

INTERNATIONAL PROPERTY RIGHTS VERSUS THE SOVEREIGN RIGHTS OF STATES:
A Critical Inquiry into the Continuing Tension in the International Investment Regime

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Abstract:

Events in Latin American countries have re-ignited the debate over the constitutive legal process governing the international regulation of foreign direct investment (FDI). These events have once again thrown into focus the continuing tension between sovereign rights and international property rights within the framework of the natural resources development agreements. This article sets out to explore their implications for the natural resources sector which has traditionally provided the setting for the debate on the international regulation of FDI. It posits the view that the long standing friction between the property rights of the FDI party and the sovereign rights of host States could in one sense be seen to a natural consequence of the private-public character dichotomy of State contracts in international economic law. The main thrust of the article is directed at a critical appraisal of the contemporary international legal problems of natural resources development agreements with a view to exploring possible long term solutions. The discussion will include: (1) a critical appraisal of the private-public law dichotomous character of natural resources agreements; (2) a critical inquiry into the source of the friction between private property rights and sovereign rights within the international investment regime and the persistent problems involving the prioritization of norms to govern FDI agreements; and (3) conclude by arguing that the requirement for FDI protection ought not to foreclose the search for lasting solutions to the friction, not least the continued quest for an international *lex specialis* for international investment law.

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I. INTRODUCTION

Events in Latin America have once more raised questions about the constitutive legal process governing the international regulation of foreign direct investment (“FDI”) in the natural resources sector. These events have again exposed the fractious nature of the relationship between host States and overseas private investors in the form of multinational petroleum and mining companies.¹ They include the promulgation in 2001 by the Venezuelan government of a new Hydrocarbons Law which ratified the concept of national sovereignty over natural resources. This was followed by Decree No.5200 of 2007 implementing the law of 2001. Decree No.5200 made provisions for the transfer of multinational oil company assets and shares to the State, in particular the handing over by these companies of equity stakes in Venezuela’s Orinoco Oil Belt operations to the State Oil Company, *Petróleos de Venezuela*.² Meanwhile in Bolivia, the government embarked on a number of indigenization programs which in 2006 led to the taking over by the State of equity interests in a number of foreign oil and gas concerns operating in the country. These initiatives culminated in a number of nationalizations in the energy and electricity sectors in 2010.³

The provisions of Venezuela’s Decree No.5200 and the various programs embarked upon by the Bolivian government may be classed as “direct takings” under the international law principles governing the nationalization or expropriation of alien property.⁴ Furthermore in 2008, following investment disputes with foreign petroleum and mining companies, Ecuador decided to withdraw its consent to arbitration under

¹ See George Joffe, Paul Stevens, Tony George, Jonathan Lux & Carl Searle, *Expropriation of Oil and Gas Investments: Historical, Legal and Economic Perspectives in an Age of Resource Nationalism*, 2 J. WORLD ENERGY L. & BUS. 3-23 (2009).

² In 2008 a number of companies operating in Venezuela’s Orinoco Oil Belt agreed to comply with the provisions of the new law; these included Chevron, Statoil, Total, ENI, BP and Sinopec. Companies refusing to comply included ExxonMobil and ConocoPhillips: see *Fact Sheet: Arbitration Between ExxonMobil and Venezuela*, available at <http://www.venezuelanalysis.com>; see also Jens Gould, *Venezuela Tightens Oil Grip*, in THE CHRISTIAN SCIENCE MONITOR, APRIL 14 2006.

³ For a chronological record of these events, see *Bolivia Takes Over BP Subsidiary*, available at <http://news.bbc.co.uk/1/hi/world/americas/8030208.stm>; *Bolivia Nationalises Energy Firm*, available at <http://news.bbc.co.uk/1/world/americas/7848615.stm>; *Bolivia Nationalizes Three Private Electricity Firms*, available at <http://news.bbc.co.uk/1/hi/world/americas/8656106.stm>

⁴ See Christopher Dugen & Joseph Profaizer, *Venezuela Launches Next Stage of Expropriation*, available at <http://www.paulhastings.com/assets/publications>; Brian Alperstein & Marco Kirby, *What is Really Behind the Nationalizations in Latin America? The Cases of Venezuela and Bolivia*, available at <http://www.lmvlaw.com/archivos/117966530.pdf>. For an analysis of the public international law principles governing nationalization and expropriation, see *Jeménez de Aréchaga, International Responsibility*, in MAX SØRENSEN (ED), *MANUAL OF PUBLIC INTERNATIONAL LAW* 533 (1968); Edwin Bourchard, *The Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreign Nationals*, 20 AM. J. INT’L L 738 (1926); IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY*, PART 1 (1983); L. Goldie, *International Responsibility and the Expropriation of Property*, 12 INT’L LAWYER 63 (1978); F.A. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT’L L 572 (1960). See also, for the public international law consequences of indirect forms of nationalization, Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REV.: FOREIGN INV. L.J. 41 (1986); Burns Weston, *Constructive Takings under International Law: A Modest Foray into the Problem of ‘Creeping Expropriation’*, 16 VA.J. INT’L L. 103 (1975); Catherine Yannaca-Small, *“Indirect Expropriation” and the “Right to Regulate” in International Investment Law*, WORKING PAPERS ON INTERNATIONAL INVESTMENT, OECD (2004), available at <http://www.oecd.org/dataoecd/22/54/33776546>.

the auspices of the International Center for the Settlement of Investment Disputes (“ICSID”).⁵ This followed Bolivia’s decision the previous year to denounce the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”).⁶ Meanwhile Nicaragua has also advocated withdrawing from the ICSID Convention.⁷ Unsurprisingly the natural resources sector, which historically has been the focus in the battle for supremacy between the sovereign rights of host nations and the private property rights of the FDI party, has once again provided the setting for the latest events.⁸

These developments, as expected, have been the subject of much academic discourse. The discussions have so far focused primarily on a growing reaction by capital importing developing countries, mainly from Latin America, against the pervasive impact of bilateral investment treaties (“BITs”). Another grievance centers on the perception of consistently unfavorable outcomes of the international arbitration process, with many awards rendered in favor of investors and against capital-importing countries.⁹ Other issues identified by leading scholars and commentators as possible causes of the current Latin American discontent with the international investment regime are, *inter alia*, the disproportionate number of investment arbitration cases brought against developing countries;¹⁰ the lack of reciprocity or the unevenness of BITs in the distribution of rights and obligations; the attribution to private foreign investors of directly effective rights which endows and confers upon them *locus standi* in international law; and perceived substantive bias and procedural shortcomings of the international arbitration process.¹¹

This article, whilst acknowledging the “BITs” premise which has been the principal focus of recent academic discourse, will argue that the root cause of the continuing discontent on the part of capital importing countries with the international investment regime lies in the substantive principles of the constitutive legal process governing the regime.¹² Amongst its key submissions the article will posit the view

⁵ Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT’L L.J. 491 (2009), at 492.

⁶ *Id.*

⁷ See Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT’L L.J. 435 (2009), at 436; Kate Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343 (2009).

⁸ See further Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 230 RECUEIL DES COURS 9 (1991-V), at 175-94.

⁹ See *supra* note 7.

¹⁰ Rebecca Dreyfus, *Latin America Faces 61% of Ongoing Mining Cases at the International Center for Settlement of Investment Disputes*, available at http://www.bilaterals.org/article.php3?id_article=16890.

¹¹ Kaushal, *supra* note 5, at 492, 497 where the author has also identified amongst these growing concerns the expansive interpretation of the substantive law governing FDI and amongst the procedural shortcomings “the broad rendering of the arbitrability of disputes by arbitrators”. See also P. Cahier, *The Strengths and Weaknesses of International Arbitration Involving a State as a Party*, in J. LEW (ED), CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 241 (1986); Z. Douglas, *The Hybrid Foundation of Modern Investment Treaty Arbitration*, 74 BRIT. Y.B. INT’L L. 151 (2004); M. SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT (3rd EDN, 2010).

¹² J. BRIERLY, THE BASIS OF OBLIGATIONS IN INTERNATIONAL LAW (1958), at 1 proffers the view, with regard to the shortcomings of international law in general, that “the recent literature on international law bears witness to the belief among international lawyers that many of the postulates which traditionally pass for international law are unrealities from which their system must be freed, if it is to be kept in touch with the facts of international life ... The task is worth attempting not only for the credit of international law as a subject

that the concerns, both past and present, expressed over the international investment regime are symptomatic of a more deep rooted jurisprudential problem. This is a problem which may be traced to the very door of the traditional principles of customary international law which govern State responsibility and the diplomatic protection of aliens and their property.¹³ Viewed from another perspective, the recent developments affecting FDI in the natural resources sector should not be seen in isolation but ought to be understood as part of an ongoing historical process.

Writing in 1978 García-Amador had observed that existing principles of customary international law on State responsibility were developed in an era when colonialism, territorial conquest and imperial domination were all considered as legitimate aspirations of the major maritime powers.¹⁴ He argued that this state of affairs led to much discontent and resentment on the part of smaller and weaker states, mainly from the developing world, towards some of the rules and principles established in that era.¹⁵ Following this discontent, early attempts by Latin American nations to roll back the boundaries of established principles of customary international law on State responsibility could be seen in the emergence in the region of putative norms of international law such as the *Calvo* and *Drago* doctrines.¹⁶ The author argues that these doctrines were clear and unequivocal expressions of the philosophy behind Latin American attempts to revise some of the traditional principles and institutions of international economic law.¹⁷ It will be further submitted as part of the present discourse that recent events having significant adverse impacts on the legal security of FDI in Latin America are but a continuation of the historical process which defines efforts by capital importing developing countries to revise the international investment regime, including its customary international law foundations.¹⁸

The principle of State responsibility in foreign expropriation cases has generally been regarded by publicists to be the principal foundation of the

deserving of scientific study, but also for practical reasons.” For a further discussion of the weaknesses of the international legal system and other problems of international law, see Higgins, *supra* note 8, in particular *Chapter 2: Sources of International Law: Provenance and Problems*, at 42-66; OPPENHEIM, *THE FUTURE OF INTERNATIONAL LAW* (1955), at 58; JESSUP, *A MODERN LAW OF NATIONS* (1948), at 2; B. RÖLING, *Les Principes du Droit International Public*, 77 RECUEIL DES COURS (1950), at 11.

¹³ Cf. C.G. Fenwick, *International Law: The Old and the New*, 60 AM. J. INT’L L. 475 (1966); A. Grahl-Madsen, *International Law at the Crossroads*, in SCAND. STUDIES IN LAW (1980), at 177-86.

¹⁴ F.V. García-Amador, *Current Attempts to Revise International Law: A Comparative Study*, 77 AM. J. INT’L L. 286 (1978); Higgins, *supra* note 8, at 36.

¹⁵ See Verzijl, *Western European Influence on the Foundations of International Law*, 1 INT’L RELATIONS 137 (1955-IV); for a critique of the view that developing nations have not contributed to the development of customary international law, see generally ALEXANDROWICZ, *AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES* (1967).

¹⁶ One of the main criticisms levied against the traditional principles of customary international law which regulate the FDI regime has been their encroachment on the principle of national sovereignty, in particular their circumscription of the public power prerogative of regulatory intervention in natural resources development projects involving the infusion of FDI. For more on this see generally F.V. GARCÍA-AMADOR, *THE CHANGING LAW OF INTERNATIONAL CLAIMS, VOLS.I&II*, (1984); see also WOLFGANG FRIEDMANN, *LAW IN A CHANGING SOCIETY* (1964); T.O. ELIAS, *NEW HORIZONS IN INTERNATIONAL LAW* (1992).

¹⁷ GARCÍA-AMADOR, *supra* note 16, at 286-88.

¹⁸ All references in this article to “international law” are to public international law.

international law regulating the FDI process.¹⁹ As such the principle forms the bedrock of the constitutive legal process governing the relationship between the foreign investor and the host State within the framework of natural resources development agreements. However, the search for adequate long term solutions to the legal problems affecting FDI in the natural resources sector has for long been obscured by the intense controversy surrounding the debate on the legal protection of FDI. The precise nature and substantive content of the applicable legal regime in this area has never clearly been defined to the satisfaction of all interest groups and stakeholders involved in the process.²⁰ Over the years diverse principles and competing standards have emerged to vie for supremacy.²¹ Informing this competition is the conflict between the international property rights of foreign investors and the sovereign rights of host States. At the center of the conflict competing principles converge, each staking a superior claim to legitimacy in the prioritization of the sources of law governing the rights and entitlements of the principal parties to transnational natural resources development agreements - the host State on the one hand and the FDI party on the other.

The various theories, views and norms postulated by the different schools of thought (although not mutually exclusive) have often tended to fall short of an all-embracing, comprehensive formula capable of addressing or satisfying the specific needs, aspirations or concerns of all stakeholders.²² The sustained emphasis of the traditional exposition of the legal foundations of the customary international law on State responsibility, for instance, has tended to focus primarily on FDI protection.²³ Postulated alternative norms of international law, on the other hand, have aspired primarily towards promoting the pre-eminence of the sovereign and public power prerogatives of the host State within the framework of natural resources development agreements in particular, and the international investment regime as a whole.²⁴ Unsurprisingly, therefore, the views of each school of thought have been fiercely contested by the opposite camp.²⁵ The chief consequence of these competing opinions has been that as a jurisprudential matter the source of international law obligations in FDI relations has been the subject of much

¹⁹ See PIETER VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* (1981); ABBA KOLO, *STATE REGULATION OF FOREIGN PROPERTY RIGHTS*, PHD DISSERTATION, UNIVERSITY OF DUNDEE (1994).

²⁰ Cf. E.I. Nwogugu, *Legal Problems of Foreign Investment*, 153 RECUEIL DES COURS 167 (1976); F.V. García-Amador, *State Responsibility – Some New Problems*, 94 RECUEIL DES COURS 369 (1958-II).

²¹ See further ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* (1986); Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 263 (1982-III).

²² For a comprehensive treatise of the competing sources of law on State responsibility, see generally GARCÍA-AMADOR, *supra* note 16; see also W.G. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964); ROSALYN HIGGINS, *CONFLICT OF INTEREST: INTERNATIONAL LAW IN A DIVIDED WORLD* (1965).

²³ F. DUNN, *THE PROTECTION OF NATIONALS* (1932); H. Schemers, *Judicial Protection of International Rights*, 23 GERM.Y.B.INT'L L 181 (1980); Stephen Schwebel, *International Protection of Contractual Arrangements*, 53 A.S.I.L PROCS. 266 (1959); Georg Schwarzenberger, *The Protection of British Property Abroad*, 5 CURRENT LEGAL PROBS. 295 (1952).

²⁴ See H.S. Zakariya, *Sovereignty over Natural Resources and the Search for a New International Economic Order*, 4 NAT. RES. F. 75 (1980); KAMAL HOSSAIN (ED), *LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER* (1980).

²⁵ See further F.V. García-Amador, *A Basic Dispute: Conflicting Views on Expropriation*, in J. NORTON (ED), *PUBLIC INTERNATIONAL LAW AND THE FUTURE WORLD ORDER* (1987): Chapter 7.

controversy, if not uncertainty. This remains the case notwithstanding what appears to have been a paradigm shift in recent years towards the traditional position and its embedding in BITs and a number of international arbitral awards.²⁶ This article will posit the view that the transformation witnessed within the sector in the past 20-30 years (from restrictiveness to investment promotion and protection) would seem to suggest more a policy response to prevailing economic exigencies than a wholehearted conversion on the part of resource-rich but capital-poor developing nations to the doctrinal precepts and prescriptions of customary international law governing the international investment regime.²⁷

But is the evolution of a regime which is capable of satisfactorily addressing the needs of all stakeholders in the international investment process a possibility? The often conflicting long term interests of the host State and the FDI party greatly complicates and further compounds the difficulty of the task involved. A need for a full awareness of the limitations imposed by political and legal constraints (the latter in the form of regime-specific established norms and practices) to the attainment of the much required equilibrium is likewise to be counseled. But this ought not to dissuade the continuing quest for viable long term solutions. It is thus proposed as part of this article to critically inquire into the precise nature and substantive content of the relevant principles with a view to attempting a contribution, however modest, to this long running debate.

At the sharp end of the controversy over FDI protection has been the specific nature of the relationship between host nations and multinational companies in the natural resources sector - with particular reference to oil, gas and mineral exploration and exploitation.²⁸ The dynamics of this relationship, from both a historical and a contemporary perspective, will serve as the background to this discourse. The article examines not just contemporary legal problems of the international investment regime but the FDI process as a whole, including an analysis of regime-specific policies and practices and their contribution to both the tension in the regime and to the ensuing debate.²⁹ In view of this orientation the perspective informing the article will be both theoretical and practical - in that theoretical postulations on the principle of State responsibility will be analyzed and tested against the background of past

²⁶ S.H. Amin, *The Iran-US Claims Settlement*, 32 INT'L & COMP. L.Q. 750 (1983).

²⁷ See Thomas Wälde, *Investment Policies in the International Petroleum Industry: Response to the Current Crisis*, in N. BEREDJICK & T. WÄLDE, PETROLEUM INVESTMENT POLICIES IN DEVELOPING COUNTRIES 7 (1988).

²⁸ See generally Robert Jennings, *Rules Governing Contracts Between States and Foreign Nationals*, in RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD 123 (1965); A.A. Fatouros, *International Law and the Internationalized Contract*, 74 AM. J. INT'L L. 134 (1980); Lowell Wadmond, *Basic Problems of Foreign Oil Operations*, in R. WILSON (ED), PROCEEDINGS OF THE 1960 INSTITUTE ON PRIVATE INVESTMENT ABROAD 537 (1960); and Philippe Kahn, *Problèmes Juridiques des Investissements Étrangères dans les Pays en Voie de Développement*, 52 INT'L L. & ARB. REP. 835 (1966).

²⁹ For analyses of specific problems regarding the legally binding character of international investment agreements, see Lowell Wadmond, *The Sanctity of Contract Between a Sovereign and a Foreign National*, in SELECTED READINGS ON THE PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS 139 (1964), (hereinafter SELECTED READINGS); see also Hans Wehberg, *Pacta Sunt Servanda*, 53 AM.J. INT'L L. 786 (1959); George Ray, *Some Reasons for the Binding Force of Development Contracts Between States and Foreign Nationals*, 16 BUS. L. 942 (1961).

and current policies and practices affecting FDI in the natural resources sector.³⁰ If effective long term solutions are to be found to the problems of the international investment regime the controversy surrounding the source(s) of obligation in host State/foreign investor relations, and their prioritization, will first of all have to be resolved - not least in view of the sometimes inconsistent outcomes of international arbitral judgments on the question.³¹ It is hoped that the current exercise may contribute towards fostering a much improved understanding of the specific nature of the international legal problems of FDI as a pre-requisite in the search for long term solutions.

From a historical perspective, current events informing the FDI regime cannot altogether be separated from the somewhat confusing background of diverse theoretical expositions spawned by a wide spectrum of international legal thought on questions concerning the international regulation of domestic natural resources development. It could in fact be said that the legal aspect is but one factor, albeit a very important one, of the general framework which informs and governs FDI in the sector. For a complete picture one must also look to the general political, historical, socio-economic and cultural contexts.³² The discussion in Part II will concentrate on the background to the international regulation of natural resources development and the way in which this background continues to inform the tension between international property rights and sovereign rights. The discourse will focus on the historical, political and economic background to the debate on the international regulation of FDI. From an economic viewpoint the pivotal role of FDI in the development of domestic natural resources will be analyzed. The main thrust of the analyses will be directed at examining the evolutionary context of the international regulation of natural resources development. It will thus include a critical commentary on the controversy surrounding the prioritization of international norms governing substantive legal obligations in natural resources development agreements.

Part III reviews the contractual and legal framework of natural resources agreements against the background of the tension between international property rights and sovereign rights. An analytical, as opposed to a purely descriptive approach, will aim at providing some insights into the relationship between contractual practice and some of the basic precepts on which international

³⁰ For more on the dynamics of the host State/foreign investor relationship and its possible implications for the evolution of international law on the subject, see A.H. Hermann, *Disputes Between States and Foreign Companies*, in J. LEW (ED), *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 250 (1986).

³¹ Brigitte Stern, *Trois Arbitrages, Un Môme Problème, Trois Solutions: Les Nationalisations Pétrolières Libyennes devant l'Arbitrage International*, in *REV. DE L'ARBITRAGE* 1-43 (1980), at 3; see also Robin White, *Expropriation of the Libyan Oil Concessions: Two Conflicting International Arbitrations*, 30 *INT'L & COMP. L.Q.* 1-19 (1981). Some authors have also drawn attention to the lack of clarity in the decisions of international arbitration tribunals on FDI disputes: see Richard Lillich and David Bederman, *Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims*, 91 *AM. J. INT'L L.* 436-65 (1997).

³² Cf. Tatiana Gulberg, *International Concessions: A Problem of International Economic Law*, 25 *ACTA SCANDINAVICA JURIS GENTIUM* 18 (1955); J. HARTSHORN, *OIL COMPANIES AND GOVERNMENTS* (1965); M. KAPLAN & N. DE KALZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* (1961); Z. MIKDASHI, *THE INTERNATIONAL POLITICS OF NATURAL RESOURCES* (1976); E.I. NWOGUGU, *THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES* (1965); G.W. STOCKING, *MIDDLE EAST OIL: A STUDY IN POLITICAL AND ECONOMIC CONTROVERSY* (1971); F. SNYDER & S. SATHIRATHAI (EDS), *THIRD WORLD ATTITUDES TOWARDS INTERNATIONAL LAW* (1987).

investment regime is founded. The discussion will explore relevant aspects of the tension between international property rights and the sovereign rights within the context of the contractual and regulatory framework of petroleum and mineral development agreements. Progressing from this aspect, the international legal context of natural resources development agreements and its impact on the tension will constitute the principal subject of Part IV. This section examines the key question of characterization or categorization of natural resources development agreements in the international investment regime. The analyses in this Part will extend to an examination of internationalization (through “externalization” of the conflict resolution process) and stabilization, and their role in the conflict between international property rights and sovereign rights.

Part V embarks on a reappraisal of the sovereign right of the host State to regulate the FDI relationship and its impact on the doctrine of acquired rights. It examines the public power prerogatives of host States and the “right to regulate” by critically inquiring into its precise nature within the framework of FDI projects and also assesses the permissible limits of the exercise of such rights under international law. The analyses in this part thus incorporate the main theme of the friction between international property rights and sovereign rights which informs the whole discussion. It will be seen as part of this discourse that the conceptual eclecticism which has been the source of so much confusion in this area of international law is in many ways a product of the divergent doctrinal postulations on these key concepts. Part V will conclude with some thoughts on an international *lex specialis* for the international investment regime.³³ It will argue that contemporary realities in the natural resources sector call for a rethinking - not a complete abandonment - of the conceptual basis of emergent norms. It will further be argued that such a rethinking ought to form part of the process of evolving a ‘*sui generis*’ *corpus juris* to govern the international investment regime of the future.

The emergent norms - *Permanent Sovereignty over Natural Resources* (PSNR),³⁴ the *New International Economic Order* (NIEO)³⁵ and the *Charter of Economic Rights and Duties of States* (CERDS)³⁶ – which were so vigorously postulated and advanced in an earlier era as peremptory norms (*jus cogens*) now appear obsolete and seemingly irrelevant to the FDI regime.³⁷ Their complete rejection implies an instinctive recourse to established principles of customary international law. But the latter have been perceived as not according a sufficient emphasis to the national economic development goals and objectives of host nations - goals which are seen to be implicit in resources development projects.³⁸ It will be

³³ To avoid any possible confusion the term *lex specialis* is preferred in this case to that of the *lex mercatoria* which has been used with specific reference to transnational commercial transactions. In this article the possible application of the *lex specialis* will be argued with specific reference to international investment agreements.

³⁴ United Nations General Assembly (UNGA) Resolution 1803, XVIII of 14 December 1962

³⁵ UNGA Resolution 3201, S-VI of 1 May 1974.

³⁶ UNGA Resolution 3281, XXIX of 12 December 1974.

³⁷ See A.O. Adede, *International Law and Property Rights of Aliens: The Old Order Changeth*, 19 MALAYA L. REV. 175 (1977); for an assessment of the limited impact of the new norms on the international investment regime, see V. Rodriguez-Padilla, *Sovereignty over Natural Resources: The End of an Era?* 3 ENERGY STUDIES REV. 108 (1991).

