

**ARE PUBLIC SECTOR ASSETS BY NATURE UNSUITABLE  
FOR FINANCING TRANS-NATIONAL INVESTMENTS ?**

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**SUMMARY**

*Does the legal regime applicable to publicly owned assets constitute a policy instrument to protect public investment? In what way can this benefit public sector property ? Are the structures of the regime sufficiently well established to provide investors with enough certainty?*

*This paper aims to answer these questions by taking a trans-national perspective. The main concern is to resolve the problems of ownership or non-ownership of public sector assets in the context of financing trans-national investments.*

*This paper responds to this issue by examining (in two stages) the various consequences for trans-national investment; the first regarding the acquisition of public sector property (I) and the second regarding the public property regime itself (II).*

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## INTRODUCTION

In a time of mass relocations, sudden or clandestine collapses of subsidiaries, agencies or offices and, more generally, of the movement for alternative globalization across an increasing number of states, trans-national investment has not had a good press.

Nonetheless, without questioning the need for this, in a world where nations from the strongest to the weakest, from the richest to the poorest are highly aware of their ever increasing interdependence, there is clearly a need to defend the case for trans-national investment, by considering whether public sector assets by nature are unsuitable for financing trans-national investments.

Any attempt to answer this question will immediately encounter a problem of definition.

– *What is meant by “trans-national investments”* ? It is true that from the point of view of any one State, foreign investments are seen as being diametrically opposed to national investments and the term foreign investment is satisfied by the fact either that the investor himself is foreign [...] or that the investment itself involves at least two different countries [...].

– *What is meant by “financing”* ? Is it necessary to consider the different methods by which the participation of foreign capital can be used to finance schemes which are in the national interest or should the question of guaranties and securities, which are essential, also be considered ?

– *What are “public sector assets”* ? Should different public sector assets be defined and are these limited to publicly owned property or should they also include assets belonging to public authorities or public utilities ? Should public sector assets also include those private assets which are used in the public sector, i.e those activities, which are of public concern, are under State control or belong to this sector because of their public nature and because of the fact they are state regulated ?

In those countries where the state plays a major role in the functioning of its economy, in particular, those countries which value the importance of their market economy, these issues are of determining importance. It is clear that the best response is to ensure that this concept is given as wide a definition as possible. This paper will attempt to examine this issue.

With these terms now defined, it necessary to examine their true importance.

Contrary to what may generally be thought, this point constitutes one of the key issues concerning trans-national investments in a largely open economy and brings with it a certain numbers of conditions. Trans-national investors, when investing in a certain country,

should carefully consider each State, the role it will play and its legal regime. Factors such as the role of the State, its openness to dialogue, certain specific constraints which apply or a State's receptivity to foreign investments will all require careful consideration.

These questions, usual for any investor whether trans-national or not, already have well established answers. Reports by international organizations, and notably by the World Bank have led the way for the advancement of foreign investment. Investment in foreign States is governed by codes of practice and international treaties exist for the protection of foreign investors' rights. Together, this more or less effectively, frames the development of international investment relationships.

This issue becomes more complex, however, where publicly owned asset regimes are involved. These regimes will be of prior concern to foreign investors who are on the point of deciding whether to invest in a particular State. Investors will additionally be concerned by the amount of debt taken on when making foreign investments and how this can be secured by guarantees over public sector assets, including assets such as nuclear plants, household waste incineration plants, water purification plants, telecommunication, gas or electric power installations, hospitals, school or university buildings or any other building used for such public purposes constructed with the aid of foreign investments.

The laws applicable to such foreign investments on publicly owned assets raise even more complex issues since not only the national laws will apply but fundamentally these laws are made in order to protect the interests of public bodies.

This in turn raises further issues: can the ownership structure be clearly identified? Will this structure inhibit trans-national investment? Does the legal regime applicable to publicly owned assets constitute a policy instrument to protect public investment? In what way can this benefit public sector property (*patrimoine public*)? Are the structures of the regime sufficiently well established to provide investors with enough certainty? Also, in certain French speaking African States, it is true that several different regimes can apply to the same assets.

