Internationalization of Foreign Investment Agreements

Some Fundamental Issues of International Law

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Recently there seems to be a trend to provide expressly the law of the host State as the proper law or applicable law in an international investment agreement1 between a host State or a State enterprise, on the one hand, and a foreign investor or a multinational corporation, on the other.2 Such a tendency with the Third-World developing countries seems to be increasingly acute as a reflection of the menace of

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often idiosyncratic arbitral approaches to the choice-of-law issue. Many developed countries are also often found to insist on the application of their own national law to natural resource development agreements. From their vantage point—that performance of such international contracts takes place in the territory of the host State—the host States consider themselves well placed to assume that this allows them to insist that the application of their own law is desirable and practical in day-to-day operations. The law of a State may sometimes mandatorily require it to contract by reference to its own national law. The exclusive role of such chosen host-State law has been beclouded by the extremely controversial theory of internationalization of international or foreign investment agreements or economic development agreements (EDAs). Thus, obviously in the context of the theory of internationalization, the perennial question remains whether, or to what extent, public international law has any role to play in the situation where the proper law of the contract is some municipal law and the contract has its being in that law as the proper law of the contract. In the pages that follow the issue will be examined from the angle of the fundamental theoretical debate on the relationship between international law and municipal law, and also in the light of international case-law. The study is mainly in the context of international

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