³⁸ S.K.B. Asante, *Traditional Concepts versus the Developmental Imperatives in Transnational Investment Law*, in R. DUPUY (ED), COLLOQUIUM ON THE RIGHTS TO DEVELOPMENT AT THE INTERNATIONAL LEVEL 352 (1979);

submitted in this discourse that it is this perception which in part aggravates incipient cultural, political and legal tensions within the framework of a natural resources project. This ultimately increases the sovereign risk of regulatory intervention by the host state in the form of fiscal measures, an indirect taking or outright nationalization.³⁹

The article will conclude by arguing the need for a revision of the substantive legal basis of the FDI regime.⁴⁰ The conclusion's gravamen is founded on the absence of consensus (or near universal support) which is critical for upholding the legitimacy of the substantive rules, procedures and processes which govern the current international investment regime.⁴¹ Its main premise will be based on the requirement for an improved and unified international legal order which is more capable of providing effective long term solutions to the legal problems of FDI, particularly those relating to the stability of investment relations in transnational natural resources development ventures.

II. THE INTERNATIONAL REGULATION OF NATURAL RESOURCES DEVELOPMENT: HISTORICAL, POLITICAL AND ECONOMIC BACKGROUND

In the period prior to independent nationhood for African, Asian and Middle Eastern countries, international petroleum and mining companies had established for themselves seemingly unassailable positions with regard to ownership or acquired rights over production and deposits.⁴² Many of these companies had their upstream operations in territories which were then under the direct political control and administration of their home countries, the latter acting as colonial authorities. But following the decolonization process and the coming of independence to these territories, the profound structural changes which accompanied this transformation in the global political landscape implied new challenges for multinational resource companies.⁴³

M. Lachs, *International Law in a Multi-Cultural World*, in *JUS '81 UPPSALA PROCEEDINGS* 183 (1981); J. Kunz, *Pluralism of Legal Systems and Value Systems and International Law*, 49 *AM. J. INT'L L.* 370 (1955).

³⁹ Cf. S.K. Date-Bah, *The Contract as a Mechanism for Taxation*, 6 *J. ENERGY & NAT. RES. L.* 41 (1988)

⁴⁰ For similar arguments with particular reference to oil concessions, see Michael Dickstein, *Revitalizing the International Law Governing Concession Agreements*, 6 *INT'L TAX & BUS. L.* 54 (1988).

⁴¹ The basis of obligation in international law (be it customary international law, treaty or convention law) being in the main consensual. On the question of consent to international law obligations and the factors which serve as yardsticks for measuring consent, see IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2008), at 4-18. See also Higgins, *supra* note 8, at 36-67; Verzijl, *supra* note 15, at 138-40; BRIERLY, *supra* note 12, at 1-67; P.E. Corbett, *The Consent of States and the Sources of International Law*, 6 *BRIT.Y.B. INT'L L.* 20 (1925) at 55-80, 340-54; G.G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 *MOD. L. REV.* 1 (1956); E. LAUTERPACHT, *ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE* (1991), at 23-58.

⁴² See, for a discussion on the concept of acquired rights, P. Lalive, *The Doctrine of Acquired Rights*, in *RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD* 145 (1965); I. FOIGHEL, *NATIONALIZATION: A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW* (1974); ZOUHAIR KRONFOL, *PROTECTION OF FOREIGN INVESTMENT: A STUDY IN INTERNATIONAL LAW* (1972).

⁴³ See HARTSHORN, *supra* note 32; Kenneth Carlston, *Concession Agreements and Nationalization*, 52 *AM. J. INT'L L.* 260 (1958); Henry Cattán, *Past and Present Trends in Middle Eastern Oil Concessions and Agreements*, in CAMERON (ED), *PRIVATE INVESTORS ABROAD – PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS* 135 (1969); J. Attwell, *The Changing Relationships Between Host Governments and International Petroleum*

These challenges were not limited to the need for a readjustment to the new geo-political situation by the companies. They extended to a re-examination of the theory and practice of international resources law and policy, in particular the constitutive legal process governing the regulation of FDI in the development of domestic natural endowments within the context of the new political landscape.⁴⁴ Foremost amongst these challenges was the precise legal character of the relationship between multinational petroleum/ mining companies and the newly independent host countries.⁴⁵ What factors, therefore, define the legal context for the international development of domestic natural resources? Which legal concepts or body of principles inform the constitutive legal framework with regard to the form and legal character of international resources development agreements involving FDI? It is proposed to examine these questions from both a legal and historical perspective, and where relevant, the evolutionary context in which these questions may be viewed over the past five decades.

An equally important question involves the characterization or categorization of natural resources development agreements within the international investment regime. Such agreements are neither contracts *stricto sensu* (i.e. agreements between private parties); nor are they inter-State agreements such as, for example, BITs which are agreements between sovereign governments. Natural resources development agreements straddle the recognized boundaries between these two forms of agreements,⁴⁶ they also bestride the accepted demarcations between private law and public law,⁴⁷ national law and international law.⁴⁸ The question of categorization has itself developed into a bone of contention; for on this question rides the permissible limits of national regulatory competence within the framework of domestic natural resources development ventures made possible through the infusion of foreign capital and technological expertise. Before examining these questions, it is proposed first to review the historical and political background to the debate over the legal regime governing the international development of domestic natural resources. This will be followed by an analysis of the indispensable role

Companies, 17 HOUS. L. REV. 1015 (1980); KAMAL HOSSAIN, LAW AND POLICY IN PETROLEUM DEVELOPMENT: CHANGING RELATIONS BETWEEN TRANSNATIONALS AND GOVERNMENTS (1979); JUHA KUUSI, THE HOST STATE AND THE TRANSNATIONAL CORPORATION: AN ANALYSIS OF LEGAL RELATIONSHIPS (1979).

⁴⁴ Cf. Jeménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1 (1978-1).

⁴⁵ Pierre Barraz, *The Legal Status of Oil Concessions*, 5 J.W.T.L. 609 (1971); H. Calvert, *The Law Applicable to Concessions*, 1 MALAYA L. REV. 265 (1959).

⁴⁶ Robert Jennings, *State Contracts in International Law*, 38 BRIT.Y.B.INT'L L. 156 (1961), at 177; Arnold McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT.Y.B. INT'L L. 1 (1957), at 10; J.D. MITCHELL, THE CONTRACTS OF PUBLIC AUTHORITIES (1954); Turpin, *Public Contracts*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 24 (1984); G. Van Hecke, *Contracts Between States and Foreign Private Law Persons*, in R. BERHARDT (ED) ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (1984), at 54; GEORG SCHWARZENBERGER, FOREIGN INVESTMENT AND INTERNATIONAL LAW (1969); HENRY STEINER & DETLEV VAGTS, TRANSNATIONAL LEGAL PROBLEMS (1986).

⁴⁷ See further George Haight, *The Choice of Public International Law as the Applicable Law in Development Contracts with Foreign Governments*, in MCDANIELS (ED), INTERNATIONAL FINANCING AND INVESTMENT 554 (1964); M. Sornarajah, *The Myth of International Contract Law*, 15 J.W.T.L. 187 (1981).

⁴⁸ See A. Giardina, *State Contracts: National Law versus International Law?*, 5 ITALIAN Y.B. INT'L L. 147 (1980-81); Günther Jaenicke, *Consequences of a Breach of an Investment Agreement Governed by International Law, by General Principles of Law, or by Domestic Law of the Host State*, in D. DICKE (ED), FOREIGN INVESTMENT IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 177 (1987).

played by FDI in the development of domestic natural endowments in developing countries.

A. Historical and Political Background to the Debate on FDI Regulation.

When in the period following independence from colonial rule the oil producing developing countries embarked on a self-assertive course of radical economic nationalism, many had perceived themselves to be accepting the challenge of destiny and the call to full nationhood.⁴⁹ This course of action, driven in part by national aspirations towards political self-determination and sovereign control over the exploitation of domestic natural resources, was to bring them (wittingly or unwittingly) into direct confrontation with the established norms and precepts of customary international law. Amongst these were the doctrines of State succession,⁵⁰ State responsibility and the diplomatic protection of aliens and their property.⁵¹ The path to national sovereignty over domestic natural resources was not restricted to outright nationalization; new forms of contractual arrangements, mainly in the form of participation agreements, also emerged at this time.⁵² But the unilateral nature of these initiatives at the behest of host nations, aimed mainly at embracing new economic policies and political attitudes, inevitably meant the placing of various forms of restrictions on the role of FDI in the development of domestic natural resources.⁵³ Historical antecedents in the industry appeared then to offer little useful alternatives to the often confrontational approach adopted by host countries.

If international law - in most cases the final arbiter in the various disputes which ensued between host countries and multinational resource companies - appeared poised to offer some measure of legal protection to the overseas investor, it however seemed to inspire little confidence in the host countries. The latter, for the most part, perceived their contribution to the development of the customary international law principles governing the international investment regime to be at best minimal and at worst non-existent.⁵⁴ Appeals for the revision of what was perceived to be the 'outdated' principles which form the traditional basis of

⁴⁹ DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER* (1992).

⁵⁰ This doctrine ensured the transmission of concession arrangement obligations from pre-independence authorities to post-independent governments and similar commitments from pre-revolutionary to post-revolutionary regimes; see generally D. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* (1967).

⁵¹ See H.A. Kuhn, *Nationalisation of Foreign-Owned Property and its Impact on International Law*, 45 AM. J. INT'L L. 709 (1951).

⁵² Benedetto Constantino, *State Participation in Oil Concessions: A New Kind of Taking of Foreign Property?*, 1 ITALIAN Y.B. INT'L L. 150 (1975); E. Smith & J. Dzienkowski, *A Fifty Year Perspective on World Petroleum Arrangements*, 24 TEX. INT'L L.J. 13 (1989) at 35-43. The phenomenon of State intervention is not limited to developing countries: see O. Mestad, *The Acquisition of Natural Resources Interests by the State: The Norwegian Ekofisk Royalty Case*, 2 ICSID REV.: FOREIGN INV. L. J. 139 (1987).

⁵³ R. MIKESSELL, *FOREIGN INVESTMENT IN THE PETROLEUM AND MINERAL INDUSTRY: CASE STUDIES OF INVESTOR-HOST COUNTRY RELATIONS* (1973); *id.*, *FOREIGN INVESTMENT IN MINING PROJECTS: CASE STUDIES OF RECENT EXPERIENCES* (1983); see also Leo Kissam & Edmund Leach, *Sovereign Expropriation of Property and Abrogation of Concession Agreements*, 28 FORDHAM L. REV. 177 (1959); Jean-Flavien Lalive, *Unilateral Alteration or Abrogation by Either Party to a Contract Between a State and a Foreign National*, in RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD 265 (1965).

⁵⁴ Cf. Osita Eze, *Legal Structures for the Resolution of International Problems in the Domain of Private Foreign Investments: A Third World Perspective Now and in the Future*, 9 GA. J. INT'L & COMP. L. 535 (1979).

customary international law thus intensified.⁵⁵ The ensuing debate raised considerable challenges for international law vis-à-vis its role in regulating international economic relations in general and the FDI process in the natural resources sector in particular – not least because of the new uncertainties over the precise status of relevant norms and principles. To both historians and publicists alike today’s “clarion calls to roll back the international investment regime”,⁵⁶ with Latin American countries at the forefront, will indeed sound like a familiar refrain. This fact *per se* underscores the importance of the historical perspective given the recurrent and cyclical nature of these events. It is, from a historical perspective, a cycle characterized by periods of latent calm often followed by bouts of intense conflict in the form of regulatory State intervention in ongoing projects and recourse by the FDI party to the international dispute settlement process.

Amongst the challenges facing contemporary international law is still the quest for satisfactory solutions to the persistent legal problems posed by the phenomenon of State contracts with foreign nationals or companies (the substantive aspects of which falls to be governed by relevant principles of public international law). Also central to this quest is the desire to find effective ways in which host State commitments to investment regime stability (contained in legislation or contract terms) can be reconciled with the inherent public powers of national legislators to vary existing laws or promulgate new legislation in ways which impact on the post-contractual framework of the FDI project.⁵⁷ Hence the key question: what are the permissible limits of unilateral State action to alter established terms and conditions governing FDI agreements? Depending on which school of thought one ascribes to, the ambit of unilateral State intervention may either, (a) be very severely circumscribed by international law; or (b) the State retains a regulatory discretion in light of its sovereign and public power prerogatives.

From a historical and political perspective two schools of thought have thus emerged from the debate on the constitutive legal process applying to natural resources development agreements. Of these schools, traditional international law thinking (which advocates the application of customary rules of international law to the international investment regime) has been criticized for being largely impervious to the hopes and aspirations of mineral-endowed developing countries for the founding of a new international economic and legal order;⁵⁸ i.e. a new regime involving a re-ordering of the underlying philosophy and legal principles applying to international economic relations between overseas private investors and host States

⁵⁵ C.F. Amerasinghe, *State Breaches of Contracts with Aliens and International Law*, 58 AM. J. INT’L L. 881 (1964); Ignaz Seidl-Hohenveldern, *Multinational Enterprises and the International Law of the Future*, 29 Y.B. WORLD AFFAIRS 567 (1975); Martin Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 AM. J. INT’L L. 585 (1961).

⁵⁶ Kaushal, *supra* note 5, at 495; and *see generally*, FRANCISCO PARRA, *OIL POLITICS: A MODERN HISTORY OF PETROLEUM* (2004).

⁵⁷ Cf. M. ARSANJANI, *INTERNATIONAL REGULATION OF INTERNAL RESOURCES: A STUDY IN LAW AND POLICY* (1981); An Tang, *The Law Applicable to Transnational Contracts*, 21 J.W.T.L. 95 (1987).

⁵⁸ S.K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT’L & COMP. L.Q. 588-628 (1988); F.V. García-Amador, *Current Attempts to Revise International Law: A Comparative Study*, 77 AM.J. INT’L L. 286 (1983); N. Horn, *Normative Problems of a New International Economic Order*, 16 J.W.T.L. 338 (1982). These critics point to the fact that the emergence of peremptory norms (*jus cogens*) purporting to govern investment relations in the natural resources sector has been matched only by perceived staticism on the part of traditional norms, the conceptual focus of which remains tilted in favour of FDI protection.

with a view to promoting sovereign ownership and control by the latter over domestic natural resources. Supporters of the putative new norms which have been proposed as a replacement for the traditional regime, on the other hand, are seen to appreciate less fully the need for FDI protection by not being sensitive to the requirement for the stability of essential investment conditions as a necessary prerequisite for the success of FDI ventures.⁵⁹

The debate itself has undoubtedly contributed a great deal to a much improved understanding of the legal problems of FDI. But a distorting side effect has been its political undertones.⁶⁰ It is to be submitted that the sometimes formulaic orientations of scholarly discourse, especially in its articulation of the principle of compensation for injury caused to foreign investor interests, has rather tended to accentuate the North-South (or West-South) affiliations in doctrinal analyses.⁶¹ A review of literature on the subject seems to suggest that the conceptual focus has been tended to be directed more at the question of applicable standards and less on the functional aspects of reparation in foreign expropriation cases.⁶² This portrays a somewhat dogmatic approach which has only served to further obscure the applied and functional role of the compensation requirement within the international investment regime. It is perhaps for this reason that the historical and conceptual evolution of the international investment regime appears to have aspired primarily towards the promotion of one viewpoint or the other. Over time the theoretical expositions of each school of thought have thus become more inclined towards the selective positioning of posited norms, principles and legal standards.⁶³ The post-independence agitation by capital-importing nations for full national sovereignty over domestic natural endowments and the politicization of the debate on the constitutive

⁵⁹ Cf. R. Brown, *Contract Stability in International Petroleum Operations*, 29 THE C.T.C. REPORTER 56 (1990); A. Chiati, *Protection of Investment in the Context of Petroleum Agreements*, 204 RECUEIL DES COURS 9 (1987-IV). For an analysis of the new norms, see James Hyde, *Permanent Sovereignty over Natural Wealth and Resources*, 50 AM. J. INT'L L. 854 (1956); F.V. García-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAWYER OF THE AMERICAS 1 (1980); Robin White, *A New International Economic Order*, 69 AM. J. INT'L L. 542 (1975); B. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth*, 75 AM. J. INT'L L. 437 (1981).

⁶⁰ It may well be that the political orientations of scholarly analysis is but a reflection of the political foundations of international law; see further Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981), at 555-56 where the author observes that the combination of political and economic factors have led some writers to view the issues almost exclusively in terms of political interests and power; see also; C. DE VISSCHER, *THEORY AND PRACTICE IN PUBLIC INTERNATIONAL LAW* (1957), at 133-36; Jorge Castañeda, *La Charte des Droits et des Devoirs Économique des États: Note sur son Processus d'Élaboration*, 20 ANN. FRANÇAIS DROIT INT'L 31 (1974), at 55.

⁶¹ See B. RÖLING, *INTERNATIONAL LAW IN AN EXPANDED WORLD* (1960), at 15; H. MOSLER, *THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY* (1980), at 3-6; and see generally Ignaz Seidl-Hohenveldern, *Le Règles Juridiques et le Conflit Nord-Sud*, 33 Ö.Z.Ö.R.V.R. 199 (1982); Guha-Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961).

⁶² See, however, C.F. Amerasinghe, *The Quantum of Compensation for Nationalized Property*, in R. LILLICH (ED), *THE VALUATION OF NATIONALIZED PROPERTY* 91 (1975); R. Wesley, *Establishing Minimum Compensation Criteria for Use in Expropriation Disputes*, 25 VAND. L. REV. 939 (1972); see further 4(6) TRANSNATIONAL DISPUTE SETTLEMENT (2007): Special issue on *Compensation, Damages and Valuation in International Investment Law*.

⁶³ GEORGE NDI, *INVESTMENT POLICY TRANSFORMATION IN THE NATURAL RESOURCES SECTOR: LEGAL IMPLICATIONS AS REGARDS THE TENSION BETWEEN INTERNATIONAL PROPERTY RIGHTS AND SOVEREIGN RIGHTS*, PHD DISSERTATION, UNIVERSITY OF DUNDEE (1994), at 7-15.

legal process governing the international investment regime at the United Nations General Assembly only served to further cloud what was already an uncertain landscape.⁶⁴ This, in turn, has led to the perception amongst capital-exporting countries that ensuing UNGA resolutions on questions relating to natural resources development are of the character of political opinions with limited normative value.⁶⁵

It is thus evident that political factors have played a key role within the framework of the historic nexus and synergies between the international development of natural resources, FDI and international law.⁶⁶ The doctrine of State responsibility is itself deeply rooted in the politics and diplomacy of international business transactions.⁶⁷ The principle is undoubtedly an indispensable element of the international investment regime. The real question is whether it (and the international investment regime as a whole) is universally recognized as representing an authoritative and objective international standard of economic and social justice. In the course of time this basic question, on which depends the legitimacy of the rules of the international investment regime, has been the subject of conflicting views.⁶⁸ As noted by one scholar “because of the existence and influence of extraneous factors which are not always compatible with the law, artificial principles and concepts have been evolved which often appear markedly incongruent”.⁶⁹ These deep divisions in both political and scholarly opinions have been a key contributor to the tension which lies at the heart of the international investment regime. Emblematic of this tension is the dilemma between continuity and change (tradition versus innovation) which itself has become a central feature of the debate on the international regulation of FDI.⁷⁰ Hence while capital-exporting nations advocate upholding the values of the current international investment regime, the capital-importing nations continue to nurse a historic grievance founded

⁶⁴ MIKDASHI, *supra* note 32; Walter Mead, *Political Economic Problems of Energy: A Synthesis*, 18 NAT. RES. F. 703 (1978).

⁶⁵ Dolzer, *supra* note 60, at 563; for a contrary view, see Oscar Garilbaldi, *The Legal Status of General Assembly Resolutions: Some Conceptual Observations*, 73 A.S.I.L. PROCS. 324 (1979); JORGE CASTAÑEDA, *THE LEGAL EFFECT OF UNITED NATIONS RESOLUTIONS* (1969).

⁶⁶ See further E. Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, 8 J. ENERGY & NAT. RES. L. 244 (1990); Higgins, *supra* note 8, at 175-80; Ian Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, 162 RECUEIL DES COURS 245-318 (1979-I); R. Bilder, *International Law and Natural Resources Policies*, 20 NAT. RES. J. 451 (1980).

⁶⁷ DUNN, *supra* note 23, at 1; and see generally C. PARRY, *THE SOURCES AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW* (1965).

⁶⁸ Amongst those who hold that international law provides a universally authoritative standard are G. Chandler, *Basis of the Law Against the Taking of Foreign-Owned Property*, 21 AM. J. INT'L L. 525 (1927) at 526; Louis Sohn & R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens*, 55 AM. J. INT'L L. 545 (1961); R. Smith, *The United States Government Perspective on Expropriation and Investment in Developing Countries*, 9 VAND. J. INT'L L. 517 (1976). For contrary views, see GARCÍA-AMADOR, *supra* note 16, at 17 where the author identifies three key areas of international law where there is an absence of universally recognized authority of norms - to wit, the principle of State responsibility; the doctrine of State succession; and maritime jurisdiction; see also Phillip Jessup, *Modernization of the Law of International Contractual Agreements*, 41 AM. J. INT'L L. 378 (1947); S. SINHA, *NEW NATIONS AND THE LAW OF NATIONS* (1967); R. ANAND, *NEW STATES AND INTERNATIONAL LAW* (1972), at 57; N. REMBE, *AFRICA AND THE LAW OF THE SEA* (1980), at 8.

⁶⁹ García-Amador, *supra* note 20, at 370.

⁷⁰ For more on this dilemma, see P. Norton, *A Law of the Future or a Law of the Past?: Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 505 (1991); Dolzer, *supra* note 60, at 564-65, 570-71; OPPENHEIM, *INTERNATIONAL LAW* (8TH EDN, 1995), at 94-8.

on what some perceive to be the basic inequality of States in international law.⁷¹ This is a perception that will clearly need addressing if the international investment regime is to regain its universal authority and legitimacy.

B. Economic Context: The Pivotal Role of FDI in the Natural Resources Sector.

FDI has traditionally played a prominent role in the development of natural resources. Private industry pioneered the birth of the oil industry in the United States and its subsequent expansion into an international industry with multinational corporations at the forefront. In developing countries the role of FDI has been an indispensable element, the *conditio sine quo non*, of the development of domestic natural resources.⁷² The basic characteristics and structure of the natural resources industries, in particular petroleum and mining, have often tended to favor a large scale, capital-intensive and multinational approach to conducting operations. These are attributes more suited to private enterprise. The distance between production sources and markets, the need for upstream to downstream vertical integration of operations, the complexity of market logistics and capital-intensiveness all imply both a multinational approach and a private sector risk and reward orientation.⁷³ Yergin, in his book *“The Prize”*, makes the following observations:

“[The petroleum industry] embodies the extremes of risk and reward, as well as the interplay and conflict ... between private business and the nation-state. It also remains ... an essential element in national power, a major factor in world economies, a critical focus for war and conflict, and a decisive force in international affairs.”⁷⁴

Driven by the spirit of entrepreneurship and founded predominantly on FDI, the global natural resources industry is a civilization which epitomizes the very essence of the market economy. Pre-dating the era of independence, the flow of FDI into the natural resources industries in resource-rich developing countries continued unabated after independence. The absence of domestic enterprises and home-grown entrepreneurs with the required capital resources, technological know-how and relevant managerial expertise meant continued reliance by the newly independent countries on FDI.⁷⁵ The deficiency in capital accumulation rendered the financing of natural resources development projects in developing countries from internal sources negligible. Local involvement in the industry generally took the form of “sponsored” or symbolic equity participation by the State.⁷⁶ Substantial public

⁷¹ For a discussion of this historic grievance, see GARCÍA-AMADOR, *supra* note 16, at 381.

⁷² Z. Mikdashi, *Oil Funding and International Financial Arrangements*, 9 NAT. RES. F. 282 (1985); J. DUNNING, *MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY* (1992); PETER ADY, *PRIVATE INVESTMENT IN DEVELOPING COUNTRIES* (1974).

