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Abstract

At the end of 1982, Mobil Oil Corporation (Mobil) withdrew from its Libyan oil exploration and production concessions. Subsequently, Mobil filed an arbitration claim against the Libyan Government, alleging that government action had effectively destroyed the economic value of Mobil's concession. This arbitration raises substantial questions of transnational contract law. Part I of this Note provides the factual background to the Mobil-Libya dispute and a review of the major issues involved. Part II discusses the right of a host government to set export prices. Part III considers whether a host government may take unilateral action even though the concession agreement includes a stabilization clause. Part IV examines the issue of "creeping expropriation." Part V analyzes the effect of the doctrine of permanent sovereignty over natural resources on the issues raised by the Mobil-Libya dispute. The Note concludes that when an oil concessionaire continues to operate in the host state for an extended period following the host government's alleged breach of contract, the concessionaire should be held to have effectively waived its claims for breach of the concession agreement.

UNILATERAL ACTION BY OIL-PRODUCING COUNTRIES: POSSIBLE CONTRACTUAL REMEDIES OF FOREIGN PETROLEUM COMPANIES

INTRODUCTION

At the end of 1982, Mobil Oil Corporation (Mobil)[1] withdrew from its Libyan oil exploration and production concessions.[2] Subsequently, Mobil filed an arbitration claim against the Libyan Government, alleging that government action had effectively destroyed the economic value of Mobil's concession.[3] This arbitration[4] raises substantial questions of transna-

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1. Mobil Oil Corp. is a wholly-owned subsidiary of Mobil Corp., a Delaware corporation formed in 1976 to serve as a holding company for the oil and energy interests of Mobil Oil Corp., as well as such other subsidiaries as Montgomery Ward & Co., Inc., and Container Corp. of America. MOBIL CORP., SEC FORM 10-K 1 (fiscal year ending Dec. 31, 1980). Mobil Oil Corp. was originally incorporated in 1882. MOBIL OIL CORP., SEC FORM 10-K 1 (fiscal year ending Dec. 31, 1980). Mobil Oil Corp. was part of the Standard Oil Company trust, which was dismantled as a result of government antitrust action in 1911. F. WADDAMS, THE LIBYAN OIL INDUSTRY 31-32 (1980). As of the end of 1984, Mobil was the United States' fourth largest corporation, with assets of U.S.$41.8 billion, more than U.S.$60 billion in annual sales revenue and net income of U.S.$1.3 billion. BUS. WK., Mar. 22, 1985, at 42-43, 107 (special annual report issue). Mobil carried out its operations in Libya through a wholly owned subsidiary, Mobil Oil Libya Ltd.

2. Mufson, *Mobil Pulls Out From Libyan Oil Fields, Saying Terms of 1955 Pact Were Violated*, Wall St. J., Jan. 5, 1983, at 2, col. 3; MOBIL CORP., 1982 ANNUAL REPORT 6 (1983).

3. MOBIL CORP., 1982 ANNUAL REPORT, *supra* note 2, at 6. Mobil's claim was referred to arbitration pursuant to the arbitration clause in Mobil's concession agreements. *See* Ibrahim, *Libya Warns Mobil to Drop Claims or Face an Audit*, Wall St. J., Sep. 26, 1984, at 42, col. 3. The arbitration clause provides that:

> If at any time during or after the currency of this Concession any doubt, difference or dispute shall arise between the Commission [i.e., the Government] and the Company concerning the interpretation or performance hereof, or anything herein contained or in connection herewith, or the rights and liabilities of either party hereunder or if the parties should fail to agree upon any matter required to be settled by agreement, the same shall, failing any agreement to settle it any other way, be referred to . . . Arbitrators.

Royal Decree Amending Certain Provisions of the Petroleum Law No. 25 of 1955, Eng. trans. at 27 (July 3, 1961) [hereinafter cited as "*1961 Amendments*"] (available at the offices of the *Fordham International Law Journal*). Some months after the referral to arbitration, Libya asserted that Mobil owed the government U.S.$110 million in unpaid taxes and equity payments, but offered to withdraw this claim if Mobil withdrew its arbitration claim and agreed to fulfill the balance of the company's commitments under the concession agreement. Ibrahim, *Libya Warns Mobil to Drop Claims or Face an Audit*, Wall St. J., Sept. 26, 1984, at 42, col. 3. No award in the arbitration had been tional contract law. The issues raised by the Libya-Mobil dispute, concerning the right of a host state[5] to change unilaterally the terms of agreements with foreign investors, extend far beyond the specific dispute in Libya. Such contract changes by host governments occur frequently in the mining and oil industries[6] and in other foreign-investment situations. Despite the frequency of these unilateral contract changes, the existing international legal framework offers no clear guidelines for determining the validity of such alterations, especially when the contractual regime regulating the investment contains a stabilization provision,[7] or provides for determining an investor's remedies if the changes are invalid.[8]

