *Nonprofit and Voluntary Sector Quarterly*, no. 1 (2013), 84–108; Salamon, Sokolowski and Anheier, *Social Origins of Civil Society: An Overview* (Working Paper of the Johns Hopkins Comparative Nonprofit Sector Project, No. 38. (Baltimore, MD: The Johns Hopkins Center for Civil Society Studies, 2000).

5.1.1 Overlapping roles and alignment of interests

Principals, beneficiaries and intermediaries in channels of development spending have overlapping roles and discrete sets of interests and objectives. The complexity of interactions among diverse interests of multiple funding sources and multiple intermediaries and recipients means that the same entity may act simultaneously as a principal and/or as an agent or beneficiary. Further complicating the equation is the fact that an agent commonly serves multiple principals simultaneously. A government body such as AusAID, for example, is an agent, accountable to the national interest and the polity, but it is also a principal vis-à-vis contractors, partners and recipients of its funding programs. An intermediary INGO or intergovernmental organization (IGO) may act as an agent of AusAID as well as to other principals, sometimes for the same project, while at the same time acting as a principal to the LINGO. LINGOs in turn act as agents of the intermediary and may also act as principals to implementing organizations at the community level. The complexity of relationships among stakeholders is compounded by the expansion and evolution of partnering arrangements. In this landscape of overlapping and intermediary agency relationships, confusion over roles is virtually inevitable; as one donor said, *“We’re not a donor but a partner. But they see us as donors anyway.”* Conflicts arise in prioritizing competing interests of multiple principals as well as the interests of the agents themselves.

Under the traditional precepts of the law of agency, an agent must not delegate and must not put its own interests before those of the principal. Both delegation and subordination of agent’s interests can be problematic in development cooperation, however. For example, the interests of agencies involved in brokering compromise between donors and recipients may impact on the bargain mediated.⁷⁰ Again, it is important to enunciate clearly who is a principal, who an agent, and for whom, to ensure optimal alignment of interests.

The problems of agency can be more difficult to address because of the public nature of development spending. Private companies can measure trade-offs of different options in terms of profit in a way that is not possible for public contracting, with its multiplicity of objectives held by multiple principals. Clearly defined or measurable trade-offs among different options can be harder to achieve, performance incentives are often weak, and incentives to take risks may be limited.⁷¹

⁷⁰ See Martens(2005) *supra* note 27.

⁷¹ B. Martens, U. Mummert, P. Murrell, P. Seabright and E. Ostrom, *The Institutional Economics of Foreign Aid* (New York: Cambridge University Press, 2008).

The distinction between roles of LNGOs as implementing partners as opposed to carrying out their own programs is closely related to alignment issues. This was expressed in some interviews as the question of whether the project is “their project we’re implementing, or our project they’re supporting.” An employee of one INGO noted, “*there’s a radical difference. Those organizations are not implementing partners. We are supporting their programs. But there’s room for improvement.*” An LNGO that acts as an implementing agency for a project itself being implemented by an INGO on behalf of a government agency often has little or no relationship with the donor, and minimal opportunity to negotiate or to understand its decisions.⁷² At times the interests of the LNGO or CSO or faith-based organization (FBO) may be closer to donors several steps removed in the distribution channel, rather than to their more proximate principals so that, perhaps paradoxically, it may sometimes be that the farther away from the donor, the more closely the parties’ interests are aligned.⁷³

Official development aid (ODA) is distinguishable from domestic spending for development in that only donors (and not beneficiaries) have a vote, creating ownership problems.⁷⁴ Donors pay recipients to do what it is “already in their interests to do”⁷⁵ because the interests of the funding sources are not perfectly aligned with those of recipients. Donors and intermediaries cannot always ensure that the intended interests are served without “goal distortion,” “*Donors do not see the goal of the partner organization – only support the project. Period. Alignment – objectives are not the same.*”

One of the most common issues for LNGOs is the lack of funding for administration costs (aka core or program costs), “*If you look at agreement requirements of donors, all small amounts, all different requirements and reporting requirements. Can’t spend money on administration, but all of this is administration. There are about 50 staff members, but donors just want ‘project activity’ – won’t pay for administration costs.*” Where they are funded, program/administrative/core costs are generally capped to LNGOs at no more than 30%. There were allusions to a possible double standard here; one INGOs documents listed its own administrative costs at over 40%. Some LNGOs try to cover some of their core costs from project budgets, which can lead to appearance of fraud even

⁷² *Bridging the Gap Between Donor Community and Local Organisations in Myanmar*, prepared for the Local Resource Centre (LRC), Yangon, available at: <<http://lrcmyanmar.org/en/resources/bridging-gap-between-donor-community-and-local-organisations-myanmar>>.

