

THE CLAIM TO PARTICIPATION IN EXISTING OIL CONCESSION AGREEMENTS — EVOLUTION AND LEGALITY

by GUNTER MULACK

Introduction

In the relationship between industrialized and developing countries direct private corporate investment is the most important private contribution to the economy of developing countries but it is also politically the most sensitive¹. The developing countries often regard the private foreign investors as the heralds of new foreign domination and thus as successors of the colonial powers. On the other hand they realize that foreign private investment is a very important if not indispensable element for the economic growth and development of their countries. In their struggle for economic independence the new States try to incorporate foreign enterprises into their domestic economy and to achieve thus more control over the activities of the foreign investor. One of the most vital sectors of the economy where private companies still play an unique rôle is the international oil industry. With the acceleration of development in the oil exporting countries their governments have recognized the value of oil for their national economies. They not only try to maximize the oil revenues but become more and more concerned with the indirect benefits which they could gain through participation in the petrochemical industry. Thus they attempt to modify the terms of concessions not only in order to further increase their revenue but also to acquire managerial control over and participation in the whole process of the oil business. To coordinate their petroleum policy on an international level the producing countries have created a special organization, the OPEC². OPEC has proved to be a powerful counterpart in negotiations with the international oil companies and has effectively advocated the interests of the oil exporting countries, as the recent negotiations at Teheran have proved once again³. In addition to the demands for higher financial benefits the OPEC member countries have asked for revision of the existing oil concession agreements in order to achieve more effective control over and an at least equal participation in all existing oil agreements. The exporting countries substantiate their claim with reference to the fundamental change of circumstances which has taken place in the relationship between companies and concession granting states since the conclusion of the major concession agreements. They refer to the concept of permanent sovereignty over natural resources and in a more specific reasoning to the "rebus sic stantibus"-doctrine. The oil companies are very reluctant to submit to these demands and instead refer to the principle of sanctity of contracts. The controversial issue is not whether the producing countries have a right to nationalize the operating

1 Cf. Pearson, "Partners in Development", New York 1969, p. 99 et seq.

2 The "Organization of Petroleum Exporting Countries" was established in 1960 as an intergovernmental organisation for regular consultation among its members and for a coordination of their petroleum policies. Cf. Swamy and Jaidah, "OPEC and the strategy of oil" in: *Inter Economics* (1968) 309 et seq.

3 The requirements of the OPEC member countries bordering the Gulf laid down in OPEC-Resolutions XXI. 120 and XXII. 131 were met by the oil companies in the Teheran Price Agreement, publ. in "Middle East Economic Survey" vol. XIV, No. 17 suppl. of Febr. 19, 1971.

companies against payment of compensation — as it recently happened in Algeria⁴ — but whether they have the right to demand revision of the existing agreements in order to insert respective participation clauses. In the following the attempt will be made to investigate whether there is any legal basis for the claim of the producing countries. In this connection it is necessary to give a short survey of the company-state relationship in the oil business.

I. The Oil Companies' Relationship to the Producing Countries

A) The Legal Framework

The legal bases for the operations of foreign oil companies in the producing countries are the concessions or as they are called nowadays the oil concession agreements. In such an agreement the state usually grants to the foreign company exclusive rights for the exploration, exploitation, processing and exporting of oil within a specified area over a long period of time ranging between 50 and 75 years⁵. The areas assigned under such concessions, if not comprising the whole territory of the granting state, are huge⁶. In return for the grant of the concession the Government receives cash payments, royalties and tax payments, not to forget the many ancillary benefits like construction of roads, ports, housing facilities and schools, medical service and transfer of technical and managerial "know how"⁷. Under these concessions the operating companies obtained an almost complete freedom of action and independence of the host country and often formed a "state within the state".

Oil concessions of this scope are not a narrow form of contract under which the companies obtain some property rights. They are more akin to international economic agreements and are often called "economic development agreements". This concept takes into account the important contribution of these ventures to the economic development of the host country⁸. The question as to the legal character of these agreements has given rise to controversial discussion.

B) Legal Character of Concession Agreements

Because of the economically, though not legally equal standing of the parties — often there is even a superiority of the company — and the formal procedure which is applied to oil concession agreements, like: approval by the legislature of the granting state, ratification in form of a statute etc., these agreements have been said to be subject to international law⁹. But even if we recognize the

⁴ On February 24, 1971 President Boumediène announced the nationalization of all pipelines, natural gas resources and 51 % of the shares of the French oil companies operating in Algeria, see „Le Monde" of February 26, 1971. The nationalisation decree is published in the Algerian „Journal Officiel" of February 25, 1971.

⁵ Most of the early concessions have a duration of 75 years, the Aramco-concession 60 years, see "Middle East Economic Survey", (MEES), vol. XII, No. 1, suppl. of November 1, 1968.

⁶ Under the Aramco-concession, e. g., the exclusive concession area amounted to about 495,000 square miles, which is roughly the size of Arizona, Texas and New Mexico combined, see "Aramco-Handbook", Dhahran 1968, p. 112.

⁷ Cf. Lenczowski "Oil and State in the Middle East", Ithaca 1960, chapter III; Aramco Annual Report 1968.

⁸ See Bourquin "Arbitration and Economic Development Agreements" in: 15 Business Lawyer (1960) 99 et seq.; Fleming "States, Contracts and Progress", New York 1960, p. 31; Friedmann "The Changing Structure of International Law", London 1964, p. 177 with further references.

⁹ Thus Mann, "The Law Governing State Contracts", in: 21 B. Y. I. L. (1944), 11 et seq.; cf. Friedmann, op. cit., p. 174.

international elements of these agreements and take into consideration such facts as their exemption from the national jurisdiction of the granting state by insertion of special international arbitration clauses and other exemptory clauses¹⁰ these agreements cannot be regarded as being treaties under the regime of international law. Though these agreements often deeply affect international relations, considering their high political and economic importance, and are concluded between the parties on practically the same level, the private corporation has no international legal status equal to that of the contracting state. Even if today under international law private persons are granted certain rights, it is recognized and undisputed that private corporations do not have the capability to conclude treaties¹¹. As the oil companies are not subjects of international law their agreements concluded with the producing States cannot be international treaties. Without going now into the extensive discussion on the specific legal character of oil concessions we may state here, taking into account the special features of the concession agreements and their international element, that these agreements are "sui generis" and do not fit into any preconceived category of the traditional law. Most writers regard them as being subject to "transnational law" or more specifically to "the general principles of law recognized by civilised nations"¹².