This paper aims to answer these questions by taking a trans-national perspective which is not only limited to France or to Western Europe. The main concern is to resolve the problems of ownership or non-ownership of public sector assets in the context of financing trans-national investments.

This paper will respond to this issue by examining (in two stages) the various consequences for trans-national investment; the first regarding the acquisition of public sector property (I) and the second regarding the public property regime itself (II).

## **I. TRANS-NATIONAL INVESTMENTS AND THE ACQUISITION OF PUBLIC PROPERTY**

Trans-national investment financing can encounter problems which are caused by a State's regime of asset ownership. These problems arise if these assets, while not constituting

a fixed asset base, have the potential to enlarge the scope of the public property ownership regime to the detriment of the private property ownership regime.

These public acquisition regimes allow the State to consider, when public necessity requires it, whether to acquire property financed by trans-national investment (i.e. by way of public "seizure") or whether to consider limiting the ambit of allowing such property to be privately financed in the first place within the context of those methods available to them (i.e. by way of a policy of limitation).

#### *A. Trans-national investments and public "seizure"*

1°) The techniques whereby a State directly acquires the property of a trans-national investor come to mind. These techniques involve methods of nationalization as determined by a state's national parliament or expropriation. Expropriation, as a general rule, is a less formal process.

The techniques which aim directly at confiscating the rights of trans-national investors in a state can be exceptionally penalising. This is due much less to the international treaties signed since 1945, or due to international organizations such as the International Centre for Settlement of Investment Disputes, than it is to national rules adopted by each State, notably at a constitutional level.

Rather than excluding nationalisation or expropriation rules, constitutional provisions surround these rules with guarantees which require, at the bare minimum, that assets should be for the public use and, of course, that a prior fair indemnity is ensured. Undoubtedly this stems from concerns which arose at the time of the French Revolution, causing many States to incorporate such provisions into their laws.

For instance, the constitution of India sets out a principle which prevents a person being deprived of their property unless this is allowed by legal provisions voted on by the National Parliament as a result of political debate. Similarly, the constitution of Mexico states two general conditions which govern any expropriation procedure: public use and payment of a fair indemnity. The constitutions of Argentina, Iraq, Malaysia, the Philippines and Sudan also make use of comparable and almost synonymous terms to qualify such an indemnity as fair or appropriate. The constitution of Kenya goes further, since it requires, as well as the public interest factor, that public authorities in the process of expropriating or nationalising assets of a foreign operator give reasonable grounds for the inconvenience caused to the investor. This constitution also requires that the indemnity due must be "*expedious*", "*total*" and that it must be paid "*as soon as possible*". The constitution of Ghana is more protective of the interest of trans-national investors and allows any private company, whether national or not, to claim before the Supreme Court that the compensation paid was too low and that they suffered loss as a result.

In addition to constitutional provisions, national laws protecting foreign investments are even more explicit. For instance, Russian law includes not only the relevant national law

but also all international treaties signed by their government. Indonesian law has similar provisions, while insisting on the fact that the indemnity established between the foreign investor and the State must be mutually agreed in accordance with international treaties and laws. Ghanaian and Sudanese law sets up an arbitration system which is based on the system used by the International Centre for Investment Disputes. For example, Sudanese law states that foreign investors should be paid over no longer than a 5-year period in the currency in which the investment was made.

Trans-national investors should be in fact far more concerned by the harmful effects caused by indirect seizure than from direct seizure processes such as nationalisation or expropriation.

2°) Certain acquisition methods are used which, while they are not generally considered to be public seizure, ultimately have the same effects, even if they do not provide for the payment of an indemnity. The regime of repatriation of capital is one such method which States have been reluctant to enact out of concern for the need to build loyalty between themselves and trans-national investors and also because of their desire to ensure that such investments serve the interests of the country.

Capital transfers, royalties, dividends can in this way be limited or even prohibited.

In some countries, for example, in Algeria, in Argentina, in Brazil or in Chile a trans-national investor will not be able to disinvest without governmental approval. This is particularly surprising considering that in most Latin American countries trans-national investors are treated on an equal footing with national investors and that this principle is widely accepted and put into practice.

