
Investment Contracts and International Law: Charting a Research Agenda

Lorenzo Cotula*

Rudolf Dolzer, *Petroleum Contracts and International Law*. Oxford: Oxford University Press, 2018. Pp. 353. £95. ISBN: 978-01-98715-97-9

Jola Gjuzi, *Stabilization Clauses in International Investment Law: A Sustainable Development Approach*. Cham: Springer, 2018. Pp. 353. €145,59. ISBN: 978-3-319-97232-9

Abstract

Investment contracts are an important part of the web of legal relations that underpin investment processes. They raise complex doctrinal issues, including with regard to their interface with public international law. The two books under review are part of a new surge in academic writing about investment contracts, in a field that is currently dominated by concerns about investment treaties and treaty-based arbitration. In this review essay, I explore the intersections between investment contracts and international law, engaging with the arguments presented in the two books and developing reflections based on trends in the wider literature. After situating the contract in academic and policy debates about international investment law, I compare the different approaches the two books embody – in relation to their scope, focus and format as well as the ways in which they conceptualize and piece together the multiple commercial and public interests at stake in investment contracting. I then discuss one theme that features prominently in both books – namely, the legal contours of investment protection, particularly in connection with stabilization clauses – and I examine its articula-

* Principal researcher in law and sustainable development, International Institute for Environment and Development, London, United Kingdom; visiting professor, Strathclyde Law School, Glasgow, United Kingdom; visiting research fellow, Warwick Law School's Centre for Law, Regulation and Governance of the Global Economy, Coventry, United Kingdom. Email: lorenzo.cotula@iied.org.

I was deeply saddened to learn that, as this essay went to press, Professor Rudolf Dolzer passed away. It was in Professor Dolzer's books that I first learned about international investment law, and I would like to pay tribute to his important contribution to this field of legal practice and inquiry.

tion with public regulatory powers. I conclude by outlining areas that deserve further exploration in scholarly work on investment contracts and international law.

1 Introduction

Shifting public policies, evolutions in investor-state arbitration and expanding academic writing have made the international law on foreign investment one of the most dynamic – and contested – fields of public international law. For a long time, issues concerning investment contracts were at the centre of investment law scholarship.¹ More recently, however, much public debate has focused on international investment treaties and on treaty-based investor-state dispute settlement, including in connection with policy evolutions both in bilateral and regional negotiations and in multilateral talks.² Academic interest in researching investment contracts has continued to produce important works. But, in mainstream scholarly debates, questions that sparked lively discussions in the 1970s and 1980s – for example, whether international law could provide the governing law of an investor-state contract – seem to have given ground to an array of doctrinal issues connected to the rapid expansion and extensive activation of the investment treaty regime.

In practice, however, contracts provide the legal basis for large-scale investment in many sectors, and, as such, they remain an important part of the web of legal relations that underpin foreign investment. The contract provides a key site for lawyers to crystallize not just the terms of an investment but also the narratives and the assumptions that underpin it – aspects that are sometimes explicitly reflected in the contract's preambular clauses. The role of contracts in investment processes is apparent not only at the project development stage, when the deals are negotiated, but also throughout the project's life cycle, and contract renegotiations have formed the object of many investor-state disputes. The place of contracts in investment relations is particularly prominent in some economic sectors and geographic regions. With regard to dispute settlement, a recent review of the caseload of the International Centre for Settlement of International Disputes (ICSID) found that the petroleum and mining sectors

¹ To mention but a few examples, Greenwood, 'State Contracts in International Law: The Libyan Oil Arbitrations', 53(1) *British Yearbook of International Law (BYIL)* (1982) 27; Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach', 59 *BYIL* (1988) 49; E. Paasivirta, *Participation of States in International Contracts and Arbitral Settlement of Disputes* (1990); N. Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (1995); Wälde and Ndi, 'Stabilising International Investment Commitments: International Law versus Contract Interpretation', 31(2) *Texas International Law Journal* (1996) 215; Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies', 12(2) *European Journal of International Law (EJIL)* (2001) 309; C. Leben, *La Théorie du Contrat d'Etat et l'Evolution du Droit International des Investissements* (2004).

² See, e.g., Working Group III on Investor-State Dispute Settlement Reform of the United Nations Commission on International Trade Law, available at https://uncitral.un.org/en/working_groups/3/investor-state.

accounted for 46 per cent of all ICSID contract-based arbitrations, and sub-Saharan Africa accounted for 50 per cent of the contract-based caseload.³

At a deeper level, the archetype of the contract sustains what some scholars have called a ‘transactional view’ of investment relations, whereby legal arrangements are structured around a bargain between the investor and the state.⁴ This binary configuration links two actors that have fundamentally different status under public international law and contrasts sharply with the diverse constellations of actors that typically characterize large investment projects.⁵ The widespread acceptance of this configuration has far-reaching reverberations for the wider international investment regime, well beyond contractual arrangements alone, and is reflected in the investor-state focus of international investment dispute settlement. Archival research shows that, already in the 1960s, the drafters of the ICSID Convention considered multiple avenues for states to consent to investor-state arbitration, including international treaties, domestic law and investor-state contracts.⁶ In practice, the contract model was used particularly extensively at the time,⁷ and the investor-state framing of investment relations, which the contract epitomizes, left an imprint on the DNA of the international system for the settlement of investment disputes.

From an international law perspective, investment contracts raise distinctive issues. Unlike treaties concluded between states, investor-state contracts are not a source of public international law and do not feature in what is often regarded as a shorthand for the identification of those sources – namely, Article 38 of the Statute of the International Court of Justice.⁸ In fact, investor-state contracts are often concluded

³ International Centre for Settlement of Investment Disputes (ICSID), ‘Spotlight: Contract-Based Disputes at ICSID’, *ICSID Newsletter*, June 2019, available at <https://icsid.worldbank.org/en/Pages/resources/Spotlight-on-Contract-based-Disputes-at-ICSID.aspx>. The two figures compare to 24 per cent and to 15 per cent, respectively, when considering all ICSID cases (whether based on investment treaties, contracts or laws).