⁷³ See ANTHONY SAMPSON, *THE SEVEN SISTERS: THE GREAT OIL COMPANIES AND THE WORLD THEY MADE* (1975); see also J. TILTON *et al*, *WORLD MINERAL EXPLORATION: TRENDS AND ECONOMIC ISSUES* (1988); S. STAUSS, *TROUBLE IN THE THIRD KINGDOM: THE MINERALS INDUSTRY IN TRANSITION* (1986).

⁷⁴ *Supra* note 49, at 779.

⁷⁵ See N. WHITE (ED), *FINANCING THE INTERNATIONAL PETROLEUM INDUSTRY* (1978); R. BOSSON & B. VARON, *THE MINING INDUSTRY IN DEVELOPING COUNTRIES* (1977), at 45-46.

⁷⁶ Frank Njenga, *The Legal Regime of Concession Agreements*, 3 EAST AFRICA L.J. 100 (1967); T. Machmud, *The Production Sharing Contract in Indonesia*, in THOMAS WÄLDE & GEORGE NDI (EDS), *INTERNATIONAL OIL & GAS INVESTMENT: MOVING EASTWARD?* (1994), at 113; W.J. Müller & T.G. Stern, *The Evolution of Petroleum Contracts in Argentina: Issues of the Foreign Investor’s Legal Protection*, 7 J. ENERGY & NAT. RES. L. 189 (1989);

sector financing by developing countries' governments, where applicable, took the form of either commercial or concessional loans, with equity financing of projects falling to the FDI party. The latter has particularly been the case for exploration activity for which loan finance is very rare (given its very high risk nature). The funding of exploration activity is still predominantly in the form of equity capital or 'seed money' provided by portfolio investors attracted by the high risk/ high reward prospects of a big commercial find.⁷⁷

The natural resources sector in developing countries thus depends almost exclusively on FDI. The latest UNCTAD regional data indicates that FDI inflows into Africa reached a record level of \$88billion in 2008 and that the main recipients were natural resources producers.⁷⁸ Latin America registered an FDI growth rate of 13% in 2008 to \$144billion with natural resources development activities as one of the main attractions⁷⁹, while in the same period West Asia (which includes the main oil producing nations of the Middle East) saw an increase of 16% in FDI to \$90billion with significant inflows into the petroleum industries.⁸⁰

From both a contemporary and historical perspective the pivotal role of FDI in the sector is thus evident.⁸¹ It is for this reason that the international law regulating relationships between the host States and overseas private investors has been particularly relevant to the development of natural resources in developing countries. International law was called into play when in the period between the 1960s and early '80s there was a tendency towards public sector involvement and participation as developing nations sought means of exercising greater control over domestic natural endowments. During this period in the natural resources sector the following became the principal manifestations of the growing self-assertiveness on the part of host nations: renegotiation of the principal terms of existing agreements; direct State participation in resources ventures leading to the advent of State petroleum and mining companies; new and innovative forms of contractual and legal arrangements such as production sharing contracts, service or management contracts and joint ventures. More extreme manifestations of sovereign control, sometimes politically motivated, took the form of nationalization or expropriation. Their effects went well beyond their immediate impact on FDI, raising questions about the role of international investment regime as a regulatory tool.

Yinka Omorogbe, *The Legal Framework for the Production of Oil in Nigeria*, 5 J. ENERGY & NAT. RES. L. 273 (1987).

⁷⁷ In some cases exploration funding could come from existing production activity: see further Thomas Wälde & George Ndi, *Fiscal Regime Stability and Issues of State Sovereignty*, in JAMES OTTO (ED), TAXATION OF MINERAL RESOURCES 63 (1993), at 69.

⁷⁸ UNCTAD: WORLD INVESTMENT REPORT 2009 at xxiii, available at http://www.unctad.org/en/docs/wir2009_en.pdf

⁷⁹ *Id.* at xxiv

⁸⁰ *Supra* note 78.

⁸¹ See further G. Pollio, *Sources of Funding For Developing Countries' Petroleum Development*, 13 NAT. RES. F. 245 (1989); Ahmed El-Chiati, *Foreign Investment in Oil and Gas Exploration and Development in the Middle East*, in 2 PROCEEDINGS: ARAB COMPARATIVE & COMMERCIAL LAW – THE INTERNATIONAL APPROACH 7 (1987); José de Gregorio, *The Role of Foreign Investment and Natural Resources in Development*, NO.196 ENERO 2003, available at <http://www.bcentral.cl/eng/studies/working-papers/>; Elizabeth Asiedu, *Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability*, 29 WORLD ECONOMY 63 (2006-I); see also V. Balasubramanyam, M. Salisu & D. Dapsoford, *Foreign Direct Investment as an Engine for Economic Growth*, 8 J. INT'L TRADE & ECON. DEV'T 27-40 (1999-I).

These policies aimed at optimizing State involvement, control and ownership of domestic natural resources became the key indicators of progress on PSNR. The new concepts of PSNR, NIEO and CERDS provided the ideological basis for post-colonial aspirations towards full political and sovereign control over natural resources development.⁸² At the center of these policies is interplay between FDI interests (in preserving managerial and operational control) and the aspirations of host States to exercise greater national control over resources development policy. As a consequence of this historic interaction, the sector has thus become the traditional battleground for playing out the conflict between private property rights and sovereign rights - with all its political, economic, cultural, nationalistic and international legal ramifications.⁸³

One of the visible results of public sector involvement in the natural resources sector in developing countries has been the emergence of State petroleum and mining companies.⁸⁴ These became the principal vehicle for State involvement in petroleum and mining operations in the form of State participation, production sharing contracts, contractual or equity joint ventures or, in some cases outright nationalization.⁸⁵ This trend led to a considerable reduction in the scope of FDI involvement in resources development in developing countries, particularly in the upstream sector where State participation became an indispensable measure of progress on PSNR. But despite this reduction in scope FDI in most cases remained the main direct source of financing for exploration and development activities while multinational resources companies remained the main providers of technical know-how. The latter took the form of the "sponsorship" of State petroleum and mining enterprises on an exploration "carry through" basis or through the provision of technical expertise under management and service contracts.⁸⁶

Unfavorable economic conditions (starting with the economic recession in 1980s) led to a policy reappraisal culminating once again in an enhanced role for FDI

⁸² See MUHAMAD MUGHRABY, *PERMANENT SOVEREIGN OVER OIL RESOURCES: A STUDY OF MIDDLE EAST OIL CONCESSIONS AND LEGAL CHANGE* (1966), at 112-14; S. Zorn, *Permanent Sovereignty over Natural Resources: Recent Developments in the Petroleum Sector*, 7 NAT. RES. F. 321 (1983); HENRY CATTAN, *THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA* (1967).

⁸³ The increased self assertiveness on the part of resource rich developing countries also saw the advent of commodity and producer associations such as OPEC (petroleum) and CIPEC (copper) in the natural resources sector. But whereas the pursuit and attainment of these goals and objectives did sometimes take on the character of an economic and political crusade against the pervading influences of FDI in the domestic economy, there is as yet little evidence to suggest that these developments ever succeeded, from a normative and jurisprudential point of view, in penetrating to any significant degree the main *corpus juris* of the international investment regime. See further S. ALMANA OTAIBA, *OPEC AND THE OIL INDUSTRY* (1976); I. SEYMOUR, *OPEC: INSTRUMENT OF CHANGE* (1980).

⁸⁴ See A. Akinsaya, *Host Government Responses to Foreign Economic Control: The Experiences of Selected African States*, 37 REV. EGYPT. DROIT INT'L 85 (1981); A. Akinsaya & A. Davies, *Third World Quest for a New International Economic Order*, 33 INT'L & COMP. L.Q. 208 (1981); G. INGRAM, *EXPROPRIATION OF UNITED STATES PROPERTY IN SOUTH AMERICA: NATIONALIZATION OF OIL AND COPPER COMPANIES IN PERU, BOLIVIA AND CHILE* (1974).

⁸⁵ Cf. Detlev Vagts, *Coercion and Foreign Investment Re-arrangements*, 72 AM. J. INT'L L. 17 (1971); see also D. Bowett, *Libyan Nationalizations of American Oil Companies' Assets*, 37 CAMBRIDGE L. J. 5 (1978); George Haight, *Libyan Nationalization of British Petroleum Company Assets*, 6 INT'L L. 541 (1972).

⁸⁶ D. Smith, *Mining the Resources of the Third World: From Concession Agreements to Service Contracts*, 67 A.S.I.L. PROCS. 227-36 (1973); Smith & Dzienkowski, *supra* note 52, at 35.

in the development of natural resources in developing countries.⁸⁷ FDI has assumed greater importance largely due to the constriction of financial resources available for exploration and development leading to the adoption of more liberal investment regimes by resource-rich but capital-poor developing countries. The importance of FDI to the international development of domestic natural resources thus remains evident. And equally important is the underlying question concerning the constitutive legal process for the resolution of FDI disputes in the natural resources sector. Before examining this question in depth, it is proposed first to critically inquire into the precise nature and legal character of natural resources development agreements in international law.

III. KEY ASPECTS OF NATURAL RESOURCES DEVELOPMENT AGREEMENTS AND THEIR ROLE IN THE FRICTION.

A pre-requisite to a clearer understanding of the problems arising from the development of domestic natural resources in an international legal context lies in appreciating the importance of legal classification or characterization. This is in view of the profound implications of characterization for the international regulation of domestic natural resources development. The importance of characterization provides the rationale for a critical examination of the specific nature and character of such agreements from an international legal perspective. The analyses in this part will thus serve as the background to Part IV. Informing the inquiry in both parts is the concept of an *economic development agreement* (“EDA”) in international economic law, its possible implications for the FDI regime and its role in the friction between international property rights and sovereign rights.⁸⁸

Natural resources development agreements belong to the generic category of “State contracts”⁸⁹ - except perhaps for those agreements concluded under private mineral ownership regimes such as obtains in the USA, licensing regimes, service contracts, or agreements involving a State enterprise or agency as opposed to the State itself. This generic designation notwithstanding, the FDI petroleum or mineral developer will often opt for the choice of an “investment contract” as the preferred legal framework for the project agreement. This preference for a “contract” designation, coupled with a contractually formalized fiscal regime, is seen to import

⁸⁷ A. Kemp, *Petroleum Exploration and Contract Terms in Developing Countries After the Oil Price Collapse*, 13 NAT. RES. F. 116 (1989); Thomas Wälde, *Third World Mineral Development and Crisis: The Impact of Worldwide Recession on Legal Instruments Governing Third World Mineral Development*, 19 J.W.T.L. 3 (1985); J. Villalobos, *Bolivia’s Strategy for Restructuring the Mining Sector and Promoting Private Investment in Mining*, 13 NAT. RES. F. 191 (1989); R. Brown, *New Mining Codes: Salient Features*, in G. JAENICKE (ED), INTERNATIONAL MINING INVESTMENT: LEGAL AND ECONOMIC PERSPECTIVES (1988).

⁸⁸ See further J.N. Hyde, *Economic Development Agreements*, 105 RECUEIL DE COURS 271 (1962-I), at 282; S. Pogony, *Economic Development Agreements*, 7 ICSID REV.: FOREIGN INV. L.J. 2 (1992).

⁸⁹ See Georges Delaume, *The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal*, 3 ICSID REV.: FOREIGN INV. L.J. 79 (1988); Christopher Greenwood, *State Contracts in International Law: The Libyan Oil Arbitrations*, 53 BRIT.Y.B. INT’L L. 27 (1982); Fernando Tesón, *State Contracts and Oil Expropriation: The Aminoil Kuwait Arbitration*, 24 VA. J. INT’L L. 323 (1984); P-Y Tszanz, *The Contribution of the Aminoil Award to the Law on State Contracts*, 18 INT’L L. 245 (1984); Hamed Sultan, *The Legal Nature of Oil Concessions*, 21 REV. EGYPT. DROIT INT’L 73 (1965); J. Fawcett, *The Legal Character of International Agreements*, 30 BRIT.Y.B. INT’L L. 381 (1953); G. Burdeau, *Droit International et Contrats d’États: la Sentence Aminoil contre Koweït de 24 Mars 1982*, 28 ANN. FRANÇAIS DROIT INT’L 454 (1982).

into the relationship remedial principles such as the doctrine of sanctity of contract - thus ensuring for the investment project its legal security.⁹⁰ It is, however, still the case that such agreements present particular problems with regard to their legal nature and character in international law.⁹¹ The majority of international agreements for the exploration and/or exploitation of natural resources exhibit a predominantly contractual form or traits pertaining to general commercial law. However, such agreements also manifest of a mixed private/ public law characteristics.⁹² It is this mixed dichotomous character which has rendered their precise legal classification an exercise fraught with considerable complexity and uncertainty. This in turn has given rise to a number of questions. Do such agreements belong to the category of 'contractual arrangements' and hence governable by relevant private law principles of contract and commercial law? Can they rightly be treated as such for the purposes of protecting the vested or acquired rights of the investor? Or do such agreements belong to a special category of transactions which - while incorporating the essential elements of private contract law - transcend the boundaries between private and public law?⁹³

Informing these questions is the extent to which the State party ('internationalization' and stabilization clauses notwithstanding) can subsequently intervene to introduce unilateral changes to the agreement through the use of its public power prerogatives. A public law classification would be more permissive of the sovereign "right to regulate" by the State.⁹⁴ A private law or contract classification, being less amenable to subsequent alteration of terms, is far more restrictive of unilateral intervention by the State. The latter classification in effect forecloses the possibility of regulatory measures by invoking remedial principles such as the doctrine of acquired rights, sanctity of contract and breach of contract principles.⁹⁵

⁹⁰ The use of the 'contractual form' is thus one of the major defensive tools in the tool-set of the overall political risk management techniques available to multinational companies: see Wälde & Ndi, *supra* note 77, at 67.

⁹¹ See A.A. Fatouros, *International Economic Development Agreements and the Illusion of Legal Certainty*, 57 A.S.I.L. PROCS. 117 (1963), at 134; GARCÍA-AMADOR, *supra* note 16, at 354-56; Wilhelm Wengler, *Nouveaux Aspects de la Problématique des Contrats Entre États et Personnes Privées*, REV. BELGE DROIT INT'L 415 (1978-79).

⁹² On the question of contractual form GARCÍA-AMADOR, *supra* note 16, at 355 is of the opinion that apart from their distinctive formal and even substantive features, such agreements are not, if viewed from the standpoint of their essential juridical nature, different from ordinary contracts. He however acknowledges that because of these distinctive features and the economic importance which derives from the technical assistance and developmental elements in such agreements, they do have a special character. Concerning the mixed private/ public (law) character of natural resources agreements, see Arbitrator Mahmassani in *Libyan American Oil Company (LIAMCO) v Government of the Arab Libyan Republic*, 20 I.L.M. 1 (1981), at 29. See also Alfred Verdross, *Protection of Private Property under Quasi-international Agreements*, in VARIA JURIS GENTIUM: LIBER AMERICUM PRESENTED TO JEAN P.A. FRANÇOIS (1950), at 355.

⁹³ Cf. TAREK RIAD, *THE APPLICABLE LAW GOVERNING TRANSNATIONAL DEVELOPMENT AGREEMENTS*, SJD DISSERTATION, HARVARD LAW SCHOOL (1985).

⁹⁴ Haight, *supra* note 47; MITCHELL, *supra* note 46; Abolbasher Farmanfarma, *The Oil Agreement Between Iran and the International Oil Consortium: The Law Controlling*, 34 TEX. L. REV. 259 (1955); A.A. Fatouros, *The Administrative Contract in Transnational Transactions: Reflections on Comparisons*, in 1 IUS PRIVATUM GENTIUM: FESTCHRIFT FÜR MAX RHEINSTEIN (1969), at 259; Philippe Kahn, *Souveraineté de l'État et Règlement du Litige: Régime Juridique du Contrat d'État*, REVUE DE L'ARBITRAGE 3 (1985).

⁹⁵ See *supra* notes 23 and 29.

Before a critical enquiry into the categorization of natural resources development agreements can be attempted, a necessary pre-requisite is to identify the principal characteristics of such agreements. The analysis is informed by two main objectives: the first is to distinguish natural resources development ventures, from an international law perspective, from other international business and commercial transactions by identifying and analyzing their special features.⁹⁶ The second is to assess the implications of these features for the question of FDI security.

Natural resources development agreements involving the infusion of FDI exhibit the following main characteristics:

A. Form: Private-Public Character Dichotomy.

From an international law perspective natural resources development projects are neither private law relationships (i.e. the *contrats privés internationaux* concept of French law) which fall to be governed by principles of private international law; nor are they public law transactions *stricto sensu* in the sense of inter-State agreements (*contrats parfaitement internationaux*).⁹⁷ Rather, they mostly belong to a *sui generis* category of mixed private-public transactions. This private-public character dichotomy has been cited as one of the possible root causes for some of the conceptual difficulties and legal problems associated with the international regulation of domestic natural resources development.⁹⁸ Dichotomy in this context denotes not a bifurcation or mutually exclusive tendencies, but the uneasy and often troubled co-existence between private law and public law, national law and international law, and private property rights and sovereign rights within the framework of such agreements. This incongruence is often defined by tendency in the long term towards a compartmentalization of interests within the framework of the project – to wit, the national economic development objectives and aspirations of the host nation on the one hand and the pecuniary interests of the FDI party on the other.⁹⁹ ‘Dichotomy’ also denotes the problems of characterization, and ultimately, the

⁹⁶ See generally Greenfield & Rooney, *Aspects of International Petroleum Agreements*, 37 ALBERTA L. REV. 352 (1999); Z. GAO, INTERNATIONAL PETROLEUM CONTRACTS: RECENT TRENDS AND NEW DIRECTIONS (1994); R. Vock, *Petroleum Development Agreements: Form and Drafting*, 8 J. ENERGY & NAT. RES. L. 251 (1990); K. BLINN, C. DUVAL, LE LEUCH & A. PERTUZIO, INTERNATIONAL PETROLEUM EXPLORATION AND EXPLOITATION AGREEMENTS: LEGAL, ECONOMIC AND POLICY ASPECTS (1986).

⁹⁷ This does not however preclude the possibility that in a few instances such agreements could indeed take on the character of purely private law contracts (e.g. by virtue of a choice of law stipulation that the agreement is to be governed by the principles of contract law) or inter-State agreements. For more on the distinction between the various forms of international transactions in the sector, see RIAD, *supra* note 93, at 16-17; WOLFGANG FRIEDMANN & R. PUGH, LEGAL ASPECTS OF FOREIGN INVESTMENTS (1959).

⁹⁸ See Rouhollah Ramazani, *Choice-of-Law Problems and International Oil Contracts: A Case Study*, 11 INT’L & COMP. L.Q. 503 (1962); H.W. Shawcross, *The Problems of Foreign Investment in International Law*, 102 RECUEIL DES COURS 129 (1961); Philippe Kahn, *Droit International Économique, Droit de Développement, Lex Mercatoria: Concept Unique ou Plurisme des Ordres Juridiques?*, in LES DROITS DES RELATIONS ÉCONOMIQUE INTERNATIONALES: ETUDE OFFERTS À BERTHOLD GOLDMAN 97 (1982) [hereinafter ETUDE ‘82].

⁹⁹ See D.A. ROJAS, LEGAL PROBLEMS IN BALANCING ACT BETWEEN THE AIMS AND OBJECTIVES OF GOVERNMENTS AND THE INTERNATIONAL OIL COMPANIES, PG.DIP. DISSERTATION, UNIVERSITY OF DUNDEE (1986).

permissible limits of the host State's regulatory competences within the post-contractual framework of the FDI project.¹⁰⁰

The view that the root causes of the legal problems affecting the FDI regime could well lie in the hybrid character of FDI projects is given further credence by the fact that international arbitral and claims practice on the question seem so far to have been tentative and exploratory - with conflicting outcomes.¹⁰¹ In the case of *BP Exploration Co. (Libya) Ltd v Government of the Libyan Arab Republic*¹⁰², for example, the arbitral tribunal ruled that oil concessions under Libyan law (the applicable law) belonged to the category of public contracts known as administrative contracts. This outcome confirmed an earlier ruling in *Sapphire International Petroleum v National Iranian Oil Company*.¹⁰³ The tribunal in *Arab American Oil Company (ARAMCO) v Saudi Arabia*¹⁰⁴, however, took a different view in rejecting a 'public law' characterization. Similarly, in *Texaco/ Calasiatic v Government of Libya*¹⁰⁵, the public law characterization was rejected on the basis of the presence of a stabilization clause in the agreement.¹⁰⁶ This last fact was construed as amounting to a negation of the "*clauses exorbitantes*" concept of administrative law, therefore rendering the agreement repugnant to the concept, nature and spirit of a public law contract.¹⁰⁷ Furthermore, in the *LIAMCO* arbitration,¹⁰⁸ the tribunal ruled that although the oil concession agreement between LIAMCO and the Libyan government was of a mixed public-private (semi-public) legal character it still retained a predominantly contractual disposition.¹⁰⁹

On balance these cases appear to favor a 'contract' classification for natural resources development agreements involving the infusion of FDI. It however remains a matter of considerable uncertainty whether such agreements can be treated in the

¹⁰⁰ For a case dealing with a subsequent breach by the State through unilateral intervention in the functioning of the project agreement, see *Wintershall AG v Government of Qatar*, 28 I.L.M 795 (1989).

¹⁰¹ On the general point of inconsistent arbitral decisions emanating from investment disputes, see Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005).

¹⁰² 53 I.L.R 229 (1974), at 318.

¹⁰³ 35 I.L.R 136 (1967).

¹⁰⁴ 27 I.L.R (1963), at 183.

¹⁰⁵ 17 I.L.M (1978), at 10.

¹⁰⁶ Stabilization clauses are aimed at restricting the regulatory discretion of the State thus shielding the natural resources development project from any new domestic legislative or regulatory initiatives. The objective is to provide both fiscal and legal regime stability for such projects, which often tend to be of an extended duration. For more on such clauses, see *infra* Part IV. See also E. Paasivirta, *Internationalization and Stabilization of Contracts versus State Sovereignty*, 60 *BRIT.Y.B. INT'L L.* 315 (1989); P. Weil, *Les Clauses de Stabilisation ou d'Intangibilité Insérées dans les Accords des Développement Économique*, in *MÉLANGES OFFERTS À CHARLES ROUSSEAU: LA COMMUNAUTÉ INTERNATIONALE* 301 (1974); Thomas Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law versus Contract Interpretation*, 31 *TEX. INT'L L.J.* 215 (1996); Wilhelm Wengler, *Immunité Législatif des Contrats Multinationaux*, 60 *REV. CRITIQUE DROIT INT'L PRIVÉ* 637 (1971).

¹⁰⁷ The "*clauses exorbitantes*" concept of French administrative law prescribes for the inclusion in public contracts of provisions which recognize and confirm the public power prerogatives of the State party. Since such provisions are permissive of subsequent regulatory intervention by the State the inclusion of stabilization clauses in such contracts would amount to a contravention (or at the very least a contradiction) of the "*clauses exorbitantes*" concept.

¹⁰⁸ *Supra* note 92.

¹⁰⁹ *Id.* at 12.

same way and applying the same legal principles as ordinary contracts between private individuals or companies. The very presence of a sovereign State as a party clearly confers on FDI agreements a very different complexion from that of ordinary contracts. International law aside, it may ultimately depend on the agreement terms, (or even the specific legal and formal requirements of the municipal legal system) as to whether a natural resources development venture is classified as a contract or a public law instrument. This in turn will depend on the bargaining dynamics between the host State and the FDI party. Host nations with a track record of proven reserves, investment security or even a fashionable geology may well be able to successfully negotiate a public law classification if faced across the bargaining table by an investor who is anxious or prepared to close a deal at all costs. But the vast majority of countries, many of them with risky exploration geology, will at the onset of negotiations be quite willing to offer a protective minerals investment environment to potential FDI partners in exchange for much needed exploration and development funding and expertise. These protective measures may include government guarantees of fiscal and legal regime stability, internationalization of the agreement by externalizing any subsequent dispute settlement process or a private contract law classification. The latter need not be explicitly stated. It could well be implied from references in the agreement to general principles contract and commercial law as the choice of applicable law.

