THE APPLICABILITY OF HOST DEVELOPING COUNTRIES' LAWS TO INVESTMENT CONTRACTS - THE AFRICAN CASE

AUGUSTUS ASANTE AGYEMANG*

I. INTRODUCTION

A major explanation for the reluctance of some African States to submit to international adjudication of investment disputes after agreeing in investment contracts to do so[1] lies in the fact that they want their laws to govern investment contracts. For instance, Algeria and Egypt often insist upon the application of their substantive laws to investment contracts.[2]

This Article argues for the exclusive application of the national laws of African host states to investment contrats. The concern is with such laws as the applicable substantive laws, that is, the laws which govern th legal rights and obligations of the parties to an investment contract as opposed to procedural laws which concern matters like the mode of appointment of arbitrators, the filing of pleadings and the form of awards. The discussion is made with respect to the situation where parties to an investment contract have failed to make provision for the applicable law.

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* Administrative Service Officer, Department of Industrial Relations, Canberra, Australia. Barrister and Solicitor, Supreme Court of Ghana.

1. See e.g. Holiday Inns/Occidental Petroleum v Government of Morocco, 51 BRIT. Y.B. INT'L. L. 123 (1980). See also Societe Ltd Benvenuti et Bonfant Srl. (Italy) v The Government of Congo, 21 I.L.M. 740 (1982).

2. McLaughin, Arbitration and Developing Countries, 13 Int'l. Lawyer 211, 219 (1979). These African States are by and large unhappy with the application of the traditional principles of international law to such contracts because they harbour the view that "... international law had been first developed in the age of colonial domination to serve the interests of some twenty countries. The countries of the third world had never had any voice in the matter and it would hardly be realistic to suppose that international law could work in their favour". See U.N. Off. Rec., G.A. (S-VI), Ad-hoc Ctee., 5 mtg., para 48.

II. ARGUMENTS AGAINST THE APPLICATION OF THE AFRICAN HOST STATE'S LAW

Foreign investors are generally reluctant to permit a developing host state's law to govern investment contracts because of the possibility that the host state might change such law to the detriment of their investments.[3]

This explains why when a host African State's law is made the applicable law, it is often frozen by means of a stabilization clause for the entire duration of the investment contract. For instance, the Concession Agreement between the Government of Liberia and the Liberian Iron and Steel Corporation (LISCO) signed on June 2, 1975, for the exploitation of iron ore reserves of the Wologisi Range in Liberia provides in Article 21 that the

> "concession shall be governed, construed and interpreted in accordance with the laws of the Republic of Liberia excluding, however, any enactment passed or brought into force in the Republic of Liberia before or after the date of this Concession Agreement which is inconsistent with or contrary to the terms hereof".[4]

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3. See e.g., Texaco/Calasiatic v Libya, 17 I.L.M. 1, 17 (1978) Writing on investing in Ghana, Tyler comments that "while Ghanaian laws relating to foreign investment are attrative ... an investor cannot feel secure that these laws will remain in effect for any substantial period of time". See Tyler, Legal Aspects of Investing in Ghana, 7 Loy. L.A. Int'l & Comp. L. JL. 165, 192 (1984).

4. FISCHER, A COLLECTION OF INTERNATIONAL CONCESSIONS AND RELATED INSTRUMENTS, V01.1, 113 (1981). Other examples of such a clause are
(a) clause 16(2) of the standard form of deed of concession of the Libyan Petroleum Law of 1955 which was a common clause found in oil concessions granted by Libya to certain foreign oil companies which provided that "this concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force

The purport of such provisions is to create an enclave status for the agreement within the legal system of the host state. Because some host states could unlawfully terminate investment contracts containing such provision, they are not in themselves absolute security for the continuance of the investment. They, however, provide the investor with a strong basis for challenging such unlawful abrogation of investment contracts before international tribunals because the effect of the clause is that the host state concedes its exercise of sovereignty over the investment, during the life-time of such investment.[5]

In the African context, such stabilisation clauses are often reinforced with bi-lateral investment protection treaties with the