⁴ Perrone, ‘The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights’, 8(4) *Journal of International Dispute Settlement* (2017) 673.

⁵ L. Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (2012), at 27–37, mapping actors and relations concerning the Chad-Cameroon oil development and pipeline project; Perrone, ‘The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?’, 7(3) *Transnational Legal Theory* (2016) 383.

⁶ T. St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (2018), at 151. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965, 575 UNTS 159.

⁷ The Indonesia-Netherlands bilateral investment treaty (BIT) of 1968 is reported to have been the first international investment treaty to feature a qualified investor-state arbitration clause (Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia, Jakarta, 7 July 1968, Art. 11), while the Chad-Italy BIT of 1969 is reported to contain the first unqualified, treaty-based expression of state consent to investor-state arbitration (Accordo tra il Governo della Repubblica Italiana ed il Governo della Repubblica del Chad per Proteggere e Favorire gli Investimenti di Capitali, Rome, 11 June 1969, Art. 7). See A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), at 44–45. Both treaties were signed after the development of the ICSID Convention, *supra* note 6. The first treaty-based investor-state arbitration was initiated in 1987. ICSID, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka – Award*, 27 June 1990, ICSID Case no. ARB/87/3.

⁸ Statute of the International Court of Justice 1945, 33 UNTS 993, Art. 38(1). See G. Hernández, *International Law* (2019), at 32–33.

pursuant to domestic law (a mining or petroleum code, for example), and many contracts explicitly identify relevant domestic law as their governing law. Claims that certain types of contractual provisions (such as stabilization, choice-of-law and arbitration clauses) would inherently ‘internationalize’ the contract, and, thus, elevate it to the international plane and change its legal status,⁹ have proved controversial.¹⁰ At the same time, it is widely recognized that international law, both customary and treaty based, can have a significant bearing on the rights and obligations of the parties both in the context of contracting processes and once the contract is in place. In the words of an influential commentary:

International law does not become the law applicable to the contract. The transaction remains governed by the domestic legal system chosen by the parties. However, this choice is checked by the application of a number of mandatory international rules such as the prohibition of denial of justice, the discriminatory taking of property or the arbitrary repudiation of contractual undertakings.¹¹

Investment treaties provide additional complexity to this interface between contractual arrangements and the rules of international law. For example, treaty-based umbrella clauses require states to honour their contractual commitments, while investor-state arbitral tribunals have held that the presence of contractual stabilization clauses can affect the application of investment treaty standards such as fair and equitable treatment.¹² A vast arbitral jurisprudence developed over the years has clarified the ways in which international law protects rights related to investor-state contracts, and academic research has elucidated the multifaceted intersections between investment contracts and international law.¹³

From a different standpoint, investment contracts are closely connected to the realm of public law – not least because they are often concluded with a state or a state-controlled entity and because fundamental issues of public policy are often at stake. These issues include the governance of publicly owned natural resources, taxation, labour relations, and environmental protection. Yet the transaction typically involves prominent commercial dimensions and is often articulated in the private law framing of autonomy of contract and of the parties’ mutual rights and obligations. These diverse considerations locate the investment contract at the interface between national and international law and between public and private law. They situate the contract in a space that hybridizes legal concepts and practices, making it an intellectually challenging – as well as practically relevant – field of scholarly enquiry.

⁹ Verdross, ‘Quasi-International Agreements and International Economic Transactions’, 18 *Yearbook of World Affairs* (1964) 230; see also *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic – Award*, 19 January 1977, paras 36–52.

¹⁰ For illustrative strands of critique both old and new, see Fatouros, ‘International Law and the Internationalized Contract’, 74 *American Journal of International Law* (1980) 134; M. Sornarajah, *The International Law on Foreign Investment* (4th edn, 2017), at 339–356; J. Ho, *State Responsibility for Breaches of Investment Contracts* (2018), at 180–221.

¹¹ C.H. Scheuer, with L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary* (2nd edn, 2009), at 587.

¹² See, e.g., ICSID, *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary – Award*, 23 September 2010, ICSID Case no. ARB/07/22, paras 9.3.25–9.3.26, 9.3.31, 9.3.34–9.3.35.

¹³ See, e.g., Arato, ‘The Logic of Contract in the World of Investment Treaties’, 58(2) *William & Mary Law Review* (2016) 351; Ho, *supra* note 10.

2 The Books

Renewed scholarly attention to the place of investment contracts in international law is therefore a welcome development, and the two books under review are – in different ways – important contributions to this debate. The books are part of a new surge in academic writing about investment contracts and their interface with public international law,¹⁴ within a wider scholarly landscape that is largely dominated by concerns about investment treaties and treaty-based arbitration. International investment law scholarship has recently experienced an empirical and cross-disciplinary turn.¹⁵ As a legal instrument that embodies an economic transaction and is typically negotiated and implemented in complex political economy contexts, the investor-state contract would lend itself to explorations that transcend the boundaries of legal analysis alone. The two books under review primarily take a doctrinal approach, but *Petroleum Contracts and International Law* does not eschew forays into the political and business contexts from which the contracts emerge and in which they are applied (for example, at 145–190).