⁷³ B. Martens, U. Mummert, P. Murrell, P. Seabright and E. Ostrom, *The Institutional Economics of Foreign Aid* (New York: Cambridge University Press, 2008).

⁷⁴ B. Martens, *Why Do Aid Agencies Exist?* 23 *Development Policy Review* (2005), 643–663.

⁷⁵ See Martens et al. (2008) *supra* note 73.

where there is no fraudulent intent. Issues of reporting and monitoring are discussed in greater detail in the following section, but it is appropriate to note here that adapting the true situation to meet reporting requirements may distort the picture to fit the exigencies of varying donor procedures and requirements. LNGOs need adequate program-based funding to ease administrative burdens of grant procurement and reporting, and to reduce risk of claims of fraudulent reporting.

Unlike many other industries or sector, in development cooperation prior experience may not provide the necessary common language to support the ongoing contracting relationship. Problems of hold-up in other distribution channels might lead to the choice of long-term relationships or vertical integration; however, both vertical integration and long-term relationships are problematic in the development cooperation context. Vertical integration is unlikely to occur across borders, cultures, and the range of other differences among these contracting organizations, even if it were legally possible. Long-term relationships can be elusive in an “industry” where relationships tend to be of short duration in part because of the distances involved and the turnover in the aid industry, “*Short term program support is common (even 1 year). Need longer-term support.*”

While personalities and interpersonal communications can be critical to successful funding partnerships, high turnover often impedes the implementation of predictable, agreed, fair procedures. It can be unclear which personnel in which organizations are communicating or are responsible for communication. LNGOs may view funding arrangements as related to personality rather than agreed arrangements and donor policies.⁷⁶ Unless cooperation is embedded in the processes, in the structural and not only in the human capital, the risk of compromise is high.

Competing interests can interfere with learning and leadership. One respondent observed of the proposal process, “*the one that wins doesn’t share the winning proposal. So they don’t know what they’re doing wrong. Very competitive, business minded, so not sharing their niche.*” Another LNGO said, “*Some strategies aren’t linked to donor requirements so hard to get funds.*” Where there are cultural differences, a party may not want to signal to local partners or competitors, or may not want to appear either too humble or over-confident.⁷⁷ There may be secrecy for this and other reasons, when sharing of information could be of benefit.

⁷⁶ See *supra* note 72.

⁷⁷ C.C. Gibson, *The Samaritan’s Dilemma: The Political Economy of Development Aid* (Oxford: Oxford University Press, 2005).

Competing interests are also an issue in training, a commonly employed approach to capacity building, but one that is less highly valued when compared with funding the operations of the LNGOs. The literature echoes the problem of technical assistance serving the interests of donor constituencies more than those of recipients. Regarding training for capacity building, even INGO representatives noted that some organizations get the same training repeatedly with little result, while their LNGO counterparts say that often the people who receive the most benefit are the well-compensated consultants contracted to deliver the training, *“The donor spend money on their own people, aid serves them. German specialist gets \$9,000 a month for one year. Very difficult to get report. Local project didn’t get any capacity from him. His salary is more than the staff of seven put together including the director.”*

With respect to compensation equity issues are a perennial concern. LNGO representatives described tension among their staff and the staff of INGOs around attitude, relative abilities and skills as well as relative compensation packages. Careful spending is sometimes perceived as a reluctance to pay the local people, *“Donors won’t agree to raise local salaries. Rents very high in Yangon. We have to move. But we can’t afford space.”* INGO staff are thought to receive exponentially higher pay and benefits than LNGO staff. The INGO, usually the direct recipient of the funding, is perceived by LNGOs to be in a position of power over the LNGO subrecipient and runs the risk of being perceived to be corrupted by money and power. An LNGO official said, *“Need to be able to explain why each person is being paid. None of that is transparent.”*

5.1.2 Reporting

The most striking theme to emerge from the interviews concerned communication, reporting, and accountability. Reporting arises in response to alignment issues, but also to adverse selection, another aspect of agency theory. Adverse selection is caused by information asymmetry, for example, where a principal is not able to become fully informed about an agent’s qualifications, relationships, capacities, etc. An INGO may risk selecting as a partner an LNGO not capable of performing to its standards because the attributes of agents are not observable. Adverse selection is best addressed by *ex ante* measures such as signaling and screening,⁷⁸ but monitoring provides another avenue to manage its effects.

Problems of alignment of interests and adverse selection motivate reporting requirements, which have in themselves become an alignment problem. For

⁷⁸ G. Farr, *Contracts as Organisations*, 51 Arizona Law Review, no.1 (2009).

example, many respondents echoed the different perspectives about short-term and long-term horizons in reference to evaluating outcomes, “*Donee needs long-term, while donor is focused on short-term results.*” Also reflecting alignment problems highlighted above, reporting is often activity-based rather than program-based.

