9-1-1978

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Recommended Citation
Thomas W. Walde, Revision of Transnational Investment Agreements in the Natural Resource Industries, 10 U. Miami Inter-Am. L. Rev. 265 (1978)
Available at: http://repository.law.miami.edu/umialr/vol10/iss2/1
Revision of Transnational Investment Agreements: 
Contractual Flexibility in Natural Resources Development**

THOMAS W. WALDE*

I. INTRODUCTION: THE NEW INTERNATIONAL ECONOMIC ORDER (NIEO)

The revision of existing contractual arrangements between transnational corporations (TNC's) and host countries has been of primordial concern to developing countries particularly in the area of natural resources. Host countries have felt that terms and conditions, imposed upon them for extremely long durations in times of highly unequal bargaining power and ability, had to be revised in order to allow them to attain material and effective sovereignty over their non-renewable natural resources. Policies based upon such objectives have clashed strongly with the interests of TNC's in protecting advantageous investment conditions by relying on Western countries' — the major capital exporters — concepts of international law. The full scope of such legal concepts, designed to grant utmost protection to foreign investment, is most clearly reflected in a recent arbitration decision.¹

Apart from the controversies surrounding the issue of nationalization, the revision of the terms of an investment contract by unilateral action of the host state, the renegotiation induced by threat of impending legislative action, and any legislative or administrative state action affecting the profitability of the investment project is viewed critically by many Western states and commentators.²


**The present article is based on a report "Revision of Contractual Arrangements between TNC's and Host Countries in the Natural Resources Industries" prepared by the author for the UN Centre on Transnational Corporations for the study Transnational Corporations in World Development: A Re-Examination (Doc.E/C.10/38). I acknowledge the assistance of Mr. Joseph Findaro who helped me to analyse investment agreements. The opinions expressed are exclusively the personal views of the author and not of the institutions the author is or has been affiliated with.

1. Texaco v. Libya, the decision of the sole arbitrator, (Libya refused to participate) René Jean Dupuy, has been published in 104 Clunet Journal du Droit International 350 (1977), and commented upon by J. Lalive, Un Grand Arbitrage Petrolier Entre un Governement et deux Societes Prives Etrangeres, id. at 319. Other arbitration decisions to be quoted in this context are the Lena Goldfields, reprinted in 36 Cornell L.Q. 31; the Societe Rialet, see Lalive, Contracts Between a State or a State Agency and a Foreign Company, 13 Int'l Comp. L.Q. 987 (1964); and the Abu Dhabi, Qatar, Sapphire and ARAMCO case, see Weil, Problemes Relatifs aux Contrats Passes entre un Etat et un Particulier, III Recueil des Cours 165 (1969).

On the other hand, associations of producer countries such as OPEC,\(^3\) and particularly the United Nations, have increasingly supported the attempts of developing countries to provide legitimacy for renegotiation of existing contracts. Such developments can be seen as the evolution of an alternative legal order confronting traditional and new international law as generated by Western industrialized states. The basic instruments relating to permanent sovereignty over natural resources (PSNOR), in their recent form,\(^4\) declare the nationalization of foreign owned mining operations to be the unalienable right of host countries. These concepts of permanent sovereignty over natural resources have been taken up as a major element of the NIEO.\(^5\) The concept of nationalization embodies the state’s right to require renegotiation of an existing arrangement instead of an outright takeover by the government. Moreover, the revision of existing agreements has become a major objective of authoritative UN instruments concerning the

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3. OPEC has taken a particularly strong stand on the revision agreements in petroleum, where changes of costs, prices, profitability rates, bargaining power, and bargaining sophistication have clashed with the long duration of concessions. In Resolution XVI. 90 (1968), See 7 Int'l Legal Mat. 1183 (1968), OPEC has declared that governments have a right to renegotiate contracts when operators receive “excessively high net earnings after taxes.” Such renegotiations shall apply to the financial terms of the concession and OPEC has laid down rather concrete rules to determine excessive profits as well as criteria to be used for renegotiation, *id.*

It is remarkable to discover the parallels between the OPEC standards and comparable standards in the U.S. Renegotiation Act of 1951, 50 U.S.C. Appx. 1211-1233 (1951) (repealed 1977), and the U.S. Armed Services Procurement Regulations. 32 C.F.R. § 3-308 (1977).

OPEC has declared that the governments be entitled to determine the new financial conditions unilaterally if the operator refuses to comply with the renegotiation demand.


For an analysis of up to 1965, see Mughraby, Permanent Sovereignty over Oil Resourses 161 passim (1966), *and recently,* Kemper, “Nationale Vefligung über natürliche Ressourcen und die Neve Weltwirtschaftsordnung der Vereinten Nationen” (1976).

Various commentators have regarded renegotiation of existing mining agreements as justified particularly:

- when rigid contractual terms provide for an excessive duration, secured against any legislative change,
- when the agreement reflects the one-sided distribution of bargaining power and ability in favor of the TNC,
- when circumstances have changed considerably so that the agreement needs adjustment to existing usages and
- when the agreement hampers severely the host country's freedom to employ its natural resources as a lever for effective economic development.  

II. THE FUNCTION OF "DYNAMIC" PROVISIONS IN INVESTMENT AGREEMENTS

Stipulations in Contracts between TNC's and Host Countries concern renegotiation, periodic revision, adjustment to changing circumstances, and other measures. These provisions introduce a degree of flexibility into the contractual regime of natural resource exploitation, and are increasingly advocated as a form of mutually acceptable instruments to implement the objectives of NIEO and PSONR. Following the recommendation of the Group of Eminent Persons, a number of commentators have advocated such forms of contractual flexibility, in order to achieve freedom from ex-

6. The General Assembly, in the Programme of Action on the Establishment of NIEO (G.A. Res. 3202, (S VI), supra note 4, Art V (6)) has expressly decided that one of the five major objectives of a Code of Conduct on TNCs is "to facilitate, as necessary, the review and revision of previously concluded arrangements." The report of the Eminent Persons to Study the Impact of MNCs on Development and International Relations — ST/ESA/7 of 1974, at p. 38/39 — recognizes the "unquestionable right of host states to change the terms of an agreement by unilateral act of sovereign legislation" and recommends periodic revision and renegotiation clauses. Within the framework of discussions concerning a Code of Conduct for TNCs, the issue of renegotiability of investment agreements, particularly in connection with national development plans and regional integration arrangements, has been taken up as a major point of negotiations. See U.N. Doc. E/C. 10/31 of 1977 at p. 8; an African regional meeting (Addis Ababa, Jan., Feb. 1977) concerning the Code of Conduct equally demands that "TNCs shall accept the renegotiation of agreements which are not in conformity with the NIEO in a manner consistent with the national development objectives of the host countries.

The position paper of the Asian group provides also for "Renegotiation of Contracts and arrangement if the costs and benefits of foreign direct investment by TNCs undergo major changes after some time," see U.N. Doc. E/C. 10/AC. 2/3 at 23, 24 (1978).


9. See authors cited supra note 7; Smith & Wells, Negotiating Third World Mineral Agreements 152 (1975); Rouhani, Assignment and Renegotiation in Negotiation and Drafting of Mining Development Agreements 21 (1976); Wells, Negotiating with Third World Governments, 55 Harv. Bus. Rev. 72 (1977).
cessive durations of strictly drafted comprehensive contractual regimes. At the same time possible reproaches for violating the sanctity of the contract by unilateral action are avoided. Among the reasons advanced are:

—Contractual flexibility channels unavoidable demands for renegotiation into a pre-regulated procedure, thereby avoiding some of the costs of escalating conflicts arising from renegotiation demands imposed on both parties.

—Contractual flexibility can provide for a gradual take-over by the host government of the mining venture, under terms agreed upon earlier, in line with the progress the host state is achieving in increasing its ability to master major management functions (marketing operations, financing, management).

—Contractual flexibility and regulated renegotiation can avoid nationalization with all its pitfalls for the host country (cut-off from marketing, financing, negative effects on the conditions required by new investors in order to undertake the needed investment, payment of high compensation).

—Contractual flexibility can be an instrument to readjust dated types and conditions of investment agreements to the new generations of contracts emerging, as witnessed particularly in the petroleum industry. Thus, irresistible pressures for a revision of long-term conditions can be channeled and the unavoidable revision peacefully facilitated.

III. BASIC LEGAL CONCEPTS PERTAINING TO THE REVISION OF INVESTMENT AGREEMENTS

The practice of negotiations for contractual flexibility and for an actual revision of existing investment contracts is interrelated with the legal discussion and the pertinent controversies concerning unilaterally enforced revision. The analysis of practice and future perspectives undertaken here has to take into account the basic legal concepts concerned. The core of the controversies is: Is the host state entitled by international law to change the existing terms of a contract with a TNC and thus force a revision of the initial agreement?

Authors, particularly from capital-exporting countries, have repeatedly stressed the "sanctity" of contracts as an overriding principle governing in-

10. See authors cited note 2 supra.
11. The "sanctity" of contracts is a concept particularly familiar to U.S. Law; see, e.g., Kuusi, State Contracts with Foreigners (1976); Weil, supra note 1; Geiger, The Unilateral Change of Economic Development Agreements, 23 I.C.L. Q. 73 (1974); Schachter, supra note 7; Mulack, Rechtsprobleme der Erdölkonzessionsabkommen im Nahen Osten 214 (1972).
12. In this context, Detlev Vagts' proposal for a code of conduct of unfair bargaining practices merits considerable attention as another instrument to channel renegotiation pressures into legal channels of conflict avoidance and conflict resolution. See Coercion and Foreign Investment Rearrangements, 72 Am. Int'l L. 17, 34 (1978).
vestment agreements between TNC and host states.\textsuperscript{13} Most recently, this doctrine has been developed further, to guarantee complete protection to an investment agreement once (as is the practice today) international arbitration, application of a not exclusively national system of law, and a stabilization clause\textsuperscript{14} have been stipulated. The arbitral award of \textit{Texaco-Calasiatic v. Government of Libya}\textsuperscript{15} grants this protection expressly only against full nationalization; arguments will easily be construed that such protection is also implicitly granted against the host country’s demand for renegotiation.

On the other hand, authors, mostly from developing countries — generally of little weight in the development of a \textit{communis opinio doctorum} of Western international law — have pointed out that the host state is en-

\textsuperscript{13} Supra note 2.

\textsuperscript{14} The practice of inserting stabilization clauses is expanding in recent agreements, particularly when the investor yields considerable bargaining leverage. It is not completely clear if the legal effect of such clauses, tying the legislative hands of the host state for periods up to 30 or 40 years, can be recognized as valid, \textit{see, e.g.}, Weil, \textit{Les clauses de stabilisation ou d'intangible insérées dans les accord de développement économique}, in Mélanges offerts à Charles Rousseau, 301 (1974) (recognizing the validity), Brown, \textit{Choice of Law provisions in concessions and related contracts}, 39 Mod. Law Rev. 6 (1976) (disputing the validity). Choice of law provisions containing stabilization or "freezing" clauses are used increasingly and often with an escalating scope and comprehensiveness, as illustrated by the following provisions from recent agreements:

1) The traditional, and most simple, stabilization clause is to be found somewhat veiled in a "consistency" provision such as "this agreement shall have full force and effect as a law of Liberia and, as such, together with all Liberian laws of general application which are not inconsistent with or contrary to the express terms of this agreement, shall govern the rights and obligations of the parties" (Liberia-Firestone rubber concession of 1976, Art. 30.1).