In addition to the restrictions on repatriation of capital, a major problem for trans-national investors is caused as result of "indirect" or "gradual" nationalisation or expropriation processes. These forms of confiscation are so insidious that they are very difficult to define.

In an article describing such practices (*"Insuring Investment and Loans against Currency Inconvertibility, Expropriation and Political Violence"* Hasting International and Comparative Law Review, vol. 9, p. 425, 1986), Professor Robert Shanks defines these practices in a very general and not very explicit manner as *"any act or action by a State which has consequences contrary to the interests a trans-national or foreign investor"*.

Significantly, he describes such practices as acts of "political violence" against trans-national investors.

These practices can include:

- the suspension of currency convertibility ;

- the systematic depreciation of investment values (for example, the deterioration in the availability of communication and telecommunications infrastructures);
- the splitting up of public utility companies into subsidiaries; or,
- the weighting towards a gradual integration of the local workforce, notably at management level, together with numerous joint venture agreements entered into on the insistence of public authorities.

There are very few ways in which trans-national investors can protect themselves against these indirect nationalization or expropriation methods, apart from the protection afforded by insurance and in particular, policies which cover for country risks.

### ***B. Trans-national investments and public limitations***

1°) Trans-national investors can indeed come up against difficulties where a State has a prerogative to limit the ambit and implementation of trans-national investment. In order to do this, states have enacted either specific or general laws, which may apply in the form of a Foreign Investment Code, in order to impose a first series of direct limitations on trans-national investors.

Such legislative provisions are well known and have a commendable objective: to encourage productivity and the transfer of technology, to facilitate participation by local investors; to restrain foreign competition in those industries considered to be sensitive and which should be reserved for local companies. Such codes governing investment are adopted in sub-Saharan African states or in East or Southern Asian countries. They can also be found in specific legislation in countries in the Middle East, North Africa and even in Latin America.

Likewise, the governments of the Philippines, South Korea, Chile, India, Kenya and Mexico have set up specific agencies. Sometimes, these policies are even provided for by government Ministries themselves, as in Brazil or Nigeria.

Under such legislation, trans-national investors are under an obligation to provide to the relevant authority, whether agency or ministry, all required information so that the relevance of their investments can be analysed. A set of objective criteria will be applied which include: the consequences on the balance of payment, the number of jobs created locally, the transfer of know-how and technology, the impact on the local market, and the weighting factors given to the integration of the local workforce.

The degree of formality of the process depends on the national legislation. This can require compliance with relevant guidelines which are to be followed to the letter or, instead, require that the investor follows a certain "*philosophy*".

The implementation of any foreign investment decision requires that prior approval is obtained for foreign capital investments. In addition to this approval process, further official measures influence the foreign investor's decision process, and in fact impose limitations in an effort to control him. Such measures include controls over the type of company (which most often involves joint ventures), sectorial or geographical limitations, reserved or restricted designated sectors and also sectors reserved only for foreign investors especially within Free Zones, (*Zones Franches*).

Foreign investors can sometimes find apparent comfort in stabilisation provisions adopted by states. These guarantee, to the extent that the good faith of the State can be relied upon, that the regime under which the investment was made will not change and that any benefit to the regime will in turn ensure that trans-national investors are considered preferentially. Under no circumstances will investors be affected by any modification which significantly deprives them of the benefit of already available protection.

In practice, however, these governmental promises will in no way envisage any real fettering of governmental expropriation or nationalisation prerogatives and any policy which appears to limit this power should be regarded as a policy of the current political majority only, despite the well-known principle of State continuity.

2°) Limitations imposed on foreign investors can also be indirect. As mentioned above, entire sectors can be restricted solely to national industry. In practice, this will concern State industries which are subject to State monopolies. Illustrations of such situations can be found right here in Europe. Network industries in Europe (such as transport, energy, telecommunications or water distribution) were until the end of 1980's often limited to the State, state administrations or state companies. Since then, these have been gradually liberalised and opened up to competition from private or foreign companies.