There is, however, a strong tendency in the producing countries to deny any legally international character of these agreements and to regard them as "administrative contracts" subject to the national law of the concession-granting State¹³. Though the stand-point of the producing countries may become relevant in the future with regard to recently concluded new types of agreements, it is unacceptable as concerns the traditional concession agreements. Those agreements are expressly exempted from the national jurisdiction by insertion of international arbitration clauses and choice of law-clauses which exclude the applicability of national law of the concession-granting state. The important concession agreements with regard to which the revision and insertion of participation clauses is now being demanded belong to this traditional type of concessions which are not subject to the national law of the concession-granting state.

In order to analyse the claim of the producing countries it seems necessary to give a short survey of the economic and political background of these concessions.

C) The Economic and Political Background of the Early Concessions

Most of the important concessions existing today were granted between 1920 and 1939¹⁴, when political and economic circumstances completely different from those of today were prevailing. The concession-granting governments were politically weak or even colonies of the Western states to which the concession-holding oil companies belong. Oil is a strategically very important material and thus the

10 Cf. Cattan "The Evolution of Oil Concessions in North Africa and the Middle East", Dobbs Ferry 1967, p. 100; Friedmann, op. cit., p. 177.

11 Kelsen, "Principles of International Law, New York 1952, p. 322; Berber "Lehrbuch des Völkerrechts", vol. I, München 1960, p. 113; Mosler "Die Erweiterung des Kreises der Völkerrechtssubjekte", Berichte der deutschen Gesellschaft für Völkerrecht, Heft 4, Karlsruhe 1961, p. 55 et seq.

12 Cf. Cattan "The Law of Oil Concessions in the Middle East and North Africa", Dobbs Ferry 1967, chapter III and IV; Friedmann, op. cit., p. 173 et seq. with further references.

13 Cf. recently Ashoush "Oil Concession Contracts and the Power of the State to Modify them", paper read at the 7th Arab Oil Congress 1970. also; Sultan "Legal Nature of Oil Concessions", in: 21 Revue Egyptienne de Droit Int. (1965), 73 et. seq.; Suqir and Tahab "Itti'afiyat wa uqad al bitrūli fi al-bilād al 'arabiyat" (Oil concessions and contracts in the Arab countries), Cairo, 1959, p. 41 et seq.

14 Cf. Durand "La Politique Pétrolière Internationale", Paris 1962, p. 39 et seq.

home governments of the oil companies were very interested in gaining access to oil resources. The oil companies had the full support of their home governments, which often used their influence and power in order to obtain optimal conditions for their oil companies¹⁵. In many respects it appeared as if the national interest of the home governments were identical with the commercial interest of their oil companies. Soon a group of internationally operating oil companies known as the "Majors"¹⁶ controlled practically the whole oil industry and owned production areas in all parts of the world. Up to the Second World War these seven "Majors" possessed a virtual monopoly in the oil industry. The structure of the relationship between these companies and the producing countries was lying wholly within the framework of classical colonial situation.

The situation came to a gradual change after the Second World War when the political influence of the colonial powers was weakened and most oil producing countries became independent states. With the growing importance of the oil supply for the industrialized countries especially the European economy became more and more dependent of a continuous oil supply from the producing countries. On the other hand the oil revenue assumed growing importance for the producing countries as it was the only resource for financing their economic development. This interdependence shifted the balance of power between companies and states in favour of the latter. Thus many new concepts could be introduced in the oil agreements, the most important being the concept of equal sharing of profits and a general increase of financial obligations¹⁷. Moreover, there was a general change in the attitude of the producing countries vis-à-vis the international oil companies.

D) Towards Economic Nationalism

During the last fifteen years the producing countries have become aware of the importance of their natural resources for the development of their national economies and recognized the need for a change in their rôle as mere tax collectors. They strove for a more active part in the disposal of their natural resources and were no longer willing to grant the foreign investors complete freedom of action in the exploitation of their natural resources¹⁸. Up to that stage the foreign companies did not take into account the needs for an integration of their enterprises into the domestic economy of the host country. They constituted economic exclaves virtually isolated from the structure of the native economy and wholly managed by foreigners. This was partly due to the fact that an integration of the highly developed oil industry into the completely underdeveloped native economy was virtually impossible in the early stage of the companies' activities. But the situation has changed and the developing countries, after having achieved political independence, were demanding economic autonomy

15 Cf. Al-Pachachi "The Development of Concession Arrangements and Taxation in the Middle East" in: MEES vol. XI, No. 22 of March 29, 1968.

16 See Evan "The Multinational Oil Company and the Nation State in: Journal of World Trade Law (1970) 666 et seq. The "Majors" are: Standard Oil of New Jersey, Shell, BP, Mobil, Socal, Texaco, Gulf and to a certain extent Compagnie Française des Pétroles.

17 For details see Cattani "The evolution . . .", chapter II, III, IV.

18 The producing countries formulated their new petroleum policy on the biennial sponsored "Arab Petroleum Congress" and after 1960 in the OPEC forum.

19 The examples are too numerous as to cite here. As to the oil industry there has been a wave of nationalization in South America starting with Cardenas, who nationalized in 1938 the Mexican Petroleum Industry.

and control over the activities of the operating companies. Without greater influence in and control over the operations of foreign companies comprehensive programs of economic planning with a view to marshalling all the potential of a country for the purpose of its economic development cannot be undertaken and carried out. A growing economic nationalism which was also based on many irrational factors, eventually led to the complete nationalization of foreign investments¹⁹. This proved impossible in the Middle East oil industry as the failure of the nationalization of the Anglo-Iranian Oil Company in 1951 by Mossadeq has demonstrated. None of the producing countries controls a decisive share of the world oil production and the world oil market is almost completely controlled by the "Majors". Thus under the economic pressure of the Great Powers Iran was not able to operate its own oil industry and therefore in 1954 concluded the consortium agreement, which again allowed foreign companies to operate in Iran²⁰. Though the entrance of other, so-called independent oil companies into the oil business has reduced the market power of the "Majors" and led to a certain degree of competition in the oil business, the situation has not changed substantially. The "Majors" still have the essential control over the production, refining and distribution of oil on the world market. The producing countries have become aware of this situation. But though their bargaining power has increased they have avoided any direct clash with the international oil companies. They have realized the importance of acquiring managerial control over the oil companies in order to gain influence and experience in all operations of the oil industry.

