THE LEGAL STATUS OF PETROLEUM DEVELOPMENT AGREEMENTS IN INTERNATIONAL LAW AND THE PROBLEM OF CHARACTERIZATION: A PROPOSED WAY FORWARD

By

Dr Mansour Al-Saeed*

&

Dr George K Ndi (*)

* PhD; LLM; LLB, Undersecretary, Ministry of Commerce and Industry, State of Kuwait (First Author)

* Licence/ Maitrise en Droit; LLM; PhD; FHEA, Course Director for the LLM in Legal Practice Course, The Law School, University of Huddersfield, England, UK (Second Author)

Abstract:

State contracts involving foreign direct investment for the development of upstream petroleum resources have posed for a long time particular legal challenge with reference to their legal and regulatory framework, especially in the event of a dispute. Governed primarily by the principles of public international law, various other sources including national administrative or public law, contract lawand peremptory norms jus cogens of public international law all converge within the framework of petroleum development agreements to vie for supremacy in the prioritization of applicable norms as the substantive governing law. It is against this background that the procedural question of characterization plays a key role in determining questions of jurisdiction and choice of applicable law. This article sets out to analyze the characterization of upstream petroleum development agreements whilst critically inquiring into the relationship between private and public law in the characterization process. The article's main premise is founded on the continuing need for reform of the current (but in our view out-dated) legal framework for dispute settlement in the upstream petroleum sector. The article's main objective is develop a new conceptual framework for the characterization of upstream petroleum development agreements, together with a proposed new legal regime which isexpected to be more suitable and appropriate to the upstream petroleum development agreements of the 21st century.

1- Introduction

State contracts, particularly those involving the infusion of foreign direct investment (FDI) for long term projects such as the upstream development of petroleum resources, have for long posed a particular legal challenge with regard to their regulation by the international investment regime. Ostensibly governed by the substantive principles of public(or customary) international law(1), various other sources converge within the framework of the international investment regime to compete for supremacy in the prioritization of applicable norms. These other sources, amongst them national administrative law, private contract law, public law principles, peremptory norms (jus cogens)of public international law, all vie to govern both the procedural and substantive aspects of international arbitration and claims practice relating to FDI, most notably in the upstream petroleum sector(2).The multiplicity of legal sources all laying a claim to either shared or exclusive competence to the regulation of international investment projects for the upstream development of petroleum resources in part derives from the private-public nature (or semi-public character) of such agreements. This private-public dichotomous character of international petroleum development agreements in turn derives from the legal status of the parties – to wit a public party (State government or State oil company) on the one hand, and a private company (multinational oil corporation) on the other.

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

Theregulatory challenges faced by the international investment regime in the 21st century arethus of particular relevance to the upstream petroleum sector which has traditionally provided the setting for the conflict between the sovereign rights of host States (petroleum producing nations) and the private property rights of foreign investors (multinational oil companies)[1].At the heart of this fundamental conflict in the international investment regime is the question of ownership rights over petroleum resources, the prescriptions of national law notwithstanding. From an international legal perspective, who, in effect, has the legal title to petroleum deposits in situ? In whom are or should the ownership rights be vested? Is it in the host State or government on whose territory these deposits are located - as is usually prescribed by a combination of national law instruments such as the national constitution, national petroleum laws and domestic investment legislation? Or is ownership of discovered petroleum deposits - as claimed by Western scholars and traditional legal theory - vested in international petroleum companies on the basis of the legal concept of acquired or vested rights founded on customary international law doctrines and principles?[2].

Under traditional legal theory the notion of acquired or vested property rights is itself founded on the premise of contractual and private property rights complemented by the legal doctrines of sanctity of contract and pactasuntservanda (i.e. agreements, contracts or pacts must be honoured)(3).The resolution of these

1- M. SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT (3rd EDN, 2010).

2- 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).

3- R. Mikesell, 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).

key questions, from an international legal perspective, in turn depends on the key question concerning the legal characterization of international investment agreements. Are the latter private agreements to be governed by private contract law principles or public instruments governable by public law? Are they national or international agreements to be governedby national law or international law respectively? Or, given the semi-public (dichotomous) character of such agreements, is it the case that they tend to straddle the boundary between private and public agreements, and thus between private law and public law, and national law and international law?These questions constitute some of the preliminary issues which this paper will seek to address as part of its critical inquiry into the main questions relating to the characterization of upstream international petroleum agreements and their governing law.

Before we can fully understand the nature of the friction over the ownership rights to petroleum deposits in situ within the context of the legal question of characterization, we have first of all to take cognizance ofboth the historical and the legal background to the disputed rights. Generally speaking, the historical aspect of questions concerning property rights and characterization revolves mainly around the development and evolution of upstream petroleum development agreements. From the historical point of view these agreements span a whole spectrum of legal forms and types - from old the fashioned concession agreements to modern day service contracts and production sharing agreements[1]. Inherent in this multitudinous variety are agreements of varying

1- Henry Cattan, 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 RelationshipsBetween Host Governments and International Petroleum 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).

legal forms and character - from the purely contractual (such as production sharing contracts) to those agreements which boast a purely public character based on administrative licensing and permits.

The legal background to characterization and the issue of ownership rights raises more serious questions concerning the constitutive international legal process governing petroleum development agreements in particular and the international investment regime as a whole(1). Amongst these questions is that of whether or not the principal evolutionary features of the current international investment regime have kept pace with the historical development and evolution of petroleum development agreements. The same question could be asked of the judicial process pertaining to the legal characterisation or classification of such agreements in international arbitration and claims practice. The second question concerns the choice of applicable law to govern international petroleum development agreements(2).Of pivotal importance to, and informing this question, is the judicial process of characterization.

The latter will often have a decisive impact on the outcomes of any judicial endeavour aimed at determining the applicable law to govern the substantive aspects of an international arbitration or claims process. This is particularly the case if the process involves disputed rights and obligations under a petroleum development agreement between an oil-producing State or State Oil Company and an international oil company to whom exploration

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

2-- 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); 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).

and exploitation rights have been assigned under a license, permit or agreement.In an international arbitration dispute between the Kuwait Oil Company (KOC) and an upstream international operator in Kuwait's upstream petroleum sector, for instance, the procedural process involving the legal characterization of the exploration or production agreement will enable an international arbitral tribunal to determine if Kuwaiti national law should be applied as the applicable law to govern the substantive aspects of the disputes; or whether the most appropriate (or "proper") law to apply should be some other system of law other than the national law of Kuwait.

The international arbitration and claims process thus plays an important part not only in terms of the dispute resolution process but also vis-à-vis the characterization exercise. But does the arbitration process, from both a historical and a legal perspective, inspire the required degree of confidence and authority which is an important aspect of any dispute resolution process? Many aspects of the current international investment regime, including the arbitration process itself, have been and are still generally perceived by many natural resources producing countries in developing or emerging regions of the worldas suffering from a number of procedural and substantive flaws. Studies have shown, for example, that the vast majority (over 95%) of investment disputes instigated before international arbitrationand claims tribunals - such as the World Bank's International Center for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC) and the Iran-US Claims tribunals - are initiated by companies and against governments[1]. This implies that host States (and petroleum producing nations in

1- 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.

particular) have traditionally been cast in the role of defendants in the vast majority of FDI disputes.It is also the case that over 98% of investment disputes adjudicated under the procedures, processes and principles of the current international investment regime are decided in favour of companies and against State defendants (governments or State-owned corporations)1.The net effect of this has been to sap the confidence of developing and emerging nations in the international investment regime and some of its key aspects such as its approach to the question of characterization and choice of law selection.

From both a historical and legal point of view, a further concern resides in the perception of the consistency with which international arbitration and claims tribunals have in their renderings accorded recognition to the arbitrability of FDI disputes between companies and governments. In other words, such disputes have consistently been subject to arbitration in an international forum notwithstanding objections by State parties(as defendant to the cause of action) based on protestations founded on sovereign or jurisdictional immunity to due process outside the national jurisdiction. Of equal concern, in this context, is the historic practice which involves the application of principles of public international law to the resolution of disputes involving private companies. This, in turn, implies the acquisition in international law by such companies of both internationally justiciable rights and locus standi (i.e. the legal ability) to bring cases internationally against governments or States - the question being whether such 'incidents' of international law (i.e. international dispute settlement) should not be reserved exclusively for inter-state or governmental relations.

The key to the resolution of these legal questions and prob-

1- 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.

lems of international investment lawin the modern era clearly lies with the significant question of characterization (also known as “classification” or “categorization”). Can petroleum development agreements be considered to be “contracts” in the classical sense of the word - and thus subject to be governed by the principles of private contract law in conjunction with relevant principles of public or customary international law in the event of a dispute involving the abrogation of its terms and conditions? Or do these agreements have a unique character which renders them of a sui generis category - thus transcending the boundaries between private law and municipal public law of the host State whilst also straddling the boundaries between national law and international law?It is against this background of the private-public law dichotomous character of upstream petroleum development agreements that the process of “characterization” plays a criticaland often defining role in determining questions of jurisdiction and choice of applicable law in any international arbitration or claims dispute1.

The articleproposesto critically analyze the process of characterization in relation to FDI agreements for upstream petroleum development while also exploring the relationship between private and public law in the process of characterization. Its key objective is to seek to posit a long term legal solution to the problem of characterization involving international petroleum development agreements. It will initially set out to achieve this objective by positing a new formulae for characterization in replacement of the current concept of the economic development agreement (hereinafter ‘EDA’). It will then progress the discussion by pro-

1- 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).

posing a new way forward through the establishment of a new lexspecialis to apply in the upstream petroleum sector and the extractive industries worldwide.

As part of our discussion we will submit that although well-meaning and properly conceived, the 'EDA' categorization for upstream petroleum agreements (and FDI projects as a whole) has now outlived its usefulness and is arguably out-dated after more than 50 years in existence. We will also argue that the 'EDA' concept was far more suited and appropriate to the old concession type petroleum development agreements than it is for the modern variety of production sharing agreements and service contracts which are now prevalent in the upstream international petroleum industry.In view of the passage of time since the initial conception of the 'EDA', there is clearly a need now for a new legal formula for characterization whichwill be suitable and relevant to the modern types of petroleum development agreements. Part of our task is to endeavour to formulate such a new approach to characterization (together with the accompanying new legal framework) which will be instrumental in providing along term solution to some of the legal problems of international petroleum development. Amongst these problems are the questions relating tothe regulatory competence of host States in the upstream petroleum sector, jurisdictional competence for the settlement of investment disputes and applicable law.

We also believe that uniformity, consistency, certainty and authoritativeness constitute the principal andimportant legal challenges facing investment international lawin the 21st century. These various attributes therefore inform the key objectives on which the current discourseis founded. The natural resources sector as a whole, and the oil industry in particular, constitute

one of the cornerstones of the world economy. It is thus evident that certainty and stability in the legal regime governing international investment relations founded on the development of the petroleum resources is a crucial requirement or pre-requisite for the maintenance of a steady and uninterrupted supply of international crude oil products. The maintenance of global economic prosperity in turn depends on the stability of crude oil supplies. It is for this reason that the constitutive legal process governing the international investment regime (including FDI in the petroleum sector) is in need of greater clarity and legal certainty through a process of fundamental reform. The chief rationale for the current articleis thus premised on this necessity. A study of this nature, we believe, has a theoretical as well as a practical relevance and importance for the upstream international petroleum industry through its potential to make a meaningful contribution to efforts aimed at finding long term solutions to the current problems besetting the international investment regime.

