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GRADUATE  
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LAW

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# SUBSURFACE PROPERTY RIGHTS IN LATVIA: PUBLIC INTEREST OVER PRIVATE RIGHTS?

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## **Abstract**

Nowadays it is commonly accepted that an efficient property rights system is instrumental to economic prosperity. Yet the nations of the world have different views on the appropriate property regime for their State shaped by each nation's history, culture, and political vision. The majority of States exercise public ownership over onshore subsurface resources, whereas the private property regime where subsurface resources belong to the landowner is nearly extinct. The US remains a major adherent of the private property regime in subsurface resources, as does Latvia amongst EU countries.

Yet, in quest of economic development, the Latvian authorities propose a legislative amendment that would vest the State with the property rights in those resources, thereby transferring property rights in the subsurface from private landowners to the State. This paper strives to determine whether the "Proposal for Improvement of Legislative Regulation on Subterranean Depths for Attraction of Potential Investment" ("Proposal") by the Latvian government is necessary and whether it would infringe the human right to property if implemented.

The paper exposes several issues to be taken into account with the governmental "Proposal" prior to implementing legislative amendments. *Firstly*, the implications of potential scenarios are not sufficiently analysed in the "Proposal" from the perspective of property as a human right. This paper addresses that gap. *Secondly*, a legislative amendment according to the "Proposal" is likely to fall short of the criteria for lawfully taking private property rights from the constitutional and ECHR perspectives. This primarily concerns the proportionality conditions, for which the paper offers a few mitigating recommendations. *Thirdly*, while the legislator explores only the property regimes of other EU countries and Canada, this paper offers the US as a country for comparative analysis on the subject, so as to alleviate proportionality concerns.



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# I The Notion of Property: Its Foundations and Development

The evolution of property rights<sup>1</sup> generally and regarding natural resources in particular must first be examined in order to understand today's property regimes and inherent State privileges. *One view* is that property is intertwined with the principle of sovereignty of the State. *Another view* is that property existed before the State system and independently of it. The former view finds its roots in legal positivism theory, whereas the latter view is supported within the frame of natural law theory. This chapter reviews these two legal theories as the foundations of property. It highlights the controversies involving both theories that prevent selection of either one of them as an absolute foundation for the notion of property.

## 1.1. Sovereignty as the Foundation for Property under Legal Positivism

Most scholars explore the property system in the light of the sovereignty of States over their territory. References to sovereignty are found in French scholarly works as early as the 16th century, yet there is no doubt that sovereignty existed long before that<sup>2</sup>. Although the concept of sovereignty may be as old as human history, the definition of the concept is multifaceted depending on the context<sup>3</sup>. For the purpose of this article it will suffice to employ the generic view on sovereignty as the legitimate and supreme power of the State to govern its territory and population.

As for the notion of property, the Peace Treaty of Westphalia dating back to 1648 is often reviewed in connection with the evolution of property rights in natural resources<sup>4</sup>. In essence, Westphalia instituted the unity of States through territorial sovereignty<sup>5</sup>. For this Westphalia is sometimes referred to as the mother of the modern notion of territoriality<sup>6</sup>. While this is a generally accepted historical fact,

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<sup>1</sup> Property rights are defined in this article as a bundle of rights with respect to property, as laid down in the Civil Law of Latvia under Section 927: "Ownership is the full right of control over property, i.e., the right to possess and use it, obtain all possible benefit from it, dispose of it and, in accordance with prescribed procedures, claim its return from any third person by way of an ownership action"; and under Section 1039: "Owners may prohibit all others from affecting their property, as well as from using or exploiting it, even if no losses are caused the owners themselves thereby": The Civil Law of Latvia, Sections 927, 1039. Available at: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The\\_Civil\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Civil_Law.doc). Last visited on 28 May 2015. See also Sprankling, John G. 2000. *Understanding Property Law*. Lexis Publishing. (Sprankling 2000, pp. 4-6). Sprankling defined property rights as (i) the right to use and enjoy, (ii) the right to exclude third parties, (iii) and the right to transfer.

<sup>2</sup> Fowler, Michael R., and Julie M. Bunck. 1995. *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*. The Pennsylvania State University Press. (Fowler and Bunck 1995, p. 21).

<sup>3</sup> *Ibid*, p. 32.

<sup>4</sup> See generally Shakelford, S. J. 2009. "The Tragedy of the Common Heritage of Mankind". *Stan. Envtl. L.J. (Stanford Environmental Law Journal)* 28: pp. 109-169. (Shakelford 2009, p. 151).

<sup>5</sup> Gross, L. 1948. "The Peace of Westphalia, 1648-1948". *Amer. J. Int'l L (American Journal of International Law)*: pp. 20-41. (Gross 1948, p. 20).

<sup>6</sup> Shakelford 2009, p. 113, *supra* note 4.

Westphalia concerns only territorial sovereignty rather than the existence of the concept of property.

The context of Westphalia must first be reviewed before using it to legitimize State privileges within their territory. The context reveals that the Treaty of Westphalia<sup>7</sup> meant to achieve general peace by ending the Thirty Years War<sup>8</sup>. This was not a treaty establishing State privileges against private rights; rather, Westphalia addressed States and implied rights and obligations of States against other States. Whilst Westphalia remains a convenient reference for advocates of State-given property stemming from the State sovereignty principle<sup>9</sup>, Westphalia does not consider private rights or address the notion of property as a universal matter irrespective of State boundaries.

In general, property can be construed independently of sovereignty. At least three legal arguments support this proposition:

- i. recognition of private property on land that belongs to no State, i.e. *terra nullius*;
- ii. continuation of property rights despite changes of sovereignty;
- iii. protection of property rights under military occupation<sup>10</sup>.

Each of these principles, diminishing the validity of viewing property only within State-made law, is examined in more detail below.

*Firstly*, international law fails to give an exhaustive answer as to whether a private claim or a State claim over new unoccupied territory would succeed if a private individual or a legal entity discovers such territory first<sup>11</sup>. Private parties can claim title to such land; however, the orientation of modern international law on States dictates that a State should assert the legal rights of private parties for them<sup>12</sup>. The principle that private parties can claim proprietary rights over *terra nullius* was endorsed in *United States v. Fullard-Leo*<sup>13</sup> and in dicta in the *Johnson v. McIntosh*<sup>14</sup> case<sup>15</sup>. Again, the Norwegian Supreme Court in the *Jacobsen* case ruled

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<sup>7</sup> The Treaty of Westphalia. Available at: [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp). Last visited on 18 April 2015.

<sup>8</sup> German History in Documents and Images. *Peace Treaties of Westphalia (October 14/24, 1648)*. Available at: [http://germanhistorydocs.ghi-dc.org/sub\\_document.cfm?document\\_id=3778](http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3778). Last visited on 18 April 2015.

<sup>9</sup> Sprankling, John G. 2014. *The International Law of Property*, 1<sup>st</sup> edition. Oxford University Press. (Sprankling 2014, p. 4).

<sup>10</sup> See generally Ederington, L. B. 1997. "Property as a Natural Institution: The Separation of Property from Sovereignty in International Law". *Am. U. Int'l L. Rev. (American University International Law Review)* 13(2): pp. 263-331.

<sup>11</sup> *Ibid*, p. 275. Ederington discusses a case when "a private individual or company discovers the reef and decides it would make a great location for a small hotel or the foundation for a mining rig. Finally, imagine the individual or company succeeds in its endeavour, and a country (of which the private party is not a national) learns of this success and asserts sovereignty over the reef" and concludes that the two foundations of property collide in this case.

<sup>12</sup> *Ibid*, p. 276.

<sup>13</sup> *United States v. Fullard-Leo*, 133 F.2d 743, 746 (9th Cir. 1943).

<sup>14</sup> *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. 8 Wheat. 543 (1823) (Chief Justice Marshall's opinion).

<sup>15</sup> Quoted in Ederington 1997, pp. 278-279, *supra* note 10.



in favour of a private individual in his claim against Norway, which attempted to ignore the individual's rights over a part of Jan Mayen Island acquired when the island's status had been *terra nullius*<sup>16</sup>.

Moreover, "a unique international question"<sup>17</sup> on *terra nullius* claims by an American company and several States in proximity to the Spitsbergen archipelago was resolved by the Treaty concerning the Archipelago of Spitsbergen<sup>18</sup>. The Treaty recognized Norway's claim over the territory in question<sup>19</sup> subject to Norway recognizing "acquired rights of nationals of the High Contracting Parties"<sup>20</sup>, including their mineral rights<sup>21</sup>. No State was claiming any privileges over this archipelago until commercially valuable coal deposits were discovered in the western part of the archipelago<sup>22</sup>. As long as *terra nullius* can be claimed by private parties as in the Jan Mayen and Spitzbergen cases, the notion of property as a natural institution can be affirmed despite proliferating legal positivism in support of sovereignty as the foundation for property.

*Secondly*, decoupling of property from sovereignty can be demonstrated through the doctrine of acquired rights, which implies the preservation of property rights at the time of government succession. This doctrine is one of the most established norms in modern international law<sup>23</sup>. This has been reaffirmed, *inter alia*, in the *German Settlers* case<sup>24</sup>. In that case, the State of Poland refused to recognize German settlers' property rights granted by the Prussian government, to which Poland was a successor by virtue of the Versailles Treaty<sup>25</sup>. The Permanent Court of International Justice maintained that "private rights must be respected by the new territorial sovereign"<sup>26</sup>. Even though some limitations are imposed by legal positivism on the natural law character of the doctrine<sup>27</sup>, this illustration weakens sovereignty as the only foundation for property rights.

*Thirdly*, a number of international conventions require private property to be respected and protected against appropriation during military occupation by a hostile

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<sup>16</sup> *Jacobsen v. Norwegian State*, 7 I.L.R. 109 (Nor. Sup. Ct. 1940) quoted in Ederington 1997, pp.280-284, *supra* note 10.

<sup>17</sup> See Lansing, R. 1917. "A Unique International Problem". *Amer. J. Int'l. L. (American Journal of International Law)* 11: pp.763-771.

<sup>18</sup> Ederington 1997, pp. 284-285, *supra* note 10.

<sup>19</sup> Nowadays known as: The Svadbald Treaty (9 February 1920), Article 1. Available at: <http://www.jus.uio.no/english/services/library/treaties/01/1-11/svalbard-treaty.xml>. Last visited on 18 April 2015.

<sup>20</sup> The Svadbald Treaty, *supra* note 19, Article 6.

<sup>21</sup> *Ibid*, Article 7.

<sup>22</sup> Lansing 1917, pp. 763-764, *supra* note 17.

<sup>23</sup> Volkovitsch, M. J. 1992. "Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts". *Colum. L. Rev. (Columbia Law Review)* 92: pp. 2162-2214. (Volkovitsch 1992, p. 2203).

<sup>24</sup> See *German Settlers in Poland*. Advisory Opinion of 10 September 1923 (Series B, No. 6). Available at: [http://legal.un.org/PCIJsummaries/documents/english/PCIJ\\_FinalText.pdf](http://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf). Last visited on 18 April 2015.

<sup>25</sup> *Ibid*, p. 18.

<sup>26</sup> *Ibid*, p. 20.

<sup>27</sup> See for details Ederington 1997, pp. 311-317, *supra* note 10.

State<sup>28</sup>. Moreover, “[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is classified as a war crime under the Rome Statute of the International Criminal Court<sup>29</sup>. The limitation of “military necessity” in this provision reflects a more modern perspective with roots in legal positivism that subordinates private property rights to the public interest<sup>30</sup>. The doctrine of military occupation is considered to be restricted by the positivistic frame to a greater extent than the aforementioned *terra nullius* and the doctrine of acquired rights<sup>31</sup>. Nevertheless, the essence of the rules on military occupation remains that private property is insulated from sovereignty and is preserved when sovereignty ceases to function<sup>32</sup>.

## 1.2. Natural Law Theory as the Foundation for Property

Scholars were fascinated by the subject of property years before the Westphalian recognition of territorial sovereignty of States<sup>33</sup>. Private property, when movable and immovable things were owned by individuals, preceded the rise of States<sup>34</sup>. Echoing the *terra nullius* argument against sovereignty as the basis for property, “The Law of Nations” treatise of the 18<sup>th</sup> century stated:

An independent individual (...) may settle in a country which he finds without an owner, and there possess an independent domain. Whoever would afterwards make himself master of the entire country, could not do it with justice without respecting the rights and independence of this person<sup>35</sup>.

However, sovereign States do not need to be regarded as obstacles to private enjoyment of property. On the contrary, under the natural law theory the purpose of States is to secure those rights. To illustrate, the Declaration of Independence of the thirteen united<sup>36</sup> States of America stipulated:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to

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<sup>28</sup> See Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague, 29 July 1899), Article 46. Available at: <https://www.icrc.org/ihl/INTRO/150?OpenDocument>. Last visited on 18 April 2015.

<sup>29</sup> International Criminal Court. Rome Statute (1 July 2002), Article 8(2)(iv). Available at: [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf). Last visited on 18 April 2015.

<sup>30</sup> Ederington 1997, p. 318, *supra* note 10.

<sup>31</sup> *Ibid*, p. 330.

<sup>32</sup> *Ibid*, p. 323.

<sup>33</sup> Grotius, Pufendorf, Locke all discussed property much earlier than 1648, the year when the Treaty of Westphalia was concluded. *Quoted in* Sprankling 2014, *supra* note 9, and Ederington 1997, *supra* note 10.

<sup>34</sup> Sprankling 2014, p. 6, *supra* note 9.

<sup>35</sup> Vattel, Emer. 2008. *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, edited by Bela Kapossy, and Richard Whitmore, Book II Ch. 7 paragraph 96. Indianapolis: Liberty Fund.

<sup>36</sup> Using “united” rather than “United” as per the source: *infra* note 58.

secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed (...) <sup>37</sup>.

This is a clear example of natural rights recognition and specification of the role of the State in securing them. It is coherent with a more modern view that the "States are now widely understood to be instruments at the service of their peoples, and not vice versa" <sup>38</sup>. Still, adherence to the natural law theory is not absolute in the US. In *Johnson v. McIntosh* <sup>39</sup> the Supreme Court stated, in essence, that property rights are defined by law <sup>40</sup>. Also, the American Declaration did not explicitly mention property amongst unalienable rights. Nevertheless, unalienable rights are not restricted only to these three owing to the formulation "among these" preceding the list of "Life, Liberty, and the pursuit of Happiness".

Natural law as a foundation for property also prevailed in Europe in the 17<sup>th</sup> and 18<sup>th</sup> centuries <sup>41</sup>. While the American Declaration omitted to specify property, the French Declaration of the Rights of Man of 1789 recognized property among others as such an unalienable right under Article 2:

The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression <sup>42</sup>.

Further, by virtue of Article 17 of the French Declaration the "imprescriptible" right to property was recognized as an "inviolable and sacred right" <sup>43</sup>. The property right under American and French formulations implied a private property regime enabling natural persons to enforce their rights against others and, in particular, against the State <sup>44</sup>.

### 1.3. Concluding Remarks I

All in all, the vision of property as a natural institution as opposed to a State-given right should not be underestimated. Property occupies a special place in international law, fundamentally distinct from sovereignty. The view of property as a natural pre-political conception culminated in constitutions around the world recognizing the right to property as a fundamental right <sup>45</sup>. Yet the extent to which property is protected under different constitutions varies. Some constitutions provide for stricter protection of private property, whereas others emphasize the possibility of

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<sup>37</sup> The Declaration of Independence (US, in Congress, 4 July 1776): Transcription. Available at: [http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html). Last visited on 18 April 2015.

<sup>38</sup> Annan, K.A. 1999. "Two Concepts of Sovereignty". *The Economist*, 352(8137): pp. 49-50. (Annan 1999, p. 49).

<sup>39</sup> *Johnson & Graham's Lessee v. McIntosh*, *supra* note 14.

<sup>40</sup> Sprankling, John G. 2000. *Understanding Property Law*. Lexis Publishing. (Sprankling 2000, p. 3).

<sup>41</sup> Ederington 1997, pp. 269-270, *supra* note 10.

<sup>42</sup> Declaration of the Rights of Man 1789 (France), Article 2. Available at: [http://avalon.law.yale.edu/18th\\_century/rightsof.asp](http://avalon.law.yale.edu/18th_century/rightsof.asp). Last visited on 18 April 2015.

<sup>43</sup> Declaration of the Rights of Man 1789 (France), *supra* note 42, Article 17.

<sup>44</sup> Sprankling 2014, p. 7, *supra* note 9. This is without prejudice to the property regime exceptions for subsurface resources.

<sup>45</sup> Sprankling 2014, p. 7, *supra* note 9.

exceptions in the interest of public welfare<sup>46</sup>, thereby paying tribute to legal positivism.

When antagonizing these two views, adherents of State-given property suggest that property regimes would be identical in all States if their nature was universal as implied by the natural law theory<sup>47</sup>. The weak point of this proposition is that it does not take into account that States, once formed, could and did impose their modifications on the notion of property irrespective of its universality. The fact that the US legal system finds references to both theories, legal positivism and natural law, verifies that the private property regime over natural resources can co-exist with either of these theories.

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<sup>46</sup> Alfredsson, Gudmundur, and Catarina Krause. 1999. "Article 17". In *The Universal Declaration of Human Rights: A Common Standard of Achievement*, edited by Gudmundur Alfredsson, and Asbjorn Eide, pp. 359-378. The Netherlands: Kluwer Law International. (Alfredsson and Krause 1999, p. 360).

<sup>47</sup> Sprankling 2014, p. 4, *supra* note 9.

## II The Human Rights View on Property

The view on property as a human right intensified through the international human rights movement after World War II (hereinafter: WWII). It is obvious that the notion of property cannot be confined purely to the domestic laws of States. If property was confined to domestic law definitions, any State could escape the protection afforded to property under international legal instruments.

This chapter reviews the development of the human right to property from international and regional perspectives. Most attention is dedicated to the European regional legal framework and its case law. The chapter concludes with the obligations that the human right to property imposes on States.

### 2.1. The International Bill of Human Rights<sup>48</sup>

Human rights emerged under the auspices of the United Nations (hereinafter: UN), in order never to allow the atrocities of WWII to happen again<sup>49</sup>. The UN was given a mandate "to guarantee the rights of every individual everywhere"<sup>50</sup> beyond the borders of national sovereignty. The task was entrusted to a specially formed Commission on Human Rights consisting of members of eight States of various cultural, religious and political backgrounds<sup>51</sup>.

#### 2.1.1. Universal Declaration of Human Rights

The efforts of the Commission on Human Rights culminated in the Universal Declaration of Human Rights (hereinafter: UDHR) adopted in 1948<sup>52</sup>. The UDHR became the first international legal instrument recognizing the right to property as a human right<sup>53</sup>. This enabled acknowledgment of the right to property amongst other human rights as an "equal and inalienable right"<sup>54</sup> for "[a]ll human beings [who] are born free and equal in dignity and right"<sup>55</sup>. The right to both individual as well as collective property is affirmed by virtue of Article 17 of the UDHR<sup>56</sup>:

(1) Everyone has the right to own property alone as well as in association with others.

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<sup>48</sup> The International Bill of Human Rights comprises the Universal Declaration of Human Rights together with the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. See United Nations. *Human Rights Law*. Available at: [http://www.un.org/en/documents/udhr/hr\\_law.shtml](http://www.un.org/en/documents/udhr/hr_law.shtml). Last visited on 19 April 2015.