E) The Concept of Participation

The old concession patterns were replaced in virtually all new agreements by the "joint venture"-formula, under which the producing countries secured an equal participation in the management of the operation company and an even higher financial participation²¹. Furthermore the joint venture is subject to control by the producing country²². The latest step in this continuous increase of governmental supervision of the oil activities of foreign companies was the conclusion of so-called "service contracts" with several foreign companies in Indonesia and also with the French state company ERAP in Iran and Iraq²³. Under these arrangements the foreign oil companies become mere contractors to the national oil companies of the producing countries and the operations are subject to the complete control of the producing country.

This constitutes the most radical departure from the previous pattern under which the concessions were exempted from any national supervision or interference. This innovation has up to now been restricted to newly concluded agreements with independent companies, which were willing to fulfill these new conditions in order to get the badly needed share in the oil market.

²⁰ See Longrigg "Oil in the Middle East", 3rd. ed., London 1968, p. 171-176 and p. 276—279.

²¹ Actual participation on a partnership basis became a reality under the NIOC-AGIP joint venture agreement concluded 1957 in Iran, see Wall "The Iranian-Italian Oil Agreement of 1957" in: ICLQ (1958) 736 et seq.

²² Al-Padachi, op. cit.

²³ For Indonesia cf. Hunter "The oil industry. The 1963 agreements and after" in Bulletin of Indonesian Economic Studies No. 2, 1965, p. 16 et seq.; for the Middle East cf. Amin "Petroleum Agreements in the Arab and other Oil Producing Countries" in: L'Egypte Contemporaine (1968), p. 110 et seq.

F) The Claim of the Producing Countries vis-à-vis the “Majors”

Even though several revisions of the old concessions have taken place the “Majors” are not willing to resign their freedom of action and decision-making which allows them to regulate the oil flow and thus to dominate the market²⁴ as well as to determine the prices, a position which they do not want to share with the producing countries. In order to achieve greater influence on the price determination and participation in the decision-making process of the oil industry the producing countries claim an at least equal participation in those existing concessions which do not provide for participation.

This new policy is stated expressly in the OPEC-Resolution XVI.90 of June, 1968²⁵ which reads under the title Participation:

“Where provision for Governmental participation in the ownership of the concession-holding company under any of the present petroleum contracts has not been made, the Government may acquire a reasonable participation, on the grounds of the principle of changing circumstances. If such provision has actually been made but avoided by the operators concerned, the rate provided for shall serve as a minimum basis for the participation to be acquired.”

In another part of this Resolution under the title “Mode of Development” it is stated under 3.:

“. . . in any event, the terms and conditions of such contracts shall be open to revision at predetermined intervals, as justified by changing circumstances. Such changing circumstances should call for the revision of existing concession agreements.”

These demands have ever since been expressed in all official declarations²⁶. The producing countries based their claims on “changed circumstances” and on the concept of “Permanent Sovereignty over Natural Wealth and Resources”. The opposed “Majors”, who are the targets of these claims, have, however, rejected them and disputed their legality by pointing to the principle “pacta sunt servanda” according to which the producing countries remain bound by their concession agreements²⁷.

II. Possible Legal Bases for the Claims of the Producing Countries

Having in mind the unique legal character of oil concession agreements, i. e. their being transnational and thus subject to the general principles of law or to basic principles of International Law, we shall now try to find out whether there is any internationally recognized norm which would support the producing countries’ claim for participation and revision, and eventually justify an unilateral change. Before dealing with the concept of changing circumstances we will analyse the notion of Permanent Sovereignty and its impact.

24 Engler “The Politics of Oil”, Chicago 1961, p. 76 et seq.

25 Published in the OPEC Bulletin of August, 1968.

26 Thus Zakariya on the 7th Arab Petroleum Congress in Kuwait, March, 1970; cf. Seymour “Quiet Congress in Kuwait” in: MEES vol. XIII, No. 24, suppl. of April 10, 1970.

27 See, e. g., Wadmond “The Sanctity of Contracts between a Sovereign and a Foreign National”, Proceedings ABA sect. Mineral and Natural Resources Law, (1957), p. 177 et seq.; cf. also the statement of Brougham, President of Aramco, in MEES of December 20, 1968.

A) The Concept of Permanent Sovereignty over Natural Wealth and Resources

1) The UN Resolutions — their genesis

It was in 1952 that the concept of permanent sovereignty was first discussed in the United Nations²⁸. In the first stage the UN delegations of the developing countries were trying to achieve in this way an international recognition of their right to nationalize foreign property in their respective countries. This movement was supported by the socialist States but strongly opposed by all capital exporting members of the UN²⁹. In 1952 a Resolution was passed in which “the right of each country freely to use and to exploit its natural wealth and resources” was affirmed though the right to nationalize was not embodied due to the influence of Western states³⁰. With this resolution the concept of permanent sovereignty over natural wealth and resources was inaugurated. During the following years the developing countries tried to further elaborate this concept and a second resolution on this subject was passed in 1960³¹. The attempts to clarify this notion focused on the 1962 Resolution which declared that “the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned”³². The resolution in several other paragraphs stressed the importance of the permanent sovereignty but also stated expressly: “Foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith”³³.

Emphasizing the importance of the national economic interests of the states concerned and their right to regulate and supervise the use of their natural resources, this resolution had not so much the aim of confirming the right to nationalize, which today is recognized under International Law, but “to enable the underdeveloped countries to seek equitable corrections of the old regimes of cooperation between the state and the foreign corporation in a way that will ensure the optimum employment of their natural resources for the strengthening of their underdeveloped economies”³⁴.

2. The Right of Economic Self-Determination

In addition to the several resolutions on permanent sovereignty which the General Assembly has passed, the UN Commission on Human Rights also dealt with this question in the context of the elaboration of the Human Rights Covenants. The “International Covenant on Economic, Social and Cultural Rights” (hereafter ECSC) as well as the “International Covenant on Civil and Political Rights” (hereafter CPC), in their identical Article 1 paragraph 2 contain the following provision:

28 See Mughraby “Permanent Sovereignty over Oil Resources”, Beirut 1966, p. 16; Brehme “Souveränität der jungen Nationalstaaten über Naturreichtümer”, Berlin (East) 1967, p. 47 et seq.