2- Rationale and Background to the Study.

One of the aims and objectives of this article is to critically explore and explain the historical background to the debate on the legal and regulatory framework for FDI in the international petroleum sector within the context of characterization. It will then proceed to a critical examination of the regime for the international regulation of natural resources production, with the emphasis being on its governing precepts and principles and their relationship to the key issue of characterization. In the course of this discoursethe authors will also seek to identify and to critically analyze the weaknesses and shortcomings of the current international investment regime with a view to proposing possible long

term solutions to the legal problems of FDI in the international upstream petroleum sector. The main thrust of the analyses will be directed at the key question of characterization and the proposed new lexspecialis through a re-examination and re-appraisal of the 'EDA' concept. Recommendations of the research project will be based on exploring and proposing a viable alternative to the EDA approach and its governing international legal framework, which in the authors' view, now seems obsolete, out-dated and of little functional value within the context of international dispute settlement after more than half a century's existence – a period in the course of which newer forms of production agreements have come into existence in replacement of the old concession regime on which the EDA classification was initially based.

In pursuance of these key objectives it is first of all proposed toidentify and to critically discuss the long standing problemsaffecting the international investment regime within the context of characterization. Foremost amongstthese problems is the friction between the sovereign rights of host states and the private property rights of FDI investors within the framework of upstream petroleum development projects1. This analytical exercise will involve a detail and comprehensive examination and re-appraisal of the historical, economic and political background to the long standing debate on the constitutive legal process governing the international investment regime. It is indeed the case that the legal aspect of this debate denotes but one dimension of the wider landscape against which the legal problems of FDI projects in general, and upstreampetroleum development agreements in particular, ought to be viewed, studied and understood. In the course of time historical, economic and political events have all

1- A.H. Hermann, Disputes Between States and Foreign Companies, in J. LEW (ED), CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 250 (1986).

interacted tohave a significantimpact (not always positive) on the relationship between oil producing States and the international oil companies. A chief concern lies in the perceived inability (or perhaps unwillingness) of the international investment regime to reflect and to accommodate the evolving historical, economic and political landscape of the 21st century[1].

An even greater impediment to progressive legal development in this field of study resides in the imperviousness of relevant principles (of contract law, customary international law, etc.) to oil industry dynamics such as the evolution of petroleum development agreements from the old pre-colonial concessions to modern day production sharing contracts and other types of service contracts. Part of the discourse in this paper will be aimed at undertaking a critical and detail investigation into the possible reasons for this inflexibility on the part of the legal process involving the international settlement of investment disputes in the upstream petroleum development sector. In the course of the analysis it will also be seen that the judicial exercise of characterisation has to some extent also been susceptible to this inflexibility. The paper will examine the possible rationale for the continued reliance by the international investment regime on the principles of customary international law as a regulatory tool in disputes involving oil producing countries and the international oil companies in the upstream sector. It is the view of the authors that this state of affairs is hardly satisfactory – especially in the light of the historic, sustained and continuing protests and objec-

1- 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 Tschanz, 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).

tions from the vast majority of petroleum and mineral producing nations against some of thebasic precepts and principles of the current international investment regime[1].

As seen above, one of the principal and defining aspects of the current international investment regimes concerns the continuing conflict involving ownership rights to petroleum deposits in situ – to wit, the tension between the sovereign rights of oil producing States to regulate exploration and production activities and the rival interests of international petroleum companies in protecting their acquired, vested or international property rights in discovered petroleum deposits. On this conflict rides a very important question, the stability of contractual relations between the main parties to upstream international petroleum development agreements. A number of studies have been done on this aspect[2]. Butthe general consensus amongst scholars is that the results so far have not been very satisfactory[3]. Indeed, the continuing persistence of this fundamental conflict which resides at the heart of the international investment regime bears ample testimony to the very limited results that have been achieved to date. The proposed new formula for the characterization of international petroleum development agreements and the accompanying lexspecialisis one which, we hope,will contribute towards finding a sustainable long term solution this problem.

A key objective of the current studyis therefore to investigate

---

1- F.V. García-Amador, THE CHANGING LAW OF INTERNATIONAL CLAIMS, VOLS.I&II, (1984); see alsoWolfgangFriedmann, LAW IN A CHANGING SOCIETY (1964); T.O. Elias, NEW HORIZONS IN INTERNATIONAL LAW (1992).

2- For example, 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).See furtherAntonio Cassesse, 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).

3- See Michael Dickstein, Revitalizing the International Law Governing Concession Agreements, 6 INT'L TAX & BUS. L. 54 (1988).

(within the context of characterization) this conflict between the long term interests of host states and multinational oil companies in far more depth and detail than in previous studies on the question.This will include a comprehensive inquiry into the reasons for the failure of proposed new principles (such as the-United Nations General Assembly Resolutions on Permanent Sovereignty over Natural Resources and the New International Economic Order) to make any significant impact or contribution to the constitutive legal process governing the international investment regime.These resolutions were sponsored by developing countries and natural resources producing nations with a view to addressing some of the perceived historic biases of the international investment regime in favouring the rights of mainly Western companies against the sovereign rights and regulatory aspirations of petroleum producing nations. Designed and conceived with a view to countering the power of the international oil companies and promoting the sovereign rights of States, these UNGeneral Assembly resolutions have long since fallen by the wayside, apparently obsolete and irrelevant to the current FDI environment of the 21st century. This paper will conduct a critical inquiry into the possible reasons for this demise and also seek to assess their possible impact on the question of characterization from a theoretical and a practical perspective.

The current problems of the international investment regime are not limited to the content of the international law governing foreign investment relations. They transcend the substantive aspects of the FDI regime to include long held grievances on the part of many natural resources producing countries vis-à-vis international dispute settlement procedures, processes and mechanisms. The first of these grievances relates to the ame-

nability of FDI agreements ("State contracts") to international arbitration in foreign venues or fori and the key question of jurisdictional immunity. Allied to this is the question of the conferment of internationally justiciable rights and locus standi on foreign investors on an international law platform - thus enabling such investors to bring foreign legal proceedings against host State governments. One of the objectives of this study is to carry out an objective and rigorous investigation into long standing claims of procedural and substantive bias on the part of the international investment regime in favour of foreign investor protection and against the sovereign rights of defendant States[1].This articlewill likewise investigate the possible reason(s) why many of these countries, whilst always ready to claim jurisdictional immunity from foreign suits (including foreign arbitration), have always accepted and continue to accept the inclusion in upstream petroleum development agreements of foreign arbitration clauses as the preferred method of dispute settlement.The analysis will throughout be undertaken within the context of the main theme of characterization.

In Part 3of this paper we will set out to critically explore and propose possible, sustainable and viable long termsolutions to the problems which have so far been identified. In so doing the article will investigate the possibility of a less contentious dispute settlement mechanism such as mediation and will advocate its greater use in disputes between governments and international investors. However, we very much appreciate the fact that such a proposition constitutes a key legal challenge – not least because of the non-binding nature of mediation. As indicate earlier in the

1 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).

introduction, a review of investment disputes submitted to international arbitration so far indicates that an overwhelming number of arbitration cases are initiated by companies against governments. The traditional approach of governments has always been to take regulatory measures or to impose regulatory sanctions or other penalties on companies which they consider to be in breach of obligations under a petroleum development agreement. But what governments do not fully appreciate is the fact that sometimes such action on their part could be deemed under the international investment regime as amounting to a form of indirect expropriation, and thereforesanctionable under international law. A key aim of the article will thus be to counsel a more diligent approach by governments when confronted by possible breaches on the part of foreign companies. It will suggest that in all cases governments should take every appropriate step to ensure that whatever action is takenagainst the company in question can be justified under international law. Indeed we believe that the submission of such breaches or disputes to international arbitration or mediation under relevant dispute settlement mechanisms contained in the petroleum development agreement with the investor is the best way for governments to guarantee compliance with international law.

In Part 4 of the paper the keyquestions of characterization, municipal jurisdictional competence and applicable law in the resolution of investment disputes in the upstream petroleum sector will be critically analyzed and evaluated. The outcomes of characterization, as seen in our introduction, can have a defining and decisive influence and impact on questions regarding jurisdiction and choice of applicable law for the settling of disputes. To begin with, the international petroleum development agree-

ment has to be characterized by the adjudicating panel of judges or arbitrators. The problem here lies in the fact that such petroleum development agreements are concludedbetween States and private investors or companies. In other words, they are not treaties (which can only be concluded between sovereign States and are therefore subject to governance by principles of public international law); nor are such agreements “contracts” in the strict sense of the word, as for example, a contract between two private companies.

Upstream petroleum development agreements have a semi-public character in that they are agreements to which the State or a State agency is a party (i.e. State contract). But are they contractual type agreements to be governed by relevant principles of private contract and commercial law?Or are they public law instruments which are subject to governance by administrative law? And to what extent are the principles of international law applicable (given the transnational character of the investment project and international nature of the relationship between the government and the foreign company)? The significance and importance of these questions resides in the extent to which the government can embark on any post-agreement alteration of the terms and conditions governing the relationship (e.g. the introduction of a new taxation regime). A public or administrative law approach will clearly be more permissive of post-agreement regulatory intervention by the State than a private contract law designation. Under the latter any such intervention will be deemed to be a breach of contract.Closer examination and scrutiny reveals that petroleum development agreements do not actuallybelong to a specific legal category. The problem which this gives rise to is known in international economic law as the ‘public-private

character dichotomy' of State contracts. This is a problem which the authors will investigate at some length with a view to proposing possible legal solutions.

A wide range of legal theories have been developed and posited over the years on the question of how best to characterize petroleum development agreements. These theories culminated in the early 1950s in development of the concept of the economic development agreement (hereinafter "EDA"). But does the EDA concept retain any relevance as the basis or formula for characterization in the 21st century? Does it provide an effective tool for the characterization process in present-day international arbitration and claims practice? And can it still be deemed to be a cogent and pertinent method of characterization after almost half a century in existence - in the course of which petroleum development agreements have undergone a profound evolution in form and types ranging from the old oil concession to modern day production sharing agreements and service contracts?

Once the international petroleum development agreement itself has been characterized the next step in the international arbitration or judicial process is to characterize the cause of action and the choice of applicable law. As part of this process answers will be sought to the following key questions: is it a contract law dispute or an administrative law dispute? Also, which system of law should be adopted as the governing law of the agreement and therefore of the dispute? Is it private contract law or public administrative law? Should it national law or international law principles and concepts which govern the international investment regime?These and other questions will be critically examined and analyzed in subsequent sections of this paper with a view to identifying all of the attendant problems and proposing

tangible solutions where necessary.

From a functional point of view the process of characterization is of critical importance in that it also has implications for the permissible limits under international law of post-agreement regulatory intervention by host States with a view to abrogating or otherwise amending, altering or revising established terms and conditions. This aspect of the questionof characterization is crucial to alleviating the tension between the sovereign rights of States to regulate exploration and production activity in the upstream petroleum sector and the interests of foreign investors in maintaining the stability of contractual terms with a view to protecting their acquired rights. As part of this study the authors propose to undertake an exhaustive and in-depth investigation into the historic, economic, political and legal background to the conflict between sovereign rights and private property rights. At the centre of this controversy is the question concerning the political risks associated with FDI projects in the upstream petroleum industry.As such the study will also seek to explore, identify, analyze and propose more innovative approaches to the management, minimisation and containment of various forms of political risks – the premise for this being that a better approach to political risk management will help in easing the tension between the sovereign rights of oil producing States and acquired rights of the international oil companies.