<sup>49</sup> United Nations. *The Universal Declaration of Human Rights: History of the Document*. Available at: <http://www.un.org/en/documents/udhr/history.shtml>. Last visited on 19 April 2015.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Sprankling 2014, p. 10, *supra* note 9.

<sup>54</sup> United Nations. *The Universal Declaration of Human Rights*. Preamble. Available at: <http://www.un.org/en/documents/udhr/index.shtml>. Last visited on 19 March 2015.

<sup>55</sup> *Ibid.*, Article 1.

<sup>56</sup> *Ibid.*, Article 17.

(2) No one shall be arbitrarily deprived of his property.

The reference to collective property rights in the first subparagraph attended to the interests of the socialist regimes<sup>57</sup>. The socialist countries comprising the Soviet bloc and its allies unsuccessfully sought to keep arbitrary deprivation to be defined by domestic law<sup>58</sup>. Contrary to these efforts, the right to property was vested in private parties with a possibility to assert it against the State<sup>59</sup>. Still the second provision of Article 17 demonstrates the right to property as not being absolute, since non-arbitrary deprivation remains an option<sup>60</sup>. The final formulation turned more restrictive on States than the Eastern bloc was pushing for, as the term “unlawfully” was not accepted to replace “arbitrarily” in the Article<sup>61</sup>. In the final formulation, “arbitrarily” is meant to proscribe unreasonable interference by States<sup>62</sup>.

The UDHR formulation of the right to property does not provide for a minimum standard on property. In other words, the right to property does not entitle everyone to a predetermined minimum amount; rather this provision protects rights acquired in private property<sup>63</sup>. Even as a non-binding legal instrument for UN Member States, the UDHR represented a commitment, which was expected to translate into law on an international, regional and domestic scale<sup>64</sup>.

### 2.1.2. The Silence of International Covenants on the Human Right to Property

The specific avowal of the property right proved more difficult to uphold when it came to binding international legal instruments. The two Covenants on fundamental human rights that followed the UDHR, namely the International Covenant on Civil and Political Rights<sup>65</sup> (hereinafter: ICCPR) and the International Covenant on Economic, Social and Cultural Rights<sup>66</sup> (hereinafter: ICESCR), both did not carry forward the right to property in an express form<sup>67</sup>. Property is only mentioned in the Covenants in the non-discrimination context<sup>68</sup>.

Still the two Covenants identify peoples as beneficiaries of the sovereign rights of States in Article 1(2) and 1(2), respectively:

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<sup>57</sup> Sprankling 2014, p. 10, *supra* note 9.

<sup>58</sup> *Ibid.*

<sup>59</sup> Sprankling 2014, p. 10, *supra* note 9.

<sup>60</sup> Cismas, I., Golay, C. (2010). Legal Opinion: The Right to Property from a Human Rights Perspective. *International Centre for Human Rights and Democratic Development (Rights & Democracy)*. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1635359](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635359). Last visited on 19 April 2015. (Cismas and Golay 2010, p. 3).

<sup>61</sup> Alfredsson and Krause 1999, p. 363, *supra* note 46.

<sup>62</sup> *Ibid.*, p. 364.

<sup>63</sup> *Ibid.*, p. 359.

<sup>64</sup> United Nations. *Human Rights Law*, *supra* note 48.

<sup>65</sup> United Nations Human Rights. *International Covenant on Civil and Political Rights*, Article 1(2). Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>. Last visited on 16 March 2015.

<sup>66</sup> United Nations Human Rights. *International Covenant on Economic, Social and Cultural Rights*, Article 1(2). Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>. Last visited on 16 March 2015.

<sup>67</sup> Sprankling 2014, p. 11.

<sup>68</sup> ICCPR, Articles 2(1), 24(1), 26, *supra* note 65; and ICESCR, Article 2(2), *supra* note 66.

All peoples may, for their own ends, freely dispose of their *natural wealth and resources* [emphasis added] without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

### 2.1.3. The Scope of Disagreement on the Right to Property of the UN Member States

The annotations to the drafting of the two Covenants<sup>69</sup> are helpful in assessing the magnitude of international disagreement among States on the right to property. One blocking point for inclusion of an express provision on the right to property turned out to be its classification. There was no unanimity on whether this right qualifies as a civil and political right or bears more of an economic, social, and cultural nature<sup>70</sup>. The annotations disclose four major areas of disagreement between States on the property matter:

- i. inclusion or non-inclusion of the right in the Covenants;
- ii. formulation of the right;
- iii. limitations to the right;
- iv. scope of restrictions on State actions<sup>71</sup>.

These areas of disagreement deserve a closer look for the purpose of the analysis undertaken here. *Firstly*, despite the variance of opinions whether to include the right to property in binding covenants or not, consent on the existence of the right of the individual to own property was not doubted<sup>72</sup>. This is also supported by the fact that the right to property is recognized in the UDHR among other fundamental human rights. In the view of some scholars<sup>73</sup>, the divergent views of the State on the notion of property are suggestive of lack of universality in the nature of the right. However, an alternative interpretation is to acknowledge the differences in State motives without prejudice to the right to property as such.

*Secondly*, no consensus was reached regarding the formulation of the right to property. Some UN Member States were in favour of a broad phrasing of the article on property<sup>74</sup>. Others were looking for a very precise wording with a specification of all associated limitations<sup>75</sup>. A consensus on the wording of the article could hardly be anticipated with such polarized views.

*Thirdly*, similar disagreements naturally applied to the limitations which States were willing to impose on the right to property by means of the Covenants<sup>76</sup>. *Finally*, the restrictions on State actions included such deliberations as to whether

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<sup>69</sup> United Nations Secretary General. *Annotation to Draft International Covenants on Human Rights: A/2929 (1 July 1955)*, p. 189. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N55/173/02/PDF/N5517302.pdf?OpenElement>. Last visited on 20 April 2015.

<sup>70</sup> UN Document A/2929, p. 189, paragraph 195, *supra* note 69.

<sup>71</sup> *Ibid*, paragraph 196.

<sup>72</sup> *Ibid*, paragraph 197.

<sup>73</sup> Sprankling 2014, p. 4, *supra* note 9.

<sup>74</sup> UN Document A/2929, p. 190, paragraph 199, *supra* note 69.

<sup>75</sup> *Ibid*, p. 190, paragraph 200.

<sup>76</sup> *Ibid*, p. 191.

“arbitrarily”, “without due process of law” or “illegally” would be most suited for phrasing of the exception related to non-arbitrary deprivation<sup>77</sup>. Additionally, the drafting process caused discussion on the appropriate conditions for legitimate expropriation of property and how compensation should be determined<sup>78</sup>.

With a lack of global consensus on the exact scope of the right to property, the Covenants failed to implement the commitment to property enshrined in the UDHR. As a result, to date there is no binding international legal instrument on the right to property. This gap had to be filled by provisions on the property right at regional level.

## 2.2. Regional Perspectives on the Human Right to Property

On the regional level, States appeared to adhere to more aligned views on the human right to property. As a result, most regional human rights instruments included the right to property amongst other fundamental human rights. The American Convention on Human Rights recognizes the right to the use and enjoyment of property, though subordinating it to the needs of “public utility and social interest”<sup>79</sup>. The African Charter on Human and People’s Rights guarantees the right to property among other rights and subjects it to lawful limitations of a public necessity nature<sup>80</sup>. In fact, the African Charter provisions on property are considered to be the most far-reaching ones<sup>81</sup>. One of its provisions expressly proscribes “all forms of foreign economic exploitation particularly that practiced by international monopolies” with a view that local peoples should be beneficiaries of the advantages associated with natural resources<sup>82</sup>. Also, the right to property was eventually included in the European Convention on Human Rights (hereinafter: ECHR) under Protocol No. 1 of 1952<sup>83</sup>. As the legal analysis further in this article concerns Latvia as a party to the ECHR<sup>84</sup>, the right to property under the ECHR requires closer scrutiny, which proceeds next.

### 2.2.1. The Human Right to Property under the ECHR

The ECHR text of Article 1 of the 1952 Protocol (hereinafter: Article P1-1) reads as follows:

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<sup>77</sup> *Ibid*, p. 192, paragraph 207.

<sup>78</sup> *Ibid*, pp. 192-193.

<sup>79</sup> American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32) (22 November 1969), Article 21. Available at: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm). Last visited on 20 April 2015.

<sup>80</sup> African (Banjul) Charter on Human and People’s Rights (27 June 1981), Article 14. Available at: [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf). Last visited on 20 April 2015

<sup>81</sup> Cismas and Golay 2010, p. 6, *supra* note 60.

<sup>82</sup> African Charter, Article 21(5), *supra* note 80.

<sup>83</sup> Council of Europe. European Convention on Human Rights, Protocol of 1952, Article 1. Available at: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf). Last visited on 20 April 2015.

<sup>84</sup> Council of Europe. *Simplified Chart of signatures and ratifications*. Available at: <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG>. Last visited on 20 April 2015.



Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties<sup>85</sup>.

This provision of the Protocol on the “protection of property” does not refer to property in the first paragraph. The first sentence instead refers to “the peaceful enjoyment of (...) *possessions* [emphasis added]”<sup>86</sup>, where the term “possessions” is used as a synonym of “property”<sup>87</sup>. The European Court of Human Rights (hereinafter: ECtHR) confirms this interpretation in its case law. In the *Marckx v. Belgium* case, the ECtHR considered a violation of the right to family and privacy in conjunction with the protection of property<sup>88</sup>. The ECtHR expressly agreed with the view of the European Commission on Human Rights that Article P1-1 guarantees the right to property<sup>89</sup>.

Further, Article P1-1 affords an exception to the peaceful enjoyment of property when required in the public interest. This exception is subject to being lawful and in accordance with the “general principles of international law”<sup>90</sup>. Such restrictions on State actions are understandable in the light of circumstances in which the ECHR and the 1952 Protocol were drafted, namely, in the “aftermath of authoritarian rule and abuse of power by the State” during WWII<sup>91</sup>. Still the ECtHR may only admit cases “after all domestic remedies have been exhausted”<sup>92</sup>, thereby allowing States to deal locally with human rights issues first.

The ECHR is silent on the matter of compensation for violations of the right to property. As Article P1-1 carries no reference to the need for compensation and its amount, this aspect of protection of property has been left for the ECtHR to interpret. For the European Union (hereinafter: EU) Member States, this lacuna is seemingly covered in the Charter of Fundamental Rights of the European Union, which expressly requires fair compensation in cases when an individual is deprived of their possessions<sup>93</sup>. Yet, while the Charter largely follows the property right formulations of the ECHR and is deemed to be generally consistent with the ECHR, the Charter is binding on national authorities only when they implement EU legal acts<sup>94</sup>. In this article, there is no issue on any EU legal act implementation. Hence,

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<sup>85</sup> *Ibid*, Protocol of 1952, Article 1.

<sup>86</sup> *Ibid*.

<sup>87</sup> Alfredsson and Krause 1999, p. 367, *supra* note 46.

<sup>88</sup> Judgment on the merits and just satisfaction delivered by a Plenary Court. *Case Marckx v. Belgium* (merits and just satisfaction), no. 6833/74, ECHR, 13 June 1979.

<sup>89</sup> *Ibid*, paragraph 63.

<sup>90</sup> ECHR, Protocol of 1952, Article 1, *supra* note 83.

<sup>91</sup> Cismas and Golay 2010, p. 5, *supra* note 60.

<sup>92</sup> ECHR, Article 35(1), *supra* note 83.

<sup>93</sup> Charter of Fundamental Rights of the European Union, Article 17. OJ C 326, 26 October 2012, p. 391–407.

<sup>94</sup> European Commission. *EU Charter of Fundamental Rights*. Available at: [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm). Last visited on 7 May 2015.

the remainder of the chapter on the regional perspective on human rights will focus on the abundant case law under the ECHR regime.

### 2.2.2. Milestone Cases on the Human Right to Property under the ECHR

One of the milestone ECHR cases is *Sporrong and Lonnroth v. Sweden*<sup>95</sup> where the two applicants objected to expropriation permits and a long-term prohibition on construction for the purpose of redevelopment of an area initiated by the Swedish authorities. This was attempted by the Swedish authorities as a zonal expropriation so as to implement the City Council's plans pursuant to a national Act of 1953<sup>96</sup>. The expropriation was examined by the ECtHR within the ambit of the first paragraph of Article P1-1<sup>97</sup>. As for the ban on construction, it was examined within the meaning of the second paragraph of Article P1-1 as a restriction on the use of property<sup>98</sup>. In this case, the ECtHR found a violation of the property protection provision of the ECHR stemming from expropriation permits aggravated by long-term construction prohibitions<sup>99</sup>. This judgment was reached by means of analysis as to whether interference with property rights took place and whether it was justified, without explicitly structuring the conditions for the latter test.

Later, in *James and Others v. The United Kingdom*<sup>100</sup>, the court addressed the conditions that must be fulfilled by the State when taking measures in the general interest of the public. In this case, the claimants alleged that the Leasehold Reform Act of 1967 violated their right to property by giving long-term tenants the power to purchase the property on terms and conditions prescribed by the government<sup>101</sup>. Although the ECtHR found no breach of the applicants' right to property, the case is significant for its specification of the conditions that States must comply with in cases of interference with private property rights in the general interest of the public.

*Firstly*, the general interest of the public must be present as dictated by the ECHR provision on the protection of property, i.e. Article P1-1<sup>102</sup>. The provision itself, however, does not define which instances of State interference would qualify as justified under the notion of public interest. In the *James and Others* case, the ECtHR afforded a wide margin of appreciation to the national government for interpretation of the scope of public interest in the context of political, economic, and social issues<sup>103</sup>. The wide margin of appreciation is entrusted to governments on the basis of "their direct knowledge of their society and its needs"<sup>104</sup>.

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<sup>95</sup> Judgment on the merits delivered by a Plenary Court. *Case of Sporrong and Lonnroth v. Sweden* (merits), no. 7151/75; 7152/75, ECHR, 23 September 1982.

<sup>96</sup> *Ibid*, paragraph 27.

<sup>97</sup> *Ibid*, paragraph 65.

<sup>98</sup> *Ibid*, paragraph 64.

<sup>99</sup> *Ibid*, paragraph 74.

<sup>100</sup> Judgment on the merits delivered by a Plenary Court. *Case of James and Others v. The United Kingdom* (merits), no.8793/79, ECHR, 21 February 1986

<sup>101</sup> *Ibid*, paragraph 11.

<sup>102</sup> ECHR, Protocol of 1952, Article 1, *supra* note 83.

<sup>103</sup> *James and Others v. The United Kingdom*, paragraph 46, *supra* note 100. *See also*: Judgment on the merits delivered by a Plenary Court. *Case of Handyside v. The United Kingdom* (merits), no. 5493/72, ECHR, 7 December 1976, paragraph 48. In *Handyside v. The United Kingdom* the ECtHR stated "State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well

*Secondly*, interference with private property rights by States must satisfy the proportionality test. As held in *James and Others*, proportionality is assessed considering “the means employed and the aim sought to be realised”<sup>105</sup>. This proportionality test is also known in ECHR case law as the “fair balance” test between the demands of public interest and the “requirements of the protection of the individual’s fundamental rights”<sup>106</sup>.

*Thirdly*, deprivation is subject to conditions provided for by law according to Article P1-1 ECHR. In the *James and Others* case, the ECtHR emphasized that conditions provided for by law are subject to a threshold of quality “requiring it to be compatible with the rule of law” beyond domestic legislation<sup>107</sup>. At the same time, the Court held that this does not call for the application of general principles of international law when dealing with property deprivation cases by a State from its own nationals<sup>108</sup>. On the latter point there is some variance in opinions of legal scholars, with some ECtHR judges advocating recourse to general principles of international law also regarding property deprivation cases from nationals of the State in question<sup>109</sup>. Importantly, these three conditions are not alternative or optional but cumulative to each other for State intrusion into fundamental property rights of individuals to be found lawful<sup>110</sup>.

The *James and Others* case is also significant for its clarification of the entitlement to compensation under Article P1-1 of the ECHR. Although compensation is not mentioned in the ECHR itself, the Court affirmed that interference with the right to property calls for compensation. In the words of the Court in reference to compensation, “the protection of the right of property [that the ECHR] affords would be largely illusory and ineffective in the absence of any equivalent principle”<sup>111</sup>. Although the Court noted that full compensation is not guaranteed under Article P1-1, its amount should nonetheless be reasonably related to the value in cases of taking of property in order to satisfy the proportionality test<sup>112</sup>.

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as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them (...) it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context”.

<sup>104</sup> *James and Others v. The United Kingdom*, paragraph 46, *supra* note 100.

<sup>105</sup> *Ibid*, paragraph 50.

<sup>106</sup> *Sporrong and Lonnroth v. Sweden*, paragraphs 69, *supra* note 95.

<sup>107</sup> See *James and Others v. The United Kingdom*, paragraph 67, *supra* note 100. See also Judgment on the merits delivered by a Plenary Court. *Case of Malone v. The United Kingdom* (merits), no. 8691/79, ECHR, 2 August 1984, paragraph 67. In the *Malone case* the ECtHR “reiterate[d] its opinion that the phrase ‘in accordance with the law’ does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law”.

<sup>108</sup> *James and Others v. The United Kingdom*, paragraph 66, *supra* note 100. See also Judgment on the merits by a Plenary Court. *Case of Lithgow and Others v. The United Kingdom* (merits), no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, ECHR, 8 July 1986, paragraphs 111-119.

<sup>109</sup> See Concurring Opinion of Judges Bindschedler-Robert, Golcuklu, Matscher, Pettiti, Russo and Spielmann (Article 1 of Protocol No 1 (P1-1) in *James and Others v. The United Kingdom*, *supra* note 100.

<sup>110</sup> Cismas and Golay 2010, p. 15, *supra* note 60.

<sup>111</sup> *James and Others v. The United Kingdom*, paragraph 54, *supra* note 100.

<sup>112</sup> *Ibid*.

As in the *James and Others* case, the applicability of compensation is widely accepted in cases of property deprivation<sup>113</sup>. Since both control over and taking of property constitute a limitation on the right to property, there is an expectation on the side of scholars for compensation to apply in both scenarios<sup>114</sup>. However, the ECHR affords a wide margin of appreciation for States to define the terms of compensation<sup>115</sup>.

### 2.2.3. Obligations of States Inferred from the Human Right to Property under the ECHR

The ECtHR interpretation of the property protection provision entails a spectrum of obligations for the States parties to the ECHR to comply with. Those obligations are rooted in UN Human Rights methodology and incorporate the obligations to respect, protect, and fulfil the human right in question<sup>116</sup>. ECtHR jurisprudence demonstrates that both negative and positive obligations arise for States under the ECHR with regard to protection of property<sup>117</sup>.

*The obligation to respect* entails a negative duty of States to refrain from interference with private rights to property<sup>118</sup>. Unlawful expropriation or expropriation without established public interest is an example of breach of the duty of States to respect the right to property<sup>119</sup>. *The obligation to protect* property is a widely accepted positive obligation of States<sup>120</sup>. For instance, property rights require sufficient protection with recourse to adequate remedies under domestic legal systems of States, including measures for prevention from encroachment of property rights by third parties<sup>121</sup>. Finally, *the obligation to fulfil* the right to property requires positive action from States to create an enabling environment for the realization of this right<sup>122</sup>.

The positive obligations affirmed in the ECtHR rulings indicate that pressure on States to uphold Article P1-1 of the ECHR is growing<sup>123</sup>. Yet this does not necessarily lead to bigger chances for private parties to obtain an injunction against

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<sup>113</sup> Cismas and Golay 2010, p. 16, *supra* note 60.