Despite their shared field of inquiry and primary concern with doctrinal analysis, however, the two books under review embody fundamentally different scholarly projects. First, the books use different parameters to define their scope and focus. On the one level, Rudolf Dolzer's book, *Petroleum Contracts and International Law*, frames its topic in more encompassing terms than Jola Gjuzi's, *Stabilization Clauses in International Investment Law*: Dolzer explores the interface between investment contracts and international law in systemic terms, while Gjuzi focuses on a particular type of provision, albeit one that has attracted particularly extensive academic and policy debates – stabilization clauses.¹⁶ As is well known, these clauses generally aim to shelter investments from the application, or from the impacts, of regulatory changes that could impair the investor's legal rights or economic benefits. As Gjuzi points out,

¹⁴ See also, e.g., I. Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (2011); Ho, *supra* note 10.

¹⁵ See, e.g., Puig, 'Social Capital in the Arbitration Market', 25(2) *EJIL* (2014) 387; Langford, Behn and Hilleren Lie, 'The Revolving Door in International Investment Arbitration', 20(2) *Journal of International Economic Law (JIEL)* (2017) 301; J. Bonnitcha, L.N. Skovgaard Poulsen and M. Waibel, *The Political Economy of the Investment Treaty Regime* (2017).

¹⁶ See, e.g., Wälde and Ndi, *supra* note 1; Bernardini, 'The Renegotiation of the Investment Contract', 13(2) *ICSID Review – Foreign Investment Law Journal* (1998) 411; Leader, 'Human Rights, Risks, and New Strategies for Global Investment', 9(3) *JIEL* (2006) 657; Cotula, 'Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses', 1(2) *Journal of World Energy Law and Business* (2008) 158; P.D. Cameron, *International Energy Investment Law: The Pursuit of Stability* (2010), at 68–83; Sheppard and Crockett, 'Are Stabilization Clauses a Threat to Sustainable Development?', in M.-C. Cordonier Segger, M.W. Gehring and A. Newcombe (eds), *Sustainable Development in World Investment Law* (2011) 333; J.E. Viñuales, *Foreign Investment and the Environment in International Law* (2012), at 337–355; Johnson and Volkov, 'Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law', 26 *American Review of International Arbitration* (2013) 361; Cameron, 'In Search for Investment Stability', in K. Talus (ed.), *Research Handbook on International Energy Law* (2014) 124; Frank, 'Stabilisation Clauses and Foreign Direct Investment: Presumptions versus Realities', 16(1) *Journal of World Investment and Trade* (2015) 88; Cotula, 'The State of Exception and the Law of the Global Economy: A Conceptual and Empirico-Legal Inquiry', 8(4) *Transnational Legal Theory* (2017) 424 at 442–450.

stabilization clauses sometimes feature in national legislation, so her book explores a legal terrain that in fact extends well beyond the reaches of contractual practice alone (at 11, 34–36).¹⁷ That said, parts of the book seem to primarily refer to contractual forms of stabilization – such as the examples discussed when interrogating the scope of stabilization clauses (at 54–69), and the book’s examination of theories on the ‘internationalization’ of investment contracts (at 213–225). This review essay only discusses stabilization clauses in their contractual manifestations.

In other respects, it is Gjuzi’s book that presents the more extensive scope: while Dolzer confines the analysis to the petroleum sector, Gjuzi is agnostic about sectors, and her book is relevant to a wider range of economic activities, even though stabilization clauses have been used extensively in the petroleum sector and have featured in petroleum-related investor-state arbitrations. Other relevant sectors include, for example, mining, agribusiness and infrastructure. What is more, although Dolzer’s book relates petroleum contracts to ‘international law’, it is mainly concerned with the international norms for the protection of foreign investment. Other norms of international law can also have a bearing on petroleum contracts and would have arguably deserved some discussion – for example, the law of the sea affects offshore contracting, and human rights and environmental law can have reverberations for important contract parameters. Conversely, the title of Gjuzi’s book refers specifically to international investment law, but the analysis is more capacious, as it also considers, for example, international instruments related to sustainable development (at 103–172).

Second, the two books differ in their overall outlook. The succinct writing style, the largely descriptive approach, the use of paragraph numbering throughout and the inclusion of a substantial annex reporting extracts of relevant investor-state arbitrations all give Dolzer’s *Petroleum Contracts and International Law* the feel of a reference book. On the other hand, Gjuzi’s book is a research-based monograph animated by an overarching line of argument about a specific question that connects investment law to the concept of sustainable development. That said, the comprehensive research that underpins *Stabilization Clauses in International Investment Law* and the author’s detailed exposition of the many relevant dimensions mean that parts of Gjuzi’s book also read as fairly descriptive.

Third, the books reflect the different positionality of their respective authors. Declaredly based on a doctoral thesis, Gjuzi’s *Stabilization Clauses in International Investment Law* crystallizes in impressively thorough terms the author’s exploration of the multiple legal concepts and instruments at play (at v). By contrast, Dolzer’s *Petroleum Contracts and International Law* is written by a scholar and practitioner whose publication pedigree includes widely used textbooks in the field of international

¹⁷ On the issues raised by stabilization clauses found (arguably more rarely) in international investment treaties, see Gazzini, ‘Beware of Freezing Clauses in International Investment Agreements’, Columbia FDI Perspective no. 191, 16 January 2017, available at <http://ccsi.columbia.edu/files/2016/10/No-191-Gazzini-FINAL.pdf>.

investment law.¹⁸ This does not mean that *Petroleum Contracts and International Law* is free from oddities or even errors.¹⁹ But the style is assertive and authoritative, and the author does not shy away from interjecting personal commentary in the doctrinal discussion, opining, for example, that the principle of permanent sovereignty over natural resources has had ‘no discernible effect on rules of international law’, but the rise of national oil companies has transformed the global petroleum industry and established ‘permanent sovereignty’ in practice without changing the law (at 33–34).