2) Quite frequent, particularly in recent Chilean copper agreements and in most agreements from weak Francophonic African countries, are stabilization clauses expressly prohibiting any subsequent tax legislation affecting the project, such as, \textit{e.g.}, "The previous taxpayment treatment, including rates, norms to determine the taxable income — and every other pertinent provision, applicable unto the Investor will remain invariable during the term of 30 years, as from the starting date of the commercial operation" (Chile-Noranda Mines Lt. agreement of 1977, Art. (q) \textit{see also} the Haiti/HIDECA agreement of 1976: "Limite de Taxation" Les montant payés à l’état suivant l’article XIX, tiendront lieu et place de tout revenue, cotisation, impositions sur les paiement de toutes les distributions due revenue ou du profit net, (Art. XX).

3) The most glaring example of a complete and all-comprehensive stabilization clause can be found in Art. 44 of the 1972 Botswana/Bamangwato Concessions Ltd. (Sashe) agreement, which reads as follows:

(a) Provided, however, that the enactment of any amendments to existing laws or regulations or the enactment of any new laws or regulations applicable to the Company or BRST or BCL Sales or any of their shareholders shall constitute a breach by Government of this Master Agreement in the event that:

The application of such laws or regulations to the Company, BRST or BCL Sales or any of their shareholders (either alone or taken together with the prior applications to the Company, BRST or BCL Sales or to any of their shareholders of such laws or regulations on a cumulative basis) has or would have a materially adverse effect on the net income or financial position of the Company, BRST or BCL Sales or a financially materially adverse effect on the rights and obligations of their shareholders under the law of Botswana existing as at the date hereof.

\textsuperscript{15} Published in 104 Clunet Journal du Droit International 350 (1977); \textit{see also} supra note
titled, by virtue of its supreme sovereign power, to change unilaterally the conditions of an agreement. In recent times, they have relied particularly on the UN resolutions concerning the NIEO and Permanent Sovereignty over Natural Resources.16

In view of the controversies, a consensus on the state of law applicable can not be said to exist. However, the consequences of two alternatives may be outlined:

(1) If the agreement should be considered — or stipulated — to be subject to the municipal law of the host state,17 then principles of international law can not be invoked. The question of renegotiability lies exclusively within the jurisdiction of the host state's legal system. The only issue eventually open to international law is whether certain renegotiations constitute "creeping nationalization" and warrant some measure of compensation.18

(2) If the agreement should be considered subject to international law, one has to find principles of international law applicable to state contracts with private companies. The "internationalization" of investment agreements is not an unavoidable and necessary consequence of stipulations calling for the application of a not exclusively national system of law. Such stipulations might be considered invalidated by the recent UN resolutions, particularly when negotiated in a situation of unequal bargaining power. But even if recourse is sought from international law, an absolute "sanctity"

16. See Mikdashi, supra note 7; Mughraby, Permanent Sovereignty over Oil Resources 174 (1965); Schachter, supra note 7; Suratgar, Considerations Affecting Choice of Law Clauses in Contracts Between Governments and Foreign Nationals, 2 Indian J. Intl L. 273 (1962); Rouhani, supra note 7; Toriguiam, supra note 7; El-Kosheiri. Stabilité et évolution dans les techniques juridiques utilisées par les pays en voie d'industrialisation, in Le Contrat Économique International-Stabilité et Evolution (1975).

Insofar as authors consider investment agreements subject only to the municipal law of the host country, the consequence of such view is the legitimacy of legislation altering the conditions of the investment; see Nwogugu, The Legal Problems of Foreign Investment in Developing Countries 186 (1965); Date-Bah. The Legal Regime of Transnational Investment Agreements, 15 J. African L. 241 (1971); Ssekandi, Contracts Between a State and a Foreign Private Company, 2 E. African L.J. 281 (1966).

17. From the survey of recent investment agreements in petroleum and non-fuel minerals, it can be stated that a visible trend toward stipulation of exclusive application of municipal law exists. Apart from the Calvo-tradition in Latin American countries (in spite of some remarks to the contrary in general observed), there will be scarcely any recent petroleum agreement in one of the major producing countries (Saudi Arabia, Iran, Algeria, Libya) which does not provide for exclusive national jurisdiction. Modern types of agreements, management, technical assistance, and long-term marketing and purchase agreements, lend themselves much less to the traditional application of international principles as does the classical concession.

18. But even then, international law can only be invoked by the home state of the TNC which claims compensation to the company as its own right under international law, provided no valid arbitration clause exists. It is interesting to note that the U.S. foreign investment insurance agency, OPIC, views the 1974 Jamaican bauxite levy as a legitimate exercise of sovereignty and not as a "creeping" nationalization. See information on the OPIC brief in the Revere Copper Case, Wall Street Journal, July 15, 1977.

According to an OPIC press release (without date, by Carl Middleton, OPIC director for Minerals and Energy) on the OPIC energy program, OPIC intends to widen its insurance program in order to cover essential provisions of investment agreements against legislative abrogation or forced renegotiation.
of contract, comparable to absolute immutability for the generally very long duration, is unknown. The principle of the *clausula rebus sic stantibus*, recognized in international law, is a basis for eventual adjustment and even termination of the agreement in case of a change of the fundamental conditions on which the agreement was based. The *clausula rebus sic stantibus* principle has to be interpreted in light of pertinent UN resolutions, reflecting the consensus of at least the capital-importing countries, on the territory of which the investment is undertaken. Thus, a far reaching change in the price of commodities, or an innovative change of contractual terms in comparable arrangements, would grant to the host state, and to the TNC, the right to require renegotiation for adjustment. It may be mentioned that TNC's very often have successfully insisted on such clauses granting themselves an exclusive right of unilateral revision.

Insofar as international law does not yield principles of sufficient clarity, a synoptic view of major legal systems, with a growing emphasis on the legal principles emanating from the United Nations and other sources of "international law of development," is necessary to derive rules able to contribute towards an emerging transnational law of investment agreements.

Such a survey shows that a change of the essential conditions on which an agreement was based can give rise in major legal systems to a right of readjustment, sometimes even of termination, under such legal concepts and principles as "frustration," "imprévision," "contrat administratif," or "Geschaftsgrundlage." Attention must also be paid to judicial readjustment or termination of agreements of unduly long duration or which re-

19. For the scope of *clausula rebus sic stantibus* in international law and its applicability to investment contracts, see Geiger, *supra* note 11; and Mughraby, *supra* note 16. For a discussion of the scope of the *clausula rebus sic stantibus* relating to petroleum concession agreements see Mulack, *supra* note 11, at 221.

The OPEC resolution XVI 90, *supra* note 3, also relies upon the concept of changed circumstances to justify a revision.

The doctrine of "changed circumstances," i.e., *rebus sic stantibus*, has been invoked to justify a revision of petroleum concessions by advocates of an exclusive application of natural law. See generally Rouhani, *supra* note 7, at 272; Zakharya, *Impact of Changing Circumstances on the Revision of Petroleum Contracts*, 37 Middle East Economic Survey (Suppl. 1969). It is interesting to note that even as strong a critic of renegotiation as Legoux recognizes as obvious that investment agreements are only "valid *rebus sic stantibus*." Legous, *supra* note 2, at 86.

The application of the *clausula rebus sic stantibus* as an inherent provision of investment agreements is most forcefully stated by a resolution of the Argentine Democratic Lawyer's Association (Ninth AJJD Congress, July 1970). It is postulated, *inter alia*, that economic independence constitutes *ius cogens* of international law and that agreements waiving such a right of a sovereign state should be considered void.


21. "[T]ransnational law ... include[s] all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." Jessup, *Transnational Law*, in the Storrs Lectures (1956). The emergence of transnational law is recognized by many authors though its content is very controversial, see, e.g., Lalive, *supra* note 1.

reflect highly unequal bargaining power and experience. Such principles are invoked in major legal systems particularly when the sovereign rights of the government collide with its contractual obligations. From the principles of major legal systems, interpreted in light of pertinent resolutions of the United Nations and specific requirements of law adequate for an "economic development agreement," one may conclude that following a substantial change of the major conditions underlying the agreement, a revision of the terms is justified. Such a right of revision could not be excluded by "stabilization" clauses, provisions in investment agreements reflecting a major bargaining weakness of developing host countries vis-a-vis TNC's.

In sum, as far as basic legal concepts of international and domestic laws are concerned, the view of absolute "sanctity" of contracts can hardly be sustained. Renegotiation and readjustment can be justified by a change of the crucial conditions underlying an agreement. In natural resources contracts, with very long duration and substantial instability of the circumstantial conditions, there is, accordingly, large room for claims for renegotiation. In addition, one should consider the impracticability of tying the hands of a developing country, in a period of fast and intensive transition, in a way no developed state would permit.

However, as the situation giving rise to legitimate renegotiation is difficult to define precisely, and as the development of standards to readjust the contract has not advanced very far in substance and in consensus, the stipulation of precise conditions, procedures, and criteria for renegotiation may be preferable to a reliance on controversial and rather vague principles.

23. See Geiger, supra note 11; Mulack, id. at 23. For agreements negotiated in colonial times, now dying out slowly, the applications of the principles of duress might also be considered.

24. See Geiger, supra note 11, reports the parallel rights of the United States and French governments to change government contracts and administrative concessions, id. at 364. The distinction made by the sole arbitrator in Texaco v. Libya, supra note 1, between the French type, "contrat administratif" and the oil concession, the prototype of government contract yielding public rights to the concessionaire, does not appear convincing. Most legal systems of administrative laws contain principles allowing the state to revoke, or to alter, government contracts or administrative concessions, sometimes without, often with, the obligation to compensate. The fact that TNC’s have, in developing countries, often achieved the contractual form for administrative concessions reflects their superior bargaining power, but should not prevent reliance of principles developed from a comparison of administrative laws. As far as economic facts are concerned, the administrative concession for petroleum development in a developed Western country does differ little from a contractual petroleum concession in a developing country.

25. To this conclusion may be added the argument that no sovereign state can bind itself to an agreement with a TNC not to alter its present legislation for very long durations. According to this view, the frequent practice of inserting "stabilization clauses" freezing the terms of the agreement and the accompanying legislation may be of no effect. See Brown, Choice of Law Provisions in Concession and Related Contracts, 39 Mod. L.Rev. 6 (1976); Geiger supra note 11, at 23; Suratgar, supra note 16, at 305.