A number of international arbitration cases have dealt with oil concessions in developing countries.[9] Most of these

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reported as of Dec. 31, 1985. *See* Feder, *Libya Trade Was Low Before Ban*, N.Y. Times, Jan. 8, 1986, at A7, col. 1, at col. 5.

4. Libya has been the defendant in three previous arbitration cases. These cases are reported as Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic, 62 I.L.R. 141 (1977) (Mahmassani, Arb.) [hereinafter cited as "*LIAMCO Arbitration*"]; BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic, 53 I.L.R. 297 (1974) (Lagergren, Arb.) [hereinafter cited as "*B.P. Arbitration*"]; and Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Government of the Libyan Arab Republic, 53 I.L.R. 389 (1977) (Dupuy, Arb.) [hereinafter cited as "*TOPCO Arbitration*"]. For descriptions of the situations that gave rise to these arbitrations and of the decisions rendered, see Fatouros, *International Law and the Internationalized Contract*, 74 AM. J. INT'L L. 134 (1980); Von Mehren & Kourides, *The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476 (1981).

5. Any state receiving foreign investment is typically classified as a "host" state. *See, e.g.*, J. KUUSI, THE HOST STATE AND THE TRANSNATIONAL CORPORATION xi (1979).

6. *See generally* T. MORAN, MULTINATIONAL CORPORATIONS AND THE POLITICS OF DEPENDENCE: COPPER IN CHILE 153-69 (1974) (readjustment of contractual terms that typically occurs in the case of developing-country mining concessions); S. ASANTE, TRANSNATIONAL INVESTMENT LAW AND NATIONAL DEVELOPMENT 40-42 (Address to Commonwealth Secretariat-United Nations Centre on Transnational Corporations Workshop on Mining Legislations and Negotiation of Resources Agreements, Gaborone, Botswana, Oct. 9-13, 1978) (available at the offices of the *Fordham International Law Journal*). Recent changes in contractual arrangements in the oil industry are discussed in the text *infra* accompanying notes 26-43. For pre-1970 changes, see *From Concession to Contract* (pts. 1 & 2), 41 PETROLEUM ECONOMIST 459 (Dec. 1974); 42 PETROLEUM ECONOMIST 21 (Jan. 1975).

7. For discussion of stabilization clauses and their effects, see *infra* text accompanying notes 131-41.

8. *See* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 515-19 (2d ed. 1976).

9. *See supra* note 4 (citing cases concerning oil concessions in developing countries); *see, e.g.*, Government of the State of Kuwait v. American Independent Oil Co., 21 I.L.M. 976 (1982) (Reuter, Sultan & Fitzmaurice, Arbs.) [hereinafter cited as "*Ami-*

cases have concerned either de jure or de facto nationalizations of concessionaires' operations.[10] The Mobil-Libya dispute, in contrast, did not arise as a result of a formal nationalization. Mobil, however, claimed that unilateral actions of the Libyan Government amounted to a material breach of the corporation's concession agreements, and that this breach justified an award of damages and entitled Mobil to withdraw from any further performance of its obligations under the concessions, even though Mobil had continued to operate in Libya for seven years following the government's unilateral actions.[11]

While Mobil publicly presented its case against the Libyan Government in terms of breach of contract,[12] the facts underlying the dispute can also be seen as an example of what is sometimes called "creeping expropriation." This is a process in which a host government, through regulatory or fiscal measures, gradually reduces the profitability of a foreigner's investment to such a degree that the state can be said to have taken the property.[13]

The Mobil-Libya dispute raises issues that apply to the actions of many oil- and mineral-producing Third World states.[14] Many of these states have been among the principal advocates of the "New International Economic Order"[15] (NIEO) and

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noil Arbitration"]; Sapphire International Petroleums Ltd. v. National Iranian Oil Co., 35 I.L.R. 136 (1963) (Cavin Arb.); Saudi Arabia v. Arabian American Oil Co. (ARAMCO), 27 I.L.R. 117 (1958) (Sauser-Hall, Ref., Badawi/Hassan and Habachy, Arbs.); Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1952 I.C.J. 93 (Preliminary Objection); Petroleum Development Ltd. v. Sheikh of Abu Dhabi, 18 I.L.R. 144 (1951) (Lord Asquith of Bishopstone, Ump.).