Finally, the books embody different takes on the issues they cover. *Petroleum Contracts and International Law* reflects a ‘classic’ treatment of the issues. In substantial continuity with a long line of scholarly writings,²⁰ the emphasis is on legal techniques to conceptualize, establish and protect investor-state contracts for petroleum projects. In contrast, Gjuzi’s book is explicitly framed around possible tensions between certain contractual devices for investment protection, on the one hand, and the power of the state to regulate in social, environmental and economic matters, on the other (at 3). Featured in the title of the book, the notion of sustainable development provides a key gravitational pole for Gjuzi’s entire exploration, which makes explicit the book’s normative angle.²¹ Dolzer’s book also embodies certain assumptions and priorities, albeit more implicitly: choices about what to include in (and exclude from) the framing can involve political judgment and reflect the author’s own viewpoint.

In fact, in some ways, *Petroleum Contracts and International Law* feels strangely out of date: its survey of legal doctrine seems skewed towards writings dated up to the 1990s (at 47–68). The work of scholarly critics such as Muthucumraswamy Sornarajah, who wrote extensively on related issues well before international investment law became a mainstream field of practice and inquiry,²² seems absent from the book, as are several concerns that the petroleum industry has come to take seriously over the past two decades. For example, there is virtually no discussion of contractual clauses to address the social and environmental impacts of petroleum operations. This contrasts with the practical significance of the issues; the developments that have occurred in relation to contractual provisions on aspects such as impact assessments, environmental liabilities, gas flaring, decommissioning and remediation;²³ and the

¹⁸ See, e.g., R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995); R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd edn, 2012).

¹⁹ For example, the Principles of International Commercial Contracts of the International Institute for the Unification of Private Law (UNIDROIT) are variously referred to as Principles of International Commercial Relations (at 124), Rules on International Commercial Arbitration (at 137) and Principles of International Commercial Law (e.g. at 138, 139); reference is made to the 1994 and 2010 editions of the Principles, but not to the revisions of 2004 and 2016 (at 137, 139), and UNIDROIT is wrongly characterized as a United Nations body (at 138).

²⁰ See the survey of legal scholarship presented in Chapter 4 of *Petroleum Contracts and International Law*.

²¹ For transparency, I would like to clarify that this angle resonates with work I have myself been involved with over the years.

²² Sornarajah, *supra* note 10, at 324–357; see also M. Sornarajah, *The Settlement of Foreign Investment Disputes* (2001), at 25–60, 85–112, 223–278.

²³ See, e.g., Tienhaara, ‘Foreign Investment Contracts in the Oil and Gas Sector: A Survey of Environmentally Relevant Clauses’, 11(3) *Sustainable Development Law and Policy* (2011) 15.

possible intersections of several of these issues with public international law. Further, as Gjuzi's book points out, aspects of sustainable development have increasingly been integrated into international investment law, including through a new generation of investment treaties (at 383–449) and, arguably, through arbitral jurisprudence that has explored, for example, environmental issues in the context of petroleum operations,²⁴ all of which brings into sharper contrast the silence in *Petroleum Contracts and International Law*.

3 Investment Protection, Public Regulation and the Place of International Law

The two books under review explore multifaceted themes and develop sophisticated legal arguments, and it is impossible to do justice to these in the limited space available here. I will confine myself to discussing one overarching theme that, explicitly or implicitly, cuts across the two books – namely, the legal contours of investment protection and, particularly in Gjuzi's book, their implications for the ability of states to regulate in a wide range of economic, social and environmental policy areas. In recent years, this issue has been at the centre of significant debate and evolution in international investment law, a trend partly driven by concerns about how the law pieces together competing public and commercial interests.

With regard to investment treaties, public reflection has revolved around the standards of treatment that the treaties establish, the dispute settlement arrangements they provide and the diverse options that states have explored or pursued to address the issues – from *status quo*, to treaty recalibration and all the way to treaty termination.²⁵ Charting global trends in contractual practice is inherently more difficult: sectors, contexts and practices are extremely diverse, and, despite developments in contract disclosure, many contracts are not in the public domain. While neither book devotes much space to examining how contractual practice has evolved over time, both discuss in depth certain types of contractual commitments and their relationship with international law.

Dolzer's book devotes significant argumentative energy to highlighting that international law has a bearing on petroleum contracts. In several places (for example, at 48–49, 63–64, 103–105), the book interrogates the *Serbian Loans* judgment, in which the Permanent Court of International Justice famously held that '[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country'.²⁶ However, this passage refers to

²⁴ E.g. ICSID, *Perenco Ecuador Limited v. The Republic of Ecuador – Interim Decision on the Environmental Counterclaim*, 11 August 2015, ICSID Case no. ARB/08/06.

²⁵ United Nations Conference on Trade and Development (UNCTAD), *Reform of the IIA Regime: Four Paths of Action and a Way Forward* (2014), IIA Issues Note 3, available at https://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf; UNCTAD, *Taking Stock of IIA Reform: Recent Developments* (2019), IIA Issues Note 3, available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf.

²⁶ *Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats and Slovenes)*, Judgment, 12 July 1929, para. 86.

the role of domestic law as the governing law of the contract – for example, establishing the rules on contract formation and termination. As discussed, such choice-of-law determinations do not preclude the application of international law to protect rights the investor may have acquired in connection with the investor-state contract. In practice, contracts are widely recognized as a type of asset protected under international investment law, most investment treaties affirm this explicitly and a vast arbitral jurisprudence has applied international law to investor-state disputes involving claims that a state's exercise of public authority infringed contractual rights.