Virtually all respondents talked about the need for better communication in development cooperation channels, and much of the discussion seemed to center on reporting. “Reporting” is how the recipient of funding talks about the issue, while to the donor or intermediary the conversation centers on “accountability.” One consultant observed, “*It’s all about accountability, but no one’s really accountable.*” While “accountability” for the use of funds seemed a preoccupation of virtually all the participants, “reporting” puts the onus on the recipient as LNGOs indicate an escalation of what they feel are already high levels of accountability. Unintended adverse consequences of measurement approaches to regulating behavior include cheating, bribery, “teaching to the test”, over- and under-reporting, incentives to not disclose problems, attraction to easy-to-achieve targets and neglect of the hard cases, emphasis on quantity over quality, and a range of false economies.⁷⁹ Interviews indicate that, rather than nourishing cooperation, reporting can be divisive, “*Compliance officers – come not to help but to find fault.*”

Respondents described reporting requirements as detailed, inflexible, and frequent, and they expressed concern over the amounts of time needed to fulfill reporting obligations, and the rigidity of donors or intermediaries, “*Report in their format for budget – HR, admin, activities. Can’t tell them, this is how we account to everyone.*” While they seemed to feel generally capable of fulfilling donors’ reporting requirements, this was not always the case, one noting that, “*we need to hire special consultants to write reports.*” This reporting burden carries significant (program) costs to the entities carrying out the work and often detracts from the value of the relationship, even to the extent of creating resentment. “Reporting” in the development cooperation context does not seem necessarily imply either “communication” or “accountability.”

Respondents wanted information and accountability to flow both ways more than it does, for sharing of information in all directions, not just from recipient upwards., “*Monitoring and evaluation go directly to donor without consulting, never share reports.*” LNGOs indicate that donors and intermediaries fail to contribute toward the aim of accountability that is so important to them, “*Donors need to change communication line. They don’t know. They should*

79 G. Grizzle, *Performance Measurement and Dysfunction: The Dark Side of Quantifying Work*, 25 *Public Performance and Management Review*, no. 4(2002), 363–369.

study the real needs of the people.” Most documentation is in the language of the funding source, not the local language, *“reports should be in Burmese and English.”*

LNGOs that are involved in the same or related projects with a regional or INGO may not communicate/coordinate directly with each other; rather the regional or INGO controls this. The reluctance to share information can convey a message of lack of trust and a failure of a collaborative approach. LNGOs want equitable channels to communicate their experiences, observations, and opinions, *“if they have the right to monitor us, we should have a right to monitor them.”* Another observed, *“Feedback mechanism of local partner – no place for that – should be in the agreement.”* Fundamentally, if there is not full communication, the true situation may not be reported and the story may be skewed. *“If there is a problem, not easy to tell why there is a problem. Everything hide.”* This dynamic can compromise both trust and effectiveness.

Accountability is related to scarcity of time and problems of distance. Donor agencies and NGOs higher in the distribution chain are time poor (or perceive themselves as time poor), so there is heavy reliance on reporting in lieu of participation and communication with those farther down in the chain, *“Donor too busy to meet with LNGOs. We can’t talk to donor. Only consortium leader can talk to donor.”* This can send a message that the donor’s time is more valuable than that of recipients, with obvious implications for power imbalance in the relationship.

LNGOs at intermediate levels appear most disadvantaged by the lack of time, participation and communication.⁸⁰ When the INGOs do attend, it is often to the local recipients, thus reinforcing the misalignment between intermediary NGOs, *“They told the LNGO people – stay on the boat and they talk to the community. Donors need to monitor according to agreed processes.”* While

80 While this inference needs further testing, the Local Resource Center of Yangon report, “Bridging the Gap Between Donor Community and Local Organisations in Myanmar” (Bridging the Gap Report) also highlights the problem, “A donor facilitated a collaboration of several unregistered organisations with a registered LNGO to write a proposal together... the contracting LNGO took full responsibility for reporting. Unregistered CSOs initially submitted reports to the contracting LNGO...as time passed, the LNGO stopped receiving these reports. Frustrated, they sought understanding and found that the unregistered CSO had been reporting directly to the donor. This meant that the LNGO was needlessly wasting time and also was really taking the risk without any control over reporting and management. INGO staff and institutions shut out the important voice of local organisations in discussions with donors, including with relations to policy and sector-specific needs... LNGOs fear that their low position in the structure means that they will be left behind, both in terms of funding and also with regards to voice....” *Bridging the Gap Between Donor Community and Local Organisations in Myanmar, prepared for the Local Resource Centre (LRC), Yangon, available at: <<http://lrcmyanmar.org/en/resources/bridging-gap-between-donor-community-and-local-organisations-myanmar>>.*

gathering information directly from beneficiaries would seem to be good practice, sensitivity is required in the execution. Telling the LNGOs to “stay on the boat” may fail to provide the accurate perspective the INGO is seeking, at the same time alienating LNGO personnel and compromising relationships.