This is very definitely the uncompromising position of the Argentinian Democratic Lawyer's Association as of 1970, see note 19 supra. Traditional international law will probably regard stabilization clauses as unconditionally binding. See Weil, Les clauses de stabilization en d'intangibilité insérées dans les accord de développement économique, in Mélanges offerts a Charles Rousseau 301, 323 (1974).
Of considerable interest in this context are procedures followed in certain
developed countries to revise government contracts; such laws and regula-
tions — particularly in the U.S. Renegotiation Act and the U.S. Armed Ser-
tices Procurement Regulations\(^\text{26}\) — provide for detailed definitions, criteria,
and procedures to revise prevailing terms.

**IV. ACTUAL PRACTICES OF RENEGOTIATION
IN NATURAL RESOURCES CONTRACTS**

It is not always easy to distinguish renegotiation from nationalization.
This difficulty is apparent, particularly in cases where the host country
forces the investor to agree to a partial or complete take-over and to con-
tinue some or all operations under revised terms. There is a shading from
the use of negotiating power to the coercive imposition of new conditions
upon a TNC, which is locked into a situation based on past investments
made on different terms.\(^\text{27}\) However, renegotiation can be distinguished by
the fact that revised terms are embodied in an agreement which constitutes
some form of continuation of the TNC's operations.

An obstacle to the precise reporting of the frequency and scope of cases
of renegotiation is the fact that, contrary to outright nationalization (which
is generally well reported),\(^\text{28}\) renegotiations, being subtler forms of revision
of investment conditions, are far less visible and thus less well documented.
Renegotiations frequently overlap with a change in the host state's invest-
ment conditions; a change in laws or regulations may also be in substance
identical with an intended or already concluded renegotiation with the
TNC's to be affected by the new terms. Most major cases of renegotiations
surveyed are accompanied or preceded by major changes in the investment
and tax regulations of the host country:\(^\text{29}\)

- **Jamaica:** 1974 Production Levy Act, 1976/77 renegotiation of
  bauxite agreement;

- **Algeria:** Petroleum Act of 1971, accompanying renegotiations
  with CFP, ERAP;

- **Iran:** Petroleum Act of 1974: follows the Consortium Sales and
  Purchase Agreement of 1973 and accompanies the service con-
  tracts of 1974;

- **Venezuela:** Petroleum Law of 1975 (PIW, Sept. 8, 1975),
  preceding various service investments;

- **Indonesia:** Production Sharing Agreements, Work Contract,
  and Excessive Profits Tax of 1975.

\(^26\) The U.S. Renegotiation Act, *supra* note 3, has been repealed since 1977. The U.S.
Armed Service Procurement Regulations, *id.*, which are published continuously by the Govern-
ment Printing Office, Washington, D.C., contain provisions relating to the elimination of
excess profits and renegotiation.


\(^28\) See U.N., Permanent Sovereignty over Natural Resources (A/9176), at 9; Sauvant &

\(^29\) See Secretary General, *Sovereignty over Natural Resources*, U.N. Doc. E/C. 7/53
(1975) [hereinafter U.N. Permanent Sovereignty]; Brasseur, 5 International Legislation and
Fiscality of Hydrocarbons 37 (1976); Girvan, Corporate Imperialism 98 (1977).
Generally, one can find a tendency away from outright nationalization toward renegotiated and gradual take-overs, whether in the area of petroleum concessions or that of non-fuel minerals and other natural resources (timber, rubber). Few major contracts ever survive unaffected under the initial conditions until their stipulated termination. Major nationalizations appear in times of high political conflict and visibility, but most changes in the “rules of the game” come about by less visible renegotiations; this is particularly so, as a survey of 170 cases of take-over of U.S. subsidiaries reveals, in the area of natural resources. The revision of terms may start with a unilateral act of the host country (Jamaica 1974), but in most cases the mere possibility of such action is an important bargaining lever of the host country in inducing a TNC to renegotiate. A survey of 50 major investment agreements (petroleum, non-fuel minerals, rubber) shows that most major agreements in petroleum and bauxite have experienced substantial revisions between 1968 and 1976, due to producers associations (OPEC, I.B.A.); but also, in copper, diamonds, iron, rubber, and phosphate, renegotiation appears to be more the rule than the exception. Renegotiation has the advantage of eliminating a number of obstacles host countries have encountered after nationalizations, such as problems in operations, in expansion of existing facilities, in marketing, and financing. Renegotiations encompassing a substantial revision have initially concentrated in the area of petroleum, but the signals emitted by the strong petroleum producing countries have since been followed by weaker petroleum producers and by host states producing non-fuel minerals. It is interesting to note that previously existing joint-venture and service contracts in petroleum have, to a large extent, been unmodified by renegotiation insofar as the host state’s participation and control were concerned. Such relative immunity to the storms of change experienced in the

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30. U.N. Permanent Sovereignty, supra note 26, at 30; Rouhani, supra note 7, at 273. This development reflects the policy enunciated by OPEC Resolution XVI. 90. supra note 3, which calls for renegotiation to revise concession with unilateral action reserved for the case of the company’s non compliance. A survey of 170 takeovers of U.S. subsidiaries reveals that renegotiation has been increasingly important as compared to nationalization. Hawkins, Mintz and Provisiero, supra note 27.

31. Smith and Wells, supra note 9, at 151.


33. See Hawkins et al., supra note 27.

34. See Bostock & Harvey, Economic Independence and Zambian Copper (1972); Zoen, U.N. Dept. of Economic and Social Affairs Workshop in New Delhi, (1975) (Mimeograph).

35. The survey is based upon several case studies and the following trade journals: Petroleum Intelligence Weekly, Middle East Economic Survey, Oil and Gas Journal, Mining and Engineering Journal and others. For a compilation of changes in government participation, see Johnson Messick, Vertical Divestiture of U.S. Oil Firms, 8 L.Poly. Int'l Bus. 963-968.

36. Such obstacles have been encountered by host countries, particularly in Peru (Marcona), Bolivia (Patino), Chile (Kennecott/Anaconda). For an extensive analysis, see Moran, supra note 32.

37. In particular, the renegotiation of bauxite agreements in the Caribbean. For a history of these negotiations, see Girvan, supra note 29, at 98. For an analysis of the fiscal provisions, see McCalla, Taxation of Bauxite Resources: The Jamaican Model, 5 Black L.J. 280 (1977).

traditional concessions suggests that companies who opted for more flexible agreements and conceded a larger share of partnership and control to the host state, were able to achieve a higher degree of stability in their contractual terms.

Insofar as the outcome and the scope of the various waves of renegotiations in recent years are concerned, the most salient feature is the maintenance of the role of the TNC as large scale consumer of output and as a supplier of technical services. The corresponding long-term purchase, marketing, and technical assistance agreements, provide generally for a considerably shorter duration of 2-12 years than did the original concessions of 25-50 years. Some of these new post-nationalization agreements known to the author appear to offer rather generous conditions to the TNC, as far as compensation for technical services (based on the volume of production) are concerned, without obliging the TNC to guarantee the performance of the services and the advice rendered.

With regard to petroleum, the most salient features of recent renegotiations have been the participation of the host state, the multiple rise of the posted price, a rise of royalty and tax rates, the elimination of certain rebates, and the imposition of excess profits taxes. Obligations following the trend of modern investment agreements concerning local employment and downstream integration (processing, shipping, marketing) have been inserted. Newly created companies share increasingly in the control of the extracting and later, the down-stream operating ventures. Another trend in renegotiated agreements is the increasing subjection to national laws of general application, reducing the traditional enclave status of the foreign investment in favor of modern types of investment regimes. Companies, on the other hand, have increasingly taken to sophisticated forms of non-equity control, such as management and long-term purchase and marketing arrangements, thus retaining material control in spite of submitting to complete national ownership. A specific feature of the bauxite renegotiations (1974-1977) is the establishment of a royalty-type fiscal instrument ("income tax," "production levy"), calculating taxable income on final metal prices, thus avoiding the shortcomings of intra-enterprise trade. The result of recent renegotiations is the development of more sophisticated forms of agreements, bringing older concession models in line with the modern evolution of the transnational investment agreement. Renegotiation is not an exception, but rather a main feature of modern, large scale, and long-term investment contracts. Renegotiation is certainly not confined to TNC-host country relations. Japanese companies have been known to demand renegotiation of long-term supply contracts when economic forecasts requiring the supplies proved wrong; such action reflects to some degree an Asian concept of contract more as a declaration of intent than as a definite obligation covered by the sanctity of contract. Commodities-supply contracts quite frequently include a clause calling for renegotiation, if currency fluctuations exceed a stipulated ceiling, if extreme changes of commodities prices occur, or if radical shifts in long-term commodities markets take place. The on-going process of renegotiation reflects the requirements of
long-term stability and flexibility. It is, on the micro-economic scale of individual agreements, an element in the continuous process of adjustment and evolution the world economic system is experiencing at present on a macro-scale.

Table I: Illustrative Cases of Renegotiation in the Petroleum Sector

<table>
<thead>
<tr>
<th>Country</th>
<th>TNC</th>
<th>Year</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>Getty Oil</td>
<td>1968</td>
<td>51% Sontratrach-participation</td>
</tr>
<tr>
<td>Algeria</td>
<td>CFP/ERAP</td>
<td>1971</td>
<td>51% Sontratrach-participation</td>
</tr>
<tr>
<td>Algeria</td>
<td>ERAP</td>
<td>1975</td>
<td>100% state ownership, severing of relations</td>
</tr>
<tr>
<td>Algeria</td>
<td>CFP</td>
<td>1975</td>
<td>51% state participation, renewed contract until 1980</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>ARAMCO</td>
<td>1974</td>
<td>60% Saudi Arabian participation for ARAMCO: long-term supply, TA-contract</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>ARAMCO</td>
<td>1976</td>
<td>100% state ownership</td>
</tr>
<tr>
<td>Ecuador</td>
<td>Texaco-Gulf (et al.)</td>
<td>1973/74</td>
<td>25% participation by CEPE (State company)</td>
</tr>
<tr>
<td>Ecuador</td>
<td>Texaco-Gulf (et al.)</td>
<td>1977</td>
<td>100% state participation</td>
</tr>
<tr>
<td>United Emirates</td>
<td>Abu Dhabi Oil Company</td>
<td>1974</td>
<td>60% state participation</td>
</tr>
<tr>
<td>United Emirates</td>
<td>Abu Dhabi Oil Company</td>
<td>1976</td>
<td>100% state ownership of all gas both associated and non-associated, formalized by decree</td>
</tr>
<tr>
<td>Kuwait</td>
<td>Kuwait Oil Company</td>
<td>1972</td>
<td>25% state participation</td>
</tr>
<tr>
<td>Kuwait</td>
<td>Kuwait Oil Company</td>
<td>1974</td>
<td>60% state participation</td>
</tr>
<tr>
<td>Kuwait</td>
<td>BP/Gulf</td>
<td>1975</td>
<td>supply contract (5 years) for TNC 100% state ownership 100% state takeover</td>
</tr>
<tr>
<td>Qatar</td>
<td>QGPC, QPC et al.</td>
<td>1974</td>
<td>60% state participation</td>
</tr>
<tr>
<td>Qatar</td>
<td>QGPC, QPC et al.</td>
<td>1976</td>
<td>100% state participation Service contract for TNC's</td>
</tr>
<tr>
<td>Iran</td>
<td>&quot;Consortium&quot;</td>
<td>1973</td>
<td>Consortium agreement of 1954 abrogated. Full management and control taken over by NI Sales and Purchase Agreement with Consortium (5 years)</td>
</tr>
<tr>
<td>Colombia</td>
<td></td>
<td>1975</td>
<td>Concessions cancelled. Renegotiation into Association and Service Contracts</td>
</tr>
<tr>
<td>Indonesia</td>
<td></td>
<td>1974</td>
<td>Excess profits tax for Contractors of PERTAMINA (by statute and renegotiation)</td>
</tr>
<tr>
<td>Venezuela</td>
<td></td>
<td>1975</td>
<td>take-over of oil companies, replacement by oil sales agreements (2-years, renewable), TA-agreements (3 years)</td>
</tr>
</tbody>
</table>
**REVISION OF AGREEMENTS**