B. The Role of the Parties and its Contribution to the Friction.

The parties to natural resources development agreements, particularly of the traditional concession variety, have in most cases been the State (as the licensing authority¹¹⁰) and the FDI investor (usually a multinational petroleum or mining company). Increasingly, however, the demise of State participation and the advent of commercialization or privatization of State petroleum/ mining companies have seen a significant reduction in direct State involvement in the sector. Most host States however continue to retain a residual interest in the form of equity or contractual joint venture participation, or a regulatory interest in relation to licensing and supervision.

From an international law perspective natural resources development projects thus differ significantly from other commercial transactions involving the State or a State agency and a foreign private party (such as a contract for the supply of goods). In the latter type of transaction the State or State entity involved is acting primarily and almost exclusively in a capacity *de jure gestionis*. This is particularly the case in the modern era with its restrictive interpretations of the doctrine of sovereign immunity vis-à-vis commercial transactions involving a State party or entity.¹¹¹ As party to a natural resources development agreement, however, the State acts in both a *de jure gestionis* and *de jure imperii* capacity. This fact accentuates the semi-public character of the transaction. The State acts in a *de jure imperii* capacity, for instance, in view of its public powers vis-à-vis the licensing of exploration and development

¹¹⁰ The dual role of the State (as a party to the agreement and as regulator) could give rise to a conflict of interests, hence exacerbating the said friction. This issue is discussed at length in M. Clode, *The State as Regulator and Participant*, in RECENT DEVELOPMENTS IN PETROLEUM LAW 83 (1984-85). For the Russian experience, see V. Kryulov & A. Moe, *The Russian Oil Sector: Finding a New Role for the State*, 11 OIL & GAS L. TAX. REV. 23 (1993).

¹¹¹ See, for example, *Trendtex Trading Corporation v Central Bank of Nigeria*, 1 ALL ER 881 [1977].

activities, or when exercising its taxation and other regulatory competences in relation to such activities. It also acts 'qua sovereign' when guaranteeing to the FDI party (under specific constitutional or legislative authority) the stability of essential contractual, legal, fiscal or other operating conditions.¹¹²

It is thus by reason of the State party's status as a public authority that the FDI party will often seek to include in the agreement conflict resolution mechanisms such as a choice of law or forum clause with a view to conferring on the project agreement an "internationalized" status. This ensures the agreement's removal from the jurisdiction of the municipal legal system by placing it under the protective aegis of international law.¹¹³ The FDI party will usually request that any potential disputes are subject to international arbitration in a neutral forum.¹¹⁴ The ultimate aim is to ensure that judicial recourse in the event of such disputes does not turn out to be futile in view of possible political interference in the judicial process by the host State's government.

These elaborate safeguards - by ultimately placing the relationship under the adjudicative competences of the international investment regime - would also seem to suggest that the State's *de jure imperii* competences are not restricted to the negotiating or contracting phase of such projects; their continuing presence and relevance to the long term functioning of the project is clearly a matter of concern to the FDI party. The host State's interests in maintaining regulatory discretion, it could be argued, militates against the FDI party's quest for regime stability. Over the project thus looms the long and lingering shadow cast by the political or sovereign risk of future regulatory intervention by the host State. The latter's status as a public authority is thus a potential source of tension within the relationship.

C. The Perceived Objectives of Natural Resources Development Projects: A Conflict of Interests?

Natural resources development agreements have as their primary objective the exploration, development and exploitation of a country's natural endowments with the perceived aim (at least from the host country's viewpoint) of promoting vital sectors of the economy as a means to achieving economic growth and prosperity. The contribution of the FDI party to this process takes the form of a substantial commitment of equity or loan capital and technological expertise to facilitate exploration and development. This is done in hope (or expectation) of realizing a

¹¹² In discussing the *de jure imperii* aspect of the State party's negotiating and contracting capacity, GARCÍA AMADOR, *supra* note 16, at 354 also notes that international resources development agreements often confer rights and obligations of a "semi-political" character such as the right to import or export specific items free of all customs duties and charges, the right to exercise control or authority over parts of the territory in which the foreign undertaking is operating (including sometimes responsibility for the maintenance of public order), and the right to "expropriate" the land required for the purpose of exploration or exploitation. For further analyses of these various elements which emanate from the State's *de jure imperii* contracting capacity, see KUUSI, *supra* note 43, at 59-60.

¹¹³ See David Suratgar, *Considerations Affecting Choice of Law Clauses in Contracts Between Governments and Foreign Nationals*, 2 INDIAN J. INT'L L. 273 (1967); John Vafai, *Conflict Resolution in the International Petroleum Industry*, 5 J.W.T.L. 427 (1971); Gillis Wetter, *Salient Clauses in International Investment Contracts*, 17 BUS. L. 967 (1962).

¹¹⁴ B. Audit, *Transnational Arbitration and State Contracts: Findings and Prospects*, in TRANSNATIONAL ARBITRATION AND STATE CONTRACTS, HAGUE ACADEMY OF INTERNATIONAL LAW 77 (1987).

reasonable or substantial margin of return on investments. The entrepreneurial spirit remains the driving force behind such projects. The profit motive is thus implicit in its very conception. It therefore comes as a surprise that the preambles, memoranda of understanding, press releases and other recitals that often precede or accompany the project agreement always tend to give pride of place to the national development objectives (the potential or expected contribution of the project to achieving national economic progress) with hardly any recognition of the legitimate expectations of the project's sponsors, the FDI party.¹¹⁵

The government, as the custodian of the economic and social well-being of the State and its citizens, clearly sees as the *raison d'être* of the natural resources development project the promotion of national economic development goals and objectives. As such, it identifies with the project the realization of certain declared (and undeclared) public interests priorities, a view confirmed by the following dictum from the case of *N.V Cabolent v National Iranian Oil Company*:

“[The] active responsibility and activity of the State in the economic field, especially to be seen in countries like Iran where the exploitation of natural resources is by far the most important source of revenue, is considered to be of ... importance for the life and well-being of [the] country and people ...”¹¹⁶

The tribunal went on to state that the oil industry in Iran related clearly to the promotion of “the primordial economic and social interest of the State.”¹¹⁷

It could thus be argued that the FDI partner, while pursuing interests of a pecuniary nature also acknowledges that in the process s/he is contributing (or is under a duty to contribute) to the host State's national economic development plans and objectives. Central to this contribution is an optimum and rational exploitation of the country's natural endowments. This is a fact which is evidently borne out by relevant instruments and appendices to natural resources development agreements: the preamble, memorandum of understanding, recitals and protocols. But such instruments, being in the main *pre-contractual* in their nature, could be argued not to have the same probative value as the actual terms and conditions of the project agreement. The lack of clear articulation on the FDI party's expected contribution to national development objectives, coupled with the absence of explicit recognition by the State party of the FDI party's pecuniary interests in the project in such instruments, could be a potential source of future difficulties. From the FDI party's perspective a stable regime is more conducive to the recovery of investments. The objective of the host State, on the other, centers on a desire to retain regulatory

¹¹⁵ See, for instance, the preamble to Timor's Petroleum Law No.13/2005 available at <http://timor-leste.gov.t/wp-content/uploads/2010/03>; preamble to South Africa's Petroleum Charter, available at www.workinfo.com/bee/petroleumcharter.doc; and the preamble to Iraq's oil law, available at <http://www.iraq-enterprise.com/oillaw/OLdraftE.pdf>.

¹¹⁶ District Court of The Hague, 5 I.L.M (1965), at 477. See also Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1 (1976); Ignaz Seidl-Hohenveldern, *International Economic Soft Law*, 161 RECUEIL DES COURS 169 (1979).

¹¹⁷ *Id.* at 479; see also *Klöckner v Cameroon (I)*, 1 ICSID REV.: FOREIGN INV. L.J. 89 (1986). For an analysis of the possible implications of this case for economic cooperation agreements generally, see Jan Paulsson, *The ICSID Klöckner v Cameroon Award: The Duties of Partners in North-South Economic Development Agreements*, 1 J. INT'L ARB. 145 (1984).

discretion with a view to promoting national economic development policies. It is these conflicting objectives which continue to nourish and to sustain the friction in the international investment regime.

D. The Time Aspect: A Critical Factor in the Equation.

The time factor is undoubtedly of great importance to natural resources development projects which, by definition, are long term engagements.¹¹⁸ To the FDI party the extended duration of the agreement is a significant factor in as much as it provides the time frame and opportunity for capital amortization or the recovery of substantial investments and earning of profits. At the same time, however, the risk element which is an inherent factor in such projects is exacerbated by the long term nature of the commitment. It is for this reason that the FDI party will often seek from the State partner guarantees as to fiscal and legal regime stability of the project as a pre-condition for the long term commitment of required capital investments and technological resources.¹¹⁹ The aim is to ensure that the contractual equilibrium is not upset or otherwise disrupted through possible intervention by the State party - for example, through the promulgation of new legislation or the subsequent imposition of new fiscal, regulatory or other administrative and executive measures.¹²⁰

The FDI party's main concern thus revolves around detrimental exposure of the project agreement to the vagaries and vicissitudes of time. Viewed from this perspective, resort by the FDI party to the contractual technique of stabilization may yet prove to be of very limited functional value in shielding the project from the ravages of time.¹²¹ For it is very much debatable whether recourse to even the most robust "freezing" version of the clause as a protective shield can guarantee for the project complete freedom or immunity from a rough and sometimes unpleasant and troublesome passage. The much desired regime stability can certainly not be achieved by attempting to draft away or to hold back the unrelenting tide of history, or the unremitting and inexorable passage of time - with all its ramifications. On the State side the long term duration of the agreement makes it almost impossible that the relationship will not at some stage be subject to the influence or effect of regulatory or legislative intervention. This could be for reasons of public policy

¹¹⁸ Typically 25-50 years in duration, although the older concessions were traditionally granted for a period of 99 years and covered very large areas of the country or in some cases the whole country: see generally PETER FISCHER & THOMAS WÄLDE, *COLLECTION OF INTERNATIONAL CONCESSIONS AND RELATED INSTRUMENTS* (1981); M. Yalapan, *Legal Nature of Papua New Guinea Petroleum Arrangements*, MELANESIAN L.J. 6 (2003); E. Wall, *The Iranian-Italian Oil Agreement of 1957*, 7 INT'L & COMP. L.Q. 736 (1958).

¹¹⁹ A typical example of such guarantees is Article 45 from the Joint Venture Agreement between Sapphire Petroleum Ltd and National Iranian Oil Company which provides: "The provisions of the Mining Act of 1957 shall not be applicable to this Agreement, and any other laws and regulations which may wholly or partly be inconsistent with the provisions of this Agreement shall, to the extent of any such inconsistency, be of no effect in respect of the provisions of this Agreement." An alternative technique, albeit with similar results, is to attempt to "freeze" the municipal law of the host state thereby excluding the effect of any future legislative or regulatory initiative by the state. Article 47 of the Master Agreement of 8 February 1962 between the Government of Ghana and Volta Aluminium Company, for example, states as follows: "... this Agreement and Scheduled Documents shall be construed and have effect in accordance with the law of Ghana as it existed on the 22nd day of January [1962]."

¹²⁰ See *infra*, Part IV (B).

¹²¹ See further Waelde & Ndi, *supra* note 106, at 247-48.

objectives, change of government, or even the natural evolution of the general or specific legal regime which impinges on the framework of the project.

The aggregation of these characteristic features of natural resources development agreements converge to inform the principles which apply to the international regulation of domestic natural resources. Before examining these principles in detail, a critical inquiry into the question of categorization will first be attempted.

IV. PETROLEUM AND MINERAL DEVELOPMENT AGREEMENTS: INTERNATIONAL LEGAL CONTEXT

A. The Question of Categorization: A Critical Commentary.

A preliminary but important aspect of any international litigation involving natural resources agreements involves the question of characterization or categorization. This procedural question, more familiar to scholars of the private international law or the conflict of laws than to their public international law counterparts, can have a pervasive influence on litigation outcomes. The rationale for categorization in international investment disputes resides in the private-public law dichotomous character of resources agreements. But categorization, far from being a defining process in this case, may sometimes have the undesired effect of compounding existing difficulties.

Natural resources development agreements involving the infusion of FDI clearly belong to the general category of 'State contracts'. This generic classification, however, only signals the beginning of the categorization process, not its end. There are incidentally a great multitude and diversity of international agreements which may be referred to as 'State contracts'. Natural resources development agreements, being predominantly of a semi-public character, are thus formally categorized as *economic development agreements* (EDAs).¹²² The EDA designation holds true irrespective of the parties' selection of the specific form of an "investment contract" as the applicable arrangement or legal framework.¹²³

The EDA categorization implies a purposive (or perceived 'functional') approach as opposed to a purely legal description - there being as yet no generally accepted or recognized legal definition of an EDA.¹²⁴ The specific types of

¹²² Pogany, *supra* note 88, at 1 for instance, draws attention to the "persistent and widespread support in academic literature of a separate category of State contracts known as economic development agreements", (see also at 2-4 where the author discusses the principal features and characteristics of EDAs). The EDA designation, although admittedly an ideologically loaded term, is to a certain extent a pertinent description of natural resources development agreements. The origins of the EDA denomination can generally be traced to Hyde, *supra* note 59, at 862. See also Jennings, *supra* note 46, at 177; McNair, *supra* note 46, at 10.

¹²³ See *supra*, Part III (A) for a discussion on the use of the form of an "investment contract" by the FDI party as a political risk management strategy.

¹²⁴ Rainer Geiger, *The Unilateral Change of Economic Development Agreements*, 23 INT'L & COMP. L.Q. (1979), at 74; see also Fatouros, *supra* note 91. It is worth noting that international arbitration claims and practice is divided not only on the question of applicable legal regime for international investment agreements but also on the question of categorization, of which see further Pogany, *supra* note 88, at 10. Arbitration awards which lend support to the EDA categorization include *Texaco/Calasiatic*, *supra* note 105, at 456; *Elf Aquitaine (Iran) v National Iranian Oil Company*, 11 Y.B. COMM. ARB. 97 (1986), at 99 (implicit recognition); *Revere Copper &*

agreements which fall under the EDA category are, however, clearly distinguishable. These include, in addition to natural resources development agreements, concessions for public works and public utilities (transport, water, energy, power supplies, telecommunications, etc.); agreements providing channels for technology transfer, turnkey projects and management contracts for public enterprises and socio-economic institutions (hospitals, educational programs, etc). Lord McNair has further outlined the following as the principal characteristics of EDAs:

- “(a) They are made between a government on the one side and on the other, a foreign corporation ...;
- (b) They are normally contracts for some long term exploitation of natural resources ...;
- (c) The rights created are not purely contractual but are more assimilated to rights of property;
- (d) They confer extensive incentives to foreign investors, such as complete freedom from export and import duties, exemption from taxation... [etc.];
- (e) Many of these development agreements are governed partly by public law and partly by private law.”¹²⁵

Some of the key elements in Lord McNair’s description are closely associated with the principal features of the traditional concession system. In interpreting these characteristics, therefore, due allowance ought to be made for the profound evolution which has since taken place in the industry with the emergence of new forms of agreements such as production sharing and service contracts. It could still be argued, however, that the EDA concept (being an all-embracing formula) has survived this evolution and thus applies to the new forms of agreements.

Another perspective on the concept of an EDA is offered by the dicta from the arbitral award in *LIAMCO*¹²⁶ in which the principal characteristics of an EDA were outlined as follows:

“A contract of this type is a semi-public agreement made between a State and a private individual, the object of which covers a project of public utility or exploitation of certain natural resources and in which are defined the rights and obligations of the parties ...

Such a contract has special characteristics of which the most common are ... special clauses concerning, *inter alia*, technical and financial provisions, use of exorbitant rights and privileges, the choice of the proper law of the contract, and a compulsory arbitration clause.”¹²⁷

Brass Inc v OPIC, 56 I.L.R at 277, where it was stated that the contract fell within the category of a “long term economic development agreement”; and the *Klöckner Arbitration*, *supra* note 117, at 89 where the tribunal’s recognition of the agreement in question as an EDA was based on the fact that it was intended to promote the economic development of the host country. Awards in which the EDA classification has not been recognized include *AMCO v Government of Indonesia*, 24 I.L.M. 1002 (1985), at 1027-28; *Amoco International Finance Corp. v Government of the Islamic Republic of Iran*, 15 IRAN-US C.T.R. 189 (1987-II), at 236; and the *LIAMCO Arbitration*, *supra* note 108, at 186-87 (implicit rejection of the EDA categorization).

¹²⁵ *Supra* note 46, at 2-4.

¹²⁶ *Supra* note 92.

¹²⁷ *Id.* at 56.

Modern perceptions of natural resources development agreements differ significantly from the pre-PSNR era under which the concession categorization prevailed. The traditional concession agreement has been defined as “a licence granted by the State to a private individual or corporation to undertake works of a public character extending over a considerable period of time, and involving the investment of more or less large sums of capital.”¹²⁸ A theoretical understanding of this definition offers little or no distinction between a mineral concession and an EDA. Viewed from a functional perspective, however, the essential differences between the two become apparent. To fully understand the nature of the distinction it is necessary to have further recourse to a more comprehensive definition of the term ‘concession’. Fischer, after acknowledging the lack of consensus on the notion and uniform application of the term, offers the following view:

“[A] concession in the wider sense may be defined as a synallagmatic act by which a State transfers the exercise of rights or functions proper to itself to a private person, State-owned enterprise or a consortium which, in turn, participates in the performance of public functions and thus gains a privileged position vis-à-vis other private law subjects within the jurisdiction of the State concerned.”¹²⁹

A key aspect of the distinction between a concession and an EDA resides in the fact that the EDA categorization clearly expresses the notion of an ‘*agreement*’ between the parties involved, the host State and the FDI party. The term “concession”, on the other hand, serves to obscure the essentially bilateral nature (and therefore the negotiated basis) of the relationship; the same applies even in cases where the mineral developer’s rights emanate from the grant of an administrative instrument such as a mining permit or license.¹³⁰ This fact is further emphasized by Nwogugu in whose view, “... as the use of [the term] ‘concession’ implies in most cases a unilateral grant by the State, the new term [EDA] removes all doubts as the true relationship between the parties.”¹³¹ But of far more significance (from a perceived functional point of view) is the fact that the notion of an EDA highlights in a very explicit manner the expected contribution of the natural resources project to national economic development aspirations of the host State. This fact perhaps explains the prominence in post PSNR/ NIEO host States’ policies of the prioritization of national economic development objectives. These include technology transfer, the professional training, employment and promotion of nationals within the framework of the project; and promotion of local enterprises through the sourcing of materials from domestic suppliers and contractors or sub-contractors.

¹²⁸ O’CONNELL, *supra* note 50, at 304.

¹²⁹ P. FISCHER, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOL.8, at 100; *see also* T. Huang, *Some Aspects of the Suez Canal Question*, 51 AM. J. INT’L L. 289 (1952).

¹³⁰ McNair, *supra* note 46, at 1. On the basis of Lord McNair’s description of the defining characteristics of an EDA, in particular his second and third points, it could well be argued that administrative law instruments pertaining to natural resources exploration and exploitation such as petroleum and mining licences and permits could be classified under the category of EDAs. For contrary arguments in favour of a ‘contract’ classification, *see generally* TERENCE DAINTITH (ED), THE LEGAL CHARACTER OF PETROLEUM LICENCES (1981).

¹³¹ *Supra* note 32, at 180.

The EDA concept thus implies at its core not just the unilateral or concessionary grant of mineral development rights; it denotes a bilateral engagement which is intended (or perhaps perceived by the host nation) to serve as a platform for national economic growth.¹³² The traditional concession-type agreement, on the other hand, is clearly marked by the absence of any aspirations towards national economic development goals and objectives or similar such expectations on the part of the host community. What, then, are the implications of the EDA categorization for the international regulation of natural resources development ventures? And is the EDA categorization supportable (in view of the continuing friction between international property rights and sovereign rights)?

On closer examination it could be argued that the EDA categorization, when viewed from a development perspective, has limited functional value. Far from being a practical tool it is arguably a purposive or an aspirational model. The apparent clarity of purpose vis-à-vis its expected contribution to national economic development objectives is hardly matched by the evolution of projects the ground. The continuing disaffection on the part of developing nations with the current international investment regime suggests that the EDA concept, well-intentioned though it may be, clearly makes for a rather poor developmental model. The end result is that it, like the traditional concession, has become an embodiment of the latent frictions and tensions which often culminate in unilateral (corrective) measures by the host State. A possible explanation lies perhaps in the misplaced emphasis vis-à-vis the role of the FDI partner as a harbinger of national economic development. It is neither feasible, nor indeed desirable, for the host State to 'delegate' to the FDI party (be it within the framework of an EDA) national development goals and objectives. This is clearly a task which is as onerous as it is unattainable - if the desired objective is indeed to transform a private profit seeking, risk and reward oriented multinational company into either a transnational development agency or an altruistic benefactor. It is clearly for this reason that concerns have been raised over the perception of natural resources development agreements premised on the EDA concept; it is therefore hardly surprising that scholars have been critical of the use of the EDA designation as going too far the other way - in that developing nations could feel that the exploitation of their natural resources is only in their interests and the foreign investor is actually carrying on his enterprise as economic aid.¹³³

The economic development function ascribed to the FDI party under the EDA categorization is rendered even more onerous by the fact that the desired national economic development goals and objectives are themselves often ill-defined and unspecified. The more likely outcome is thus to generate unrealistic expectations in the host community. The interest of other key stakeholders (shareholders, investors, lenders, etc) and their legitimate expectations and overall corporate mission clearly lies in realizing the highest possible rate of return on their investments - not in

¹³² Cf. Norma Webb-Brown, *Developments in the Bauxite-Alumina Industry in Jamaica, 1976-1980*, in UNITED NATIONS LEGAL & INSTITUTIONAL ARRANGEMENTS IN MINERALS DEV'T 216 (1986) [hereinafter INSTITUTIONAL ARRANGEMENTS]; C. Tibone, *Renegotiation of the Selebi-Phikwe Contract in Botswana*, in INSTITUTIONAL ARRANGEMENTS, 193 (1982); R. Venkata, *Transnational Corporations, International Law and the New International Economic Order*, 6 SYRACUSE J. INT'L L. & COMM. 17 (1978); Jean Touscoz, *Le Régime Juridique des Hydrocarbures et le Droit International du Développement*, 100 J. DROIT INT'L 296 (1973).

¹³³ See I. DE LUPIS, *FINANCE AND PROTECTION OF INVESTMENTS IN DEVELOPING COUNTRIES* (1987), at 24-43.

promoting the national development aspirations of the host community. These arguments are intended in any way to negate the significant contribution which FDI can make, directly and indirectly, towards the economic and social development of recipient communities. On critical reflection, however, it has to be submitted that the EDA designation (with its exaggerated and somewhat presumptuous emphasis on the economic development functions of FDI projects) has the potential to be transformed into a platform for conflict. This is particularly the case if, in the long run, the attainment of the desired national development objectives proves to be elusive.

Doctrinal opinions remain divided on the question of the precise implications of the EDA categorization for the security of FDI within the context of the international investment regime. It would indeed appear that the notion of an EDA, with its developmental focus, implies a more expansive interpretation of the regulatory discretion of host States in exercising public power prerogatives. Some scholars, however, take a different view. Rather surprisingly, Pogany has posited the view that implicit in the notion of the EDA is an enhancement of legal protection for FDI in as much as the effect of the EDA categorization is to “internationalize” the contract; he thus argues that the ultimate effect is to isolate the project from the influence of national regulatory, legislative and judicial competences.¹³⁴ He further posits that such “internationalization” (which is independent of the real or apparent intention of the parties as expressed in the choice of law provision in the agreement) serves to protect the investor in the same way as the stabilization clause which is directed more at precluding subsequent unilateral alteration of established terms and conditions by the host State.¹³⁵

The EDA categorization thus undoubtedly has significant implications for the security of FDI in the natural resources sector. The combined effect of a “public law” designation together with an EDA categorization is clearly to enhance the developmental function and public power prerogatives. The latter, it may be argued, thus becomes inherent in the very nature of natural resources development agreements. With this comes the possibility (or political risk) of subsequent regulatory intervention by the host State. A “private law” or contract categorization, on the other hand, implies the pre-eminence, and arguably the immutability, of the acquired rights of the FDI party within the framework of the agreement. This is not to say that in the event of a private law categorization the State’s ‘right to regulate’ is in effect extinguished; nor that in the event of an EDA categorization the State’s right to regulate will be completely devoid of international law consequences. For international law prescribes a duty to pay prompt, adequate and effective recompense to the FDI party where such regulatory intervention is construed as amounting to a direct or indirect taking.

