INVESTMENT CYCLES AND THE RULE OF LAW IN THE INTERNATIONAL OIL AND GAS INDUSTRY:

SOME REFLECTIONS ON CHANGING INVESTOR-STATE RELATIONSHIPS

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I. INTRODUCTION

The linkage between investment cycles and the Rule of Law in the international oil and gas industry has sometimes aroused comment among international lawyers.[1] It remains as topical a subject today as ever, with a sharp and possibly sustained downturn in investment following on a long period of high commodity prices, sometimes called a 'commodities super-cycle.' The confidence of governments in producing countries and many investors that the benefits of high prices would continue for many years has been punctured by events. Nemesis follows hubris, time and time again. Yet the variety of legal instruments designed to counter or mitigate the effects of these swings of fortune – the investment cycles and the political responses they often trigger – has grown both quantitatively and qualitatively. The diversity of players and the quality of advice has grown too. A convenient method of identifying some of the ways in which the contemporary legal landscape has been adapted to improve the management of hydrocarbon resources and anticipate uncertainty is to compare and contrast it with that of the previous downturn. Indeed, such a method is readily available.

Among the many achievements of the University of Houston Law Center and the Houston Journal of International Law is the lead it took twenty-five years ago to design a kind of Best Practice 101 of Oil and Gas Law[2] and ready it for application abroad. The driver behind this exercise was the opening up to the West of the Russian petroleum-bearing provinces at the end of the so-called

1. *See, e.g.*, Thomas W. Wälde, *Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law*, 1 J. WORLD ENERGY L. & BUS. 55, 95-96 (2008) (exploring the ability of the "rule of law" to withstand price cycles in the resource industries); Piero Bernardini, *Stabilization and Adaptation in Oil and Gas Investments*, 1 J. WORLD ENERGY L. & BUS. 98, 98-100 (2008) (discussing contract devices, such as adaptation and stabilization clauses, that mitigate the effects of changing price environments in investment cycles).

2. The outputs from this exercise were contained in a symposium edition of the Houston Journal of International Law. Symposium, *The Russian Petroleum Legislation Project at the University of Houston Law Center*, 15 HOUS. J. INT'L L. (1993). This included a contribution by James W. Skelton, Jr., entitled *Drafting the Russian Law on Oil and Gas: An Industry Lawyer's Perspective*.

Cold War.[3] At the time, the international oil and gas industry was still reeling from the loss of control over Middle East oil and was looking for a new frontier province where abundant supplies of petroleum would be found.[4] There was a perception that the new market-oriented Russia represented an El Dorado of opportunity for investors at a time of low oil prices.[5] Yet, without sound laws,

3. Gary B. Conine, *Petroleum Licensing: Formulating an Approach for the New Russia*, 15 HOUS. J. INT'L L. 317, 339-40 (1993) (discussing the challenges posed by the opening of the Soviet Union to international energy investment).

4. *See* Steve A. Yetiv, *Global Oil and the World Economy: Less to Worry About Than Meets the Eye*, 6 QUEST 8, 9 (2003) (discussing Russia's emergence as an oil source in the event of conflict with the Middle East). From 1995 through 2000, Russia was the third largest petroleum producing-country in the world. *Total Petroleum and Other Liquids Production*, U.S. ENERGY INFO. ADMIN. http://www.eia.gov/beta/international/ (last visited Apr. 3, 2016) (use visualization controls to select the year of the desired liquid hydrocarbon production data).

5. *See* Sabrina Tavernise, *U.S. Official Sees Russia in Oil Catbird Seat*, N.Y. TIMES (Nov. 29, 2001), http://www.nytimes.com/2001/11/29/business/us-official-sees-russia-in-oil-catbird-seat.html (describing multi-billion dollar investments made by ExxonMobil and ChevronTexaco in Russia during the period). At the time the cyclicality of oil prices was very evident. Fiona Hill & Florence Fee, *Fueling the Future: The Prospects for Russian Oil and Gas*, 10 DEMOKRATIZATSIYA 462, 464 (2002) (describing the cyclical rise and fall of oil prices as it corresponded to the Russian economy). Prices had still not recovered from a serious fall in the mid-1980s and they stayed low for most of the 1990s. *Id.* Then, as now, the price of oil had reached historic lows. *Id.*; James Preciado, *High Inventories Help Push Crude Oil Prices to Lowest in 13 Years*, U.S. ENERGY INFO. ADMIN. (Feb. 4, 2016), http://www.eia.gov/todayinenergy/detail.cfm?id=24832 (discussing how, as of February 2016, crude oil prices in the United States dropped below $30 per barrel). If oil prices had not fallen so low, Mr. Gorbachev, the Soviet President, might not have dissolved the Soviet Union, and there might well have been no end to the Cold War at that time, even if it was likely to happen at some point. *See generally* STEPHEN KOTKIN, ARMAGEDDON AVERTED, 15-28 (updated ed. 2008) (discussing the impact that the fall of oil prices had on the Soviet Union's oil-dependent economy in the 1980s and 1990s); Douglas B. Reynolds & Marek Kolodziej, *Former Soviet Union Oil Production and GDP Decline: Granger Causality and the Multi-Cycle Hubbert Curve*, 30 ENERGY ECON. 271 (2008) (postulating an alternative theory for the impact that the fall in oil prices had on the collapse of the soviet union while noting the predominate theory is that the fall had a direct impact on the Soviet Union's collapse); Michael Reagan, *Putin, Petroleum, and Pantyhose*, TOWNHALL (Mar 6, 2014), http://townhall.com/columnists/michaelreagan/2014/03/06/putin-petroleum-and-pantyhose-n1804878 ("Lower oil prices devalued the ruble, causing the USSR to go bankrupt, which led to perestroika and Mikhail Gorbachev and the collapse of the Soviet Empire."). We are back to the future with the present price fall – or the future is back to the past in this respect. *See* Andrew Critchlow, *Cheap Oil Will Win New Cold War with Putin – Just Ask Reagan*, TELEGRAPH (Nov. 10, 2014, 6:34 AM), http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/11220027/

transparency and an emphasis on best practice in resource management, the more reputable investors hesitated to go in. The Houston initiative was designed to balance a high standard of fairness for the resource owners with the kind of guarantees of a stable legal and business environment that large-scale foreign investment requires.[6] The Rule of Law would replace vague 'arrangements' in which the whims of the State were dominant. The wider significance of this initiative is that it was and remains one of the seminal efforts by world-class academics and leading practitioners of law to design a form of shared governance of petroleum activities between a large capital-importing state and international investors.

In the twenty-fifth anniversary year of this bold academic initiative, the context is once again one of very low oil prices,[7] causing a high degree of uncertainty about what terms of engagement are appropriate for investors to commit to new projects and what governments should be offering them to secure a long-term relationship.[8] I want, therefore, to take the Houston initiative as a starting point for some reflections on how fair and stable cooperation between host governments and investors (we

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CheapoilwillwinnewColdWarwithPutinjustaskReagan.html (noting the parallelism between the early 1990s and the present).

6. Jacqueline L. Weaver, *The History and Organization of Russian Petroleum Legislation Project at the University of Houston Law Center*, 15 HOUS. J. INT'L L. 271, 275 (1993).

7. *Total Petroleum and Other Liquids Production*, *supra* note 4.

8. *See, e.g.*, *New Iranian Oil and Gas Contracts Extend 20-25 Years*, OIL & GAS 360 (Dec. 3, 2015), http://www.oilandgas360.com/newoilandgascontractsextend2025yearsbyiran/ (describing Iran's new "Iranian Petroleum Contracts," which are meant to attract investors and include longer terms, require companies to enter into a joint venture with an Iranian partner, and compensate companies for developing riskier projects); Hamid Ould Ahmed, A*lgerian Court Jails Six in Oil Firm Corruption Case*, REUTERS (Feb. 2, 2016, 1:56 PM), http://www.reuters.com/article/usalgeriacorruptionidUSKCN0VB27W (discussing corruption charges against Algerian state officials for changing contract price terms with international oil companies); Jack Newsham, *Saipem Says Gazprom Owes $827M over Nixed Project*, LAW360 (Feb. 1, 2016, 8:17 PM), http://www.law360.com/articles/753222/saipem-says-gazprom-owes-827m-over-nixed-project (reporting on the cancellation of a large gas pipeline project due to international tensions). In addition, retrospective legislative tax changes have inspired arbitration, increasing the uncertainty. *See, e.g.*, EnCana Corp. v. Republic of Ecuador, LCIA Case No. UN3481, Award, ¶¶ 88, 94 (Feb. 3, 2006) (determining whether a change in tax law applied to a corporation retrospectively).

might call this 'shared governance') might now be framed given developments since then.

As one might expect, there are some issues that the participants in the original project could not have expected to assume the importance they now have and others that have faded into irrelevance.[9] There are also some elements of continuity however. Outside of the United States, the norm then as now is that hydrocarbon resources are owned by the host state;[10] foreign investors need to accommodate themselves to this fact, since they will arrive as guests at their hosts' table, often in a context in which there is a legacy of unhappy contact with the West. How the two sides establish and maintain long-term contractual relationships in an industry characterized by periodic volatility and demands for renegotiation by governments is, and has been, a matter of controversy among scholars and industry experts for decades.[11] In this article I want to focus on two basic themes about this relationship, that were present in the University of Houston Law Center's venture – knowledge asymmetry and the contractual prerequisites of a long-term relationship – and to

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9. *See infra* notes 37-49 and accompanying text. *Compare* GREGORY ZUCKERMAN, THE FRACKERS 13 (2013) (stating that, as late as 2008, Washington and Wall Street bought into the "popular and vaguely Malthusian notion" of peak oil), *with id.* at 3-4 (cheering the demise of the peak oil theory and exalting the benefits of shale drilling and the acceptance of shale drilling internationally, predicting that "global gas production could rise by 50 percent by 2035"). There are few voices of concern about a coming shortage of oil and gas, for example, and the industry itself has changed, being more consolidated now, more technologically sophisticated and no longer seeking that elusive large petroleum-bearing territory where investors can do their business unworried about political risk. Harry R. Weber, *New Technology Boosts Efficiency, Safety of Offshore Drilling*, HOUS. CHRON. (May 4, 2013, 10:42 PM), http://www.houstonchronicle.com/business/energy/conferences/article/New-technology-boosts-efficiency-safety-of-4489110.php; ERNST & YOUNG, NAVIGATING GEOPOLITICS IN OIL AND GAS 2, 8 (2014) (discussing areas in which investment occurred despite political risk).

10. *See* Guillermo J. Garcia Sanchez & Richard J. McLaughlin, *The 2012 Agreement on the Exploitation of Transboundary Hydrocarbon Resources in the Gulf of Mexico: Confirmation of the Rule of Emergence of a New Practice?*, 37 HOUS. J. INT'L L. 681, 695 (2015) (stating that the international legal principle of sovereignty confers nation States jurisdiction over their own natural resources, extending to a certain point in their territorial waters).

11. *See, e.g.*, Wälde, *supra* note 1, at 55-57 (discussing the problem of unilateral host state control over resource contracts); Bernardini, *supra* note 1, at 98 (discussing stabilization clauses as a means of protecting parties' interests).

examine them in the light of events and trends since that time. My guiding assumption is that the spirit of that project remains relevant today, even if some of the problems are new and others have evolved in unexpected ways.