**Libya**  
*Exxon et al.*  
1973/74 51% participation  
1977 100% state ownership

**Nigeria**  
*Shell/BP*  
1973 participation schedule:  
35% to 51% in 1981  
1974 55% immediately  
1976 60% government  
20% Shell  
20% BP

---

**Table II: Illustrative Cases of Renegotiation in the Non-Fuel Mineral Sector**

<table>
<thead>
<tr>
<th>Country</th>
<th>TNC</th>
<th>Year</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Papua New Guinea</td>
<td>Rio Tinto Zinc</td>
<td>1974</td>
<td>Excess profits tax (sliding tax) and other tax changes, expected to produce additional revenues of ca. 40 Mio. AS p/a above 1967 agreement. Mutual review of agreement all 7 years other adjustments provisions</td>
</tr>
<tr>
<td>Zambia</td>
<td>Roan/AMAX</td>
<td>1969</td>
<td>51% state participation, management and sales contract for TNC's</td>
</tr>
<tr>
<td>Zambia</td>
<td>Roan/AMAX</td>
<td>1974</td>
<td>Increase of national control over management via the newly created state company</td>
</tr>
<tr>
<td>Ghana (Bauxite)</td>
<td>Kaiser (VALCO)</td>
<td>1973/77</td>
<td>Sub. increase of rates for use of power</td>
</tr>
<tr>
<td>Venezuela (Iron Ore)</td>
<td>US-Steel</td>
<td>1974</td>
<td>Negotiated take-over followed by management agreement with other US company</td>
</tr>
<tr>
<td>Indonesia (Copper)</td>
<td>Freeport Minerals</td>
<td>1974/75</td>
<td>Reduction of tax holidays</td>
</tr>
<tr>
<td>Liberia</td>
<td>LAMCO</td>
<td>1974</td>
<td>Increase in use of company's transportation system, localization of employment, minor increase of fiscal revenues</td>
</tr>
<tr>
<td>Liberia</td>
<td>LISCO</td>
<td>1975</td>
<td>Payments for deferral of exploitation liability to taxes of general application</td>
</tr>
<tr>
<td>Liberia</td>
<td>Dt. Exploration und Bergbau (Bong Mining Company)</td>
<td>1974</td>
<td>Minor increase in revenue, stronger provisions in localization, creation of technical committee to increase national control</td>
</tr>
<tr>
<td>Liberia (Rubber)</td>
<td>Firestone</td>
<td>1976</td>
<td>Subjection to general laws, modernization of agreement, increase in revenue</td>
</tr>
<tr>
<td>Senegal (Phosphate)</td>
<td>Taiba</td>
<td>1974</td>
<td>50% government participation, increase of tax receipts</td>
</tr>
<tr>
<td>Gabon/Mauritania</td>
<td>MiFerma/Somifer</td>
<td>1974</td>
<td>Partial/complete take-over, marketing arrangements, entry of Japanese trading companies</td>
</tr>
</tbody>
</table>
The renegotiation of four major agreements in Liberia (LAMCO, LISCO, Bong, and Firestone) is rather well documented. It reflects a continuous change, even of a minor scope and weight in most provisions, particularly as far as the objectives of the Liberian government in adjusting the concessionary terms to the conditions in more advanced countries are concerned. Between 1960 and 1977, at least four renegotiations have taken place in those agreements, slowly and gradually modifying the terms within the framework of the basic concessions. Renegotiation, well documented here, is not an exception but rather a main feature of modern, large-scale, and long-term investment contracts in natural resources. The renegotiation pattern and the results reflect the sophistication that the host country achieves in learning the basic abilities of exercising control over its natural resources.

<table>
<thead>
<tr>
<th>Country</th>
<th>TNC</th>
<th>Year</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jamaica</td>
<td>Kaiser, Reynolds,</td>
<td>1974</td>
<td>Super-royalty: Imposition of a tax based on a percentage of the final ingot price (7.5% to 8.5%) 51% participation of Jamaica Programme to increase processing of bauxite into Alumina in Jamaica. Revenue increased from 1973 to 1974: from 25 Mio. US$ to 160 Mio. US$. From TNC’s: Long-term supply agreement (40 years); 7 years management contracts. (Total take per ton: from US$ 2.8 to US$ 12)</td>
</tr>
<tr>
<td></td>
<td>ALCOA, ALCAN</td>
<td>1976</td>
<td>(heads of Agreements/Final Agreements)</td>
</tr>
<tr>
<td>Surinam</td>
<td>ALCOA</td>
<td>1974</td>
<td>6% levy on bauxite, based on final ingot price, increase in revenues: from ca. 18 Mio. US$ to ca. 45 Mio. US$ (take per ton: $11)</td>
</tr>
<tr>
<td>Haiti</td>
<td>Reynolds</td>
<td>1974</td>
<td>7.5% bauxite levy, based on final ingot price, increase in revenues: ca. 2 Mio. US$ to 11 Mio. US$ (total take per ton: from $1.88 to $11)</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>Rutile Ltd</td>
<td>1975</td>
<td>47% equity-purchase option for government by 8th year of production at book value</td>
</tr>
<tr>
<td>Zaire</td>
<td>Union Minière</td>
<td>1967</td>
<td>100% government ownership (GECAMINES) Management Contract for 25 years, compensation: 6% of export sales</td>
</tr>
</tbody>
</table>

Sources: The illustrative cases of renegotiations have been compiled from: Permanent Sovereignty, U.N. Doc. E/C. 7/53; A/9716 and E/C. 7/66; from Brasseur, International Legislation and Fiscality of Hydrocarbons, 13ff (1976); Zakahariya, 9 Vand. J. Transnat’l L. 545 (1976); from sources such as the Petroleum Intelligence Weekly (PIW), the Middle East Economic Survey (MEES), the Oil and Gas Journal, and the Latin American Economic Report. Other sources used are: T. Turner, Oil and Government in Nigeria (1977) (Ph.D. thesis at London School of Economics); Smith & Wells, at 15ff; Negotiating Third World Mineral Agreements, (1975); Radmann, Nationalizations in Bolivia (Verfassung und Recht in Ubersee) at 277 (1972); Clower, Growth without Development (1966); Coale, German Transnationals in Tropical

V. THE EVOLUTION OF CONTRACTUAL FLEXIBILITY

1. Duration of Contracts

Traditional petroleum concessions in the Middle East often had a duration of up to 99 years. With the course of time, world market conditions have changed, generally favoring the TNC. New arrangements have evolved which have made the older concessions appear outdated and disadvantageous to the host country. Finally, host countries became increasingly aware of the capacities of the concessionaries to contribute in various ways to new development objectives. Accordingly, in addition to the wave of nationalizations and renegotiations, host countries have, with growing emphasis, insisted on a curtailment in the duration of the agreement and particularly have insisted on various contractual instruments to increase the flexibility of the contractual regime to adjust to the changing basic circumstances of the mining project. Such a development, which may be called a “dynamization” of the cornerstones of the agreement, such as the distribution of management and control, of marketing and production, of fiscal revenue systems, and of employment provisions, has come about occasionally with the willing consent of the investor: Sophisticated company negotiators increasingly realize that contractual flexibility is an instrument which can channel necessarily arising conflicts and demands for a revision of contractual terms, thereby avoiding radical measures such as complete take-overs, which cut off the TNC from its raw materials source and the host country from its marketing and financing connections.

In response to these developments and developing countries demands in negotiations, agreements with TNC’s in natural resources provide for an increasingly shorter period of time. In non-fuel mining, a modern agreement may have a duration of 25-35 years, depending upon whether the start of the period is the date of conclusion of the contract or the start of commercial production. In petroleum, the duration may even be considerably


Such a distinction may often stem from the fact that the lead time, that is the time between start of exploration until repayment of initial investment by production, is considerably longer in non-fuel than in petroleum mining. However, attention should be paid to the fact that the stipulated duration of the contract is often considerably lengthened because it only runs from the start of commercial production. As long as no precise and enforced time limits are placed as a timetable for exploration, feasibility study, construction, and production, the TNC will often foreclose the mine site to competitors without actually speeding up commercial exploitation. The duration of an agreement tends to shorten considerably once a fullfledged concession contract is substituted by modern types of agreements, thereby shifting the risk and responsibility, in various scales, from the TNC to the host country: Time periods of 4 and 10 years can be observed in management, service, and technical assistance contracts. If such agreements are concluded after a national takeover, the long-term supply contracts with TNC's after nationalization will cover considerably less time than traditional concessions; time periods of 2, 3, or 5 years, often coupled with more flexible stipulations of extension and renewability, are not unusual. Duration will often hinge on the expected depletion of the mine; hence, TNC's will prefer a duration which corresponds to the prospective operation period of the site. In order to enhance contractual flexibility, host countries increasingly insist on durations shorter than prospective exploitation periods and will try to make exploitation of adjacent mine sites dependent on a complete or partial renegotiation of the previous agreement. Also, precise timetables are set for the various stages of development. Rights for renewal are coupled with a complete or partial revision of the terms.

41. This observation is based on a survey of 157 recent agreements. The survey shows that in non-fuel contracts concluded between 1971 and 1977, twenty-one through twenty-five durations are the most frequent, while in petroleum agreements a strong minority (nine as against fourteen) of the contracts provide for ten years as opposed to twenty-six through thirty years.