29 Brehme, op. cit., p. 51 et seq.

30 Resolution 523 (VI) of February 12, 1952, see Brehme, op. cit., p. 48.

31 UN Resolution 1515 (XV) of December 15, 1960.

32 Resolution 1803 (XVII), I lit. 1; cf. Banarjee “The Concept of Permanent Sovereignty over Natural Resources — An Analysis” in: 8 Indian J. of Int. L. (1968) 515 et seq.

33 Resolution cit., I lit. 6.

34 Mughraby, op. cit., p. 39.

"All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.³⁵"

This provision has substantially been included in all drafts of the Covenants since the beginning in the 1950s. Whereas the provision clearly refers to existing obligations arising out of contracts or agreements concluded with investors, it is somewhat strange to find another provision in the Covenants, namely Article 25 of the ECSC and Article 47 of the CPC which read:

"Nothing in the (present) Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.³⁶"

This rule seems to annul the reservation concerning existing contractual obligations and thus to affirm an absolute right to override existing obligations, though this is not clearly expressed³⁷. These examples may suffice to show the efforts of the developing countries within the UN to ensure their sovereign rights over natural resources on an international basis.

3) The Legal Significance of Permanent Sovereignty

In spite of the growing importance of UN resolutions for the international community their legal nature is very disputed. Socialist writers attribute to them full legal force whereas Western writers widely recognize their political importance but deny their binding force³⁸. It cannot be contested that these resolutions have a high political value and that they do influence the conduct of international relations but this does not give them any binding force in a legal sense³⁹. The resolutions are issued as declaratory statements and are in themselves not formally binding rules of law. The General assembly has no formal legislative competence and therefore the resolutions cannot be regarded as being sources of international law⁴⁰.

This lack of legislative competence does not exclude, however, the possibility that the General Assembly through its practice may contribute to the development of customary international law. In our age of highly developed information systems and close communication and cooperation of all states in the United Nations system the formation of customary international law is facilitated and accelerated. Through discussion and passing in form of resolutions of certain principles these may become, after subsequent practice, rules of customary International law. If, as is the case with the resolutions on permanent sovereignty,

35 Resolution 2200 (XXI) of December 16, 1966, publ. in 30 ZaöRV (1970) 349; see also Halperin "Human Rights and Natural Resources" in 9 William and Mary L. R. 770 et seq.; cf. further: Schwelb, "Human Rights and the Teaching of International Law", 64 AJIL (1970) 355 (358—361).

36 Halperin, op. cit.

37 *ibid.*, p. 772.

38 For the socialist view see Brehme, op. cit., p. 71 et seq., for the Western writers di Qual "Les Effets des Résolutions des Nations Unies", Paris 1967, p. 119 et seq.; Castañeda "Legal Effects of United Nations Resolutions", New York 1969, p. 168 et seq.

39 See also Hyde "Permanent Sovereignty over Natural Wealth and Resources" in: 50 AJIL 855.

40 Cf. the statement of Judge ad hoc van Wyk in the South West Africa Cases: "Applicant's contention involved the novel proposition that the organs of the United Nations possessed some sort of legislative competence . . . it is clear from the provisions of the charter that no such competence exists, and in my view it would be entirely wrong to import it under the guise of a novel and untenable interpretation of Article 38 (1) (b) of the Statute of this Court", in: South West Africa Cases, Judgment, Merits (1966) I. C. J. Reports, p. 170; see also Higgins "The United Nations and Lawmaking: the Political Organs", in: 64 AJIL (1970), Proceedings of the 64th Annual Meeting, p. 43.

certain principles are repeatedly confirmed by the overwhelming majority of member states acting with a general "opinio juris", these principles may be regarded as becoming rules of customary international law. Therefore a number of progressive publicists attributes an increasing legal significance to the General Assembly resolutions⁴¹.

The precise extent, however, to which the principles of permanent sovereignty is legally significant, is highly disputed. Certainly it is an affirmation and clarification of the concept of sovereignty. But it is doubtful whether it carries any further legal meaning. What could be relevant regarding the claim of oil producing countries for revision and insertion of participation clauses in the oil concession agreements, is the latest UN resolution dealing with natural resources, 2158 (XXI) of November 25, 1966 which reads under I.5:

"(the GA) Recognizes the right of all countries, and in particular of the developing countries, to secure and increase their share in the administration of enterprises which are fully or partly operated by foreign capital and to have a greater share in the advantages and profits derived therefrom on an equitable basis, with due regard to the development needs and objectives of the peoples concerned and to mutually acceptable contractual practices . . .⁴²"

This paragraph might serve as a legal basis for the claim of the producing countries to obtain participation in all existing concessions, if we could attribute a legal significance to this resolution. Socialist writers generally recognize the concept of permanent sovereignty, as laid down in the different UN resolutions, as being a valid principle of international law⁴³. Most of the Western writers deny this and regard the permanent sovereignty as a politico-economic concept which has only limited bearing in a legal sense and must be seen in connection with existing international law⁴⁴. If we regard the resolutions constantly repeating the concept of permanent sovereignty as a method of generating a custom, we must observe, however, that though the majority of the General Assembly affirmed this principle, major Western states like the United States, the United Kingdom and France have, during the discussions, objected to this principle. The consistent polarization of views in the forum of the UN in this specific context is to be regarded as evincing a lack of consensus on the legal significance and bearing of the principle of permanent sovereignty. Hence we might say, that, although the principle is basically recognized and thus as a clarification of the principle of sovereignty has a certain legal validity, no further specific customary legal rule can be derived from the resolution at the present stage. The further elaboration of the principle of permanent sovereignty and subsequent practice and recognition by the great majority of states may, however, lead to acceptance as a rule of customary law.

At the present stage, therefore the producing countries may not base their actions on the specific rules issued in UN resolutions because these specific rules are not yet recognized legal norms. Furthermore it is nowhere expressly stated that

41 Cf. Falk "On the Quasi-Legislative Competence of the General Assembly" in 60 AJIL (1966) 782—791; also Onuf: "Professor Falk on the Quasi-Legislative Competence of the General Assembly" in: 64 AJIL (1970) 349—355; Higgins, op. cit. all with further references.

42 UN-Yearbook 1966, p. 334.

43 See Brehme, op. cit., p. 58 et seq.; cf. also the Sowjet resolution draft proposal, in: *Revue des Nations Unies* 5, 1961, p. 59.