This leaves the residual question as to how natural resources development agreements can best be categorized - given the above critique of the EDA concept. There is clearly a need to free the question of categorization from the EDA approach with its functional presumptions and developmental pretensions, from its grandiose but somewhat unrealistic expectations. However, an instinctive recourse to a wholly descriptive denomination such as ‘petroleum and mineral development agreement’

¹³⁴ *Supra* note 88, at 11-12.

¹³⁵ *Id.* at 12.

simply begs the question as to their precise legal category and the sources of applicable law. What is proposed here as a possible replacement for the somewhat outdated EDA concept is not intended at this stage to be a detail postulation but rather a preliminary sketch, with more substantive work anticipated in the future.

One of the difficulties with the EDA concept stems from the fact that it aspires to be an all-inclusive categorization formula, a moniker for all FDI projects regardless of their legal form. In other words, it does not distinguish between contractual type agreements based on negotiated and project-specific terms and conditions, and more standardized regimes such involving permits and licensing. The latter clearly have a greater propensity towards public law, being in the main administrative instruments. It is posited that a differentiation between these two types is imperative to the question of categorization. What is thus required is a legal distinction based on two discrete categories.

In the first group would be administrative type instruments (concessions, permits and licenses) drawn together under the category of *economic cooperation agreements* (“ECA”). Their proclivity towards public law would thus render the ECA concept more amenable to the exercise of public power prerogatives of the State, thus restricting the scope and effect of stabilization provisions. Given its character as an administrative instrument the ECA concept will be more permissive of the renegotiation and re-adjustment of terms and conditions, with national municipal law as the governing law. This will include judicial adaptation with a view to promoting the attainment of national economic development objectives – the latter being an implied obligation within the framework of the ECA. The second category, the *economic partnership contract* (“EPC”) would bring together contractual type agreements. At the heart of the EPC concept would be the notion of equality of status between the parties which derives from the negotiated basis of the agreement – i.e. a partnership of equals. Underlying the EPC model would be private contract law and international law principles such as sanctity of contract, *pacta sunt servanda* and the pervasive influence of stabilization provisions. Hence there will be lesser scope in the EPC for the exercise of public power prerogatives and minimal expectation (if any at all) from the FDI party vis-à-vis anticipated contributions to national economic development objectives. Within this new framework the EDA concept could well retain a residual role for the categorization of those agreements which straddle the boundary between the ECA and the EPC.

B. The ‘Protective’ Function of Internationalization and Stabilization: A Critical Appraisal.

From a drafting perspective, the submission of natural resources development agreements to governance by the international investment regime (including relevant principles of public international law), is often contractually achieved through the twin techniques of internationalization and stabilization. The combined effect of these techniques is to immunize, shield or otherwise isolate the minerals project from the effect or influences of the municipal legal system and from the regulatory competences of the host State. Internationalization, in a manner deemed perhaps to be consistent with the transnational character of natural resources development ventures, is itself usually achieved through the medium of a dispute settlement

provision such as a choice of law or forum clause in the agreement.¹³⁶ Such provisions ensure that in the event of a dispute the range of applicable legal rules is not restricted to the municipal law of the host State.¹³⁷ At their most effective, these techniques ensure that the whole of the dispute settlement process is externalized and thus falls outside the scope of any potentially applicable municipal legal rules.

The intended effect of the stabilization clause is to complement the protective function of internationalization by “freezing” the municipal law of the host State and its application to the venture by reference to a prescribed date (usually the date of the signing of the agreement). Its objective is thus to shield the latter from any subsequent regulatory intervention by the host State.¹³⁸ A fully-fledged study of the concepts of internationalization and stabilization is clearly beyond the remit of this article.¹³⁹ Rather, what is proposed is to attempt an objective inquiry in the form of a critical appraisal of the protective function of both these techniques with a view to expounding their rationale, the problems associated with their use and the manner in which they impact on the tension between international property rights and sovereign rights.

1. Internationalization: A Functional Analysis

The internationalization of mineral development agreements can be achieved through the following ways¹⁴⁰:

¹³⁶ In the absence of a choice of applicable law provision in the contract, international arbitral and claims tribunals have recourse to the relevant conflict of laws rules or to the general principles of private international law in their effort to determine the choice of applicable law or “proper law” of the agreement. For further analysis of this and attendant problems, see RIAD, *supra* note 93, at 62-168; Delaume, *supra* note 89, at 37-50. In doctrinal writings the question has often been raised as to the measure of influence and relevance of international law to international investment projects in the absence of a specific choice of law clause in the agreement which expressly prescribes international law as the governing law. Attempts to answer this question have led to the postulation of two main theories. These are the “contract without law” theory - i.e. universal autonomy of the contract created by the parties themselves and transcending all legal systems; for an articulation of this theory, see Alfred Verdross, *The Status of Foreign Private Interests Stemming from Economic Development Agreements with Stabilization Clauses*, in SELECTED READINGS, *supra* note 29, at 117-21;. The second theory is that of the “basic legal order” (or *Grundlegung*), for an analysis of which see Karl-Heinz Böckstiegel, *Droit International et Contrat d’État*, in MELANGES REUTER 588 (1981). At one end of the spectrum (contract without law theory) the focal point is on the contractual will of the parties as the governing law; at the other end (basic legal order), the focus remains the locality of the project with the municipal law as its main point of reference. The common effect of these two extremes would seem to be to do away with the concept of internationalization. See further A.F. Maniruzzaman, *Conflict of Laws Issues in International Arbitration: Practice and Trends*, 9 ARB. INT’L 371 (1993); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT’L L. 1314 (2003); Giesela Ruhl, *The Problems of International Transactions: Conflict of Laws Revisited*, 33 J. PRIV. INT’L L. 59-91 (2010).

¹³⁷ Paasivirta, *supra* note 106, at 323.

¹³⁸ See Waelde & Ndi, *supra* note 106, at 220-21.

¹³⁹ For a commentary on the various schools of thought on ‘internationalization’ and the theories which they have spawned, see D. O’CONNELL, *INTERNATIONAL LAW* (1970), at 56-79; Manurizzaman, *supra* note 137; M. SORNARAJAH, *THE PURSUIT OF NATIONALIZED PROPERTY* (1986), at 81-130.

¹⁴⁰ Internationalization has also been referred to variously as ‘delocalization’, ‘denationalization’, ‘transnationalization’ or ‘externalization’ in scholarly discourse on the subject.

- (a) Contractual stipulations regarding the choice of applicable law or forum, the main objective of which is to externalize the dispute settlement process;
- (b) Through the judicial process of categorization culminating in the selection of international law principles as the “proper law” of the agreement;
- (c) Through State practice vis-à-vis BITs;
- (d) By invoking relevant principles of customary international law on State responsibility and the protection of aliens and their property in the event of a dispute.

The contractual techniques referred to in (a) above is often through the device of an express choice of law provision in the agreement.¹⁴¹ Stipulations as to the governing law vary widely and may be based on any one or more of the following:

- Choice of national law of the host State: this has the attraction of appearing to be the ‘proper law’ of the agreement, being its natural seat’ or ‘centre of gravity’ (i.e. the *lex contractus* or *lex situs*). However, concerns over its applicability include the fact that national constitutional provisions could raise doubts as to the amenability of either the agreement or the State party to municipal judicial processes or as to the arbitrability of any subsequent disputes under an arbitration clause.¹⁴² Secondly, even if the agreement is deemed amenable to judicial process or arbitrable, domestic judicial construction in the form of a purposive interpretation of the EDA or ‘public contract’ concepts (coupled with an expansive interpretation of developmental objectives or public interests prerogatives) could well frustrate any remedial recourse by the FDI party to the municipal legal system. It is in view of these concerns that the FDI party will often seek to internationalize the agreement by removing it from the scope and influence of the municipal legal system.
- Choice of the national law of the home State of the FDI party: may have the attraction of being perhaps a well developed legal system with transparent and efficient processes and procedures, but could be deemed to be alien to the operational aspects of a project located in another jurisdiction.
- Choice of national law of a third country: its key attraction lies in its perceived neutrality, but it could equally be deemed foreign and alien to the project.
- A combination of two or more systems of national law, most likely that of the host State and the home State of the FDI party together with a third system of law. This may include principles of law common to the legal systems of both contracting parties together with general references to ‘good faith’, ‘good will’ or the general principles of (commercial) law. This somewhat exploratory, tentative and uncommitted approach to internationalization, far from achieving its desired objective, could well give rise to a ‘conflict of laws’ scenario.

¹⁴¹ For a complete inventory of the various types of choice of law provisions in use, see Prosper Weil, *Principes Généraux de Droit et Contrats d’État*, in ETUDE ’82, *supra* note 98, at 387.

¹⁴² On grounds, for example, of State or sovereign immunity.

- Choice of public international law or the ‘general principles of law recognized by civilized nations’: this is a straightforward approach to internationalization of the applicable law. The term “civilized nations” was often used in the past to denote those nations whose legal systems were regarded as acceptable and suitable for arbitration. Although the term has now virtually disappeared from the lexicon of publicists it still retains a place amongst choice of law provisions.¹⁴³ With the latter, it performs the dual function of seeming to provide a compromise on the question of the applicable law while at the same time seeking to distance the agreement’s governing law from its natural point of reference – the host country or *locus* for the implementation of the project.

With regard to State practice the main effect of BITs, from a remedial point of view, is the projection of FDI agreements onto the international legal plane. This process in turn confers on the FDI party *locus standi* in international *fori* through the acquisition of internationally justiciable rights under the BIT regime.¹⁴⁴ On closer examination, however, a somewhat ironic consequence of this improvisational subjoining of protection (sought through the BIT mechanism for the FDI party) is an enhancement of the hybrid nature and semi-public character of FDI agreements. The end result is to distance the agreement still further away not just from the national legal system but, arguably, also from pervasive influence of private contract law principles. This in turn (depending on the outcomes of categorization) renders the agreement either more susceptible to governance by public law concepts at the national level, or by the doctrine of *pacta sunt servanda* following its projection onto the international legal plane.

The process of internationalization is thus generally perceived to offer a protective function to the FDI party within the framework of the project agreement, in as much as internationalization provisions are conceived and designed to render the agreement less susceptible to subsequent unilateral State actions or domestic dispute settlement procedures. Elucidating on this point, Suratgar observes that the main “interest or motive of those who advocate [internationalization] is the desire to ensure against the possibility of [legal] effect being given to a termination or modification of the agreement ... by an act of sovereign legislation.”¹⁴⁵

The principal legal justification for this denial of effect to subsequent municipal processes and procedures would appear to be based on the principle of *pacta sunt servanda*. According to Mann, following the internationalization of the agreement, “its existence and fate would be immune from an encroachment by a system of municipal law in exactly the same manner as ... a treaty.”¹⁴⁶ Some authors, in a similar vein, have identified as the intended objective of internationalization the

¹⁴³ For an example of its earlier use, see McNair, *supra* note 46.

¹⁴⁴ Kaushal, *supra* note 5, at 496; see also A. NEWCOMBE & L. PARADELL, *LAW AND PRACTICE OF INTERNATIONAL INVESTMENT TREATIES* (2008); Douglas, *supra* note 11; J.W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT’L L. 655 (1990).

¹⁴⁵ *Supra* note 113, at 302.

¹⁴⁶ F.A. MANN, *STUDIES IN INTERNATIONAL LAW* (1973), at 222-23. See also Robert von Mehren & Nicholas Kourides, *International Arbitration Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT’L L. 467 (1981), at 510-11; SHAVARSH TORIGUIAN, *LEGAL ASPECTS OF OIL CONCESSIONS IN THE MIDDLE EAST* (1972), at 242.

desire or aspiration by the FDI party to ensure for the project agreement a detachment or “escape” designed to ignore the impact of municipal law rules.¹⁴⁷ Viewed from another perspective, internationalization serves to reinforce the consensual element which is an inherent feature of the contractual process; it protects against unilateral modification to negotiated terms and conditions without the consent of the FDI party – i.e. by invoking international law consequences in the form of the doctrine of *pacta sunt servanda* and related principles.¹⁴⁸ But one concern could be that perceived as such, the function of internationalization is to prioritize the interest of the FDI party (in the form of acquired rights) over any rival claims of the host State to exclusive domestic competence or public interest prerogatives – with the former claim founded on the premise of the *lex loci sitae*. Secondly, one of the effects of internationalization seems to be to fetter the administrative discretion of the host State vis-à-vis the project agreement. This could in turn have far-reaching domestic constitutional implications¹⁴⁹ - hence exacerbating the friction between the rights of the investor to investment security and the host State’s right to exercise regulatory discretion in pursuit of public interest objectives.

It is undoubtedly the case that the technique of internationalization, contractual or otherwise, provides some measure of comfort and protection to an FDI minerals investor who nurses apprehensions regarding any subsequent dispute settlement process falling under the exclusive jurisdiction of the municipal legal system of the host State. As an anticipatory mechanism for the resolution of FDI disputes (on the basis of a judicial process which is independent of the domestic institutions and politics of the host State) internationalization clearly performs a useful function as a risk management strategy. This it does through avoidance of the political risk of subsequent regulatory intervention by national authorities, any such intervention being subject to international law consequences. It also seeks to avoid the risk of possible political interference (leading to an absence of judicial impartiality) in the event of a project dispute.

But when viewed from the perspective of the application of substantive principles of law the expected function of internationalization, which is to render a breach of the project agreement a breach of international law, is far less easily ascertained. This last expectation is that which has remained shrouded in uncertainty in view of the fact that (established customary international law principles notwithstanding) many host nations still rely on rival concepts such as PSNR as well as municipal legal and constitutional principles in disputes with FDI parties as seen recently in Bolivia and Venezuela.¹⁵⁰

¹⁴⁷ Paasivirta, *supra* note 106, at 317; J. Castberg, *International Law in Our Time*, 138 RECUEIL DES COURS 1 (1973), at 10; George Ray, *The Law Governing Contracts Between States and Foreign Nationals*, in PROCEEDINGS OF THE INSTITUTE OF PRIVATE INVESTORS ABROAD (1960), at 65-69.

¹⁴⁸ One author has identified amongst the prevailing trends in international law favouring internationalization the doctrine of *pacta sunt servanda*, the theory of acquired rights, affirmative arbitral awards and doctrinal views promoting customary international law principles on the subject; amongst the countervailing trends are PSNR, the concept of administrative contracts, the doctrine of *clausula rebus sic stantibus* and views previously promoting the normative value of the *Calvo* clause: see SORNARAJAH, *supra* note 139, at 108-37.

¹⁴⁹ See Suratgar, *supra* note 113, at 307; SORNARAJAH, *supra* note 139, at 97-98.

¹⁵⁰ It has to be said, however, that one of the most pervasive effects of BITs on the international investment regime has clearly been the shunting aside of putative norms such as PSNR.

A review of doctrinal analyses on the question of the validity and protective function of internationalization and of its impact on the relationship between property rights and sovereign rights reveals a rather mixed picture. Generally speaking doctrinal opinion seems to be split into three groups. In the first group are those scholars who advocate upholding the validity of internationalization based on the application of *pacta sunt servanda*.¹⁵¹ Amongst these is Weil who, in making the connection between internationalization and *pacta sunt servanda*, argues that the choice of internationalization has as its main effect the submission of the agreement to governance by public international law; in his view, this includes notably the principle of *pacta sunt servanda*, in a manner as to render any breach by the State party in effect a breach of public international law.¹⁵² In the second group are those who hold out against both internationalization or “delocalization” and the application of the doctrine of *pacta sunt servanda*.¹⁵³ These scholars see in the unrestricted application of the latter doctrine an attempt at a possible derogation from the equally important principle of sovereignty.¹⁵⁴ Bowett, for instance, has argued that *pacta sunt servanda* pertains exclusively to the law of treaties and has no obvious application to State contracts - even assuming the application to the latter of international norms.¹⁵⁵ Other writers, while recognizing the “international effects” of the delocalization process, still express some doubt as to the capacity of such protective endeavors to offer absolute protection.¹⁵⁶

These differences in doctrinal opinions serve to illustrate the degree of conceptual uncertainty over applicable norms. This in itself is symptomatic of the fractious nature of the relationship between property rights and sovereign rights within the framework of natural resources projects and the international investment regime as a whole. From a historical perspective, the root cause of the problem lies not in the principle of applying international law *per se* to the FDI process, but rather in identifying and applying relevant *sources* of international norms to substantive obligations. One author succinctly puts the point thus:

¹⁵¹ Cf. Kenneth Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT’L L. 260 (1958); Prosper Weil, *Problèmes Relatifs aux Contrats Passés Entre un État et un Particulier*, 128 RECUEIL DES COURS 95 (1969-III), at 95-114; Hyde, *supra* note 59, at 862.

¹⁵² *Id.* at 113-14; see also Wehberg, *supra* note 29, at 786 where the author argues that the principle *pacta sunt servanda* is valid in respect of contracts between States and private companies; Karl-Heinz Böckstiegel, *Arbitration Between Parties from industrialized and Less Developed Countries*, 60 INT’L ARB. REP. 269 (1982), at 308 who in recognizing State contracts as being “quasi-international agreements” nonetheless prescribes the application of the doctrine of *pacta sunt servanda* to them. See further Gérard Cohen-Jonathan, *L’Arbitrage Texaco-Calasiatic v Gouvernement Libyenne*, 23 ANN. FRANÇAISE DROIT INT’L (1977), at 474.

¹⁵³ See, for instance, Angelo Sereni, *International Economic Institutions and the Municipal Law of States*, 96 RECUEIL DES COURS 210 (1959)

¹⁵⁴ Suratgar, *supra* note 113; SORNARAJAH, *supra* note 139, at 2-51; Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 178 RECUEIL DES COURS 259 (1982), at 298-355; F.V. García-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 MIAMI J. INT’L L. 1 (1980); *id.*, *supra* note 16, at 387-95.

¹⁵⁵ D. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRIT.Y.B.INT’L L. 49 (1988), at 54-5; see further McNair, *supra* note 46 at 10; Geiger, *supra* note 124, at 102. See also the *Amoco International Finance* case, *supra* note 124, at 242-43 where the tribunal emphasized against the application of *pacta sunt servanda* to State contracts.

¹⁵⁶ E. Lauterpacht, *The World Convention on the Settlement of International Investment Disputes*, RECUEIL D’ÉTUDES DE DROIT INT’L EN HOMMAGE À P. GUGGENHEIM (1968), at 642-55; GEORG SCHWARZENBERGER, *FORIEGN INVESTMENTS AND INTERNATIONAL LAW* (1969), at 144.

“[Much] uncertainty exists as to the precise status of international norms... Until such time as a consensus can be achieved [regarding] the rules of international law applicable to relations between foreign investors and host States ... the effectiveness of ‘internationalization’ clauses is bound to remain uncertain. The difficulty is not that these clauses cannot perform the normal function of stipulations of applicable law, but rather that the substantive rules to which they apply is still in a state of flux.”¹⁵⁷

One of the unforeseen or undesired consequences of internationalization can thus clearly be seen in the conflict regarding the choice of applicable law - i.e. national law *versus* international law. This is a conflict that goes beyond one of governing law. Against the background of internationalization is the rivalry between the FDI party’s desire for investment security and the regulatory impulses of the host State driven by the desire for sovereign control – to wit, the rivalry over ownership and control of resources.

The use of the form of an ‘investment contract’ (as opposed to an administrative grant or permit) together with the technique of internationalization often goes hand in hand with an attempt by the FDI party to “stabilize” the essential contractual, fiscal, legal and other operational conditions pertaining to the implementation phase of the project. This combination is intended to provide the investor with a comprehensive package of political risk management strategies.¹⁵⁸ It is proposed next to appraise the effectiveness or otherwise of the stabilization strategy.

2. Stabilization Commitments: A Contextual Analysis

The stability of essential investment conditions (contractual, legislative, fiscal, regulatory and operational) constitutes one of the key components informing the security of FDI ventures.¹⁵⁹ Fiscal and regulatory uncertainty appreciates to a considerable degree the political risk factor associated with long term mineral development ventures and will most likely act as a disincentive to the commitment of

¹⁵⁷ GEORGES DELAUME, *TRANSNATIONAL INVESTMENT CONTRACTS: APPLICABLE LAW & SETTLEMENT OF DISPUTES* (1992), at 15-16. *See also* John Crawford & Wesley Johnson, *Arbitrating with Foreign States and Their Instrumentalities*, 5 INT’L FIN. L. REV. 11 (1986), at 12 where the authors point out that references in FDI agreements to international law principles are generally designed to protect [overseas private investors] against unilateral State actions but that these principles are themselves in a state of flux and that it is never by any means certain that they will continue to offer such protection in the long term.

¹⁵⁸ Examples of other political risk management strategies include spreading the risk through joint venturing partnerships (i.e. involving corporations of different nationalities in the venture ensures the concerted reaction of the international community in the event of a dispute with the host government); political risk insurance through national, private commercial or multinational risk insurance agencies such as MIGA; and warding off the risk through the use of financial, economic and political persuasion and leverage: *see further* Wälde & Ndi, *supra* note 77, at 66; Theodore Moran, *Transnational Strategies of Protection and Defenses by Multinational Corporations: Spreading the Risk and Raising the Cost for Nationalization in Natural Resources*, 27 INT’L ORGAN. 273 (1973).

¹⁵⁹ As observed by Weil, *supra* note 106, at 302 the stabilization clause offers within the framework of the agreement “une stabilité juridique suffisante pour permettre l’amortissement des investissements.”

significant resources required for minerals development.¹⁶⁰ Stabilization thus serves a dual purpose. Its primary function is to protect and ensure the long term security of FDI.¹⁶¹ Secondly, governments with promising but undeveloped (or underdeveloped) mineral properties - or with attractive geological prospects - will often seek through stabilization clauses to extend guarantees of legal security to foreign investors.¹⁶² Such guarantees may be inserted into mineral development agreements or be contained in relevant administrative orders, regulations or legislation.¹⁶³ From a transactional viewpoint, stabilization thus serves the specific function of a 'country risk management device' by seeking to lower the perception of political risk in the eyes of prospective 'suitors'.

It is indeed the case that previous political risk events are often painfully inscribed not just in the personal memories of senior executives and managers, but also in the long term institutional/ historical memories of multinational corporations and investor home countries affected by such events.¹⁶⁴ Stabilization guarantees thus provide a certain degree of psychological comfort, an anodyne prescription which serves to assuage and soothe the unpleasant memories of yesteryears. It is partly for this reason that countries, particularly those with indigent historical records of such events, will sometimes go to great lengths to try to reduce the perception of political risks (through commitments to regulatory restraint) as part of an overall investment promotion strategy.

Much has already been written on stabilization clauses and their role in the international investment regime.¹⁶⁵ It is therefore proposed to limit the analysis in this section to a review of the practice of stabilization within the thematic context of the conflict between international property rights and sovereign rights. Whatever form they take government guarantees (of regulatory abstention, administrative restraint or fiscal stability) to foreign investors are perceived to serve a specific risk management function. This can be either through their preventative (in warding off the sovereign risk of regulatory uncertainty by rendering the project agreement immune from subsequent municipal law rules or *lex posterior*), or anticipatory roles.

¹⁶⁰ See, with reference to factors influencing the flow of FDI generally, M. Levis, *Does Political Instability in Developing Countries Affect Foreign Investment Flows? An Empirical Examination*, 19 MANAGEMENT INT'L REV. 59 (1979); F. Schneider & B. Frey, *Economic and Political Determinants of Foreign Direct Investment*, 13 WORLD DEV'T 161 (1985); UN CENTRE ON TRANSNATIONAL CORPORATIONS: *THE DETERMINANTS OF FOREIGN DIRECT INVESTMENT*, (1992).

¹⁶¹ See A. Akinsaya, *International Protection of Direct Foreign Investment in the Third World*, 36 INT'L & COMP. L.Q. (1987), at 57-75; A. El Chiaty, *Protection of Investments in the Context of Petroleum Arrangements*, 204 RECUEIL DES COURS 9 (1987-IV); see also the case of *Revere Copper & Brass Inc. v OPIC*, 17 I.L.M. 1321 (1978).