In the concluding parts, a key aspiration of the study will be to posit more modern and innovative approaches to the characterization process which are more suitable to the aspirations of the principal stakeholdersin the upstream petroleum (and mineral) development agreements of the 21st century.The conclusion willthus reflect on ways of improving the effectiveness of the consti-

tutive legal structure applying to transnational resource ventures, exploring in the process a possible shift away from the generality of international law towards an lexspecialismodelled along the lines of the specificity of the formerlaw merchant and conforming to the unique or sui generis character of upstream international petroleum development agreements.

3. Some Preliminary Reflections on the Role of Characterization in International Petroleum DevelopmentDisputes.

The main premise for this study is founded on the perceived inability of the current international legal regime (which forms the basis of the constitutive legal process for the resolution on international investment disputes in the upstream petroleum development sector) to provide adequate and effective solutions to the problems which arise from the international development of petroleum resources. One of the key problems in this area clearly resides in the question of characterization. The latter involves the classification of a dispute (or FDI agreement) into an identifiable legal category such as, inter alia, “contract simpliciter”, “administrative contract”, “State contract”, “economic development agreement”, or “international development agreement”(1).

From both a historical and legal point of view, it is undoubtedly the case that the legal process of characterization or classification has become heavily politicized over the years. Opposing schools of thought have put forward often conflicting postulations as to how upstream petroleum development agreements ought to be classified in international arbitration and claims practice. Also susceptible to much wider political influences and considerations has been the procedural question regarding the approach to characterization of the applicable source of law to govern FDI

disputes: contract law versus administrative law; private law versus public law; and national law versus international law. And clearly evident in the midst of this conflict is a “North/ South” split (i.e. industrialized versus developing and emerging nations). Many Western scholars of the “traditional” school of thought, for instance,have argued in support of an approach to characterization which will ultimately ensure that the key precepts and principles of the current international investment regime are maintained based on relevant principles of contract law and customary international law(1). Such a position which is founded on perpetuating the status quowill clearly favour the rights and interests of the international oil corporations - most of which emanate from the industrialized countries but whose key operations (petroleum exploration and production together with the extraction of other primary raw materials) are based in developing and emerging nations. Opposed to this view are the “revisionist” scholars who favour a reform of the current international investment regime and an approach to characterization which relies less on private law or international law, and more on national (public) law under the jurisdictional competences of the domestic or municipal legal system(2). Adherents of revision thus advocate that the international investment regime should accord more relevance and importance to the sovereign rights of States over control and ownership indigenous petroleum deposits and production, and that greater preference ought to be given to national regulatory and domestic judicial competence in the settlement of international investment disputes3. The latter group of scholars tend to be found mainly in petroleum producing nations and other natural

1- G. Delaume, The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal, 3 ICSID Rev.-FILJ 79 (1988).

2- F.V. García-Amador, THE CHANGING LAW OF INTERNATIONAL CLAIMS, VOLS.I&II, (1984).

3- S. Asante, International Law and Investments, 37 INTL & COMP. L. Q. 588 (1988).

resources-rich developing countries – hence the "North-South" split to which reference has already been made.

The resulting debate has not only generated a great deal of controversy but has given rise to diverging and often conflicting views on questions relating to jurisdictional competence vis-à-vis the arbitrability by international dispute settlement bodies (mainly arbitration tribunals) of disputes involving private investors and State parties. This divergence of opinion goes beyond the approach to be adopted for characterization of petroleum development agreements and extends to the key question of choice of applicable law. The conflicting opinions on the question of characterization in particular is hardly surprising, given that the outcome of characterization often has a decisive effect and influence on the ultimate outcomes of investment litigation.

From a purely objective and scholarly point of view, a key concern lies in the fact that, as with every politicized question, the end result of endeavours in this field has been much confusion - most notably exemplified in the conflicting renderings of international arbitral tribunals on questions of characterization[1]. This situation may well have arisen out of an overzealous aspiration by international arbitrators to satisfy both schools of thought founded for the need for compromise. But the result to date is hardly reassuring. There is thus clearly a pressing need for certainty in this area of international law. This in turn requires the need to conceive and to propose a viable alternative to currently prevailing models of characterization – a new legal concept having the required degree of clarity, authority and permanence which international

1 R. White, Expropriation of the Libyan Oil Concessions – TwoConflicting International Arbitrations, 30 INT'L & COMP. LAW 183 (1964); R. Lillich& D. Bederman, Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims, 91 AM.J.INT'L L 436 (1997).

economic relations founded on petroleum development, (and international economic law as a whole) merits and deserves.

4. The Legal Characterization ofUpstreamInternational Petroleum Agreements: A Critical Commentary.

Characterization denotes the judicial technique which an arbitrator or judge may employ as part of an international arbitration or litigation process to assign to an upstream petroleum development agreement a specific legal category such as contract, administrative contract, economic development agreement or international development agreement. This will often involve a two-staged process. The first stage of the process involves the characterization of the cause of action. Following the characterization of the cause of action into a specific legal category such as a“contract”, “administrative contract” or “economic development contract”, the second stage of the process will be aimed at identifying or‘classifying’ the choice of applicable law to govern both the agreement and the dispute.

The outcome of the first stage (classification of the upstream petroleum development agreement) will often have a crucial influence on this second stage. For example, a contract designation or classification for the upstream petroleum development agreement will almost certainly mean the characterization of the dispute as a contract law dispute or cause of action, with principles of contract and commercial law as the applicable law.

Before embarking on a critical analysis of the characterization process, it is proposed first of all to examine the international legal context of upstream petroleum development and its relevance to the question of characterization. Our discourse in the next section inevitably has a historical dimension to it which

serves to highlight the key evolutionary features of the constitutive legal processes of the international investment regime as it applies to the upstream petroleum industry.

4.1 The Background to the Characterization Debate: Historical and Legal Context.

In the pre-independenceperiodinternational petroleum and mining companies had established for themselves deeply entrenched and seemingly unassailable in the territories under colonial administration - particularly with relation to ownership or acquired rights over production and deposits in situ[1].The upstream petroleum development operations of Western oil corporations were mainly sited in overseas territories administered under colonial rule or under the direct political control of European powers whichserved as the home countries of the multinational oil corporations. However, the advent of decolonization and the attainment of independent statehood for African Asian, Middle East countries wrought profound and significant geo-political realignments in international economic relations. These geo-political transformations in turn introduced new legal, operational and strategic challenges for multinational resource companies which in turn were to have significant implications for the legal and regulatory framework governing the upstream petroleum industry[2].

These new challenges extended beyond the necessity for a repositioning and re-adjustment by multinational oil corporations to

1- 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).

2- Kenneth Carlston, Concession Agreements and Nationalization, 52 AM. J. INT'L L. 260 (1958); Henry Cattan, 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 RelationshipsBetween Host Governments and International Petroleum Companies, 17 HOUS. L. REV. 1015 (1980).

the emerging geo-political landscape of the post-independence era.The new political environment clearly dictated a re-appraisal of the theoretical, philosophical, and functional bases of international resources law and policy. A pre-requisite in this regard was a re-examination of the constitutive legal process governing FDI in the upstream petroleum development sector(1).At the forefront of issues for critical examination was the precise legal character of the commercial relationship between multinational oil corporations and oil producing countries(2).Foremost amongst the questions raised were the following: what factors shape, influence and ultimately define the international legal context for domestic natural resources development by transnational enterprises(3)?Which legal concepts or norms(corpus juris) are best suited for incorporation into the constitutive legal framework for the international development of the upstream petroleum industry? As seen above an equally significant question concerns the legal classification or characterization of upstream petroleum development agreements by the international investment regime.

Upstream petroleum development agreements, regardless of the denomination or precise legal formulation, are neither contracts strictosensu (i.e. agreements between private parties); nor are they inter-State agreements concluded between sovereign entities or governments (e.g. bilateral or multilateral treaties). The special characteristic of upstream petroleum exploration and production agreements involving multinational corporations for the development of natural resources is that they straddle

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

2- 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).

3- 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).

the recognized boundaries between private contracts and public agreements between sovereign governments[1]. They also bestride the generally accepted demarcations between private and public law[2], national law and international law3.The question of characterization has itself developed into a contentiousacademic issue amongst commentators and scholars. This is hardly surprising, because on the outcome to this the question rides the very important issue concerning the delimitation of the permissible limits of national regulatory competences within the framework of an upstream petroleum development agreement.

What our study has revealed is that there are still some deeply rooted problems of both a conceptual and practical nature which persist in this area of the law. A critical review of the academic literature reveals a proclivity in legal scholarship representing two opposing schools of thought.The"traditionalist"camp made up of mostly Western scholars favour the status quo – i.e. the application of the norms of the current legal system (based on contract law principles complemented by doctrines of customary international law) to disputes between oil producing States and multinational companies operating in the upstream petroleum sector. The position taken by the group of scholars can

1- R. 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; G. SCHWARZENBERGER, FOREIGN INVESTMENT AND INTERNATIONAL LAW (1969); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS (1986).

2- G. 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).

3- A. Giardina, State Contracts: National Law versus International Law?, 5 ITALIAN Y.B. INT'L L. 147 (1980-81); GüntherJaenicke, 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).

ultimately be summarized as favouring a high degree of protection for FDI in the upstream petroleum sector regardless of its impact on the doctrine of national sovereignty over natural resources. Opposing this school of thought are scholars who advocate a greater level of national sovereignty and control domestic natural resources and their exploitation. Their position is founded on the premise thatpriority should be accorded to the sovereign rights of the State over the private interests of private oil companies in view of the State's role as custodian of the national interests. Amongst the areas they have identified for reform isthe revision of principles of the current regime for upstream petroleum development which is based on concepts of customary international law.

In this study the authors examine a number of key questions drawn from this academic debate regarding the appropriate legal framework for the settlement of disputes in the upstream petroleum sector within the evolutionary context of international oil industry litigation. It is hoped that the findings of the study will help to clarify some of the very important issues under discussion and bring to the attention of policy makers the need for reform in this area of law regarding dispute settlement in the upstream petroleum sector.

Viewed from a historical and evolutionary perspective, the geopolitical transformations which took place in the middle of the 20th century with the attainment of independence for many countries in Africa and Asia also had significant legal implications for the upstream petroleum industry. Colonial-era concession agreements gave way to new forms of contractual arrangements which were deemed to be moreexpressive in legal form of the newly acquired status of political self-determination. It was the

hope of both policy makers and legal commentators that the new forms of upstream arrangements with multinational oil companies would facilitated the achievement of newly defined economic aspirations - leading to the attainment of national economic goals and objectives. Some of these objectives were encapsulated in the concepts of permanent sovereignty over natural resources (PSNR) and the new international economic order (NIEO) which had become the norm.From a dispute settlement perspective this entailed significant legal challenges for the process of characterization as public law principles began to exert more influence, signalling the advent of the private-public dichotomy in the characterization process.