44 Fischer "La souveraineté sur les ressources naturelles" in: 8 *Annuaire Français de Droit Int.* (1962), p. 518; Böckstiegel "Die allgemeinen Grundsätze des Völkerrechts über Eigentumsentziehung", Berlin 1963, p. 54; Hyde, op. cit., p. 855.

developing countries may legally abrogate existing agreements. On the contrary, Resolution 1803 (XVII) reaffirms the binding force of investment agreements⁴⁵. By way of summary we may state, that neither the UN resolutions nor the UN Covenants on Human Rights provide a legal basis for the claim of the oil producing countries, though they do support, on a political basis, the claims of the producing countries.

B) The “*clausula rebus sic stantibus*” as Legal Basis

As we have pointed out, the developing countries substantiate their claims also with reference to the “*rebus sic stantibus*” doctrine or principle of “changing circumstances”. The investors deny the validity of this doctrine as a legal principle and oppose this reasoning. In the following we propose to analyse the existence of “*rebus sic stantibus*” as a legal principle and its applicability in general, before applying the principle to the disputed concession agreements.

1) “*Rebus sic stantibus*” in International Law

It was primarily under international law that the doctrine has been developed and is still being discussed⁴⁶. Though concessions are not as such governed by international law, we will analyse the existence and range of “*rebus sic stantibus*” under international law, because this reflects the international attitude towards this doctrine and is therefore relevant for the transnational agreements.

a) Evolution of the doctrine

The origin of the doctrine “*conventio intellegitur rebus sic stantibus*” is to be found in Roman private law elaborated by the Glossatores⁴⁷. It was later introduced into international law by Grotius in his famous treaties „*De Jure Belli ac Pacis*”⁴⁸. Ever since all writers on international law refer to the doctrine and numerous articles and special monographs have been dedicated to its discussion⁴⁹. Most international jurists seem to have confined themselves to a mere repetition of what their predecessors had said before them, though some new aspects have also been developed. For the history of the development of the doctrine and the importance of German publicists like Klüber and others who understand it as a tacite clause ending the validity of treaties when certain circumstances whose existence was supposed necessary by the parties changed in essential respects⁵⁰, we may refer to the Comment on Article 28 of the Harvard Draft Convention on the Law of Treaties which gives an excellent survey of the

45 Cf. above, footnote 33.

46 See Van Bogaert “Le sens de la clause *rebus sic stantibus* dans le Droit des Gens actuel”, in: 70 Rev. Générale de Dr. Int. Public (1966), p. 49—74.

47 Cf. Oppenheim “International Law”, vol. I, 8th ed. by Lauterpacht, London 1955, p. 939 note 2, also McNair “La Terminaison et la Dissolution des Traités”, in 22 Recueil des Cours (1928), p. 469.

48 Liber II, cap. XVI, § XVII, § XXV.

49 See Berber, op. cit., p. 459 et seq. with further references; cf. also the bibliography given by Schaumann “*Clausula rebus sic stantibus*” in Strupp/Schlochauer, Wörterbuch des Völkerrechts, vol. I, Berlin 1960, p. 291; Brierly, “The Law of Nations” 6th ed., Oxford 1963, p. 35.

50 Klüber “Europäisches Völkerrecht”, Stuttgart 1821, p. 266 et seq.

evolution of this doctrine by international legal publicists⁵¹. Among more recent writers the doctrine has found acceptance as a principle of international law⁵². Even Lauterpacht, a determined advocate of the opposed principle “*pacta sunt servanda*”, recognizes the validity of “*rebus sic stantibus*” when he says: “It is clear that the Court (i. e. PCIJ) was prepared to recognize the principle that the change of conditions may have an effect on treaty obligations⁵³.” Even if there are also writers denying the validity of “*rebus sic stantibus*” we can say that the overwhelming majority have recognized the “*rebus sic stantibus*” doctrine as a principle of international law⁵⁴.

b) Meaning of the doctrine.

While it is true that the precise meaning of the doctrine has not been strictly defined in any international judgment and that there are different opinions concerning its range of applicability we will try to summarize the discussion and outline the general consensus. Mainly three different theories have been discussed. The classical theory, which has lost significance, said that every treaty contains a tacit clause which provides that the treaty has obligatory force only so long as things stand as they were at the time of its conclusion. A second theory says that the clause becomes effective in case of a fundamental change in the circumstances under which the contracting parties had concluded the treaty with the understanding that these circumstances would prevail. The third theory presupposes, for the operation of “*rebus sic stantibus*”, the existence of objective criteria such as a fundamental change which affects the “basis” or the “essential” of the treaty relationship (objective theory)⁵⁵. These three groups of theories are discussed and disputed in several variations.

Whereas the aim of “*rebus sic stantibus*” as seen by earlier publicists is the termination of the treaty, recent writers emphasize the revision of the treaty as result of an application of the “*rebus sic stantibus*” doctrine⁵⁶. Summing up the different opinions, we may say that the clause will come into effect when the following conditions are fulfilled⁵⁷:

- a) There must be an objective change of the factual situation, a change in motivation is not relevant.
- b) This change must affect the basis of the treaty.
- c) The change has not been foreseen at the time of conclusion of the treaty.
- d) The change must not have been caused by the party who invokes the “*rebus sic stantibus*” doctrine.
- e) The change of circumstances must have been such a fundamental one that the basis of the relationship is so heavily affected that the party concerned cannot be expected “*bona fide*” to adhere any longer to the treaty.

51 See 29 AJIL (1935), Suppl. p. 1096—1126, especially p. 1097—1102.

52 Oppenheim, op. cit., p. 939; Rousseau “Droit International Public”, 4th ed., Paris 1968, p. 74; Berber, op. cit., p. 459 et seq.; Schaumann, op. cit., p. 289 et seq.; Friedmann, op. cit., p. 300 et seq.

53 in “The Development of International Law by the Permanent Court of International Justice”, London 1934, p. 43.