¹⁶² See *supra* note 119, for an example of such a clause. Stabilization clauses range in type from the classic "freezing" or "consistency" clause which freezes the applicable law as it exists on the date of the agreement to "mutual consent" or "intangibility" clauses. The latter require any subsequent changes to be subject to prior agreement of both parties. A third version, the "compensation clause" requires recompense to the FDI party for any loss suffered as a consequence of government intervention, of which see further Ndi, *supra* note 63, at 194.

¹⁶³ Ndi, *supra* note 63, at 170, 195. The protective function of stabilization commitments contained in legislation, regulations or other administrative instruments is far less certain when compared to the contractual version, in view of the fact that the former relies to a greater extent on legislative discretion and may thus be subject to subsequent repeal or amendment.

¹⁶⁴ Wälde & Ndi, *supra* note 77, at 66.

¹⁶⁵ See *supra* note 107. For an analysis of the setting for the various types of stabilization clauses see Ndi, *supra* note 63, at 178-95. For a comprehensive inventory of the types of clauses, see Weil, *supra* note 106.

In the latter function, provision is often made for compensation in the event that the FDI party suffers additional financial burdens as a consequence of project specific post-contractual regulation or other ensuing general regulatory measures.¹⁶⁶

It is, however, in their preventative role that stabilization provisions are better known. In this role they serve as an expression of the long term contractual equilibrium, the latter being a pre-condition to facilitating the funding requirements of mineral development ventures. It is for this reason that companies embarking on transnational petroleum and mining ventures will tend to seek clarity, precision and some degree of predictability as to their legal rights, entitlements and obligations under the project agreement.¹⁶⁷ The specificity (and stability) of terms facilitates the design of financial requirements which may involve the raising of project loans and the long term servicing of debt incurred through such loans.¹⁶⁸ Fiscal certainty in particular constitutes a key component in the design of financial analysis models informing the mechanics of project implementation – i.e. the forecasting of costs, expected cash flows and income projection, tax liabilities, capital amortization, etc. Fiscal certainty likewise constitutes a pre-requisite for the extension of credit lines by financiers towards project loans/finance.

Against this backdrop, political and institutional instability, as well as the ever present possibility of regulatory intrusion, could all entail significant adverse implications not just for project revenues but also for the security of title and rights to mineral property. The host State government of the day may, for instance, develop second thoughts about specific terms and conditions contained in the agreement after a substantial outlay of investment has been already committed by the company or following a significant discovery of a mineral deposit. Under these conditions bargaining power is known to shift considerably in favor of the host State. The latter could then seek to exploit its newly found leverage on the grounds of a (perceived) change of circumstances.¹⁶⁹ The government may, for example, demand an increased share of the mineral rent if the economics of the project turn out to be far more favorable than was originally forecast by the financial models and economic projections on which the initial negotiations were based.¹⁷⁰ In this eventuality, public and government opinion may become amenable to the influences of new and innovative forms of taxation of the project or even some form of direct State participation.¹⁷¹ As observed by Wälde & Ndi, in these circumstances the well known

¹⁶⁶ This version of the clause is hence referred to as a “compensation clause”: see Ndi, *supra* note 63, at 195.

¹⁶⁷ It is not certain if companies pursue with equal zeal and vigour the clear and unequivocal expression of their correlative contractual obligations and responsibilities. Nor should they - negotiating stratagem clearly mandates (from the company’s point of view) that its options are rather left open. But the absence of reciprocity regarding clarity as to the correlative obligations of the FDI party (e.g. commitments or contribution to national development objectives) could well turn out to be a potential source for friction, thus placing in jeopardy the much sought after stability in the project regime.

¹⁶⁸ The core concern of project creditors remains the ability of the project to repay its debts, hence the relevance of stability provisions to project financiers; see generally David Suratgar, *International Project Finance and Security of Lenders*, in INSTITUTIONAL ARRANGEMENTS, *supra* note 132.

¹⁶⁹ Ndi, *supra* note 63, at 172.

¹⁷⁰ Wälde & Ndi, *supra* note 77, at 64.

¹⁷¹ Well known examples of ensuing tax legislation unilaterally amending established fiscal terms and conditions include the Oil Taxation Act of 1975 in the UK, of which see Richard Bentham, *The Acquisition of Natural Resources Interests by the State in the United Kingdom and in International Law*, 5 J. ENERGY & NAT. RES. L. 49 (1987), at 55; Terence Daintith & Ian Gault, *Pacta Sunt Servanda and the Licensing and Taxation of*

concept of the “obsolescing bargain” tends to appreciate quite considerably the “hostage effect of sunken investment” in the form of funds irretrievably committed to the project by the FDI party on the basis of negotiated terms and conditions.¹⁷² The merits of specific economic arguments aside, political and regulatory pressures have thus become a quite familiar facet of the bargaining dynamics of transnational mineral development ventures. Political, fiscal and regulatory uncertainty clearly distorts the risk-reward equation. The containment of this uncertainty through the technique of stabilization could, however, in itself lead to long term friction as regulatory pressures build up over time.

Given this environment of regulatory uncertainty and unpredictability the stabilization clause, by seeking to regulate the pattern of future government conduct vis-à-vis the mineral investment project, thus complements the form of an investment contract as the preferred legal arrangement in managing the political risks of mineral development ventures.¹⁷³ The consensual and negotiated basis of the contractual relationship (as opposed to the alternative of an administrative instrument) is seen to render it less amenable to the influences of administrative *fiat* with any subsequent alteration of terms and conditions being subject to the mutual consent of both parties. There is, therefore, a key argument to be posited for upholding the validity and enforcement of stabilization provisions: by their conferring on the project agreement a greater degree of transparency and clarity regarding the pre-determined legal obligations of the parties, there should thus be a case for upholding

North Sea Oil Production, CAMBRIAN L. REV. 27 (1977), at 35-38; the Bauxite Production Levy and Mining Amendment Act (No.2) of Jamaica and the ensuing *Revere Jamaica Alumina case* which upheld both the constitutionality of new bauxite production levies and the inalienable right of the government to retain sovereign control over mineral production activities – for a discussion of which see Webb-Brown, *supra* note 132; and unilateral changes by the Norwegian government to royalty levies for petroleum production in the North Sea, discussed in Frantz Dalgaard-Knudsen, *Exploitation Concessions: Contracts or Permits? – Contributions from the Norwegian Phillips/Ekofisk Case*, 5 J. ENERGY & NAT. RES. L. 165 (1987); see also O. Mestad, *supra* note 52.

¹⁷² OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS AND RELATIONAL CONTRACTING* (1985), at 180. See also Sheila Hollis & John Berresford, *Structuring Legal Relationships in Oil and Gas Exploration and Development in ‘Frontier’ Countries*, in WÄLDE & NDI, *supra* note 76, at 41, where the authors make the following observation: “Focusing on the parties’ relative bargaining power, the host country’s is least (and the foreign company’s greatest) in the pre-exploration stage, when it is uncertain whether the host country actually has anything to sell (commercial petroleum deposits). At this stage the foreign company will be best able to negotiate terms that compensate it for its high level of risk. Once commercial petroleum is found, both the company’s risk and its bargaining position decrease substantially [footnote omitted]”.

¹⁷³ Scholars appear to be divided on the question of whether or not political risks considerations play a significant part in investment decision making. According to Thomas Wälde, *North/South Economic Cooperation and International Economic Development Law: Legal Process and Institutional Considerations*, 23 GERM.Y.B. INT’L L. 59 (1980), at 60 the readiness of international resources companies to undertake long term and high risk investment depends on the stability of the legal and fiscal regime of the project. But others take a different view: R. Brown, *More From Houston – A Government Lawyer’s Perspective*, 2 J. ENERGY & NAT. RES. L. (1984), at 247 holds that there is no concrete evidence to suggest that the stability of the municipal legal system (i.e. political stability and legal security) are necessarily or usually pre-conditions for investment. In support of this view the author identifies countries such as Angola, Namibia, Colombia, and Chile which continued to attract substantial volumes of investment into the minerals sector during periods of political instability and legal insecurity. For a similarly held view, see Higgins, *supra* note 154, at 234. It is thus the case that geological prospects and marketing opportunities may sometimes override considerations of legal security and political risk perceptions. See further W.G. Prast & H.L. Lax, *Political Risk as a Variable in TNC Decision-Making*, 6 NAT. RES. F. 183 (1982).

the greater degree of expectation and reliance which the FDI party attaches to the negotiated terms and conditions.

How, then, does the stabilization clause impact on the tension between international property rights and sovereign rights within the context of the international regulation of natural resources development projects? According to Delaume, the purpose of stabilization is “to reach a compromise between the sovereign prerogatives of the State involved and the legitimate quest of the private party for stability of status consistent with sound business judgment.”¹⁷⁴ Lalive, on the other hand, holds the opinion that the primary and fundamental purpose of the clause is to protect the foreign operator.¹⁷⁵ Whatever its true function may be, what is clearly the case is that the presence of the stabilization clause alongside public interest considerations within the framework of mineral development agreements can accentuate the underlying tensions between the sovereign prerogatives of the State and property rights of the FDI party. For a (new) government intending to restructure the post-contractual regime with a view to promoting national economic development objectives, the stabilization clause looms as an impassable barrier on the path to attaining such ambitions. Over the long term the government’s frustrated aspirations could well serve as a catalyst for friction and conflict in the relationship.

Such tensions can become even more acute in municipal legal systems in which the mineral development venture acquires a distinctly public law character. Such is the case, for example, of the French administrative law system (and French-inspired municipal law systems in Africa, the Middle East and Latin America) where the venture acquires the character of a “*convention d’établissement*”. Under such systems the ‘classical’ private law notion of a mineral development agreement as a contractual relationship *inter partes* (or contract *simpliciter*¹⁷⁶) becomes substantially depreciated. This is in view of the fact that the project is perceived to acquire a socio-economic relevance and development function, thus becoming an instrument of national economic strategy and public policy.¹⁷⁷ This in turn substantially qualifies the consensual element in the agreement thus giving the public power prerogatives of the State an enhanced status and pre-eminence within the relationship.¹⁷⁸ The question then arises as to the validity, protective function and effectiveness of the stabilization clause vis-à-vis its relationship with the concept of State sovereignty.

Scholarly opinion remains very much divided on the question of the validity of the stabilization clause in international law.¹⁷⁹ Some authors uphold the ‘international legal effect’ of such clauses by positing the view that breach of the stabilization

¹⁷⁴ GEORGES DELAUME, *TRANSNATIONAL CONTRACTS: LAW AND PRACTICE* VIII (1983), at 39; this proposition has to be understood in the light of the wide range of possibilities available for stabilization clause selection, including the compensation clause which can be said to be a genuine compromise that permits regulatory intervention against recompense to the FDI party for any loss suffered. See also A.A. FATOUROS, *GOVERNMENT GUARANTEES TO FOREIGN INVESTORS* (1963), at 62-63.

¹⁷⁵ Jean-Flavien Lalive, *Contrats entre États ou Entreprises Étatiques et Personnes Privées: Développements Récents*, 181 *RECUEIL DES COURS* 9 (1983-III), at 86.

¹⁷⁶ See Arbitrator Dupuy in the *TOPCO Award*, 17 *I.L.M.* (1978), at 24-25 for more on this concept.

¹⁷⁷ See further Ignaz Seidl-Hohenveldern, *The Social Function of Property and Property Protection in Present-Day International Law*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER IN MEMORY OF VAN PANHUYS* 77 (1980).

¹⁷⁸ Cf. Turpin, *supra* note 46, at 28.

¹⁷⁹ Waelde & Ndi, *supra* note 106, at 243-45.

provision is itself an act illicit by its very nature – i.e. without the further requirement for the State involved to be in breach of customary international law.¹⁸⁰ In the opposing camp are scholars who perceive in such clauses an attempt to fetter the public powers of the host State. These scholars argue that such an attempt would constitute a possible derogation from the principle of sovereignty both under national and international law.¹⁸¹ The judgments of international arbitral and claims tribunals, on the other hand, remain divided on the question.¹⁸² What is clearly evident is that one of the undesired effects of stabilization clauses may well be to heighten already incipient tensions within the framework of the project agreement. The long term effect could thus be to compromise the very protection which is sought from the clause, ultimately leading to open conflict between the acquired rights of the FDI party and the sovereign right of the host State to regulate.

It would be somewhat precipitous to conclude this section without drawing attention to the so-called ‘suicide’ clause.¹⁸³ These clauses confer on the FDI petroleum or mineral developer the right to invoke a full scale take-over of the project by the host State in return for agreed compensation. Such would be the case if, in the view of the former, the cumulative effect of successive State interventions had reached an extent deemed to be unsustainable; or if a particular regulatory exercise was deemed to be insupportable or insufferable by virtue of it being an unjustified intrusion by the State. ‘Suicide’ provisions (a kind of ‘consensual deprivation’) can be said to occupy the opposite end of the spectrum to stabilization clauses. Unique and enigmatic in their own way, they continue to arouse a curiosity amongst scholars which remains to be fully satisfied.

V. THE SOVEREIGN ‘RIGHT TO REGULATE’ AND ITS IMPACT ON THE DOCTRINE OF ACQUIRED RIGHTS

The ongoing friction in the international investment regime between the property rights of the investor and the sovereign rights of host countries stems largely from the fact these apparently conflicting values combine to form part of the same international legal order.¹⁸⁴ The root cause of this, as already seen, may well reside in the private-public dichotomous character of FDI ventures. Contractual practice relating to internationalization and stabilization, and State practice on BITs may be said to be contributory factors to this tension.¹⁸⁵ In this Part the main features

¹⁸⁰ See *supra* note 23. Other scholars have gone one step further by arguing that breach of the stabilization clause attracts not just the doctrine of *pacta sunt servanda* but also confers on the FDI party a “special right” to compensation (*lucrum cessans*); see, for instance, Aréchaga, *supra* note 44, at 307; Geiger, *supra* note 124, at 99-103. The premise for these arguments would appear to be J-F Lalive’s thesis that the stabilization clause confers on the agreement “un protection accrue, protection au second degré”, of which see Lalive, *supra* note 175, at 60.

¹⁸¹ Sereni, *supra* note 153, at 210.

¹⁸² See further Wälde & Ndi, *supra* note 77, at 81-83 for a review of arbitral tribunal rulings on the validity of stabilization clauses under international law.

¹⁸³ See Ndi, *supra* note 63, at 180; IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW (1992), at 150; for an example of a ‘suicide clause’ see Article 32(B) of the Concession Agreement of 17 November 1960 between Volta Aluminium Company and the Government of Ghana, in J. BUS. L. (1962), at 223.

¹⁸⁴ Wälde & Ndi, *supra* note 77, at 79.

¹⁸⁵ For the contribution of BITs to the tension in the international investment regime, see Kaushal, *supra* note 5, at 510-19, 522-33.

at the centre of the tension will be analyzed together with their principal manifestations. The Part concludes by exploring a possible way forward for the international regulation of FDI.

A. The 'Public Power Prerogative': A Critical Reassessment.

The EDA categorization notwithstanding, it could still be argued that natural resources development ventures remain in essence contractual relationships *inter partes*; at the very least such agreements retain a residual contractual disposition.¹⁸⁶ When viewed from this perspective the notion of unilaterally exercising public power prerogatives within the framework of the agreement appears in principle to be incompatible with the consensual element which is an inherent feature of a contractual agreement. Propositions in favor of unilateral State intervention are not only inconsistent with the private contract law concept of *consensus ad idem*; they also go against the grain of mainstream international legal thought, a considerable amount of intellectual capital having already been invested in promoting the concept of acquired rights.¹⁸⁷ Viewed from a different perspective, however, opposition to the idea of the State's unilateral exercise of public powers may be tempered by the established fact that FDI agreements in general (and petroleum and mineral development ventures in particular) exhibit certain traits and particularities which clearly sets them apart from private law contracts.¹⁸⁸ It is on this premise that the EDA categorization was originally conceived and based. And it has indeed been posited that the EDA categorization would automatically render applicable to the FDI investor the protection of the principles of international law "quite independently of the *intention* of the parties as manifested in the choice of law clause."¹⁸⁹ It could thus be argued that the combined effect of the EDA categorization and of such 'automated internationalization' is to depreciate to a considerable degree the consensual element in the agreement.

The rationale for automatic internationalization relies on the fact that the EDA concept is deeply rooted in the international legal system. It has thus been argued that the concept has the effect of removing the relationship from the domain of municipal contract law and placing it under the aegis of international law; or that it would at the very least render international law to be applicable in part to the agreement.¹⁹⁰ But this raises the question as to the necessity of internationalizing the relationship through an EDA construction in order to secure international law protection for the FDI party - given that the customary international law principles of

¹⁸⁶ In the *TOPCO* arbitration, 53 I.L.R. (1979), at 393 for instance the Sole Arbitrator (Dupuy) ruled that the deeds of concession in dispute were of a contractual nature since they expressed an agreement of the wills of the conceding State and the concession holders.

¹⁸⁷ *Supra* note 23.

¹⁸⁸ See *supra* Part III(A).

¹⁸⁹ E. PAASIVIRTA, PARTICIPATION OF STATES IN INTERNATIONAL CONTRACTS: ARBITRATION AND THE SETTLEMENT OF DISPUTES (1990), at 93 (*emphasis added*); see also M. Bourquin, *Arbitration and Economic Development Agreements*, 15 BUS. L. (1959-60), at 868-69.

¹⁹⁰ Pogany, *supra* note 88, at 5-17. Amongst those who have argued against such a conception of the legal implications and effect of the EDA categorization are McNair, *supra* note 46, at 10 where the author posits that public international law *stricto sensu* cannot be the proper law of EDAs in view of the fact that such contracts do not involve inter-State relations.

State responsibility and the diplomatic protection of aliens and their property already serves the latter purpose. The answer to this question could well lie in the subsumption of contractual rights under the broader category of acquired/ property rights by virtue of the EDA categorization. But it could be argued (given the orientation and focus of the EDA concept on national development objectives) that the EDA categorization attracts not just international law protection for the FDI party but also the overriding public interests prerogatives of the State. Viewed from this perspective the public power prerogatives of the host State thus become an inherent feature of the project agreement.¹⁹¹ These powers exist mainly as a result of the public interests priorities which can be said to be present in natural resources development projects.¹⁹² Riad, for instance, has observed these inherent public powers “exist ... not only with regard to concessions in the classical sense, but also in relation [to] all modern types of contracts concerning the development and exploitation of certain natural resources which are by definition within the State’s public [and regulatory] power.”¹⁹³ Hyde further posits the view that unilateral intervention in such agreements by the State is as much a matter of right as of power.¹⁹⁴

Such public powers are widely recognized under various municipal legal systems. In England, Jamaica and Norway, for example, the exercise of such public powers is well established on the basis of domestic constitutional law principles reinforced by judicial precedents.¹⁹⁵ Under the French administrative law system and other French-inspired municipal legal systems of African and Middle Eastern countries public interest considerations may sometimes require the presence in public contracts (such as mineral development agreements) of what is known as “*les clauses exorbitantes de droit commun*.”¹⁹⁶ These provisions, although specifically

¹⁹¹ See, for instance, the dictum of Rowlatt, J. in the English case of *Redericktiebolaget Amphitrite v The King (The Amphitrite)* 2 K.B. 500 (1921), at 503 where the learned judge ruled that it was not competent for the State to fetter its future executive action or regulatory discretion in a contract with a private party.

¹⁹² The unilateral exercise of such powers could range from full scale nationalization to the introduction of new fiscal levies, environmental regulations or the setting of domestic prices. A court ruling in India in May 2010, for instance, upheld the government’s right to unilaterally set domestic prices for gas and other natural resources: see *Indian Court Makes Reliance Gas Feud Ruling*, available at http://news.bbc.co.uk/1/hi/world/south_asia/8667057.stm.

¹⁹³ *Supra* note 93, at 22.

¹⁹⁴ Hyde, *supra* note 88, at 323.

¹⁹⁵ In England, Rowlatt, J. in *The Amphitrite*, *supra* note 191; in Jamaica, *Revere Jamaica Alumina Ltd v AG/ Minister of Mining and Natural Resources of the Government of Jamaica*, cited in Webb-Brown, *supra* note 132, at 216; and in Norway, *The Norwegian Phillips/Ekofisk Royalties Case*, discussed in Dalgaard-Knudsen, *supra* note 171.

¹⁹⁶ For a commentary on relevant African systems, see LOYRETTE, *LE CODE PÉTROLEIR SAHARIEN* (1961). The majority of Middle Eastern and Arab countries prefer an administrative or public law classification for petroleum development projects, of which see SHAVARSH TORIGUIAN, *LEGAL ASPECTS OF OIL CONCESSIONS IN THE MIDDLE EAST* (1972), at 100; Ahmed El-Kosheri, *Le Régime Juridique Créé par les Accords de Participation dans les Domaine Pétrolière*, 149 *RECUEIL DES COURS* (1975), at 342-43; ASHOUSH, *LE RÉGIME JURIDIQUE DES ACCORDS PÉTROLIERS DANS LES PAYS ARABES* (1975); SIKSEK, *THE LEGAL FRAMEWORK OF OIL CONCESSIONS IN THE ARAB WORLD* (1960); BENCHIKH, *LES INSTRUMENTS JURIDIQUE DE LA POLITIQUE ALGERIENNE DES HYDROCARBURES* (1973). It is worth noting in this respect that in Egypt concessions for the exploitation of natural resources are classified under “Concessions of Public Utility Services” under Articles 668-73 of the Civil Code. Likewise under the Algerian Petroleum Law 86-14 of 19 August 1986 petroleum and mining operations are assigned a public utility status: see further *PETROLEUM LEGISLATION, SUPPLEMENT 111* (1993), at 8.

included and not subsequently imposed unilaterally, typically confer on the State wide ranging powers of intervention in the functioning of the project. This fact serves as further confirmation, from the perspective of the municipal legal system, that the public interest prescribes the relevance of the State's public powers to the functioning of a public contract or *contrat administratif*.¹⁹⁷ It is on this premise that Riad further argues that "...the public power is omnipresent and constitutes a predominant factor by the very nature of the 'Development Agreement' from the first day of its conclusion and throughout its entire duration. This reality is clearly reflected in the French terminology of the '*convention d'établissement*'".¹⁹⁸

The *contrat administratif* concept involves not only a departure from the common law approach with its principal focus on *consensus ad idem* and the sanctity of contract doctrine. It also foretells of the ensuing friction and possible conflict once the agreement is projected on to the international legal plane through the application of the doctrines *pacta sunt servanda* and State responsibility. The principal effect of applying municipal public law principles is that the FDI agreement is perceived to acquire a socio-economic relevance to the national development objectives and aspirations of the host nation, hence aligning itself with the underlying philosophy which informs the EDA concept. The project agreement thus becomes a possible instrument for orchestrating strategic economic planning as well as a mechanism for articulating and implementing public policy. The increased emphasis which has been placed on the national development aspects of such agreements in the post-PSNR/NIEO era has only served to further nourish and sustain this 'public law' conception of natural resources development projects. But once this public law approach is brought into play alongside established principles of customary international law as part of the same international legal order, the international investment regime becomes transformed into the principal fault-line of the tension between sovereign rights and international property rights. It also becomes an embodiment of the conflict between the prescriptions of customary international law and the aspirations and expectations of the municipal legal, administrative and political system.

The distinctive characteristic of the current EDA categorization thus lies in the fact that the host State is 'sovereign' and has a duty to promote and to protect the public interests. This public law quality presupposes that in the event of a conflict of interests within the framework of the project agreement (between the community interests and the private interests of the FDI party) the former should in most cases prevail. Such a hypothesis, if indeed it holds true, leaves ample scope for the subsequent and unilateral exercise of regulatory powers by the host State.¹⁹⁹ Doctrinal opinion, however, is not in agreement on this issue. Some commentators see in the EDA categorization a confirmation of the public character of the agreement consistent with the concepts of public powers and exclusive domestic

¹⁹⁷ On the question of whether or not a mining concession under French law belongs to the category of a '*contrat administratif*', leading commentators such as A. de Laubadere have replied by stating that "la réponse ne peut être qu'affirmative": II TRAITÉ ELEMENTINE DE DROIT ADMINISTRATIF (1981), at 1156. See further LAUBADERE, MODERNE & DELVOLVÉ, II DROIT ADMINISTRATIF (1983), at 332.