With the advent of PSNR and the NIEO, the foundations of the established order based on maximum protection for FDI came under increasing pressure in the face of political agitation forthe dawning of a new era and a new emphasis on State rights. However our study reveals that with the latest development in this area (i.e. the “credit crunch” of 2008) the emphasis has again shifted towardsincreased receptivity towards FDI promotion and that investment protection once again has occupied the central ground in upstream petroleum development policy. In our view these constantly shifting perspectives hold significant implications for the judicial process of characterization in the event of a dispute between an upstream operator and the State party.

It is thus evident that long standing conceptual difficulties and controversies regarding the specific character of upstream petroleum development agreements and the international legal context of their regulation remain the enduring legacy in this area of the international settlement of commercial and investment disputes. The divergence of views which has developed in scholarly

debate over the precise legal character and form of upstream petroleum agreements(and on the implications of characterization for the question of regulatory competence) has become the defining hallmark of previous studies on the topic. At the very heart of this divergence of views reside the conflict between private property rights (FDI) and the sovereign rights of host States within the legal and regulatory framework which governupstream petroleum development agreements.

It is thus proposed next to identify some of the theoretical, practical and legal problems which are associated with the question of characterization.

4.2The Characterization of Upstream Petroleum Development Agreements in the International Dispute Settlement Process: A Preliminary Analysis.

Key to understanding the international legal context of dispute settlement in the upstream petroleum industry is an appreciation and awareness of the importance of legal classification (characterization). This is in view of the significant implications and profound effect which characterization holds for regulation of the upstream petroleum sector. The objective in this section of the paperis thus to assess the legal character and specific nature of upstream petroleum development agreements from an international legal perspective. The highlight of the discussion will focus on the importantimplications which the economic development agreement (EDA) concept may have on the characterization exercise under the current legal regime. This discussion will also examine the relevance of private and public law concepts within the framework of characterization and the difficulties caused by

the private-public character dichotomy of upstream petroleum development agreements. The main thrust of the analysis will be aimed at identifying current legal problems relating to characterization which continue to impact strongly on the international settlement of disputes involving upstream petroleum agreements. The analysis in this section will further seek to assess the implications of legal categorization or characterization for questions regarding State responsibility and the protection of FDI in the upstream petroleum sector.

Upstream petroleum development agreements and other legal arrangements for the development of natural resources generally belong to the category of State contracts(with the exception of those prevailing under private ownership system such as in the United States). But the use of the denomination "State contract" is not necessarily conclusive in itself as to legal form within the context of characterization. Rather, it is a generic denomination which elicits a critical examination and further elaboration. It is for this reason that upstream petroleum development agreements present a special problem vis-à-vis their precise legal nature and specific character when they become the subject of the international dispute settlement process[1].It is undoubtedly the case that the vast majority of such agreements exhibit a predominantly contractual form and similar traits; however, they are equally imbued with mixed private/ public legal features[2].It is in view of the latter fact that their legal classification (or characterization)

1- García-Amador, (1984), p.354 et seq.

2- On the question of their contractual form, García-Amador, (1984), p.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. The author, however, goes further and acknowledges the fact 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. With regard to the mixed private/ public character of natural resources development agreements, see Arbitrator Mahmassani in LIAMCO v. Libya, 20 I.L.M. (1979), at 29.

for the purpose of a judicial or arbitration process aimed at dispute settlement has become an exercise of such difficulty and complexity. A number of questions arise in this context: Does an upstream petroleum development agreement belong to the private law category of a 'contract'? Or does it belong to a special category which incorporates the essential elements (while at the same time transcending the boundaries) between private contract law and a public law instrument?

The legal implications and significance of these two questions clearly resides in the extent to which the State party to the upstream petroleum agreement can subsequently and unilaterally intervene to introduce post-contractual amendments or unilateral changes to the agreement through the exercise of sovereign prerogative or other public and regulatory powers.

4.3 Characterization of the Sources of Law Governing Upstream Petroleum Development Agreements.

The jurisprudence which emerged from the Iran-U.S. claims tribunal processhas once again brought to light the significant problems affecting both the formulation and the interpretation of some of the key principles of international law governing, inter alia, the responsibility of States for injury to foreign economic interests. It also highlighted some of the important problems associated with the substantive rules and procedures whichapply to the settlement of international disputes between States and foreign investors(1). The legal problems of FDI and its international regulation, and the efforts made to find adequate and effective

1 See further C. Amerasinghe, "Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice", 41 I.C.L.Q., (1992), 22; see also N. Brower, "The Iran - United States Claims Tribunal", 224 Rec. des Cours, (1990-V), 133.

legal solutions to them, pre-date the Iran-US claims[1]. So too does the debate between proponents for the continued application of the current international legal regime to these problems, and those who, on the other hand, strongly advocate the need for a reforming of the system. In the past, the debate has focused mainly around the inadequacy of existing rules and the necessity to create a new international legal order embodying new rules and principles which are better equipped to regulate certain topics of international law - including State responsibility and the international settlement of claims - in the light of changing geopolitical circumstances in the international community.

The commentary in this section of the article will be approached from the premise that the current regime is in need of fundamental reform, based on the evidence from the literature review conducted as part of this study, which has clearly highlighted many inadequacies, problems, weaknesses and shortcomings. It is our objective viewthatthere remains a present and continuing need to seek effective long-term solutions to these problems, in particular the key problem concerning the characterization of upstream petroleum development agreements. This premise (coupled with the renewed interest in issues relating to events the upstream petroleum development sector in Bolivia and Venezuela in the recent past[2] provides us with a justifiable reason to re-visit here some of the crucial issues underpinning the rationale for a reform of the international regime which governs disputes in the

1 Writing as early as 1926, Brierly had stated, with regard to international law in general, that "[t]he 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 deserving of scientific study, but also for practical reasons": in Brit. Y.B.I.L., (1926), 27; and in The Basis of Obligation in International Law, (1958), p.1. See also, for a discussion on the shortcomings of existing principles of international law, Oppenheim, The Future of International Law, (1955), p.58.

2 See G.Joffe et al, 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).

upstream petroleum development sector. In this section, this opportunity will be transformedinto a preliminary inquiry into the key issue of characterization of the sources of law to govern international disputes relating to upstream petroleum development agreements. However, it is important to note that the outcome of characterization will ultimately determine the prioritization of norms and the selection of the governing or applicable law which will apply to the dispute between the multinational upstream operator and the host country.

A number of sources of law converge within the framework of the upstream petroleum development agreement, every staking a superior claim to supremacy in the prioritization of rules to govern the relationship between the foreign investor (multinational oil company) and the host State party. These sources can be summarized as follows:

National law: including the investment code; petroleum or mining code; taxation code; national constitution; domestic contract and commercial law principles; administrative and public law; etc.

Public international law: relevant principles of customary international law on State responsibility; diplomatic protection of aliens and their property (including foreign investments in the upstream petroleum sector); substantive norms and rules governing the international claims processes, including the compensation standards; bilateral investment treaties and relevant international conventions.

Emerging international law: in particular UN Resolutions on Permanent Sovereign over Natural Resources(1) and on the New International Economic Order(2).

1 S.Zakariya, Sovereignty over Natural Resources and the Search for a New International Economic Order, 4 NAT. RES. F. 75 (1980).

2 KAMAL HOSSAIN (ED), LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER (1980).

Private International Law or the Conflict of Laws: governs the procedural aspects of international arbitration or judicial process for the settlement of international commercial and investment disputes, including those in the upstream petroleum industry.

In the absence of a choice of forum (jurisdiction) or choice of governing law clause in the agreement the rules of private international law will be used to ascertain questions relating to competent jurisdiction and which system of law to apply to the substantive aspects of the disputes. The latter aspect involves characterization of the source(s) of law. This is a very important exercise which will often be conducted against the background and within the context of a conflict of laws scenario in which different systems of law vie for recognition and supremacy: e.g. national law versus international law; customary principles on international law versus emerging principles of international law; domestic law versus foreign law; private law versus public law; contract law versus administrative law; etc. Given the absence of an explicit choice of law clause, or in the event that the choice of law clause itself includes several systems of law which have conflicting provisions, the essence of the process in characterizing the source of law is to ascertain the proper law of the dispute. It is in effect a selection process a definitive role to play in deciding the ultimate outcome of the dispute depending on which system of law is chose as the applicable law.

The current system of characterizing the source of law (or choice of law selection) is riddled with myriad problems arising from the presence of so many conflicting systems of law which all have a connection with the dispute and which could all potentially apply as the applicable law. It is for this reason that in Part 5 of this paper the authors will argue for the replacement of the cur-

rent system of choice of law selection (or characterization of the source of law) by moving from the generality of current sources to a specialized regime tailored specifically for the upstream petroleum sector (alexspecialis). In advancing this alternative approach the authors will also developed a conceptual framework for the lexspecialis by articulating its key attribute, features and substantive contents(see Appendix 1).

4.4 Characterization of the Cause of Action: A Critical Commentary.

A veryimportant legal question at the center of any international dispute settlement process relating to upstream petroleum development revolves around the question of characterization of the cause of action itself.This procedural question, as with that of the characterization of the applicable source of law, is likely to have a very importantimpact on the outcomes of litigation involving a dispute between an international oil company and a host State within the context of upstream petroleum development activities. As seen in preceding sections of this article, petroleum development agreements defy the accepted demarcations between the domains of private law and public law. The underlying rationale for characterization in upstream petroleum disputes therefore resides in thissemi-public (or private-public) law character. It is furthermore the case that the judicial function of characterization - far from providing a definitive solution to the problem associated with assigning upstream petroleum development agreements to a specific legal category (i.e. private law contract or public law instrument) - may inadvertently have the unfortunate effect of exacerbating and compounding already existing complexities and legal difficulties.

As seen in Part 2 of this paper, upstream petroleum development agreements involving foreign enterprises and overseas capital and technical know-howcan be assigned to the general category of 'State contracts'. This generic categorization in itself triggers the necessity for a more definitive and exhaustive categorization process which will ultimate assign the agreement to a specific legal category and the dispute to a specific class or cause of action (e.g. breach of contract).In the generic denomination of a 'State contract' thus lies the beginning, rather than the end, of the characterization process. There are evidently a multitudinous variety of commercial agreements whichcome under the rubric of 'State contracts'. From a characterization perspective upstream petroleum development agreements offer a wide range and bewildering variety of legal forms – from pre-colonial concessionary agreements, to "contract simpliciter" (based on private law), to public law instruments which come under the rubric of the administrative contract. In addition to these widely recognized legal forms, scholars have also drawn attention to the predominantlysemi-public character of upstream petroleum development agreements in particular, arguing that in view of their special attributes such agreements should be formally assignedto the all-inclusive legal category of aneconomic development agreement (EDA)[1]. It has also been argued that the EDA designation ought to be applied irrespective of the specific intention of the parties as expressed, for instance, in their selection of the specific form of an "investment contract" as a description for the upstream petroleum development agreement.

1 J.N. Hyde, Economic Development Agreements, 105 Recueil DE COURS 271 (1962-I), at 282; S. Pogany, Economic Development Agreements, 7 ICSID REV.: FOREIGN INV. L.J. 2 (1992). Pogany, at p.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 thrust of our analysis in this section will be directed at the EDA categorization. Representing as it does the latest in a long history of efforts aimed at finding an appropriate and effective solution to the key question of characterization in the settlement of international disputes involving upstream petroleum development projects, it is the objective submission of the authors that the EDA categorization has now outlived its usefulness after more than half a century in existence. Our submission is based on evidence drawn from this study, including from the literature review and case law studies. And if this submission is correct (as we believe it is), then the obsolete status of the EDA further casts an unflattering shadow over even older forms of categorization such as the concession, the contract simpliciter and the administrative contract (all of which pre-date the EDA).