54 Cf. Schaumann, op. cit.; Van Bogaert, op. cit.

55 Berber, op. cit., p. 461.

56 See Detter “Essays on the Law of Treaties”, London 1967, p. 99.

57 Cf. Berber, op. cit., p. 462—463.

The result of the application of the “*rebus sic stantibus*” rule would be a revision of the treaty in order to adapt it to the changed circumstances. Only if this is not possible, the treaty would be terminated.

c) Codification of the doctrine

The many projects which were undertaken in order to codify the international law of treaties always dealt with the “*rebus sic stantibus*”. Thus the doctrine has been recognized and adopted both in the Harvard Draft Convention of 1929 and in the UN Draft of 1966⁵⁸. In the Vienna Convention on the Law of Treaties the doctrine is embodied in Article 62 which provides:

“A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty, and
- b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.⁵⁹”

This negative formulation is intended to prevent misuse of the rule, which is inherent in the recognition of the doctrine as a rule of law. The incorporation of the doctrine of “*rebus sic stantibus*” in the “Treaty on Treaties” must be regarded as a recognition of its legal validity as a rule of international law.

2) Application of the Doctrine

a) State practice

Many states have in fact invoked the doctrine on several occasions in order to justify the non-observance or repudiation of treaty obligations. As Friedmann concludes: “. . . theory and practice of the Western democratic states accepts . . . the doctrine *rebus sic stantibus*, i. e. the principle that a basic change of circumstances may be a legitimate cause of repudiation or of nonobservance of a treaty-commitment”⁶⁰. As principal examples for its application we may cite the revision of the Paris Peace Treaty of 1856 by Russia in 1871 or the successive revisions of the Versailles Treaty. There are several other examples cited by Van Bogaert⁶¹. We must, however, admit that the doctrine may easily be abused and become an excuse of breaches of treaties as in the case of the German violation of Belgian neutrality in 1914. Of particular interest is the fact that the United States expressly resorted to this doctrine in support of its unilateral abrogation of the International Load Line Convention. In his opinion of July 28, 1941 the then Acting Attorney General of the United States, in arguing that this Convention had ceased to be binding upon the United States, said: “It is a well-established principle of international law, ‘*rebus sic stantibus*’, that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially

⁵⁸ See Schwelb “Fundamental Change of Circumstances” in 29 *ZaöRV* (1969) p. 39 et seq.

⁵⁹ publ. in: 63 *AJIL* (1969), p. 894.

⁶⁰ Friedmann, *op. cit.*, p. 300.

⁶¹ *op. cit.*, p. 57 et seq.; 63 et seq.

changed. Suspension of the Convention in such circumstances is the unquestionable right of the State adversely affected by such a change . . .”⁶². The Proclamation of August, 1941, issued thereafter by President Roosevelt suspending the Convention, re-iterated the same reasons: “. . . under approved principles of international law it has become, by reason of such changed conditions, the right of the United States of America to declare the Convention suspended and inoperative . . .”⁶³. Another example would be the suspension of the Franco-American Agreement of 1926 regarding the French War debt payments which was also declared void on ground of “*rebus sic stantibus*”⁶⁴.

These examples demonstrate that the “*rebus sic stantibus* doctrine” is widely applied in international state practice.

b) Judicial Application of the Doctrine

Only few cases have arisen before international judicial bodies in which it has been necessary for them to define and apply the doctrine “*rebus sic stantibus*” as a rule of international law. It is even true that this doctrine has never been applied as yet by any international tribunal as the basis for an award. On the other hand the tribunals never have explicitly or implicitly rejected the doctrine and have never questioned its validity. They simply held that the factual situation in the cases brought before them did not justify the application of the doctrine. A leading case in which the International Court dealt with the doctrine was a litigation between France and Switzerland regarding the free Zone of Upper Savoy and Gex, in which France claimed that the provisions made after the Napoleonic War for the withdrawal of the French customs lines some distance behind the Franco-Swiss boundary should be held to have lapsed on the ground of a change of circumstances⁶⁵. According to Lauterpacht the Court was prepared to recognize the principle “*rebus sic stantibus*” although it refused to say to what extent the change of conditions may have an effect on the continuity of the treaty obligation⁶⁶. In addition to these scarce comments by international judicial decisions it shall be mentioned that several national courts such as the German “*Staatsgerichtshof*” and the Swiss “*Bundesgericht*” have recognized the validity of “*rebus sic stantibus*” as a rule of international law but denied the applicability in the pending cases⁶⁷. There are also examples for the application of the doctrine by Arbitration Tribunals in cases in which private companies and States were involved⁶⁸. Summarizing we may say at this point that the “*rebus sic stantibus*” doctrine is recognized in principle as a valid rule of international law though courts are very reluctant to apply it.

62 Bishop “International Law, Cases and Materials”, 2nd ed., Boston/Toronto 1962, p. 160—162; Lissitzyn “Treaties and Changed Circumstances” in: 61 AJIL (1967) 895 (908—909).

63 Lissitzyn, *ibidem*.

64 *ibid.*, p. 904.

65 PCIJ Series A/B No. 46, p. 156; see also Menzel “Völkerrecht”, München/Berlin 1962, p. 269.

66 cf. footnote 53.

67 RGZ 112, Anhang, p. 21—31; BGE 8, 43; BGE 54 I, p. 188; see also 29 AJIL (1935), Suppl., p. 1102—1111.

68 This is the “*Alsing*” case, see Schwebel, 8 ICLQ (1959) 320—345; “*Parcs Pakrac Railway Company v. Yugoslavia*” cited by Van Bogaert, *op. cit.*, p. 69.

3) *Rebus sic stantibus* as a General Principle of Law Recognized by Civilized Nations

Though the existence of “*rebus sic stantibus*” as a rule of international law may stand for the international recognition of this principle, we will show that it is not only a specific rule of international law but a general principle existing in the leading legal systems of the world. From its conception in Roman private law this doctrine has found its way into all modern legal systems.

a) Common Law

“*Rebus sic stantibus*” as a concept complementary to the principle of sanctity of contracts is well recognized under English Common Law. It can be referred in this connection to the doctrine of frustration or supervening impossibility of performance of contracts developed by English courts since the second half of the nineteenth century. In his “Sanctity of Contracts” Sir David Hugh Parry said: “. . . during the last one hundred years the courts have been evolving a doctrine to the general effect that if there should occur some intervening event or change of circumstances so fundamental as to strike at the root of the agreement, the contract should be treated as brought to an end . . .”⁶⁹. This doctrine has been elaborated under English law by the courts especially in the famous case *Krell v. Harry* (1903) and in a group of similar cases which came to be known as the *Coronation Cases*⁷⁰. It is also known under American Law⁷¹.