More difficult questions arise with regard to the nature of the interface between investor-state contracts and the rules of international law. There has been considerable debate, and sometimes inconsistent jurisprudence, over the relationship between an investment contract and a range of treaty provisions, including umbrella, fair and equitable treatment and expropriation clauses. For example, tribunals and scholars have discussed whether the umbrella and arbitration clauses contained in an investment treaty can bypass the effects of a contractual forum selection clause that restricts options to domestic courts.²⁷ Gjuzi's book explores such interface issues in some detail, discussing how contractual clauses can enhance investment protection when arbitral tribunals apply investment treaty standards such as expropriation (at 299–327), fair and equitable treatment (at 328–355) and full protection and security (at 355–357) and examining the controversial relation between contractual commitments and treaty-based umbrella clauses (at 357–364).

When it comes to the substantive content of investment contracts, stabilization clauses constitute the main focus of Gjuzi's book.²⁸ These clauses also feature prominently in Dolzer's *Petroleum Contracts and International Law* – in fact, they are the only type of substantive contractual clause that occupies a devoted chapter in the book (at 191–207). Both authors note that the practice of stabilization clauses is extremely diverse. Approaches to classify these clauses also vary, and the two books adopt somewhat different typologies.²⁹ By way of illustration, some clauses purport to 'freeze' applicable law to the norms in force at a specified time and to exclude the application of subsequent regulatory changes. On the other hand, so-called 'economic equilibrium' clauses link changes in law to requirements that the government restore the contract's economic equilibrium. Hybrid clauses combine freezing and economic equilibrium elements.

The historical emergence of stabilization clauses is bound up with the political economy of large foreign investment projects, particularly in certain economic sectors. For example, stabilization clauses are often used in extractive industry investments. These projects tend to require high capital costs upfront and to take time to recover costs and make a profit, making the investor vulnerable to adverse state

²⁷ For a detailed discussion, see Arato, *supra* note 13.

²⁸ As discussed, the book also discusses stabilization clauses contained in national legislation, but this review essay is concerned with contractual clauses.

²⁹ See *Stabilization Clauses in International Investment Law* (at 37–73); *Petroleum Contracts and International Law* (at 195–198).

action over the duration of the project. Meanwhile, commodity price hikes have created frustration among certain governments eager to gain more from natural resource development within their jurisdiction, so extractive industry projects are often accompanied by renegotiations and investor-state disputes. In effect, stabilization clauses seek to lock the parties into the deal they negotiated in the early stage of the investment cycle.

As Gjuzi notes, the scope of stabilization clauses can vary significantly – from commitments centred on the fiscal regime to more encompassing provisions that cover wide-ranging conduct by central and local public authorities (at 54–69). In line with the findings of earlier research,³⁰ Gjuzi discusses examples of stabilization clauses that, expressly or as a result of their broad formulation, cover issues such as labour law, environmental protection and health and safety (at 61–62). Insofar as stabilization clauses determine whether – or under what conditions – a covered regulatory change applies to an investment project, they interrogate the interface between investment protection and a state's ability to regulate. As such, the clauses have historically proved contentious, particularly as developing countries were seeking to restructure international economic relations.³¹ And as contractual practice shifted from a primary concern about expropriation to allocating regulatory risk in potentially wide-ranging policy areas, non-governmental organizations (NGOs) began to raise concerns that a mechanical application of certain types of stabilization clauses could constrain the implementation of social, environmental or economic measures, including steps to realize human rights.³²

Specifically with regard to human rights concerns, a study jointly commissioned by the International Finance Corporation and the then United Nations (UN) Special Representative to the Secretary-General for Business and Human Rights, John Ruggie, concluded that 'in a number of cases the stabilization clauses are in fact drafted in a way that may allow the investor to avoid compliance with, or seek compensation for compliance with, laws designed to promote environmental, social, or human

³⁰ A. Shemberg, *Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights* (2008), paras 74, 88–93, 146–147, available at <http://documents.worldbank.org/curated/en/502401468157193496/pdf/452340WPOBox331ation1Paper01PUBLIC1.pdf>.

³¹ Frank, *supra* note 16, at 91–93.

³² See, e.g., Amnesty International UK, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project* (2003); Amnesty International UK, *Contracting out of Human Rights: The Chad-Cameroon Pipeline Project* (2005). These concerns present several interlinked dimensions. First, where public authorities introduce more stringent rules, depending on the wording of the stabilization clause, they may have to exempt ongoing investments from the new rules or, in economic equilibrium clauses, bear the costs by offsetting the investors' losses. Second, if states must bear the costs of public action, they may be discouraged from acting in the first place, particularly where public finances are already under strain, or else they might prioritize forms of regulation that, while less effective in achieving the stated policy goal, are less burdensome for the investor. See Cotula, *supra* note 16, at 168–172; see also Tienhaara, 'Unilateral Commitments to Investment Protection: Does the Promise of Stability Restrict Environmental Policy Development?', 17(1) *Yearbook of International Environmental Law* (2007) 139, at 161.

rights goals'.³³ The study highlighted geographic disparities in the use of stabilization clauses, finding the more problematic clauses to be particularly prevalent in low- and middle-income countries.³⁴ This pattern may reflect differentiated investor perceptions of regulatory risk and/or different balances of negotiating power between investors and states, but research has also linked the more encompassing stabilization clauses to a country's level of corruption and authoritarianism.³⁵ The UN Guiding Principles on Business and Human Rights (UN Guiding Principles) affirm that 'states should maintain adequate domestic policy space to meet their human rights obligations' when negotiating investor-state contracts.³⁶

There is limited evidence on the impacts these debates and guidance have had on contractual practice. But they have clearly had mixed impacts on scholarly work, and the two books under review take notably different approaches. Gjuzi places at the centre of her analysis the 'antinomy' between stabilization clauses and what she refers to as 'regulatory power' (at 3). Her book elaborates extensively on this tension (at 93–103) and engages specifically with the UN Guiding Principles as one response to it (for example, at 479–481). By contrast, beyond references to stabilization clauses having formed the object of 'controversial debates' (at 192), there is little trace of these issues in *Petroleum Contracts and International Law*, even though the NGO concerns originally emerged in connection with petroleum projects.