42. Another element which may prolong the stipulated duration is the provision allowing the TNC to ask for a renewal, for ten through twenty-five years, upon the same conditions. These renewal rights create what appears to be a short duration but which actually is not. In recent agreements, however, renewal rights are generally made subject to a right of renegotiation of the major terms of the agreements, compare, e.g., the Sierra Leone/A.F.A.G. bauxite agreement (1961), section four, which reads:

Upon written application the Company, not later than six months prior to the expiration of the License, the Government shall grant renewal of the License for a further period of five years upon the same conditions, provided that the Company is not then in default under any of the terms and conditions of the License or of this agreement, but the said renewal . . . will not be granted unless the Company has applied for, and been granted a mining lease under clause five of the agreement and has started the production and export of bauxite in commercial quantities.

The above being a relatively short renewal condition upon the performance of the investor: with the Indonesia-Rio Tinto Zinc agreement (1977) section twenty-nine which reads:

Subject to the provisions herein contained, the Agreement shall continue in force until the expiration of the Last Operating Period . . . the government agrees that within a reasonable period prior to the expiration of the Operating Period for any Mining Area it will give sympathetic consideration to any request by the Company to extend the Operating Period in question in recognition of the requirements for the appropriate economic recovery of Minerals from any such area.
TABLE III

A. Duration: Non-Fuel Mineral Contracts

<table>
<thead>
<tr>
<th></th>
<th>1-10 (yrs.)</th>
<th>11-15</th>
<th>16-20</th>
<th>21-25</th>
<th>26-30</th>
<th>31-40</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950-1960</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>6</td>
<td>—</td>
</tr>
<tr>
<td>1961-70</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>6</td>
<td>15</td>
<td>1</td>
</tr>
<tr>
<td>1971-1977</td>
<td>5</td>
<td>2</td>
<td>4</td>
<td>14</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>6</td>
<td>6</td>
<td>5</td>
<td>20</td>
<td>23</td>
<td>2</td>
</tr>
</tbody>
</table>

(TOTAL: 73)

B. Duration: Petroleum Contracts

<table>
<thead>
<tr>
<th></th>
<th>5-9 (yrs.)</th>
<th>10-20</th>
<th>21-25</th>
<th>26-30</th>
<th>31-40</th>
<th>over 40</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950-60</td>
<td>—</td>
<td>—</td>
<td>1</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>1</td>
</tr>
<tr>
<td>1961-70</td>
<td>—</td>
<td>2</td>
<td>7</td>
<td>30</td>
<td>3</td>
<td>3</td>
<td>45</td>
</tr>
<tr>
<td>1971-77</td>
<td>—</td>
<td>9</td>
<td>3</td>
<td>14</td>
<td>—</td>
<td>2</td>
<td>28</td>
</tr>
<tr>
<td>TOTAL</td>
<td>—</td>
<td>11</td>
<td>11</td>
<td>44</td>
<td>3</td>
<td>5</td>
<td>74</td>
</tr>
</tbody>
</table>

(TOTAL: 74)

2. Contractual and Legislative Instrument to Increase Contractual Flexibility

Due to the long duration of contracts and the corresponding high occurrence of unforeseen events, and to the unequal balance in the distribution of benefits and consequent conflicts, agreements increasingly provide for various instruments to augment the agreement’s ability to sail safely through the storms of change. Perhaps three main approaches can be distinguished to facilitate the contractual revision of terms and conditions:

(a) Provisions providing for a procedure of renegotiation of the whole agreement triggered by the lapse of a period of time or by certain more or less clearly defined events;

(b) provisions providing for renegotiation, triggered by lapse of a time period or by certain events, of specific clauses of the agreement, generally the cornerstones of the fiscal regime (tax and royalty rates), or of the contractual regime relating to the pricing of minerals.
(c) provisions stipulating automatic adjustment or change of cornerstone clauses of the agreement, such as a tax rate, increasing over time or at certain specified events, relinquishment of the concession areas, change and adjustment of royalty rates, most-favored clauses, and divestment. Occasionally, the automaticity of such a revision will not function as contemplated but will require detailed renegotiation. Automatic revision clauses may therefore function by triggering overall renegotiation.

3. Renegotiation

In mineral contracts before 1970, renegotiation clauses in favor of the host country could only be found rarely. They generally covered issues such as readjustment of royalties, or of pricing arrangements following a change of world market conditions. Such provisions generally entitled the TNC as well as the host country to renegotiate. TNC's, on the other hand, were entitled frequently to a revision of the contractual regime, triggered by most favored clauses. Most investment agreements in francophonic Africa contain such provisions. However, in recent agreements, a visible surge of renegotiation provisions can be observed. The provisions cover topics ranging from the stipulation of periodic renegotiation of the agreement to the stipulation of the renegotiation of specific clauses triggered by precisely defined events. An analysis of 104 large scale investment contracts (petroleum, non-fuel minerals, other natural resources) shows that while from 1967-1973, of 68 contracts, only 6 provided for specific or general renegotiation, 12 agreements out of 36 concluded between 1974 and 1977 contained renegotiation clauses. Even in these recent agreements, renegotiation is often severely limited. It is conditioned upon the lapse of seven to thirteen years after commercial production, and in two agreements, upon the occurrence of "profound change in circumstances" of the original agreement. Such a revision by renegotiation is hardly revolutionary. It embodies traditional Western concepts of the "Geschäftsgrundlage," the clausula rebus sic stantibus and "frustration," and even limits the scope and applicability of such principles. Such restricted renegotiation clauses may be far away from actually inserting flexibility into the contractual regime, compared to other instruments of flexibility which they restrict. Yet, seen from an evolutionary perspective, they may be justified as a primary instrument in a relatively weak host-country's achieving an increasing degree of sovereignty over its natural resources.

43. For a discussion of termination, revision, and adjustment of contractual obligation under these concepts, see Geiger, supra note 11; Mughraby, supra note 4. These principles can generally be involved without the requirement of a lapse of certain time period. The clauses mentioned restrict accordingly, the scope of such principles. It is questionable whether these restrictions can be considered valid once a change in certain circumstances (profitability, costs, comparable terms, competitiveness) has taken place, see, e.g., the Liberia-Firestone Rubber Agreement (1976) section twenty-nine which reads:

For the purpose of considering profound changes in circumstances from those existing on the Effective Date or on the date of most recent review of this agreement, at the request of either party, consult together. In case such profound changes are established to have occurred, the parties shall effect such changes in, or clarification of, these agreements that they agree are necessary.
As far as the evolution of such general renegotiation provisions is concerned, one may expect that they embody traditional concepts of the *clausula rebus sic stantibus* with an increasing precision with respect to the conditions, the standards, and procedure of renegotiation. Evolving further, they may free themselves from these traditional legal concepts and provide for periodic renegotiation, or renegotiation conditioned upon precisely defined events, with a precision approaching the automatic readjustment provisions. Issues to be dealt with in such modernized revision arrangements could be:

(1) A precise definition of events triggering renegotiation, such as:
- a certain period of time (such as 5, 7, or 10 years) after start of commercial production;
- a period of time until the initial investment plus an agreed upon rate of return (internal, on equity/total investment) has been recouped;
- a material change of fundamental circumstances (comparable agreements, international codes, excessive profits, world market price change, change of ownership and control of TNC, change in home country legislation).

(2) The scope of the renegotiation:
- covering the whole agreement;
- relating only to certain key provisions (taxation and fiscal regime, pricing, employment, processing).

(3) The standards to be used by the parties, or a third-party, in renegotiating, such as:
- fairness, (better to be defined as target rate of return, percentage of division of costs and benefits);
- account of the risk taken or to be taken in the future;

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44. The tax regulations of the TNC's home country have been singled out for particular attention in this context. *See, e.g.*, the Jamaica/ALCOA bauxite agreement (1976) § 8.02(h) which reads:

Subject to the provisions of any Income Tax Treaty between Jamaica and the United States which hereafter may be concluded and which includes provisions for relief from double taxation, in the event of double taxation arising from actions by Jamaica or the United States with respect to any of the matters covered by this Article VIII of this 1976 Agreement then Alcoa may request a review and discussion of the action giving rise to such double taxation and the Government shall take such reasonable action as the parties thereto may deem proper and appropriate in the circumstances to endeavor to avoid or reduce such double taxation. Nothing contained in this Subsection 8.02(h) shall expressly or by implication create any obligation on the part of the Government to waive, reduce, or remit in whole or in part any tax which Alcoa shall have paid or shall be liable to pay under this Article VIII of this 1976 Agreement.

*See also* the Jamaica/Reynolds bauxite agreement (1977) § 6.04 which deals with the setting of the production levy on bauxite based on a percentage of the final aluminum ingot price and which reads: "In the event of the imposition in the United States of price controls of aluminum, either party may request review and discussion of the provisions of this article."
—terms of parallel or more recent agreements, comparable to the project at issue or of mining, tax, and investment legislation comparable with the situation of the project at issue;

—elimination of excess profits, excess profits defined in precise terms, using a target rate of return, the general level of net earnings elsewhere in industry where similar circumstances occur, the rate of return necessary to induce operators to undertake the risk;\(^4\)

—the economic feasibility of revised terms and the TNC's competitive position;

—the standards set by international organizations and the relevant producers association.

(4) The procedure of renegotiation and the consequences of the parties' inability to reach an agreement:

Here, some institutionalized mechanism may be useful to overcome the parties' inability to reach an agreement on their own. Such a third-party decision may, even if rarely used, provide a strong incentive towards compromise; both parties may be very unwilling to let a third-party decide on the content of a renegotiated agreement. International and national dispute settlement institutions, decision by one or three experts, ad-hoc arbitration, and finally, the setting-up of a specialized renegotiation board (e.g. the United States Renegotiating Act), may be considered. The more precise the standards and criteria are, the more both parties' readiness to stipulate a renegotiation clause to reach an agreement and to submit to a third-party decision will increase. The reason for such increased willingness is the greater predictability of the financial consequences.

As banks are becoming increasingly important in negotiations and insist on the projects accelerated ability to pay back loans, any renegotiation clause triggered by the completion of repayment of loans will enhance the banks' willingness to accept such a provision.

It can be expected that renegotiation clauses of growing sophistication, as outlined, will be more frequently used. However, the more precise the standards to be used for renegotiation, the more such clauses will overlap with automatic adjustment arrangements.

\(^4\) These are the criteria set forth in OPEC Resolution XVI. 90, supra note 3. For renegotiation, see also Renegotiation Act id.
TABLE IV.