To give an example of this in France, it was only when the law 2004-669 of 6 July 2004 on electronic communications and audio-visual communications services (JO 10 July 2004) came into force that all limitations on foreign investors wishing to take up majority participation in companies operating radio-electric networks disappeared. Before the enactment of this legislation, which even now will not be entirely implemented until all of its provisions come into force, foreign investors could not directly acquire more than a 20% direct stake in such companies. The Marrakech Agreement signed on 15 April 2004 removed such restrictions applicable to indirect investment thus forcing France to comply with this agreement and reluctantly modify its legislation accordingly.

It has to be noted that France is one of a very small number of States, including the United States, which has maintained this type of limitation on direct investments in their telecommunications sector. Elsewhere in Europe, such limitations have disappeared without threatening State sovereignty or the States' power of control with the result that this sector has now been liberalised.

Limitations imposed on telecommunications operators were officially justified given the public nature of the terrestrial broadcasting network which was limited to the public sector by the combined provisions of the two acts brought into force on 17 June 1989 and 26 July 1996 respectively.

This brings us to analyse the key issue of the property regime of the state (and of state entities).

## **II. TRANS-NATIONAL INVESTMENT AND THE PUBLIC PROPERTY REGIME**

The issue to be determined here is whether the regime of public sector assets is compatible with the need to provide security for trans-national investments. This paper has already considered this as a central issue even if the previous analysis came to the conclusion that it is not the sole issue of importance here. Any answer to this requires will require a very methodical approach.

*“To call something by an incorrect name is to add to the misfortune of the world”* Camus

Where public sector property is concerned, words are often used interchangeably although they actually refer to profoundly distinct realities. This is why it is important to establish the precise meaning of what is meant by property owned and operated by public sector bodies for the public use (*domanialité publique*) and the property of the public sector (*patrimoine public*).

### ***A. Trans-national investments and public sector property***

1°). In Western legal systems, it is now beyond doubt that national laws allow public entities to hold legal title to their property in the same way that individuals or companies hold title to theirs.

Public property is characterised by a States wealth of assets (*patrimoine*) which includes assets owned by public sector bodies which may or may not be assigned to public use. This duality conforms to the Latin - Germanic tradition which is followed by a number of states including most European countries among which France and also Asian and Latin American countries whose national constitutions contain specific provisions giving constitutional value to the distinction between the ways governments own their assets.

Examples of such constitutions can be found in countries such as Luxembourg, Portugal, Italy, Britain, the Netherlands and Spain.

Some of these constitutions such as the constitution of Greece, go further and distinguish between assets included in the ambit of public sector property (*patrimoine public*). The constitution of Portugal lists assets which belong in the public domain (*domaine public*). The constitution of Italy states unambiguously that property can be either public or private



and that economic assets can be owned either by the state, by local authorities or by individuals.

While an overview of these constitutions allows investors to realise that certain assets cannot be acquired since their ownership is State restricted, such assets may however become accessible to investors if they obtain authorisation for using these assets to carry out a public service.

The current French Constitution refers to a former provision of the preamble to the French Constitution of 27 October 1946 and provides that *“any asset or organisation whose activities are characterised by the provision of a national public service or as a de facto monopoly shall be owned by the people”*.

The duality of public sector property (*patrimoine public*) stems from French legal tradition and has influenced overseas legal systems. For example, provision for such duality is found in Japanese law which provides for a distinction between corporeal public property and incorporeal public property. Beyond this basic distinction, Japanese public law divides state property into four categories of assets depending on their use:

1 - state owned assets necessary for running governmental activities or for housing civil servants and agents;

2- assets directly for public use;

3- assets reserved for the imperial family (in which the future empress Masako Owada who used to be a brilliant Harvard graduate nowadays spends long and boring days); and

4- assets used by national companies.

Administration property is therefore distinct from non-administration property which includes all other assets of the State that do not fulfil the above mentioned criteria. This category includes land, buildings, decommissioned military assets, assets paid in kind in the process of recovering tax and public utility assets which are no longer in use.

In spite of their initial differences, countries where a common law regime applies also have similar distinctions between these two groups of assets: moveable and immovable property. In this way anglo-saxon lawyers have imposed a similar system onto public assets.