This circumstance aligns with the wider approach taken in Dolzer's book, as several issues that depart from investment protection concerns are not discussed or are only briefly touched upon (such as the remark that decision-making related to petroleum contracts 'increasingly' takes place 'under the critical eyes ... of political opposition, the civil society, and interested media within the host State' [at 12]) or else are somewhat summarily dismissed (for example, with regard to the extensive literature on the 'resource curse' [at 189–190]). Admittedly, a detailed research monograph provides a more conducive space for exploring such complex issues in depth, though a reader might expect a treatise on the interface between investment contracts and international law to outline the multiple dimensions of the issues covered, albeit in a more succinct form.

Dolzer rightly notes that 'policy judgment on [stabilization] clauses will vary dependent upon basic premises and perspectives' and calls for a balanced assessment

³³ Shemberg, *supra* note 30, para. 146.

³⁴ *Ibid.*, paras 145, 147.

³⁵ Frank, 'Stabilisation Clauses and Human Rights: The Role of Transparency Initiatives', in I. Feichtner, M. Krajewski and R. Roesch (eds), *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (2019) 111.

³⁶ Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 March 2011, Principle 9. The Principles for Responsible Contracts, which are annexed to the Guiding Principles, provide more detailed guidance, clarifying that '[c]ontractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's *bona fide* efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations'; Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, UN Doc. A/HRC/17/31/Add.3, 25 May 2011, Principle 4.

that considers the clauses not in isolation but, rather, in the context of the overall contractual package of which these clauses form a part (at 194). He reviews arbitral jurisprudence and correctly concludes that tribunals have tended to give effect to contractual stabilization clauses (at 207). Gjuzi reaches similar conclusions (at 213–278, 370) and goes on to assess the different ways in which stabilization clauses can affect the power of the state to regulate in pursuit of sustainable development (at 93–103). She also explores concrete options to realign stabilization clauses with sustainable development (at 451–493). These recommendations essentially entail recentring stabilization clauses around the disciplining of arbitrary state conduct, to the exclusion of *bona fide* measures, and favouring an evolutive interpretation of the clauses (for example, at 459, 464, 482–487). Thus reconceptualized, Gjuzi argues, stabilization clauses ‘can be construed as being ultimately compliant ... with the cause of sustainable development’ (at 489).

These recommendations helpfully identify practical approaches to reconcile commercial and sustainable development imperatives. But while I articulated ideas along broadly comparable lines in some earlier writings,³⁷ particularly at a time when the issues were yet to make it on the mainstream agenda and tended to prompt dismissive reactions from industry insiders, the debate seems to have since shifted in more fundamental ways. Over the past few years, the unfolding of the commodity cycle, and particularly the commodity price hikes experienced a few years ago, have made several states more assertive in their relations with foreign investors in the natural resources sectors, sparking talk of ‘resource nationalism’ in pro-investor quarters.³⁸ Meanwhile, the proliferation of investor-state arbitrations, and public concerns about the proceedings and their outcomes, has sustained a ‘backlash’ against the international system for investor-state dispute settlement³⁹ and a ‘return of the state’ in international investment law,⁴⁰ which is reflected in the efforts that several states have made to ‘recalibrate’ their investment treaties and reassert control over treaty interpretation.

In this evolving context, more radical critiques of stabilization clauses have emerged that more fundamentally challenge the relevance or desirability of the clauses from a host state perspective,⁴¹ and a wider range of techniques has been explored to safeguard regulatory power if the clauses are featured in investor-state contracts. Examples include linking the duration of any stabilization commitment to the time frame needed for the investor to recover costs and generate a minimum level of returns or to reassure lenders for the duration of their loans, rather than to the often longer duration of the overall contract; and restricting any commitments on the fiscal regime to specified taxes, while also moving from tax stability to tax predictability so

³⁷ For example, Cotula, *supra* note 16, at 172–178.

³⁸ For a discussion, see S.P. Ng’ambi, *Resource Nationalism in International Investment Law* (2016).

³⁹ M. Waibel *et al.* (eds), *The Backlash against Investment Arbitration* (2010).

⁴⁰ Alvarez, ‘The Return of the State’, 20(2) *Minnesota Journal of International Law* (2011) 223.

⁴¹ E.g. Frank, *supra* note 16.

as to align the contractual fiscal regime with the price fluctuations that characterize commodity cycles.⁴²

In addition, the very concept of sustainable development has come under closer scrutiny for its vagueness and ambiguities.⁴³ Whether sustainable development can provide effective guidance in navigating difficult problems and trade-offs around issues such as tax regimes, ecological integrity and social justice, in the context of investment contracting, largely depends on how that concept is understood and operationalized in practice, including with regard to legal arrangements. The recent inclusion of sustainable development issues in a new generation of investment treaties provides ground for caution: treaty clauses related to sustainable development issues have thus far tended to remain largely hortatory or without effective enforcement mechanisms, and, as such, they seem unlikely to engender a meaningful rebalancing of economic, social and economic considerations.⁴⁴

Gjuzi highlights this problem and argues instead for a more diffuse application of sustainable development principles – for example, through interpretive techniques such as systemic integration (at 444). Compared to standalone clauses, this approach might lend itself to a more holistic consideration of the multiple aspects of sustainable development. Yet, systemic integration also involves limitations, which may be linked, for example, to the significant discretionary power it grants to tribunals on how to ‘take into account’ other relevant, applicable norms of international law, and this has sometimes resulted in arbitrators reaching different conclusions, even in the same dispute.⁴⁵