10. *See, e.g.*, *supra* note 4 (citing cases concerning oil concessions in developing countries); *Aminoil Arbitration*, 21 I.L.M. 976 (1982); Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1952 I.C.J. 93 (all involving nationalization issues).

11. *See* Mufson, *Mobil Pulls Out From Libyan Oil Fields, Saying Terms of 1955 Pact Were Violated*, Wall St. J., Jan. 5, 1983, at 2, col. 3.

12. *Id.*

13. For a more detailed discussion of "creeping expropriation," see *infra* text accompanying notes 165-73.

14. For a discussion of actions by petroleum-producing states during the 1970s, see H. ZAKARIYA, STATE SOVEREIGNTY OVER NATURAL RESOURCES IN ACTION 5-8 (Jan. 23, 1981) (unpublished report prepared for submission to the seventh session of the United Nations Committee on Natural Resources) (available at the offices of the *Fordham International Law Journal*). Earlier developments are reported in Permanent Sovereignty Over Natural Resources: Report of the Secretary-General 3-5, U.N. Doc. E/C.7/53 (1975) and Permanent Sovereignty Over Natural Resources: Report of the Secretary-General 4-9, U.N. Doc. A/9716 (1974).

15. *See infra* text accompanying notes 183-85.

"permanent sovereignty over natural resources,"[16] a principle, reflected in numerous international declarations,[17] that emphasizes a host state's right to regulate and control the exploitation of its natural wealth. Any widely publicized arbitral decision, in a case like the Mobil-Libya dispute, that appears to set limits on host states' rights to tax resource-exploiting foreign companies would represent, to these states, a severe limitation on their sovereignty.[18]

This Note will analyze three related issues raised by the Mobil-Libya dispute: 1) the right of host states to set prices unilaterally for their commodity exports, even when the commodities are produced and sold by foreign investors operating under concession agreements;[19] 2) the permissible extent of unilateral host-government fiscal measures, such as changes in tax or royalty rates, which affect natural-resource concessionaires;[20] and 3) the boundary between permissible regulation of foreign investment and impermissible "creeping expropriation."[21]

Part I of this Note provides the factual background to the Mobil-Libya dispute and a review of the major issues involved. Part II discusses the right of a host government to set export prices. Part III considers whether a host government may take unilateral action even though the concession agreement includes a stabilization clause. Part IV examines the issue of "creeping expropriation." Part V analyzes the effect of the doctrine of permanent sovereignty over natural resources on the issues raised by the Mobil-Libya dispute. The Note concludes that when an oil concessionaire continues to operate in the host state for an extended period following the host gov-

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16. *See infra* text accompanying notes 178-82.

17. *See, e.g.*, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962) (Permanent Sovereignty Over Natural Resources); G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9400 (1973) (Permanent Sovereignty Over Natural Resources); G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974) (New International Economic Order); G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 52, U.N. Doc. A/9631 (1974) (Charter of Economic Rights and Duties of States).

18. On the precedential effect of arbitral decisions and investor uncertainty as to their application, see Caldwell, *Selected Clauses in Transnational Contracts* § 4.08(5), in THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS (V. Nanda ed. 1985).

19. *See infra* text accompanying notes 108-30.

20. *See infra* text accompanying notes 131-34.

21. *See infra* text accompanying notes 165-74.

ernment's alleged breach of contract, the concessionaire should be held to have effectively waived its claims for breach of the concession agreement.