¹⁹⁸ RIAD, *supra* note 93, at 6.

¹⁹⁹ The FDI party would normally be expected to be compensated for any loss suffered as a consequence of the exercise of such public powers, although the relevant standard of compensation would be a national standard as prescribed by the municipal legal system and not the customary international law standard.

regulatory competence.²⁰⁰ Others, on the contrary, have interpreted the EDA categorization as an indication of the international law protection to which the FDI party is entitled.²⁰¹

At the heart of the problem lies the need to balance the legitimate interests and expectations of the FDI party and the equally legitimate aspirations of the host State. The former will, in most cases, call for the maintenance of the 'contractual equilibrium' for the extended duration of the agreement. The latter, on the other hand, requires the preservation of the regulatory option. Customary international law indeed recognizes the host State's right to regulate; but only if it is in the public interest, non-discriminatory and subject to the payment of prompt, adequate and effective compensation where the intervention qualifies as a direct or indirect taking of alien property interests.²⁰² The real question is whether these conditions are couched in such stringent terms as to amount to a deterrent against the recognized of host States right to regulate. It could well be argued that the Hull compensation formula in particular (with its market value orientations) serves more of a deterrent than a remedial function - especially for poorer nations which can scarcely afford the customary international law 'market price' of the 'right to regulate'.

The different and sometimes conflicting requirements of the FDI party and the host State within the framework of the project agreement highlights once more the private-public dichotomous character of such agreements. This hybrid character clearly has the effect of accentuating the difficulties of delineating a clear boundary between the private law (contractual) and the public law (regulatory) aspects of the relationship. The injection of international law into the mixture, far from providing a solution, only further compounds the difficulties. At the heart of the regime requiring a minimum international law standard of protection for FDI thus lie the tension between international property rights and sovereign rights.

B. International Property Rights versus Sovereign Rights: At the Heart of the Friction in the FDI Regime.

The conflict in the international investment regime between the private property rights of FDI party and the sovereign rights of host States has been most acutely played out in the petroleum and mineral sectors.²⁰³ Sovereignty is one of the principal indicia of statehood.²⁰⁴ From a legal perspective sovereignty denotes the legal personality of the State.²⁰⁵ In practice the exercise of sovereignty by the State

²⁰⁰ RIAD, *supra* note 93, at 6-7.

²⁰¹ PAASIVIRTA, *supra* note 189, at 93; Pogany, *supra* note 88, at 4-5.

²⁰² See generally Edwin Borchard, *The Diplomatic Protection of Citizens Abroad*, 20 AM. J. INT'L L. 738 (1926); Amerasinghe, *supra* note 62.

²⁰³ For a general discussion on the nature of this conflict, see OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* (1992), in particular CHAPTER XIV on *Sovereign Rights and International Business*; PETER CAMERON, *PROPERTY RIGHTS AND SOVEREIGN RIGHTS: THE CASE OF NORTH SEA OIL* (1983).

²⁰⁴ L. Wilderhaber, *Sovereignty and International Law*, in MACDONALD & JOHNSON (EDS), *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* (1983), at 425-31; PAASIVIRTA, *supra* note 189, at 331. For an analysis of the concept of sovereignty and its relationship to international economic law, see SEIDL-HOHENVELDERN, *supra* note 186, at 21-31.

²⁰⁵ This includes its physical territory and its appurtenances (airspace and maritime areas under national jurisdiction), the government and population, and the exercise of jurisdiction within its frontiers. According to

gives rise to general powers of governance within its territory, including the power to legislate and other public power competences. These powers of '*imperium*' confer on the government the capacity to conduct international relations - politically within the international community of nations and also commercially with private foreign concerns. The relationship between the concept of sovereignty and the principle of State responsibility appears at face value to be rather simple and uncomplicated: customary international law prescribes that the exercise of sovereignty must be in conformity with established principles governing, *inter alia*, the rights, duties and international responsibility of States. Thus the exercise of sovereignty in any manner deemed to be inconsistent with prior established legal obligations would normally engage the international responsibility of the State involved for any ensuing damage or loss caused to another State or to aliens and their property. On closer examination, however, this appearance of simplicity proves to be somewhat deceptive.²⁰⁶

As already seen, the difficulty arises firstly from the conception of an international legal order which embraces principles promoting both the international property rights of private investors and the sovereign rights of States.²⁰⁷ The second difficulty arises from the assimilation of private contract law rules and concepts governing private rights to the principles of public international law governing, *inter alia*, State responsibility. The evolutionary development of customary international law has also seen the subsuming of intangible contractual rights into the broader category of tangible property or acquired rights. This process has in turn provided the rationale for the customary international law principles on FDI protection. The final piece in the jigsaw has been the assimilation of host State regulatory interference with the contractual (or property) rights of the FDI party to an international tort or *delict*.²⁰⁸ With the public power prerogative being an exercise of

IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2008), at 105 these attributes constitute "... the physical and social manifestations of the primary type of international legal person, the State."

²⁰⁶ Political, economic and institutional factors are in themselves powerful determinants of the scope and possible extent of the exercise of the powers of *imperium*. In the modern era the invoking of the doctrine of "sovereignty" in the international arena is now generally perceived to be a helpless cry from the weak. Powerful nations tend to invoke the 'national interest'. Weaker "proto" or "quasi" states, on the other hand, still resort to the emotive and rather old fashioned concept of sovereignty (partly for want of military 'muscle' to pursue national objectives). For more on the relationship between sovereignty and domestic political, economic and institutional factors, see ROBERT JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990), at 2.

²⁰⁷ See *supra* Part V(A); see further PAASIVIRTA, *supra* note 189, at 332-33.

²⁰⁸ In the *Rudolf Claim*, 9 REPS. INT'L ARB. AWARDS 244, at 250, for example, the tribunal ruled that the taking or destruction of rights acquired, transmitted or defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking or destruction of tangible property. Similarly, in the *Schufeldt Claim*, 2 REPS. INT'L ARB. AWARDS 1079, at 1097 the tribunal stated that there cannot be any doubt that property rights are created under and by virtue of a contract. See also the *Norwegian Shipowners' Claim (Norway v United States)* 1 REPS. INT'L ARB. AWARDS, at 307; *Starrett Housing v Iran*, 16 IRAN-US C.T.R. 112 (1987-III), at 230-31 where the taking of contractual rights was recognized as compensable under customary international law in the same way as the taking of tangible property; the *Amoco International Finance case*, *supra* note 124, at 220. See further *Certain Norwegian Loans Case*, I.C.J. REP. 9 (1957), at 34; the *Anglo-Iranian Oil Company Case*, I.C.J. PLEADINGS (1952), at 90. Amongst doctrinal writers the view has been posited that regulatory intervention by the State in breach of a stabilization clause constitutes tortious conduct that possesses an international illegal quality: see Mann, *supra* note 4, at 579. The assimilation of contractual rights to property rights to property rights can also be seen in the evolution in investment insurance practice during the 1970s from property insurance to contract insurance.

the very sovereignty which forms part of the same international legal order as the property rights of aliens, the international investment regime has thus become the embodiment of incipient friction and tensions between international property rights and sovereign rights.

At the heart of the conflict between these rights is thus the recognized and established power of the State, on the one hand, to regulate property, investments and other transactions within its national territory and under its direct jurisdictional competence. On the other hand, there is the need to protect foreign investors from the possibility of the arbitrary exercise of the powers of *imperium* in a manner which is likely to have significant adverse consequences for the investor's acquired rights. The ever increasing volume of international arbitral and claims practice on investment disputes between host States and FDI parties bears witness not just to the internationalization of FDI agreements. The international arbitration process also provides ample testimony to this tension by serving a catalogue or repository for this fundamental conflict at the heart of the international investment regime.

A further complication arises from the dual role of the State as a party to the agreement and as regulator. It is in the latter role that the State (as custodian of the national patrimony) enjoys an *imperium* in the form of extensive legislative, executive, administrative and judicial competences. This empowers it to regulate, *qua* sovereign, essentially commercial relationships in a capacity *de jure imperii*. The same applies to a purely *de jure gestionis* relationship between the FDI party and a State petroleum or mining enterprise (or other State agency) in the form of a joint venture, participation agreement or similar arrangements. One consequence of this dual role of the State is that the consensual aspect of the relationship becomes so substantially qualified and the public power prerogatives acquire such a pre-eminence as to suggest a basic inequality in the relationship.²⁰⁹ The question thus arises as to the degree of objectivity and impartiality vis-à-vis the government's role as a regulator.

From the FDI party's perspective there is always the concern that the government, when regulating the relationship ex-contractually, may be tempted to tilt the balance in it's (or its agent's) favor. This necessitates on the part of the FDI party an instinctive recourse to political risk management strategies such as internationalization and stabilization.²¹⁰ The government, however, would in most cases (often subsequent to the conclusion of the contract) be concerned to maintain its sovereign prerogatives and to retain the option to exercise them in pursuit of the national interests. The long term effect of stabilization could well be an accumulation of regulatory pressures which ultimately culminates in more pervasive and wider ranging regulatory measures, including nationalization. This may be the case, for example, where there is a perception on the part of the government that the general effect of stabilization in the past has been to forestall legitimate State intervention. It is against this background of the State's dual role as participant and regulator, and of the friction between international property rights and sovereign rights, that the

²⁰⁹ Turpin, *supra* note 46, at 28.

²¹⁰ See *supra*, Part IV.

probative value of the stabilization clause as a protective mechanism is thus called into question.²¹¹

When unilateral intervention in the functioning of the project agreement by the host State does ensue, it falls primarily to international law to allocate responsibility and in the process to give effect to the contractual or property rights of the FDI party which are judged to have been violated through such intervention.²¹² Once projected on to the international legal plane the conflict between international property rights and sovereign rights is transformed into a new contest as competing (and often conflicting) principles of the international legal order vie for supremacy in the prioritization of norms to govern the dispute: national law *versus* international law; established principles of customary international law *versus* peremptory norms *jus cogens* (PSNR, NIEO and CERDS); and private contract law *versus* public law principles of constitutional and administrative law. It is thus still a matter of conjecture as to whether the principal features of the constitutive legal process of the current international investment regime are capable of reconciling the conflicting requirements and claims of capital-importing countries and those of foreign investors backed by the capital-exporting nations; or if indeed the current regime has the capacity to find adequate, effective and long term solutions to the disputes which ensue from this tension.

How then can the current international investment regime be assessed, from a normative point of view, given this tension between international property rights and sovereign rights? This section thus concludes with an observation on the principal evolutionary features of the current regime. It is indeed axiomatic that over the years the doctrine of acquired rights has been heavily fortified by various doctrinal and contractual ramparts - to wit, the customary international law principles of State responsibility and the diplomatic protection of aliens and their property (with the Hull remedial formula as its flagship); the doctrine of State succession; reliance and expectation contract theories expressed through the doctrines of *pacta sunt servanda* and sanctity of contract (and their expansive interpretation in international arbitral and claims practice);²¹³ and the contractual techniques of internationalization and stabilization.²¹⁴ This protective canopy afforded to the foreign investor has been further shored up by contemporary State practice in the form of the proliferation of BITs in the modern era.²¹⁵ Assembled together, these principles present a formidable armory of legal weaponry which an aggrieved international petroleum or minerals investor can readily press into service in defense of entitlement to the protection of acquired rights derived under the natural resources development agreement. Indeed, it could further be argued that the advent and brief sojourn, followed by a somewhat hasty and unscheduled retreat, of postulated new norms of the international investment regime in the form of PSNR and NIEO confer on the current regime a distinctly traditional hue. This last fact - coupled with the very limited

²¹¹ Waelde & Ndi, *supra* note 106, at 138-41.

²¹² GEORGES DELAUME, *TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES* (1992), at 37-50.

²¹³ See, for example, *Mobil Oil Iran Inc v Iran*, 16 IRAN-US C.T.R 3 (1987-III), at 64-68; and *Phillips Petroleum (Iran) v Iran*, 21 IRAN-US C.T.R 79 (1989-I) at 88-89, both of which upheld not only the enforceability of disputed stabilization commitments but also the principles of sanctity of contract and *pacta sunt servanda*.

²¹⁴ See *supra*, Part IV.

²¹⁵ See Kaushal, *supra* note 5, at 491.

and restrictive interpretation of the doctrine of *clausula rebus sic stantibus* within the context of international investment agreements²¹⁶ - bears ample testimony to the deep entrenchment and resilience of the customary international law foundations of the current international investment regime.

C. A 'Lex Specialis' for the International Investment Regime? Some Preliminary Thoughts.

International investment agreements are in effect *quasi-international* agreements and therefore do not fit wholly into any standard category.²¹⁷ Public international law, on the other hand, constitutes *ius inter gentes* (law between nations). This in part explains the unease and misgivings concerning an FDI regime based primarily on principles of customary international law. Drawing from various sources, one of the principal features of the current FDI regime resides in the fact that it does not constitute a uniform or homogenous *corpus juris*. It may thus be posited that uniformity, consistency, universal recognition and legitimization are the key pre-requisites for the international investment regime of the future. But are these features attainable? And if so how?

One criticism of the current regime stems from what some writers see as the projection of the concept of reparation as the paramount feature of the doctrine of State responsibility.²¹⁸ Revisionist scholars, many of whom perceived a new role for

²¹⁶ It is still a matter of some debate as to whether or not the doctrine of *clausula rebus sic stantibus*, which serves as a countervailing principle to the doctrine of *pacta sunt servanda*, has any application to semi-public contracts such as natural resources development agreements or if its application is restricted to inter-State agreements. For scholarly expositions of these arguments, see Hassan El Hada, *The Competence of a State to Abrogate an EDA: A Plea for Compromise and Conflict Avoidance*, 9 ARAB L.Q. 309-23 (1994); Ahmed El Kosheri, *The Particularity of the Conflict Avoidance Methods Pertaining to Petroleum Agreements*, 11 ICSID REV.: FOREIGN INV. L.J. 272 (1996); J.W. Salacuse, *Renegotiating International Project Agreements*, 24 FORDHAM INT'L L.J. 1319 (2001); Piero Bernardini, *The Renegotiation of International Investment Contracts*, 13 ICSID REV.: FOREIGN INV. L. J. 411 (1998); Lawrence Atsegbua, *Problems and Prospects in Achieving Contractual Stability in International Oil Agreements*, 19 OPEC REV. 255-62 (1995). It may however be stated with some degree of certainty that where the doctrine of *rebus sic stantibus* is incorporated into an investment agreement it assumes the status of a contractual term and is applicable as such; see further F. Przetacznik, *The Clausula Rebus Sic Stantibus*, 56 REV. DROIT INT'L 189 (1976); Piero Bernardini, *Stabilization and Adaptation in Oil and Gas Investments*, 1 J. WORLD ENERGY L. & BUS. 98-112 (2008), at 98; John Gotanda, *Renegotiation and Adaptation Clauses in Investment Contracts, Revisited*, 36 VAND. J. TRANSNAT'L L. 1461 (2003). An example of a provision in an agreement which mirrors the *clausula rebus sic stantibus* principle is Article 26(4), (Equilibrium and Economic Balancing Clause) of the Petroleum Agreement of 22 July 2004 between the Government of Ghana and KOSMOS Energy Ghana HC which makes provision for negotiations and if need be, rectification of the agreement's terms in the event of an unforeseen change of circumstances with a view to restoring the economic position or equilibrium of the parties as at the date of the agreement.

²¹⁷ For similar arguments with reference to transnational commercial arbitration, see Joanna Jemieliak, *Legitimization Arguments in the Lex Mercatoria Cases*, 18 INT'L J. FOR THE SEMIOTICS OF LAW 175 (2005), at 176.

²¹⁸ GARCÍA-AMADOR, *supra* note 16, at 89; B. CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953), at 163; G.I. TUNKIN, THEORY OF INTERNATIONAL LAW (1974), at 389. See also P. ZANNAS, LA RESPONSABILITÉ INTERNATIONALE DES ÉTATS POUR LES ACTES DE NEGLIGENCE (1952), at 22; A. BILGE, LA RESPONSABILITÉ DES ÉTATS ET SON APPLICATION EN MATIÈRE D'ACTES LEGISLATIFS (1950), at 15-36; GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC II, at 64.

international law in the post-colonial context, thus argued that since national economic development objectives have become widely accepted as a key feature of the international investment regime, there ought to be a more progressive conception of the doctrine of State responsibility. In other words, in the event of a conflict between competing principles, rules which facilitate development should be prioritized and accorded preference over those of a more rigid and circumscriptive disposition.²¹⁹ The chief premise for these arguments seems to rest on the perception that the foundations of the traditional conception of the FDI regime has been undermined and eroded by modern trends in the political economy of international economic relations as encapsulated in the EDA, PSNR and NIEO concepts.²²⁰ But these claims are not undisputed. Some scholars, writing much earlier, had already asserted that international responsibility amounts to a basic duty of the State to eliminate the consequences of an unlawful act through the principle of reparation;²²¹ this is regardless of any other claims made on international law, including the aspirations of capital-importing countries to development.

In the light of these opposing views a possible *sui generis corpus juris* in the form of a *lex specialis* for the international investment regime thus becomes an increasingly attractive proposition, if not an imperative.²²² Academic discourse on a possible *lex mercatoria* has generally tended to focus on transnational commercial contracts and applicable arbitration rules. The *lex mercatoria* or “new law merchant” has indeed been a prominent feature in academic discourse on transnational commercial contracts over the past four decades.²²³ But the concept of a ‘third legal order’ applying to State contracts has also been muted in arbitral awards and scholarly discourse with specific reference to the FDI regime.²²⁴ In the *TOPCO*

²¹⁹ Cf. M. Sornarajah, *Compensation for Expropriation: The Emergence of New Standards*, 13 J.W.T.L. (1979), at 109-113; Dolzer, *supra* note 60, at 562.

²²⁰ Guha-Roy, *supra* note 61, at 863; see further R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT’L & COMP. L.Q. 55-75 (1966).

²²¹ C. de Visscher, *La Déni de Justice en Droit International*, 52 RECUEIL DES COURS (1935), at 41; Basdevant, *La Responsabilité Internationale*, 58 RECUEIL DES COURS (1936-IV), at 662. The conceptual basis of the traditional principle of State responsibility can be traced back to the 17th century scholar E. DE VETTEL, CLASSICS OF INTERNATIONAL LAW (translated by C. FENWICK), at 136, where the scholar postulated the following view: “Whoever ill-treats a citizen indirectly injures the State which must protect the citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief aim of civil society, which is protection.”

²²² See generally F.A. Mann, *The Theoretical Approach to the Law Governing Contracts Between States and Private Parties*, 11 REV. BELGE DROIT INT’L 526 (1975); Ignaz Seidl-Hohenveldern, *The Theory of Quasi-International and Partly International Agreements*, 11 REV. BELGE DROIT INT’L 567 (1975).

²²³ For comprehensive treatises on the concept of *lex mercatoria* in relation to international commercial law, see FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA (1992); JAN DALHUISEN, DALHUISEN’S TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW – THE LEX MERCATORIA AND ITS SOURCES, VOL.1 (2010); FILALI OSMAN, LES PRINCIPES GÉNÉRAUX DE LA LEX MERCATORIA (1998); FRANCIS ROSE, LEX MERCATORIA: ESSAYS ON INTERNATIONAL COMMERCIAL LAW IN HONOUR OF FRANCIS REYNOLDS (2000); I. Strenger, *La Notion de Lex Mercatoria en Droit du Commerce International*, 227 RECUEIL DES COURS 209 (1991-II).

²²⁴ See, for instance, G. Delaume, *The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal*, 13 ICSID REV.: FOREIGN INVESTMENT L.J. 79 (1998), in which the authors goes as far as to dismiss the concept as being mythical. See also E. Gaillard, *Thirty Years of the Lex Mercatoria*, 10 ICSID REV.: FOREIGN INVESTMENT L.J. 224 (1995); PETER WOLFGANG, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS (1995), at 151-63; A.F. Maniruzzaman, *Choice of Law in International Contracts, Some Fundamental Conflict of Laws Issues*, 16 J. INT’L ARB. 151 (1999). See also Iran-US Claims Tribunal Reps. (Partial

award, for instance, Arbitrator Dupuy was of the view that "...contracts between States and private persons can, under certain conditions, come within the ambit of a particular and new branch of international law: the international law of contract."²²⁵ This third legal order, formless and inchoate in its present state, is not a legal system in its own right but will require time for normative growth, development and evolution. This is unlike the *lex mercatoria* which many scholars assert already exists.²²⁶

But is a new international legal order for natural resources development agreements (and FDI as a whole) a viable proposition? What obstacles stand in the way of the founding of such an order? Before commenting on the specific nature of the *lex specialis*, it is proposed first to identify the possible problems which may be encountered as part of the institutionalization of such a system. It has to be said that the obstacles which present themselves in the way of the development of a *lex specialis* for the FDI regime are indeed quite considerable, if not formidable. But they are not necessarily insurmountable. The first problem is surely that of gaining universal recognition. On this depends the pivotal question of legitimization. In a survey, for instance, of over 400 governing law provisions included in transnational commercial and investment contracts between the years 1987 and 1989, not a single one selected the *lex mercatoria* as the governing law.²²⁷ This is rather surprising given the ubiquitous presence of the concept in scholarly writings on the law applicable to transnational commercial contracts.²²⁸ Secondly, the proposed *lex specialis* (like its counterpart the *lex mercatoria*) may itself suffer at first from a number of deficiencies. In addition to the initial problem of attracting universal recognition and hence legitimacy, there may well be concerns over its perceived generality, vagueness, imprecision, incompleteness and perhaps its unpredictability²²⁹ – i.e. similar concerns to those expressed in relation to the *lex mercatoria* for transnational commercial contracts.²³⁰ Amongst some of the reasons

Awards in Cases Nos. 74, 76, 81, 150, (311-74/76/81/150-3) of 14 July 1987, in Y.B. INT'L COMM. ARB. (1988), at 292.

²²⁵ *Supra* note 186, at 479. For a discussion of the overall perspectives which both inform and necessitate the requirement for a unified and uniform international legal order, see generally J. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993); Ignaz Seidl-Hohenveldern, *Multinational Enterprises and the International Law of the Future*, 29 Y.B. WORLD AFFAIRS 301 (1975).

²²⁶ Some scholars, however, have denied the existence of the *lex mercatoria* as a recognized normative system of applicable legal principles and rules, of which see F.A. Mann, *England Rejects 'Delocalised' Contracts and Arbitration*, 33 INT'L & COMP. L.Q. 193 (1984); K. Hight, *The Enigma of the Lex Mercatoria*, 63 TULANE L. REV. 616 (1989). See also RICHARD LILLICH & CHARLES BROWER (EDS), *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS JUDICIALIZATION AND UNIFORMITY?* (1994).

²²⁷ Stephen Bond, *Negotiating Dispute Settlement in the International Petroleum Industry: The International Chamber of Commerce*, IN WÄLDE & NDI, *supra* note 76, at 174.

²²⁸ See further P. JESSUP, *TRANSNATIONAL LAW* (1956), at 2; O. Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985); Berman & Kaufmann, *The Law of International Trade: Lex Mercatoria*, 19 HARV. INT'L L.J. 221 (1978); B. Cremades & S. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, BOSTON UNIV. INT'L L.J. 317 (1984); A. Goldstajn, *The New Law Merchant*, J. BUS. L. 12 (1961); Berthold Goldman, *Frontières du Droit et 'Lex Mercatoria'*, 9 ARCHIVES DE PHILOSOPHIE DU DROIT 117 (1964).

²²⁹ See Bowett, *supra* note 155, at 52 where the author argues that the use of the word *lex mercatoria* has varying connotations, but is sometimes used to embrace general principles (although supplemented by trade usages and customs) and that its defects are principally that in practice, it offers few predictable rules and instead confers a wide discretion on arbitrators.

²³⁰ See generally Ana Mercedes López Rodríguez, *Lex Mercatoria*, RETTID (2002), at 44, available at <http://www.rettid.dk/artikler/20020044.pdf>

advanced for the non-application of the *lex mercatoria* in arbitral awards are the uncertainty, ill-definition and elusiveness of its rules coupled with its indeterminate nature.²³¹ But these concerns ought not to dissuade or otherwise foreclose efforts aimed at developing, over the long term, an autonomous new legal order for the FDI regime. This is in view of the apparent inability of the present regime, seemingly rendered rigid and hide-bound by existing principles, to reconcile the rival claims of the concepts of international property rights and sovereign rights.