Gjuzi skilfully navigates these complex issues through solidly grounded doctrinal analysis that dissects antinomies and responses. On the other hand, a legalistic conception of sustainable development, and of investment law, risks obscuring the politically contested nature of the issues and the long history throughout which that contestation

⁴² A.M. Maiga and B. Schwartz, *Revising Mali’s Mining Code: Three Key Areas for Improvement* (2018), available at <https://pubs.iied.org/pdfs/17491IIED.pdf> ; A.M. Maiga and B. Schwartz, ‘Mali’s New Mining Law: An Improvement, But Fails Artisanal Miners’, *International Institute for Environment and Development Blog* (8 October 2019), available at www.iied.org/malis-new-mining-law-improvement-fails-artisanal-miners (both publications discuss legislative rather than contractual stabilisation provisions); see also H. Mann and A. Redhead, ‘IGF/OECD Program on Tax Base Erosion and Profit Shifting in the Mining Sector’, Presentation made at the Organisation for Economic Co-operation and Development, Paris, 25 June 2018, available at www.oecd.org/dev/Session-1_Alexandra-IISD_OECD%20NR-PD_Jun%202018.pptx.

⁴³ For critical discussions of sustainable development, see, e.g., Viñuales, ‘The Rise and Fall of Sustainable Development’, 22(3) *Review of European, Comparative and International Environmental Law (RECIEL)* (2013) 3; Cardesa-Salzmann and Cociolo, ‘Global Governance, Sustainability and the Earth System: Critical Reflections on the Role of Global Law’, 8(3) *Transnational Environmental Law* (2019) 437.

⁴⁴ J. Gathii and S. Puig (eds), *Symposium on Investor Responsibility: The Next Frontier in International Investment Law*, vol 113 (2019), available at www.cambridge.org/core/journals/american-journal-of-international-law/volume/AED2077F3422BB3F291F651F695CD4FA.

⁴⁵ For a discussion of the limits of systemic integration in mediating the relationship between international investment and human rights law, see Cotula, ‘Land, Property and Sovereignty in International Law’, 25(2) *Cardozo Journal of International and Comparative Law* (2017) 219, at 268–272; Fahner and Happold, ‘The Human Rights Defense in International Investment Arbitration: Exploring the Limits of Systemic Integration’, 69(3) *International and Comparative Law Quarterly* (2019) 741.

unfolded – from decolonization to claims for a New International Economic Order, the spread of neo-liberalism and efforts to recalibrate the international investment regime. In these respects, Dolzer's *Petroleum Contracts and International Law* embodies a more explicit attempt to plot some of the main legal developments against their historical and political contexts and to outline the long-term trajectories that affect scholarship and jurisprudence in this area of law (at 17–45).

4 Deepening and Broadening the Research Agenda

Together, the two books under review cover extensive ground, but some big questions remain. Some relate to the nexus between investment protection and public regulation, and, with regard to sectors such as petroleum and coal, they are partly linked to the fundamental transformations with which the energy sector is faced. With the adoption, in 2015, of the Paris Agreement to address climate change,⁴⁶ there is broad-based recognition of the urgent need to reduce carbon emissions. The Intergovernmental Panel on Climate Change (IPCC) estimates that limiting the temperature increase to 1.5 degrees Celsius above pre-industrial levels – a target that the Paris Agreement identifies as desirable,⁴⁷ and the IPCC as a key turning point for the severity of climate-related damage⁴⁸ – could require dramatic reductions in global oil production.⁴⁹ At the same time, research indicates that the 1.5 degree Celsius goal will already be exceeded by fully implementing the oil projects that have been approved worldwide, meaning that corrective action is needed if the world is to keep temperature rises within 1.5 degrees Celsius.⁵⁰

Decarbonization of energy systems is often discussed in terms of demand-side measures – that is, policy or technological developments that reduce demand for carbon-intensive energy sources, whether through lower consumption, more efficient energy use or greater reliance on lower-emission sources. But there have also been calls for supply-side measures that could more directly affect relations between investors and states, such as coal phase-outs and termination of oil operations,⁵¹ and

⁴⁶ Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

⁴⁷ Art. 2(1)(a).

⁴⁸ Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: Summary for Policy Makers* (2018), para. A.3.2, available at https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf; see also the report's analysis comparing the climate-related impacts of temperature rises of 1.5 degree and 2 degree Celsius (section B).

⁴⁹ *Ibid.*, at 16 (particularly 'pathways' P1 and P2).

⁵⁰ A. Grant and M. Coffin, *Breaking the Habit: Why None of the Large Oil Companies Are 'Paris-Aligned', and What They Need to Do to Get There* (2019), at 6, 10, 40, available at www.carbontracker.org/reports/breaking-the-habit/; see also Tong *et al.*, 'Committed Emissions from Existing Energy Infrastructure Jeopardize 1.5°C Climate Target', 572 *Nature* (2019) 373; Stockholm Environment Institute *et al.*, *The Production Gap: The Discrepancy between Countries' Planned Fossil Fuel Production and Global Production Levels Consistent with Limiting Warming to 1.5°C or 2°C* (2019), available at <http://productiongap.org/>.

⁵¹ Le Billon and Kristoffersen, 'Just Cuts for Fossil Fuels? Supply-Side Carbon Constraints and Energy Transition', 0(0) *Environment and Planning A: Economy and Space* (2019) 1. See, e.g., activist calls for phasing out Scotland's fossil fuel industry. G. Muttitt, A. Markova and M. Crighton, *Sea Change: Climate Emergency, Jobs and Managing the Phase-Out of UK Oil and Gas Extraction* (2019), available at <http://priceofoil.org/content/uploads/2019/05/SeaChange-final-r3.pdf>; K. Keane, 'Climate Change: Squeezing North Sea Dry Will Harm Paris Targets', *BBC News* (15 May 2019), available at www.bbc.co.uk/news/uk-scotland-scotland-business-48274440. I am indebted to Kyla Tienhaara and Brendan Schwartz for these points.

even demand-side measures, if effective, could have reverberations for investor-state relations in fossil fuel-producing countries.⁵² These evolutions raise questions about whether legal techniques that were developed to balance competing commercial and public interests in a world without such a hard carbon constraint are still appropriate in the changed context and what new approaches might be needed to facilitate the energy transition.