Examples of this include:

- in Canada, assets held by the Crown such as land used for national defence, federal parks, ancient monuments, nature reserves, water courses for hydraulic purposes ; or

- in the United Kingdom, English law imposes a prescribed derogatory regime onto assets such as Crown lands which can only be prescribed after 30 years of possession whereas the duration of tenure of the land is in principle only 12 years.

2°) The duality of property held by the administration is not universally accepted.

In socialist countries, where a distinction exists between assets which are public and those which are private, this distinction appears completely unnatural when compared to the Latin model described above since it ensures that public property is considered to be “sacred” and pre-eminent.

However, it is in countries governed by Muslim law that the clearest distinction concerning State patrimony (*patrimoine de l'Etat*) exists between the two categories of assets. In Islamic nations, public owned assets are depreciated more than privately owned assets. They are, furthermore, qualitatively and quantitatively in a minority. This is even the case under applicable laws of Muslim African states who have created a hybrid legal regime of national and Muslim law, and even Western law for those countries previously colonised.

The trans-national investor investing in these countries must take into account the importance of local laws according to which public property does not in fact exist, since laws of traditional African societies are based on the customs of each ethnic group. In fact, these laws recognise three types of legal relationships with property:

- property held by corporate families;
- the rights of an individual to use land; and
- the private acquisition of moveable assets.

National constitutions or legislative provisions are often influenced on such local laws. One such example is the constitution of Madagascar which is based on prerogatives established by village communities. Further examples can be found in the laws of Burundi, Chad or Cameroon to the extent that their constitutions recognise rights taken from local communities regarding cultural, dwelling and pastoral land which belong in principle to the State.

In Nigeria, the rural code establishes the prerogatives of the village chiefs who allot certain exclusive rights to members of their tribe.

This customary tradition is combined with influences from Western law dating from the colonial period. In sub-Saharan African States under French influence, it is significant that the colonial administration, convinced by the superiority of its legal system, often sought to impose a system whereby, in the absence of an express recognition of ownership

rights in the laws of the local custom, any assets left unclaimed became State-owned property.

It is on this basis, that many French speaking black African countries maintain a distinction, considered rather artificial today, between public assets, whether or not these are assigned for public use, since this distinction does not at all follow the logic of the cultural tradition of these countries. Taking the examples of Cameroon, Senegal, Congo or Togo a rather binary concept applies to public sector bodies, with sometimes a third notion of a *domaine populaire* coexisting alongside the *domaine national* and the *domaine privé*.

Muslim law, a religious substantive law inspired by the customs of Arabia and Iraq further complicates the legal scheme in many countries of Africa or Asia which apply Muslim law.

Under Muslim law, property has a divine origin, as established by the Koran, which does not exclude the existence of a distinction between public and private assets, like in Roman law systems. Such assets include roads, places of worship, public spaces or rivers, all of which constitute public assets since they are all put to public use. These "public" assets are distinguished from those of the (public) treasury and from those which are subject to private acquisition. Islamic law, however, also provides for the existence of assets which, because they are assigned to public use, do not belong to anybody. Instead since these assets are for the enjoyment of all, like air, water, and deserts, they are therefore subject to collective ownership, or even to joint ownership.

The trans-national investor is thus confronted with the need to view this distinction on a case by case basis to be able to manage his interests as well as he can including the legal status of his rights with regard to the assets of a particular State.

### ***B. Trans-national investments and state owned property***

1°) The regime of public domain (*domanialité publique*) distinguishes public property from private property by granting assets assigned for public use with a series of privileges intended to guarantee their permanence.

Among these privileges, it undoubtedly remains the case that assets owned by public bodies and operated for public use cannot be subject to any type of dealing. They cannot be sold, hired out for commercial purposes, mortgaged or pledged.

This originates from the well know French legal principle of inalienability of the public domain which was established by the *Edit de Moulins* of 1566. However, this principle must not be over-estimated,

- firstly, since even in countries where it has been as firmly established as in France, it has never received any real constitutional recognition, which allows

legislators to downgrade or exempt assets where this is considered necessary under the careful control of the courts or constitutional councils; and

- secondly because the unavailability of state or local authority assets in the public domain relates only to those assets assigned to collective public use.