b) French Law

Under French law as well it has been recognized that a change in circumstances may result in unreasonable hardship to the parties of a contract. This doctrine — “*théorie de l’imprévision*” — was originally developed in French private law under which judges were allowed to rescind or adjust contracts to fit changes in circumstances. Yet, French courts have never applied this doctrine in civil matters, on the grounds that it is the duty of the legislature to intervene whenever great changes in socio-economic conditions necessitate the adjustment of contracts⁷². The doctrine gained, however, firm acceptance under French administrative law. Here it was developed and formulated by the “*Conseil d’Etat*”, the highest administrative court of France. It was applied for the first time in the now famous case “*Gaz de Bordeaux*”⁷³ in 1916, where due to the War the coal prices had been rising so much that the continued operation of gas concessions on the conditions originally agreed upon became totally uneconomic. An adjustment of the concession was decreed by the court⁷⁴. Another important case for the development of the “*théorie de l’imprévision*” was “*Tramways de Cher-*

⁶⁹ London 1959, p. 47.

⁷⁰ Cf. Chitty on Contracts, vol. I, 23rd ed., London 1968, who deals with these cases on p. 871—877 and 1159—1229.

⁷¹ Cf. *Bergstedt v. Bender*, 222 S. W. 547 (1920); *Williard v. Taylor* 19 L. Ed. 501; *Pratt v. Carrol*, 3 US 627; *Gotthelf v. Stranahan*, 138 N. Y. 345; 34 N. E. 286.

⁷² *Mughraby*, op. cit., p. 186; see also *Planiol et Ripert*, 6 *Droit Civil* 539 (1952).

⁷³ *Conseil d’Etat* (1916), S. 1916 III 17.

⁷⁴ Cf. Mitchell “*The Contracts of Public Authorities*”, London 1954, p. 191.

bourg”⁷⁵, where the doctrine of adjustment in order to fit changing circumstances was further elaborated. Under the French doctrine, as Bruzin explains, the contracts subsist but have to be adapted to the new conditions in order to become enforceable⁷⁶. Comparing this doctrine with the English doctrine of frustration the main difference is, as Mitchell points out⁷⁷, that under the frustration doctrine the contract is terminated, whereas “*imprévision*” on the contrary is founded upon the continuation of the contract. Both doctrines are similar, however, because both refer to the emergence of unforeseen circumstances, be it called “*bouleversement de l’économie du contrat*” or “*frustration of the commercial purpose*”⁷⁸. It should be noted, however, that the application of the “*imprévision*” doctrine is limited to administrative contracts⁷⁹. This doctrine has found its way also into several other Civil Codes drafted under the influence of French law⁸⁰. Under Italian law it is known as “*soppravvenienza*” doctrine⁸¹.

c) German Law

Under German law “*rebus sic stantibus*” is accepted as a rule of law both in doctrine and in the courts. The theory has been developed under the general clause of the German Civil Code, Article 242, which provides that a debtor is “bound to perform (his obligations) according to the requirements of good faith, taking ordinary usage into account”. It was Oertmann who initiated the modern conception of the “*rebus sic stantibus*” doctrine in 1921 with his concept of “*Geschäftsgrundlage*” (contractual basis) which he defined as “an assumption made by one party that has become obvious to the other during the process of the formation of the contract, and has received his acquiescence, provided that the assumption refers to the existence, or the coming into existence of circumstances forming the basis of the contractual intention. Alternatively, a ‘contractual basis’ is the common assumption of the respective parties of such circumstances”⁸². Oertmann’s formulation was soon adopted by the “*Reichsgericht*” which held that courts had the power to reshape the contract for the parties in accordance with changing circumstances⁸³, taking into consideration the economic motives of the parties, the nature and purpose of the transactions and their relation to the change of circumstances. One of the criteria developed since in dozens of decisions was the “*Unzumutbarkeit*” (unexpectedability), that is, the idea that due to the change of circumstances the party concerned cannot “*bona fide*” be expected to adhere any longer to the contractual obligations. Whereas the “*Reichsgericht*” had in mind a subjective view, modern doctrine and case law have put more emphasis on objective criteria such as fundamental change of circumstances which heavily affect the position of the parties⁸⁴. In practice the change of circumstances has, however, been applied only to exceptional cases. Not only under German law

75 Conseil d’Etat (1932), S. 1933 III 9.

76 “*Essai sur la Notion d’Imprévision et sur son Rôle en Matière Contractuelle*”, Paris 1922.

77 *op. cit.*, p. 190.

78 *ibidem*.

79 Cf. Waline “*Droit Administratif*”, 9th ed., p. 622—624; de Laubadère “*Traité Théorique et Pratique des Contrats Administratifs*”, Paris 1956, p. 71—135.

80 See e. g. the Egyptian Civil Code, Article 147, the Polish Civil Code of 1932, Article 269.

81 Art. 1467 Italian Civil Code, see Schaumann, *op. cit.*

82 “*Die Geschäftsgrundlage. Ein neuer Rechtsbegriff*”, Leipzig 1921, p. 37.

83 First developed in RGZ 103, 332 (1921), see also RGZ 168, 126.

84 See Palandt “*Bürgerliches Gesetzbuch*”, 28th ed., lit. 6c to § 242.

but also under other Germanic systems like the Swiss the doctrine has been embodied in the codes, e. g. in Article 373 Swiss Code of Obligations and in the general clause of Article 2 Swiss Civil Code.

3) Islamic Law

Not only the leading Western systems have developed and accepted the “*rebus sic stantibus*” in their respective laws but also in islamic law (*šari’a*) this doctrine is not unknown. Even though the doctrine has not been developed as a general theory it has been discussed and applied as a specific one by several islamic jurists in the context of “*kharaj*”, i. e. monopoly, “*hikr*”, i. e. excuses in lease contracts and “*jawa’ih*”, i. e. calamities⁸⁵. Furthermore, with the evolution of their legal systems and the adoption of new legal concepts many islamic countries have promulgated civil codes which were drafted according to European models. These codes have all embodied “*rebus sic stantibus*”⁸⁶.

In summing up we may therefore say that the “*rebus sic stantibus*” doctrine is recognized in all leading legal systems of the world and can therefore be regarded as a general principle of law recognized by civilized nations.