II. THE SEARCH FOR PREDICTABILITY

Let me start with a paradox. The past quarter century has seen a robust growth in concerns and actions to counter the effects of climate change and to reduce the impacts of large-scale fossil fuel usage in modern and modernizing economies.[12] At the same time, there has been an unprecedented increase in the number of countries that are seeking and developing fossil fuels and other minerals. Most of this increase has come from low- and middle-income countries that need to accelerate economic growth in the face of a demographic surge and limited alternatives for growth, such as subsistence agriculture or traditional commodity exports. After a long period of high prices, the commodities super-cycle between 2004 and 2011, *there are now more countries exploring for and extracting oil, gas and other minerals than at any time in history*. Yet much of this growth has occurred in countries with limited institutional capacity and which offer highly volatile environments for investors. This growth has also coincided with a burgeoning literature that emphasizes the risks of reliance on what are sometimes referred to as the 'extractive industries' (EI), which include oil, gas, and mining. Instead of being a path to accelerated economic growth, it warns, such reliance can lead to social dislocation, corruption and economic mismanagement on a large scale: a 'resource curse', rather than a blessing.[13] The authors have no shortage of real-life evidence to

12. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 1207-20 (Vicki Been et al. eds., 7th ed. 2013) (discussing how various countries started addressing global climate change after the Intergovernmental Panel on Climate Change reported in 1995 that humans were influencing the global climate).

13. *See* Isaac Arnsdorf, *The Resource Curse*, BLOOMBERG (Sep. 12, 2014, 8:59 AM), http://www.bloombergview.com/quicktake/resource-curse; *see also* Eyanir Chinea & Corina Pons, *Venezuela Ex-Ministers Seek Probe Into $300 Billion in Lost Oil Revenue*, REUTERS (Feb. 2, 2016, 1:31 PM), http://www.reuters.com/article/us-venezuela-politics-idUSKCN0VB26F (documenting the plight of Venezuela's citizenry following a fall in oil prices); Anatoly Kurmanaev, *Venezuela's Biggest Firm Says Country Needs Foreign Aid*, WALL STREET J. (Feb. 2, 2016, 4:42 PM), http://www.wsj.com/articles/

muster in support of their broad claims. Indeed, contrary to expectations, a significant feature of natural resource development is that over half of the countries whose economies it has driven are *not* catching up in development terms.[14]

In spite of these risks, many governments will surely weigh up their domestic options and conclude that support for extractive activities and engagement with the international energy (and mining) industry holds more prospective benefits than costs. After all, oil, gas, and mineral resource wealth is widespread in developing states where it frequently accounts for a very high share of gross domestic product (GDP), export earnings, government revenues and jobs.[15] Its economic and social

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venezuelasbiggestfirmsayscountryneedsforeignaid1454449374 (discussing Venezuela's food shortage in the wake of the country's economic crisis); Ilya Gridneff, *Soma Oil Lobbies U.K. to Oppose Proposed Somalia Moratorium*, BLOOMBERG (Oct. 1, 2015, 1:03 PM), http://www.bloomberg.com/news/articles/2015-10-01/soma-oil-lobbies-u-k-to-oppose-proposed-moratorium-on-somalia (voicing concerns from international authorities that "oil exploration may fuel violence and corruption" in Somalia). *See generally* Leif Wenar, *Property Rights and the Resource Curse*, 36 PHIL. & PUB. AFF. 2, 2-7 (reviewing events attributable to the resource curse); Ivar Kolstad & Tina Søreide, *Corruption in Natural Resource Management: Implications for Policy Makers*, 34 RES. POL'Y 214 (2009) (discussing the mechanisms driving the ability of governments to abuse natural resources to the detriment of the people).

14. *See* MCKINSEY GLOBAL INST., REVERSE THE CURSE 6 (2013) ("Almost 80 percent of resource-driven countries have below-average levels of per capita income. Since 1995, more than half of these countries have failed to match the global average (unweighted) per capita growth rate.").

15. FISCAL AFFAIRS DEP'T, INT'L MONETARY FUND, FISCAL REGIMES FOR EXTRACTIVE INDUSTRIES 6 (2012), http://www.imf.org/external/np/pp/eng/2012/081512.pdf. No less than one third of the membership of the International Monetary Fund (IMF) comprises "resource-rich" countries, dependent on EI revenues for their future prosperity. *Id.* The IMF has distinguished four groups of resource-rich countries: 1) resource-rich developing countries (it identifies twenty-nine of these); 2) prospective natural resource-exporting low- or lower-middle-income countries (it identifies twelve); 3) upper-middle-income resource-rich economies (it identifies fourteen); and 4) high-income resource-rich countries (it identifies eight). INT'L MONETARY FUND, MACROECONOMIC POLICY FRAMEWORKS FOR RESOURCE-RICH DEVELOPING COUNTRIES, app. 1 at 47-50 (2012), http://www.imf.org/external/np/pp/eng/2012/082412.pdf. In earlier research, it identified over thirty-five developing states as "hydrocarbon-rich" and twenty states as "mineral-rich," based on the following criteria: (1) an average five year share of hydrocarbon or mineral fiscal revenues in total fiscal revenues of at least twenty-five percent; or an average share of hydrocarbon or mineral export proceeds of at least twenty-five percent. INT'L MONETARY FUND, GUIDE ON RESOURCE REVENUE TRANSPARENCY 2 n.8, app. 1 at 62-63 (2007). In most cases the observed shares are well in excess of twenty-five percent. *Id.* app. 1 at 62-63.

transformative potential for any country capable of producing it has long been evident.[16] In a single generation, the conversion of these non-renewable natural resources into other forms of capital can create the kind of wealth and sustainable opportunities that would allow a country to accelerate its transition from poverty to at least middle-income status and for its citizens to enjoy a better quality of life.[17]

For low-income countries dependent upon aid, a policy shift towards EIs offers the prospect of an economy diversified away from subsistence agriculture, a balanced budget, a reduction in foreign debt, savings for a time when the resources decline (and for times when the market price falls), and an opportunity to develop new industries. For countries emerging from serious conflict or severe economic misfortune, a policy shift towards EIs offers the prospect of a fresh start. It is not surprising then that *the number of countries seeking to use oil, gas, and mining resources to make such a transformation in their societies is increasing significantly*.[18] There are now no less than eighty-one countries with economies that are driven by these resources,[19]

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16. *See* AFRICA PROGRESS PANEL, EQUITY FOR EXTRACTIVES 8 (2013) ("Far from being hostage to a non-curable resource curse, this generation of political leaders has an opportunity to harness resource wealth for a transformation in human development."). Even for a high-income, resource-rich, diversified economy like the United States, the economic benefits of large-scale development of unconventional oil and gas resources have been spectacular. ZUCKERMAN, *supra* note 9, at 3 (noting the benefits accruing to the United States because of shale production).

17. *See The Opportunities From Resource Wealth*, EI SOURCE BOOK, http://www.eisourcebook.org/615_21TheOpportunitiesfromResourceWealth.html (last visited Feb. 6, 2016) (noting the many worldwide successes, including select states in the Middle East and North Africa, Columbia, Peru, Malaysia, Chile, Botswana, Brazil, Ghana, and South Africa). Opportunities remain in many countries in Africa, particularly in Mozambique. *See* Manuel Mucari, *Exxon, Eni, Sasol Win Rights to Explore Mozambique's Oil and Gas Reserves*, REUTERS (Oct. 28, 2015, 6:00 PM), http://www.reuters.com/article/mozambique-gas-idUSL8N12S5FR20151028 (reporting that over $30 billion will be invested in Mozambique before 2018 to build liquefied natural gas export facilities).

18. U.N. DEV. PROGRAMME, EXTRACTIVE INDUSTRIES FOR SUSTAINABLE DEVELOPMENT app. fig. (2009), http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Extractive%20Industries/Extractive-Industries-Brochure.pdf.

19. MCKINSEY GLOBAL INST., *supra* note 14, iv. The McKinsey Global Institute defines "resource-driven countries as those economies where the oil, gas and mineral sectors play a dominant role, using three criteria: (1) resources account for more than 20 per cent of exports; (2) resources generate more than 20 per cent of fiscal revenue; or (3) resource rents are more than 10 per cent of economic output." *Id.*

and almost eighty percent of them have below global average levels of per capita income.[20]

In moving ahead with their plans, such countries will typically seek out and rely upon whatever advice they can to help them make the right decisions about the legal and economic arrangements that they will need to put in place. The same combination of public need, unfamiliarity with international practice, and vulnerability that was present at the inception of the Houston project, and which acted as a trigger to its inception, is present among many of the 'resource-rich' states of today. A key difference is that there are many more of them, both large and small, in every continent on the planet, and that their starting point in many cases is significantly weaker than Russia's was a quarter century ago.

In response to this potentially unhappy situation, we may note the increased predictability brought about by rule-making in the international energy industry. The present context is more challenging to capital-importing governments than ever before, and yet, in terms of stability, it is more promising for long-term relationships with investors. The body of energy-related transnational law that has been introduced is very large indeed and justifies a brief listing of examples: 1) in the controversial and booming field of international investment law, where thousands of Bilateral Investment Treaties (BITs) have been concluded since the early 1990s, the number of cases before international tribunals concerning energy disputes has been estimated at forty-three percent of the total;[21] 2) a dedicated investment protection treaty called the Energy Charter Treaty (ECT) came into force in 1998, committing fifty-two States and two international organizations to its principles;[22] 3) in recent years,

20. *Id.*

21. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ISSUE 2016-1, THE ICSID CASELOAD – STATISTICS 12 (2016); Doak Bishop, *Investor-State Dispute Settlement Under the Transatlantic Trade and Investment Partnership: Have the Negotiations Run Aground?*, 30 ICSID REV. 1, 1 (2015).

22. The Energy Charter Treaty, *available for signing* Dec. 17, 1994, 2080 U.N.T.S. 100; *see also The Energy Charter Treaty*, ENERGY CHARTER (Apr. 9, 2015), http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/. For an account of these early years, see PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW 152-64 (2010).

the ECT has become the basis for more investment treaty claims by investors than NAFTA's Chapter 11;[23] 4) a regionally-focused Energy Community Treaty has supplemented the ECT, committing eight States and one international organization to its principles;[24] 5) a comprehensive body of law has emerged in the EU that commits all of its twenty-eight members to an internal market in energy;[25] 6) last, but not by any means least, there have been global and regional instruments to address the effects of global warming on the environment that are linked to the use of fossil fuels in driving modern economies.[26]

To this list of energy initiatives taken largely by states, one may add the many initiatives in rule-making taken by non-state actors. These "soft law" instruments can prove highly influential. For example, the advantages of predictability and certainty have stimulated associations of industry and non-industry players, such as the Association of International Petroleum Negotiators (AIPN) or the International Bar Association (IBA), to introduce and publish model contracts and sets of principles, intended to

23. *See* U.N. CONFERENCE ON TRADE & DEV., IIA ISSUES NOTE NO. 2016-2, INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2014, at 1, 4 (2015) (tracking international dispute venues and noting claims under the ECT surpassed claims brought under Chapter 11 of NAFTA during 2014).

24. Treaty Establishing the Energy Community, Oct. 25, 2005, 2734 U.N.T.S. 3, 6-7.

25. *See* Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 2003/54/EC, 2009 O.J. (L 211) 55 (legislating the most recent rules regarding the internal electricity market); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 2003/55/EC, 2009 O.J. (L 211) 94 (legislating the most recent rules regarding the internal natural gas market).