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4. (contd)
on the date of execution of the agreement of amendment by which this paragraph (2) was incorpoated into this concession agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the company without its consent". See Texaco/Calasiatic Award on the Merits, 53 I.L.R. 389, para 3 (1979).
(b) the Master Agreement of December 24, 1969, signed between the Government of Zambia, the Industrial Development Corporation of Zambia (a Zambian Government Agency) and the Roan Selection Trust, a copper mining company, when the Zambian Government acquired a 51% majority interest in the operations of the company. Providing for ICSID arbitration of disputes, the agreement stipulated that the arbitrators should apply "the law of Zambia (including its rules on the conflict of laws) as in force on the date of execution of this Agreement disregarding all legislation, instruments, orders, directions and court decisions having the force of law in Zambia (other than those contemplated by this Agreement) adopted, made, issued or given subsequent to the date of execution of this Agreement". See Brown, Choice of Law Provisions in Concessions and Related Contracts, 39 M.L.R. 625, 627-628 (1976).

5. See Texaco/Calasiatic Arbitration, 53 I.L.R 481-482 (1979).

4. home States of foreign investors.[6] Under some of these treaties, each State party guarantees from expropriation the investment of the nationals of the other State party in its territory.[7] In the treaties between the U.S. and some African States, the U.S. guarantees the investments of its nationals in the territory of the other State party. Where the host state expropriates such investment and the U.S. indemnifies its national for this loss, it becomes subrogated to the interests of its national against the host state.[8] The importance of investment protection in Africa is evidenced by the Models for Bi-lateral Agreements on Promotion and Protection of Investments prepared by the Asian-African Legal Consultative Committee to assure the "promotion and protection of investments primarily in the context of economic co-operation between the countries of the Asian-African region".[9]

Some African States have sought to allay the fears of investors by stipulating guarantees against arbitrary expropriation in their investment laws. For example, the Draft Investment Code, 1984, of

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6. Typical examples of such treaties are, the Treaty of December 6, 1983, between the U.S. and Senegal in ICSID, INVESTMENT TREATIES, VOL.2, RELEASE 84-3, issued December, 1984 (1983). The Treaty of September 11, 1970, between the Netherlands and Kenya, Id., Vol.1, 25 (1970). The 1982 Treaty between the U.S. and Egypt, Id., Vol.2, 59 (1982). Treaties between the U.S and Botswana in ICSID, INVESTMENT LAWS OF THE WORLD, VOL.1, the U.S. and the Republic of Congo, Id., Vol.10, the Federal Republic of Germany and Ghana,)).

7. See e.g., art. 3 of the Federal Republic of Germany-Ghana Treaty, Id.; the Egypt-U.S. Treaty of September 29, 1982 Concerning the Reciprocal Encouragement and Protection of Investments, 21 I.L.M. 927, 934 (1982).

8. Art. 3 of the Botswana-U.S. Treaty in ICSID, INVESTMENT LAWS OF THE WORLD, Vol.1, art. 2 of the U.S.-Republic of Congo Treaty in ICSID, INVESTMENT LAWS OF THE WORLD, Vol.10.

9. 23 I.L.M. 237 (1984).

5. Ghana which has recently been enacted into law provides in Article 30(1) that

> "subject to the provisions of this code
> (a) no enterprise approved under this code shall be subject to expropriation by the Government;
> (b) no person who owns, whether wholly or in part, the capital of an enterprise approved under this code shall be compelled by law during the period the enterprise continues to enjoy benefits under this code to cede his interest in the capital to any other person;
> (c) benefits attached to an approved enterprise at the time of approval shall not, except under Section 45 or 46 of this code, be altered subsequently to its disadvantage".10

Under Article 30(2), approved enterprises could be taken over only in exceptional circumstances and even the, such take over must be in the public interest with the Government paying or ensuring that adequate, fair and prompt compensation is paid.

Policy statements by various governments have in the past disavowed the possibility of unlawful expropriation. For example, in 1962, the then President of Ghana said that

> "our Government has no plans whatever to take over industries in the private sector ... where Government has taken over private industry, it has done so either because - as in the case of the acquisition of the gold mines - the owners had indicated their intention of closing down, or - as in other cases - because the owners themselves had made proposition to the Government. The Government has in no case attempted to expropriate enterprise ... where it becomes necessary to take over private business at the request of private enterprise itself, the Government will ... ensure that adequate compensation is paid to the owner."11

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10. WEST AFRICA MAGAZINE, 629, March 24, 1986. GHANA'S DRAFT INVESTMENT CODE, 1984.