Varying frequency and time frames for reporting to different funding sources can create problems and concerns about fraudulent practices. One participant noted that a copier required repairs but the funds for such expenses had been exhausted, so the reporting was fudged to cover the repair because otherwise, “*Have to wait 2 months to buy a new drum for printer.*” Another outlined the difficulty in accurately reporting hours and costs when working across several different projects with different funders and reporting time frames.

Information required in the reports is sometimes considered too detailed or otherwise impracticable. Often suppliers do not have access to the information or do not wish to provide it, “*Most of the taxis are CNCP supporters. Five page report to donor this morning. ‘Why need my phone number?’ Taxi not want to give phone number.*” Donors are perceived to be concerned with trivial detail, often unrealistic requirements and getting paper work filled in correctly. There is a frustration on the part of LNGOs with what they see as donors’ lack of awareness of the real issues and the story that really needs to be told, “*Donors need to know. Do you want the report or do you want the reality?*” The respondent concluded, “*they just want a beautiful report.*”

An information problem inherent in agency is that an agent may selectively inform its principal in ways that reflect well on the agent. The information flows in development cooperation can appear “broken” compared to the ideal, neoclassical principal-agent feedback loop.⁸¹ NGOs as contractors are incentivized to provide information that the donor wants to hear, their predominant motivation in relating to the immediate donor may be the aim of securing future contracts. To the extent this is the case, they are less willing to risk passing control to beneficiaries, which in turn can limit effectiveness. This problem is exacerbated in situations where measurement of the good to be provided is difficult, such as institutional reform. The beneficiary view is biased because the beneficiary not paying as a principal would be paying the agent, and beneficiary preferences are not the same as those of donors. Consultants, suppliers of goods, and intermediaries become the direct beneficiaries of aid. The feedback loop is “broken” as these intermediaries with diverse interests replace the voice of the principal.⁸²

⁸¹ C.C. Gibson, *The Samaritan’s Dilemma: The Political Economy of Development Aid* (Oxford: Oxford University Press, 2005).

⁸² *Ibid.*

5.1.3 Moral hazard

Missing information and local knowledge lead to moral hazard, where one actor is protected against risk resulting from his or her own behavior. An example of this is where a donor wants its development spending to constitute efficient investment, but is not good at assessing efficacy, so the intermediary agency bears the consequences of bad decisions.⁸³ When INGOs fail to perform, LNGOs are reluctant to access any formal complaint mechanism, and may view it as an interpersonal problem, not related to donor policy, “*If they make a mistake, we close our eyes.*” INGOs have a different perspective. In order to see what is really going on, they may make efforts to get out to the remote communities, but such efforts can create other types of misunderstanding as mentioned above. Accountability should not come at the expense of motivation and initiative. “*Funding with condition, regulation, especially regarding how it’s spent – this document, that document... Working with Cambodian people not so easy to get document. Take motor taxi – where’s receipt? Taxi? -not have receipt. Then asked to return money because not meet guidelines. But money already spent so how to get money back? ... Chinese money have no human rights conditions so we will take Chinese money.*”

5.2 Legal status and roles in contracting and partnering

Respondents’ attitudes about contracting and legal issues were also canvassed in the interviews. Here, the main themes were LNGOs’ capacity to enter contracts, the perceived significance of contracting, and the problem of standard form contracting in development cooperation.

5.2.1 LNGOs’ capacity to enter contracts

First, the legal structure and status of an NGO can influence the formation and administration of partnerships.⁸⁴ The capacity of local CSOs to legally interact in

⁸³ *Ibid.*

⁸⁴ This finding would also be consistent with R. Eyben, *Hiding Relations: The Irony of ‘Effective Aid*, 22 *European Journal of Development Research*, no. 3 (2010), available at: <<http://open docs.ids.ac.uk/opendocs/handle/123456789/2028>>. Eyben’s substantialist vs relational approach. According to Eyben substantialist denotes a perspective that “sees the world primarily in terms of pre-formed entities in which relations among the entities are only of secondary importance.” While relational denotes that relationships between actors matter, and actors themselves change and evolve through their interaction with each other.