A. Renegotiation: Non-Fuel Mineral Contracts

<table>
<thead>
<tr>
<th></th>
<th>With Renegotiation Clauses</th>
<th>Without Renegotiation Clauses</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1967</td>
<td>2</td>
<td>12</td>
<td>14</td>
</tr>
<tr>
<td>1967-70</td>
<td>2</td>
<td>18</td>
<td>20</td>
</tr>
<tr>
<td>1971-73</td>
<td>2</td>
<td>17</td>
<td>19</td>
</tr>
<tr>
<td>1974-77</td>
<td>7</td>
<td>13</td>
<td>20</td>
</tr>
<tr>
<td>TOTAL</td>
<td>13</td>
<td>60</td>
<td>73</td>
</tr>
</tbody>
</table>

(TOTAL: 73)

B. Renegotiation: Petroleum Contracts

<table>
<thead>
<tr>
<th></th>
<th>With Renegotiation Clauses</th>
<th>Without Renegotiation Clauses</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1967</td>
<td>1*</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>1967-70</td>
<td>2</td>
<td>15</td>
<td>17</td>
</tr>
<tr>
<td>1971-73</td>
<td>—</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>1974-77</td>
<td>1</td>
<td>11</td>
<td>12</td>
</tr>
<tr>
<td>TOTAL</td>
<td>4</td>
<td>39</td>
<td>(TOTAL: 43)</td>
</tr>
</tbody>
</table>

C. Renegotiation: Agriculture and Forestry

<table>
<thead>
<tr>
<th></th>
<th>With Renegotiation Clauses</th>
<th>Without Renegotiation Clauses</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1967</td>
<td>1</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>1967-70</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>1971-73</td>
<td>—</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>1974-77</td>
<td>4</td>
<td>—</td>
<td>4</td>
</tr>
<tr>
<td>TOTAL</td>
<td>5</td>
<td>9</td>
<td>(TOTAL: 14)</td>
</tr>
</tbody>
</table>

4. Automatic Adjustment and Revision of Contractual Arrangements

Automatic adjustment and revision clauses appear to be one of the major new traits of mineral contracts between TNCs and host countries. Automatic adjustment and revision can deal effectively with a number of the problems outlined. However, it should not be forgotten that automatic revision of the cornerstones of a contract is negotiated generally at a time when the TNC still holds the bargaining power superiority. Automatic revisions may often, by a gradual increase of the host country's share of the benefits
and of the control, ease otherwise escalating conflicts. At the same time, such a provision accommodates the TNCs and the banks’ strong interest in predictable terms on which to base the very risky decision of committing substantial amounts of investment capital. When the host country is at its weakest level of bargaining power, automatic revision alone may not be sufficient to maximize the host country’s share of the benefits generated by the project. Other measures to achieve this goal will be discussed under the heading of “assurance of mining rights.” Automatic revision must be seen as one of a series of possible instruments in creating a workable arrangement with investing TNCs in achieving national sovereignty.

The pertinent characteristic of automatic adjustment and revision is that, from the onset of the investment, TNC and host country have agreed on the changes in the contractual regime which will occur when certain events happen or when a certain period of time has elapsed. As long as no unforeseen and unconsidered events arise, the contract is able to adjust itself to a range of possible, yet uncertain future events. By providing for sliding scales of the government’s revenue, the contract can generally provide a continuing feeling of fairness on the part of the host country, without engendering the conflicts arising under forced renegotiation or nationalization. Thus, the excess profits tax levied in several recent contracts avoids the unavoidable outcry over exploitative behavior by the TNC in the host country.

Automatic adjustment and revision is particularly, but not exclusively, stipulated in the following areas:

— the contractual regime concerning employment and economic development of the host country (timetables for localization of employment and linkages);

— the size of the concessionary area;

— the fiscal regime of the contract (taxes, royalties, duties, fees);

— the division of equity between host country and TNC (disinvestment, phase-out arrangements, buy-in options).

(a) Automatic Adjustment within the Fiscal Regime

Most provisions with an impact on the distribution of revenues between TNC and host country (and sometimes home country) can be stipulated so as to make them dynamic, i.e., they are able to adjust to events or changes according to certain timetables. Only some major instruments of such kind contained in recent agreements shall be outlined:

Royalties can be adjusted according to the development of world market prices of minerals or processed metals (Jamaica). They can be graduated so as to encourage productivity and can be made to reflect the overall or average profitability of mining operations. Some contracts contain a fixed component of royalty (to provide a steady revenue) and a variable component (so as to allow the host country to share in the economic risk and benefit of world market price development).
Income/Corporation taxes are stipulated in such a way that the tax rate increases after certain absolute levels of profits have been reached, after a stipulated (internal) rate of return (on equity/total investment) has been reached, after the initial investment has been recouped, and after elapse of periods of time (Papua-New Guinea, Indonesia, Iran).

Accounting Practices are drafted so as to achieve a certain degree of flexibility. In the initial production period until recoumpent of investment and repayment of loans, accelerated depreciation increases the cash flow to the company. Similar effects can be reached with a carry forward of losses within a certain time period. Such accounting privileges will disappear gradually, increasing the host country's share similar to progressive and sliding tax schemes.

Rentals (Deadrents, area fees) increase overtime so as to increase the incentive for the TNC to relinquish areas. Such an incentive is linked to the instrument of mandatory relinquishment to be discussed infra.

Service Fees, paid by the host country or the joint venture to the TNC for rendering technical management services, decrease after a certain time. Such decrease reflects the expectation of more efficient operation and provides an incentive for the TNC to train the national management rapidly.

Profit-sharing Schemes, when coupled with disinvestment (infra), provide for a rising share of the host government's share of total revenues generated by dividends on shares.

(b) Dynamic Employment and Economic Development Contractual Agreements

As job creation and qualification, integration of the mining venture into the national economy and other economic performance objectives gain growing weight within the host country's negotiation goals, contractual flexibility and dynamics are increasingly stipulated. In matters of employment, timetables are established to increase the employment of nationals at various levels up to top management. In matters of processing of minerals extracted in order to increase national value added, timetables may be set. In addition, contracts may provide incentives, specific work programs, or even third party decisions to start and to increase the capacities for the various stages of economically feasible local processing. Lastly, the grant of renewal of the initial contract may be made subject to positive performance insofar as local processing of extracted minerals is concerned.

(c) Reduction of the Mining Area

Stemming from petroleum practice, contracts increasingly provide for a gradual relinquishment of the area allotted. After each stage (i.e. prospection, exploration, exploitation), or after certain periods of time, the operator must relinquish a certain (often increasing) percentage of the concessionary
area. Such a policy of gradual and progressive relinquishment induces active exploration and exploitation. It can work against TNC's policies of preserving unexploited mining areas to foreclose competitors and it allows the host state to exploit itself, or in combination with other companies, areas relinquished by the initial concessionaire. The setting aside of "national reserves" taken from explored areas and reserved for exploitation by the host country is another instrument. Such a national reserve can be used to induce the TNC to offer better terms for its exploitation. Obligatory relinquishment, complemented by increasing land rentals, also has a function in the context of the ongoing bargaining between TNC and host country. If exploitable mining areas have to be relinquished to the host state, the host state can use its right to grant new concessions in that area to achieve better terms from the initial operator or new entrants. For this purpose, in Canada, a checkerboard system of concession area grants has been developed,\(^46\) whereby after successful exploration and granting of a mining concession, the mining area is divided in a checkerboard pattern, the various blocks evenly divided between the state and the operator. According to such a system, the operator is rewarded for his risky and successful exploration and the state retains some leverage with its parts of the explored areas. A similar system has been proposed for deep-seabed mining.\(^47\) The reservation of some part of the explored area to the state for later exploitation and negotiation may accordingly increase the host state's leverage in later negotiations and increase the flexibility of the contractual regime, without creating conflicts over forced renegotiation.\(^48\)

(d) Disinvestment Provisions: Contractual Nationalization

An avenue to complete national sovereignty over natural resources of increasing importance has become systematic, agreed-upon or legislatively prescribed, disinvestment, also called "phase-out" or "fade-out."\(^49\) Disinvestment means that, according to various forms, schedules, timetables, and procedures, the investing TNC starts with a majority or with complete ownership of the investment project. However, in the course of time of following certain events, nationals of the host country, the government, or particularly the state enterprise take over equity and control of the

\(^{46}\) See presentation by J. Ross Tolmie, Buenos Aires Workshop (1973) published as Negotiation and Drafting of Mining Development Agreements (1976). A national reserve can be used to induce the TNC to offer better, revised terms for its exploitation while retaining sufficient incentives for speculative exploitation. For a system of national reserves, see generally Codigo de Minería 1975, art. 18 (Bolivia), Legislacion Minería, 1975, art. 71 (Mexico). The relinquishment, or setting aside as national reserves, of successfully explored areas has been of particular consequence with regard to petroleum development (witness a Venezuelan service contract in which 80 percent of the discovered area was relinquished). In juxtaposition to the Venezuelan contract, the IRAN-ERAP and the IRAQ-ERAP agreements of 1966 and 1968 provided that a part of the recoverable reserves were excluded from agreement area and were to be treated as national reserves.


\(^{48}\) Supra note 46.

\(^{49}\) See Hirschman, How to Divest in American, and Why (1969); Smith & Wells, supra note 9, at 135; Mikdashi, supra note 7, at 162.
operating company. Disinvestment takes place until a prescribed level of national ownership or complete national ownership is reached.

Disinvestment is comparable to a joint-venture, differing only insofar as the joining of the national entities will take place after the initial stage of the investment.\(^{50}\) It is comparable to nationalization, differing insofar as the investor agrees to a normally gradual nationalization and to its conditions and compensation. Disinvestment has been widely hailed as a major, peaceful step towards national ownership and control and towards a de-escalation of many investment disputes.\(^{51}\) Indeed, once nationalization takes place according to an agreed upon program, much pressure for forced nationalization is eliminated. Host countries have often regarded disinvestment as a means of achieving national control parallel to the host country's learning process, enabling it to take effective control without deterring investors by affecting contracts through unilateral action.

In light of the above, a large number of investment laws prescribe or provide incentives for gradual disinvestment by TNCs.\(^{52}\)

Natural resources, however, are often excluded from such statutory divestment since special agreements tend to govern major large scale investment projects.\(^{53}\) Yet recently there has been a trend towards a relaxation of disinvestment prescriptions in some countries.\(^{54}\) It has also been found\(^{55}\) that merely providing some tax incentives does not induce TNCs to major divestment strategies. Thus, the best source for the actual evolution of divestment arrangements is found less in statutory disinvestment prescriptions than in the history of contractual negotiations and in the contractual documents themselves.

As for petroleum contracts, major petroleum producing countries have started with the New York Agreement of 1972 to establish a timetable for divestment, starting with an immediate state participation level of 25 percent and rising in 1978 to a 51 percent majority. These divestment schemes, however, have by now been passed over by the complete take-over of petroleum TNCs' subsidiaries in the OPEC countries.\(^{56}\)

\(^{50}\) Divestment generally means the gradual increase of ownership by nationals (or government entities) of the host country. It is closely related to an equity joint venture where the ratio of equity holding is stipulated to be stable and is accompanied by provisions providing for options of the host country to buy into the operating company or to participate in any increase in equity capital.

\(^{51}\) See generally Group of Eminent Persons, supra note 6, at 39.


\(^{54}\) latin American Economic Report, Nov. 19, 1976 at 1. For problems with divestment and joint venture, see Franko, International Joint Ventures in Developing Countries: Mystique and Reality, 6 Law and Policy in International Business 315 (1974).

\(^{55}\) See Ness, supra note 52.