11. WEST AFRICA MAGAZINE, 1095, October 6, 1962. The Government of Nigeria stated that there are "no plans for nationalising industry beyond the extent to which public utilities are already nationalised . . should this occur then fair compensation assessed by independent arbitration will be paid". See Akinsanya, Host Governments' Responses to Foreign Economic Control: The Experience of Selected African Countries, 30 I.C.L Q. 769, 771 (1981).

By these various treaties, legislation and policy statements, the African states concerned have committed themselves not to adopt laws terminating an investment contract and thus they have guarantees that if their laws are stabilised in investment contracts they will not unlawfully enact legislation to change them so as to terminate such investment contracts.

Another argument traditionally employed to prevent the law of a host eveloping state from governing and regulating investment contracts is that such host states may lack laws sufficiently developed and matured to deal with the complex and complicated issues raised by investment contracts.[12] This argument, however, cannot be applied

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12. Spofford, Third Party Judgment and Economic Transactions, 113 HAGUE RECUEIL 121, 190 (1964). McNair, The General Principals of Law Recognised by Civilized Nations, 33 brit. Y.B. Int'l L. 1, 3 (1957). GHANA HANSARD (OFFICIAL PROCEEDINGS OF THE GHANA PARLIAMENT) 99 (1961). In the Sheikh of Abu Dhabi Case, Lord Asquith noted that "if any municipal system were appalicable, it would prima facie be that of Abu Dhabi" but rejected the application of this law because "... no such law can reasonably be said to exist. The Sheikh administers a purely discretionar justice with the assistance of the Koran and it would be fanciful to sugggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments". See 18 I.L.R. 144, 149. A similar position was taken in 1953 by Sir Alfred Bucknill as a Referee in Ruler of Qatar v International Marine Oil Company Limited. After pointing to certain facts which pointed to the application of the law of Qatar, Islamic law, to the agreement, namely, the fact that it was written in Arabic, the fact that it involved the extration of oil from Qatar's soil, the fact that the Ruler as a party to the contract had the right to designate Qatar as the place of arbitration, he rejected the idea that a modern oil concession could be governed by the legal system prevailing in Qatar at that time. He held that "the law (the Islamic Law as administered in Qatar) does not contain any principles which would be sufficient to interpret this particular contact". See 20 I.L.R. 534, 545.

to African host states with the same force. Most of these states[13] were formerly colonies of metropolitan powers like France,[14] Spain,[15] Briatin,[16] Portugal,[17] and Belgium[18] and their legal systems are based on either the English common law system or the Continental civil law system - the principal legal systems of the world.

Apart from this consideration, African states have enacted modern arbitration statues, investment laws, constitutions and decrees to provide comprehensive laws to govern investment contracts.[19] Examples of such regulations are the Models for Bi-lateral Agreements on Promotion and Protection of Investments prepared by the Asian-African Legal Consultative Committee,[20] the Djibouti Code of International Arbitration of February 13, 1984,[21] the Kenyan Foreign Investments Protection Act of 1953,[22] and Mozambique's Foreign Investment Law, Law No.4/84 of August 18,

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13. The only notable exceptions are Ethiopia and Liberia but the Liberian legal system, for instance, has been much influenced by the U.S. Common Law.

14. See e.g., Togo, Algeria, Ivory Coast, Senegal, Guinea and Gabon.

15. See e.g., Equatorial Guinea and the Spanish Sahara.

16. See e.g., Nigeria, Ghana, Zambia, Kenya and Botswana.

17. See e.g., Angola, Mozambique and Guinea Bissau.

18. See e.g., Zaire, Rwanda and Burundi.

19. See e.g., ICSID, INVESTMENT LAWS OF THE WORLD, Vols. 1-4.

20. 23 I.L.M. 237 (1984).

21. 25 I.L.M. 1 (1986).