It is for this reason that the *domanialité publique*, with its system of constraints, is recognised as a *régime d'affectation* insofar as it relates only to property intended for collective use. Once such collective use ceases, public bodies owning these assets can start taking the necessary legal steps to downgrade the relevant assets which are to be classed as private and to authorise alienation to the extent that this is in the interests of their good management.

Times have thus changed since the *domanialité publique* regime meant that a trans-national investor's proposal to invest in a State would be met with opposition. Even public assets put to collective use, can be assigned to private organisations with authorisations. Therefore such concessions have been made to enable, for example, the building of dykes in sea and river ports. Also so called commercial concessions have been made regarding airports, public building works for the construction of road or motorway infrastructures, energy transport and telecommunications infrastructures, household refuse incineration plants, and waste water treatment and drinking water plants.

Such "*concessions*", in a generic sense, are not incompatible with the recognition of trans-national investors' rights, in the sense that such rights relate to the exclusive use of land and allow for a right to indemnities in cases where investors' prerogatives have to be modified.

Among these rights, a particular place is reserved for quasi-ownership rights *in rem* which administrative law confers on private authorised bodies.

It should be mentioned that throughout the concession period, the *cessionnaire* holds the right of ownership which includes the right to recover, a fortiori, his own assets. This requires trans-national investors and their advisers to be particularly attentive to the provisions in the contracts made with a state or a state body, since there is no perfectly established distinction between those assets which will be returned automatically to the public body, those which will be recovered and those subject to the concession.

From this perspective, one should consider the anglo-saxon concept of BOT (Build, Operate and Transfer), and its several variations (in particular BOOs, BTOs, BLTs), which assists in clarifying this essential question. The contractual terms which these concepts produce, clearly establish the regime governing assets which are built and used before property is handed over when the contract comes to an end.

Undoubtedly, one can hope that the law governing this issue will become much more specific in terms, not only of its application by the public domain, but also concerning

contracts authorising private bodies to operate their activities on public domain properties (*conventions d'occupation domaniale*), according to the French legal model of *les baux emphytéotiques administratifs*. This will really help to push past former boundaries.

In the interests of protecting national, foreign and even more so, trans-national economic or financing operators investing in the public domain, it is necessary to insist, by explicit adherence to contractual agreements, on the rights of occupants, by setting out the particular way in which these rights are partially transferred. At the same time, those reasons, linked to serving the public interest which can lead public authority lessors to break the contractual terms, must be more explicit and must lead to the creation of a more systematic right to indemnities. A trans-national investor cannot gain any lasting satisfaction from a regime which uses the public interest as a generic reason for justifying its decisions, including those decisions which call into question such investments.

2°) Along with its lack of availability, public property is also characterized by “non-seizability”, even if this principle is less related to the *domanialité publique* regime than to the nature of the owner of the asset concerned.

It would be normal, in open economies which want to encourage trans-national investors, (even if this is only because they intend to support foreign investments made by their export industries), that public property assets, whether operated for public use or not, can be used to provide guarantees for national or international financings.

Judging by case law, the principle of “non-seizability” is absolute since no exceptions to this principle are recognised. This contrasts with the principle of unavailability mentioned previously. While the principle of “non-seizability”, on the one hand, has a widening ambit since its application also includes public sector owned assets operated for public use, at the same time it has a limited scope, since it does not make allowance for exceptions.

It would be necessary, however, for this principle to have a limited and relative scope. Unique to France is that despite several attempts to implement changes in several jurisdictions, the French Civil Supreme Court (*Cour de Cassation*) maintains the principle of “non-seizability” for those assets owned by public entities carrying out a commercial activity.

The largest part of their legal regime stems from common law. Today their activities compete with private companies or more often with international suppliers or national and international customers.

It is frankly abnormal that as a result of their public law status their assets cannot be seized. One is required to possess the subtleties of a judge to consider whether rolling stock of the SNCF or telecommunication cables supported by pylons constitute moveable property in order for these assets to escape the principle of “non-seizability” and to be seized or frozen under a common law power of enforcement. Without this guarantee, economic operators simply will not invest in them.