I. *BACKGROUND OF THE DISPUTE*

A. *The History of Oil Concession Agreements*

Before 1960, host governments in the oil-producing developing countries played a passive role, exercising little or no control over the actions of concessionaires.[22] During this period, host governments had virtually no influence in determining the prices of their oil exports,[23] and received only modest financial returns from the oil produced in their territory.[24]

A growing awareness in developing countries of the inequities of the traditional concession system[25] led to some

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22. *See* U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, ALTERNATIVE ARRANGEMENTS FOR PETROLEUM DEVELOPMENT 3, U.N. Sales No. E.82.II.A.22 (1982). For general descriptions of the history of oil concession agreements, see, e.g., H. CATTAN, THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA (1967); J. HARTSHORN, OIL COMPANIES AND GOVERNMENTS: AN ACCOUNT OF THE INTERNATIONAL OIL INDUSTRY IN ITS SALIENT ENVIRONMENT (1962); K. HOSSAIN, LAW AND POLICY IN PETROLEUM DEVELOPMENT 1-12 (1979); S. LONGRIGG, OIL IN THE MIDDLE EAST: ITS DISCOVERY AND DEVELOPMENT (1968); Z. MIKDASHI, A FINANCIAL ANALYSIS OF MIDDLE EASTERN OIL CONCESSIONS, 1901-65 (1966); E. PENROSE, THE LARGE INTERNATIONAL FIRM IN DEVELOPING COUNTRIES: THE PETROLEUM INDUSTRY (1968); G. STOCKING, MIDDLE EAST OIL (1970); L. TURNER, OIL COMPANIES IN THE INTERNATIONAL SYSTEM (1978).

Many of the concessions, especially in the Persian Gulf and Africa, were originally granted for periods extending into the 21st century. *See When Do the Concessions End?*, PETROLEUM PRESS SERVICE, Dec. 1971, at 449. In Libya, most of the concessions, including Mobil's, were due to end in the year 2011. *Id.*

23. H. CATTAN, *supra* note 22, at 3; Howarth, *Twenty-Three Years of Oil*, PETROLEUM PRESS SERVICE, Jan. 1973, at 22.

24. Howarth, *supra* note 23, at 22.

25. *See* K. HOSSAIN, *supra* note 22, at 13. Among the issues which were considered by the oil-producing states to be problem areas under the concession system were the following:

(a) long duration of concessions;
(b) absence of relinquishment provisions or, where such provisions existed, failure by the concessionaires to comply with their requirements;
(c) suspension of governmental rights to tax;
(d) discretion given to concessionaires to determine the pace of exploration and to decide what areas should be developed and for how long areas should lie idle;
(e) retention of managerial decisions exclusively in the hands of foreigners;
(f) flaring (burning-off) of natural gas and failure to reinject gas into reservoirs (to provide for greater ultimate recovery);

changes in the 1950s and 1960s.[26] The principal developments included formation of the Organization of Petroleum Exporting Countries (OPEC)[27] and the introduction of new forms of petroleum exploration and production agreements, notably the production-sharing contracts pioneered by Indonesia[28] and the use of joint ventures, in which the host government participated both as an equity partner and as a tax collector.[29] Further changes in the pattern of relations between the oil companies and host governments were made by the Tehran, Tripoli and Geneva agreements of 1970-1973,[30] in which

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(g) arbitrary pricing policies; and
(h) adoption of accounting methods and procedures that had the effect of reducing the government "take."

Id. at 15; *see also* G. STOCKING, *supra* note 22, at 130-37.

26. *See* K. HOSSAIN, *supra* note 22, at 15-19; A. SAMPSON, THE SEVEN SISTERS: THE GREAT OIL COMPANIES AND THE WORLD THEY SHAPED 108-12 (1975).

27. The immediate stimulus for the formation of OPEC was a reduction in posted prices by the major oil companies in 1960. *See* P. TERZIAN, OPEC: THE INSIDE STORY 32-45 (1985); *see also* K. HOSSAIN, *supra* note 22, at 16. For general discussion of the role of OPEC, see M. AL-OTAIBA, OPEC AND THE PETROLEUM INDUSTRY (1975); Z. MIKDASHI, THE COMMUNITY OF OIL-EXPORTING COUNTRIES (1972).

28. Under production-sharing contracts, the host state retained title to the oil and the production facilities; the foreign investor provided the capital and technology and was entitled to a share of the oil produced to repay the investment costs, plus a share of the "profit oil" remaining after costs had been paid. For a description of the Indonesian production-sharing agreements, see STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 94TH CONG., 1ST SESS., A STUDY OF THE RELATIONSHIPS BETWEEN THE GOVERNMENT AND THE PETROLEUM INDUSTRY IN SELECTED FOREIGN COUNTRIES: INDONESIA 7-10 (Comm. Print 1975) (Congressional Research Service Report); Fabrikant, *Production Sharing Contracts in the Indonesian Petroleum Industry*, 16 HARV. INT'L L.J. 303, 310-33 (1975).