22. ICSID, INVESTMENT LAWS OF THE WORLD, Vol 4.

8. 1984.[23] African host states, therefore, have comprehensive laws capable of regulating investment contracts and making such laws the governing substantive laws of investment contracts will not prejudice the interests of foreign investors because there are in place in Africa, safeguards to assure the stability of investment contracts.

III. STATE PRACTICE

According to Walde, recent arbitration clauses in the petroleum contracts of African States like algeria and Libya reflect a clear and definite trend towards the exclusive application of the law of the host state.[24] He affirms that the same trend is noticeable with respect to mineral contracts.[25] Some publicists also assert that in practice, the tendency in investment contracts is towards making provisions for the application of the law of the host state.[26]

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23. Id., Vol.6; See also, Ghana's Act 437 of August 11, 1981 relating to the Investment Code of 1981, ICSID, 17 ANNUAL REPORT, 1982/1983, ANNEX 4, 23, Benin's Law No.82-005 of May 20, 1982 relating to the investment Code,))., and Sudan's Encouragement of Investments act, 1980, Id. See also, the Investment Act 1986 of Zambia in 12 COMMONWEALTH LAW BULLETIN 635 (1986).

24. Walde, Negotiating for Dispute Settlement in Transnational Mineral Contrats: Current Practice, Trends and an Evaluation from the Host Country's Perspective, 7 DENVER JL. OF INT'L L. & POL. 1: 33, 45 (1977).

25. Id.

26 E.g., Smith and Wells assert that "increasingly, whether the concession agreement calls for resort to arbitration or to host country courts, the law of the host country is explicitly invoked". See SMITH & WELLS, NEGOTIATING THIRD WORLD MINERAL AGREEMENTS - PROMISES AS PROLOGUE 122, 125 (1975). In a review of State practice, Kuusi notes that "the classical doctrine

9. This tendency has been justified by reference to certain authorities. The first such authority is the dictum of the Permanent Court of International Justice in the Serbian Loans Case that "any contract which is not a contract between states in their capacity as subjects of international law is based on the municiapl law of some country".[27]

Secondly, reference is made to the activities of States within the United Nations especially with respect to the United Nations Resolutions on Permanent Sovereignty of States over their Natural Resources and the Establishment of a New International Economic Order[28] in order to argue that, because these resolutions affirm the right of States to permanent sovereignty and control over their natural resources, they assert a trend to subject natural resources development contracts and disputes arising from them entirely to local laws and regulations.[29] Reinforcing this trend are the activities of producer organisations like OPEC.[30] For instance,

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26. (contd)
according to which State contracts with foreigners are governed by national legal systems seems to have regained support". He concludes that "the policy of subjecting all State contracts with foreigners to national laws of host states ... is presently adhered to by a unified group of more than one hundred developing countries". See KUUSI, THE HOST STATE AND THE TRANSNATIONAL CORPORATION, ANANALYSIS OF LEGAL RELATIONSHIPS 164 (1979).

27. P.C.I.J. SER. A. NO.20, JUDGMENT 14, 41 (1929).

28. See G.A. Res. 1803 (XVII), G.A.O.R. 17 Session, Suppl. 17, 15. G.A. Res. 3281 (XXIX), 14 I.L.M. 251 (1975). G.A. Res. 320 (S-VI), 12 I.L.M. 715 (1974).

29. Onejeme, The Law of Natural Resources Development: Agreements Between Developing Countries and Foreign Investors, 5 No.1 SYR JL. INT'L L & COMM., 1, 4, (1977).

30. See e.g., 10 I.L.M. 1082 (1971). See also, 13 I.L M., 221 (1973).

10. OPEC Resolution XVI-90 of 1960 provides for the exclusive application of the host state's law to dispute over petroleum investments.[31]

Thirdly, reference is made to the traditional rules of conflict of laws which seem to support the position that the legal system with the closest and most real connection to the agreement should govern it.[32] Thus, according to an Iranian Court decision,

> "the material and spiritual relations which link the concession agreement to the laws and the judicial system of the grantor state support and confirm its continuing and constant control".[33]

The law of the host African State should be the applicable law of an investment contract because, in most cases, the agreement has a major impact on such host State's social, economic and legal

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31. See Declaratory Statement of Petroleum Policy in Member Countries, OPEC Res. XVI-90, reprinted in 7 I.L.M. 1183 (1968). Commenting on this provision, Dr Zakariya, Chief of OPEC's Legal Department said that "there was no reason to continue the tradition o divorcing oil contracts from domestic legal systems; on the contrary, the subjection of oil concessions and contracts to national laws would be likely to facilitate the further refinement of the laws concerned". See Zakariya, Some Analytical Comments on OPEC's Declaratory Statement of Petroleum Policy, 12 MIDDLE EAST ECONOMIC SURVEY, SUPPLEMENT TO NO.16 (February 14, 1969).