\(^{56}\) supra note 35.
As for non-fuel mineral contracts, divestment in the form of options of governments to acquire a (majority) participation in a distant future have been known for quite a while. It is only since 1969 that equity participation by nationals of the host country has become popular in some developing countries, ranging from minority participation until, as more recently, majority participation. Our survey of 77 non-fuel minerals agreements shows that in 29 agreements (particularly before 1971) no state participation at all was contained and that increasingly at least some degree of state participation (mostly between 25 and 49 percent) is stipulated, be it as initial state participation or as a participation target to be reached in 2 to 10 years. In some contracts, the state has a corresponding option to gradually increase either its own participation or the participation of its nationals. In Indonesia, a country which has chosen investment agreements as the preferred instrument to govern foreign investment, our survey of 15 non-fuel minerals contracts shows that up to 1973, the general scheme (with one exception) has been an initial participation of 2 to 5 percent, growing within 5-10 years to ca. 25 percent. Since 1974, however, the growing pressure for locally held equity is reflected in an initial participation of 5-10 percent, with the final participation target of 25-51 percent to be reached within a maximum time of 10 years. Such an analysis, however, does not reflect the actual implementation of the agreements, but more the changing standards of expectation which host countries hold when they negotiate.

**TABLE V**

Non-Fuel Mineral Contracts: National Participation and Disinvestment

<table>
<thead>
<tr>
<th></th>
<th>less than 25%</th>
<th>25%-49%</th>
<th>greater than 49%</th>
<th>(Service Agr.) complete</th>
<th>govt. ownership</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1967</td>
<td>—</td>
<td>1</td>
<td>3</td>
<td>—</td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>1967-70</td>
<td>10</td>
<td>1</td>
<td>5</td>
<td>—</td>
<td></td>
<td>16</td>
</tr>
<tr>
<td>1971-73</td>
<td>6</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td></td>
<td>16</td>
</tr>
<tr>
<td>1974-77</td>
<td>3</td>
<td>5</td>
<td>4</td>
<td>—</td>
<td></td>
<td>12</td>
</tr>
<tr>
<td>TOTAL</td>
<td>19</td>
<td>12</td>
<td>15</td>
<td>2</td>
<td></td>
<td>(TOTAL: 48)</td>
</tr>
</tbody>
</table>

(Only those contracts with national participation provisions were included in the analysis.)

NOTE: 1976 Indonesian Model, is included
10 contracts are from 2° source:
29 of 77 contracts did not contain features of national participation

57. See Smith & Wells, supra note 9, at 131.
### TABLE VI
Indonesia: National Participation (Disinvestment)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Number of Agreements</strong></td>
<td>6</td>
<td>5</td>
<td>4</td>
<td>15</td>
</tr>
<tr>
<td><strong>Initial Local Participation</strong></td>
<td>5-2%</td>
<td>5-?</td>
<td>1-10%</td>
<td>2-?</td>
</tr>
<tr>
<td></td>
<td>1-10%</td>
<td>1-5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Final Participation Goal</strong></td>
<td>5-20%</td>
<td>5-20%</td>
<td>2-25%</td>
<td>2-51%</td>
</tr>
<tr>
<td></td>
<td>1-50%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Number of Years required to reach Goal</strong></td>
<td>1-10 yrs.</td>
<td>5-?</td>
<td>2-10 yrs.</td>
<td>2-?</td>
</tr>
<tr>
<td></td>
<td>2-5 yrs.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>3-?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL: 15</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

A crucial distinction can be made between divestment leading to some degree of national participation and divestment leading to majority ownership. Divestment can be arranged by offering shares to national citizens, to the government, or to the state mining enterprises. Fade-out provisions may set a fixed and invariable pattern of programmed divestment, a timetable for the achievement of certain levels of national ownership, or they may offer to the host government an option to buy shares at certain events or times. This last provision is particularly interesting and may reflect strong bargaining power of the host country. In modern mining agreements, host countries often allow the TNC to explore (at its own risk and cost) and reserve to themselves the option to buy a part (minority, majority, full ownership) of the equity once exploration and feasibility studies are successful. The exercise of the option may be at a pre-fixed reduced price level. Compensation for the investor in such cases takes the form of long-term sales commitments, compensation of exploration costs out of later production/profits, and of some other incentives stipulated. However, such an advantageous deal is only reluctantly accepted by such investors who are intensively interested in developing the mineral (oil, uranium) in question, and who are more concerned about securing a long-term supply commitment than high profits.

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58. See a series of six petroleum agreements of 1974 in Iran. See also Donndorf Cooperative Ventures with Developing Countries (paper for the International Symposium on Uranium Supply and Demand, June 1977).

59. Accordingly, it has often been state enterprises from Western countries, less concerned about profit, but more concerned about security of long-term supply of strategically important energy, which have been ready to accept innovative contractual arrangements. Representative contracts are the 1957 E.N.I. - Joint Ventures, the 1966 E.R.A.P. petroleum service agreements and recently concluded uranium risk contracts, see Donndorf, Formen der internationalen Zusammenarbeit auf dem Energieohstoff — Sektor 33 (1977); Zakharyia, New Directions in the Search for and Development of Petroleum Resources in the Developing Countries, 9 Vand. J. Transnat'l L. 545 (1976).
Of importance in divestment schemes is whether the divestment is to be made by an increase of capital or by a sale of those shares held by the TNC to host country nationals or entities. Valuation of the price of the shares to be used for divestment differs: the various alternatives range from pure market value (over some privileges to nationals), to reevaluated and finally to simple book value. It is important if payment is to be made at once, or by government secured bonds, or, not uncommonly, from the production or the profits of the mining project. Frequently, precise criteria and procedures for valuation are established in the agreement. However, host countries may wish to reserve the negotiations for this important decision for a stage where they already have a higher bargaining power than at the onset of the project. Valuation criteria stipulated in the original contract will invariably reflect the superior bargaining power of the TNC, as contrasted with book value compensation in renegotiated divestment schemes.

As much as divestment is praised and has become popular as a smooth and peaceful instrument to achieve a contractual flexibility and a gradual implementation of the objectives of permanent sovereignty, the concept and its real effects must also be questioned. At first, the price to be paid for divestment will have to be taken into account carefully. A government will have to decide whether it is worthwhile to use its scarce financial resources for acquiring equity in a mining venture, particularly when the equity passes to the government at a time when the mining resources are close to being exhausted. A survey of the timetables for divestment in a number of contracts suggests that governments will often acquire full ownership at a time when the minable resources are close to depletion.

One of the major objectives of divestment is the acquisition of a larger share of the management and control of the venture. This objective can be achieved as well by other means, such as a stipulated right of the government to be represented on the board of directors and on the management level. As far as financial revenues by dividends from equity are concerned, the same result can be achieved by taxes and other levies. Often the very purpose of gradually taking over the control of the investment is being thwarted in spite of progressive divestment by the conclusion of management contracts which grant the decision-making power over management to the

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60. Compensation paid according to nationalizing legislation or relevant renegotiations with the parent companies are increasingly based upon depreciated (sometimes updated) book value, see U.N. Permanent Sovereignty over Natural resources (Annex), supra note 28; Girvan, supra note 29, at 200.

Care should be taken to not overlook the fact that compensation is not only found in cash payments based upon book value, but often, also, on highly advantageous service, technical assistance, and shipping and management agreements constituting the legal form of a continuation of the TNC's presence after nationalization. The compensatory character of such post-nationalization agreements is particularly evident in the management agreements concluded in Zambia and Zaire after nationalization. See Bostock & Harvey, Economic Independence and Zambian Copper (1972), Lukoji, The Structure of Multinational Corporations in Zaire, in Natural Resources and National Welfare, The Case of Copper 271 (Seidman ed. 1975); and in Peru with Marcona Mining, see Gantz, 71 Am. J. Int'l L. 474 (1977).

management contract partner.\textsuperscript{62} Countries which desire to maintain foreign capital once invested should be wary about the capital out-flow effects of divestment programs.\textsuperscript{63} Perhaps provisions relating to reinvestment of capital earned by divestment should be considered as a possible solution. Finally, if no developed stock market and capital exists in the host country, divestment obligations by offerings to local citizens may often not be feasible. In fact, a study on Southeast Asian divestment patterns\textsuperscript{64} found that local participation requirements are met predominantly by divestment to strawmen of national citizenship, the capital outlay for their purchase of shares being financed by loans from the TNC. Thus, local participants were kept under tight reins by the TNC. In other cases, local participation served particularly to acquire local political support in the form of partnership with local strong-men.

Divestment cannot be dismissed completely. It may, in combination with other patterns, gradually increase national control and insert flexibility into the contractual regime. The price of the divestment, who is going to participate, what effects such participation will have in view of the objectives of national sovereignty over natural resources, and what impact divestment will have on the implementation of national control, should be carefully considered. Divestment should be evaluated in comparison with other instruments available with a view toward ensuring maximum effectiveness of the objectives.

\textbf{(e) Most-Favored Provisions}

Another vehicle of revision of contractual terms and conditions is a stipulation that a subsequent grant of better conditions to another party in areas such as fiscal arrangements, price structure, methods of production, and marketing and development of production area may give rise to a right of the party of the first agreement to require the same conditions to be inserted in that agreement. Such most-favored (country or company) provisions stem from the practice of commercial treaties of international law. The grant of better conditions in a subsequent agreement to the party of the first agreement can be stipulated to be automatic, or it may give rise to a right to call for renegotiation of the first agreement. Most-favored company clauses

\begin{footnotes}
\textsuperscript{62} In petroleum, this has been a general pattern. In non-fuel minerals, management contracts of this kind are to be found in the new Panama Copper Contract of 1976 and in the Zambian and Zairean takeover of the foreign owned mining industry.

\textsuperscript{63} Sachdev, Divestment: A New Problem in Multinational Corporation Host Government Inter-face, 16 Management International 23 (1976).

\textsuperscript{64} See Weinstein, Multinational Corporations and the Third World: The case of Japan and South East Asia, 30 Int'l Organization 373-89 (1976).
\end{footnotes}
are quite frequent in some concession contracts. TNC's have thus retained the unilateral right to revise contractual terms in their favor. Such provisions have been criticized. They inhibit governments in their subsequent negotiations and they are difficult to implement, as it is very difficult to single out individual provisions granting better conditions to the subsequent partner from a network of other considerations and stipulations in the whole agreement. The most-favored company clause has accordingly disappeared from sophisticated recent mineral contracts. On the other hand, the rapid evolution of petroleum concessions, normally initiated in one country and "leap-frogging" to other countries, has brought about a larger number of most-favored country clauses, favoring the host country. Such provisions basically function as an instrument to bring about renegotiation within the terms and procedure set by the initial contract, instead of generating unnecessary disputes by forced upon revision of terms and conditions. Those conflicts are caused by the pressure on the host country to adapt its own petroleum concession terms to achievements in other producer countries. An interesting "middle-of-the-way" solution is a short duration (i.e., 5 years) of the initial contract, with a right of the TNC to receive renewal but conditioned on its acceptance of terms agreed by other foreign oil companies which have achieved similar production results. This combination of short-term periods for the duration of the agreement, together with rights for renewal under the terms prevailing at the time of the renewal, appears to be a flexible and mutually acceptable way of adapting mineral contracts without generating unnecessary conflicts.