29. *See* U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, *supra* note 22, at 4. In joint ventures, the foreign investor and the host government or its state oil company each owned a portion of the equity and each was responsible for financing its share of costs. The first joint venture agreements were negotiated by the Italian state oil company, Ente Nazionale Idrocarburi (ENI) in Iran in 1957. A. SAMPSON, *supra* note 26, at 149.

30. The text of the Tehran Agreement relating to Persian Gulf oil prices is reprinted in PETROLEUM INTELLIGENCE WEEKLY, Feb. 22, 1971, at Supp. 1. The text of the Geneva agreement modifying the Tehran agreement to take account of currency fluctuations is in PETROLEUM INTELLIGENCE WEEKLY, Jan. 31, 1972, at 5. The Tripoli agreement relating to Libyan prices is in PETROLEUM INTELLIGENCE WEEKLY, Apr. 12, 1971 at 9 [hereinafter cited as "*Tripoli Agreement*"], and a supplemental agreement concerning currency fluctuations that affected Libyan prices is in PETROLEUM INTELLIGENCE WEEKLY, May 29, 1972, at 7. The negotiations surrounding these agreements are described in P. TERZIAN, *supra* note 27, at 112-53; F. WADDAMS, *supra* note 1, at 236-45 and in *Tough Bargaining in Tripoli*, PETROLEUM PRESS SERVICE, Apr. 1971, at 122. For an industry view of the agreements as a basis for future price stability, see *Billion-Dollar Package*, PETROLEUM PRESS SERVICE, Mar. 1971, at 82.

the transnational[31] corporations for the first time recognized a role for host governments in the process of setting oil prices.[32]

The Arab-Israeli war of October, 1973, and the OPEC states' assumption of control over oil prices in 1973-1974[33] produced even greater changes. Specifically, many host governments assumed full authority to determine the oil prices used for assessing the oil companies' taxable income[34] and required concessionaires to cede to them a share in equity participation in the concessions.[35] In Libya, these changes were reflected in the adoption of Libyan Arab Republic Revolutionary Command Council Law No. 82 of 1973 Amending Certain Provisions of the Petroleum Law No. 25 of 1955 (Law No. 82).[36] These amendments gave the Ministry of Petroleum Affairs the right to determine oil prices.[37]

31. The term "transnational" has been increasingly used in recent years in place of "multinational" or "international" when referring to activities carried out across national frontiers. Transnational corporations are business organizations comprising several legal entities that operate in more than one country and are linked together by a controlling parent corporation. J. KUUSI, *supra* note 5, at 25; *see also* H. STEINER & D. VAGTS, *supra* note 8, at xv.

32. *See* M. TANZER, THE ENERGY CRISIS: WORLD STRUGGLE FOR POWER AND WEALTH 125 (1974). Most oil produced in OPEC states was, as late as 1972, sold to affiliates within the vertically integrated structures of the transnational oil companies. Tanzer & Zorn, *OPEC's Decade: Has It Made a Difference?*, 36 MONTHLY REV. 31, 35 (May 1984). Therefore the reported sales prices for oil were largely within the discretion of the companies; profits could be realized at any stage from crude oil production to consumer product marketing. *See* S. GHANEM, THE PRICING OF LIBYAN CRUDE OIL 43 (1975). From the point of view of the producer governments, the relevant price was the "posted price" for crude oil, on which the calculation of royalties and taxes was based. *Id.* at 26-27. In Libya and elsewhere, this posted price was originally determined by the oil companies themselves, which then notified the host governments of their determination. *Id.*

33. *See generally* P. TERZIAN, *supra* note 27, at 163-87; A. SAMPSON, *supra* note 26, at 249-59; N. JACOBY, MULTINATIONAL OIL 257 (1974). On the use of oil-supply boycotts by the producing states in response to the 1973 war and as a device for supporting price increases, see *October Revolution*, PETROLEUM PRESS SERVICE, Nov., 1973, at 402.

34. *See* K. HOSSAIN, *supra* note 22, at 21.

35. *Id.*

36. Libyan Arab Republic Revolutionary Command Council Law No. 82 of 1973 Amending Certain Provisions of the Petroleum Law No. 25 of 1955 [hereinafter cited as "*Law No. 82*"] (English translation available at the offices of the *Fordham International Law Journal*).