32. See e.g., Adan Deria Gedi v Sheikh Salim El Amoudi, 1 AFRICAN LAW REP. (COMMERCIAL) 385 (1964). See also, SPP (Middle East) Ltd., SPP Ltd., v Egypt, 22 I.L.M. 752, 769 (1983).

33. See Iranian Court Decision on Arbitral Award in Dispute Between Sapphire International Petroleum Ltd., and the National Iranian Oil Co., Judgment of December 1, 1963, Court of First Instance, Teheran, reprinted in 9 I.L.M. 1118, 1123 (1970). In the same vein, an African commentator asserts that "there must be a selection from among interested jurisdictions the one jurisdiction whose dominant interest justified the application of its substantive rules for the resolution of the conflict which has arisen". See Onejeme, supra note 29, 15.

11. systems. It may, for instance, involve the investment of vast amounts of capital and the erection of permanent installations over a large part of its territory and in view of this, it has been difficult "to justify provisions in an agreement which in effect exempt an investor from the operation of local law or which apply another law".[34]

Fourthly, a lot of investment contracts provide for the application of the law of the host African State as the substantive law. For example, the Agreement between Getty and SONATRACH, the Algerian state oil concern, provides that the relationship between the parties is governed by Algerian law.[35] Section 32 of the Concessions Agreement between the Government of Liberia and the Liberia Gold and Diamond Corporation of September 20, 1976 provides that "this agreement shall be governed, construed and interpreted only in accordance with the laws of the Republic of Liberia".[36] Thus the practice of states as expressed in investment contracts supports the application of the laws of African host states to investment contracts.

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34. Lipton, Negotiating a Concession Agreement: from the Host Government's Point of View in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN BLACK AFRICA 78 (1975).

35. Isaad, National Report on Algeria, 4 YEARBOOK OF COMMERCIAL ARBITRATION 7 (1979).

36. FISCHER, A COLLECTION OF INTERNATIONAL CONCESSIONS AND RELATED INSTRUMENTS, Vol.3, 433, 434 (1983). Also to similar effect are (a) art. 8(1) of The Concessions Agreement in Joint Venture Form Between the Government of Sierra Leone and SILETI of Italy signed on January 30, 1975, for the exploitation of certain forest reserves which provides that "the agreement shall be governed, construed and interpreted only in accordance with the laws of the Republic of Sierra Leone". Id., Vol.1, 1 (1981). (b) the contract between SONATRCH and TECHNIP of March 15, 1973, which stipulated that "the applicable law is the law in force in Algeria". See Issad, Supra 6.

12. Finally, some African states have enacted laws which oblige foreign investors to locally incorporate before they can operate on their territories. For example, under the Companies Decree of Nigeria, all foreign enterprises are required to be incorporated under Nigerian law.[37] The Nigerian Petroleum Decree of 1969 which regulates the petroleum industry vests ownership and control of all petrleum enterprises in the hands of Nigerians.[38] By its terms,

> "licences and leases to explore, prospect and mine petroleum may be granted only to
> (a) a citizen of Nigeria or
> (b) a company incorporated in Nigeria under the Companies Decree of 1968 or any corresponding law".[39]

Articles 1 and 2 of Ordinance No.7-22 of April 12, 1971, require foreign investors to operate in Algeria through locally incorporated subsidiaries.[40] In the Holiday Inns Arbitration, the foreign investors involved in the arbitration had to incorporate four local companies because the Moroccan Government required them to do so.[41] Such incorporation makes them nationals of the host state subject to national law. State practise therefore supports the application of African host states' laws to investment contrcts.