<sup>114</sup> *Ibid.*

<sup>115</sup> *James and Others v. The United Kingdom*, paragraph 54, *supra* note 100. See also Van Banning, Theo. R. 2001. *The Human Right to Property*. Oxford: Intersentia. (Van Banning 2001, p. 103). Van Banning clarifies that the ECtHR "will respect the state's assessment as to compensation unless the Court finds it manifestly without reasonable foundation".

<sup>116</sup> United Nations Human Rights. *International Human Rights Law*. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>. Last visited on 29 May 2015.

<sup>117</sup> Cismas and Golay 2010, p. 21, *supra* note 60.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, p. 28.

<sup>120</sup> See for example: Judgment on the merits and just satisfaction delivered by the Third Section. *Case of Blumberga v. Latvia* (merits and just satisfaction), no. 70930/01, ECHR, 14 October 2008, paragraph 65.

<sup>121</sup> *Ibid.*, paragraph 67.

<sup>122</sup> Cismas and Golay 2010, p. 29, *supra* note 60.

<sup>123</sup> Akkermans, Bram, and Michael Milo, Vincent Sagaert. 2012. "Chapter 10: Uniform or Harmonized Property Law". In *Cases, Materials and Text on Property Law*, edited by Sjef Van Erp, and Bram Akkermans, pp. 1011-1143. Oxford: Hart Publishing. (Akkermans, Milo and Sagaert 2012, p. 1109).

State interference with private property rights<sup>124</sup>. The wide margin of appreciation afforded to States on the interpretation of the notion of public interest as a rationale for private property rights restrictions allows States the freedom to act.

### 2.3. Concluding Remarks II

The right to property firmly occupies its seat among other fundamental human rights. The overall consensus to uphold this right can be evidenced through the UDHR. Still there is considerable divergence on the intricacies of the right to property among States globally. As a result, no binding international instrument protects the right to property. The regional instruments undertook the promise of the UDHR and established a binding human right to property for States to comply with. On the European continent, the case law of the ECtHR significantly clarifies the legal tests applicable for assessing alleged violations of the human right to property.

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<sup>124</sup> Akkermans, Milo and Sagaert 2012, *supra* note 123.

### III Special Treatment of Natural Resources under Property Law

As demonstrated by the omnipresence of the right to property on the international and regional agenda, there is no doubt about general recognition of the human right to property. Also, the sovereignty of each State to provide governing rules for its population on its territory is a firmly established principle of international law. The interplay of these two foundations for the right to property with respect to natural resources is fascinating. The outcome ranges from an affirmed private human right to property in natural resources to a State privilege dictated by the general public interest, notwithstanding an otherwise private property regime.

In contrast to the general right to property, the scope of the right concerning natural resources is far from enjoying general acceptance around the globe. One major difference across countries is the answer to the question who the property rights holder over natural resources is. This chapter provides an overview of different property regimes over natural resources. It is followed by an enquiry into how far property rights extend down into the subsurface as part of examining the centre of the Earth theory. Finally, the principle of permanent sovereignty over natural resources (hereinafter: PSNR) concludes the picture on special treatment of natural resources within property law.

#### 3.1. Different Regimes for Natural Resources as an Object of Property Law

In essence, property rights in natural resources comes down to finding a balance between the values of private property ownership and preservation of public benefits from natural capital<sup>125</sup>. Most jurisdictions attribute the right to subsoil<sup>126</sup> natural resources to the State<sup>127</sup>. The roots of such property regime lie in the *domanial* system from the term *dominium* for the right of ownership in Roman law<sup>128</sup>. This system, when a State excludes the possibility of private ownership over subsoil natural resources, is also known as an absolute governmental or State property

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<sup>125</sup> Hudson, B., Rosenbloom, J. 2013. "Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change". *Hastings L. J. (Hastings Law Journal)* 64(1273): pp. 1273-1341. (Hudson and Rosenbloom 2013, p. 1276).

<sup>126</sup> Hereinafter: the terms "subsoil" and "subsurface" resources are used interchangeably referring to onshore subsurface resources throughout the article.

<sup>127</sup> Pereira, R., Gough, O. 2013. "Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law". *Melb. J. Int'l. L. (Melbourne Journal of International Law)* 14: pp. 451-495 (Pereira and Gough 2013, p. 475). See also Omorogbe, Yinka, and Peter Oniemola. 2010. "Property Rights in Oil and Gas under Domanial Regimes". In *Property and the Law in Energy and Natural Resources*, edited by Aileen McHarg, Barry Barton, Adrian Bradbrook, and Lee Godden, pp. 115-139. New York: Oxford University Press. (Omorogbe and Oniemola 2010, p. 118).

<sup>128</sup> Ronne, Anita. 2010. "Public and Private Rights to Natural Resources and Differences in their Protection?" In *Property and the Law in Energy and Natural Resources*, edited by Aileen McHarg, Barry Barton, Adrian Bradbrook, and Lee Godden, pp. 60-79. New York: Oxford University Press. (Ronne 2010, p. 61).

model<sup>129</sup>. Such model finds its roots in sovereignty as the primary foundation for the right to property, vesting the State with the right “to determine and organize its property rights”<sup>130</sup>.

In contrast to the *domanial* regime is the nearly extinct regime of *accessio*, where ownership of minerals *in situ* is coupled with the surface rights to land<sup>131</sup>. This is also known as the private property regime. The private property, or *accessio*, regime in the subsurface<sup>132</sup> is found in the US<sup>133</sup> and, amongst EU Member States, in Latvia<sup>134</sup>. This model rests on the natural law theory foundations of property.

However, the classification of States into *domanial* or *accessio* regimes is not always absolute. Natural resources trigger an array of associated rights, such as ownership, exploration, and exploitation rights. The attribution of these rights varies depending on the resource being onshore or offshore as well as on the type of resource. By way of illustration, rights of exploration and exploitation over offshore resources belong to the State even in *accessio* countries accepting private ownership of onshore resources<sup>135</sup>. Also, some States opt for special treatment of energy resources under the subsoil group and claim ownership of oil, gas, and coal for the State to enjoy<sup>136</sup>, while leaving the rest of the subsoil group open for private ownership. This is known as the national property model, where property in energy subsurface resources is vested in the State<sup>137</sup>.

These examples of natural resources treatment models demonstrate that the specifics of property rights remain for national legal systems to define<sup>138</sup>. This traditional viewpoint is further strengthened by the nearly universally accepted *lex rei sitae* rule of private international law<sup>139</sup>. Under the *lex rei sitae* rule, the applicable law for property law aspects of an international case is the law of the State where

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<sup>129</sup> Gonzalez, Jose J. 2010. “The Scope and Limitations of the Principle of National Property of Hydrocarbons in Mexico”. In *Property and the Law in Energy and Natural Resources*, edited by Aileen McHarg, Barry Barton, Adrian Bradbrook, and Lee Godden, pp. 210-221. New York: Oxford University Press. (Gonzalez 2010, p. 211).

<sup>130</sup> Omorogbe and Oniemola 2010, p. 117, *supra* note 127.

<sup>131</sup> Gonzalez 2010, p. 210, *supra* note 129.

<sup>132</sup> In this paper the term “subsurface” (used interchangeably with “subsoil”) refers to a depth of more than 2 meters below the surface in line with the provision of the Latvian Law on Subterranean Depths that allows exploration and extraction without licence of minerals within 2 meters depth: Law on Subterranean Depths (Latvia, 1996), Section 11. Available at: <http://likumi.lv/doc.php?id=40249>. Last visited on 1 May 2015. For the English version of this and other Latvian laws quoted in this paper, go to the “Tulkojums” (“Translation”) section under the link provided when available. See Chapter 5.1.3. for an overview of this law.

<sup>133</sup> With the exception of California and Indiana States. See Omorogbe and Oniemola 2010, pp. 118-119, *supra* note 127.

<sup>134</sup> According to the Civil Law of Latvia discussed in more detail in Chapter 5.1.2, Section 1042, *supra* note 1.

<sup>135</sup> Ronne 2010, p. 65, *supra* note 128.

<sup>136</sup> Roggenkamp, Martha M. et al. 2007. *Energy Law in Europe national, EU and international law and institutions*, 2<sup>nd</sup> edition. New York: Oxford University Press. (Roggenkamp et al. 2007, p.1273). See also Gonzalez 2010, p. 211, *supra* note 129.

<sup>137</sup> Gonzalez 2010, p. 211, *supra* note 129.

<sup>138</sup> Shakelford 2009, p. 154, *supra* note 4. See also Schrijver, Nico. 1997. *Sovereignty over Natural Resources*. Cambridge University Press. (Schrijver 1997, p. 9).

<sup>139</sup> Akkermans, Milo and Sagaert 2012, p. 1017, *supra* note 123.

the property object is situated<sup>140</sup>. As a result of this mandatory aspect of property law, issues pertaining to natural resources would generally be governed by the *lex rei sitae* rule, excluding the choice of law possibility so common in the field of contract law<sup>141</sup>. The absence of choice of law possibility with respect to natural resources intensifies the need to challenge every rule and privilege that States impose and claim with respect to natural resources.

Finally, irrespective of the property model over subsoil natural resources, the rights for their exploration and production are usually assigned through a system of licences to third parties called licensees, which can be both State-owned and private<sup>142</sup>. The licensing system restricts the right to use property and largely resembles the contractual process<sup>143</sup>, where licences may be given separately for initial exploration and the subsequent production phase in case of success in the first phase. Licences may be exclusive or non-exclusive. In any case, these rights remain subject to limitations imposed by public control with time and geographic area being the most common restrictions.

### 3.2. Centre of the Earth Theory for Natural Resources

Whether by virtue of a natural right or of a State-given right, the right to property is central to the legal systems of the world. Exactly how far that right extends beneath the surface is the concern for determination of property rights in natural resources. Legal scholars fascinated by this matter would necessarily have to consider the Latin doctrine *cujus est solum ejus est usque ad coelum et ad inferos*. The doctrine means that the owner of the land surface also owns the space above it up to the borders of the atmosphere (*ad coelum*) and beneath the ground down to the centre of the Earth (*ad inferos*)<sup>144</sup>. An important specification to interpretation of this doctrine is that it applies only to everything that is "capable of being reduced into private ownership"<sup>145</sup>.

#### 3.2.1. Historical Background to the Centre of the Earth Doctrine

As regards the origin of the doctrine, its formulation in Latin misleads one into searching for its roots in the Roman legal system. However, despite the expression being in Latin and being generally consistent with the Roman concept of "full and absolute" ownership, albeit subject to non-abuse of logic<sup>146</sup>, the origin of this

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<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*, p. 1012.

<sup>142</sup> Ronne 2010, pp. 68-69, *supra* note 128.

<sup>143</sup> Omorogbe and Oniemola 2010, p. 127, *supra* note 127.

<sup>144</sup> Bradbrook, A. J. 1988. "Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claims to Natural Resources Located above and beneath the Land". *Adel. L. Rev. (Adelaide Law Review)* 11: pp. 462-483. (Bradbrook 1988, p. 462).

<sup>145</sup> Abramovitch, Y. 2008. "Maxim Cujus Est Solum Ejus Usque Ad Coelum as Applied in Aviation". *McGill L. J. (McGill Law Journal)* 8: pp. 247-269. (Abramovitch 2008, p. 247).

<sup>146</sup> *Ibid.*, pp. 248-253. Cf. Sprankling, J. G. 2008. "Owning the Center of the Earth". *UCLA L. Rev. (UCLA Law Review)* 55: pp. 979-1040. (Sprankling 2008, p. 258). Sprankling considers the maxim to be a mere invention of William Blackstone.



doctrine is most commonly attributed to Jewish law<sup>147</sup>. This is largely owing to the phrase “depth and height” included in the deeds when transferring legal title to property in the Hebrew legal system<sup>148</sup>.

In common law a doctrine generally becomes authoritative in so far as judicial authorities adopt it in their decisions<sup>149</sup>. Historically, this doctrine has been predominantly reviewed with regard to airspace while fewer cases considered its application towards the subsurface<sup>150</sup>. Back in 1568, it was affirmed in the *Case of Mines* that the ore or mine in the soil belongs to the land owner, whereas the Crown can claim the gold or silver<sup>151</sup>. Yet this case did not specifically mention the centre of the Earth doctrine as good law. The first record upholding the maxim with respect to airspace in English law is found in 1586 in *Bury v. Pope*<sup>152</sup>. The case concerned the space above land property and, in particular, cutting off the sunlight from neighbours by erecting a building close to the neighbours’ own<sup>153</sup>.

With respect to natural resources, the maxim suggests that property rights in land are not confined to surface rights. One of the most cited references is the *Commentaries on the Law of England* by William Blackstone in 1766<sup>154</sup>. Although it is sometimes said that the law in effect utilised the near-surface standard, such as height as required for a tree to grow upwards and depth as required for its roots, before Blackstone<sup>155</sup>, this in itself does not constitute a counterargument against private subsurface ownership rights. It merely indicates that at that time there were no technological means to explore the subsurface as is possible nowadays. In fact, recently the Supreme Court of the United Kingdom upheld in *Star Energy Weald Basin v. Bocardo* that the “the owner of the surface is the owner of the strata beneath it, including minerals”<sup>156</sup>. This judgment affirmed the view of the Court of Appeal in the *Mitchell v. Mosley* case of 1914<sup>157</sup> calling it “good law”<sup>158</sup>.

While the maxim seems to have been mostly developed and applied in common law countries<sup>159</sup>, its roots may also lead to civil law tradition via a German legal theorist, Samuel Pufendorf<sup>160</sup>. The doctrine has also influenced the civil codes

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<sup>147</sup> Abramovitch 2008, p. 249, *supra* note 145. See also Bradbrook 1988, p. 462, *supra* note 144.

<sup>148</sup> Abramovitch 2008, p. 249, *supra* note 145.

<sup>149</sup> *Ibid*, p. 254.

<sup>150</sup> Bradbrook 1988, p. 463, *supra* note 144.

<sup>151</sup> Sprankling 2008, p. 984, 988, *supra* note 146. Cf. Bradbrook 1988, p. 463, *supra* note 144. Bradbrook emphasizes that the court was definitive in its judgment only with respect to gold and silver belonging to the Crown, without explicitly vesting the ownership rights in all other minerals in the land owner.

<sup>152</sup> Quoted in Abramovitch 2008, p. 253, *supra* note 145. See also Bradbrook 1988, p. 462, *supra* note 144.

<sup>153</sup> Abramovitch 2008, p. 255, *supra* note 145.

<sup>154</sup> Quoted in Sprankling 2008, pp. 982-983, *supra* note 146.

<sup>155</sup> *Ibid*, p. 983.

<sup>156</sup> *Star Energy Weald Basin Ltd & Anor v Bocardo SA* [2010] UKSC 35 (28 July 2010), paragraph 27.

<sup>157</sup> *Mitchell v. Mosley* [1914] 1 Ch 438.

<sup>158</sup> *Star Energy Weald Basin Ltd & Anor v Bocardo SA*, paragraph 27, *supra* note 156.

<sup>159</sup> Bradbrook 1988, pp. 463, 479, *supra* note 144.

<sup>160</sup> Sprankling 2008, pp. 986-987, *supra* note 146.

of countries from different parts of the world<sup>161</sup>. For example, Article 552 of the French civil code of 1804 is a restatement of the doctrine stipulating that “[p]roperty in the soil imports property above and beneath” although subject to restrictions by statutes, such as mining acts<sup>162</sup>. The Belgian, Austrian, Italian, Japanese, Spanish, Swiss civil codes adopted land ownership provisions similar to the French version of the doctrine<sup>163</sup>. Then the German Civil Code that was enacted in 1896 followed with Section 905 also stipulating restrictions on ownership:

The right of the owner of a plot of land extends to the space above the surface and to the subsoil under the surface. However, the owner may not prohibit influences that are exercised at such a height or depth that he has no interest in excluding them<sup>164</sup>.

Although the first sentence of Section 905, which is still present in the German Civil Code, resembles the ideas of the doctrine, its effects are clearly limited by the second sentence. This serves as a reasonable use condition for the exercise of property rights above and below the surface.

Also, the American legal system has followed this maxim, vesting private land owners with ownership over a slender column of soil and everything contained therein<sup>165</sup>. The modern American property regime continues to recognize the right of the land owner “to the exclusive possession of the earth, minerals, and other substances below the surface of the land”<sup>166</sup>. The Court of Iowa affirmed this recently in *Nichols v. City of Evansdale* stating that everything down to the depths is owned by the surface owner<sup>167</sup>. This was later again upheld by the same court in *Orr v. Mortvedt*<sup>168</sup>. This is despite the fact that the doctrine has been abandoned with respect to airspace with the development of airplanes, as first adjudicated in *United States v. Causby*<sup>169</sup> and similarly held in England later in *Bernstein v. Skyviews & General Ltd*<sup>170</sup>.

### 3.2.2. Should Airspace Precedents Extend to the Subsurface?

Denouncing the ownership of airspace beyond use should not be paralleled with subsurface exploration, for the traffic volumes above and beneath the ground are

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<sup>161</sup> *Ibid*, p. 988.

<sup>162</sup> The Civil Code (France, 1804), Article 552. Available at: [http://www.napoleon-series.org/research/government/code/book2/c\\_title02.html#chapter1](http://www.napoleon-series.org/research/government/code/book2/c_title02.html#chapter1). Last visited on 27 April 2015.

<sup>163</sup> Abramovitch 2008, p. 263, *supra* note 145.

<sup>164</sup> German Civil Code (English translation). Available at: [http://www.gesetze-im-internet.de/englisch\\_bgb/](http://www.gesetze-im-internet.de/englisch_bgb/). Last visited on 27 April 2015.

<sup>165</sup> Sprankling 2008, 981, *supra* note 146.

<sup>166</sup> *Ibid*, p. 991.

<sup>167</sup> *Nichols v. City of Evansdale*, 687 N.W.2d 562 (Iowa 2004)

<sup>168</sup> *Orr v. Mortvedt*, 735 N.W.2d 610 (Iowa 2007).

<sup>169</sup> In that case the owners of a chicken farm sued the US State for damage to the farm allegedly caused by disturbance from military aircraft above the land of the farm: *United States v. Causby*, 328 U.S. 256 (U.S. Supreme Court 1946).

<sup>170</sup> *Bernstein v Skyviews & General Ltd* [1977] EWHC QB 1 (9 February 1977).

not comparable<sup>171</sup>. In another case considering the *ad coelum* part of the doctrine, *Hinman v. Pacific Air Transport*, the Court observed on the doctrine<sup>172</sup>:

This formula was never taken literally, but was a figurative phrase to express the full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land<sup>173</sup>.

While humans so far have not built constructions higher than 830 meters<sup>174</sup>, subsurface exploration reaches deeper than that<sup>175</sup>. Following the *Hinman v. Pacific Air Transport* logic, property rights under the maxim extend to the depth the land owner is able to use. In practical terms, the layers beyond the crust<sup>176</sup> are outside the reach of humans, at least, without special life support equipment<sup>177</sup>.

Generally, applying the same limitations to the subsurface and airspace is not warranted for several reasons. *Firstly*, unlike the air<sup>178</sup>, land and the minerals contained beneath it are capable of being possessed. *Secondly*, a difference exists in the extent of interference in private property rights *ad coelum* and *ad inferos*<sup>179</sup>. Taking the surface as a reference point to assess the degree of interference, an airplane does not touch the surface in order to fly over it. In turn, access to hard minerals beneath the surface is only possible from the land plot in question, thereby causing greater inconvenience to the owner. *Thirdly*, most of the opposition to the doctrine is motivated by alleged trespass cases which are undesirable in the light of the advance of technology in airspace as well as in subsurface exploration. For underground natural resources, trespass as a cause of action refers to the protection of land owners from illegal entry into their subsurface and depletion of the natural resources they have rights to from the surface of the neighbouring property<sup>180</sup>. However, the right of the owner to control access to the subsurface from his own land has not been critically questioned.