26. *See* Suzanne Goldenberg et al., *Paris Climate Deal: Nearly 200 Nations Sign in End of Fossil Fuel Era*, GUARDIAN (Dec. 12, 2015, 12:19 PM), http://www.theguardian.com/environment/2015/dec/12/paris-climate-deal-200-nations-sign-finish-fossil-fuel-era (discussing the Paris Agreement in which approximately 200 countries' "signaled an end to the fossil fuel era [by] committing for the first time to a universal agreement to cut greenhouse gas emissions and to avoid the most dangerous effects of climate change"); *European Climate Change Programme*, EUROPEAN COMMISSION, http://ec.europa.eu/clima/policies/eccp/index_en.htm (last visited Apr. 8, 2016) ("At European level a comprehensive package of policy measures to reduce greenhouse gas emissions has been initiated through the European Climate Change Programme.").

guide parties in their drafting and negotiations.[27] The processes of introducing such rules are often quite formal and lengthy, involving extensive consultations to codify good or best international industry practice. This has extended to the production of guidelines and tool-kits for environmental and social aspects of hydrocarbons and mining operations. Many of these are in the public domain.[28] International organizations like the World Bank, the International Monetary Fund and the Extractive Industries Transparency Initiative (EITI) are also conspicuous by their interventions on themes linked to investment, local content, transparency, and accountability.[29]

Given this new centrality or at least enhanced importance of legal rules, we may recall the spirit of the original Houston project, and ask what challenges an independent, balanced, values-driven project such as that one, might identify if it were to

27. INT'L BAR ASS'N, MODEL MINE DEVELOPMENT AGREEMENT (2011), http://www.eisourcebook.org/cms/Dec%202012/Model%20Mine%20Development%20Agreement.pdf. The AIPN model contracts are available only to members. They cover a wide range of legal relationships: joint ventures; unit development; gas sales and purchase agreements, and dispute settlement. *Model Contracts*, ASS'N INT'L PETRO. NEGOTIATORS, https://www.aipn.org/mcvisitors.aspx. For a comprehensive overview of model contracts in the international petroleum industry, see A. Timothy Martin & J. Jay Park, *Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger*, 3 J. WORLD ENERGY L. & BUS. 4, 8-12 (2010) (contrasting the advantages of using form contracts, including cost efficiency, negotiation speed, risk avoidance, and wide industry understanding, with the disadvantages of using model contracts, including a loss of bargaining power, use of these contracts by unqualified persons, model paralysis, and the staleness of past model contracts).

28. Examples include the many guidelines provided by the International Petroleum Industry Environmental Conservation Association, *Library*, INT'L PETRO. IND. ENVTL. CONSERV. ASS'N, http://www.ipieca.org/library (last visited Feb. 6, 2016), and the INT'L TAX & INV. CTR., PRINCIPLES FOR DEVELOPING COUNTRY HYDROCARBON INVESTMENT POLICIES http://iticnet.org/images/PrinciplesForDevelopingCountryHydrocarbonInvestmentPolicies.pdf.

29. Examples include the International Finance Corporation's Performance Standards, which are part of its Sustainability Framework and are recognized globally as a benchmark for environmental and social risk management in the private sector. INT'L FIN. CORP., PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL STANDARDS (2012), http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES. *See also* SILVANA TORDO, ET AL., WORLD BANK STUDY NO. 78994, LOCAL CONTENT POLICIES IN THE OIL AND GAS SECTOR 153-55 (2013), http://documents.worldbank.org/curated/en/2013/01/17997330/local-content-oil-gas-sector (communicating the results of a study undertaken to identify ways countries can maximize local content creation).

be designed today? The next part of this article explains why, in spite of an abundance of knowledge sources that is currently evident, there is a greater need than ever before for the kind of analysis and interpretation that was evident in that project. The impacts of changing knowledge of the extractives activities, an area in which industry practices have always enjoyed a specialized character, present serious problems of access and interpretation for many of the countries new to hydrocarbons activities.

III. TACKLING THE ASYMMETRY OF SPECIALIST KNOWLEDGE

For any country seeking to develop a domestic petroleum industry, the knowledge context presents a major challenge, particularly knowledge of legal frameworks, contracts and fiscal design.[30] Imbalances in specialist expertise in, say, negotiations between governments and companies will tend to be exacerbated by technical and informational asymmetries which will also tend to favor companies. A problem that the Russians had in 1991-1992 was their knowledge deficit with respect to market-oriented arrangements and how they worked. The disciplines of law and accounting had for years been subordinate to those of engineering and geology in hydrocarbons development.[31] Moreover, they had a legacy problem. Their domestic petroleum industry had functioned for decades in the former Soviet Union but it was poorly managed and had declining output. So, in opening up to the West, they were keen to learn what were the best and most efficient practices around the world that they could learn from. The University of Houston Law Center came in as a source of that knowledge, not because it had direct experience but because it was capable of codifying and presenting

30. *See, e.g.*, Paul R. Gregory, *Creating a Legislative Framework for a Market in Energy Resources: An Economist's View*, 15 HOUS. J. INT'L L. 539, 547-48 (1993) (documenting the difficulties that the University of Houston implementation team encountered in helping draft the appropriate Russian resource laws).

31. *Cf.* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 141 (2002) (acknowledging Russia's technical capabilities in areas that were vital to the Soviet Union's success); Simona Pipko & Roman Pipko, *Inside the Soviet Bar: A View from the Outside*, 21 INT'L LAW. 853, 854 (1987) (divulging that the law profession was not well respected during the Soviet years).

relevant parts of that experience for a newly independent state – it was trusted, independent, and reputable as a provider of that knowledge, and able to conduct a comparative exercise in a methodologically rigorous manner.

Today, this knowledge landscape is very different. Compared to the dark, pre-internet world of 1991-1992, there is an unprecedented abundance of information available to the new hydrocarbon states, much of it from highly reputable sources. Take, for example, the AIPN model contracts, concluded and published only after a rather formal and rigorous process of consultation and critique by its expert membership.[32] That membership comprised a few hundred lawyers and corporate negotiators in the early 1990s but is now close to 4,000, more than ten times larger.[33] Many government-sponsored contracts and concessions or licenses are available online;[34] many guides to industry contracts are available, as well as ones addressing fiscal terms, specific issues like methods of licensing or local content policies or sovereign wealth funds or institutional design of national oil and gas companies. How are government officials in a low- to middle-income country to wade through this knowledge swamp to reach an understanding of what they need in a particular and unique set of circumstances?

32. *Model Contracts*, *supra* note 27; ASS'N OF INT'L PETROLEUM NEGOTIATORS, THE ART OF THE DEAL 26 (2007), http://aipn.org/userfiles/file/History%20Book_sm.pdf (summarizing the history of AIPN's creation of its model contracts).

33. *See AIPN's History*, ASS'N INT'L PETRO. NEGOTIATORS, https://www.aipn.org/Profile.aspx (last visited Feb. 8, 2016) (noting that AIPN's initial membership was very small and was predominately made up of members from the United States); *Profile*, ASS'N INT'L PETRO. NEGOTIATORS, https://www.aipn.org/Profile.aspx (last visited Apr. 3, 2016) (explaining that AIPN's increased membership is comprised of members from over 110 countries and from a variety of backgrounds such as commercial, legal, and academic).

34. An example is the crude oil sales agreement between PDVSA-Petróleo S.A. and Nustar Marketing LLC, provided by the United States Securities and Exchange Commission. Crude Oil Sales Agreement between PDVSA-Petróleo S.A. and Nustar Marketing LLC, Mar. 1, 2008, http://www.sec.gov/Archives/edgar/data/1110805/000119312508064276/dex101.htm (last visited Feb. 8, 2016). *See also* Crude Oil Sales Agreement by and Between Plains Exploration & Production Co. and Conoco-Phillips Co., Jan. 1, 2012, http://www.sec.gov/Archives/edgar/data/891456/000119312511209286/dex101.htm.

Countries seeking knowledge in this area can be broadly distinguished into two camps.[35] Firstly, there are countries entirely new to these industries which were seeking to develop these resources for the first time: perhaps they had just acquired independence, or had evidence of discoveries of oil and gas and metals for the first time and had old laws that needed revising. The second group comprises countries like Mexico or Brazil that were looking at ways of reforming existing legal regimes so as to attract new investment and reverse a period of stagnation (Russia in 1991-1992 would have fallen into this category).[36]

In spite of differences in the degree of familiarity with the oil and gas industry among the two groups, there is still a role for the match maker. How do you match the existing body of knowledge to a particular demand from a country? This takes us to the limits of most academically inspired projects. In the case of the Houston project in Russia, I suspect it was never in any doubt that the independently minded Russians would decide what was best and most appropriate for them. That is surely the right way for a sovereign state to go; if the results are disappointing, then the process is still one that they have had control over and have to take responsibility for.

It may be useful, however, to note under this topic of knowledge asymmetry some of the areas impacting on 'good practice' that are of recent origin: what are the subjects that the clever and enthusiastic participants in the Houston project could probably not have envisaged as becoming important in the way they are today? Briefly, here is a list of five of what seem to me to be the more notable of them:

1. There has been an immeasurable increase in access to knowledge. Most people can obtain access through a

35. This distinction is used in a forthcoming publication, PETER D CAMERON & MICHAEL STANLEY, OIL, GAS AND MINING: A SOURCE BOOK (The World Bank, forthcoming Fall 2016). It is based on the project EXTRACTIVES INDUSTRIES SOURCE BOOK, www.eisourcebook.org (last visited May 14, 2016).

36. *See* U.S. DEP'T OF STATE, BRAZIL INVESTMENT CLIMATE STATEMENT 3, 5 (2015) (commenting that recent government action, including the Plano Brasil Maior, seek to encourage foreign investment); Juan Montes, *Mexico Opens Energy Sector to Private Investors*, WALL STREET J. (Aug. 7, 2014, 2:28 AM), http://www.wsj.com/articles/mexico-opens-energy-sector-to-private-investors-1407392884?cb=logged0.516139043495059 (discussing Mexico's energy reforms aimed at attracting private investors).

mobile device, tablet, or computer and that can be done from almost anywhere in the world. This has led to a democratization of knowledge, as well as an enhancement of the influence of civil society groups, whether locally or internationally organized.[37] It also leads to a corresponding increase in demand for *interpretation* of what a good oil contract is, what is a fair deal, and so on. This will only grow as we enter an area in which big data emerges from the effects of transparency and anti-corruption laws in the United States and Europe.[38]

2. There is a wide awareness of how oil and gas resources can be immensely damaging to the country that owns them. This is the so-called Resource Curse.[39] For example, Nigeria has seen the destruction of much of its agricultural sector at the same time that its hydrocarbons industry has grown to make the country a global player in international petroleum markets and the strongest economy in Africa.[40] Various conflicts can be stimulated by the discovery or development of oil, gas, and minerals like diamonds or

37. *See* Richard Calland, *Access to Information: How Is It Useful and How Is It Used?*, *in* ACCESS TO INFORMATION 15, 15-16 (Laura Neuman ed., 2002) (referring to the Indian state of Rajasthan and how access to information helped its citizens safeguard their rights, such as earning a minimum wage).

38. *See Anti-corruption Compliance and Big Data Analytics*, ERNST & YOUNG (Jan. 2014), http://www.ey.com/US/en/Issues/Governance-and-reporting/Audit-Committee/BoardMatters-Quarterly—January-2014—-Anti-corruption-compliance-now-requires-big-data-analytics (suggesting that incorporating big data concepts into anti-bribery and corruption analytics increases specificity and accuracy of information); Commission Decision of June 6, 2011, Establishing an EU Anti-Corruption Reporting Mechanism for Periodic Assessment, 2011 O.J. (C 286) 4, 4-5, arts. 1-4 (creating and implementing a system by which the Europe Union can assess and improve its efforts to combat corruption).

39. *See supra* note 13.

40. *See* Xavier Sala-i-Martin & Arvind Subramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria* (Nat'l Bureau of Econ. Research, Working Paper No. 9804, 2003), http://www.nber.org/papers/w9804.pdf (showing that Nigeria's decline in the share of agriculture in GDP from sixty-eight percent in 1965 to thirty-five percent in 1981 was caused by Nigeria's overinvestment in natural resources, primarily in oil); *Africa's New Number One*, ECONOMIST (Apr. 12, 2014), http://www.economist.com/news/leaders/21600685-nigerias-suddenly-supersized-economy-indeed-wonder-so-are-its-still-huge (discussing several factors, including its massive oil reserves, which led to Nigeria's ascension as Africa's largest economy in terms of GDP).

rare earths. This means that countries have become much more concerned to ensure that resource development leads to wider economic and social benefits and triggers development that is sustainable, sometimes called Resources for Development.[41]

3. More people are aware of the need to prepare for possible environmental disasters, particularly in deep offshore areas. The Macondo oil spill is only one, albeit spectacular, example, and it happened in an advanced country and involved a group of companies with relatively deep pockets.[42] For countries with lax environmental rules, poorly staffed authorities and with state companies running the show, such disasters are less likely to be prevented, managed or remedied. Even so, companies do have to prepare for these possibilities now, with implications for the design of contracts with governments and suppliers and for the legal frameworks. A different kind of issue becomes more acute during an investment downturn: the risk that an investor/operator will default on its obligation to clean up or decommission installations and structures when a project ceases to be commercial. In high cost areas like the North Sea, such defaults have already occurred.[43]

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41. *See* ORG. FOR ECON. CO-OPERATION & DEV., NATURAL RESOURCES AND PRO-POOR GROWTH 3, 16-17 (2008) (noting that there exists "the potential for natural resource management . . . to contribute to poverty reduction and economic development of developing countries").