37. *Law No. 82* added the following paragraph to every oil concession agreement then in force in Libya:

> The Minister of Petroleum may, in the event of change in circumstances or basis of determining the prices of crude oil or derivatives thereof in the mar-

In addition to imposing new pricing rules, the Libyan Government also negotiated new agreements with the concessionaires between 1972 and 1975. Under these new agreements, the companies each sold the government 51% interests in their respective operations.[38] This new situation was accepted by the major transnational oil corporations in the OPEC states generally,[39] as well as specifically in Libya.[40] By 1975, for example, all the concessionaires operating in Libya had signed participation agreements.[41] By virtue of these agreements and Law No. 82, the government obtained a majority equity interest in the oil concessions[42] and the right to determine export prices unilaterally for purposes of royalty and tax calculations.[43]

By the mid-1970s, a new pattern of relations between OPEC host governments and transnational corporations had been established.[44] The governments, rather than the oil companies, took primary responsibility for determining basic issues such as how much oil to produce, and at what price it

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> ket, determine the prices of crude oil and its derivatives by a decision therefrom in which he takes into account market conditions and the superior qualities of Libyan crude oil . . . provided that computation of the income realized by the concession holder from sale of crude oil or derivatives thereof shall be made in accordance with the prices determined in the decision of the Minister of Petroleum.

Law No. 82, *supra* note 36, at 1.

38. For a discussion of the process by which the Libyan Government acquired its 51% interest, see F. WADDAMS, *supra* note 1, at 254-60. The participation agreement with Mobil was concluded on Apr. 16, 1974. *See* Participation Agreement Between the Government of the Libyan Arab Republic and the National Oil Corporation and Mobil Oil Libya Ltd., Apr. 16, 1974 [hereinafter cited as "*1974 Participation Agreement*"] (available at the offices of the *Fordham International Law Journal*). The Mobil participation agreement followed an earlier acquisition of 51% ownership by the Libyan government in Occidental's Libyan operations. *See Text of Libyan Decree Nationalizing Occidental*, PETROLEUM INTELLIGENCE WEEKLY, Aug. 20, 1973, at 8-9.

39. *See, e.g.*, U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, MAIN FEATURES AND TRENDS IN PETROLEUM AND MINING AGREEMENTS 6-7, U.N. Sales No. E.83.II.A.9 (1983).

40. *See infra* text accompanying notes 96-99.

41. *See* F. WADDAMS, *supra* note 1, at 259.

42. *1974 Participation Agreement*, *supra* note 38, at 3.

43. *See Law No. 82*, *supra* note 36.

44. *See* K. HOSSAIN, *supra* note 22, at 38-41. One of the oil companies' responses to these changed conditions was to diversify their operations away from OPEC states and to obtain increased profits at other stages of the industry than crude oil production. *Id.*

should be sold.[45] It is within this new pattern that the facts of the Mobil-Libya dispute should be analyzed.

B. *Principal Issues in Contract Disputes*

As host governments have taken a more active role in the international oil industry, a number of issues have emerged as recurrent sources of controversy between these governments and the transnational oil companies.[46] The effects of three of these issues, 1) the choice-of-law clause, 2) stabilization clauses, and 3) a company's de facto acquiescence to unilateral government conduct, are particularly relevant to the Mobil-Libya dispute.

1. Choice of Law

Within broad limits, contracting parties are free to choose the law that will govern their agreement.[47] From the point of

45. *See, e.g.*, P. TERZIAN, *supra* note 27, at 112-45 (discussion of OPEC states' efforts to establish control over pricing); *see also* U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, *supra* note 39, at 27-51 (reflecting post-1973 contractual practice outside the OPEC states).

46. All of these issues arise from a characterization of petroleum concession agreements as essentially contractual in nature. While the precise status of such agreements is a matter of some controversy, *see* White, *Expropriation of the Libyan Oil Concessions—Two Conflicting International Arbitrations*, 30 INT'L & COMP. L.Q. 1, 5 (1981), most of the prior decisions are unequivocal in their characterization of concession agreements as bilateral contracts. *See, e.g.*, *Aminoil Arbitration*, 21 I.L.M. 976, 1001 (1982); Saudi Arabia v. Arabian American Oil Co. (ARAMCO), 27 I.L.R. 117, 164 (1958); and Anglo-Iranian Oil Co. Case (U.K. v. Iran), [1952] I.C.J. 93, 111-12. Similar conclusions as to the basically contractual nature of oil concession agreements were reached in the previous Libyan arbitrations. *LIAMCO Arbitration*, 62 I.L.R. 141, 169-70 (1977); *TOPCO Arbitration*, 53 I.L.R. 389, 440 (1977) (quoting M. Cohen-Jonathan, Les Concessions en Droit International Public 133-34 (1966) (unpublished thesis)); *B.P. Arbitration*, 53 I.L.R. 297, 327 (1974); *see also* Mann, *The Theoretical Approach Towards the Law Governing Contracts Between States and Private Persons*, 11 REVUE BELGE DE DROIT INTERNATIONAL 562, 564 (1975).