C) “*Rebus sic stantibus*” versus “*Pacta sunt servanda*”

In the discussion concerning the validity of “*rebus sic stantibus*” the question arises whether the doctrines of “*pacta sunt servanda*” and “*rebus sic stantibus*” are not in fact irreconcilable because the doctrine of changing circumstances if recognized would undermine the sanctity of contracts. This same argument is advanced by representatives of the major oil companies who are not willing to accept the “*rebus sic stantibus*” argument⁸⁷. While nobody can deny the outstanding significance of the sanctity of contracts and its enormous influence, it is, however, not an absolute principle. Even in those countries which adhere to the principle of free enterprise and individual rights, the freedom of contract which is premised upon the idea of its sanctity has been limited through legislature and courts⁸⁸. “*Pacta sunt servanda*” will and must remain the foundation of law in general and especially of international law, where it must be regarded as a basic norm. Without this principle there would be no stability and security which are the essential factors of any legal order. But a legal order should not only furnish rigid pattern of rules, it should also aim at ensuring equity and justice. A moderator is needed in the eternal conflict between law as a rigid and static system and the dynamics of life. In this sense we have to understand the “*rebus sic stantibus*” doctrine as enhancing the effectiveness of “*pacta sunt servanda*” since it tempers its rigidity, making its application more dynamic and realistic. Thus we can say that both doctrines are not diametrically opposed but in fact they rather complement each other. Revision of contracts, especially those of long duration, is also neither an exception to nor does it contradict the rule “*pacta sunt servanda*”, if

85 Cf. al-Ghunaimi, “Participation and Change of Circumstances”, in MEES of April 10, 1969, letter to the editor.

86 Civil Code of Libya, Art. 146; Egyptian Civil Code, Art. 147.

87 See the statement of Brougham in his letter to the editor, MEES, December 20, 1968.

88 Berber, op. cit., p. 459—460.

we understand the latter as unviolability of contracts and not as unchangeability. The law must readapt itself constantly to its environment in order to remain just⁸⁹. Thus “*pacta sunt servanda*” does not rule out the application of the “*rebus sic stantibus*” doctrine.

D) Application of “*rebus sic stantibus*” to concessions

Before analyzing the applicability of the doctrine in the context of the concession problem we may recall its essential prerequisites:

- 1) The agreement must not provide for its revision.
- 2) There must have been an objective fundamental change of circumstances since the conclusion of the agreement, which was not foreseen and foreseeable by the parties. The party concerned must be so heavily affected by the change that under ‘*bona fide*’ she can no longer be expected to adhere to the contract.
- 3) The result would be a right to revision of the agreement. The question of “change” raises delicate points of law and fact. Is there in the relationship between companies and producing countries so fundamental a change that a revision of the concession agreements would be justified?

The major oil concessions have been concluded roughly 40 years ago and contain no renegotiation clause even though they are all running over a term of 50—75 years. All these concessions were obtained under political and economic circumstances completely different from those prevailing today. The granting countries were completely underdeveloped and dependent of the Western countries, as described in the introductory sections. This situation has changed fundamentally. Today no one can deny that the producing countries, which, meanwhile, have become independent states and have acquired the necessary skills, would in fact have the right to invoke “*rebus sic stantibus*” and claim readjustment of the concession, had these remained unchanged since their conclusion.

This, however, is not the case. The companies, aware of the changing circumstances, repeatedly agreed to revise and to adapt the concessions accordingly, thus in fact, at least implicitly, recognizing “*rebus sic stantibus*”. The financially equal participation concept — 50:50 sharing of profits —, the relinquishment principle, i. e. rendering back portions of the original concession area, and a high quota of domestic employees on all levels have been agreed upon. Hence, we cannot say that the concessions today have the same contents as at the time of their conclusion. They, too, have substantially changed so that we must take the date of last revision as a starting point for the inquiry as to whether any changing circumstances within the meaning of our doctrine have evolved in the meantime.

The origin of the partnership concept in the oil business dates back to 1957 when for the first time such an agreement was concluded in Iran⁹⁰. The call for participation in all existing concession agreements, which has been put forward

⁸⁹ Schaumann, op. cit, p. 290; Lalive, “Recent Trends: Abrogation or Alternation of an Economic Development Agreement between a State and a Private Foreign Party”, in: 17 *Business Lawyer* (1962), p. 463.

⁹⁰ Cf. footnote 21.

since 1968, must be seen in close relation to the principle of partnership inaugurated in 1957. The latter has certainly effected an important change in the relationship between oil companies and producing countries. Taking into account, however, the exceptional character of the “*rebus sic stantibus*” rule, it must be doubted whether the concept of partnership is to be regarded as so fundamental a change of circumstances that the producing countries under “*bona fide*” can no longer be expected to adhere to the traditional concession agreements.

Even a new factual situation does not justify a unilateral revision of the agreements on grounds of “*rebus sic stantibus*”. If we would, *arguendo*, recognize the claim of the producing countries as justified, the question still remains: who is to decide? It is hardly an acceptable and, indeed, a dangerous legal proposition to maintain that the claimant state alone should be competent to do so. Such a controversial matter should be submitted to arbitration or decision by a neutral authority. Thus, the argument of “*rebus sic stantibus*” may be used as a lever to negotiate with the oil companies or to submit the case to international arbitration. The doctrine should, however, not serve as a basis for unilateral action which would destroy the relation of trust between the producing States and the operating oil companies.

Concluding Remarks

As we have tried to point out, the long duration of early concluded investment or concession agreements pose many problems and conflicts in our time of accelerated change in the relationship between developing countries and foreign investors. The balance of interests between the parties is very delicate and might be jeopardized by any arbitrary action. The developing countries should recognize the interests of the foreign investors and the latter should take into consideration the national interest of the host states. The relationship between them and local governments must be a relation of trust and mutual understanding if they are to be mutually profitable. What should emerge from the above discussion is the importance of the good faith idea. The companies should feel an obligation “*bona fide*” to mutually and regularly reconsider the terms of their agreements with developing countries and to be ready to accept necessary changes. Only this way a build-up of conflict issues possibly leading to a clash might be avoided. The developing countries on their turn should refrain from unilateral arbitrary actions against the foreign investors which in a long term perspective would not be in their interest.

From a practical point of view the controversy shows the necessity to enact renegotiation clauses in newly concluded investment agreements and to restrict the duration of these agreements to a reasonable period of time⁹¹.

⁹¹ See also the recommendations of the Pearson Commission, Pearson, *op. cit.*, p. 106.