It is true that the rights to airspace above land have been re-examined and limited since the development of the air industry. Nevertheless, there are reasons to approach the subsurface rights evolution differently even with the advance of

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<sup>171</sup> Cf. Sprankling 2008, pp. 1030-1031, *supra* note 146. Sprankling provides examples of carbon sequestration and heat mining technologies that require deep surface usage in the interest of carbon dioxide storage mitigating global climate change and geothermal energy plant creation, respectively, as an analogy for technological development in the subsurface that can be compared to airspace usage development.

<sup>172</sup> The Court is referring to the centre of the Earth doctrine as "this formula".

<sup>173</sup> *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936), 757.

<sup>174</sup> The Telegraph. *Top 7 Tallest Buildings in the World*, (26 April 2015). Available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/10775224/Top-seven-tallest-buildings-in-the-world.html>. Last visited on 26 April 2015.

<sup>175</sup> Mines, oil and gas wells currently reach almost ten kilometres in depth: Sprankling 2008, p. 995, *supra* note 146.

<sup>176</sup> "The earth's crust averages twenty-two to twenty-five miles in thickness under the continents": *Ibid*, p. 994.

<sup>177</sup> *Ibid*, p. 1025.

<sup>178</sup> Abramovitch 2008, p.248, *supra* note 145.

<sup>179</sup> Cf. Sprankling 2008, p. 981, *supra* note 146. Cf. *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985 (Ohio 1996).

<sup>180</sup> Klingensmith, L., McGavran, W. A. 2014. "Bright Lights, Big Oil". *Hous. Law (Houston Law)* 52: pp. 16-19. (Klingensmith and McGavran 2014, pp. 17-18).

underground exploration technology. For those reasons, it can be concluded that the treatment of airspace is not a sufficiently close standard to be transposed to the subsurface area.

### 3.2.3. Reality Check on the Centre of the Earth Theory

It is plausible that the centre of the Earth theory has no practical utility with regard to the layers beneath the crust, as past legal statements have never required application of the doctrine to those layers for resolution of disputes<sup>181</sup>. Nor has any judgment known in common law actually held that land means ownership of a thin column of soil, rock and other matter stretching from the surface all the way down to the centre of the Earth<sup>182</sup>. As for the crust, the first layer under the surface, humans have already penetrated half way down into it<sup>183</sup>. While it is known that the temperature and pressure at further depths is intolerable for humans<sup>184</sup>, subsurface rights at the crust pose a challenge in today's technologically advanced environment.

In their claims to minerals in the subsoil, land owners at common law have relied on the *cujus est solum ejus est usque ad coelum et ad inferos* doctrine<sup>185</sup>. Whether or not their claim for ownership of minerals is legitimate may be challenged by opponents of the doctrine. In many cases, though<sup>186</sup>, the owners of the surface do have effective control over those minerals, as entry onto the land requires the surface owner's consent<sup>187</sup>. Even where the approach is that the resource is nobody's property until it is excavated into possession, permission to access that resource can only be obtained from the surface land owner<sup>188</sup>. This implies that irrespective of ownership rights in minerals, control over access effectively grants such rights to the land owner<sup>189</sup>.

In fact, opponents of the doctrine do not challenge the private mineral rights regime but rather question whether ownership rights should extend to the very centre of the Earth<sup>190</sup>. This can be agreed upon – ownership of the centre of the Earth is of no practical utility at the current stage of human evolution. However, the subsurface within the crust is accessible to humans and, hence, satisfies the reality check that the full version of the centre of the Earth doctrine fails.

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<sup>181</sup> Sprankling 2008, p. 999, *supra* note 146.

<sup>182</sup> Bradbrook 1988, p. 463, *supra* note 144.

<sup>183</sup> Currently the world's deepest man-made hole, Kola Borehole on the Kola peninsula in Russia, is about 12 km deep and was made for scientific research purposes. See Atlas Obscura. *Kola Superdeep borehole*. Available at: <http://www.atlasobscura.com/places/kola-superdeep-borehole>. Last visited on 26 April 2015.

<sup>184</sup> Sprankling 2008, p. 995, *supra* note 146.

<sup>185</sup> Bradbrook 1988, p. 464, *supra* note 144.

<sup>186</sup> Except for some technologies like hydraulic fracturing ("fracking") that uses vertical penetration until a certain depth and then requires horizontal drilling, so it is possible to access the subsoil via the neighbour's surface and then horizontally trespass into another territory.

<sup>187</sup> Bradbrook 1988, p. 464, *supra* note 144.

<sup>188</sup> *Ibid*, pp. 473-474.

<sup>189</sup> *Ibid*, p. 474.

<sup>190</sup> See generally Sprankling 2008, *supra* note 146.

### 3.2.4. Modernization of the Centre of the Earth Doctrine with the Rule of Capture

With the reality check verified, practical application of the doctrine still requires modernization to cater for the specifics of certain subsurface resources. In a private property regime the minerals in place under the surface are owned by the land owner. However, some natural resources are harder to fit into this ownership approach. Oil and gas can move through the subsurface, disregarding the man-made boundaries of surface land plots, thereby posing a challenge to the doctrine and its straightforward application.

There are two main ownership approaches to dealing with this migratory characteristic of oil and gas. The first one is the *non-ownership* approach, whereby the land owner does not own the oil and gas underneath but instead is entitled to extract those from under the surface and, thereby, to acquire ownership upon capture<sup>191</sup>. The second one is the *ownership-in-place* approach, vesting the surface owner with the title to oil and gas beneath the property, unless those are lawfully captured by a neighbour<sup>192</sup>. The purpose of both approaches is to encourage exploration for and extraction of these resources<sup>193</sup>. The majority of the states in the US, which is the most prominent example of a private property regime over natural resources, follow the latter approach<sup>194</sup>.

The rule of capture described above in conjunction with the two approaches to ownership applies to resources that may move under the ground<sup>195</sup>, such as oil and gas that have a migratory and fugacious nature<sup>196</sup>. Owing to their migratory characteristic, oil and gas can cross the border of one property underground and be captured by a neighbour. In such a case, irrespective of where the reserves were lying in the subsoil, the neighbour becomes the owner as the first captor and there is no actionable trespass case<sup>197</sup>. Under the rule of capture the title to resources cannot be guaranteed to the land owner unless the resources are captured by him<sup>198</sup>.

This rule is an adaptation of the ownership approach of the Latin maxim in its classic form towards resources of a migratory nature, as opposed to ownership of other solid minerals<sup>199</sup>. In turn, the rule of capture has been further augmented by

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<sup>191</sup> Sprankling 2000, p. 505, *supra* note 1. See also Omorogbe and Oniemola 2010, p. 119-120, *supra* note 127.

<sup>192</sup> Sprankling 2000, p. 505, *supra* note 1. See also Omorogbe and Oniemola 2010, p. 118-119, *supra* note 127.

<sup>193</sup> Sprankling 2000, p. 505, *supra* note 1.

<sup>194</sup> Lamarre, C. E. 2011. "Owning the Center of the Earth: Hydraulic Fracturing and Subsurface Trespass in the Marcellus Shale Region". *Cornell J.L. & Pub. Pol'y (Cornell Journal of Law and Public Policy)* 21: pp. 457-487. (Lamarre 2011, p. 467, Chart 1).

<sup>195</sup> Sprankling 2008, p. 1008, *supra* note 146.

<sup>196</sup> Bradbrook 1988, p. 481, *supra* note 144.

<sup>197</sup> See for example *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d, 4 (Tex. 2008).

<sup>198</sup> Phillips, S. K. 2013. "Property and Prosperity: Examining Contemporary Private Property Ownership in Light of Increased Oil and Gas Development in the United States". LL.M. Thesis, McGill University. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2326094](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326094). Last visited on 8 May 2015. (Phillips 2013, p. 36).

<sup>199</sup> Lamarre 2011, p. 463, *supra* note 194.

the correlative rights doctrine<sup>200</sup> in many states in today's US legal framework<sup>201</sup> so as to prevent the race to drill leading to economic waste. The centre of the Earth doctrine has helped to shape property rights in natural resources, yet in today's world the rights of the surface owner are not absolute even in common law countries. In the US, where the private property regime over subsurface minerals is the most intense, the land owner's rights are still subject to the reasonableness standard taking into account the needs of third parties and society in general<sup>202</sup>.

### 3.3. Principle of Permanent Sovereignty over Natural Resources

While the centre of the Earth doctrine deals with the natural resource property rights of private parties against other private parties and the State, after WWII there was a need to address the inter-State relations of ex-colonies and ex-colonizers. The principle of PSNR emerged for developing States to claim rights over natural wealth on their territory as a response to a surge in nationalizations in the postcolonial period after WWII<sup>203</sup>. The underlying notion of this principle is to secure the benefits of natural resource wealth with the nation on whose territory the resources lie. Territorial sovereignty, established already by the Treaty of Westphalia in the 17<sup>th</sup> century, served as a prerequisite for exercising PSNR.

The first document to acknowledge this principle as a "basic constituent of the right to self-determination" was United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources in 1962 (hereinafter: Resolution)<sup>204</sup>. Even though the Resolution is not legally binding on States, the principle of PSNR proclaimed in it became an accepted customary rule of international law<sup>205</sup>. The Resolution declared that "[n]ationalization, expropriation and requisitioning (...) on the grounds of public utility, security or the national interest" shall be compensated to foreign investors<sup>206</sup>, thereby vesting the host State with such right to nationalise the property of foreign investors<sup>207</sup>. The notion of expropriation here does not cover non-discriminatory restrictions on the exploitation of natural resources that may be compensation free<sup>208</sup>.

As for nationalization of ex-colonisers' property, the Resolution stipulates that compensation should be appropriate. This formulation is not specific enough, representing a lack of global consensus over the matter of compensation<sup>209</sup>.

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<sup>200</sup> See Chapter 5.5.2. for a more detailed discussion on the correlative rights doctrine as part of pooling statutes.

<sup>201</sup> Phillips 2013, pp. 31-32, *supra* note 198.

<sup>202</sup> Sprankling 2000, p. 496, *supra* note 1. See also Chapter 5.5.2 for a more detailed discussion on the US approach.

<sup>203</sup> Pereira and Gough 2013, p. 453, *supra* note 127.

<sup>204</sup> United Nations Audiovisual Library of International Law. General Assembly Resolution 1803 (XVII) Permanent Sovereignty over Natural Resources (14 December 1962). Available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/1803%28XVII%29](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803%28XVII%29). Last visited on 16 March 2015.

<sup>205</sup> Pereira and Gough 2013, p. 464, *supra* note 127.

<sup>206</sup> UN Resolution, *supra* note 204.

<sup>207</sup> Pereira and Gough 2013, p. 456, *supra* note 127.

<sup>208</sup> Ronne 2010, p. 72, *supra* note 128.

<sup>209</sup> Cismas and Golay 2010, p. 19, *supra* note 60.

Advocates of the so called Hull Formula<sup>210</sup>, the developed States, insisted that appropriate compensation be construed as conforming to general principles of international law as "prompt, adequate and effective"<sup>211</sup>. In turn, developing States adhered to the Calvo doctrine<sup>212</sup> that prescribes appropriate compensation to be determined in line with the national law of the expropriating State<sup>213</sup>.

Having originated as a privilege of the host State against other States' nationals, nowadays the principle of PSNR is reviewed with respect to the property rights of peoples in the light of commercial exploitation of natural resources. The evolution of international law is seen to have moved the PSNR away from its historic Westphalian conception towards recognition of the rights of participation of private persons as part of the principle<sup>214</sup>. In fact, the Resolution refers to peoples along with nations in the declaration of the right to permanent sovereignty over wealth stemming from natural resources. Although international legal instruments on human rights, such as the ICCPR and ICESCR, do not expressly refer to PSNR; the principle is linked to the right of self-determination of peoples through the Covenants<sup>215</sup>.

On the one hand, the rights of peoples to natural resources under this principle can be seen just as a right to a share from profits generated by natural resources; on the other hand, this right might be interpreted as including the right to manage the natural wealth on their territory<sup>216</sup>. In this regard, the rights of Saami peoples that inhabit today's territories of Finland, Norway, Russia, and Sweden have attracted close attention from human rights activists and scholars<sup>217</sup>. In particular, the Human Rights Committee reviewed whether the cultural rights of indigenous Saami peoples in Finland had been violated as a result of natural resource extraction in traditional reindeer herding areas. The Committee found no violation given that the Saami community was consulted prior to natural resource exploration<sup>218</sup>.

In general, the application of PSNR from a human rights perspective finds use all around the globe and is not limited to the Saami case. In Canada, aboriginal

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<sup>210</sup> Named after Cordell Hull, an American politician who served as Secretary of State in 1933-1944 and as a delegate to the United Nations Conference in 1945. For details see U.S. Department of State, Office of the Historian. *Biographies of the Secretaries of State: Cordell Hull*. Available at: <https://history.State.gov/departments/history/people/hull-cordell>. Last visited on 24 April 2015.

<sup>211</sup> Cismas and Golay 2010, p. 19, *supra* note 60. See also Ripinsky, Sergey, and Kevin Williams. 2008. *Damages in International Investment Law*. London: British Institute of International and Comparative Law. (Ripinsky and Williams 2008, pp. 72-73).

<sup>212</sup> Named after Carlos Calvo, an Argentinian legal scholar.

<sup>213</sup> Cismas and Golay 2010, p. 19, *supra* note 60.

<sup>214</sup> Pereira and Gough 2013, pp. 453-454, *supra* note 127. Cf. Ronne 2010, pp. 64-65, *supra* note 128. Ronne suggests that States are free to determine the ownership regime over subsoil natural resources based on permanent sovereignty over natural resources vested with the States.

<sup>215</sup> Cambou, D., Smis. S. 2013. "Permanent Sovereignty over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Arctic". *Mich. St. Int'l. L. Rev. (Michigan State International Law Review)* 22: pp. 347-376. (Cambou and Smis 2013, p. 358).

<sup>216</sup> Pereira and Gough 2013, p. 473, *supra* note 127; Cambou and Smis 2013, p. 375, *supra* note 215.

<sup>217</sup> See for example Cambou and Smis 2013, p. 348, *supra* note 215.

<sup>218</sup> Pereira and Gough 2013, p. 487, *supra* note 127.

groups from the Yukon contested the development of the Alaska gas pipeline<sup>219</sup>. In Russia, Siberian local tribes oppose the routing of an oil pipeline through their lands, thereby exposing commercial projects detrimental to the environment and the human rights of the peoples in the area<sup>220</sup>. Such examples of extension of the principle beyond justifications concerning nationalisation of foreign investment originally intended by the Resolution demonstrate the evolution of the principle and its linkage to private rights in the property system of natural resources.

### 3.4. Concluding Remarks III

All in all, States employ different property models in their quest for balance between private rights and public interest in onshore subsoil natural resources. Regimes recognizing private ownership of minerals theoretically may go as far as to entitle the land owner to all the subsoil beneath the surface and down to the centre of the Earth. In practice, the geological reality of subsurface structure and the migratory property of petroleum resources called for clarifications to the centre of the Earth doctrine. Furthermore, States not only need to establish a fair balance between private and public interests, but also to secure the benefits of their sovereign natural wealth against other States. This is achieved through the principle of PSNR which evolved to recognize the rights of private persons to participate in managing natural resources. Such interplay between sovereignty and natural human right foundations to property in natural resources coupled with the importance of the subject for society makes it a highly sensitive matter for national governments to legislate on.

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<sup>219</sup> Roddick, D. 2006. "Yukon First Nations and the Alaska Gas Pipeline". *2-3 Indigenous Affairs* pp. 12-19.

<sup>220</sup> Fondahl, G., Sirina, A. (2006). Oil Pipeline Development and Indigenous Rights in Eastern Siberia. *2-3 Indigenous Affairs* pp. 58-67. Available at: [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/IA\\_2-3-06.pdf](http://www.iwgia.org/iwgia_files_publications_files/IA_2-3-06.pdf). Last visited on 21 March 2015.



## IV Big Brother: the European Union

Under the principle of PSNR, States can exercise their rights over natural resources in the interest of peoples, where the latter thereby become objects of international law<sup>221</sup>. International law cannot decide how exactly peoples should benefit from the natural wealth of a given nation State. The intricacies of this entitlement of legal persons to benefit from natural resources are left instead to the discretion of the State in question, turning it into a national matter<sup>222</sup>.

Still prior to making an enquiry into the property regime makeover intended by Latvia, it is necessary to review regional legislation that Latvia as an EU Member State is subject to by virtue of the EU *sui generis* regime. This chapter verifies whether Latvia has an obligation to harmonize its property system over subsoil natural resources with the rest of the EU and amend its regime into the *domanial* type. The history of energy policy harmonization within the EU provides further useful insights into the EU's competence with regard to the property systems of its Member States in subsurface resources.

### 4.1. Is Latvia Bound to Harmonize its Property System with the EU?

Regarding the property regimes in the EU Member States, the Treaty on the Functioning of the European Union (hereinafter: TFEU) contains a provision stipulating that "[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership"<sup>223</sup>. This provision has a long history, with the Schuman Declaration of 9 May 1950 being recognized as the origin of the Article<sup>224</sup>. Since then this provision has been incorporated into the European Coal and Steel Community Treaty, the Euratom Treaty, the European Economic Community Treaty, the Treaty Establishing the European Community and, finally, the TFEU as well as the European Economic Area agreement<sup>225</sup>. The wording of the provision has not changed as part of the overall modification of the Treaties<sup>226</sup>.

At first reading, this provision prevents interference by EU institutions with the property regimes of the Member States. A literal reading of the Article could lead to the interpretation that the EU holds no competence to legislate in the field of property law<sup>227</sup>. Scholars have analysed the meaning of Article 345 TFEU in the light

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<sup>221</sup> Schrijver 1997, p. 311, *supra* note 138.

<sup>222</sup> *Ibid*, p. 9. See also Ronne 2010, p. 64, *supra* note 128.

<sup>223</sup> Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26 October 2012, pp. 47–390, Article 345.

<sup>224</sup> See Court of Justice: AG Colomer's Opinion in *Commission of the European Communities v Portuguese Republic*, Case C-367/98, EU:C:2001:369, paragraph 45.

<sup>225</sup> Akkermans, B., Ramaekers, E. 2009. "Article 345 TFEU (ex. 295 EC), Its Meanings and Interpretations". *European Law Journal* 16(3), pp. 292-314. (Akkermans and Ramaekers 2009, p. 313).

<sup>226</sup> *Ibid*.

<sup>227</sup> Ramaekers, Evelyne. 2013. *European Union Property Law: From Fragments to a System*. Intersentia. (Ramaekers 2013, p.102).

of the different language versions and drafting history of the Article and concluded that its purpose is not to exclude the application of EU law to the field of property<sup>228</sup>.