partnerships, horizontal and vertical, public and private, is impacted by government regulation, registration, and certification requirements. In Cambodia this involves registration with relevant government ministries. Many LNGOs in Cambodia also seek to obtain CCC (Cooperation Committee for Cambodia) certification for good governance practice.⁸⁵ Not all CSOs seek to comply with regulation, however, under the current regime, “*There is resistance to NGO law, as threat to civil society freedom to assemble freedom to act. But this is not to say that there is no need for the law. There is a need, but because this is a dictatorship, any law can be used by the dictatorship for its ends.*” Another respondent said that the NGO law, “*should not be enacted until there is a judicial system in place to fairly interpret the law – judicial reform is an essential precursor to fairness in regulation.*” A member of a Cambodian LNGO expressed frustration with the environment for civil society and what in some cases amounts to a subordinate role to government, “*NGOs are becoming so institutionalized that they’re doing the government’s bidding, particularly in education and health; they’re just propping up the dictatorship, while the government takes credit saying it did it when it didn’t.*” An organization that was engaging in activities against the government told of the government’s move, “*to suspend the organization, but there is no law that says that the government can suspend an organization.*”

In Myanmar registration with relevant government ministries is also required of CSOs. According to the 1988 Organization of Association Law local groups are required to register under the Ministry of Home Affairs. NGOs must pay 100,000 kyat (approx. USD110) and submit report every 2 years under the regulations, but in reality sources say that groups must pay up to 500,000 kyat. Respondents report that many LNGOs are not able to obtain the proper registrations and function outside the bounds of this legal requirement.⁸⁶ There are around 270 NGOs registered at the Ministry of Home Affairs, though more than 1,000 are estimated to be working inside Myanmar.⁸⁷ Failure to meet the requirements for registration may be due to financial limitations, but may also involve inability to find members who meet government requirements and are

⁸⁵ Partnerships for sustainable development in Cambodia, available at: <<http://www.ccc-cambodia.org/>>

⁸⁶ In 2013 a new law was proposed to require registration of all NGOs operating in Myanmar with significant penalties for noncompliance. The LNGOs responded collectively and the proposed law is under revision. See also *Bridging the Gap Between Donor Community and Local Organisations in Myanmar, prepared for the Local Resource Centre (LRC)*, Yangon, available at: <<http://lrcmyanmar.org/en/resources/bridging-gap-between-donor-community-and-local-organisations-myanmar>>, pp.12–13.

⁸⁷ Kyaw Zan Myint quoted in *The Irrawaddy*, available at: <<http://www.irrawaddy.org/archives/11784>>.

willing to formally serve, “*Hard to find members of advisory board. Voluntary, interested in the work. Want to be paid. Won’t work for free in Cambodia.*”

Failure to register can affect the organization’s functional capacity to operate including legal and financial affairs and can impact on the partnering arrangements.⁸⁸ “*Donor wants legal status – previously was hard takes a year, costs us US \$500. So a CBG decides not to register. Donor asks for registration. CVG can’t get there – so barriers.*” There is also some resistance to the registration requirement, “*Groups do not want to become registered – CSO shouldn’t need to be registered.*” Another said, “*Civil society organizations do not want to become registered as an association or NGO.*”⁸⁹

The role of government in enabling civil society activity through the legal system – judiciary, regulation, tax – is a recurring theme in the literature.⁹⁰ With respect to legal infrastructure in support of contracting, the operation of commercial law assumes supportive infrastructures of both government and the market. Similarly, development spending cannot work as effectively where the institutions are lacking, where there is a failure in the legal infrastructure of the justice system and in markets. In development cooperation, instead of promoting certainty, government can be a source of risk. In addition to the problems LNGOs may face with attaining the status to enter into contractual relationships, in Cambodia and Myanmar there is little in the way of legal infrastructure for the support and enforcement of contractual obligations and minimal regulation of private contracting behavior. The lack of legal infrastructure impacts on the use of contract if parties cannot rely with confidence on legal enforcement. When asked about enforcement of agreements in aid, respondents generally replied

88 The *Bridging the Gap Between Donor Community and Local Organisations in Myanmar*, prepared for the Local Resource Centre (LRC), Yangon, available at: <<http://lrcmyanmar.org/en/resources/bridging-gap-between-donor-community-and-local-organisations-myanmar>>.

quotes a CSO representative, “Because of the donor constraints regarding registration, we worked with an INGO partner. We have very little voice in the proposal development process. After that the donor created a ‘small window’, which is good. But, now we are back in the same position because the ‘big window’ is 10 times as much and so now we must apply under the a bigger organisation in order to access such funds.”

89 Further insight into this issue in Myanmar is provided by the LRC report, “Bridging the Gap Between Donor Community and Local Organisations in Myanmar”, “For ODA agencies, grantees must function as a legal entity. The execution of a binding contract between donor and grantee hinges on the both parties existing as legal entities and therefore able to commit to fulfilling contract obligations. In Myanmar, local CSOs have struggled to secure legal status.” *Bridging the Gap Between Donor Community and Local Organisations in Myanmar*, prepared for the Local Resource Centre (LRC), Yangon, available at: <<http://lrcmyanmar.org/en/resources/bridging-gap-between-donor-community-and-local-organisations-myanmar>>.