Inherent in the EDA concept is a functional designation in that implies a purposive approach to categorization – i.e. a legal framework for the promotion of the host country's economic development objectives. Perceived as such, the EDA concept is not intended to signify a purely legal description. Indeed there is as yet no consensus on a generally accepted legal definition or the EDA concept[1].However, the specific types of State contracts which come under the rubric of the EDA category are clearly identifiable. In addition to upstream petroleum development agreements, they include other naturalresources development projects, public works contracts and concessions for public utilities; State contracts aimed at facilitating the transfer of technology, and turnkey projects and management contracts for public enterprises and socio-economic institutions in the education and heath sectors.In identifying the principal features of the EDA,

1 R. Geiger, The Unilateral Change of Economic Development Agreements, 23 INT'L & COMP. L.Q. (1979), at p.74.

one author has highlighted the following main characteristics of EDAs:

"(a) They are made between a government on the one side and on the other, a foreign corporation …;

They are normally contracts for some long term exploitation of natural resources …;

The rights created are not purely contractual but are more assimilated to rights of property;

They confer extensive incentives to foreign investors, such as complete freedom from export and import duties, exemption from taxation…[etc.];

Many of these development agreements are governed partly by public law and partly by private law"[1].

It could be argued that some of the key elements identified above resemble the principal features of the old concessionary model. It is thus the case that in contemplating these elementswe ought to take account of, and make due allowance for, the fundamental and profound evolution which has become the defining feature of the upstream petroleum industry following the emergence of newer forms of arrangements such as the production sharing agreement and the service contract. On the other hand, it could perhaps be argued that the EDA model (conceived as it is to be an all-embracing formula for characterization) has survived this evolutionary episode and that it's perceived flexibility makes it sufficiently adaptable to be able to embrace the new forms of agreements within its framework.But we submit that this is no necessarily the case.

1- A. McNair, The General Principles of Law Recognized by Civilized Nations, 33 BRIT.Y.B. INT'L L. 1 (1957), at pp.2-4.

A judicial perspective on the EDA concept is presented though the judgmentof the arbitral award in LIAMCO[1] in which the principal features 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[2]".

Modern perceptions of upstream petroleum development agreements differ significantly from those in the pre-PSNRera, a period in 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[3]". A theoretical understanding of this definition offers little or no distinction between a concession for the upstream development of petroleum resources and an EDA. However, after careful examination from a more functional perspective, the distinguishing features between the two become quiteapparent. To fully comprehend the nature and significance of the distinction, a further recourse to a more indepth and com-

1- Libyan American Oil Company (LIAMCO) v Government of the Arab Libyan Republic, 20 I.L.M 1(1981).

2- Id. at p.56.

3- O'Connell, INTERNATIONAL LAW (1970), at P.304.

prehensive definition of the term 'concession' is required. Fischer (while acknowledging the absence of consensus on the meaning and applicationEDA concept, offers the following remarks:

"[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"[1].

To begin with, 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 foreign investor (or multinational oil company). The usage of the term "concession", on the other hand, clearly militates against and serves to undermine the mutuality, essentially bilateral nature, and therefore the negotiated basis of the host State-foreign investor relationship. The sameargument applies regardless of whetherthe upstream petroleum developer's rights originate from an administrative instrument such as an exploration or production permit or license granted by the State; in other words, these administrative instruments still retain some element of mutuality and could arguably be subsumed under the EDA categorization as opposed to the concession type project.[2] A further illustration of this fact can be seen in Nwogugu's remarks that, "… as the use of [the term] 'concession' implies in most cases a unilateral grant by the State,

1- A. McNair, The General Principles of Law Recognized by Civilized Nations, 33 BRIT.Y.B. INT'L L. 1 (1957), at pp.2-4.

2- Terence Daintith (ed), the legal character of petroleum licences (1981).

the new term [EDA] removes all doubts as the true relationship between the parties[1]". Of greater significance, however, is the notion that from a functional perspective the EDA categorization- explicitly prescribes by its very name the expected contribution of the upstream petroleum development project to the national economic development objectives, goals and aspirations of the host State. It is this very fact that serves to explain the popularity and prominence of the EDA concept in the post-PSNR/ NIEOera following its adoption as the vehicle for host States' policies aimed at the promotion of natural resources-based economic development strategies. Such strategies included, inter alia, maximization of revenues from production, technology acquisition and taking steps towards establishing a base for industrialization.

It thus becomes apparent from the foregoing that the EDA concept implies at its very core the prioritization of the host State's development aspirations - unlike the concession which is in effect a unilateral or concessionary grant of upstream petroleum development rights. The EDA is expressly conceived and founded on the principle of mutuality of interests, denoting as it does a bilateral engagement for upstream petroleum development designed to serve as a platform for national economic growth[2]. Conversely, the concession-type agreement is lacks any such aspirations for the attainment of national economic development goals and objectives or similar such expectations.

1- E. Nwogugu, Legal Problems of Foreign Investment, 153 RECUEIL DES COURS 167 (1976), at p.180.

2- N. 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).

Two important questions intercede at this point and both questions need to be addressed in order to progress the analysis towards its intended key objective of developing a new conceptual framework for the characterization of upstream petroleum development agreements.This first question is as follows: what are the precise legal implications of the EDA model for the international settlement of disputes relating to upstream petroleum development activities? And the second question is the following:what genuine prospect is there for retaining the EDA and other forms of categorization which are currently in use?; and are theysupportable given the continuing controversies, problems, frictions and tensionstogether with the legal uncertainties which persist in this area of the international settlement of commercial disputes?

When viewed from a critical perspective, it quickly becomes apparent that the EDA categorization's function as a developmental model is rather limited in value and scope. It could thus be argued that far from representing a functionaltool which could be employed as a framework for promoting economic development of the host country, its only value resides in being an aspirational or a purposive model. Our study reveals that the apparent clarity of purpose vis-à-vis the EDA'sexpected contribution to national economic development objectives is, with a few exceptions, hardly matched by the evolution of upstream petroleum development projects on the ground. The exceptions tend to be countries with very high volumes of daily oil production and small populations, leading to high GDP per capita. The continuing disaffection expressed by many natural resources producing countries with the current FDI regime suggests that the EDA concept, although well-intentionedand generally well-conceived, has not fulfilled its initial promise of solving the problem of characterization. It

equally represents a rather inadequate framework for promoting economic growth based on a natural resources-led development strategy. Consequently the EDA, like its predecessor the concession, has itself unwittingly become an embodiment of the very latent frictions, tensions and problem within the international legal framework for upstream petroleum development which it had aspired to resolve. And history teaches us that the disappointed expectations of host countries often culminate in unilateral corrective measures being taken to address any perceived imbalance in the economics of the upstream petroleum development relationship between the oil company and the State.

From a practical viewpoint the main weakness in the EDA concept lies in the fact that it seeks to transform a profit-oriented multinational company into a transnational development agency - a role for which it was not conceived and is clearly not suited. This is one of the grounds on which concerns have been expressed over a perception of upstream petroleum development agreements premised on the EDA concept. As such is not at all surprising that some academic commentators have criticized the use of the EDA categorization as extending too far to the other end of the spectrum - in that countries could be left with the perception that upstream petroleum development activities are only intended to be in their interests with the overseas investor's operations serving as a form of economic aid[1].

Under the EDA model, the development function ascribed to the foreign enterprise is rendered even more onerous by the very fact that the desired economic development aspirations are often very poorly defined and unspecified. Development plans and objectives are often couched in very vague and imprecise

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

language in memoranda of understanding, the preambles to the upstream petroleum development agreement or other non-contractual documents. This in turn generates very high hopes and unrealistic expectations in the host community. As a result of critical reflection following the research which has been conducted as part of this study, the authors will submit that the EDA concept harbors within it the seeds for potential future conflict between the economic development aspirations of the host country and the profit-seeking motives of the FDI investor. This is in view of its highly exaggerated and rather presumptuous emphasis on the attainment of the host country's development objectives within the specific framework of the EDA (upstream petroleum development) project.It could well be the case that theattainment of the desired economic development goals and objectives in the end proves to be elusive, leading to conflicts and disputes between the upstream petroleum operator and the host country.

There remains an acute division of scholarly views as to the precise legal implications of the EDA categorization vis-à-vis the status and protection of FDI within the framework of the upstream petroleum development in particular, as well as within the context of the international investment regime generally. It seems to be the case that the EDA model, with its focus on promoting the economic development objectives of the host nation, promotesa more permissive or expansive interpretation of the regulatory discretion of the host country in the exercise of its public power prerogatives within the framework of the agreement. But not all scholars take this view. Pogany, for instance, has argued that implicit in the EDA model is an enhancement of legal protection for FDI. This is rather surprising, given that he is one of the scholars with a strong advocacy for the developmental focus of the EDA

concept. His premise for promoting the viewpoint of FDI protection is based on theautomatic “internationalization” of any upstream petroleum development agreement which is subsumed under the EDA category. Following this line of reasoning he further argues that the ultimate effect of EDA categorization is to insulate and to isolate the agreement from the pervasive influences of domestic legislative, regulatory and judicial competences(1). In his viewsuch “internationalization” (independent as it is from the real or apparent intention of the parties) serves as a protection for the FDI investor in a similar way to a stabilization clause(2).

It becomes apparent from the foregoing analysis that the EDA categorization undoubtedly has important implications regarding the FDI securityin the upstream petroleum sector. The combined effect of an EDA categorization alongside a public law designation will serve to enhance the status of public power prerogatives and economic development aspirations within the framework of the project. Viewed from this perspective,public power prerogatives thus become an inherent feature of EDA model and of upstream petroleum development projects, leading to the possibility of post-agreement regulatory intervention by the host State. Inherent in the EDA designation therefore is the notion of the political risks of FDI.

However, this approach to categorization seems restrictive in that it suffers from a lack of comprehensiveness in its rather limited scope. It is obviously the case that not all forms of agreements for the upstream development of petroleum and other natural resources can be subsumed under the rubric of an EDA. This is particularly the case, for example, with contractually

1- Pogany, (1992), at pp. 11-12.
2- Id. at p.12.

based agreements such as joint venture agreements and production sharing contracts.

A contract categorization (governable by private law as opposed to public law) implies the pre-eminence, and arguably the immutability, of the contractually-acquired rights of the FDI party within the framework of the upstream petroleum development agreement. This does not necessarily imply that in the event of a contract categorization the State's regulatory competences are in effect extinguished; nor is there any implication that in the event of an EDA categorization the State's right to regulate will be completely devoid of international law consequences. It is the case that international law prescribes specific pre-requisites and conditions for the lawful exercise of regulatory intervention by the host State - regardless of the legal category to which the agreement is assigned. The real question lies in the permissible limits of such State intervention within the context of the prescribed conditions.

We shall now turn our attention to the residual but very important question as to how upstream petroleum development agreements can best be categorized in view of the criticisms of the EDA concept which have been outlined above. This question will be examined in depth in Part 5 of this article.