There are not many cases on Article 345 TFEU in CJEU practice. Moreover, those that did involve this Article were not milestone cases in EU law evolution<sup>229</sup>. In *Annibaldi*, the CJEU used Article 222 EEC (ex 295 TEC, 345 TFEU) to conclude that property matters are “within the purview of the Member States”<sup>230</sup>. Other sources suggest the interpretation of the Article should be less restrictive. One view is that Article 345 TFEU is meant to imply EU neutrality in matters of nationalization and privatization of undertakings<sup>231</sup>. This view is supported by the wording of the Schuman declaration that solely referred to “the methods of ownership of enterprises”<sup>232</sup>. In reality the EU does interfere with the property regimes of its Member States when the internal market<sup>233</sup> and non-discrimination<sup>234</sup> principle are concerned<sup>235</sup>. Also, a number of legal instruments at the EU level concern the property dimension in the light of cultural objects, late payments, insolvency proceedings, and financial instruments<sup>236</sup>.

Still, to date none of the EU legal instruments regulates the ownership regime over subsurface natural resources. In the light of Article 345 TFEU, the Member States retain their prerogative to legislate in the area of property law in so far as national laws are not in conflict with the EU rule of law<sup>237</sup>. Nevertheless, this does not mean that the EU rule of law cannot impact the legal rules related to the natural resources of the Member States. EU energy policy serves as an excellent illustration of the harmonization of the internal market with respect to energy related natural resources, without intervening in the property regime of Member States. A brief insight into the development of EU energy policy will illustrate the point.

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<sup>228</sup> See in general Akkermans and Ramaekers 2009, *supra* note 225; see also McHarg, Aileen. 2010. “Social Obligations of Ownership and Regulations of Energy Utilities”. In *Property and the Law in Energy and Natural Resources*, edited by Aileen McHarg, Barry Barton, Adrian Bradbrook, and Lee Godden, pp. 360-387. New York: Oxford University Press. (McHarg 2010, pp. 379-380); see also Ramaekers 2013, pp. 101-141, *supra* note 227. Cf. Del Guayo, Inigo, and Gunther Kuhne, Martha Roggenkamp. 2010. “Ownership Unbundling and Property Rights in the EU Energy Sector”. In *Property and the Law in Energy and Natural Resources*, edited by Aileen McHarg, Barry Barton, Adrian Bradbrook, and Lee Godden, pp. 326-359. New York: Oxford University Press. (Del Guayo, Kuhne and Roggenkamp 2010, p. 337). Del Guayo, Kuhne and Roggenkamp suggest that EU law “does not regulate the way ownership of the [energy] sector is organized”.

<sup>229</sup> Ramaekers 2013, p. 102, *supra* note 227.

<sup>230</sup> Court of Justice: Judgment in *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio*, Case C-309/96, EU:C:1997:631, paragraph 23.

<sup>231</sup> Akkermans, Milo and Sagaert 2012, p. 1035, *supra* note 123; see also Ramaekers 2013, p. 110, *supra* note 227.

<sup>232</sup> European Union. *The Schuman Declaration* (9 May 1950). Available at: [http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index\\_en.htm](http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm). Last visited on 3 May 2015.

<sup>233</sup> See Court of Justice: Judgment in *Commission of the European Communities v Kingdom of Belgium*, Case C-503/99, EU:C:2002:328

<sup>234</sup> See Court of Justice: Judgment in *Robert Fearon & Company Limited v Irish Land Commission*, Case 182/83, EU:C:1984:335.

<sup>235</sup> Akkermans, Milo and Sagaert 2012, p. 1035, *supra* note 123.

<sup>236</sup> *Ibid*, p. 1036-1045.

<sup>237</sup> Ramaekers 2013, p. 122, *supra* note 227.

## 4.2. Insights from EU Energy Policy Harmonization

Between WWII and the 1980s, the European energy sector was characterised by a system of national monopolies driven by the public sector<sup>238</sup>. This period is sometimes referred as the “old economy [that is] State-owned, vertically organized, and monolithic”<sup>239</sup>. The prevailing view at that time was that State ownership of energy companies was the means of securing the supply of energy<sup>240</sup>. Others emphasize that strong government control followed as a response to the energy crises of the 1970s<sup>241</sup>. Towards the 1990s, the “new economy [characterized by] privatization, and the dominance of the horizontal, contractually-organized processes of the competitive markets” emerged<sup>242</sup>. The “new economy”, however, should not be associated with deregulation<sup>243</sup>, as the 1990s brought the first EU-wide legislative packages regulating the internal energy market<sup>244</sup>. The vision of the new economy was that in a liberalized market energy exchange would be secured for the internal energy market<sup>245</sup>.

On top of legislative packages liberalizing the energy sector, a licensing system providing for exploration and exploitation of energy resources, in particular, hydrocarbons, became the central element permitting both private and public entities to act in the field under the auspices of an authorised body<sup>246</sup>. In the EU, the Hydrocarbons Licensing Directive sets the minimum standard for all Member States with regard to licensing for prospecting, exploration, and production of hydrocarbons<sup>247</sup>, where hydrocarbons refer to oil, gas and their derivatives. Exclusive rights for activities in the scope of this Directive should be granted based on non-discriminatory and transparent criteria – this notion is present throughout the recitals and provisions of the Directive. The non-discrimination requirement also implies that licensing is available both to public and private entities<sup>248</sup>, including those of third

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<sup>238</sup> Talus, Kim. 2013. *EU Energy Law and Policy: A Critical Account*, 1<sup>st</sup> edition. New York: Oxford University Press. (Talus 2013, p. 269).

<sup>239</sup> *Ibid*, p. 270.

<sup>240</sup> Del Guayo, Kuhne and Roggenkamp 2010, p. 329, *supra* note 228.

<sup>241</sup> Roggenkamp et al. 2007, p. 1268, *supra* note 136.

<sup>242</sup> Talus 2013, p. 270, *supra* note 238.

<sup>243</sup> Roggenkamp et al. 2007, p. 1268, *supra* note 136.

<sup>244</sup> European Commission. *Energy and Environment*. Available at: [http://ec.europa.eu/competition/sectors/energy/overview\\_en.html](http://ec.europa.eu/competition/sectors/energy/overview_en.html). Last visited on 29 May 2015.

<sup>245</sup> Haghghi, S. S. 2008. “Energy Security and the Division of Competences between the European Community and its Member States”. *European Law Journal* 14(4): pp. 461-482. (Haghghi 2008, p. 463).

<sup>246</sup> Ronne 2010, p. 68, *supra* note 128.

<sup>247</sup> Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospecting, exploration and production of hydrocarbons. OJ L 164, 30 June 1994, pp. 3–8.

<sup>248</sup> Commission of the European Communities. *Report from the Commission to the Council on Directive 94/22/EC on the conditions for granting and using authorizations for the prospecting, exploration and production of hydrocarbons* (COM(1998) 447 final, Brussels, 19 July 1998), p. 2. Available at: <http://aei.pitt.edu/3420/1/3420.pdf>. Last visited on 30 May 2015. The report states “the main objective of [the Directive 94/22/EC] was to ensure non-discriminatory access for all companies (or other entities), regardless of their nationality or whether they are public or private”.

countries subject only to the national security exception under Article 8(2). The directive effectively denies any preferential status for public entities over private, thereby proclaiming the market-based approach in the EU licensing regime for hydrocarbons. It is noteworthy that, by virtue of Article 2(1) of the Directive, Member States retain the right to exercise their sovereignty over hydrocarbons by deciding which areas within their territory should be opened for prospecting, exploration, and production of the subject matter.

#### 4.3. Concluding Remarks IV

EU law does not regulate the property regimes of the Member States over their natural resources. By virtue of Article 345 TFEU, the Member States retain their right to legislate in the field of property in so far as national laws are not in conflict with the EU rule of law, such as the non-discrimination principle and the freedoms enabling the single internal market. This does not prevent the EU from regulating energy policy and governing its liberalization and licensing standards.

## V Amending the Property Regime over Mineral Resources in Latvia

From the property regime perspective the Republic of Latvia is an exception in the EU when treating natural resources. The current legislative framework contains no reservations to private ownership of natural resources embedded in the bowels of the earth, unlike in the rest of the EU Member States. However, the recent decision by the Cabinet of Ministers to explore options for a legislative amendment on the matter might turn Latvia into a *domania* regime over onshore subsurface resources.

This chapter offers insights into the current legislative framework over subsurface resources in Latvia on the constitutional, civil and special law levels. An analysis of “The Proposal” for a makeover of the property regime over subsurface resources in Latvia follows next. The analysis in particular explores the economic rationale behind the intended makeover and the scenarios considered in the legislative Proposal. Further, a constitutional assessment of “The Proposal” is conducted taking into account Latvia’s obligations under the ECHR. A comparative inquiry into the US regime and the lessons it offers for the Latvian private property regime over subsurface resources conclude the chapter.

### 5.1. Existing Legislative Framework on Ownership of Natural Resources

#### 5.1.1. Constitutional Right to Property

At the outset, “The Proposal” pronounces the existing framework around natural resources to be archaic<sup>249</sup>. To objectively assess this proposition, an enquiry into the current legislative framework around natural resources is required. First of all, the Latvian Constitution guarantees private property rights pursuant to Section 105 that was enacted in 1998<sup>250</sup>. The human right to property under Section 105 reads as follows:

Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation<sup>251</sup>.

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<sup>249</sup> Latvijas Republikas Ministru Kabineta Tiesību Aktu Projekti. *Koncepcija par Zemes Dzīļu Izmantošanas Tiesiskā Regulējuma Pilnveidošanu Potenciālo Investīciju Piesaistei* (in Latvian, Proposal for Improvement of Legislative Regulation on Subterranean Depths for the Attraction of Potential Investment), p. 4. Available at: <http://tap.mk.gov.lv/lv/mk/tap/?dateFrom=2013-11-24&dateTo=2014-11-24&text=zemes+dz%C4%AB%C4%BCu&org=0&area=0&type=0>. Last visited on 28 April 2015.

<sup>250</sup> The Constitution of the Republic of Latvia (15 February 1922), Section 105 (15 October 1998). Available at: <http://www.saeima.lv/en/legislation/constitution>. Last visited on 28 April 2015.

<sup>251</sup> *Ibid.*

Importantly, this provision of the Constitution is found under the fundamental human rights chapter. In this formulation, the property right is not absolute, for it specifies that the right cannot be used contrary to the public interest, envisages restrictions on property rights in accordance with law as well as recognizing expropriation of property in exceptional situations. Nonetheless, Section 105 implies an institutional guarantee by the State of the human right to property<sup>252</sup>. According to the institutional guarantee, the legislator cannot pass a law that would substantially restrict or eliminate the concept of property<sup>253</sup>. The Proposal does not contain a threat to eliminate the concept of private property *per se*; however, it would restrict the range of objects qualifying as private property if implemented.

### 5.1.2. Ownership of Mineral Resources under the Civil Law of Latvia

The Civil Law of Latvia specifies the rights of owners with regard to immovable property in a way that follows the centre of the Earth doctrine. By virtue of Section 1042 of the Civil Law:

Owners of land own not only the surface thereof, but also the airspace above it as well as the land strata below it and all minerals which are found in it<sup>254</sup>.

This formulation has been inherited from the predecessors of the current civil law in this territory at least since the 19<sup>th</sup> century<sup>255</sup>. In addition, Section 1043 further specifies that land owners may act according to their own discretion with their surface as well as the strata below it insofar as third party boundaries are respected<sup>256</sup>.

At the same time, the civil law provisions can be subject to special laws<sup>257</sup>. With respect to property rights beneath land<sup>258</sup>, the Latvian government adopted a special law regulating use of the subsurface nearly 20 years ago. This law is reviewed in more detail in the next section.

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<sup>252</sup> Levits, Egils. 2000. "Cilvēktiesību jēdziens" (in Latvian, Human Rights Concept). In *Cilvēktiesības pasaulē un Latvijā* (Human Rights Worldwide and in Latvia), Rīga, edited by Ineta Ziemele, pp. 31-32. Rīga: Izglītības solī.

<sup>253</sup> Balodis, Kaspars. 2011. "105. pants" ("Section 105"). In *Latvijas Republikas Satversmes Komentāri* (VIII nodaļa, Cilvēka pamattiesības), edited by A. Endziņš, R. Apsītis, T. Jundzis, G. Kūtris, pp. 465-466. Latvijas Vēstnesis.

<sup>254</sup> The Civil Law of Latvia, Section 1042, *supra* note 1. The German version of the Civil Law of Latvia is available in: *Latvijas Republikas Civillikums, Lettlands Zivilgesetzbuch (The Civil Law of Latvia in Latvian and German)*. 2006. Latvijas Vēstnesis.

<sup>255</sup> The Proposal, p. 12, *supra* note 249.

<sup>256</sup> The Civil Law of Latvia, Section 1043, *supra* note 1.

<sup>257</sup> Grūtups, Andris. 1996. *Latvijas Republikas Civillikuma komentāri: Īpašums 927.-1129.p. (Comments on the Civil Law of the Republic of Latvia: Property: Sections 927-1129)*. A/S Preses Nams. (Grūtups 1996, p. 122).

<sup>258</sup> The Latvian government also adopted laws limiting the use of airspace above land. *See for example* Law on Aviation (Latvia, 1994). Available at: <http://likumi.lv/doc.php?id=57659>. Last visited on 12 May 2015.

### 5.1.3. Special Law on Subterranean Depths

In 1996 the Latvian government adopted the Law on Subterranean Depths, a special law regulating the use of subsurface strata<sup>259</sup>. The purpose of this legislative act is:

[T]o ensure complex, efficient, environmentally-friendly and sustainable use of subterranean depths as well as specify the requirements for the protection of subterranean depths<sup>260</sup>.

It is noteworthy that the purpose was specified as a result of the 2004 amendment, thereby indicating that this law was seen as an adequate legal instrument to ascertain sustainable use. Also, this law serves as transposition of the provisions of the EU Hydrocarbons Licensing Directive<sup>261</sup>.

As for property rights in natural resources, Section 3 of the Law on Subterranean Depths affirms that title to the subterranean depths and all mineral resources contained therein belong to the owner of the land<sup>262</sup>. By the definition specified in this law, 'subterranean depths' refers to the layer of the Earth's crust that is economically and technically accessible and exploitable<sup>263</sup>.

Nevertheless, the government reserves the right to impose restrictions on subterranean depths ownership vested in natural and legal persons as well as surface land ownership. Pursuant to Section 5(2), the State may limit subsurface ownership rights in accordance with law when necessary for the State<sup>264</sup>. Further, Section 5(3) of the law stipulates that land may be alienated for:

(...) national security, environment and subterranean depths protection needs, use of mineral resources and deposits of national significance as well as use of sections of subterranean depths of national significance, arrangement and exploitation of structures of national significance<sup>265</sup>.

Hence, private ownership rights extending to the usable layer of the crust are subject to the public interest restrictions in broad terms by virtue of the Law on Subterranean Depths. Besides, the State and local governments within Latvia may limit the use of subterranean depths in the interest of subsurface protection and rational use<sup>266</sup>, as the fundamental principle governing use of the subsurface is to serve the interests of all – the land owner, the State, and society at large<sup>267</sup>. This law envisages certain restrictions on the right to property on the basis of the balancing of interest principle between land owners, the State, and society<sup>268</sup>.

The Law on Subterranean Depths states that the onshore subsurface may be used by the owner, a person authorised by the owner or acting in accordance with a contract signed with the owner or an authorised person<sup>269</sup> in accordance with the

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<sup>259</sup> Law on Subterranean Depths, *supra* note 132.

<sup>260</sup> *Ibid*, Section 2.

<sup>261</sup> Directive 94/22/EC, *supra* note 247.

<sup>262</sup> Law on Subterranean Depths, Section 3, *supra* note 132.

<sup>263</sup> *Ibid*, Section 1(20).

<sup>264</sup> Law on Subterranean Depths, Section 5(2), *supra* note 132.

<sup>265</sup> *Ibid*, Section 5(3).

<sup>266</sup> Law on Subterranean Depths, Section 6(4), *supra* note 132.

<sup>267</sup> *Ibid*, Section 6(1).

<sup>268</sup> Grūtups 1996, p. 122, *supra* note 257. *Cf.* Balodis 2011, p. 468, *supra* note 253.

<sup>269</sup> Law on Subterranean Depths, Section 8(1), *supra* note 132.

procedures set within this Law. Exploration and extraction of minerals within a total area of 0.5 hectares and a depth of 2 meters can be carried out without licence<sup>270</sup>.

## 5.2. Birth of “The Proposal” for a Makeover from a Private to a Public Regime

On February 25, 2014, the Latvian government, acting on an initiative from the Ministry of Economy<sup>271</sup>, embarked on a path to explore options for profiting from the subsurface resource base of the State<sup>272</sup>. The draft version of a potential future property model over natural resources became available for public discussion on October 23, 2014. “The Proposal” refers to paragraph 33 of the session of the Cabinet of Ministers in February as its basis<sup>273</sup>. The title to paragraph 33 translates as “Information Report on Cooperation with Canadian Enterprises”<sup>274</sup>. The major purpose of the desired legislative change is to attract investment and to stimulate the interest and involvement of land owners in the exploration and exploitation of natural resources<sup>275</sup>. It is clear from the phrasing in “The Proposal” that mainly foreign direct investment (hereinafter: FDI) is sought under the first rationale<sup>276</sup> – this is in line with the title of the part of the session where the decision to explore options was made by the Cabinet of Ministers.

Besides, public news by the Latvian Investment and Development Agency confirms that the initiative for this legislative change is backed by foreign corporate investors’ interests<sup>277</sup>. The news states that a Protocol of Intent has been signed between the Latvian government and Canadian enterprise *Ginguro Exploration Inc.* that operates in the field of natural resource exploration<sup>278</sup>. Moreover, the news discloses that until now exploration in Latvia was different from the methods offered by *Ginguro*, whereas *Ginguro’s* interest in the exploration of Latvia’s natural resource

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<sup>270</sup> *Ibid*, Section 11.

<sup>271</sup> Ministru Kabineta 2014. gada 25. februāra sēdes darba kārtība (Agenda of the session of the Cabinet of Ministers on 25 February 2014), point 6.4. Available at: <http://tap.mk.gov.lv/mk/mksedes/saraksts/darbakartiba/?sede=715>. Last visited on 28 April 2015.

<sup>272</sup> The Proposal, *supra* note 249.

<sup>273</sup> The Proposal, p. 4, *supra* note 249.

<sup>274</sup> This is the author’s own translation, there being no publicly available content of this protocol, as this part of the session was closed. *Latvijas Republikas Ministru Kabineta Sēdes Protokols Nr. 12 (Protocol Nr. 12 of the Session of Cabinet of Ministers of the Republic of Latvia)*, paragraph 33. Available at: <http://tap.mk.gov.lv/mk/mksedes/saraksts/protokols/?protokols=2014-02-25>. Last visited on 28 April 2015.

<sup>275</sup> The Proposal, pp. 5-6, *supra* note 249.

<sup>276</sup> For example, it is stated in “The Proposal” that „Būtisks ieguvums no šādu izpētes darbu īstenošanas, kurām tiktu piesaistītas ievērojamas investīcijas būtu zināšanu pārnese no pasaules vadošajām valstīm ieguves rūpniecības jomā” (The Proposal, p. 28, *supra* note 249) which translates as „Knowledge transfer from world leading natural resource excavation countries would be a significant gain for natural resource exploration”.

<sup>277</sup> Investment and Development Agency of Latvia. *LIAA Ziņas Vasara 2014 (Summer 2014 News of the Investment and Development Agency of Latvia)*, p. 13. Available at: [http://www.liaa.gov.lv/files/liaa/attachments/zinas\\_vasara1.pdf](http://www.liaa.gov.lv/files/liaa/attachments/zinas_vasara1.pdf). Last visited on 28 April 2015.