90 See, for example, J. Garton, *The Regulation of Organized Civil Society* (Oxford: Hart, 2009).

that there was little possibility of enforcement through formal legal channels. As the development cooperation landscape straddles both commercial and public sectors as well as the nonprofit sector, market mechanisms can be another source of uncertainty. Rather than reinforcing agreements through course of dealing and custom, the norms for extra-contractual frameworks in interpreting parties' obligations may not play out, as in the domestic context, within a familiar landscape for all participants.

5.2.2 LNGOs perception of the significance of contracts

While further research will consider these different elements of the entire contracting process, the interviews in this first stage of research did not yield an entirely consistent picture of how LNGOs view the contract and contracting process. First, it is important to recognize that contract is but one of many parts to documenting development cooperation agreements, *“Contract is short but refer to other documents – budget, report format, RFP proposal.”* That, said, the role of contract itself is not clear. One representative of a large NGO stated, *“they [the LNGOs] don’t look at the contract, the program or project manager doesn’t look at the contract; they say ‘I just trust’. Sometimes they don’t even know when the project begins and ends...the parties should read the contracts – they should be aware of what’s in the contracts.”* A representative of another of the larger INGOs stated, *“If you make a contract for the local partner they will read it line by line. They will point out what they’re not clear on, or not happy with.”* But the same respondent also observed that, *“the local CBOs aren’t interested in what’s in the contract (because what can you do about it?)”* With respect to enforceability most agreements reviewed to date appear to be intended to be legally enforceable, whether or not the legal infrastructure is in place to provide the means for enforcement. One agreement, however, contains the following clause, *“this agreement serves only as a record of its parties intentions and does not constitute or create and is not intended to create rights or obligations under domestic or international law and will not give rise to any legal process and will not be deemed to constitute or create any legally binding or enforceable rights or obligations express or implied.”*

5.2.3 Standard form contracting in development cooperation

There are also important issues with respect to the standard form nature of the contract. Development cooperation agreements involve a range of kinds of

tender and grant arrangements that vary in detail, specificity, positions of the parties, and so on. They may be termed variously grant agreements, grant agreement deeds, cooperation agreements, service contracts, or memoranda of understanding. What most have in common is that they are standard form, which means that they are drafted and controlled by one party, typically the larger regional or international funding source or intermediary in the transaction, with little or no negotiation. An LNGO manager said, “*Contract donor-driven policy. Send agreement. You have to sign. No negotiation. No right to reject because we need money. No right to amend. No choice.*” Another said, “*Can negotiate program activities, budget, but not terms of reference.*”

Standard form contracts are designed to reduce transaction costs by eliminating the *ex ante* costs of negotiating and drafting each new agreement. They allow the drafting party to enter into the same agreement with each recipient, which also helps contain costs of administration and monitoring. While the donor or intermediary as drafting party of a standard form contract does have a legitimate interest in the increased efficiency and reduced costs of the standard form, there are potential disadvantages to the one-sided nature of such contracts. Standard form contracting often implies greater risk of onerous terms, undue advantage to the drafting party, interference with independence, and inordinate credit or benefit to the drafting party.⁹¹ Standard form contracting shifts the nature of contract from process to commodity. The agreement becomes a part of the package the donor provides and is less a representation of a meeting of the minds between the parties, as is the role of contract in classical contract theory. The result can be an erosion of the meaning of contract and can even compromise recipients’ commitment to perform, often under conditions that are likely to test that commitment.⁹²

Because the standard form contract may not represent the interests of all stakeholders, the private mechanism of governance through the use of contract has the potential to lead to inefficiencies or undesirable social consequences. One respondent, currently with an INGO, who had worked with both large and small NGOs stated, “*If there’s room for INGOs to make changes in their contracts based on context, that would really help. We can’t go so far as negotiating every individual contract – that’s not happening – but we could acknowledge certain areas.*”

These contracts must often accommodate high levels of uncertainty in performance. This uncertainty can be difficult to reconcile with the standard

⁹¹ See Sidoti et al.(2009) *supra* note 3.

⁹² E. Spencer, *The Regulation of Franchising in the New Global Economy* (Northampton, MA: Elgar, 2010).

form nature of the contract. The standard form contract emphasizes the formalities of the contract and contract formation, but uncertainty over time and in unfamiliar contexts requires flexibility, reciprocity, and trust that develop over time. When a standard form contract is drafted with the discretion needed to accommodate uncertainty, it enhances the power of the drafting party. Thus the standard form contract allows the donor or intermediary to shift the risk of uncertainty to recipients and reinforces problems of agency where one party does not bear the risk. As a tool of governance, therefore, contract serves the interests of the drafting party, which often fail to align with the interests of LNGOs or those of other stakeholders. Standard form contracting can impede capacity building of LNGOs as recipients in the distribution channel and can reinforce uses of power and discretion that undermine the relationship.