42. U.S. COAST GUARD, BP DEEPWATER HORIZON SPILL INCIDENT SPECIFIC PREPAREDNESS REVIEW (ISPR) FINAL REPORT (2011), https://www.uscg.mil/foia/docs/dwh/bpdwh.pdf; *see, e.g.*, AUSTL. DEP'T OF THE ENV'T, MONITORING PLAN FOR THE MONTARA WELL RELEASE TIMOR SEA AS AGREED BETWEEN PTTEP AUSTRALASIA (ASHMORE CARRIER) PTY. LTD. AND THE DEPARTMENT OF THE ENVIRONMENT, WATER, HERITAGE AND THE ARTS (Oct. 9, 2009), http://www.environment.gov.au/system/files/pages/e73e8ac7-2143-4540-9a3a-fa709f54db39/files/montara-monitoring-plan.pdf (discussing the plan for cleaning up an oil and gas leak in the Timor Sea).

43. *See* Michael Kavanagh, *North Sea Oilfields Offer New Prospects*, FIN. TIMES (Oct. 22, 2013, 10:30 AM), http://www.ft.com/cms/s/0/12447484-2ab5-11e3-8fb8-00144feab7de.html#axzz41WFtSMhn (estimating that £10.4 billion (U.S.$14.8 billion) will be spent, over the next ten years, on removing out-of-service oil platforms in the North Sea); John Vidal, *Amnesty Report Accuses Shell of Failing to Clean up Niger Delta Oil Spills*, GUARDIAN (Feb. 8, 2016, 7:01 PM), http://www.theguardian.com/global-development/2015/nov/03/amnesty-report-accuses-shell-of-failing-to-clean-up-niger-delta-oil-spills (discussing an

4. Human Rights issues have become more important in the oil and gas industry as operating companies have taken steps to safeguard their security. Various bodies have taken up the U.N. Guiding Principles on Business and Human Rights (the so-called Ruggie Principles),[44] and recommended their wide adoption.[45] The framework for these is organized around the ideas of 'protect, respect and remedy" and is targeted at businesses rather than at states.[46] For many companies with largely offshore operations this has been less evidently a matter of urgency, but there appears now to be momentum behind this drive for compliance.[47]
5. There is a much wider appreciation among the many advisory bodies, whether intergovernmental, governmental, or NGO-based, that whatever general principles or advice is given to governments, there is no such thing as "one size fits all," and governments need to design a new hydrocarbon regime or adjust and adapt an existing regime to suit individual circumstances.[48] Increasingly, there is also an

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Amnesty report claiming that "[f]our oil spill sites in Nigeria identified by the UN, which Shell has claimed to have had cleaned up by contractors since 2011, are still polluted").

44. *See* John Ruggie (U.N. Special Rep. of the Secretary-General), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008); U.N. Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights, U.N. Doc HR/PUB/11/04 (2011) [hereinafter U.N. Guiding Principles], http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; SUNE SKADEGÅRD THORSEN ET AL., A GAME CHANGER (2011), http://business-humanrights.org/sites/default/files/media/documents/ungps-a-game-changer-nov-2011.pdf (discussing the support the *Guiding Principles on Business and Human Rights* have received from the private sector).

45. *See* THORSEN ET AL., *supra* note 44 (commenting on the considerable support the Guiding Principles have received from the United Nations, companies around the world, and several countries).

46. *See* U.N. Guiding Principles, *supra* note 44, at 3, 13, 27.

47. For an example of a company with offshore operations that has implemented the Ruggie Principles, see KOSMOS ENERGY, ON HYDROCARBON EXPLORATION OFFSHORE WESTERN SAHARA 3 (2014) (declaring its commitment to conduct operations in accordance with the Guiding Principles on Business and Human Rights).

48. *See* Bassam Fattouh, *Lebanon Should Be Wary of Importing Petroleum Revenue Strategies*, LEB. CTR. POL'Y STUD. (June 2015), http://www.lcps-lebanon.org/featuredArticle.php?id=44 ("While many countries have followed the Norwegian model in managing their hydrocarbon wealth, there is no one-size-fits-all approach."); *see generally*

> awareness that even the very best economic or legal advice will fail if the governance institutions are weak or poorly developed.[49]

IV. MANAGING LONG-TERM CONTRACTS BETWEEN INVESTORS AND STATES

There are a number of features of the oil and gas landscape that affect investor relations with states now that were either not prevalent at all at the time of the Houston project or were much less marked than they are now. A number of these features are noted below in Part A. They underline the continuing importance of knowledge asymmetry in spite of the abundance of knowledge supply discussed in Section C above. However, there is one strong element of continuity that needs to be emphasized. A constant feature of oil and gas operations – then and now – is the need to ensure that long-term contracts are in place between investors and governments which can withstand two kinds of cycles: the investment cycle that tracks the rise and fall in the international oil price and the political cycle that has a tendency to react to these rises and falls. When prices are high, governments often seek to intervene to capture a larger share of the rent.[50] When they are low, governments tend to give away too much to attract scarce capital at a time when investors have many opportunities to choose from.[51] As the price fluctuates, this cycle of seeking a

Mary Ann Tétreault, *Stuff Is Not Enough: Resources and Governance in the Middle East*, *in* GOVERNANCE IN THE MIDDLE EAST AND NORTH AFRICA 33 (Abbas Kadhim ed., 2013) (discussing various theories that have been put forth to explain the successes and failures of countries in the Middle East and noting that "there is no one-size-fits-all explanation for its successes and failures").

49. *See generally* Daron Acemoglu, *Interactions Between Governance and Growth: What World Bank Economists Need to Know*, *in* GOVERNANCE, GROWTH, AND DEVELOPMENT DECISION-MAKING 1 (2008) (reviewing important considerations for policymakers related to the importance of institutions).

50. *See, e.g.*, *Argentina Tries Its Hardest to Attract Foreign Oil and Gas Companies*, ENERGY REP. (Aug. 6, 2013, 9:37 PM), http://oilprice.com/Finance/investing-and-trading-reports/Argentina-Tries-its-Hardest-to-Attract-Foreign-Oil-and-Gas-Companies.html (discussing the increase in oil and natural gas prices and incentives implemented by the Argentinian government in order to attract more exploration and production companies).

51. *See, e.g.*, *Q & A: BP Gas Deal with Egypt a Giveaway?*, AL JAZEERA (Apr. 9, 2015, 3:58 PM), http://www.aljazeera.com/news/2015/04/bp-gas-deal-egypt-giveaway-

greater share and then giving away too much tends to repeat itself. At present we are in a low point of the cycle, with many parallels to the period twenty-five years ago.

The risks that a familiar political cycle would assert itself in the 1990s must have been known to the participants in the Houston Petroleum Law Project. So too must have been the familiar limitation to any advisory role: that good advice may be offered but not necessarily taken up. Several large projects were concluded under petroleum agreements that the government of Russia and indeed that of its neighbor, Kazakhstan, subsequently were to characterize as containing unfair terms.[52] In line with the above pattern, these reactions occurred at a time when oil prices had resumed an upward trajectory more than a decade later.

Notably, three petroleum agreements of the production sharing variety that were concluded between Russia and foreign investors in the 1990s, when prices were low, had to be renegotiated later to the advantage of the Russian government.[53] Partly because they took the form of a production sharing contract, with "post-colonial" connotations, many in Russia did not deem them to be either fair or appropriate to the Russian setting, in spite of the participation of Russian shareholders in two of the three production sharing contracts.[54] As oil prices continued to rise in 2005, criticism of the benefits arising to investors from these contracts grew, even though the contracts had proven to be successful in channeling more than US$16

150409144843985.html (reporting that Egypt's recent oil deal gives BP "100 percent of profits, after paying royalties and taxes").

52. *See After Sakhalin: What Does Shell's Capitulation to Gazprom Mean for the Russian Energy Industry?*, ECONOMIST (Dec. 13, 2006), http://www.economist.com/node/8413089 (discussing large energy operations done under "production-sharing agreements" that some Russians now consider unfairly generous); Ryan Kennedy & Adilzhan Nurmakov, *Resource Nationalism Trends in Kazakhstan, 2004-2009*, at 3 (Russian and Caspian Energy Developments (RUSSCASP), Working Paper, Mar. 2010), http://www.fni.no/russcasp/wp-nurmakov-kennedy-kazakhstan.pdf (noting that the actions taken by the Kazakhstani government regarding production sharing agreements "reflect a popular perception that the deals of the early 1990s were unfair, giving too many benefits to international oil companies").

53. CAMERON, *supra* note 22, at 332-33.

54. *Id.*

billion into the country, the bulk of foreign direct investment into Russian oil projects.[55] State intervention followed.

During the period of high oil prices from 2004 to 2012 there were very many examples of politically motivated actions against the rights acquired by investors under long-term contracts made during the earlier period of low prices when capital was scarce and the need to attract it from alternative opportunities was great. In some cases, there were increases in royalties or taxes, while in others, new taxes were introduced. Examples included: Alaska (2007);[56] Algeria (2006);[57] Argentina (2006);[58] China (2006);[59] and the United Kingdom (2005).[60] Even if not expressly stated as such, the goal was to achieve a more equitable sharing of the revenue resulting from the exploitation of the country's natural resources in what the host state deemed to be extraordinary circumstances. However, these actions were not taken in a context in which the investment rules were static or indifferent to the kinds of political risk sketched out above. During this period, investors drew upon the growing panoply of international investment treaty protections and also the various kinds of contract stabilization clauses that they had at their disposal in a sort of "fight-back" against what was characterized

55. *Id*.

56. *See* James P. Lucier Jr., *What Palin Really Did to the Oil Industry*, WALL STREET J. (Sept. 5, 2008, 11:59 PM), http://www.wsj.com/articles/SB122057543526201877?cb=logged0.37867369782179594 (noting that Governor Palin's decision to implement a twenty-five percent tax on oil and gas profits has resulted in Alaska's oil and gas tax revenue reaching an all-time high).

57. *See* Barbara Lewis, *Analysis – Algeria Steps Towards Resource Nationalism*, REUTERS (July 14, 2006, 1:19 PM), http://uk.reuters.com/article/idUKL1489930420060714 (discussing Algeria's decision to move toward resource nationalism and propose a windfall tax on international oil companies).

58. Law No. 26,741, May 4, 2012 (Arg.) (providing that fifty-one percent of equity in certain oil and gas corporations, such as YPF, belongs to Argentina).

59. Vinson & Elkins LLP, *China to Levy Windfall Tax on Oil Production Enterprises*, MARTINDALE (Apr. 27, 2006), http://www.martindale.com/taxation-law/article_Vinson-Elkins-LLP_230322.htm?PRV=OGO (noting that China's PRC State Council decided to implement a windfall tax on oil producers in China).

60. HER MAJESTY'S TREASURY, PRE-BUDGET REPORT 2005 - BRITAIN MEETING THE GLOBAL CHALLENGE: ENTERPRISE, FAIRNESS AND RESPONSIBILITY 118, http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/d/pbr05_completereport_1980.pdf (announcing an increase in the supplementary corporation tax for oil companies doing business in the North Sea).

as "resource nationalism" on the part of capital-importing, resource-rich states.[61] Each of these forms of investor protection has been substantially modified over the past quarter century, and therefore merits some appraisal in sections (B) and (C) below.