<sup>278</sup> *Ibid*, p. 13.



base dates back to 2011<sup>279</sup>. The gap between the expression of interest by the Canadian corporation and the proclaimed need for a makeover of Latvian property rights regime in the news release is minute. Although “The Proposal” does not expressly mention the boost of FDI amongst its aims, the trigger was clearly investment interest shown by foreign corporations.

### 5.2.1 The Economic Rationale behind “The Proposal”

“The Proposal” is largely economically-oriented towards creation of an investment-friendly environment, an objective that warrants exploration of investment relations and the impact on the wealth of the country and its population. It has been established through scrutiny of the origin of “The Proposal” that its actual aim is to stimulate the flow of finance into the country. This can be achieved through FDI, which is known as a longer time horizon means for multinational companies to serve their host markets, in particular for exploitation of natural resources<sup>280</sup>.

It is commonly accepted that FDI provides a variety of positive impacts on the host country’s economy<sup>281</sup>. *Firstly*, FDI in natural resources may contribute to productivity and technological improvements in the industry of the host country, insofar as the foreign company’s trade secrets are not concerned<sup>282</sup>. *Secondly*, FDI may positively affect the economy through increase in natural resource exports as a result of their more intensive exploration<sup>283</sup>, especially in countries like Latvia where the current level of operations in the natural resource production sector is relatively low. *Thirdly*, FDI may directly and indirectly generate employment<sup>284</sup>. *Finally*, overall growth of the economy is positively correlated with investment, both domestic and foreign, especially for developing countries<sup>285</sup>.

With positive macroeconomic impacts of FDI in mind<sup>286</sup>, it is reasonable that governments seek to boost investment inflow. Those governments that “can credibly commit to the policy preferences of [multinational companies] will more likely attract higher levels of FDI inflows”<sup>287</sup>. As may be inferred from the motives behind “The Proposal”, the Latvian government seems to be doing exactly that – committing to the policy preferences of foreign investors. To back up the legitimacy of the FDI aim,

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<sup>279</sup> *Ibid.*

<sup>280</sup> Jensen, Nathan M. 2006. *Nation-States and Multinational Corporation: A Political Economy of Foreign Direct Investment*. Princeton University Press. (Jensen 2006, p. 23). *See also* Johnson, A. 2005. “Host Country Effects of Foreign Direct Investment: The Case of Developing and Transition Economies”. PhD Diss. Jonkoping International Business School. (Johnson 2005, p. 54).

<sup>281</sup> Lall, Sanjaya. 1996. “The Investment Development Path: Some Conclusions”. In *Foreign Direct Investment and Governments: Catalysts for Economic Restructuring*, edited by John H. Dunning, and Rajneesh Narula, pp. 423-441. London: Routledge. (Lall 1996, p. 439). *See also* Johnson 2005, p. 25, *supra* note 280.

<sup>282</sup> Jensen 2006, pp. 28-30, *supra* note 280. *See also* Johnson 2005, p. 26, p. 133, *supra* note 280.

<sup>283</sup> Jensen 2006, p. 31, *supra* note 280.

<sup>284</sup> *Ibid.*

<sup>285</sup> Johnson 2005, p. 152, *supra* note 280.

<sup>286</sup> Economists also recognize the detrimental potential of FDI, such as forcing local companies out of business and environmental degradation. *See for example* Johnson 2005, p. 25, *supra* note 280.

<sup>287</sup> Jensen 2006, p. 50, *supra* note 280.

“The Proposal” could expand amongst its aims on the aforementioned positive impacts of FDI on the economy.

### 5.3. Four Alternative Solutions under “The Proposal”: Scenarios A, B, C, D

“The Proposal” describes the current standing in usage of the Latvian natural resource base, namely, the existing property rights framework, known and potentially available natural resources, geological data to hand, the institutions and social groups involved as well as economic instruments for natural resource exploration and their meaning in the economic sector<sup>288</sup>. Private ownership of the subsurface including the natural resources contained therein is mentioned as the main problem hindering natural resource exploration and exploitation<sup>289</sup>.

Therefore, “The Proposal” refers to the legal framework in force mainly to demonstrate the existing legal basis for restrictions on private property rights<sup>290</sup>. “The Proposal” primarily considers the ownership provisions<sup>291</sup> of the Law on Subterranean Depths and those entitling the State to impose restrictions<sup>292</sup> on private property rights. In essence, “The Proposal” aims at creation of an environment favourable for investment with little consideration as to whether this objective can be achieved without the alienation of private rights to minerals in subsurface strata.

Despite the lack of analysis on the effectiveness of the existing law, “The Proposal” offers four possible scenarios for legislative development in the field of natural resource exploration and exploitation without taking related surface rights. Yet the scenarios vary on the degree of limitations implied by each scenario on private property rights over subsoil natural resources. The following four scenarios are considered:

- A. No amendments to the existing legislative framework.
- B. Extending the usage of the area of national significance as a pretext for private subterranean right restrictions.
- C. Keeping surface rights with land owners, while subterranean rights below a certain depth are transferred to the State.
- D. Specifying subsurface natural resources as a distinct property object separate from the surface<sup>293</sup>.

Each scenario requires a closer look into the changes implied before assessing their impact on private property rights.

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<sup>288</sup> Ministry of Environmental Protection and Regional Development of the Republic of Latvia. *Publiskai Apspriešanai Nodod Konceptijas Projektu par Zemes Dzīļu Izmantošanu Investīciju Piesaistei Latvijā*, Press release, 23 October 2014 (in Latvian, Proposal for Legislative Amendment on the Use of Subterranean Depths for the Attraction of Potential Investment is Released for Public Discussion). Available at: [http://www.varam.gov.lv/lat/aktual/preses\\_relizes/?doc=18497](http://www.varam.gov.lv/lat/aktual/preses_relizes/?doc=18497). Last visited on 28 April 2015.

<sup>289</sup> The Proposal, p. 4, *supra* note 249.

<sup>290</sup> *Ibid*, p. 7.

<sup>291</sup> Law on Subterranean Depths, Section 3(1), *supra* note 132.

<sup>292</sup> *Ibid*, Sections 5(2), 5(3) and 12<sup>1</sup>.

<sup>293</sup> The Proposal, pp. 4-5, 30-39, *supra* note 249.

### 5.3.1. Scenario A – Maintaining the Status Quo

Scenario A equals *de lege lata* with respect to natural resources, unlike the rest of the scenarios, which are options of *de lege ferenda*. Scenario A means preserving the *status quo* regarding the legislative framework, such as provisions of the Constitution of Latvia, the Civil Law of Latvia, and the Law on Subterranean Depths discussed above. “The Proposal” mentions only one drawback of scenario A – this scenario does not fulfil the aim of “The Proposal”: to create an environment favourable for investors<sup>294</sup>. This alleged drawback is scrutinized in more detail as part of the comparative inquiry into the US regime in chapter 5.5.

### 5.3.2. Scenario B – Extending the Usage of Areas of National Significance

Scenario B entails amendments to the existing legislative framework around mineral resources in Latvia, in particular, to the Civil Law of Latvia and to the Law on Subterranean Depths. The current legislation allows for restrictions on proprietary rights in sections of subterranean depths of national significance for the government to be able to use the subterranean depths or for obtaining ground water when necessary in the public interest<sup>295</sup>. Such areas of national significance are defined under Section 1(19) of the Law on Subterranean Depths as districts of the crust denoted by the Cabinet “the use of which may be of especially significant meaning in national economic, protection and in other fields”<sup>296</sup>.

At present only one such area is specified by the government, namely, Dobele structure<sup>297</sup> subject to a separate Latvian Regulation No. 524<sup>298</sup>. Although the current Regulation for Dobele structure does not apply to mineral extraction<sup>299</sup>, the owners are proscribed from hindering research on the useful properties of the subsurface<sup>300</sup>. Scenario B recommends extending the government right for restrictions in areas of national significance to include the use of mineral resources under the scope of public interest<sup>301</sup>. If adopted, scenario B would lead to definition of more such areas of national significance on the basis of available geological research data<sup>302</sup>.

“The Proposal” suggests a few weaknesses inherent in scenario B. *Firstly*, Section 12<sup>1</sup>(1) of the Law on Subterranean Depths stipulates that the Cabinet of Ministers will separately decide on each instance of restriction of proprietary rights in such areas of national significance<sup>303</sup>. *Secondly*, to define a new area of subterranean depths of national significance, there should be sufficient geological information to

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<sup>294</sup> The Proposal, p. 30, *supra* note 249.

<sup>295</sup> Law on Subterranean Depths, Sections 12<sup>1</sup>(1), *supra* note 132.

<sup>296</sup> *Ibid*, Sections 1(19).

<sup>297</sup> The Proposal, pp. 7-8, *supra* note 249.

<sup>298</sup> Ministru Kabineta Noteikumu Nr. 524: Valsts Nozīmes Zemes Dzīļu Nogabala “Dobeles Struktūra” Izmantošanas Noteikumi (Regulation No. 524 for Use of a Section of Subsoil of National Significance “the Dobele Structure”, Latvia, 7 July 2008). Available at: <http://likumi.lv/ta/id/179012-valsts-nozimes-zemes-dzilu-nogabala-dobeles-struktura-izmantosanas-noteikumi>. Last visited on 1 May 2015.

<sup>299</sup> *Ibid*, Section 3.

<sup>300</sup> *Ibid*, Section 12.

<sup>301</sup> The Proposal, p. 30, *supra* note 249.

<sup>302</sup> *Ibid*.

<sup>303</sup> *Ibid*, p. 31.

justify attribution of such new status<sup>304</sup>. This appears to be a subjective assessment. On the contrary, it is reasonable that private proprietary rights are restricted in the public interest only in exceptional cases, for example, when qualitative geological data support elevation of the status of the area in question to be of national significance. *Thirdly*, "The Proposal" highlights as a weakness the administrative burden on the government apparatus from maintenance of all contracts with private land owners for exploration and extraction of mineral resources<sup>305</sup>.

At the same time, scenario B involves a lesser scale of change than scenarios C and D and this is acknowledged as a strong point of this option<sup>306</sup>. In this scenario, the State budget is forecast to benefit from income associated with licences and taxes out of greater investment levels and new employment places in industry<sup>307</sup>. On the other hand, an increase in spending by the State is envisaged in categories like making geological information available to the public as well as improving the institutional capacity necessary for implementing scenario B<sup>308</sup>. The net effect between changes in estimated revenues and expenses is not discussed in "The Proposal". Hence, the economic motivation of scenario B is not sufficiently substantiated by financial calculations. This makes it rather hard for the general public to comprehend the value and legitimacy of the public interest behind the intended changes.

### 5.3.3. Scenario C – Introducing State Ownership below a Certain Depth or Layer

Scenario C proposes to eliminate the private ownership regime over natural resources by separating surface rights from mineral rights at a certain depth<sup>309</sup>. According to the law in force, mineral rights are defined as the rights to explore, extract, and prospect for minerals in the subsurface<sup>310</sup>. The concept of minerals incorporates "formations of non-organic or organic origin (also groundwater) the use of which is practically possible and economically viable"<sup>311</sup>. According to scenario C, surface rights would still include the right to use land and soil as well as natural resources contained underneath, such as clay, sand, gravel, peat, and the like<sup>312</sup>. This definition of resources from the near-surface soil corresponds to the list of widespread mineral resources provided in the Annex to the Law on Subterranean Depths<sup>313</sup> that can be extracted without a licence<sup>314</sup>.

Scenario C attempts to implement this separation of mineral rights from surface rights through setting a depth or geological layer borderline that would divide ownership of the contents and the right to use between the State and the surface

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<sup>304</sup> *Ibid.*

<sup>305</sup> The Proposal, p. 31, *supra* note 249.

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid*, p. 32.

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid*, p. 33.

<sup>310</sup> Law on Subterranean Depths, Sections 1(7), 1(6) and 1(9), respectively, *supra* note 132.

<sup>311</sup> *Ibid*, Section 1(3).

<sup>312</sup> The Proposal, p. 33, *supra* note 249.

<sup>313</sup> Law on Subterranean Depths, Annex, *supra* note 132.

<sup>314</sup> *Ibid*, Section 11(1)(1).

owners<sup>315</sup>. At present, quarries on Latvian territory reach 50 meters in depth, boreholes for groundwater 200 meters, and for mineral water up to 300 meters<sup>316</sup>. "The Proposal" targets expropriation of mineral rights beneath a certain borderline. At the same time, scenario C does not resolve what the borderline should be, leaving it open for further consideration in the course of the property regime makeover in Latvia.

Scenario C considers phased implementation as an option, i.e. there could be a 5-10 year transition period before the new legislative framework comes into force<sup>317</sup>. Additionally, this scenario foresees compensation to the land owner in case of damage to the surface as a result of exploration activities<sup>318</sup> as well as a royalty payment from the licence-holder to the surface owner if valuable minerals are found on their land<sup>319</sup>. This scenario requires either amendments to the Civil Law of Latvia and the Law on Subterranean Depths, or completely new legislation on mineral resources<sup>320</sup>.

The disadvantages of scenario B vanish with scenario C. The implementation of such a profound distinction between the surface and mineral rights with attribution of the latter to the State would turn the *accessio* regime into a *domanial* regime, thereby removing the need for case by case decisions on proprietary rights restriction and the administrative burden of a contractual relationship with private land owners inherent in scenario B. Amongst the disadvantages, the drafters acknowledge the magnitude of change in the property rights regime and envisage serious opposition from land owners<sup>321</sup>. The State budget impact is analogous to that in scenario B<sup>322</sup>, hence, analogous criticism applies.

Scenario C is uncharacteristic for a State with an *accessio* system of natural resource ownership. *Accessio* States, characterised by recognition of private ownership of the subsurface, do not generally restrict the depth to which private property rights extend. At most, scholars advocate that subsurface rights should not extend beyond 300 meters down into the soil, without prejudice to rights in deeper minerals<sup>323</sup>. Still, in a world based on sovereignty States are not prevented from exercising their legislative power and limiting private ownership of minerals.

#### 5.3.4. Scenario D – Introducing Mineral Rights as a Distinct Object of Property

Finally, scenario D exhibits the most radical of all scenarios, limiting private property rights by separating natural resources and subterranean depths into a distinct property object different from surface property<sup>324</sup>. In this scenario, ownership of certain natural resources would be vested in the State. "The Proposal" leaves it open

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<sup>315</sup> The Proposal, p. 33, *supra* note 249.

<sup>316</sup> *Ibid.*

<sup>317</sup> The Proposal, p. 33, *supra* note 249.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*, p. 34.

<sup>320</sup> *Ibid.*

<sup>321</sup> *Ibid.*

<sup>322</sup> *Ibid.*, p. 35.

<sup>323</sup> See Sprankling 2008, p. 1021, *supra* note 146.

<sup>324</sup> The Proposal, p. 36, *supra* note 249.

whether all or part and which natural resources should become the property of the State. "The Proposal" refers to broadly formulated criteria of the Estonian Earth's Crust Act<sup>325</sup>. According to the Estonian Act, mineral resources of importance to economic development of the country or its export potential as well as mineral resources capable of trans-border environmental impact belong to the State<sup>326</sup>.

The advantages of scenario D are all listed from the perspective of the State without considering the balance of rights between land owners and the State. "The Proposal" lists clarity of mineral resource usage amongst the strengths of scenario D<sup>327</sup>. However, the clarity of mineral resources exploration and extraction is analogous between scenarios A and D. The difference between these two scenarios is where the ownership of the entire subsurface resource base of the country is vested, in the private or in the public domain.

Throughout "The Proposal", private rights over natural resources are seen as an obstacle to proper market functioning and satisfaction of the public interest. In fact, the ability of the government authorities to prevent irrational behaviour by private persons, either natural or legal, is mentioned amongst the advantages of scenario D<sup>328</sup>. Such irrational behaviour is known as a holdout problem inherent in a private property regime over subsurface resources<sup>329</sup>.

Ultimately, scenario D is presented as the most favourable for the aims of "The Proposal", such as to create an environment favourable for investment. Still it is unclear how scenario D fulfils the other aim of "The Proposal", namely, to stimulate the interest and involvement of land owners in the use of natural resources<sup>330</sup>. To the contrary, taking away subterranean rights eliminates the interest of surface owners to explore the subterranean depths. On the drawback side, "The Proposal" mentions likely resistance from the land owners' side as well as challenges to defining the list of mineral resources that should belong to the State<sup>331</sup>. "The Proposal" culminates in scenario D being suggested for implementation as the optimal way forward for a Latvian property regime over subterranean depths<sup>332</sup>.

#### 5.4. Constitutional Assessment of "The Proposal"

According to comments on the Constitution of Latvia, property primarily should serve the interests of its owner<sup>333</sup> with private property being a precondition for a market

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<sup>325</sup> Earth's Crust Act (Estonia, 23 November 2004). Available at: [http://faolex.fao.org/cgi-bin/faolex.exe?database=faolex&search\\_type=query&table=result&query=ID:LEX-FAOC098321&format\\_name=ERALL&lang=eng](http://faolex.fao.org/cgi-bin/faolex.exe?database=faolex&search_type=query&table=result&query=ID:LEX-FAOC098321&format_name=ERALL&lang=eng). Last visited on 2 May 2015.

<sup>326</sup> *Ibid*, Articles 3 and 4.

<sup>327</sup> The Proposal, p. 37, *supra* note 249.

<sup>328</sup> The Proposal, p. 37, *supra* note 249.

<sup>329</sup> Klingsmith and McGavran 2014, p. 18, *supra* note 180.

<sup>330</sup> The Proposal, pp. 5-6, *supra* note 249.

<sup>331</sup> *Ibid*, p. 37.

<sup>332</sup> Latvijas Republikas Ministru Kabineta tiesību aktu projekti. *MK rīkojuma Projects* (Project Order of the Cabinet of Ministers). Available at: <http://tap.mk.gov.lv/lv/mk/tap/?dateFrom=2013-11-24&dateTo=2014-11-24&text=zemes+dz%C4%AB%C4%BCu&org=0&area=0&type=0>. Last visited on 28 April 2015.

<sup>333</sup> Balodis 2011, p. 468, *supra* note 253.

economy and a democratic society<sup>334</sup>. However, analysis of the interests of the owner is missing from "The Proposal", apart from mentioning expected opposition from landowners to the intended makeover of the regime. The second sentence of Section 105 of the Constitution proscribes usage of property against the public interest<sup>335</sup>. Put simply, this means that property should be used in accordance with law<sup>336</sup>. With respect to natural resources, there is no prohibition on *not* using property contrary to the interests of the public. In other words, nothing in constitutional law obliges private land owners to explore and extract natural resources beneath their land. As for the third sentence of the human right to property in Latvian constitutional law, expropriation is the most radical interference with private property rights; therefore, it would only be possible in the public interest in extraordinary circumstances on the basis of a separate legislative instrument against fair compensation<sup>337</sup>.

This chapter proceeds with analysis of "The Proposal" in the light of Section 105 of the Latvian Constitution. The conditions for restrictions on private property rights and their compatibility with "The Proposal" are reviewed first; then follows an assessment of "The Proposal's" fit under the conditions for lawful expropriation.

#### 5.4.1. Restrictions on Private Property Rights

In the light of Latvia's international obligations under the ECHR, the Constitutional Court has held that restrictions on private property rights should:

- i. be in conformity with law;
- ii. be of legitimate aim;
- iii. satisfy the proportionality condition<sup>338</sup>.