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37. See e.g., Oil Prospecting License No.90, granted to Occidental Petroleum of Nigeria, Annex 1, H in OPEC, SELECTED DOCUMENTS 203, 217 (1971). See also, art. 369 of the Nigerian Companies Decree, No.51 of 1968.

38. See arts. 2(2)(a) and 2(2)(b) of the Nigerian Petroleum Decree of 1969.

39. Id.

40. OPEC, SELECTED DOCUMENTS OF THE INTERNATIONAL PETROLEUM INDUSTRY 35 (1971).

41. Lalive, The First World Bank Arbitration (Holiday Inns v Morocco) - Some Legal Problems, 51 BRIT. Y.B. INT'L. L. 123, 137-142 (1980).

13 IV. THE APPLICABILITY OF INTERNATIONAL LAW TO INVESTMENT CONTRACTS - THE INTERNATIONALISED CONTRACT

Even though a number of publicists have argued that international law should be the applicable substantive law of investment contracts,[42] the preferable view is that international law should not be applied in this way to such contracts.

In the first place, international law lacks a sufficiently developed and well-equipped legal technique for dealing with the numerous issues of private law which disputes over such agreements raise.[43] For instance, it does not

> "indicate the influence of mistake on the agreement - does mistake render the contract void or voidable or neither? Is a set-off allowed and in what circumstances? ... International law gives no answer to such questions."[44]

Secondly, once international law is determined to be the applicable law, it means that "for purposes of interpretation and application of the concession, the grantor (the State) agrees to treat the grantee as if the latter had international personality".[45] This is an unacceptable position because international law applies

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42. See e.g., Mann, The Proper Law of Contracts Concluded by International Persons, 35 BRIT, Y.B. INT'L. L. 34, 43 (1959). JESSUP, A MODERN LAW OF NATIONS 141 (1959). Friedman, The Relevance of International Law to the Processes of Economic and Social Development in FALK & BLACK, THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, Vol.2,3,27 (1970).

43. Wolff, Some Observations on the Autonomy of Contracting Parties in the Conflict of Laws, 35 FROTIUS TRANSACTIOLNS 143, 152 (1950).

44. Id.

45. Schwarzenberger, The Protection of British Property Abroad, 5 CURR. LEG. PROBS. 295, 315 (1952).

14. primarily to the relations between sovereign states or states and international organisations and should not apply to investment contracts as the substantive law.[46] Most developing countries support this position and affirm that such agreements are not subject to international law but to the law of the host state.[47] Indeed, the impact of Article 42(1) of the ICSID Convention, which makes international law applicable to investment contracts, on ICSID is said to be negative because it has probably deterred some developing countries from using ICSID to settle their investment disputes.[48]

In the Texaco/Calasiatic v Libya arbitration, Professor Dupuy held that the deed of concession, the subject-matter of the dispute, was an internationaalised contract because it was an economic development agreement, it contained a provision for international arbitration and it made reference to the principles of international law as a standard for the application of Libyan law and subsidiarily, to the general principles of law.[49] He noted that "the fact of having requested the President of the International Court of Justice to appoint the Sole Arbitrator can only reinforce the necessity of subjecting this arbitration directly to international law".[50]

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46. Verdross, The Status of Foreign Private Interests Stemming from Economic Development Agreements with Arbitration Clauses in SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS 117; 123 (1964).

47. Kuusi, supra 123-127. Castaneda, U.N. Prov. Rec., Gen. Assembly XXIX, 2 Ctee., 1638 mtg., 5.

48. Id., 156.

49. 4 YEARBOOK OF COMMERCIAL ARBITRATION 177, 181 (1979).

50 17 I.L.M. 1, 9 (1978).

Professor Dupuy argued that where there is an international contract, the parties contract as equals and the host state is bound by any guarantee it gives to the private party.[51] Such a guarantee in the form of a stabilisation of rights clause, has the effect of removing "all or part of the agreement from the internal law and to provide for its correlative submission to ... a system which is properly an international law syustem".[52] The host state confers on the private party an international capacity limited to the contract between the parties.[53] The agreement fetters the sovereignty of the host state and even though it has the enjoyment of permanent sovereignty over its natural resources, the exercise of such sovereignty is limited by the agreement during its duration.[54] The host state, therefore, could not rely on its sovereignty to terminate the agreement during its duration because it has by virtue of this same sovereignty bound itself not to take such action during the tenure of the contract.[55]

This decision has been severely criticized by several commentators. According to White, "State practice ... is almost totally at variance with this analysis ...".[56] Professor Fatouros emphasises

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51. 53 I.L.R 389, 468-483 (1979).