5. The Proposed Way Forward: A New Formula for the Characterization of Upstream Petroleum Development Agreements.

It is evident from our analysis so far that there is a need to free the question of characterization from the problems associated with previously unsuccessful approaches and models, including the EDA concept. The old concession-type agreement has long since become obsolete and retains little(if any) practical value in the post-colonial world, except perhaps for a passing historical and academic interest. The contract approach suffers from an over-indulgence of the private party by downgrading the public character aspect of the upstream petroleum development venture. As for the EDA model its functional presumptions(which in turn are based on its economic development pretensions) confers on it somewhat grandiose but unrealistic expectations. What wethus propose through this studyis a potential and viablealternative to the outdated EDA model. Furthermore, this proposed new approach is postulated in the form of a truly all-inclusive conceptual framework which is intended to serve as a replacement for the current system of characterization.

A key problem with the EDA model resides in the fact that it aspires to be an all-inclusive categorization formula without having the necessary attributes and the flexibility to accommodate all the various types of upstream petroleum development agreements under a single canopy. The obvious consequence of this is that it has become a moniker and a refuge for all types of State contracts regardless of their precise legal form and character. It could thus be argued that it has itself become a generic rubric which attempts to accommodate all State contracts. This indiscriminate approach suffers from the obvious deficiency that

it fails to make the required distinction between contractual-type agreements based on negotiated project-specific terms and conditions, and more standardized regimes such as exploration and production permits and licenses. The latter (unlike the former) are in essence administrative instruments in view of their inclination and proclivity towards public law. We would therefore submit that a differentiation between these two types is both an imperative and a pre-requisite to the question of characterization. We would further submit that what is thus required is a categorization formula founded on two distinct and discrete categories, which is what we propose as part of the conceptual framework which we have developed as part of this study (see Appendix 1).

In the first category, what we propose is a new characterization formula known as the Petroleum Development Contract (PDC), which will group together contractual-type arrangements. Central to the PDC concept would be the notion of equality of status between the State party and the foreign operator in the upstream petroleum sector. This equality of status would be a derivative of the negotiated basis of the agreement – i.e. a contractual relationship between equals. Governed by private contract law and the sanctity of contract doctrine, the PDC model would also be subject to the pervasive influences of international law principles such as pactasuntservanda (‘pacts or agreements must be honored’). It would equally be amenable to theeffect and impact of concepts such and internationalization and stabilization.This in effect implies a lesser scope within the PDC framework for the exercise of public power prerogatives together with minimal expectationsof the FDI party vis-à-vistheir anticipated contributions to national economic development objectives.

In the secondcategory, we would suggest the inclusion of public law administrative instruments such as permits and licensing regimes. Also included in this category would be the Economic Development Agreement (EDA) in view of its aspirational function as a tool for promoting economic development. We are therefore not advocating the jettisoning of the EDA altogether; rather, what we propose is a reassignment (and downgrading) of its status and role within the framework of the new characterization formula.Upstream petroleum development agreements falling within this groupwould be categorized together under the rubric of what we would term theEconomic Partnership Agreement (EPA). Their inclination towards public law would thus render the EPA concept much more amenable to the sovereign exercise of the public power prerogatives of the State, thus neutralizing or limiting the scope and effect of restrictive provisions such asinternationalization and stabilization clauses. In view of its character as an administrative instrument the proposed EPA concept will also be more permissive of the post-agreement renegotiation or re-adjustment of the terms and conditions of an upstream petroleum development project.This will include judicial adaptation of the terms of an agreement in the event of changed circumstances with a view to promoting the attainment of national economic development objectives – the latter being an implied expectation within the framework of the EPA. Domestic municipal law will serve as the governing law of the EPA unless the parties stipulate otherwise through an express choice of law clause in the agreement. Municipal legal jurisdiction with jurisdictional competence conferred on local courts vis-à-vis the settlement of any disputes between the operator and the government will also prevail (unless expressly stated otherwise in a choice of forum clause).

Figure 1: Key Features of the Proposed New Characterization Formula

Petroleum Development Contract (PDC)	Economic Partnership Agreement (EPA)
Legal Character: Contract	Legal Character: Administrative Instrument
Method of establishment: contractually negotiated terms and conditions	Method of establishment: administrative grant
Examples: Production Sharing Agreement; JV Agreement, modern concession	Example: exploration/ production permit or license.
Governing law: private law	Governing law: public law
Functioning: less permissive of post-agreement regulatory intervention through public power prerogatives.	Functioning: more permissive of post-agreement regulatory intervention through public power prerogatives.
Strict application of the doctrines of sanctity of contract and 'pactasuntservanda'.	Less strict application of the doctrines of sanctity of contract and 'pactasuntservanda'.

To complement Figure 1 (above), Appendix 1 contains a diagrammatic representation of the conceptual framework for the proposed new characterization formula.

Having outlined the conceptual framework for the new approach to characterization, we shall now turn our attention to the proposed new legal regime which will provide the legal framework for this new approach to characterization will take place.

6. The Proposed New 'Lex Specialis' for the International Investment Regime: Nature, Scope and Substantive Contents.

As argued in Section 5 of this paper FDI projects for the international development of upstream petroleum resources are by the very nature quasi-international agreements which defy generally accepted legal categories of characterization based on the rules of the current system[1]. The key features of these agreements encompass private law and public law, as well as national law and public international law. This is in view of the sui generis or unique character of upstream petroleum development agreements. However, public (or customary) international law constitutes jus inter gentes (law between nations). It is for this reason, we believe, that an international dispute settlement process for the upstream petroleum industry which is founded primarily on the norms of public international law has so far not been able to deal effectively with the legal problems arising from such agreements. Relying on a variety of disparate legal sources, one of the defining features of the current systemresides in the fact that it does not constitute a uniform or homogenous corpus juris or body of law. It is on this ground that uniformity, consistency, universal recognition and legitimacy are posited by the authors as key pre-requisites in charting the way forward. But is the attainment of the desired pre-requisites a feasible prospect, and if so how?This is a question to which we shall turn our attention shortly.

Another problem with the current system resides in its promotion of the principle of reparation as the key objective of the international law doctrine of State responsibility in the settlement

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

of investment disputes[1]. Scholars who advocate reforming the system have posited arguments against this conception on the premise of a new role for international law in the modern world. In their view,economic development objectives are now generally recognized and accepted as a key aspiration of the FDI regime which itself is founded on international law.They therefore make the submission that this new perspective to international law and the FDI regime requires a much more progressive conception of international law doctrines and principles, including that of State responsibility. This would in turn require that in the event of a conflict of laws between competing principles and interests, those rules which favor and promote development should be given preference and priority over more rigid and circumscriptive rules whose main objective is to promote and protect the private investor interests[2]. Furthermore, it has been argued in the academic literature that thetraditional view of the current regime for international commercial dispute settlement has been severely eroded and undermined by the developments in the political economy of international economic in the post-colonial era, a fact which calls for a re-examination of the legal foundations on which such economic relations are based[3].

However, the literature review shows that there are alternative points of view to these arguments. Those scholars who hold an opposing view have argued that State's responsibility under in-

1- García-Amador, (1984), at p.89; B. Cheng, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953), at p.163; G.I. TUNKIN, THEORY OF INTERNATIONAL LAW (1974), at p.389. Seealso P. ZANNAS, LA RESPONSABILITÉ INTERNATIONALE DES ÉTATS POUR LES ACTES DE NEGLIGENCE (1952), at p.22; A. BILGE, LA RESPONSABILITÉ DES ÉTATS ET SON APPLICATION EN MATIÈRE D'ACTES LEGISLATIFS (1950), at pp.15-36; GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC II, at p.64.

2- M. Sornarajah, Compensation for Expropriation: The Emergence of New Standards, 13 J.W.T.L. (1979), at pp.109-113.

3- R.P. Anand, Attitude of the Asian-African States Toward Certain Problems of International Law, 15 INT'L & COMP. L.Q. 55-75 (1966).

ternational law amounts to a duty to redress and to eliminate any harmful effects or consequences of a State'sunlawful conduct by paying reparation1. This would be the case, for instance, of any regulatory actions by the State which affects the financial interests of foreign investors in the upstream petroleum development sector. Hence in the views of this school of thought agreements for the upstream development of petroleum resources fall under the categorization of 'contracts simpliciter' which are governable by private contract law together with relevant principles of international law. This, they argue, would be regardless of any 'development' claims made by host States (or by those advocating reform) on international law generally or more specifically on upstream petroleum development projects.

6.1 The Proposed Way Forward

It is the view of the authors of this paper that this cleavage of scholarly opinion on key aspects of the present regime has persisted for too long, leading to uncertainty in the precise status of the opposing norms. Furthermore, it is our objective view based on this study that the conception of an alternative and more effective'sui generis corpus juris' in the form of a lexspecialisprovides the only way forward2. The literature review conducted as part of this study reveals that previous studies in the

1- C. de Visscher, La Déni de Justice en Droit International, 52 RECUEIL DES COURS (1935), at 41; Basdevant, La Responsibilité 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 p.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."

2- 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).

field have been restricted to articulations of a possible lexmercatoriafor international commercial contracts(mainly for the international sale of goods) together with its rules of arbitration[1]. We note, however, that the possibility of a 'third legal order' to govern State contracts (particularly for the upstream petroleum sector) has periodically been hinted at in arbitral awards[2]. This was the case, for example, in theTOPCO Award in which Arbitrator Dupuy expressed 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[3]". He did not go as far as to specify what form this 'international law of contract' would take or what its substantive contents would be.However, in relation to international commercial transactions such as contracts for the international sale of goods,some scholars have strongly asserted that a third legal order, known as the lexmercatoria, already exists[4].

1- FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATON, 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 LexMercatoria en Droit du Commerce International, 227 RECUEIL DES COURS 209 (1991-II).

2- G. Delaume, The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal, 13 ICSID REV.: FOREIGN INVESTMENT L.J. 79 (1998); 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 pp.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 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 p.292.

3- 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).

4- Some scholars, however, have denied the existence of the lexmercatoria 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. Highet, 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).

This brings us to our main proposition – whether a new international legal framework for the upstream petroleum sector (which incorporates our proposed new characterization formula as outlined in Part 4 of this paper and in Appendix 1) represents a viable alternative to the current system. What obstacles stand in the way of the founding of such an order? In our objective view we do believe that the proposed new system together with the new characterization formula presents an important and viable alternative to the current system with all its legal, conceptual and practical problems. This is an informed view based on the research that we have conducted and in the conceptual framework which we have developed as part of the study. What we therefore advocate is a 'lexspecialis' (or special legal framework) which is specially tailored to suit the particularities of the upstream petroleum sector. It is now proposed to outline the main characteristics of the proposed new system.

6.2 Main Features and Scope of the Proposed 'Lex Specialis'

We envisage that the development of the norms and rules of our proposed legal framework for the international settlement of upstream petroleum industry disputes will involve two key stages: firstly, defining its main characteristics, substantive rules and the sources from which these rules will be drawn.The second stage will require the putting in place rules of interpretation or judicial construction. At the first stage, the new legal framework will not be expected to be derived from a completely new set of rules. Instead, the process of developing its normative content will involve the collation and streamlining of regime-specific concepts and principles from the current system alongside the development of new norms and principles. The latter exercise will depend mainly from arbitration practice.

From the perspective of characterization our proposed new conceptual framework incorporating the two new categories (the PDC and EPA) are expected to be at the core of the new regime. The new conceptual framework will thus serve as an alternative to the current approach to characterization, and will aim at eliminating the conceptual and legal problems associated with the current regime which we have identified as part of this study.