A. Ring in the New

In a number of respects, investor-state relations have been affected by developments that are either new or have taken on a new importance with the increased geographical scope of hydrocarbons activity. The lack of experience of many of the new countries increases the risk of public policy errors and ultimately disputes.

An example of this arises from the globalization process. The opportunities for companies to locate themselves in different jurisdictions to minimize their tax liabilities has increased[62] at the same time as more and more countries are becoming keen to promote their oil and gas resources.[63] For the new countries there is an urgent requirement to develop sound tax laws, build up a modern tax administration and ensure that these are operational. This is a big challenge for some countries which have limited skilled or financial resources and which may inherit inadequate laws and structures from an earlier era in their development.[64] For countries that have an established oil and gas industry like

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61. *See* Mark Clarke & Tom Cummins, *Resource Nationalism: A Gathering Storm?*, 2012 INT'L ENERGY L. REV. 220, 220-24 (suggesting various ways investors could protect themselves against or mitigate the consequences of resource nationalism, such as including stabilization clauses in contracts and using international arbitration).

62. Sam Cage, *Corporate Oil Booms in Low-Tax Switzerland*, REUTERS (Mar. 12, 2009, 9:04 AM), http://www.reuters.com/article/swiss-tax-location-idUSL312427120090312?feedType=RSS&feedName=rbssEnergyNews&rpc=22. *See also*, Laurence Knight, *Corporate Tax Avoidance: How Do Companies Do It?*, BBC NEWS (Dec. 4, 2012), http://www.bbc.com/119Nslbusiness-20580545 (discussing how Starbucks', Google's and Amazon's decisions regarding the business operations in Europe was largely driven by finding the most favorable tax regime).

63. Rabah Arezki & Ritwik Banerjee, *Aid and Oil*, 51 FIN. & DEV. 48, 48-49 (2014) (noting that in recent years, many developing countries in Africa, South Asia and Latin America have discovered oil reserves and estimating that within a decade most African nations will be oil producers).

64. *See generally* FISCAL AFFAIRS DEP'T, INT'L MONETARY FUND, *supra* note 15 (discussing the need for developing countries to develop new tax regimes, and advising how to do so).

Mexico and Brazil, it is more a matter of adaptation and learning from other tax administrations.[65]

A very different example is evident from the recent experience of several African countries. A number of them have become involved in legal disputes with investors following the sale of interests by small companies to large companies with the resources to develop significant hydrocarbons discoveries. Some examples of the sales in East Africa give an indication of the amounts involved. In Tanzania, the location of numerous energy transactions, in 2011, activity centered on the acquisition of Dominion Petroleum by Ophir Energy[66] and on investment in exploration licenses by various smaller players.[67] In Uganda, a sixty-six percent interest in three exploration blocks was sold by Tullow in 2012 for US$2.9 billion.[68] The Thai energy company, PTT, purchased Cove Energy for US$1.9 billion, thus acquiring a stake in the rich gas fields off the coast of Mozambique.[69] In August 2013, a further sale was made in Mozambique: ten percent of a large gas field was sold by Anadarko to ONGC (India) for US$2.64 billion.[70]

Behind the various disputes seems to be a combination of factors. Firstly, the tax regimes were insufficiently well developed

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65. *See* Global Risk Insights, *Despite Reforms, Brazil and Mexico Lack Energy Investment*, OILPRICE (Nov. 26, 2013, 12:05 AM), http://oilprice.com/Energy/Energy-General/Despite-Reforms-Brazil-and-Mexico-Lack-Energy-Investment.html (arguing that Mexico's and Brazil's energy sectors will continue to grow and attract investment if the countries implement policy reforms).

66. Michael Kavanagh, *Ophir Energy to Acquire Dominion for £118m*, FIN. TIMES (Oct. 13, 2011, 5:44 PM), http://www.ft.com/intl/cms/s/0/5bf92b16f5af11e0824e-00144feab49a.html#axzz3yVUESJZr.

67. *Id.*

68. *Uganda Sale and Purchase Agreements Signed Between Tullow, CNOOC and Total for $2.9 Billion Total Cash Consideration*, TULLOW OIL (Mar. 30, 2011), http://www.tullowoil.com/media/press-releases/uganda-sale-and-purchase-agreements-signed-between-tullow-cnooc-and-total-for-2.9-billion-total-cash-consideration.

69. Rebecca Bream & Gwen Robinson, *PTT Wins Battle for Cove as Shell Drops out*, FIN. TIMES (July 16, 2012, 6:50 PM), http://www.ft.com/intl/cms/s/0/751c765ccf3911e1-a1ae00144feabdc0.html#axzz3yVUESJZr; Sarah Young & Charlie Zhu, *Thai PTT Set to Win Cove After Shell Drops Bid*, REUTERS (July 17, 2012, 1:28 AM), http://www.reuters.com/article/us-cove-offer-idUSBRE86G01S20120717.

70. Ed Crooks & Avantika Chilkoti, *India's ONGC Takes Stake in African Gasfield*, FIN. TIMES (Aug. 26, 2013, 8:16 AM), http://www.ft.com/cms/s/0/4ede72620de311e38d9d-00144feabdc0.html#axzz3yVUESJZr.

to capture this kind of gain.[71] Secondly, there appears to have been little appreciation that such sales by small, so-called "first mover" companies to larger companies with the resources and skills to manage the high-cost development stage is far from unusual in the oil and gas industry and can indeed benefit the host state concerned.[72] The country first secures investment from one of these smaller companies at a time of high risk, then a discovery is made, and then further investment is made by a larger company with the resources to develop that discovery and provide for the related infrastructure. Thirdly, there has sometimes been a short-sighted view that the sales represented an opportunity to make a substantial gain in revenues for the state. In these cases, the sales occurred at a high point in the oil market and offered unusually high gains for the companies that were selling the interests. It seems eminently reasonable to establish a capital gains tax but the laws providing for this should be established at the outset when the investor is making the decision whether or not to invest. For some countries in sub-Saharan Africa, such as Ghana, Mozambique, and Uganda, that was not the case and much-publicized disputes emerged as they scrambled to address this problem retrospectively.[73] A well-prepared legal and fiscal regime would have circumvented this entirely.

71. *See* Adriano Nuvunga, *Reform to Inform: Promoting Transparency in Mozambique*, OIL & GAS YEAR (Apr. 10, 2013), http://www.theoilandgasyear.com/articles/reform-to-inform-promoting-transparency-in-mozambique/ (arguing that Mozambique did not have the institutional capacity to implement its tax system, which was designed by Western donor countries); Efam Dovi, *Ghana's 'New Path' For Handling Oil Revenue*, AFRICAN RENEWAL (Jan. 2013), http://www.un.org/africarenewal/magazine/january-2013/ghana%E2%80%99s-%E2%80%98new-path%E2%80%99-handling-oil-revenue (discussing Ghana's new fiscal regime designed to avoid the problems caused by inadequate tax regimes in other African countries).

72. *See, e.g.*, *Mozambique Would Benefit from Regional Gas Master Plan*, ESI-AFRICA (Oct. 4, 2013), http://www.esi-africa.com/news/mozambique-would-benefit-from-regional-gas-master-plan/ (projecting the potential growth and benefit that can be a result of the oil development in Mozambique and the model used commonly elsewhere in the world should provide a far reaching catalyst for the area).

73. *See* Matina Stevis & Nicholas Bariyo, *Tax Disputes Flare As Africa Fights 'Secret' Oil Deals*, WALL STREET J. (Dec. 15, 2014, 4:43 PM), http://www.wsj.com/articles/tax-disputes-flair-as-africa-fights-secret-oil-deals-1418679781.

If we were to do a very swift tour of the legal, economic, and institutional landscape to identify ways in which investor-state relations have changed in the past couple of decades, we might note five developments in the oil and gas industry. In each instance, the impact has been to challenge or require a revision in the established body of knowledge. A list of the more important topics would include the following:

- The growing prevalence of national oil and gas companies so that very few countries, especially in the developing world or so-called "emerging markets," do not have them.[74]
- The growing use of model or standard form contracts by lawyers as a basis for particular commercial relationships, such as joint ventures, gas sales agreements, unitisations and Liquefied Natural Gas sale and purchase.[75]
- The wide use of sovereign wealth funds to assist in the management of revenues, with much experience now available on their performance in terms of savings and stabilization functions.[76]

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74. Research into their operation has been extensive, so that an abundance of case studies exist, as well as more general discussions. On hydrocarbons, see generally OIL AND GOVERNANCE (David G. Victor et al. eds., 2012); PATRICK R.P. HELLER ET AL., NAT'L RES. GOVERNANCE INST., REFORMING NATIONAL OIL COMPANIES (2014), http://www.resourcegovernance.org/sites/default/files/documents/nrgi_9recs_eng_v3.pdf; Silvana Tordo et al., *National Oil Companies and Value Creation* (The Int'l Bank for Reconstruction & Dev./The World Bank, Working Paper No. 218, 2011); Charles McPherson et al., *State Participation in the Natural Resource Sectors: Evolution, Issues and Outlook*, *in* THE TAXATION OF PETROLEUM AND MINERALS 263, 263-88 (Philip Daniel et al. eds, 2010); VALÉRIE MARCEL & JOHN V. MITCHELL, ROYAL INST. OF INT'L AFFAIRS, OIL TITANS: NATIONAL OIL COMPANIES IN THE MIDDLE EAST (2006); *see also State Owned Companies*, NAT. RES. GOVERNANCE INST., http://www.resourcegovernance.org/rgi/soc (last visited Apr. 3, 2016) (presenting information and data on state owned natural resource gathering companies).

75. With millions of oil, gas, and mining transactions concluded every day around the world, the advantages of standardization lie in savings of time and effort by using "boiler plate" text that can be applied to many individual contracts. Some industry associations have encouraged their development and use. Their length and content varies considerably with detailed guidance notes added in many cases. Their growth in use is documented in Martin & Park, *supra* note 27, at 5-6.

76. There is a large body of research now available—the work of the Natural Resource Governance project stands out for comprehensiveness. *See, e.g.*, *National*

- The use of clear and detailed fiscal rules by many developing countries to assist in addressing the effects of oil price volatility and other uncertainties.[77]
- The growing practice of oil and gas company associations to produce guidelines, toolkits, and standards for adoption by members on a wide range of environmental and social matters such as impacts, gender, and community issues.[78]

One idea common in the past has faded into insignificance. For a long time governments were told to worry about the oil and gas "running out." From a global point of view, it would seem that – apart from the island of Nauru – no country has ever actually used up all of its supply of mineral resources.[79] A more helpful framing of this issue might be to consider how a government should manage a gradual decline of its resource base. This is a challenge that faces countries like the United Kingdom, Colombia, and Oman.[80] In recent years, various policies and legal instruments have been developed to anticipate and manage this problem in ways that encourage cooperation between investors and host states.[81]

Resource Funds, NAT'L RES. GOVERNANCE INST., www.resourcegovernance.org/natural-resource-funds (last visited Apr. 3, 2016). On mining, see ELIZABETH WALL & REMI PELON, SHARING MINING BENEFITS IN DEVELOPING COUNTRIES (2011); ROBERT BACON & SILVANA TORDO, ENERGY SECTOR MGMT. ASSISTANCE PROGRAM, EXPERIENCES WITH OIL FUNDS (2006); ALAN GELB ET AL., CTR. FOR GLOB. DEV., SOVEREIGN WEALTH FUNDS AND LONG-TERM DEVELOPMENT FINANCE (2014) (supplying additional studies for perusal to further explain the use sovereign wealth funds).

77. Much experience is available on this subject. *See, e.g.*, FISCAL AFFAIRS DEP'T, INT'L MONETARY FUND, *supra* note 15, at 7-9 (discussing how best to realize the revenue potential of EIs in developing countries).