Case law provides little guidance in the interpretation of development cooperation contracts in part because the cross-border nature of the transaction means few cases are ever litigated. In other sectors where standard form, long-term (or otherwise uncertain) contracts create similar conditions, the parties' inability to address these conditions through their private arrangements has led to government regulation. Examples of this include Australia's unfair contract terms legislation that applies to consumer contracting, and mandatory codes of conduct or legislation. Regulatory intervention is not viable across borders in the development cooperation arena, so the parties must resort to other means in order to reach a balanced and effective interaction through private means of contracting.

5.3 Summary of findings

- Development cooperation resembles a distribution channel. Funding allocations are “retailed” with discrete transactions and costs at each stage in this process, overlapping roles and accountabilities, and confusion over project ownership, mission, and alignment of interests, all of which impact on LNGOs' advocacy and independence. Inadequate support for program costs was a common theme, as was the need for more program funding, not just the project funding preferred by donors.
- LNGOs' attempts to cover the costs of local administration can lead to appearance of fraud even where there is no fraudulent intent. Some LNGOs try to move to a program-based model to ease administrative burdens of grant procurement and reporting, and to reduce risk of claims of fraudulent reporting. Adapting the true situation to meet reporting requirements again may distort the picture to fit the exigencies of varying donor procedures and requirements.

Short-term horizons were mentioned in relation to impacts on capacity building, planning, and autonomy of LNGOs. There is a need for long-term interactions/relationships that are well orchestrated but not vertically integrated. This complicates the business of identifying and applying appropriate structures and rules for these complex and uncertain interactions.

- The processes of competition for funding tend to favor established organizations rather than nurturing and building fledgling organizations and because competition can prevent collaboration and sharing of information.⁹³
- Reporting was a dominant theme, with concern over issues related to broken feedback loops that too often allow shifting responsibility, with insufficient mechanisms to encourage shared responsibility and cooperation.
 - Of great concern was the amount of time and resources required for reporting, and detailed, inflexible, and frequent reporting requirements. The donor community is focused on accountability but LNGOs are struggling to keep up....and these are program costs. There is a heavy emphasis on monitoring and evaluation, reporting and accountability and issues of reporting with a focus on outcomes and cost efficiency.
 - The underlying motivations for accountability need to be understood and addressed, with greater flexibility in policies and procedures, and adaption to context. Information needs to flow both ways, as true leadership and support of capacity building are less likely to take place when the flow of information is principally from recipient to donor, rather than from donor to recipient, as well as horizontally.
- Overall, it appears that what is needed, and what has been requested, is more direct support to local organizations, particularly for program costs; longer-term support; cooperative mechanisms for funding; better mechanisms for cooperation and coordination; mutual respect, trust, and transparency; and more opportunities to participate in the projects. These themes are largely summarized in the following quotes:
 - One respondent said, *“A few simple answers: registration, understand local context, what it takes to register, have a bank account, not expect people to work for nothing, don’t only fund project costs – consider your own costs, if there’s a meeting in Bangkok they need a passport. Channels of communication.”*

⁹³ See *supra* note 72.

- When asked for the most important messages, another LNGO manager said, “*not just activity costs ...also fund program and personal costs, second most important need longer-term agreements.*”
- Another employee of an LNGO suggested that, “*Joint assessments should be got done together with a partner/in participation with smaller organizations of both project and organizational capacity.*”
- A letter from the Executive Committee of the MNN to the UN Humanitarian Coordinator dated 18 September 2009 stated, “*We should meet together to discuss and consult to find and promote better mechanism for cooperation and coordination with external agencies, INGOs and LNGOs. By this way, we can develop mutual respect, mutual trust, mutual transparency and coordination among us. We request you all to kindly give us more opportunities to participate in the projects that concern the welfare of our people.*”

The LNGOs know what they want, but the question is how to get there. Donors are, for the most part, aware of the concerns expressed in these interviews. It seems that problems persist even when both parties are informed of them, and these problems, particularly agency problems, alignment, information, accountability, and the already heavy emphasis on reporting and the “measurement culture”⁹⁴ are likely to become exacerbated by increasing multilateralism and partnering. The trend toward increased partnering is also likely to exacerbate the mismatch between local needs and available resources. Donors are perceived to give money for what will serve their interests and image best, which is not always what the LNGO operations need, while at the same time insisting on burdensome reporting requirements. More steps in the distribution channel needing to pay administrative costs can mean a bigger squeeze.