The newly proposed regime will have two main aspirations or objectives: first, to solve the problems which have been identified and critically analyzed as part of this study.Secondly to ensure that equal treatment is extended to all the stakeholders in the upstream petroleum development venture – i.e. the private investor on the one hand and the host State in the other.We envisage that within the new framework the second objective will be achieved by limiting any exaggerated claims or entitlement by host governments to excessive regulatory powers(1). On the other hand, the new regime will extend recognition to the public power prerogatives which we believe are an inherent and undeniable feature of the upstream petroleum industry. We would further submit that these inherent prerogatives are by their very nature endemic to the sector, and as such constitute one of the defining features of the proposed new regime.

Other key features of the new regime are outlinedin the table below:

1- P. Peters, N. Schrijver& P. de Waart, Responsibility of States in Respect of the Exercise of Permanent Sovereignty over Natural Resources, 36 NETHER. INT'L L.J. 285 (1989).

Figure 2: The Proposed 'Lex Specialis' for the Upstream Petroleum industry

Main Features & Characteristics	Procedural Aspects	Substantive Content (Rules)	Application
Codification	Dispute settlement procedures:will be based on law of the forum (lexfori).	Sources of law: will include the substantive rules of the new 'lexspecialis'	To international settlement of disputes between operators and licensors in upstream petroleum industry, including mediation, arbitration and litigation (subject to the provisions of relevant choice of law clause where applicable).
Authoritativeness & Legitimacy	Characterization: new proposed formula or procedure for categorization (see Part 4 of this paper).	Will also include relevant rules of national legislation (e.g. investment code or petroleum laws).	Can also be adapted for the international settlement of disputes in primary and extractive sectors (mining, natural resources, etc.) – subject to the provisions of relevant choice of law clause where applicable.
Consistency & uniformity	Questions relating to jurisdictional competence of relevant tribunals and choice of applicable law: relevant rules of Private International Law of the forum.	Plus relevant rules of international commercial law incorporated into the new 'lexspecialis'.	FDI disputes between States and overseas investors generally.
Transnationality& Universality (a globally recognized code consistent with the global character of the upstream petroleum operations and the globalization in international commercial and investment relations).	Questions relating to the recognition and enforcement of foreign arbitral awards and judgements: relevant rules and procedures of the enforcement forum.	And finally relevant rules of customary international law and international conventions incorporated into the new 'lexspecialis'.	

Source: M. Al-Saeed & G. Ndi (2013)

We believe that the proposed new regime has a genuine prospect of reconciling the varied and sometimes conflicting interests within the legal framework of upstream petroleum operations. Its true potential as a tool for conflict resolution resides in the fact that it aspires to accord equal emphasis to the genuine needs and requirements of all stakeholders. We also propose and envisage that the new framework will give priority to mediation over litigation, together with other anticipatory and conflict avoidance mechanisms for dispute resolution. This in turn suggests an alignment of the interests of private upstream operators (multinational oil companies) with the long termeconomic development aspirations of host nations. The specific (often financial) motives of the formercan be very easily determined. The developmental aspirations and interests of the host State are often far more difficult to identify; nor are they easily ascertainable or quantifiable. We therefore propose as part of this study that the often vaguely postulated notion of 'national economic development objectives' will have to be articulated with much more clarity within the framework of the proposed new regime.

6.3 Substantive Rules and Norms of the Proposed New Regime

As previously stated, although we expect the proposed new regime to be specifically tailored for the upstream petroleum sector, we do not envisage that all of its substantive rules will be newly created. Rather, they will be collated from currently available sources and will include principles of international commercial law, national law and relevant principles of international law. Over time new norms and principles can then be developed as part of the system in keeping with the specific requirements and

developments in the upstream petroleum industry.Indeed we expect that the proposed new system will be a living and evolutionary regime and not a static one.

The following are some of the key norms which we expect will form part of the proposed new regime:

Principle of party autonomy under which the parties are free to negotiate their own terms, including choice of forum and applicable law clauses.

The doctrines of sanctity of contract and pactasuntservanda will apply. Also the parties will be bound by other customs which prevail in the upstream petroleum industry, and also by usages to which they have implied consented (in so far as such usages have not been expressly excluded by the parties concerned).

Agreements for upstream petroleum development may not be concluded to the detriment of third parties such as the citizens of the host State.

Where terms have not been individually negotiated (e.g. permits and licenses), the contra proferentemrule of judicial construction will apply. In addition, the agreement will be construed taking into account the whole economic history of the relationship between the upstream petroleum operator and the host country.

Vitiating factors (e.g. misrepresentation of reserve capacity by the operator; corruption of host country officials by the operator; force majeure; etc.) will apply to invalidate the agreement.

The host State cannot transfer rights to the operator in violation of national legal or constitutional provisions.

The equitable principles of good faith, rule against unjust enrichment, etc. will apply.

An operator acting as agent for other entities binds all the entities (e.g. in an upstream joint venture project).

In the absence of a choice of forum of choice of law clause, relevant procedural rules of private international law will be used to establish questions relating to the jurisdictional competence of a tribunal and the proper law of the agreement.In ascertaining the proper law, specialized laws will prevail over general principles.

However, we do not envisage that the proposed new system will not encounter some difficulties and problems. It is therefore proposed to examine some potential problems in the next section.

6.4 A Preliminary Appraisal of the Proposed Framework

We expect that at the start a number of problems will be encountered in the course of institutionalizing the new system. However, we believe that such problems are not insurmountable. The main obstacle to implementing a system such as the one which we propose is thatof gaining general acceptance and universal recognition. In the absence of such acceptance and recognition the system will lack legitimacy. Evidence, drawn from empirical studies which we have consulted as part of the literature review for our study,points to a similar problem with the lexmercatoria. In one study, a survey of over 400 governing law clauses inserted intointernational commercial and investment agreementsin the period between 1987 and 1989 show that none of these contracts adopted thelexmercatoria as its governing law[1]. Secondly, the new regime which we propose may be subject to a number of other problems. In addition to the initial problem concerning uni-

1 Stephen Bond, Negotiating Dispute Settlement in the International Petroleum Industry: The International Chamber of Commerce, in T. Wälde & g. Ndi (eds), INTERNATIONAL OIL & GAS INVESTMENT: MOVING EASTWARD? (1994), at p.174.

versal recognition and legitimacy, there could well be some concerns expressed over its perceived generality, vagueness, imprecision, incompleteness and perhaps its unpredictability[1] – i.e. concerns similar to those expressed about the lexmercatoria[2]. Amongst some of the key reasons given for not applying the lexmercatoria in arbitral awards, for instance, are its perceived uncertaintyand elusiveness, in addition to the indeterminate nature of its rules[3].

However, these potential concerns should not discourage efforts (such as the one involved in this study) aimed at the conceptual development of an autonomous new legal order for the international settlement of disputes in the upstream development of petroleum resources. This is more so because the present system has clearly demonstrated its inability to find effective solutions to the legal problems of this sector, especially as concerns the rival claims associated with the concepts of international property rights and sovereign rights.

7. Conclusion

In concluding, it is important to point out that the conceptual basis of the proposed new legal framework is founded on the premise of an autonomous, authoritative, unified and universally recognized and accepted system of law[4]. What we envisage as part of our proposal is a specific legal and institutional frame-

1- D. Bowett, State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach, 59 BRIT.Y.B.INT'L L. 49 (1988), at p.52.

2- Ana Mercedes López Rodríguez, Lex Mercatoria, RETTID (2002), at 44, available at http://www.rettid.dk/artikler/20020044.pdf

3- Joanna Jemielniak, Legitimization Arguments in the Lex Mercatoria Cases, 18 INT'L J. FOR THE SEMIOTICS OF LAW 175 (2005), at p.200.

4- For similar arguments in relation to the lexmercatoria for international trade and commerce, 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.

work which will provide a comprehensive basis for the effective categorization of upstream petroleum development agreements by providing the basis for the applicable law in dispute settlement. Amongst its main attributes will be the equitable principle of 'good faith' which will serve as the guiding principle for the judicial construction and interpretation of the rights and obligations of the parties. In postulating this view we may draw comfort from a number of arbitration awards, in particular Petroleum Development Ltd v Sheikh of Abu Dhabi[1] and Sapphire International Petroleum v National Iranian Oil Company[2]. The judicial renderings in these two cases(based on the "modern law of nature" and the common practice of civilized nations)drew on equitable concepts such as the 'spirit of good will', 'integrity' and 'reason' in passing judgment[3].

The process of developing the substantive content of the new legal framework is expected to comprise of two further steps: the first step relates to the identification of the various normative sources, and the second step to the collating of the main body of rules and principles which will form the basis of the applicable law. We envisage that the second step will involve a codification process based on a list of substantive governing principles (including those outlined in Section 6.3 above). We also expect the procedure for identification, collation and codification will be similar to that proposed by Lord Mustill, or to the principles proposed by Professor Berger as the basis for the codification of the lexmercatoria[4]. Finally, we would submit (on the basis of our ob-

1- I.L.R. 18 (1951).

2- I.L.R. 35 (1967).

3- Jemielniak, (2005), at p.203.

4- Mustill, The New Lex Mercatoria: The First Twenty Five Years, 4 ARB. INT'L 86 (1988), at pp.110-14; for a list of Professor Berger's principles see BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA (1999), at pp.210-11.

jective assessment drawn from this important study) that the mutuality of interests which is central to our proposed new system has the potential to be a more reliable and effective guarantor of stability, legal certainty and conflict avoidance.

In the table below is represented our main findings from the study, the evidence on which our findings are based, and our key recommendations.

Figure 3:

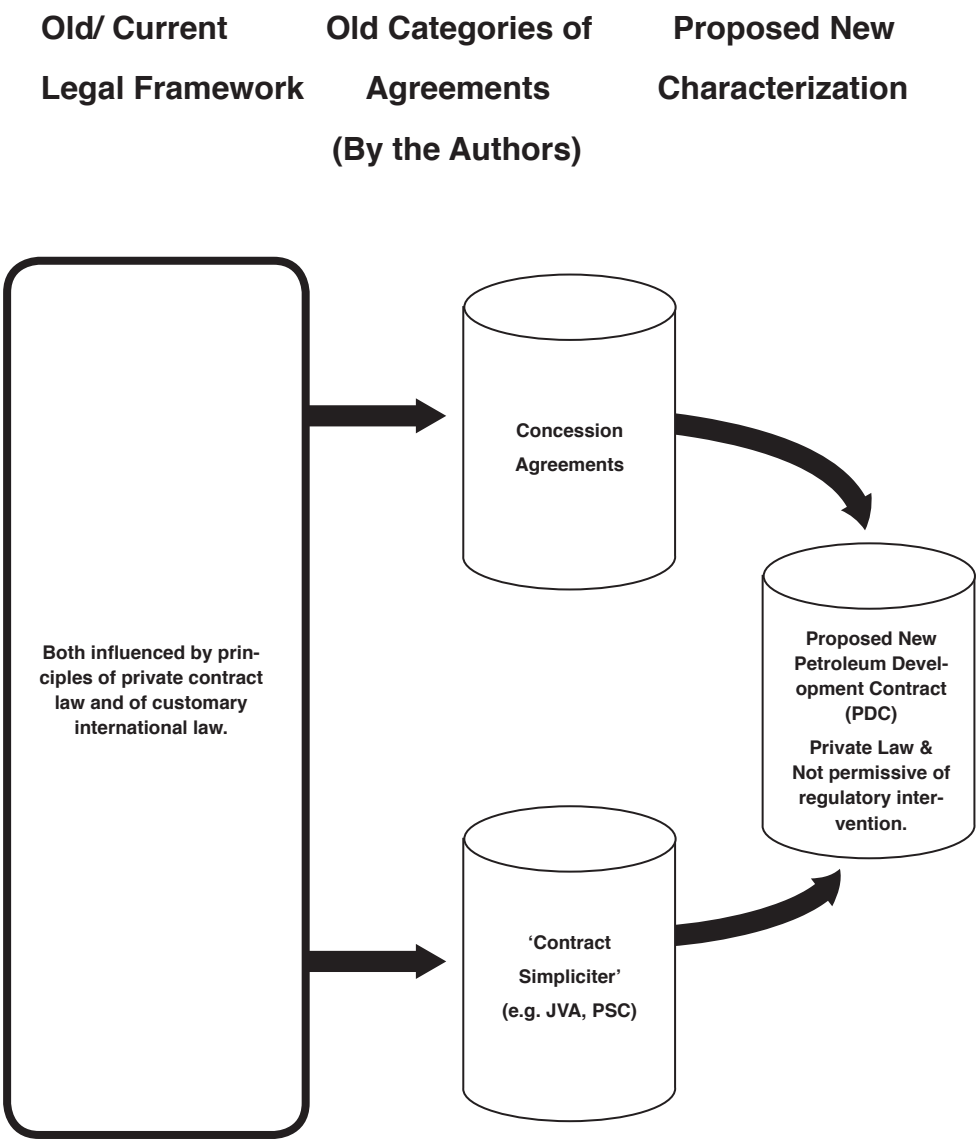
SUMMARY OF MAIN FINDINGS AND RECOMMENDATIONS OF THE STUDY

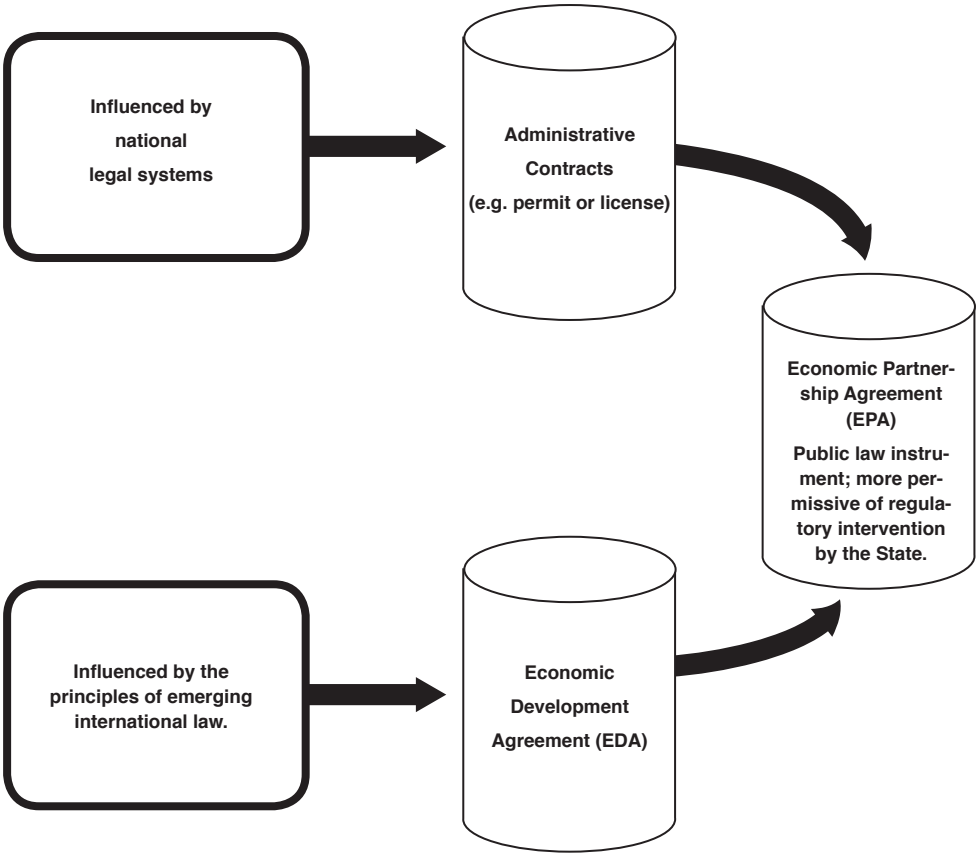
Area of the Study	Findings	Evidence on which the Findings are Based.	Authors' Recommendations
On the present regime for the settlement of disputes in the upstream petroleum industry.	Evidence from the research shows that the current system lacks the required level of authoritativeness, consistency, uniformity and universality. It also suffers from a legitimacy deficit and fails to command the required of confidence in the international community of oil producing nations.	Literature review. Case studies conducted on international arbitration showed inconsistent judgements and renderings by tribunals. Authors' critical appraisal and academic assessment of the substantive rules and procedures.	The authors have developed a conceptual framework as part of the study which they recommend as a replacement for the current regime – i.e. a proposed new lexspecialis specifically tailored for the upstream petroleum industry to regulate the relationship between oil producing nations and international oil companies.
On the role of national legislation and the municipal legal system in dispute settlement in the upstream petroleum industry.	The study found that national legislation and the national legal system has historically played a very limited role in the arbitration of upstream oil industry disputes, especially at the level of international arbitration.	Evidential sources include the literature review and critical case studies of arbitral awards including Aminoil Oil v Kuwait; Aramco case; BP v Arab Republic of Libya; and other cases from the Iran-US Claims Tribunal.	The study recommends an enhanced role for national legal systems in the prioritization of sources of law as part of the proposed new legal system.

On the procedural questions of jurisdictional competence and applicable law in upstream petroleum industry disputes.	The objective conclusions of the study were that the current approach to procedural questions is unsatisfactory in granting locus standito multinational corporations based on principles of public international law while paying little attention to the doctrine of sovereign immunity and national jurisdictional competences.	Evidence for this finding is based on a critical assessment and appraisal or relevant principles, cases and doctrinal debate by academic commentators on these key issues.	The authors re-emphasize the necessity for a new system which is better suited to the private-public and national-international law dichotomous character of upstream petroleum industry disputes.
On the key question relating to the characterization of upstream petroleum development agreements.	The authors' main finding is based on the argument that the EDA characterization and those preceding it are now obsolete and out-dated after more than 50 years in existence, in which time the upstream petroleum industry has evolved new types of agreements.	Evidence for this finding is drawn from a critical review of the historical evolution of upstream petroleum agreements, from the colonial concession type agreements to production sharing contracts, joint ventures and service agreements.	One of the study's key recommendations is the replacement of the current formulae for characterization with a new all-inclusive system which has an inbuilt flexibility aimed at distinguishing between administrative and contractual types of upstream petroleum development agreements. This will address the problem of private-public character dichotomy of such agreements.
On the long standing question regarding the accepted standard of compensation for regulatory interference, direct and indirect takings (i.e. expropriation, nationalization, creeping expropriation, etc.)	The study came to an objective conclusion that there is still a great deal of confusion and uncertainty regarding the applicable standard of compensation.	Evidence for tis finding came from the literature review, and from a historical overview and critical examination and appraisal of relevant concepts and legal principles.	The authors recommend the adoption of "appropriate compensation" in view of its flexibility over the full compensation standard. The study argues that "appropriate compensation is better suited to taking into account the history and evolution of the upstream petroleum development project.

APPENDIX 1

New Conceptual Framework of Characterization of Upstream Petroleum Development Agreements





Source: M. Al-Saeed & G. Ndi (2013)

7. Selected References

7.1 Books

- Arsanjani, M.H., International Regulation of Internal Resources: A Study in Law and Policy (1981).
- Al-Qasem, A., Principles of Petroleum Legislation (1985).
- Cassese, Antonio, International Law in a Divided World, (1986).
- Cattan, Henry, The Law of Oil Concessions in the Middle East and North Africa (1967).
- Delaume, Georges, Transnational Contracts: Applicable Law and Settlement of Disputes (1992).
- García-Amador, Francisco V., The Changing Law of International Claims (1984).
- Hartshorn, J.E., Oil Companies and Governments (1965).
- Higgins, Rosalyn, Conflict of Interests: International Law in a Divided World (1965).
- Hossain, Kamal, Law and Policy in Petroleum Development: Changing Relations Between Transnationals and Governments (1979).
- Mitchell, J.D., The Contracts of Public Authorities (1954).
- Steiner Henry J., &VagtsDetlev F., Transnational Legal Problems (1986).

7.2 Articles

- Attwell, J., The Changing Relationships between Host Governments and International Companies, 17 Houston Law Review 1055 (1980).
- Asante, Samuel K.B., International Law and Investments, 37 Int'l & Comp. L.Q. 588 (1988).
- Barraz, Pierre, The Legal Status of Oil Concessions, 5 JWTL (1971), 609.
- Brownlie, Ian, Legal Status of Natural Resources in International Law (Some Aspects), 162 Hague Recueil des Cours (1979-I), 249.
- Delaume, Georges, The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal, 3 ICSID Rev.-FILJ 79 (1988).
- Delaume, Georges, State Contracts and Transnational Arbitration, 75 Am. J. Int'l L. 784 (1981).
- Dabinovich, T., Petroleum Service Contracts in Argentina, Brazil and Columbia: Issues Arising from their Legal Nature, 5 JERL 15 (1987).
- Dickstein, M., Revitalizing the International Law Governing Concession Agreements, 16 Int'l Tax. & Bus. L. 54 (1988).
- A. Fatouros, International Economic Development Agreements and Illusion of Legal Certainty, 57 ASIL Procs. (1963),117.
- Francisco García-Amador, Current Attempts to Revise International Law: A Comparative Analysis, 77 AJIL (1983), 286.
- John Vafai, Conflict Resolution in the International Petroleum Industry, 5 JWTL (1971), 427.

- R. K. Venkata, Transnational Corporations, International Law and the New International Economic Order, 6 Syracuse Jn. Int'l Law & Commerce (1978), 14.
- Alfred Vedross, The Status of Foreign Private Interests Stemming from Economic Development Agreements with Arbitration Clauses, in Selected Readings on the Protection by Law of Private foreign Investments, (1964), 117.

7.3 Indicative List of Cases

- Alcoa Minerals of Jamaica Inc. v. Government of Jamaica, 4 Yrbk Comm. Arb. 206 (1979).
- Anglo-Iranian Oil Company Case (UK v Iran), PCIJ Rep. 21 (1951).
- BP Exploration Co. (Libya) Ltd v Government of the Libyan Arab Republic, 53 ILR 300 (1979).
- Elf Aquitaine Iran v. National Iranian Oil Company, Rev. de l'Arb. 413 (1984).
- Government of the State of Kuwait v. Aminoil, 27 ILM 976 (1982).
- Mobil Oil (Iran) Inc. v. Iran, 16 Iran-US CTR 3 (1987-III).
- Oil Fields of Texas Inc. v. Iran, 1 Iran-US CTR 347 (1981-82).
- Phillips Petroleum Co. (Iran) Inc v. Iran, 21 Iran-US CTR 79 (1989-I).
- Sapphire International Petroleum Ltd v. National Iranian Oil Company, 35 ILR 136 (1967).