78. *See supra* notes 26-29, 42-49 and accompanying text.

79. *See* Philip Shenon, *A Pacific Island Nation Is Stripped of Everything*, N.Y. TIMES (Dec. 10, 1995), http://www.nytimes.com/1995/12/10/world/a-pacific-island-nation-is-stripped-of-everything.html.

80. *See generally* Juliette Jowit, *World Is Facing a Natural Resources Crisis Worse Than Financial Crunch*, GUARDIAN (Oct. 28, 2008, 8:01 PM), http://www.theguardian.com/environment/2008/oct/29/climatechange-endangeredhabitats (noting the difficulty facing the world's nations trying to manage declining natural resources and doing so in a reasonable amount of time).

81. A good example of this is the United Kingdom's Maximizing Economic Recovery Strategy. *See* DEPT. OF ENERGY & CLIMATE CHANGE & OIL & GAS AUTH., MAXIMISING

B. *Treaty Protection*

One of the principal ways in which the legal landscape has altered was prefigured by a development that started at about the same time as the Houston project: the development of multilateral treaties for investment and trade, with NAFTA being a conspicuous outcome of this and another introduced specifically for energy issues, the ECT.[82] The spirit of optimism at the time about the benefits of increased globalization created a swell of support for the adoption of multilateral treaty arrangements. The ECT built on this and was driven by a sense that a special relationship between Europe and Russia was possible and desirable. The outcome of several years of negotiations resembled a large trade and investment agreement. Russia signed it but never ratified it.[83] The United States was involved in the negotiations but did not sign it.[84]

Irrespective of the, at best, very mixed results of its political objectives in stabilizing East-West relations, the ECT has undeniably become part of the legal landscape of international investment law. In contrast to the now familiar world of cases brought under the many BITs, the ECT cases have seen a growing number of disputes about renewable energy – above ground forms of energy rather than the subsoil ones, such as hydrocarbons or

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ECONOMIC RECOVERY OF UK PETROLEUM (2016) (proposing safeguards and obligations that all parties should follow to properly steward resources).

82. *See* Jeff Faux, *NAFTA's Impact on U.S. Workers*, ECON. POL'Y INST. (Dec. 9, 2013, 4:00 PM), http://www.epi.org/blog/naftas-impact-workers/ (discussing the way in which NAFTA served as a "template for rules of the emerging global economy"); Qinglin Zhang, *Analysis of the Impact on Sustainable Development by Investment Regulations in the Energy Charter Treaty*, 8 J. WORLD ENERGY L. & BUS. 542, 542 (2015) (explaining the effects of the ECT on international relations and development).

83. Irina Mironova, *Russia and the Energy Charter Treaty*, ENERGY CHARTER (Aug. 7, 2014), http://www.energycharter.org/what-we-do/knowledge-centre/occasional-papers/russia-and-the-energy-charter-treaty/.

84. *See Constituency of the Energy Charter Conference: Members of the Energy Charter Conference*, ENERGY CHARTER (Mar. 19, 2015), http://www.energycharter.org/who-we-are/members-observers/ (displaying the countries that ratified the Energy Charter, which does not include the United States); *see also* Energy Charter Treaty, *supra* note 22, annexes N, ID (noting the reasons why the United States participated in negotiations).

coal.[85] Moreover, as with NAFTA, a significant number have begun to involve states as respondents which may be classified, for lack of a more readily understood category, as "developed."[86] Yet an interesting feature of the ECT's development is that the very definition of energy which it contains has proved insufficiently broad to capture the kind of subject matter that is increasingly included in "energy."[87] Both renewable energy and unconventional oil and gas have proved far more important in practice than the ECT drafters envisaged.

By the end of April 2016, ninety-three cases had been filed under the ECT, making it the most frequently invoked international investment agreement in the world and overtaking NAFTA Chapter 11, which had been invoked forty-nine times as of the same date.[88] The largest award ever made by an international arbitral tribunal against a host state – around US$50 billion – was made against Russia in a case involving Yukos, an expropriated oil company, under the ECT.[89]

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85. Brendan Casey & Michael J. Stepek, *The Rise in Claims Filed by Renewable Energy Investors Under the Energy Charter Treaty*, LEXOLOGY (Nov. 3, 2015), http://www.lexology.com/library/detail.aspx?g=b1266c4f-dfed-4433-b298-281e492e7638.

86. *See, e.g.*, Claire Provost & Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries*, GUARDIAN (June 10, 2015, 1:00 PM), http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid (providing an example of a company suing Germany under the ECT).

87. Energy Charter Treaty, *supra* note 22, art. 1(4), annex EM.

88. *List of All Investment Dispute Settlement Cases*, ENERGY CHARTER (Apr. 29, 2016) http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases; *NAFTA Investor-State Arbitration*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/c3439.htm (last visited June 20, 2016). The NAFTA figure excludes notices of intent to submit a claim that did not lead to actual commencement of an arbitration, and it omits a handful of nuisance claims that, whilst filed, never proceeded to the establishment of a tribunal to hear the alleged claims. For an overview see www.NAFTAclaims.com. The list of energy materials and products does not explicitly include fuels that might play a role in a low carbon economy, such as bio fuels, hydrogen or CO2 (in a carbon capture and storage regime for example). Low carbon investments are very probably protected under the ECT, but there is no de iure definition of what constitutes a low carbon investment under the ECT.

89. Yukos Universal Ltd. (Isle of Man) v. Russia, PCA Case No. AA 227, Final Award, ¶ 1888 (July 18, 2014) (awarding US$1.85 billion in damages and close to US$2.5 million in costs and attorney fees); *see also* Emmanuel Gaillard & Yas Banifatemi, Yukos, *Largest Arbitral Award Ever*, SHEARMAN & STERLING LLP, http://www.shearman.com/en/services/practices/international-arbitration/yukos-arbitral-award (discussing the award).

With more than 3,000 investment agreements, like BITs, in place, investors now have many more opportunities to manage any potential disputes that emerge with states.[90] It should be recalled that, outside of the United States, oil, gas, and mining activities are typically subject to an extensive degree of political control.[91] They often have a strategic character for the economies concerned, leading to a variety of restrictions imposed by states on their use and development. Sovereign states are the owners and custodians of the resources in almost every country in the world, so some engagement with politics is unavoidable.[92] With the upswings and downswings in investment cycles just described, investor-state disputes can be expected to occur frequently, but investors are now able to rely on treaty commitments by their home and host governments as well as their contract provisions agreed with the state itself to enhance their protection. With most states being signatories to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[93] the likelihood of enforcement is enhanced.[94] The role of the International Centre for Settlement of Investment Disputes (ICSID) too has helped in this respect.

From barely double digit numbers of cases before the ICSID, energy claims have grown over the past decade to comprise a large percentage of cases before the ICSID, International Chamber of Commerce (ICC), and London Court of International

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90. *See* U.N. CONFERENCE ON TRADE & DEV., IIA ISSUES NOTE NO. 2015-1, RECENT TRENDS IN IIAS AND ISDS, 2 fig. 1 (noting that the cumulative number of international investment agreements that have been signed is over 3,000).

91. *See* Andrew Cheon et al., *Instruments of Political Control: National Oil Companies, Oil Prices, and Petroleum Subsidies*, 48 COMP. POL. STUD. 370, 370-72 (2014) (discussing how some governments politically control aspects of their oil industries).

92. *See* NICHOLAS HAYSOM & SEAN KANE, CTR. FOR HUMANITARIAN DIALOGUE, NEGOTIATING NATURAL RESOURCES FOR PEACE 8-11 (2009) (describing types of resource ownership and providing examples of how multiple nations approach natural resource ownership).

93. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 3.

94. *See Contracting States*, N.Y. CONVENTION, http://www.newyorkconvention.org/countries (last visited Feb. 8, 2016) (listing the numerous signatories to the convention). The Convention provides for enforcement in all member nations, therefore with a majority of nations signing on, enforcement is much more likely.

Arbitration.[95] In the scale of claims filed, they are almost in a class of their own. Individual claims have exceeded the GDP of many countries in some disputes, and the number of claims has mushroomed across the globe.[96] A claim by ExxonMobil against Venezuela was for US$12 billion.[97] A recent award (October 2014) by an ICSID tribunal against Venezuela was around US$1.6 billion, probably the largest award ever to be rendered by an ICSID tribunal.[98]

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95. *Compare* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD – STATISTICS (ISSUE 2016-1), at 7, 26 (2016), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf (reporting 52 cases registered in 2015, of which ten were oil, gas and mining disputes and twenty-two were electric power and other energy disputes), *and* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD – STATISTICS (ISSUE 2015-1), at 7, 26 (2015), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20(English)%20(2)_Redacted.pdf (reporting 38 cases registered in 2014, of which fourteen were oil, gas and mining disputes and ten were electric power and other energy disputes), *with* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD – STATISTICS (ISSUE 2010-1), at 7, 22 (2010), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2010-1%20English.pdf (reporting twenty-five cases registered in 2009, of which six were oil, gas and mining disputes and four were electric power and other energy disputes). *Compare* Craig Tevendale & Daniel Waldek, *The ICC 2013 Statistics – Another Busy Year for International Arbitration*, HERBERT SMITH FREEHILLS LLP (Sept. 9, 2014, 3:02 PM) http://hsfnotes.com/arbitration/2014/09/09/the-icc-2013-statistics-another-busy-year-for-international-arbitration/ (stating fifteen percent of the 767 cases filed at the ICC in 2013 were energy disputes), *with* Paul Oxnard & Benoit Le Bars, *Arbitration of Energy Disputes*: *Practitioners' Views from London and Paris*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE ENERGY SECTOR 55, 55 (Assoc. for Int'l Arbitration, ed., 2009) (stating eleven percent of the 599 cases filed at the ICC in 2007 were energy disputes). For information on the London Court of International Arbitration, see SARAH LANCASTER, LONDON CT. OF INT'L ARB. REGISTRAR, REGISTRAR'S REPORT 2013, at 1 (2013) http://www.lcia.org//media/download.aspx?MediaId=376 (last visited Apr. 8, 2016) ("In terms of industry sectors, the oil & gas industry continued to be significant in generating referrals to the LCIA in 2013 (15%), as well as the broader energy and resources sector (7%).").

96. PETER CAMERON, FUNDAMENTAL STANDARDS OF PROTECTION FOR INTERNATIONAL ENERGY INVESTMENTS – THE ROLE OF FET IN RECENT ENERGY CASES 1 (2013) [hereinafter CAMERON, FUNDAMENTAL STANDARDS OF PROTECTION]; Peter Cameron, *In Search of Investment Stability*, *in* RESEARCH HANDBOOK ON INTERNATIONAL ENERGY LAW 124, 146 (Kim Talus ed., 2014) [hereinafter Cameron, *In Search of Investment Stability*].

97. Cameron, *In Search of Investment Stability*, *supra* note 96, at 146.

98. *See* Venezuela Holdings B.V. and others v. Venezuela, ICSID Case No. ARB/07/27, Award, ¶ 404 (Oct. 9, 2014). For another large award, see the discussion by Tai-Heng Cheng & Lucas Bento, *ICSID's Largest Award in History: An Overview of*

Just as there are now many more channels for the peaceful settlement of disputes, so too there are a growing number of regional centers to assist investors and states to do so, from Singapore and Hong Kong to Mauritius, London and Cairo.[99] However, this system has increasingly been subject to criticism for the service it offers to companies and governments with its high costs and often long lead-times and the benefits it has undoubtedly conferred on many law firms and professional arbitrators.[100] The kind of specialist disputes that are common in energy are also often presided over by non-specialist arbitrators.[101]

With the number of cases related to energy resulting in a growing number of published awards, one may ask whether this is a system that is delivering a higher degree of investor protection than was previously available to foreign investors. From the various individual cases with their unique fact-patterns, it is only a very bold investigator who would seek to generalize at the present time. However, one can certainly gain some insights from early results of investor-state disputes involving acquired rights and their protection.