47. *TOPCO Arbitration*, 53 I.L.R. 389, 442 (1977). A preliminary question in most of the petroleum arbitrations is which conflict of laws rules the arbitrator should apply in determining the substantive law that governs the dispute. There are two possible approaches. First, the arbitrator could look to the conflict of laws rules in force at the seat of the tribunal. Alternatively, an arbitrator could apply the conflict of laws rules that he or she deems appropriate, without any necessary regard to the site of the arbitration, in the light of all the circumstances of the case, so as to give effect to the will of the parties. *See B.P. Arbitration*, 53 I.L.R. 297, 326 (1974) (choosing Danish choice of law rules as most appropriate). Either approach will normally result in the application of the substantive law chosen by the parties, if they have made such a choice. When, however, a party fails to participate in the arbitration

view of developing countries the preferred choice of law clause is one which provides that all disputes are to be settled in accordance with the law of the host state.[48] Other governments, particularly in the early years of oil exploration on their territory, have sometimes agreed to choice of law clauses that applied the law of the investor's home jurisdiction.[49] More typically, however, major natural-resource agreements provide for some wholly or partially internationalized choice of law.[50] One typical formulation applies the law of the host state generally, but provides that international law shall apply whenever there is a gap in the host state's legislation.[51] Another form of internationalization, less favorable to developing countries, applies international law or "general principles of law" whenever that law conflicts with the law of the host state.[52] This is the choice

proceeding, the resulting choice of law and procedural determinations may seem somewhat arbitrary. For example, in the Libyan concessions, if one party fails to cooperate in choosing arbitrators, the choice will be made by the President of the International Court of Justice, and the chosen arbitrator will then select the choice of law and procedural rules. *See* White, *supra* note 46, at 8 n.34.

48. *See* Walde, *Negotiating for Dispute Settlement in Transnational Mineral Contracts: Current Practice, Trends and an Evaluation from the Host Country's Perspective*, 7 DENVER J. INT'L L. & POL. 33, 47 (1977). This preference for domestic (municipal) law is likely to be increased as a result of recent decisions awarding substantial damages. *See* White, *supra* note 46, at 18. Examples of contracts that include such clauses are given in A. Sahakian, Contracts and Agreements in the International Petroleum Industry 61 (unpublished report to U.N. Centre on Transnational Corporations, Jan., 1981) (available at the offices of the *Fordham International Law Journal*). The original Libyan concession agreements, signed in 1955, provided that the governing law was to be "the laws of Libya and such principles and rules of international law as may be relevant." F. WADDAMS, *supra* note 1, at 106. This emphasis on domestic law as reinforced by the 1961 amendment to the Petroleum Law, which added the phrase, "but only to the extent that such rules and principles are not inconsistent with and do not conflict with the laws of Libya." *Id.* This situation was reversed by the 1966 amendments. *See infra* text accompanying note 90.

49. *See, e.g.*, Kuwayt Oil Co. Concessionary Agreement, Dec. 23, 1934, art. 18 (specifying arbitration in London) and art. 21 (making the English text definitive) (available at the offices of the *Fordham International Law Journal*).

50. *See* Walde, *supra* note 48, at 48. For a clear statement of international law as the governing law of the concession, see Revised Agreement: Persia and the Anglo-Persian Oil Co., Apr. 29, 1933, art. 22(F) (referring to art. 38 of the Statute of the Permanent Court of International Justice as defining the governing law of the concession) (available at the offices of the *Fordham International Law Journal*).

51. The Libyan arbitration clause negotiated in 1963 was of this type. *See* Amendment to Concession Agreement (Sep. 28, 1963) [hereinafter cited as "*1963 Agreement*"] (available at the offices of the *Fordham International Law Journal*).