52. 17 I.L.M. 17 (1978).

53. 53 I.L.R. 457-460 (1979).

54. Id., 481-482.

55. Id., 494-495. See also Mann, The Law Governing State Contracts, 21 BRIT Y.B. INT'L. L. 11, 19 (1944).

56. See White, Expropriation of the Libyan Oil Concessions - Two Conflicting International Arbitrations, 30 I.C.L.Q.1, 11 (1981)

that "the award disregards state practice, in favour of doctrinal pronouncements and a small number of arbitral awards" and that

> "the international law of contracts is at best a fragile structure based on the capacity of states to assume binding legal obligations toward private persons as evidenced by some state practice, a handful of arbitral awards - in most of which only one party participated - and, by no means least, a veritable mountain of legal writing, not all of it from impartial sources".57

Delaume in commenting on the arbitrator's holding that international law is the law which governs the legal relations between the parties noted that "in view of the clear sequence of the choice-of-law clause agreed upon by the parties, this conclusion appears unwarranted".58 By holding that international law was the govering law of the agreement, the arbitrator minimised the importance of Libyan Law and the general principles of law in the

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57. Fatouros, International Law and the Internationalised Contract, 74 A.J.I.L. 134, 137, 139-140 (1980). Professor Rigaux notes that a State contrat may not be removed from the State's legislative control without some clear indication that the State has so consented. See Rigaux in REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 435, 456-458 (1978). In the Texaco/Calasiatic Arbitration, such clear indication was lacking. Referring to the factors which the arbitrator relied on to hold that the contract was internationalised, Greenwood comments that "unfortunately, the award does not make clear how many of the factors identified by Professor Dupuy as the attributes of such agreements must be present before a contract can be so characterised". See Greenwood, State Contracts in International Law - The Libyan Oil Arbitrations, 53 BRIT. Y.B. INT'L. L. 27, 52 (1982).

58. See Delaume, State Contracts and Transnational Arbitration, 75 A.J.I.L. 784, 797 (1981), The choice-of-law clause, Clause 28(7) provided that "this concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law including such of those principles as may have been applied by international tribunals." See the Texaco/Calasiatic Preliminary Award, 53 I.L.R. 402-404 (1979).

clause when the agreement required a careful balance of the principles of Libyan law common to the principles of international law.[59]

Professor Dupuy's holding unduly fetters the sovereignty of host states over their natural resources and is unlikely to find favour with sovereignty conscious African states. Furthermore, it does not explicate what the international law of contracts consists of, apart fom the principle of pacta sunt servanda referred to in the award.

The application of international law to investment contracts as the governing law will produce uncertainty in settling investment disputes because the rules of international law on investments are controversial. For instance, issues like the assessment of compensation for expropriation or the validity of an expropriation where there is a stabilisation clause are the subject of great disputation among publicists and in international tribunals.[60]

V. CONCLUSION

The law of the host African State should govern investment contracts because state practice supports such a position. African States have developed laws which could be employed to settle investment disputes. These laws often contain safeguards against unlawful

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59. Id.

60. See Smith & Wells, Conflict Avoidance in Concession Agreements, 17 HARV. INT'L. L. JL. 51, 60-61 (1976). B.P. Award, 53 I.L.R. 297, 353-354 (1979). Texaco/Calasiatic Award on the Merits, 17 I.L.M. 27 (1978). LIAMCO v Libya, 20 I L M. 1 (1981)

expropriation. Such safeguards are also provided by the stabilisation clauses contained in investment contracts and the bi-lateral investment protection treaties entered into by African States and the home states of foreign investors. International law should not be applied to investment contracts as the substantive law because it does not govern the relations between a private investor and a host state. It governs primarily the relations between states and its rules on international investment have evoked controversy and are largely of uncertain application.