In Latin America, many oil companies availed themselves of rights under investment treaties during the commodities boom of the early twenty-first century, but also launched claims based on contract breach when several governments sought greater (and in their view "fairer") shares of the benefits.[102] ExxonMobil, a U.S.

Occidental Petroleum Corp. v the Republic of Ecuador, KLUWER ARB. BLOG (Dec. 19, 2012), http://kluwerarbitrationblog.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/ (stating that the award was "reportedly the largest award ever to have been issued by an ICSID tribunal.")

99. IBA ARBITRATION 40 SUBCOMM., INT'L BAR ASS'N, THE CURRENT STATE AND FUTURE OF INTERNATIONAL ARBITRATION 11-13, 21 (2015).

100. *See, e.g.*, Annalisa M. Leibold, *The Friction Between Investor Protection and Human Rights: Lessons from* Foresti v. South Africa, 38 HOUS. J. INT'L L. 215, 225, 255 (2016) (criticizing the international arbitration system for its lack of transparency and high costs).

101. IBA ARBITRATION 40 SUBCOMM., INT'L BAR ASS'N, *supra* note 99, at 15, 53-54.

102. *See* Luis E. Cuervo, *The Uncertain Fate of Venezuela's Black Pearl: The Petrostate and its Ambiguous Oil and Gas Legislation*, 32 HOUS. J. INT'L L. 637, 670-77 (2010) (discussing actions taken by the Venezuelan government to gain more ownership in oil and gas interests as well as profits from oil companies that led to several breach of contract claims in arbitrations); ConocoPhillips Petrozuata B.V. v. Venez., ICSID Case No.

company, claimed US$12 billion for expropriation of oil wells and refineries in 2007.[103] It pursued parallel claims based on treaty violation, using the Netherlands-Venezuela BIT, and contract breach.[104] The company was offered book, not market, value for its investments but rejected this.[105] It later reduced its claim to US$7 billion.[106] In December 2011, it was awarded US$907 million in the ICC (contract) case, about the same as the book value of its former assets.[107]

The contribution to doctrinal development of the many oil, gas, and mining cases has helped to generate a significant literature in international investment law. However, the ExxonMobil case draws attention to some notable features of the evolving system: damages awarded by an arbitral tribunal can be much lower than claims; settlements are often sought and accepted (although the offer was not accepted in this case); treaty and contract claims are often pursued simultaneously, partly for tactical reasons, as are negotiations on a settlement; disputes in this field can arise from a political realignment in the host state that made severe conflicts with foreign investors inevitable.

The ExxonMobil case also raises the question of whether activation of a claim through the investment treaty regime facilitates a settlement or triggers a breakdown in the investor-state relationship. While a general answer to this question may be impossible, it is probable that a large oil, gas, or mining company can afford the costs of a parallel 'treaty plus contract' approach to arbitration and may have an interest in pursuing a case strategically to (indirectly) defend its interests in

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ARB/07/30, Decision on Jurisdiction and the Merits, ¶¶ 212-13, 290 (Sept. 3, 2013) (finding jurisdiction under the bilateral investment treaty between the Netherlands and Venezuela in an arbitration involving a breach of contract); *Occidental Petroleum Corp.*, Award, ¶ 876 (finding Ecuador liable for breaching a contract with Occidental Petroleum and the US-Ecuador bilateral investment treaty).

103. CAMERON, FUNDAMENTAL STANDARDS OF PROTECTION, *supra* note 96, at 2.

104. *See* Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A., ICC Case No. 15415/JRF, Final Award, ¶ 5.1.1 (Dec. 23, 2011) (giving the factual background of the ExxonMobil dispute).

105. *Id.* ¶¶ 170-71.

106. *Id.* ¶ 99.

107. *See id.* ¶ 865; *see also* CAMERON, FUNDAMENTAL STANDARDS OF PROTECTION, *supra* note 96, at 2.

other parts of the world. The scale of damages sought may not be the real clue as to its motives for launching and persisting in the legal action. If a breakdown appears inevitable, the arbitration process plays a role in what is effectively an exit strategy. For companies much smaller in size than ExxonMobil, access to legal protections under an investment treaty may mean that their exit is transformed into one that loses them their shirt but not their trousers!

On the other hand, a more encouraging use of the investment treaty regime is evident from a recent case in Kazakhstan. When the government laid claim to a larger share of the foreign companies' investment in an oil and gas field, the investors initiated arbitration proceedings in Stockholm and a media announcement was made.[108] The Kazakh government requested talks and, almost two years later, a settlement was reached, in which two foreign investing corporations agreed to transfer a share of the field to the government in exchange for US$3 billion.[109] In this instance the government and foreign investors used dispute settlement mechanisms to initiate serious discussions on an exchange of interests and a settlement of various claims.[110] Various contract and treaty based claims were explored but ultimately never became operational.[111] The parties continued to work together to develop the large oil and gas field.[112]

It would, of course, be unwise to base any generalizations about the international investment regime from the few cases

108. *Ascom Takes Government of Kazakhstan to Stockholm Court of Arbitration Under the International Energy Charter Treaty*, PR NEWSWIRE (Sept. 8, 2010), http://www.prnewswire.com/news-releases/ascom-takes-government-of-kazakhstan-to-stockholm-court-of-arbitration-under-the-international-energy-charter-treaty-102416259.html.

109. *Kazakhstan: Government Acquires 10% Stake in Karachaganak Project for US$3 Billion*, ENERGYASIA (Dec. 15, 2011), http://energyasia.com/kazakhstan-government-acquires-10-stake-in-karachaganak-project-for-us3-billion/.

110. Raushan Nurshayeva et al., *Kazakhstan Says Karachaganak Case in Arbitration*, REUTERS (May 27, 2010, 7:22 AM), http://www.reuters.com/article/kazakhstan-karachaganak-idUSLDE64Q14B20100527.

111. *See generally* Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A., ICC Arbitration Case No. 15415/JRF, Final Award (Dec. 23, 2011).

112. *See* ENI, ENI EXPLORATION & PRODUCTION IN KAZAKHSTAN (2015), https://www.eni.com/it_IT/attachments/documentazione/pubblicazioni/paesi/eni_acs.pdf (showing, for example, that in 2014 ENI and the National Company KazMunaiGas entered into a cooperation agreement for the joint development of the Isatay block in Kazakhstan).

mentioned above. However, they do suggest that the investment regime is not per se a fundamental threat to state sovereignty and that states have considerable power to respond to the operation of that regime. Indeed, where there is a political realignment, as in Venezuela, and a government is determined to make changes that reduce the value of the investor's assets, the combination of treaty and contract protections still appears insufficient to provide even the most determined investors with the long-term security or compensation they are looking for when they make their investment.[113]

C. Contract Protection

At the time of the Houston project, thinking about the arrangement of stabilization provisions in long-term petroleum agreements was already beginning to change. A new form of stability was already being used that took into account the greatly increased influence of national oil companies: sometimes called the allocation of burden form.[114] Probably the more dramatic trend in contract usage, however, in promise if not in reality, was the shift away from so-called freezing clauses to a form of renegotiation or readjustment clause.[115] Here, thinking has undoubtedly changed.

While there are different forms of the freezing clause, a common version is to freeze the law governing the parties' contract by limiting it to the law of the host state at the time at the effective date of the petroleum contract. The contract acquires

113. *See*, *e.g.*, PETER D. CAMERON, ASS'N OF INT'L PETRO. NEGOTIATORS, STABILISATION IN INVESTMENT CONTRACTS AND CHANGES OF RULES IN HOST COUNTRIES 21-22 (2006) [hereinafter AIPN REPORT] (discussing why unilateral amendments to petroleum contracts by host governments remains a significant risk for investors); Peter Cameron, *Reflections on Sovereignty Over Natural Resources and the Enforcement of Stabilization Clauses*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 311, 341 (Karl P. Sauvant ed., 2013) [hereinafter Cameron, *Reflections on Sovereignty*].

114. *Cameron – Stability Based on Contract*, EI SOURCE BOOK, http://www.eisourcebook.org/482_CameronStabilityBasedonContract.html (last visited Feb. 3, 2016); *see also* Thomas Wälde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215, 257-58, 263-64 (1996).

115. *See* Wälde, *supra* note 1, at 79 (discussing the evolution of the stabilization clause to a modern renegotiation clause meant to provide contractual protection).

an enclave status exempt from any legal changes in the wider legal regime of the host state.[116] The allocation of burden clause and the renegotiation or rebalancing form of stabilization do not tie the state's hands in this way, allowing it to make changes at a later date but subject to certain conditions that (depending on the contract wording) will protect the investor's interest at the time the contract is concluded.

The conventional wisdom is that the trend over the past quarter of a century has been away from forms of stabilization that fetter the state's discretion over the life of a contract.[117] Elsewhere, I have argued that the renegotiation form can be structured so as to achieve similar effects to benefit the investor.[118] However, the relevant consideration here is that for most of this time there were no published awards on renegotiation clauses and indeed none for many years that would provide guidance as to how a tribunal would assess stabilization clauses in a modern setting. This has begun to change.[119]

A key notion in a modern stabilization clause will be the idea that a "change in law" has to occur to trigger renogotiation.[120] Some stabilization clauses define the "law" that has changed to include different kinds of legal instruments and, in some cases, to

116. This "cannot be considered as lex contractus" and is better seen as a "system of reference chose by the parties to be incorporated into their contract: Bertrand Montembault, *La stabilisation des contrats d'État à travers l'exemple des contrats pétroliers: Le retour des dieux sur l'Olympe?* [*The Stabilization of State Contracts using the Example of Oil Contracts: A Return of the Gods of Olympia?*], 6 INT'L BUS. L.J., 593, 608 (2003).

117. AIPN REPORT, *supra* note 113, at 50.

118. *See generally* Cameron, *Reflections on Sovereignty*, *supra* note 113, at 311-44.

119. *See* Elisabeth Eljuri & Clovis Trevino, *Energy Investment Disputes in Latin America: The Pursuit of Stability*, BERKELEY J. INT'L L. 306, 340-345 (2015) (discussing contractual stability commitments as well as arbitral decisions involving economic equilibrium clauses and renegotiation clauses); *see also* Alisher Umirdinov, *The End of Hibernation of Stabilization Clause in Investment Arbitration: Reassessing Its Contribution to Sustainable Development*, 43 DENV. J. INT'L L. & POL'Y 455, 473-80, 485-87 (2015) (discussing an arbitral decision surrounding a stabilization clause).

120. *See* Katja Gehne & Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment* (NCCR Trade Regulation, Working Paper No. 2013/46, 2014) (discussing the way in which a change in law can aggravate the relationship between host states and investors, thus triggering a stabilization clause).

include "interpretation" of the law.[121] The need for this explanation is to identify the specific origin of the problem. An example is Article 30 of a Tanzanian Production Sharing Contract which addresses Change in Legislation in the following manner:

> If at any time or from time to time there should be a change in legislation or regulations which materially affects the commercial and fiscal benefits afforded by the Contractor under this contract, the Parties will consult each other and shall agree to such amendments to this Contract as are necessary to restore as near as practicable such commercial benefits which existed under the Contract as of the Effective Date.[122]

The wording makes it clear that a "change in law," defined here as "a change in legislation or regulations," is required and the parties are required to commence discussions with a view to restoring the original benefits in the contract. The possibility of an amicable solution is encouraged.

Further, it is also necessary to explain why the change in any legal instrument (or interpretation) should be a problem at all. In brief, the answer is that the change has effects that undermine the economic bargain struck between the investor and the state in the original contract.[123] This linkage is crucial since it points to a question about the character of the effects of the change in law. Finally, it will be important to ensure that both parties are aware that communication of a change in law within the terms of the stability arrangement has occurred prior to discussion or negotiation about the next steps. All of the above predate any formal step to commence arbitral proceedings.