In addition, there remains considerable scope to explore a wider range of contractual issues and provisions. For example, renewed interest in tackling tax avoidance and the implementation of multilateral reform of bilateral tax treaties can raise questions in connection with contractual fiscal regimes, including the operation of any contractual tax avoidance and tax stabilization clauses.⁵³ Meanwhile, concerns about the enclave nature of resource projects have fostered the development of clauses to maximize economic opportunities for local workers and suppliers, while changes in environmental awareness have facilitated the emergence of contractual provisions on wide-ranging environmental issues associated with large-scale investments. Clauses related to water rights – for instance, in connection with large-scale irrigated agriculture projects – raise issues in the context of water scarcity and competing water demands. These themes beg questions about the contract and its relationship both with national law (for example, tax, water and environmental legislation) and with the rules of international law (including tax treaties, human rights related to water and natural resources, and trade and investment treaties restricting local content requirements).

In addition, resource conflicts associated with large-scale investment projects have raised questions about the parties to the contract and the contract's formation procedures, shifting the focus from the contract as a legal document to contracting as a dynamic process. International instruments related to indigenous peoples, and growing jurisprudence developed by regional human rights bodies, have addressed issues of local consultation and free, prior and informed consent, which if followed through can have a significant bearing on contracting procedures.⁵⁴ Further, the need for investors to establish workable relations with local actors has fostered the development of community-investor agreements: from social responsibility agreements that channel certain benefits to groups most directly affected by the project, to contracts that include local actors in the main economic transaction – for example, through joint

⁵² For example, if lower global demand fundamentally changes an energy project's returns, this could raise not just commercial viability issues but also, from a host state perspective, questions as to whether the reduced economic benefits justify the project's continued operation, given its shifting cost-benefit profile compared to alternative development pathways.

⁵³ Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting 2016.

⁵⁴ United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 September 2007, Arts 19 and 32(2); Convention no. 169 Concerning Indigenous and Tribal People in Independent Countries 1989, 1650 UNTS 383, Art. 6; see also Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment, 28 November 2007, para. 134; Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, 27 June 2012, paras. 160, 163–167, 185.

ventures and multi-actor agreements that also involve the government.⁵⁵ A number of recent national laws – for example, in the mining sector – mandate investors to negotiate such agreements.⁵⁶

Practical challenges aside (for example, about notions such as ‘community’ and the gap between legal categories and often complex and evolving social realities), these developments raise issues about the interface between investment contracting and international law. This is not only because human rights treaties may have a bearing on the contracting process, including through the application of consultation requirements. From an investment law perspective, there are questions as to whether investments made in breach of consultation requirements should be deemed to be protected by applicable investment treaties⁵⁸ and whether representations made by public officials before consulting affected groups can be deemed to create ‘legitimate expectations’ protected under those treaties. In recent years, issues surrounding local consultation requirements have found their way into investor-state arbitration.⁵⁹

These diverse illustrative themes, concerning both the content of the contracts and their formation process, outline a more encompassing research agenda than that reflected in the two books under review and in the prior long-standing debates about investment contracts and international law. Yet, the broader agenda links closely with the analysis developed in the two books – not least because stabilization clauses, which occupy a central place in the books under review, can intersect with several of these themes: from climate imperatives, to local content requirements and water rights and all the way to community-investor agreements. In Guinea’s mining sector, for example, stabilization clauses were reported to have created a ‘dual legal regime’, whereby new community development requirements were only applied to mining concessions granted after the adoption of the legislation introducing those requirements.⁶⁰ This interrelatedness of issues means that advancing the broader agenda would benefit from bringing into dialogue scholarly approaches that have thus far evolved largely in isolation, and the authors of the two books under review would have much insight to contribute to these explorations.

⁵⁵ O’Faircheallaigh, ‘Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon’, 44(2) *Community Development* (2013) 222; Odumosu-Ayanu, ‘Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework’, 15 *Melbourne Journal of International Law* (2014) 1; J. Loutit, J. Mandelbaum and S. Szoke-Burke, *Emerging Practices in Community Development Agreements* (2016), available at <http://ccsi.columbia.edu/2016/02/10/emerging-practices-in-community-development-agreements/>; Gathii and Odumosu-Ayanu, ‘The Turn to Contractual Responsibility in the Extractive Industry’, 1(1) *Business and Human Rights Journal* (2016) 69.

⁵⁶ Nwapi, ‘Legal and Institutional Frameworks for Community Development Agreements in the Mining Sector in Africa’, 4(1) *The Extractive Industries and Society* (2017) 202.

⁵⁸ On the reverberations of alleged breaches of environmental impact assessment requirements, see ICSID, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya – Award*, 22 October 2018, ICSID Case no. ARB/15/29.

⁵⁹ See, e.g., ICSID, *Bear Creek Mining Corporation v. Republic of Peru – Award*, 30 November 2017, ICSID Case no. ARB/14/2, paras 203, 208, 257–264, 406–412, 565–569, 656–668; *Partial Dissenting Opinion of Professor Philippe Sands QC*, 12 September 2017.

⁶⁰ H.D. Drame, ‘Relationships between Mining Companies and Local Communities under the 2011 Guinean Mining Code: An Analysis of the Legal Framework Governing LDAs and LEDFs’, *Oil, Gas and Energy Law Intelligence* (October 2019), at 11, 13.