If successful, the outcome of "The Proposal" would be the passing of a new law. Hence, *the first condition* is taken care of by virtue of "The Proposal's" nature.

As for *the second condition*, the Latvian Constitutional Court recognizes restrictions on property rights for protection of third party human rights, the democratic system, public security, prosperity, and virtue to qualify as restrictions in the public interest, thereby, too, of legitimate aim<sup>339</sup>. Most likely "The Proposal" aims to qualify for public prosperity as a rationale for its proposed makeover of the Latvian property regime over subsurface property rights. However, it is unclear whether the aim of "The Proposal" could succeed given the case law so far. For example, income tax on pension was accepted as a property rights restriction in the name of public prosperity by the Constitutional Court, for it secures government budget income necessary for financing priority activities of a social nature<sup>340</sup>.

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<sup>334</sup> *Ibid*, p. 459.

<sup>335</sup> Constitution of the Republic of Latvia, Section 105, *supra* note 250.

<sup>336</sup> Balodis 2011, p. 468, *supra* note 253.

<sup>337</sup> *Ibid*, p. 460.

<sup>338</sup> LR Satversmes Tiesa (Latvian Constitutional Court): *Nr. 2008-11-01* (Riga, 22 December 2008), paragraph 9.

<sup>339</sup> LR Satversmes Tiesa (Latvian Constitutional Court): *Nr. 2008-34-01* (Riga, 13 February 2009), paragraph 19.

<sup>340</sup> LR Satversmes Tiesa (Latvian Constitutional Court): *Nr. 2007-01-01* (Riga, 8 June 2007), paragraph 23.

Imposing a tax on pensions is not equivalent in impact to taking away subterranean rights. Moreover, "The Proposal" does not expressly identify any social benefit of the intended change as part of its aims. Hence, the intended legislative amendment in its current formulation does not seem to fall under the auspices of the distributive role of the State<sup>341</sup>.

To mitigate concerns over legitimate aim, "The Proposal" could specify the link between public prosperity and investment more clearly. In particular, the benefits of FDI in relation to the economic development of the State could support the legitimacy of the aim. Given the wide margin of appreciation the ECHR affords to States in the interpretation of public interest<sup>342</sup>, "The Proposal" could satisfy the legitimate aim condition in the ECtHR.

As for *the third condition*, proportionality may become a stumbling block for the legal amendment intended by "The Proposal". The proportionality condition further requires three criteria to be satisfied:

- i. the means must be appropriate for achievement of the legitimate aim;
- ii. it must be impossible to achieve the legitimate aim with less restrictive means on individual rights;
- iii. the benefit for the public must outweigh the individual loss<sup>343</sup>.

These are cumulative criteria and should be evaluated in the same sequence as provided above<sup>344</sup>. Moreover, in order to affirm the legislation in question as unconstitutional, the Constitutional Court is not obliged to offer an alternative option as appropriate and less restrictive means for achieving a legitimate aim<sup>345</sup>. Still as a part of *the first proportionality criterion*, it is in the competence of the Constitutional Court to verify whether the legislative authority assessed the existence of such less restrictive means in pursuit of the legitimate aim<sup>346</sup>.

The optimal way to perform this is to consult the preparatory documents for a given legislative act<sup>347</sup>, such as "The Proposal" in this case. In fact, "The Proposal" did consider other means of achieving its aims under scenarios B and C. Both of these scenarios were found less restrictive on private property rights. This renders the envisioned legislative change according to scenario D challenging from the perspective of *the second criterion*.

As for *the third criterion*, namely, comparison of the public benefit and individual loss caused by a property rights restriction, proportionality is easier ascertained when the restriction concerns single cases, such as a road servitude

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<sup>341</sup> Van Banning 2001, pp. 332-333, *supra* note 115. Van Banning discusses the distributive role of the State in pursuit of the social objective of poverty reduction, whereas "The Proposal" makes no direct link to the poverty reduction objective.

<sup>342</sup> See *James and Others v. The United Kingdom*, paragraph 46, *supra* note 100; and *Handyside v. The United Kingdom*, paragraph 48, *supra* note 103, for ECHR statements on the wide margin of appreciation.

<sup>343</sup> Latvian Constitutional Court, Judgment *Nr. 2008-34-01*, paragraph 20, *supra* note 339; and Latvian Constitutional Court, Judgment *Nr. 2008-11-01*, paragraph 13, *supra* note 338.

<sup>344</sup> Balodis 2011, p. 474, *supra* note 253.

<sup>345</sup> *Ibid.*

<sup>346</sup> LR Satversmes Tiesa (Latvian Constitutional Court): *Nr. 2008-36-01* (Riga, 15 April 2009), paragraph 15.

<sup>347</sup> Judgment *Nr. 2008-36-01*, paragraph 15.1.



crossing private property boundaries<sup>348</sup>. This balance may be harder to achieve in cases of legislative acts affecting a wider range of persons. The land reform of 1991 implemented by the Latvian government after regaining independence could be regarded as a precedent of the scale intended by "The Proposal" with the scenario D solution.

The land reform aimed at gradual denationalization of property unlawfully expropriated during Soviet times as well as its privatization and return to lawful pre-expropriation owners<sup>349</sup>. In particular, this law entitled the lawful owners or their heirs to recover the ownership rights to property and receive fees from tenants, to accept another land plot of equal value, or to receive compensation in accordance with the law<sup>350</sup>. Nevertheless, some owners claimed the law was not implemented in conformity with Section 105 of the Constitution, as the owners could not freely exercise their right to use the property after reclaiming ownership of their property<sup>351</sup>. In part of its case law the Constitutional Court upheld the Land Reform Law, affirming such property right restrictions that carried a legitimate aim of third party rights protection and fulfilled the proportionality condition<sup>352</sup>. On other occasions, the Court found certain provisions of the Land Reform Law to be unconstitutional due to their lack of proportionality<sup>353</sup>.

In contrast to the aims of "The Proposal", the land reform aimed at restoring legal property rights. In turn, "The Proposal" intends to take private property rights away under scenarios B, C and D. Therefore, a mineral law on the basis of "The Proposal" in its current form is likely to be found unconstitutional for failure to fulfil the three proportionality criteria.

#### 5.4.2. Expropriation of Private Property Rights

So far the constitutional assessment has focused on restrictions on individual property rights, yet Section 105 also provides for lawful expropriation or taking of property subject to certain conditions. In fact, of all the *de lege ferenda* scenarios considered in "The Proposal", only scenario B could theoretically qualify as a restriction and not expropriation, as the current law already foresees restrictions on the use of subterranean depths in areas of national significance<sup>354</sup>. However, "The Proposal" refers to expropriation of subsurface property rights when the private land owner also does not cooperate in scenario B<sup>355</sup>.

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<sup>348</sup> See for example Latvian Constitutional Court, Judgment *Nr. 2008-11-01*, *supra* note 338.

<sup>349</sup> Par Zemes Reformu Latvijas Republikas Pilsētās (in Latvian, Land Reform Law in the Cities of the Latvian Republic), Section 2. Available at: <http://likumi.lv/doc.php?id=70467>. Last visited on 11 May 2015.

<sup>350</sup> *Ibid*, Section 12(3).

<sup>351</sup> Latvian Constitutional Court, Judgment *Nr. 2008-34-01*, paragraph 3, *supra* note 339.

<sup>352</sup> *Ibid*, paragraph 19.

<sup>353</sup> Latvian Constitutional Court, Judgment *Nr. 2008-36-01*, paragraph 15.3, *supra* note 346.

<sup>354</sup> The Law on Subterranean Depths, Section 10(8), *supra* note 132, already stipulates "The provisions for the use of a section of the subterranean depths of national significance shall be determined by the Cabinet separately for each section".

<sup>355</sup> The Proposal, p. 31, *supra* note 249: "Būtībā zemes īpāšņiem tiktu atsavinātas zemes dziļes (...)". In English this translates as "Subterranean depths are effectively expropriated from the land owner" in this scenario.

In turn, scenarios C and D propose an outright transfer of subsurface rights and mineral rights to the State throughout Latvian territory. While land owners would retain the surface rights, such reduction of their property rights would most likely be deemed a partial taking of property. According to the comments on the Latvian Constitution, the result of expropriation does *not* need to be the complete removal of property rights from the owner in order to qualify for expropriation rather than restriction – partial property taking is also recognized under Latvian constitutional law<sup>356</sup>. For expropriation to be recognized in conformity with the Constitution, the following four criteria must be fulfilled:

- i. a separate law must exist as a ground for expropriation;
- ii. public interest;
- iii. an exceptional case;
- iv. fair compensation<sup>357</sup>.

*The first criterion* for legitimate expropriation is meant to protect against arbitrary expropriation<sup>358</sup>. Latvia adopted a special law on the procedure by which immovable property can be expropriated, i.e. the Law on Expropriation of Immovable Property in the Public Interest<sup>359</sup>. This law reaffirms the first criterion by virtue of Section 4 stating that both voluntary and forced expropriation can take place on the basis of a separate law<sup>360</sup>. The term “separate law” here means a legislative act specific to each property expropriation case<sup>361</sup>. One implication of the first criterion could be a huge burden on the Latvian legislative branch to produce legislative acts for taking subsurface or mineral rights away from each private owner. Put simply, this may not be possible to implement in practice. Yet “The Proposal” does not envision such a repercussion for either of the scenarios, although it could be expected in the light of targeted expropriation of subsurface rights.

As for *the second criterion*, an example of its interpretation can also be found in the Law on Expropriation of Immovable Property in the Public Interest with its non-exhaustive list on rationales falling into the public interest category<sup>362</sup>. The provision includes rationales like public security, protection of the environment, health protection, needs of a social, cultural, educational character<sup>363</sup>. This law echoes previous rulings of the Constitutional Court with respect to the notion of

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<sup>356</sup> Balodis 2011, p. 475, *supra* note 253.

<sup>357</sup> LR Satversmes Tiesa (Latvian Constitutional Court): *Nr. 2009-01-01* (Riga, 21 October 2009), paragraph 10.

<sup>358</sup> *Ibid*, paragraph 11.

<sup>359</sup> Sabiedrības vajadzībām nepieciešamā nekustamā īpašuma atsavināšanas likums (Law on Expropriation of Immovable Property in the Public Interest, 2011). Available at: <http://likumi.lv/doc.php?id=220517>. Last visited on 11 May 2015.

<sup>360</sup> *Ibid*, Section 4.

<sup>361</sup> See Latvian Constitutional Court, Judgment *Nr. 2009-01-01*, *supra* note 357, for an example of the Constitutional Court reviewing the compatibility of the expropriation specific law in the Terehovas border area with Section 105 of the Constitution of Latvia. See also Balodis 2011, p. 475, *supra* note 253, for other examples.

<sup>362</sup> The Law on Expropriation of Immovable Property in Public Interest, Section 2, *supra* note 359.

<sup>363</sup> *Ibid*.

public interest<sup>364</sup>. This is an indication that the economic and industry development aims of "The Proposal" are unprecedented in the Latvian legal system.

Also, the case law of ECHR includes no precedent of the kind. In *James and Others v. The United Kingdom*, the court did not find a breach of Article P1-1 of the ECHR<sup>365</sup> *inter alia* justifying UK interference with property rights on the premise of eliminating social injustices<sup>366</sup>. Similarly in *Mellacher and Others v. Austria*, a legislative act "making accommodation more easily available at reasonable prices to less affluent members of the population" was found to have a legitimate aim in the general interest<sup>367</sup>. The public interest in removal of social injustices as in the above-cited case appears to be a more straightforward fit under the notion of public interest than the purely economically driven motivation of the government of Latvia with the intended legislative amendment. In fact, "The Proposal" has already been criticized in Latvian legal circles for having a very narrow interest in mind<sup>368</sup>. The Latvian proposed amendment might more easily qualify as an economic endeavour than as remedial social legislation<sup>369</sup>. Nevertheless, States enjoy a wide margin of appreciation under the ECHR regime in public interest matters<sup>370</sup>.

Regarding environmental damage concerns in the public interest, movement is inherent in the Earth's interior layers<sup>371</sup>. This characteristic can be used against a private property regime in minerals in support of the government's role in securing the general interest of society and protecting the subsurface from private interference<sup>372</sup>. However, this is not the motive of the Latvian authorities. To the contrary, the transfer of mineral rights from a private regime to a public one is intended to encourage exploitation of natural resources, thereby increasing the risk of environmental damage through possible interior subsurface movements.

*The third criterion* of exceptional circumstances for legitimate expropriation should be assessed in conjunction with the proportionality condition. In the view of the Constitutional Court in a case of land expropriation near the Latvian border, exceptional circumstances were explained as circumstances when the legitimate aim

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<sup>364</sup> Latvian Constitutional Court, Judgment Nr. 2008-34-01, paragraph 19, *supra* note 339.

<sup>365</sup> *James and Others v. The United Kingdom*, paragraph 78, *supra* note 100.

<sup>366</sup> *Ibid*, paragraph 47-49.

<sup>367</sup> Judgment on the merits delivered by a Plenary Court. *Case of Mellacher and Others v. Austria* (merits), no. 10522/83; 11011/84; 11070/84, ECHR, 19 December 1989, paragraphs 47 and 57.

<sup>368</sup> Advokātu atbalsta biedrība. *Zemes dziļu tiesiskā regulējuma maiņas iecere draud ar nacionalizāciju* (Proposal for Legislative Amendment on Subterranean Depths regulation Threatens Nationalization), (12 November 2014). Available at: <http://www.latvijasadvokats.lv/spotlight/117>. Last visited on 4 May 2015. Cf Mārtiņš Tārlaps. *Zemes dziļes Latvijā – suns uz sienu kaudzes* (Latvian Subterranean Depths – A Dog in the Manger, 1 December 2014). Available at: <http://www.rln.lv/lat/dabas-resursi/>. Last visited on 4 May 2015.

<sup>369</sup> For examples of reasonable legislation with legitimate aims in the general or public interest see *James and Others v. The United Kingdom*, para 47-49, *supra* note 100; see also *Mellacher and others v. Austria*, *supra* note 367.

<sup>370</sup> *James and Others v. The United Kingdom*, paragraph 46, *supra* note 100; and *Handyside v. The United Kingdom*, paragraph 48, *supra* note 103.

<sup>371</sup> Sprankling 2008, p. 994, *supra* note 146.

<sup>372</sup> *Ibid*.

cannot be achieved by any other means<sup>373</sup>. In that case the Court justified the expropriation instance in question, amongst other reasons, on the ground that the expropriation was exceptional as opposed to mass expropriation<sup>374</sup>. Hence, the legislator should assess whether the same legitimate aim may be secured without mass impact on private property rights<sup>375</sup>. Such constitutional case law is not promising for the implementation of scenarios C and D that employ mass taking of the subsurface and mineral rights, rather than case by case taking as in scenario B.

As for *the fourth criterion*, i.e. fair compensation, the law does not provide a universal approach to its calculation given the wide variety of property objects that differ in their characteristics<sup>376</sup>. One of the factors to take into account for calculating fair compensation is any special characteristics and the type of use of the expropriated property object<sup>377</sup>. Regarding mineral resources as a type of property, it is likely that compensation will not be close to the value of resources expropriated if the land owners do not use the subterranean depths prior to expropriation. Scenarios B, C, and D envisage compensation to the surface owner where subterranean depths are used by authorised third parties<sup>378</sup>, possibly in the form of royalty payments<sup>379</sup>.

## 5.5. Comparative Review of the Latvian Regime

The opening summary of "The Proposal" highlights that subterranean depths belong to the land owner in Latvia unlike in the rest of the EU Member States<sup>380</sup>. This may mislead the reader into thinking that Latvia is obliged to harmonize its natural resource ownership regime with the rest of the EU. However, the analysis of EU standing with regard to its Member State property regimes in the previous chapter<sup>381</sup> has demonstrated that no such legal obligation is imposed on Latvia. Therefore, the search for more suitable candidates for comparative analysis of the property regime over natural resources is warranted.

### 5.5.1. Subjective Choice of Countries for Comparison in "The Proposal"

In its current form "The Proposal" dedicates three pages to a comparative review of the legal frameworks of other countries concerning natural resources<sup>382</sup>. It brings some examples from the EU Member States and Canada that are deemed to have common trends with Latvia<sup>383</sup>. Such choice of countries raises some questions, though.

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<sup>373</sup> Constitutional Court of Latvia, Judgment *Nr. 2009-01-01*, paragraph 13, *supra* note 357.

<sup>374</sup> *Ibid.*

<sup>375</sup> Balodis 2011, p. 477, *supra* note 253.

<sup>376</sup> *Ibid.*, p. 478.

<sup>377</sup> *Ibid.*

<sup>378</sup> The Proposal, p. 5, *supra* note 249.

<sup>379</sup> *Ibid.*, p. 28, p. 34. "The Proposal" does not explicitly mention royalty payments as a necessary attribute of scenarios B and D; royalties are only mentioned with respect to scenario C (p.34); however, the possibility to implement the royalty system is mentioned in "The Proposal" (p.28).

<sup>380</sup> *Ibid.*, p. 4.

<sup>381</sup> See Chapter 4.

<sup>382</sup> The Proposal, pp. 23-25, *supra* note 249.

<sup>383</sup> *Ibid.*, p. 23.

*Firstly*, the ownership of all or certain natural resources by the State in the other EU countries does not oblige Latvia to unify or harmonize with the rest of the EU, absent such direction and competence from the EU. *Secondly*, comparison to Canada in the comparative review confirms a link between the aims of “The Proposal” and the interests of the potential Canadian investors. *Thirdly*, this choice of countries for comparison seems to be heavily influenced by the desired outcome of comparison. Taking all the countries with a restriction of private rights over natural resources leads an uninformed reader to think that Latvia’s current model is archaic and a change is long overdue, just as suggested by “The Proposal”.

### 5.5.2. A More Objective Candidate for Comparison – the US

In contrast, a neutral reader could question why there is no mention of other countries with a similar private property regime over natural resources as in Latvia and whether those States face similar concerns as to lack of exploration and extraction activities. Furthermore, another partner in private ownership of the subsurface and its contents, the US, is known to the Latvian public<sup>384</sup>. Hence, this chapter proceeds with a comparative inquiry into the treatment of subsurface resources under the *accessio* regime of the United States (hereinafter: US).

From the constitutional perspective, the US Constitution recognizes the right to property as a right of persons as well<sup>385</sup>. The part relevant to property rights reads as follows:

No person shall (...) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation<sup>386</sup>.

Just like the Latvian Constitution, the US one provides for property deprivation only in accordance with the law. In fact, the formulation of Latvian constitutional law is stricter than the US one for it stipulates that the taking of private property may be permitted only in exceptional circumstances on the basis of a specific law. In turn, the US formulation of the constitutional right to property is broader, leaving specific requirements other than lawfulness and compensation outside its wording.

As for the property model over natural resources, the US private property regime is conversely considered as one of the reasons why natural resource extraction flourishes in that country<sup>387</sup>. In particular, pushing corporate giants to negotiate with multiple private land owners for contracts on the mineral rights to

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<sup>384</sup> The US private regime in the subsurface is known at least to the Latvian media, see Latvijas sabiedriskie mediji. *Zemes dziļu īpašumtiesības liedz veikt izpēti un derīgo izraktenju iegūšanu* (Subterranean Depth Property Rights Inhibit Subsurface Resource Exploration and Extraction, 7 February 2015). Available at: <http://www.lsm.lv/lv/raksts/latvija/zinas/zemes-dzilju-ii-pashumtiesibas-liedz-veikt-izpeti-un-deriigo-izraktenju-iegushanu.a116950/>. Last visited on 4 May 2015.