The legal device of the American "lease", is therefore only possible if one pays the price by getting entangled in such legal acrobatics. Clearly this should not continue to be the case, even if this financing tool has been at odds for a few months with the views of the American Congress, which has declared it to be at least partially dead.

Similarly, it is unthinkable to discuss this point without mentioning the decision of the Paris Court of 1984, well known to all French lawyers, which concerned a freezing order placed on sums of money belonging to the SNCF. The judge, conscious of the need to develop the rules applicable to assets owned by public bodies, established a new precedent in case law by widening the scope of application of the principle of "*non-seizability*" to require the involvement of a public accountant.

The Court of Appeal found that a correlation existed between the requirement for using a public accountant and the nature of the funds held by publicly-owned bodies as creditor. If the legislator did not ensure that publicly-owned bodies involve this type of accountant, public bodies should not be able to hold funds of this nature or of such public value and that this should correspond to the age old concept of "public monies" covered ("*deniers publics*").

Therefore these funds would become "seizable" by application of private law, with the question of "non-seizability" being determined by the administration's accounting regime.

It is a shame that this case law is so at odds with the doctrine. It has been pointed out, with some truth, that the absence of a public accountant and the application of financial management rules should not mean that public owned bodies are fully subject to private law requirements.

Having said that, it would be logical for the legislator to "seize" this question and to arrange that the "seizability" of assets owned by public bodies, should at the very least, be permitted for those organisations carrying out industrial or commercial activities.

These thoughts on French law are of course applicable to other legal systems as well.

The same causes result in similar effects elsewhere. Those countries whose legal systems are based on French law or who are subject to its influence, are confronted today with either the same or similar problems. These are also sometimes framed in identical terms. They require that similar solutions are found to those which have previously been mentioned.

One such solution could be found by identifying a third concept which "spans" many legal systems. We have seen how a dialogue exists which is unique to "public property" and to "public domaniality". The first term covers assets which are both moveable and immoveable and include the asset wealth (*patrimoine*) of public bodies and the second covers a system of exceptions to this, defining those privileges of public power with regard to assets whose functions serve the national interest. There is currently a need to optimise the management of public sector assets, in the same way as this would be carried out by a

private individual who would arrange for the transfer of public property after it had been decommissioned or down graded.

For several years, however, States have, to the best of their ability, managed their capital interests in portfolios of shares in public companies and also judges have been very attentive to the distinction between capital and company shares. They take care not to introduce too much rigidity into the management of those companies which, even if they are owned by public bodies or state-owned organisations, must be able to function with the same tools at their disposal as their national or international competitors in the private sector.

This has resulted in the creation of a concept of "public membership", which identifies the status of a public company as compared to that of a private company within the regime of assets belonging to public bodies and sets out the specific case in which state or public bodies hold shares in the capital of industrial or commercial sector companies. Much could be gained if this solution were used more often.

Perhaps the time has come to transcend the distinction between public property and the public domain by systematic recourse to the concept of public membership which cuts across both terms. This would make it possible to optimise the management of a state's portfolio, by allowing the public sector access to the private sector. Undoubtedly, one would need to find ways for public and private law property regimes to interrelate.

The references to the "shares" of a state and not to their "assets", whether in respect of moveable or immovable property, expressly encourages this idea.

It is at a certain price - i.e. through developing concepts beyond their current legal scope ultimately to access public property - that State assets can become more suitable to finance international investments, even if this is not yet the case.

## CONCLUSION.

It becomes clear, therefore, that the answer to the question initially posed as to whether applicable regimes are compatible with the requirements of trans-national investors and their financial backers, is more subtle than it appears at first sight. The answer is neither entirely positive, nor entirely negative. It implies a fine analysis of the different situations, which are as diverse as the legal traditions of the states which make up the world today.

Finally it is reassuring, that the diversity of regimes corresponds to an authentic diversity of their cultures.

It should also be repeated that in many respects it is a good thing, that States, faced with the demands imposed on them by movements towards globalisation and universalization, can oppose these demands with their own respective cultural and legal traditions, which are deeply rooted in their histories and which have fashioned their peoples and built their identities.

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