It is beyond the remit of this article to embark on a detail articulation of the substantive nature and content of the proposed *lex specialis* for the FDI regime. Rather what is proposed at this stage is a preliminary sketch of its basic nature, principal normative features and key functions. The conceptual basis of a future *lex specialis* for the FDI regime could be founded on the premise of an autonomous (stateless), unified and universally accepted system of law.²³² What is thus envisaged is a specific legal and institutional framework serving as a comprehensive basis for the proper categorization of natural resources development agreements (and FDI as a whole) whilst also providing the basis for the applicable law. One of its key attributes would be the concept of 'good faith'. This will serve as the guiding principle for the interpretation by international arbitral and claims tribunals of the rights and obligations of the parties. Some comfort could well be drawn in this regard from the two arbitral awards in *Petroleum Development Ltd v Sheikh of Abu Dhabi*²³³ and *Sapphire International Petroleum v National Iranian Oil Company*.²³⁴ The dicta in both awards, which were based on the "modern law of nature" and the common practice of civilized nations, relied to a great extent on the 'spirit of good will', 'integrity' and 'reason' in reaching judgment.²³⁵

The normative development and evolution of the *lex specialis* would involve two key stages: firstly, defining its substantive content and sources; and secondly, identifying relevant rules of interpretation or judicial construction. On the first point, the *lex specialis* is not expected to be a completely new system of law. Rather, the process of defining its normative content will rely to a great extent on collating and streamlining relevant concepts and principles of the current international investment regime. From a categorization perspective the proposed new ECA and EPC concepts would provide the conceptual basis for the new regime as alternatives to the EDA.²³⁶ Within this framework equal voice will be accorded to FDI protection and to the realization of any identified or identifiable national economic development objectives of the project.²³⁷ The former objective will be ensured by reining in excessive, unreasonable or untenable host State claims to exclusive regulatory

²³¹ Jemielniak, *supra* note 217, at 200.

²³² For similar arguments regarding the *lex mercatoria*, see Tamara Milenković-Kerković, *Origin, Development and Main Features of the New Lex Mercatoria*, available at <http://www.facta.junis.ni.ac.rs/eao/eao97/eao97-10.pdf>.

²³³ I.L.R. 18 (1951).

²³⁴ I.L.R. 35 (1967).

²³⁵ Jemieniak, *supra* note 217, at 203.

²³⁶ See *supra*, Part IV(A).

²³⁷ Scholars have in the past posited the notion of an international law of development as part of the international investment regime: see Brownlie, *supra* note 66; N. Brower & J. Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW 295 (1975); K. SAUVANT, CHANGING PRIORITIES ON THE INTERNATIONAL AGENDA: THE NEW INTERNATIONAL ECONOMIC ORDER (1981); GARCÍA-AMADOR, *supra* note 16, at 617-714; see also Akinsaya & Davies, *supra* note 84.

competences or PSNR,²³⁸ the latter through the recognition that public power prerogatives are an inherent and undeniable feature of the FDI regime. Such prerogatives are in fact endemic to the very nature of petroleum or mineral development projects.

The *lex specialis* would thus represent a genuine attempt at reconciling the doctrine of State responsibility with the principle of State sovereignty.²³⁹ It will strive to accord the same emphasis to the specific needs and requirements of both parties and to provide anticipatory mechanisms for mediation and dispute resolution in the event of a conflict. This in turn will involve an alignment of the interests of the FDI party with the long term interests of the host State vis-à-vis its national development objectives. The specific (pecuniary) interests of the FDI party are often easily ascertained; those of the host State less easily so. The rather vague and ambiguous concept of 'national economic development objectives' will thus need articulating with a greater degree of clarity as part of the *lex specialis* process.

The process of defining the substantive content of the *lex specialis* will involve two further stages: firstly, identifying the various normative sources; and secondly, collating the main body of rules and principles which will form the basis of the applicable law. The latter could well involve a codification process based on a list of principles similar to the twenty principles proposed by Lord Mustill or the seventy-eight principles proposed by Professor Berger as the basis of the *lex mercatoria*.²⁴⁰ As part of these principles, for instance, it may well be that the proposed ECA/EPC concepts assume a truly developmental function. Provision could be made, for instance, for the establishment of a 'development fund' within the project agreement. The proposed ECA model, with its proclivity towards public law, would seem to be the more amenable of the two proposed concepts for accommodating such a fund. The development fund, comprising for instance proceeds from occasional taxes on windfall profits or financial penalties levied on the FDI party for breach of licensing conditions, could be ring-fenced for the realization of specific infrastructural or social projects identified and approved by both parties.

A key obstacle to the process of collating the normative sources and substantive content of the *lex specialis* clearly lies in the question of legitimization. Political progress through cooperation between capital-importing and exporting countries (coupled with recognition, consent or acquiescence by the FDI community)

²³⁸ As observed by Machmud, *supra* note 76, at 119 the desire by governments to maintain control over vital sectors of the economy may sometimes manifest itself in a tendency to over-regulate. Such excessive regulation may take the form of price setting, the enforced use by the FDI party of local products and services, etc. See further Waelde & Ndi, *supra* note 106, at 257; Paul Peters, Nico Schrijver & Paul de Waart, *Responsibility of States in Respect of the Exercise of Permanent Sovereignty over Natural Resources*, 36 NETHER. INT'L L.J. 285 (1989).

²³⁹ Dolzer, *supra* note 60, at 554, where the author calls for a new synthesis of State practice and legal convictions based on the elaboration of a new set of rules consistent with doctrines relating to the sources of international law.

²⁴⁰ For Lord Mustill's list, see Mustill, *The New Lex Mercatoria: The First Twenty Five Years*, 4 ARB. INT'L 86 (1988), at 110-14; for a list of Professor Berger's principles see BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* (1999), at 210-11. It is interesting to note that items 72-78 of the "Berger principles" deal with the question of nationalization and compensation in relation to the FDI regime, with appropriate compensation or fair market value (Rule 73) as the preferred standard, not the customary international law standard of prompt, adequate and effect or full compensation (Hull formula).

can be the only panacea to this problem. Within the institutional framework of international arbitral and claims practice the key contribution to the process will come in the form of judicial construction. The latter will involve an approach to interpretation within the framework of the proposed ECA/EPC concepts which accords an equal weighting to the need for FDI protection and the competing interests of host States. This will involve judicial recognition of the risk-reward equation as the guiding principle of FDI - i.e. that capital amortization and a reasonable rate of return on investments are legitimate expectations of the FDI party. It will equally involve an acknowledgement of the fact that the right of the host State to regulate is endemic to many FDI projects, as are domestic expectations regarding the project's contribution to national economic development.

The most important aspect of judicial interpretation relates perhaps to stabilization provisions. It is posited that the new regime will involve a very narrow construction (restrictive interpretation) of stabilization provisions. In ascertaining their validity or effectiveness vis-à-vis FDI protection, the first point of reference ought to be relevant municipal law rules of constitutional and administrative law. Where such commitments on the part of the State are deemed to be unconstitutional or otherwise *ultra vires* under domestic rules they ought to be deemed equally invalid or ineffective within the context of the international investment regime. Secondly, assuming that the stabilization clause in question is valid under national law, it still ought to be very narrowly construed in accordance with the principle of 'good faith' and with due regard to the equally important principle of the host State's sovereign right to regulate. The concepts of reasonableness and proportionality ought therefore to be the guiding principles of judicial construction. Stabilization clauses with unreasonably wide scope which seek to stifle regulatory initiative (e.g. the traditional "freezing" clause) could thus be deemed to be disproportionate in view of their erosive impact on the 'right to regulate' and their cumulative effect on the long term functioning of the project agreement.²⁴¹ Such clauses could thus be rendered null and void whereas compromise clauses such as the 'compensation clause' could be deemed reasonable and valid.²⁴²

Informing the new regime would be the critical linkage between FDI and its contribution to the economic and social development of the host State – i.e. the intertwining of the interests of the FDI party and those of the host State.²⁴³ One of the principal requirements of the OPIC insurance scheme, for example, is the expectation that the underwritten venture will contribute to national economic development.²⁴⁴ Similar to the once proposed international law of development, the

²⁴¹ International arbitral and claims tribunals, in approaching the question of construction, could well adopt a similar approach to the English contract law *contra proferentem* rule of construction, a judicial technique used for the interpretation of exemption clauses. This technique involves applying a narrow rule of construction to exemption clauses with any ambiguities in the language or content of such clauses to be construed against the party who seeks to rely on its protection. For an analysis of this rule see CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT, 15TH EDITION (2006) at 212-14.

²⁴² See *infra*, Part VI.

²⁴³ Judicial construction of might thus extend to the judicial adaptation of agreements in view of changed circumstances if both parties cannot on a renegotiation. Cf. M. BARTELS, STUDIES IN TRANSNATIONAL LAW OF NATURAL RESOURCES: CONTRACTUAL ADAPTATION AND CONFLICT RESOLUTION (1981).

²⁴⁴ See H.S. Zakariya, *Political Risk Insurance in Petroleum Development*, in BEREDJICK & WÄLDE, *supra* note 27, at 205.

disposition of the new regime would not be strictly juridical but one approaching to the notion of equity.²⁴⁵ Its emphasis will thus be on global economic interdependence and the principles of transnational social justice.²⁴⁶ It will, of necessity, concern itself not just with legal protection for FDI but also with principles promoting effective national competence over the structures, policies and methods of developing domestic natural endowments.²⁴⁷ Such policies may include, for example, regulatory intervention by the State to promote environmentally sustainable practices such as conservation measures and the renewal of depleted resources.

It is thus to be submitted that the mutuality of interests which lies at the heart of the *lex specialis* is of itself a more reliable and effective guarantor of the legal security of FDI. For on the latter depends the realization of much desired national economic development aspirations. It can reasonably be said that a host nation would hesitate to expropriate a project which is clearly conceived and designed in such a way as to make a significant contribution to its national development objectives.²⁴⁸ This proposition applies *à fortiori* if the venture is perceived to be already making an effective contribution to national development goals within the framework of an international investment regime which provides an enabling environment for the mutual realization of the interests and objectives of both parties. This in turn should ensure that the interests of any one party are not unnecessarily prejudiced, hence lessening the scope for friction and conflict.

VI. CONCLUSION

The stability, variation and breach of natural resources development agreements involving the infusion of FDI (and attendant problems) has been the principal theme informing this study. The enduring nature of these problems within the FDI regime does not necessarily imply the futility or impotency of international law as a regulatory tool.²⁴⁹ But what is clearly evident is the need for a *corpus juris* with the required degree of consistency, as well as the basic ability, to reconcile the divergent interests which all form part of the legal framework for the international development of domestic natural resources. It has to be a regime founded on a universal perception of real authority combined with an expectation of certainty and a reasonable degree of permanence. Its role as a dispute settlement mechanism may well extend beyond a purely adjudicative process to include aspects of mediation. One of its key functions would thus be to serve as a conciliatory intercessor in the conflict between international property rights and sovereign rights.

²⁴⁵ ELIAS, *supra* note 16, at 208-11; see also A.F. Maniruzzaman, *International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View*, 20 WIS. INT'L L.J. 1 (2001-02).

²⁴⁶ See ROLF KNIEPER, *THE CONCEPT OF NATIONAL SOVEREIGNTY AND DEVELOPMENT* (1992).

²⁴⁷ Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147 (1962), at 1164-65.

²⁴⁸ Except perhaps for overriding policy exigencies or for purely ideological or political motives.

²⁴⁹ See, however, M. KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF LEGAL ARGUMENT* (1989), in which the author goes as far as to eliminate international law as a separate conceptual category on the basis that international law is indistinguishable from politics; see further Ian Scobbie, *Towards the Elimination of International Law: Some Radical Scepticism About Sceptical Radicalism*, 61 BRIT.Y.B. INT'L L. 345 (1990).

It is to be submitted, however, that a key obstacle lies in the absence of a unified system of binding precedent applying to the international investment regime. The result can be seen in the inconsistent and conflicting arbitration outcomes noted earlier.²⁵⁰ Attaining the key attributes of authority and permanence relies partly on a system based on judicial consistency and uniformity of judgments. But it is difficult to see how these attributes can be attained without a unified system of binding arbitration in which judgments rendered by international arbitral and claims tribunals acquire precedential value and status.

Contractual practice will clearly need to evolve in line with any new regime. If indeed the development aspect is an endemic feature of resources agreements, then such objectives ought to be given more prominence in probative contract terms as opposed to being relegated to the memoranda of understanding, recitals, preambles, 'heads of agreement', press releases or other such sub-contractual instruments. The often grandiose nature of the pronouncements in such instruments (sometimes approaching to pomposity) contain in the main ritualistic incantations which are remarkable only for their vagueness and opacity. It could be argued that the breadth and latitude of the language used in these instruments has the general effect of downgrading the 'development objectives' stated therein to a sub-legal category of contractual intentions. The desired objectives, in effect, acquire the character of a political wish list devoid of any real strategy for implementation. The trained eye of the lawyer is clearly able to see beneath the fig leaf of such 'commitments' the near absence of substantive content in the form of legally enforceable obligations vis-à-vis the achievement of the stated objectives.

One of the main findings of this article has been the problems associated with stabilization.²⁵¹ Its most extreme rendering, the "freezing" provision, can be a rather crude and abrasive tool (vis-à-vis its circumscriptive effect on the scope and exercise of the doctrine of State sovereignty) for containing the problem of political risks. One of its undesired effects could be to exacerbate rather than to lessen the friction between international property rights and sovereign rights. The inflexibility of 'freezing clauses' could thus, over the long term, become a catalyst for friction and conflict within the relationship.²⁵² It is thus to be submitted (given the protective function of the principle of State responsibility) that the stabilization clause amounts to an extraneous contraption on the already heavily studded armor of customary international law. From the perspective of FDI protection they are an unnecessary - and arguably, avoidable - embellishment of an already protective international investment regime.²⁵³ Much has already been written on the question of the incongruous nature of the relationship between stabilization provisions and the

²⁵⁰ *Supra* note 31.

²⁵¹ For more recent articles on the subject, see M. Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENVER J. INT'L L. & POL'Y 217 (2001-02); T.J. Pete, *Evaluating Stabilization Clauses in Venezuela's Strategic Association Agreements for Heavy Crude Oil*, 40 UNIV. MIAMI INTER-AMER. L. REV. 347 (2008-09).

²⁵² Ndi, *supra* note 63, at 187.

²⁵³ Except perhaps for those who subscribe to the "special right" to compensation arguments posited by some scholars, of which see *supra* note 180.

concept of State sovereignty.²⁵⁴ It is further posited that the widespread recognition and enforcement of such provisions could lend the impression of an over-indulgence of the FDI party under the current international investment regime. It is also the case that under some municipal legal systems such clauses violate domestic constitutional law prescriptions as well as the *clauses exorbitantes* concept of administrative law.²⁵⁵

Within the framework of the current FDI regime it could be argued that such provisions violate the spirit of the EDA concept.²⁵⁶ And from a political and public relations perspective, their effect on the domestic political scene could well be counter-productive in spawning accusations of “sovereign capitulation” or the granting of excessive, exclusive and discriminatory favors to foreign economic interests.²⁵⁷ Over time these accusations could arouse patriotic sentiments in the government of the day, the undesired consequence of which could be the very intervention which the clause sought to avoid.

In as much as the concept of domestic control or national sovereignty is an inherent feature in the management and development of domestic natural endowments, regulatory intervention by the State will ineluctably remain an implicit factor in the equation. This remains the case regardless of any guarantees of non-intervention contained in the project agreement or in BITs.²⁵⁸ Diligence and prudence thus counsel a more dynamic approach to political risk management. If indeed stabilization is considered an imperative feature of the risk management strategy, then such provisions ought to be conceived and drafted in such a manner as not to

²⁵⁴ See generally FATOUROS, *supra* note 174; Verdross, *supra* note 136, at 117; Nicolas David, *Les Clauses de Stabilité dans les Contrats Pétroliers: Question d'un Praticien*, 113 J. DROIT INT'L 79 (1986); S.K. Chatterjee, *The Stabilization Clause Myth in Investment Agreements*, 5 J. INT'L ARB. 97 (1988).

²⁵⁵ For arguments in favor of counter-balancing the *clauses exorbitantes* powers of the State with other legal safeguards, see M. Khatchadourian, *Legal Safeguards in Egypt's Petroleum Concession Agreements*, 22 ARAB L.Q. 387-96 (2008).

²⁵⁶ See further T. Meron, *Repudiation of Ultra Vires Contracts and the International Responsibility of States*, 6 INT'L & COMP. L.Q. 273 (1957).

²⁵⁷ Wälde & Ndi, *supra* note 77, at 64. In Latin America these sentiments have led to the emergence in both academic and popular literature of concepts such as “*dependencia*” (economic dependency) and “*entregismo*” (capitulationism). For a vivid exposition of both concepts combined with a forceful historical indictment of the perceived role of FDI in the “underdevelopment” of Latin America, see EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT* (1973). Amongst the best known exponents of the *dependencia* theory (which analyzes the perceived role of the current international investment regime in ‘consolidating of the dynamics of economic dependence by developing countries’) are the following: R. VERNON, *SOVEREIGNTY AT BAY* (1971); S. Hymer, *The Multinational Corporation and the Law of Uneven Development*, in H. RADICE (ED), *INTERNATIONAL FIRMS AND MODERN IMPERIALISM* (1975); N. Girvan, *Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint*, in 3 VALUATION OF NATIONALIZED PROPERTY 49 (1975).

²⁵⁸ A number of dicta from international claims awards seem to suggest otherwise. In the *Mobil Oil Iran Inc* case, *supra* note 213, at 64-65, for instance the tribunal ruled that, “Contemporary international precedents have concluded that such contractual provisions preclude a sovereign during the stated period from exercising the rights it otherwise possesses under international law to take an alien’s property for a public purpose, and without discrimination and for a just compensation”; see also *Phillips Petroleum Co. v Iran*, *supra* note 213, at 88. For dicta in support of the State’s right to regulatory intervention irrespective of stabilization guarantees, see *British Petroleum v Libya*, 53 I.L.R. at 297; and *LIAMCO v Libya*, 62 I.L.R., at 70 (all cited in Higgins, *supra* note 154, at 241-42); see further *Kuwait v American Independent Oil Company (AMINOIL)*, 66 I.L.R. 519 (1982) - in particular *para.* 95.

stifle the natural evolution of municipal law within the framework of the project agreement.²⁵⁹ Nor should they (or the agreement) be unduly permissive of government actions which pose a significant threat to the long term stability of the relationship. Stabilization provisions, if at all necessary, should thus be very limited in their scope, objectives and duration.²⁶⁰ Their primary objective should be to promote a practical and working FDI relationship. In this regard “cooperation clauses”,²⁶¹ adjustment or renegotiation clauses and the “compensation” version of the stabilization clause are all well placed to serve as alternatives to the traditional ‘freezing’ version of the clause.²⁶² More use could also be made of alternative political risks management strategies.²⁶³

After taking account of the wide range of scholarly opinions and the various historical and normative developments which have been highlighted in this study, it thus remains the case that the current international investment regime, when in full sail, flies primarily the colors of the traditional school with the ‘Hull formula’ as its chief ensign. This to the near exclusion of peremptory norms *jus cogens*.²⁶⁴ The pre-eminence of established principles of customary international law and its auxiliaries in the international investment regime can clearly be seen through their pervasive influence on the outcomes of both past and recent international arbitration and claims practice.²⁶⁵ Traditional principles of customary international law have clearly have acquired a much louder voice in the international investment regime. However, the unease and discontent with the regime remains in many quarters as evidenced by the recent events in Latin America.²⁶⁶ Viewed from this perspective the recent paradigm shift in capital-importing countries towards investment promotion and protection in the sector could well be argued to be perfunctory, perhaps even a mere

²⁵⁹ MANN, *supra* note 146, at 322 has argued that in international law “express exemption from the effects of future legislation is redundant”; see also Higgins, *supra* note 154, at 243.

²⁶⁰ See H. Le Leuch, *Recent Evolution of Petroleum Exploration and Exploitation Agreements in Developing Countries: New Approaches to Introduce More Flexibility and Progressivity in the Contractual Terms*, 10 NAT. RES. F. 205 (1986).

²⁶¹ For a provision designed to serve as a compromise between the conflicting needs of the host State for flexibility and that of the investor for stability, see the “Cooperation Clause” in the 1969 Falconbridge Agreement between the Republic of Dominica and Falconbridge Dominica, discussed in R. Dunbar, *International Renegotiations: The Case of Dominica Republic and Falconbridge*, 15 NAT. RES. F. 258 (1991).

²⁶² The key attraction in these versions of the clause resides in the fact that they do not seek to stifle the regulatory initiative of the host State. As stated by the tribunal in the AMINOIL arbitration, *supra* note 258, at para. 95, “a limitation on the sovereign rights of the State is all the less to be presumed where the concessionaire is in any event in possession of important guarantees regarding its essential interests in the shape of a legal right to eventual compensation.”

²⁶³ See further John Kinna, *Investing in Developing Countries: Minimisation of Political Risk*, 1 J. ENERGY & NAT. RES. L. 89 (1983); H.S. Zakariya, *Political Risks in Transnational Petroleum Investment: The Mitigating Role of National and International Insurance Programs*, 11 NAT. RES. F. 165 (1987); Theodore Moran, *Legal and Financial Approaches to the Management of International Political Risk: An Overview*, in FARIBORZ GHADAR ET AL, (EDS), *MANAGING INTERNATIONAL POLITICAL RISK: STRATEGIES AND TECHNIQUES* 53 (1983).

²⁶⁴ See further Rodriguez-Padilla, *supra* note 37.

²⁶⁵ See *American International Group v Islamic Republic of Iran*, 4 IRAN-US C.T.R. 96 (1983-III), at 109; *INA v Iran*, 8 IRAN-US C.T.R. 373 (1985-I), at 388; *Sola Tiles Inc. v Iran*, 14 IRAN-US C.T.R. 223 (1987-I), at 234; see also Mendelson, *Compensation for Expropriation: The Case Law*, 79 AM. J. INT’L L 414 (1985).

²⁶⁶ It is interesting to note that in one case the United States government made a submission to the effect that where there is an ambiguity in choice of jurisdiction provisions at the centre of international investment disputes such ambiguity ought to be resolved in favour of maintaining host State sovereignty: see *Methanex v United States*, 7 ICSID REP. 239 (2005).

sophistry. Slowly but inexorably the cycle continues to revolve. The pendulum will inevitably reach the other end of the spectrum. For until such a time that there is a genuine international consensus based on universally accepted rules, the international investment regime will continue to suffer from what could be said to be a legitimization deficit.

The ultimate conclusion to be drawn from this study is that the problems highlighted may not be as intractable or as elusive as they appear at first sight to be. These divergent and discordant strands all point towards the requirement for a reformed international investment regime. This could perhaps take the form of a new *lex specialis* to govern the FDI process - a regime with a distinctive *sui generis* character better suited to cater for the specific temperament, peculiarities and even the idiosyncrasies of FDI agreements. It is posited that the new regime will need to embrace within its framework key aspects of the international law of development.²⁶⁷ It will need to balance the requirement for FDI protection with an approach which is sensitive to events or “changes taking place in the real world outside of the disputed documents”.²⁶⁸ It would be expected that a rethinking of the customary international law compensation requirement vis-à-vis its remedial function will form part and parcel of this renewal process. The ‘Hull formula’, which serves as the bedrock of the customary international law compensation requirement, and the specific problems which arise from its application within the framework of contemporary international economic law, will constitute the subject matter of a further separate study.

²⁶⁷ Cf. Wolfgang Friedmann, *The Relevance of International Law to the Processes of Economic and Social Development*, 60 A.S.I.L PROCES. 8 (1966).

²⁶⁸ See further Higgins, *supra* note 154, at 233-35; see also C.F. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1967), at 12. Regarding the need for investment protection Chandler, *supra* note 68, at 526 has correctly argued that the investment of surplus capital abroad and the operation of the principle of State responsibility go hand in hand, and that the indispensable business of international trade and foreign investment will cease whenever the protection of the correlative law of nations against the confiscation of foreign-owned property is repudiated.