<sup>385</sup> United States Constitution, Fifth Amendment, Right of Persons. Available at: <http://constitution.findlaw.com/>. Last visited on 8 May 2015.

<sup>386</sup> *Ibid.*

<sup>387</sup> Forbes. *Six Reasons Fracking Has Flopped Overseas*. Available at: <http://www.forbes.com/sites/jeffmcmahon/2013/04/07/six-reasons-fracking-has-flopped-overseas/>. Last visited on 4 May 2015.

their lands promotes competition in the industry<sup>388</sup>. In contrast, negotiating with a single authority that issues licences in a country with State-owned natural resources places a high corruption risk on that authority<sup>389</sup>. It is true that such risk can be mitigated with an array of anti-corruption measures. However, for such risk mitigation measures to work the risk needs to be acknowledged in the first place. This recognition of a higher corruption risk as a result of consolidation of natural resources ownership in the hands of the State is missing in "The Proposal".

Research of the US property regime over subsurface resources inevitably leads to learning about *ownership-in-place* and the *non-ownership* model. The *ownership-in-place* doctrine treats all minerals, including oil and gas that are of a fugitive nature, the same way, namely, the land owner has property rights over the minerals under the land<sup>390</sup>. Yet this ownership right ceases to exist if oil and gas migrate beyond the borders of the land owner's property<sup>391</sup>. This theory prevails in American States abundant with shale oil and gas<sup>392</sup>. In contrast, the *non-ownership* doctrine treats oil and gas as resources not subject to ownership until reduced to possession<sup>393</sup>. While there is no indication that the subterranean depths of Latvia may be abundant with oil and gas, the fact that these ownership models apply only to fugacious substances like oil and gas reaffirms the point that private ownership of hard minerals is not an impossible approach.

Another factor that stimulates natural resource exploration and extraction in the US within the framework of private mineral rights is the pooling rules. Those rules are passed at the state level in the US and apply to oil and gas development. While there is no indication that there would be oil and gas reservoirs in Latvian territory, the pooling solution may be at least a partial answer to the concerns voiced in "The Proposal" on the holdout of consent to resource exploration and extraction by land owners. The Latvian authorities believe that the mismatch between the borders of a land plot and of a natural resource reservoir as well as the lack of financial means to explore and extract resources is a hindering factor for the use of subterranean depths<sup>394</sup>. Hence, it is useful to understand how this is overcome in the US.

By virtue of pooling, multiple private subsurface right holders are grouped together to ensure that the use of mineral resources under one lease satisfies the requirements of a majority of the pooled land owners<sup>395</sup>. This way pooling ensures resource extraction in accordance with the resource conservation statutes in the US

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<sup>388</sup> *Ibid.*

<sup>389</sup> In general, the perception of corruption in Latvia is higher than for the majority of the EU Member States, yet Latvia is almost equally far from being regarded as "highly corrupt" as it is from "very clean" according to the 2014 Index: Transparency International. *Corruption Perceptions Index 2014: Results*. Available at: <http://www.transparency.org/cpi2014/results>. Last visited on 13 May 2015.

<sup>390</sup> Lamarre 2011, p. 466, *supra* note 194.

<sup>391</sup> *Ibid.*, pp. 467-468.

<sup>392</sup> *Ibid.*, p. 467, Chart 1.

<sup>393</sup> *Ibid.*, p. 469. In fact, such a concept is also not unfamiliar to the Latvian legal system, *see* The Civil Law of Latvia, Section 885, *supra* note 1: "The possessor of a parcel of land becomes the possessor of property concealed on it only after it has been found".

<sup>394</sup> Proposal, p. 5, *supra* note 249.

<sup>395</sup> Klingsmith and McGavran 2014, p. 18, *supra* note 180.

that lay down spacing requirements for drilling activities not to occur too close to each other. At the same time, it must be acknowledged that pooling restricts the individual property rights of pooled land owners. Still the combination of private interests by means of pooling is a less restrictive method than snatching subsurface rights away from private land owners.

The mechanism of pooling is understood more easily through illustrations from different states across the US. Most states address the problem of non-agreeing private land owners with forced pooling provisions<sup>396</sup>. The states of Montana, Wyoming, and Colorado are among that majority and their relevant pooling provisions are useful for illustration purposes here.

The Oil and Gas Conservation Act of Colorado state emphasizes that pooling aims to secure the correlative rights of the owners to obtain an equitable royalty share from the production of resources embedded under their lands<sup>397</sup>. The Colorado Act stipulates that the authorities may order pooling of all private interests for the development and operation of the drilling unit in case voluntary agreement is absent<sup>398</sup>. In Colorado, the threshold for pooling necessitates that owners bearing at least 80 percent of all production costs and the same percentage of owners holding a production interest in the proceeds should agree on extraction operations<sup>399</sup>. In Montana, the threshold is linked to consenting owners holding an interest in 60 percent of the surface area concerned<sup>400</sup>. Similarly, in Wyoming the threshold is linked to the area owned by interested land owners and set to 80 percent<sup>401</sup>, above the threshold level in Montana.

Such pooling statutes allow overcoming the challenge posed by a multiplicity of private landowners who may not agree to the use of natural resources under their land surface, i.e. the holdout problem<sup>402</sup>. The pooling approach allows corporations with financial means to efficiently develop natural resources under a private regime of mineral rights. The effects of pooling have been well-described in *Mire v. Hawkins* in the State of Louisiana<sup>403</sup>. As a result of pooling, different individual interests within a defined subsurface unit are converted into a common interest in so far as required for the development of the unit and the related drilling operations<sup>404</sup>. This way

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<sup>396</sup> 39 states in the US as per correction to the article on 20 May 2011: Baca, M. C. *Forced Pooling: When Landowners Can't Say No to Drilling*, (18 May 2011). Available at: <http://www.propublica.org/article/forced-pooling-when-landowners-cant-say-no-to-drilling>. Last visited on 8 May 2015.

<sup>397</sup> This is a reference to the correlative rights doctrine, i.e. "(...) owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production therefrom (...)". Oil and Gas Conservation Act (Colorado, US, 2014), paragraphs 34-60-102(1)(a)(III) and 34-60-103(4). Available at: [https://cogcc.state.co.us/RR\\_Docs\\_new/rules/AppendixV.pdf](https://cogcc.state.co.us/RR_Docs_new/rules/AppendixV.pdf). Last visited on 8 May 2015.

<sup>398</sup> *Ibid*, paragraph 34-60-116(6).

<sup>399</sup> *Ibid*, paragraph 34-60-118(5).

<sup>400</sup> Montana Code Annotated (Montana, US, 2014), paragraph 82-11-204(1). Available at: [http://leg.mt.gov/bills/mca\\_toc/82.htm](http://leg.mt.gov/bills/mca_toc/82.htm). Last visited on 8 May 2015.

<sup>401</sup> Wyoming Statutes Annotated (Wyoming, US, 2014), paragraph 35-11-316(c). Available at: <http://www.lexisnexis.com/hottopics/wystatutes/>. Last visited on 8 May 2015.

<sup>402</sup> Klingsmith and McGavran 2014, p. 18, *supra* note 180.

<sup>403</sup> *Rita Mire et al. v. Cecil Hawkins et al.*, 249 La. 278, 186 So.2d 591, paragraph 596 (Supreme Court of Louisiana, 1966).

<sup>404</sup> *Ibid*.

pooling promotes a “co-operative effort” among land owners of the surface above the mineral unit in the subsurface<sup>405</sup>.

### 5.5.3. Lessons for Latvia from the US

The concept of correlative rights through the pooling statutes may be a valuable legal transplant to consider in pursuit of stimulation of the use of natural resources while preserving a balance between private rights and public interest in Latvia. With the first legal acts in pursuit of natural resource conservation adopted in the US as early as in 1906<sup>406</sup>, the concept of pooling has passed through more than a century-long test of time. The doctrine of correlative rights as applied in the US may require modifications to better fit the circumstances of Latvia with respect to its national subterranean depths.

In particular, Latvia could decide on its own optimal threshold of consenting land owners or threshold in terms of area, the owners of which agree to lease their mineral rights. The potential need to alter legal transplants for a local situation does not diminish the utility of American doctrines on treatment of subsurface natural resources for consideration in Latvia. In any event, potential restrictive measures within the private property model over subterranean depth are a necessary ingredient to be included in “The Proposal”.

## 5.6. Concluding Remarks V

This chapter scrutinized “The Proposal” by the Latvian authorities to amend the property regime over natural resources in the country. The existing legislative framework around the property in subsurface natural resources recognizes the right to property as a fundamental right that theoretically extends down to the centre of the Earth, thereby echoing the doctrine of the same name. The national *lex specialis* on the subterranean depths requires private land owners to obtain a licence prior to use of natural resources beyond a certain depth and scale.

Of the four scenarios considered in “The Proposal” for the new regime, three *de lege ferenda* scenarios B, C, and D imply a partial expropriation of property through taking subsurface rights away from land owners. “The Proposal” suggests that the legislator should proceed with scenario D, effectively turning Latvia from an *accessio* into a *domanial* regime country. Despite an existing economic rationale for the proposed amendment, the constitutional assessment leaves doubts as to the proportionality of the suggested means. These doubts are confirmed by the comparative inquiry into the US *accessio* regime that demonstrates the potential for natural resource use without expropriation of private subsurface rights.

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<sup>405</sup> *Ibid.*

<sup>406</sup> “Oil and Gas Conservation”. 1930. *Harv. L. Rev. (Harvard Law Review)* 43: pp. 1137-1147. (Oil and Gas Conservation 1930, p. 1138).



## Conclusion and Recommendations

This article examined private property rights over onshore subsurface natural resources against State privileges claimed over the matter. The case of Latvia presents a unique opportunity for the study, as the country aims to implement a legislative amendment of the regime from a private to a State property model in mineral resources<sup>407</sup>. This makeover is intended on the basis of "Proposal for the Improvement of Legislative Regulation on Subterranean Depths for Attraction of Potential Investment" prepared by the Ministry of Environmental Protection and Regional Development of the Republic of Latvia<sup>408</sup>. This article scrutinizes "The Proposal" for its impact on private rights to property with reference to another example of the private regime in subsurface resources, namely, the US, and offers a few recommendations.

Aiming for a comprehensive assessment of the impact of "The Proposal" on private property rights, the article first turns to the foundations of property. Two legal theories, legal positivism and natural law theory, support different foundations of property – the State-given right grounded in the notion of sovereignty<sup>409</sup> and the natural right to property as a matter of fundamental justice<sup>410</sup>, respectively. The analysis concluded that these two foundations of property are complementary, as the natural right to property must be asserted by the sovereign. An example of the US legal system finding roots in both legal positivism and natural law theory demonstrates that a private property regime over natural resources can rest on either of these two legal theories<sup>411</sup>.

The right to property is recognized as one of the fundamental human rights, as evidenced through the global consensus enshrined in the UDHR<sup>412</sup> and binding regional legal instruments<sup>413</sup>. For Latvia, the case law of the ECtHR clarifies the legal tests applicable for assessing alleged violations of the human right to property. While the ECHR affords a wide margin of appreciation for States to decide what qualifies as a matter of public interest in each given society<sup>414</sup>, the proportionality test restricts the freedom of States to limit the human right to property. The ECHR leaves the scope of what constitutes property to be a matter for the States to decide.

Hence, an inquiry into the special treatment of natural resources under property law was undertaken in this article. The element of public concern associated with subsoil natural resources due to their exhaustibility makes their study of major

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<sup>407</sup> Press release, 23 October 2014, *supra* note 288.

<sup>408</sup> The Proposal, *supra* note 249.

<sup>409</sup> Sprankling 2000, pp. 2-3, *supra* note 1.

<sup>410</sup> *Ibid*, pp. 3-4.

<sup>411</sup> See Chapter 1.2. In particular, the Declaration of Independence, *supra* note 37, and *Johnson & Graham's Lessee v. McIntosh*, *supra* note 14.

<sup>412</sup> See Chapter 2.1.1. In particular, the UDHR, Article 17, *supra* note 54.

<sup>413</sup> See Chapter 2.2. In particular, American Convention on Human Rights, *supra* note 79; African Charter, *supra* note 80; and ECHR, *supra* note 83.

<sup>414</sup> *James and Others v. The United Kingdom*, paragraph 46, *supra* note 100; and *Handyside v. The United Kingdom*, paragraph 48, *supra* note 103.

importance for society at large<sup>415</sup>. On the external front, States ensure benefits from their natural resources by means of the PSNR principle that emerged in the post WWII period. The principle of PSNR permitted the host state to nationalize ex-colonizers property on the grounds of public interest provided appropriate compensation was paid to those foreign investors<sup>416</sup>. In line with recognition of the human right to property in the UDHR and subsequent human rights instruments, the PSNR evolved from its original conception as a privilege of the host State against nationals of other States towards recognition of private persons' rights of participation in managing natural resources<sup>417</sup>.

On the internal front, national regimes range from an absolute governmental model vesting ownership with the State to a private property model in the subsurface<sup>418</sup> theoretically entitling land owners to all the strata under the surface down to the centre of the Earth. Under the existing legislative framework Latvia represents the latter approach to subsurface property rights as witnessed through its Civil Law<sup>419</sup>. Yet the centre of the Earth doctrine has undergone modifications in common law courts in quest of encouraging the exploration and extraction of natural resources with the advancement of technology<sup>420</sup>, thereby shifting the balance from natural rights to legal positivism as a foundation for property rights. The intent of the Latvian government to amend the legislative framework on subterranean depths fits this trend to clarify and adapt the doctrine to current resource needs.

In essence, "The Proposal" by the Latvian government considers four scenarios for realization of its aim to stimulate investment in the exploration and extraction of subsurface resources<sup>421</sup>. Under scenario A, preserving the existing legislative framework is discarded for its disadvantage in the attraction of investors' funding<sup>422</sup>. Under scenario B, an option to treat a larger share of Latvian territory as areas of national significance is considered<sup>423</sup>. This scenario is rejected for its administrative burden on the State authorities, due to the need to pass a separate legal act for each of the areas of national significance<sup>424</sup>. Scenarios C and D introduce State ownership of the subsurface throughout the territory of the State<sup>425</sup>, thereby implying expropriation of subsurface property rights from land owners without taking away the surface rights. Scenario C achieves this through the separation of private and State property at some depth or a geological layer. In turn, scenario D accomplishes the same by distinguishing mineral rights as a separate object of

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<sup>415</sup> Mingyuan, Wang, 2010. "Natural Gas Development and Land Use: Conflict between Legal Rights and its Resolution". In *Property and the Law in Energy and Natural Resources*, edited by Aileen McHarg, Barry Barton, Adrian Bradbrook, and Lee Godden, pp. 167-184. New York: Oxford University Press. (Mingyuan 2010, p. 172).

<sup>416</sup> UN Resolution, *supra* note 204.

<sup>417</sup> See Chapter 3.3. In particular, Pereira and Gough 2013, pp. 453-454, 473, *supra* note 127; and Cambou and Smis 2013, p. 358, *supra* note 215.

<sup>418</sup> See Chapter 3.1.

<sup>419</sup> The Civil Law of Latvia, Section 1042, *supra* note 1.

<sup>420</sup> See Chapter 3.2.4.

<sup>421</sup> The Proposal, p. 5, *supra* note 249.

<sup>422</sup> *Ibid*, p. 30.

<sup>423</sup> *Ibid*, pp. 30-32.

<sup>424</sup> *Ibid*, p. 31.

<sup>425</sup> *Ibid*, pp. 33-38.

property to be vested with the State. Scenario D is suggested for implementation by "The Proposal"<sup>426</sup>, which would turn Latvia from an *accessio* into a *domanial* regime country.

ECHR case law indicates that Latvia may be afforded a wide margin of appreciation for the aims of "The Proposal" and its implementing legal acts to qualify under the notion of public interest. The background to "The Proposal" suggests that its primary target is to encourage FDI in the Latvian mineral resource base. FDI as a rationale is commonly linked with the economic development of States and hence may be feasible to justify under the notion of public interest. This article recommends explicitly including the FDI rationale and its positive impact on the overall economic development of the country in "The Proposal".

In turn, the proportionality of the means put forward in "The Proposal" in its current form leaves some doubts from the constitutional and ECHR perspective<sup>427</sup>. *Firstly*, "The Proposal" must be more convincing that the means are appropriate for achievement of the aim. While "The Proposal" appeals to the EU Member States and Canada in its comparative analysis<sup>428</sup>, such choice of countries may not be the most appropriate given that all of the selected countries represent the public property regime over subsurface resources. Also, despite the emphasis on the rest of the EU Member States in "The Proposal", this article clarifies that Latvia has no obligation to harmonize its property system with respect to natural resources under the EU rule of law.

Hence, the article recommends that a more thorough analysis of potential options, especially within the private property regime, should be included in "The Proposal". This can be achieved through a comparative inquiry into the US private property model as conducted in this article. The example of the US revealed more proportionate means to stimulate investment inflow into Latvia within the *accessio* regime, such as conservation statutes on voluntary or forced pooling that addresses the holdout problem<sup>429</sup>. The Latvian government may use this or similar analysis of the US regime in analysis of its *de lege ferenda* options. For the means to be found appropriate by the Latvian Constitutional Court and the ECHR<sup>430</sup>, it may suffice to reason that the Latvian subsurface resource base is not as rich as the US one, and thus cannot attract FDI under the current regime.

*Secondly*, this article recommends that a map of land plots owned privately and by the State should be prepared. As one third of Latvian territory is currently owned by the State<sup>431</sup>, it may already be possible to explore and extract resources without property regime changes. Such a map showing a mismatch of publicly owned land and mineral base could be used by the Latvian government to reason in favour of scenarios B, C, or D for attaining the aims of "The Proposal". This would

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<sup>426</sup> MK Rīkojuma projekts (Project Order of the Cabinet of Ministers), *supra* note 332.

<sup>427</sup> See Chapters 5.4 and 2.2. for Constitutional assessment and ECHR regime, respectively.

<sup>428</sup> The Proposal, pp. 23-25, *supra* note 249.

<sup>429</sup> See Chapter 5.5. The holdout problem is a term denominating the situation when the resource base spans multiple land plots and their owners refuse to grant permission for natural resources exploration and/or extraction.

<sup>430</sup> See Chapters 5.4 and 2.2. for Constitutional and ECHR regime proportionality conditions, respectively.

<sup>431</sup> The Proposal, pp. 14-15, *supra* note 249.

strengthen the position of the Latvian government on the proportionality condition, by demonstrating the impracticality of less restrictive means.

*Finally*, the benefit for the public must outweigh any individual loss for the proportionality of the means to get established. Hence, the article recommends that the potential loss of private land owners should be taken into account in "The Proposal". The Latvian government may consider whether subsurface property rights carry any value to land owners who do not use the subsurface at present. If "The Proposal" contained figures on the proportion of land owners exercising their mineral rights and on the expected net impact of the property regime makeover on the State budget, the proportionality of the public benefit compared to individual losses could be more evident.

All in all, these concerns and recommendations need to be taken into account by the legislator when developing "The Proposal" and subsequent legislative acts in order for the government not to be charged with infringement of private property rights in the Constitutional Court and ECtHR. This article addresses the omission of "The Proposal" to thoroughly analyse the impact of the suggested legislative amendment options on private property rights of Latvian land owners. While "The Proposal" in its current form is likely to be found infringing of private property rights, the public interest warrants further exploration of lawful approaches to the property regime makeover in Latvia. Guidance provided in this article may be useful in this respect.