5. Force Majeure, Assignment, Termination, Renewal

There are a number of other contractual instruments, which occasionally contribute to greater flexibility of the contractual regime, even if their main intention is directed towards other functions. In all those instru-

65. Particularly in agreements of TNCs with Francophone countries in Africa, such provisions favoring the company are very frequent, see, e.g., the Uranium agreement between the Central African Republic (no Empire) and the French C.E.A. of 1969, art. C.F., Journal Official, May 20, 1969, which reads:

Si pendant la durée de la présente convention une autre convention de concession de urines d'uranium est signée par le Gouvernement et un tiers, le CEA en ses ayants droit auront le droit d'obtenir, à leur demande, le bénéfice des clauses de la nouvelle convention s'ils l'estiment plus favorable. A cet effet, une nouvelle convention sera signée par les parties et annexée à un décret modifiant le décret institutif de la concession.


67. See Rouhani, Assignment and Renegotiation (1973). The important O.P.E.C. Resolution XVI. 90 supra note 3, relies strongly on better terms achieved by other countries in a comparable situation as a basis for renegotiation.
REVISION OF AGREEMENTS

ments, a trend towards greater sophistication and towards a contribution to host country sovereignty and contractual flexibility can be observed. The force majeure clause is drafted with increasing precision. In modern agreements, care is taken that any force majeure, beyond the reasonable control of the parties, does not unilaterally increase the obligations of the parties beyond the previous balance. Such a clause may induce some renegotiation once force majeure has taken place and once the consequences of such force majeure change the contractual distribution of costs and benefits.

Agreements, in general, contain a provision as to the assignability of the contract. Traditionally, the TNC was entitled to assign its right from the agreement freely. The current trend, however, increasingly restricts the freedom of assignment: Consent by the state is generally required, and only in some agreement is the state obliged not to refuse such consent without reasonable justification; other restrictions, on assignment, grant to the state, enterprise, a preemptive right to take over the contract or void assignment to companies not domiciled in the host state. Assignment is only facilitated when the assignor and the assignee are identical, and when assignment of a part of the shares is necessary to increase the size of the investing consortium to obtain the necessary financing, provided that the assignor is jointly responsible with the assignee for its obligations arising from the agreement. Accordingly, assignment is certainly not a major instrument for inserting flexibility into the contractual regime. Yet, given the requirement of government consent and a preemptive right, it can facilitate the use of these rights for the host country as a bargaining lever to achieve better terms subsequent to the initial contract.

The same is valid for the renewal clauses. If governments (as they increasingly do) successfully insist on the renewal to be governed by terms and conditions to be agreed at the time of renewal (eventually with a right of first refusal or a privileged negotiation right of the investor), they can adjust the contractual regime to the conditions prevailing at the time of renewal. If the duration of the contract is rather short and various renewals are contemplated, renewal may even become a powerful instrument for a flexible revision.

Governments and TNCs reserve themselves the right to terminate the agreement if certain precisely defined events, such as absence of economic feasibility of the project or default of the other party, occur. Termination as such does not inject flexibility into the contractual regime. However, as a heavy-handed yet quite effective sanction for inducing compliance of the TNC with its obligations under the agreement, it may increase the host country's position in the ongoing bargaining process during the implementation of the agreement. As with all other provisions reinforcing the host country's position vis-à-vis the TNC, careful drafting of termination rights

69. See Rouhani, supra note 9.
70. See Eigen, supra note 68.
and of the consequences will contribute towards national sovereignty over natural resources. Increasingly, the events justifying termination are set down in more detail and encompass a larger range of possible defaults by the TNC. As consequences of termination or expiration of the agreements, all movable and non-movable assets generally become the governments’ property. The TNC will be required to restore any damages done to the land and to recultivate the mined areas.

6. Assurance of Mining Rights in the Phases of Project Implementation

The distribution of costs and benefits from the investment between TNC and host country is decisively determined by the date on which the final and comprehensive contractual regime is negotiated. If such an agreement is negotiated early in the relationship, before the prospection or exploration stage, the TNC’s superior bargaining power will generate terms unilaterally favoring the investor. Such unilateral distribution of benefits increases the probability of later demands for renegotiation by the host country once the project’s uncertainty and risk have disappeared and once the project turns out to be highly profitable. A major objective in generating long-term stability of the contractual regime by injecting flexibility into the relationship between TNC and host country is a postponement of the decisive negotiations until such date when the uncertainty and risk surrounding the project have been considerably reduced. Such a point is reached when the very risky and costly exploration and feasibility study have been completed and when full information is available on the technical and economic realities of the mining project. This objective, i.e., the postponement of the final negotiations, conflicts, however, with the necessity of providing incentives for the TNC’s sufficient to engage them in the risky and costly pre-production activities.

Accordingly, a number of developments have taken place which allow postponing the date of the negotiations for the final agreement. One possibility is that the TNC undertakes exploration with a specific exploration agreement which does not cover the later terms of the production regime. Here, the investor needs at least a promise of cost recovery in case the exploration is successful. This has been the practice in two recent major copper projects. Investors can rarely be induced to undertake exploration if they do not receive a right of first negotiation, a right of first refusal, a premium for successful exploration, or some other sufficiently substantial financial incentive. The exploration agreement may also cover only basic issues of a subsequent production contract, such as the target rate of return

71. See Kirchner, Schanze, Schlabrendorff, Stockmayer, Wäde, Fritzsche & Patzina, Rohstofferschliessungsvertragen in Entwicklungsländern, 301 (1977); Moran, supra note 32, at 154.
72. See Eigen, The Negotiation Environment for Mining Agreements (1976).
73. In two major recent copper projects, the O.K. Tedi project in Papua New Guinea (exploration undertaken by Kennecott) and the Cerro Colorado project in Panama (exploration undertaken by Canadian Javelin), the new agreement with DAMCO in Papua New Guinea and with Texas Gulf (Panama) are apparently based upon the understanding that the exploration costs will be refunded by the host country or the project company to the exploration company.
and the basic features of the contract to be negotiated after the feasibility study has been finalized.

The entry of home government entities, created not to maximize profits, but to secure long-term minerals and energy supplies (petroleum, uranium) by undertaking risky exploration and production in developing countries, has also favored a postponement of the date of final negotiations. Such government entities may be satisfied with a lower rate of return, with a contractual form as required by the host government and by minority joint venture or service contract forms, if they receive at least a guarantee of a long-term supply of the production. Accordingly, arrangements with government entities appear to satisfy host country aspirations to a larger degree than arrangements with TNCs. Finally, the capacity of host countries to undertake exploration efforts on their own, supported by technical development aid and by the UN revolving fund,73 enhances their ability to negotiate with TNCs at a more favorable date to reach a mutually acceptable agreement than if negotiated before the uncertainty has been removed.

It can be expected that this trend of negotiating the major components of mining contracts after exploration, either in the form of service, management, or joint venture and concession contracts, will strengthen the stability of contractual regimes and support host countries' aspirations for permanent sovereignty.

7. Legislative and Administrative Measures to Enhance Contractual Flexibility

The measure employed by host countries to unilaterally change the terms of mineral extraction have already been mentioned: the exercise of legislation powers to change the contractual regimes.

Also of interest are administrative measures provided in investment regulations and administered by investment boards to control the performance of the agreement by the TNC. Such measures can effect a revision of the agreement. One instrument (Colombia) used for such purpose is the authorization even of long-term contracts only for a short term (e.g., 3-5 years). Such short-term authorization leaves enough leverage with investment board to urge a revision of the contractual regime once the implementation of the contract or the change of circumstances require such a change.76

74. This is the case with the Brazilian German Uranium-nuclear energy cooperation agreement, see Donndorf, supra note 58. The 1974 Iranian petroleum service agreements with Ultramar; Deminex, A.G.I.P., Ashland and C.F.P. provide, inter alia, that the:

General Contractor shall conduct and perform all the necessary operations . . . supply N.I.O.C. [the Iranian Petroleum State Enterprise] with funds necessary . . . [and that] operations shall be carried out at the sole risk of the General Contractor.

In the case of commercial production, the fund, supplied by the contractor shall be reimbursed, "As remuneration for services rendered for exploration and development, N.I.O.C. does guarantee the sale of certain quantities of petroleum produced from the field . . . developed by the general contractor." Id.


76. Such a system of periodic administrative review and authorization allows a continuous monitoring of the TNC's performance.
VI. CONCLUSION

The survey of basic legal concepts, of actual renegotiations, and of the evolution of the various instruments in legislation, in administration and in mineral agreements between TNC's and host countries, reflects the reality and the necessity for constant adjustment of mining investment in developing countries. The experience of the regimes for mineral extraction in major developed mineral producers (Australia, Canada) is quite similar. The conclusion to be drawn is that a careful and continuous learning process relating to the negotiation and the drafting of the regimes for mining investment by TNC's has to adjust to these facts. The more the unavoidable changes and revisions can be channeled by agreed procedures, the more unnecessary costs of conflicts imposed on both parties can be avoided. In negotiating such regimes, care must be taken not to overvalue any individual concept of achieving contractual flexibility because of the symbolic value and the praise it may have received. Analysis brings out the dependencies, weakness, and costs involved in choosing the various instruments available to implement such a policy of gradual revision. Accordingly, care must be taken to undertake a cost/benefit analysis of these instruments in view of the objectives held by host countries, to recognize the important linkages of various instruments in achieving flexibility within the major areas of a mining regime: fiscal matters, economic performance objectives, dispute settlement mechanisms, and financing. The analysis has also shown that objectives can often be reached by various instruments or by combinations, and no single concept deserves absolute preference over others. The current trend of injecting contractual flexibility into mining investment regimes can be expected to continue until the main objectives of permanent sovereignty over natural resources is reached and until the high dependency of developing countries on the volatile world markets for their natural resources has been reduced.


78. Long-term stability will in the end not come about by legal instruments alone, but by a system of mutual interdependence between the parties concerned. As long as the foreign investor continues to render services of value to the host state and as long as the agreement is fashioned flexible enough to adjust to the fast transition of the social, economic and political structures of Third World countries, stability of the relationship as such — not only of the individual investment regime — is likely to exist. TNC's interested in obtaining such an "ultra-stability", i.e., a flexible stability, will hence seek to put their development potential to the service of the economic development objectives of host states. I have attempted to analyse the relationship between economic development performance of the TNC and stability of investment terms in an article for Law & Policy in Int'l Business (forthcoming) entitled The Integration of Natural Resources Investment by TNC's into the National Economy of Developing Host Countries.