Attitudes of LNGOs about the significance of contracts to their interactions are mixed, but do indicate that the perceived significance of contracting is low. They also indicate a lack of appreciation of the utility of contract as a governance tool. The legal infrastructure supporting contracts is an uncertain patchwork, and standard form contracting means LNGOs have relatively little input into inclusion and structuring of contract terms. Development cooperation agreements are written so that control is accorded to INGOs, while risk is allocated to LNGOs.

⁹⁴ See *supra* note 79.

6 Revising the role of contract

Increased direct funding might offer a potential solution to the complexity of the development spending distribution networks. Increasing partnering, however, suggest that the trend is in the opposite direction, that it may not be so easy to cut out the “middle-man” in development cooperation. More reporting could be another solution but reporting is only one means to regulate relationships and govern interactions, and may not be the most appropriate tool to achieve all the various aims with which it is freighted in development cooperation. It is certainly not the only means to address problems of agency. The limitations and disadvantages of independent reporting by individual recipients, which, as noted above, can include over- and under-reporting, incentives to not disclose problems, attraction to easy-to-achieve targets, emphasis on quantity over quality, and a range of false economies.

Contract offers an alternative means to achieve some of the objectives that are currently sought to be addressed through monitoring, such as rendering the distribution chain more equitable and efficient. The interviews suggest that contract as a tool of governance remains largely untapped in its potential to manage inefficiencies in development cooperation. Better contracting processes and documentation could help ameliorate agency problems, revise reporting processes, and reduce reliance on monitoring. The coordinating function of contract could be of benefit in identifying and applying appropriate structures and rules for complex and uncertain interactions and help support longer-term interactions/relationships that are well orchestrated but not vertically integrated.

This use of contract as a tool of governance departs from classical contract theory in which contract is a formal means of enforcing promises and evolves toward contract as a means to engender cooperation and organizational learning. Evidence suggests that accurate and explicit enunciation of both parties' intentions in contracting documentation could assist in unifying efforts toward achieving objectives as well as in coordinating and tracking activity.

In order for contract to achieve this potential, however, its idiosyncrasies and limitations of contract in development cooperation must also be taken into account. First, with respect to LNGOs' legal capacity to enter contracts and the legal infrastructure in support of contracting, the regulatory environment should be stable and certain. Appropriate regulatory approaches should be encouraged, for example, the new law in Myanmar. Donor expectations are also relevant, for example in the levels of official status donors expect and the assistance they provide to LNGOs in meeting those requirements. To address the need for greater

awareness and clarity about the uses and meaning of contract and contracting processes, education initiatives could help non-drafting parties to see that contract can serve their interests, as a means to address the lack of infrastructure and to help address inherent uncertainties. Research in contracting in highly innovative contexts where such uncertainty is also an issue indicates that contract serves to create frameworks for understanding. Finally, there are ways to ameliorate inefficiencies engendered by the standard form characteristics of these agreements and their inherent uncertainty. Market-based solutions include ensuring that the non-drafting party has an understanding of the terms and can engage in collective action not only to educate and increase awareness, but also to negotiate, and so to claim for the recipient a role in the process of the design of the relationship. Higher levels of awareness may also encourage self-regulatory measures in the donor community to ensure fair contract conditions. Contract terms and processes can be revised for greater flexibility to respond to each party's needs and to remove impediments to participation. The contract needs to articulate purpose and establish clear objectives and should be drafted to ensure cooperative approaches to unforeseen contingencies. Reporting obligations can be designed via the contract to engender greater participation of both parties. Overall the focus is on *ex ante* participation in order to relieve some pressure on the *ex post*. As these considerations are addressed, contracting can better engender cooperation in the contracting relationship and serve parties' interests in a way that is fair and efficient in carrying out the expectations.

Further analysis of the agreements collected in connection with these interviews is reserved for the next phase of this research, which will examine how contracts and related documentation reflect the aims of each contracting party (and their shared interests) with respect to principal-agent problems such as free riding, asymmetric power relationships, and information problems. In order to gauge how contract is used as a means of control and how it may be used to enhance cooperation, the research will assess the use of contract provisions related to control, e.g. rigid requirements for performance, penalties for failure to perform or non-compliance, monitoring and inspection of partners' activities, and termination clause. It will also assess the use of contract provisions that have been found to be more closely linked to coordination, e.g. contract terms that focus on roles and processes such as a provision in a contract for a process to redefine the objectives or reassign tasks between firms during their relationship, terms that facilitate the search for alternative solutions that fit in with the other party's plans and coordination related to reassignment of tasks among participants, indications of duration and conditions of renewal, and dispute resolution provisions.

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