A Change in Law provision will typically specify that: (1) a change in law can occur in a specific manner, (2) the change should have negative effects upon the investment agreement to

121. *See id.* (discussing how a stabilization clause could foster coherence in the law).

122. GOV. OF TANZ., MODEL PRODUCTION SHARING AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA AND TANZANIA PETROLEUM DEVELOPMENT CORPORATION AND ABC OIL COMPANY, art. 30(b) (2004), http://www.resourcegovernance.org/sites/default/files/Model%20Production%20Sharing%20Agreement%202004.pdf (emphasis added).

123. *See* Dolly Wu, *Timing the Choice of Law by Contract*, 9 NW. J. TECH. & INTELL. PROP. 401, 401 (2011) (explaining that unanticipated changes in law "might defeat the very purpose of a contract").

be significant, and (3) in the event of that occurrence, the parties may well include some form of notification requirement or similar communication requirement to facilitate negotiations on a solution.[124] Essentially, a scheme of linked actions is typically established by the parties to make a "change of law" trigger effective.[125] The host government guarantees stability to the investor but does not fetter its sovereign capacity to make new laws, including laws that may affect the stabilized investment.[126]

As stated above, the triggering event will usually be a change in the law that materially affects the interests of a party or parties to the contract and, typically, that will be the foreign investor.[127] The question remains however: what constitutes a change in law?

Some investment agreements define the category of law widely to encompass as many legal instruments as possible, while others are narrower in scope. In a recent arbitral award, *Burlington v. Ecuador*[128], the tribunal examined the meaning of a change defined in the contract:

> In the event of a modification to the tax system or the creation or elimination of new taxes not foreseen in this

124. *See, e.g.*, PUB.–PRIVATE P'SHIP IN INFRASTRUCTURE RES. CTR. FOR CONTRACTS, LAWS & REGULATIONS, WORLD BANK GRP., CHANGE OF LAW – CHECKLIST AND SAMPLE WORDING 3-7 http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/change_of_law_checklist_sample_wording_en.pdf (last updated Mar. 25, 2015) (providing a sample change of law clause). A change of law provision is also known as a stabilization clause in international transactions. Margarita T.B. Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENV. J. INT'L L. & POL'Y 217, 222-23 (2002). A stabilization clause is defined generally as "a specific commitment by the foreign country not to alter the terms of the agreement, by legislation or any other means, without the consent of the other contracting party" and specifying that a "stabilization clause stricto sensu" states that the "governing law of the contract shall be that of the contracting state at the time the contract was executed, thereby preventing the application of subsequent changes in the contracting state's law." *Id.*

125. Coale, *supra* note 124, at 223.

126. Specific clauses, such as "stricto sensu" clauses, do not restrict the sovereign state from changing laws but simply insulate companies from enforcement under new laws. *Id.*

127. *See id.* at 222 (explaining that the state has the power to change laws and stabilization clauses give companies assurances that their investments will be protected when or if those changes occur).

128. Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 546 (Dec. 14, 2012).

> Contract or of the employment contribution, in force at the time of the execution of this Contract and as set out in this Clause, which have an impact on the economics of this Contract, a correction factor will be included in the production sharing percentages to absorb the impact of the increase or decrease in the tax or in the employment contribution burden.[129]

In *Burlington*, the Ecuadorian president submitted a bill to Congress proposing to increase state participation in so-called "extraordinary profits."[130] The Ecuadorian Congress approved the bill and enacted Law 42, amending the Hydrocarbons Law.[131] The Constitutional Court of Ecuador then ruled that Law 42 did not modify the production sharing contracts (PSCs).[132] In arbitration, Ecuador argued that Law 42 did not modify the PSCs because it dealt only with oil prices.[133] The tribunal, however, held that a "modification to the tax system" had occurred through the enactment and application of Law 42.[134]

In another case involving Law 42 in Ecuador, *EnCana Corporation v. Ecuador,* the contract provisions referred to "Tax

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129. *Id.* ¶ 317.

130. *See id.* ¶ 29 ("So-called extraordinary profits [are] profits resulting from oil prices in excess of the price of oil as it stood when the [production sharing contracts] were executed.").

131. Registro Oficial. 25 de Abril del 2006 Suplemento, 2006-42 Ley Reformatoria a la Ley de Hidrocarburos art. 2. Discussing the law, the tribunal in *Burlington* stated:

> Law 42 which amended The Hydrocarbons Law reads as follows: 'Participation of the State over non agreed or unforeseen surpluses from oil selling contracts. Contracting companies having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of execution of the agreement expressed at constant rates for the month of payment, shall grant the Ecuadorian State a participation of at least 50%.'

Burlington Resources Inc., ICSID Case No. ARB/08/5, Decision on Liability, ¶ 30.

132. Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 145 (Dec. 14, 2012).

133. Ecuador argued that Law 42 did not modify the PSCs because Law 42 only deals with oil *prices*, and PSCs deal with oil *volume*. *Id.*

134. *Id.* ¶ 412 ("But Law 42 did trigger the contractual mechanism applicable in the event of a modification to the tax system . . . . Accordingly, Ecuador was under an obligation to apply a correction factor that would absorb the effects of Law 42 . . . .").

Regime Amendment" as the triggering change, to the extent that they affected the economy of the contract.[135] The case turned on Value Added Tax (VAT) which was not expressly referred to in the investment agreement in the list of taxes that were to be subject to stabilization.[136] The tribunal held that the stability clauses in the various agreements applied in case of amendment to the tax regime but also to its interpretation.[137] At the time that the agreements became effective, VAT refunds were allowable.[138] In the tribunal's view, subsequent developments produced a modification to the tax regime or to its interpretation as compared to the situation when the agreements became effective.[139] There was a settled practice of interpretation by the tax authority (and evidence to support this), which was contradicted by the legal measure subsequently introduced.[140]

By the time the dispute arose in *EnCana Corp.*, there had been "numerous amendments and modifications made to the tax regime in general and the VAT regime in particular during the relevant period."[141] This context was important in *EnCana Corp.* The tribunal could identify an established interpretation of the law that had been adhered to previously by the tax authority, noting that in this case it was one from which the tax authority

135. Provision 11.9 of the Tarapoa Participation contract which read:

> In case of any amendment to the tax regime or labor participation effective at the date of execution of this Contract as described in this Clause, or its interpretation, or creation of new taxes or liens not provided for in this Contract, which may affect this Contract's economy, a correction factor in the participation percentages shall be included to absorb the increase or decrease of a tax charge or labor participation aforementioned.

EnCana Corp. v. Republic of Ecuador, LCIA Case No. UN3481, Award, ¶ 34 (Feb. 3, 2006).

136. *Id.* ¶¶ 88, 94.

137. *See id.* ¶ 160 (rejecting Ecuador's argument that the only issue for renegotiation would be actual changes to the VAT regime).

138. *See id.* ("At the time the X3 factor was set for the Tarapoa field, on 2 August 2001, VAT refunds were currently being allowed to AEC.").

139. *Id.*

140. *See id.* ("In the Tribunal's view subsequent developments, including the Interpretive Law, produced a modification to the tax regime or to its interpretation as compared with the situation as at 2 August 2001.").

141. *Id.* ¶ 41.

then departed.[142] If a change in law is to be based merely upon a change in interpretation of the law, the tribunal is unlikely to depend upon the assertion of a change in law by an aggrieved claimant and ignore the sovereign entirely; instead, it is likely to seek to base the deviation by the tax authority upon some objective criteria.[143] In the *EnCana Corp*. case it was able to identify that deviation.[144]

In the above cases, the measure introduced as a change in law had draconian effects on the investors concerned.[145] However, not only was the change in law held to be expropriatory in effect, but Ecuador was also criticized for failing to provide any clarity about its meaning and extent, and for making changes inconsistent with established practice as well as law.[146]

On the basis of the foregoing analysis, it would appear that if an investor were able to prove that an established interpretation existed, an inconsistent interpretation could be classified as a change in law. If, however, an interpretation of a tax law was being made for the first time, it is hard to see how it would fit into that category, as in such a case there is, by definition, no prior, established interpretation of what the law means.

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142. AIPN REPORT, *supra* note 113, at 65 ("The change in interpretation occurred in 1997 and before that time the Law was interpreted as meaning that no input VAT was chargeable on imports.").

143. *Id.* at 66 (The Tribunal noted that *Metalclad* had nothing to do with taxation and rejected the claim of direct expropriation in *EnCana*).

144. *Id.* at 65-66.

145. *EnCana Corporation*, LCIA Case No. UN3481, Award, ¶ 23 (explaining EnCana was harmed when Ecuador issued SRI Resolutions which denied it the right to VAT credits and refunds); Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 9 (Dec. 14, 2012) (stating that the law changed to a new production-sharing contract where "the contractor would assume the entire risk of oil exploration and exploitation, and would in exchange receive a share of the oil produced in accordance with the allocation formulas specified in each contract"); Occidental Exploration & Production Co. v. Ecuador, LCIA Case No. UN3467, Final Award, ¶¶ 60-61 (July 1, 2004) (finding that the Ecuadorian tax law required the taxpayer to apply to the courts within twenty-one days following a resolution, otherwise the resolution became final and binding).

146. *See, e.g.*, Alberto Alvarez-Jiménez, *Ex Post General Regulation and Investment Protection in Recent International Arbitration*, 16 AM. REV. INT'L ARB. 343, 373-76, 382-83 (2005) (summarizing EnCana's claim that Ecuador acted inconsistently in its application of the law).

This issue of a first time interpretation was addressed in *Duke Energy International Peru Investment No. 1, Ltd. v. Peru*.[147] In that case, the Ad Hoc Committee found that the tribunal was correct when it determined that its task was not to "sit on appeal from the decisions of . . . the Tax Court, but only to determine whether their decision 'represents a change from their respective decisions . . . .'"[148] In relation to a "stabilized law" that was being subject to an initial interpretation, the tribunal said that the standard to be met by a claimant is that the interpretation be "patently unreasonable or arbitrary"[149] – quite a high standard. The Ad Hoc Committee agreed.[150]

The above awards are not the only ones that provide guidance on how stabilization will be understood by international arbitral tribunals, but they do form part of an evolving jurisprudence that will provide greater understanding of the scope of legal protections accorded to investors in the international oil and gas industry.

V. CONCLUSIONS

In the current transition to a new investment cycle, many insights will be gained into how relations between investors and capital-importing States should be organized in the international oil and gas industry. As the German philosopher G.W.F. Hegel commented, however, the Owl of Minerva flies only at dusk.[151] Sadly, many of these insights will be applicable in a context in which investors will be scrutinizing very carefully the level of protection offered them by the extensive international investment law regime when the results of challenges under it have begun to emerge. Similarly, they will be looking carefully at the kind of provisions on offer in petroleum contracts, in the light of possible,

147. Duke Energy Int'l Peru Invests. No. 1, Ltd./Peru (Annulment Proceeding), ICSID Case No. ARB/03/28, Decision of the *Ad Hoc* Committee, ¶ 243 (Mar. 1, 2011).

148. *Id.* ¶¶ 216, 221.

149. *Id.* ¶ 216.

150. *Id.* ¶ 221 ("[I]n the Committee's view, this part of the Award was not only adequately reasoned, it was also arrived at after consideration of the evidence of Peruvian law.").

151. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 23 (Allen W. Wood ed., H.B. Nisbet trans., 1991).

perhaps even probable future tests. It is this sense of finality about a long upward cycle that invites parallels with the world in which the Houston Petroleum Law Project was launched a quarter century ago. One element is missing however: the remarkable sense of optimism about the wider international investment environment that supported initiatives such as NAFTA and the ECT. Perhaps the remarkable spread of knowledge about how to manage hydrocarbons resources, lessons learned by many countries, both positive and negative, and easy access to it, will encourage calm and realistic assessments of what governments need to offer to attract and keep investors. In this context, the need for objective, independent analysis from trusted sources is as relevant now as it was a quarter of a century ago when the Houston Petroleum Project was launched.