52. *See TOPCO Arbitration*, 53 I.L.R. 389, 441-62 (1977).

of law rule adopted in the Libyan oil concession agreements.[53]

2. Stabilization Clauses

Foreign investors have traditionally attempted to prevent host governments from making unilateral changes that would adversely affect the investors' profitability.[54] The usual form taken by these attempts is a clause that purports to bar any changes in the contractor's rights that may be made by the government without the investor's consent.[55] While the legal impact of such clauses, at least within the host state's own jurisdiction, is questionable,[56] the clauses may nonetheless provide a basis for compensation or damage claims when a contract has been internationalized.[57] In addition, many foreign investors seek such clauses as a means of reinforcing the parties' stated intention not to change the agreement without mutual consent.[58]

Stabilization clauses have traditionally been included in many of the major oil-producing states' agreements.[59] The language used in these clauses in Libya[60] is fairly typical of

53. *See infra* text accompanying note 90 for text of the choice of law clause in its most recent Libyan version. The fact that international law governs the agreement, however, may not necessarily determine the outcome of any particular dispute in which the international law rules themselves are uncertain or ambiguous.

54. *See* Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT'L & COMP. L.Q. 401, 404 (1979).

55. *Id.* at 409. For an example of such a clause, see *infra* text accompanying note 82 (discussion of the Libyan stabilization clause).

56. *See* Zakariya, *Changed Circumstances and the Continued Validity of Mineral Development Contracts*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 263 (K. Hossain ed. 1980); *see also* F. Hyndrex, A Sovereign Nation's Legal Ability to Make and Abide by a Petroleum Concession Contract 7 (paper presented at the First Arab Petroleum Congress, Cairo, April, 1959) (arguing that no government can bind its successors not to alter a previous contract) (available at the office of the *Fordham International Law Journal*).

57. *See, e.g.*, the importance attached to the stabilization clause in the *Aminoil Arbitration*, 21 I.L.M. 976, 1023 (1982). Stabilization clauses typically protect the investor against (a) tax increases; (b) the imposition of other fiscal charges; (c) amendments to laws affecting the concessionaire's operations; and (d) expropriation, nationalization and other forms of government intervention in the enterprise. Asante, *supra* note 54, at 409.

58. *See id.* at 409-10; *see also* Moran, *Transnational Strategies of Protection and Defense by Multinational Corporations: Spreading the Risk and Raising the Cost of Nationalization in Natural Resources*, 27 INT'L ORG. 273 (1973).

59. *See* U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, *supra* note 22, at 41.

60. Kingdom of Libya, Ministry of Petroleum Affairs, Agreement for Amendment of Petroleum Concessions Nos. 9, 10, 11, 12, 13, 14, 15, 50, 57, 62, 72, at 22

contracts in force in the 1960s and early 1970s.[61] Notwithstanding the wide acceptance of stabilization clauses, major changes have in fact occurred in the relations between host governments and transnational oil companies.[62] Among the more dramatic changes were the rapid price increases of 1973-1974, despite the five-year price stability guarantee of the 1971 Tehran and Tripoli agreements,[63] and the producer governments' rapid acquisition of majority or even 100% equity ownership of the concessions, despite agreements that purported to phase in such equity participation over ten years.[64] Most such changes reduced the companies' share of profits,[65] and not all the changes were accepted willingly.[66] The stabilization clause mechanism is not by itself an effective device for achieving actual stability in contract terms. The clauses are ineffective because most companies choose not to insist on prompt enforcement of the clause, but rather learn to live with the changed terms. Any modification of the formal contract terms occurs, if at all, months or even years after the government has effectively made the changes. The Saudi Arabian government,

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(Jan. 20, 1966) [hereinafter cited as "*1966 Amendment*"] (available at the offices of the *Fordham International Law Journal*). The text of the stabilization clause in Libya, as finally amended, provided:

> (1) The Government of Libya will take all the steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.
>
> (2) This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of execution of the agreement of amendment by which this paragraph (2) was incorporated into this concession agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent.

Id. at 22.

61. *See, e.g., Aminoil Arbitration*, 21 I.L.M. 976, 1020 (1982) (text of Kuwait stabilization clauses).

62. *See supra* text accompanying notes 33-44.

63. Under the 1971 Tehran Agreement, *supra* note 30, for example, price increases through 1975 were to be limited to 5 cents per barrel per year, plus 2.5% annually to compensate for inflation. P. TERZIAN, *supra* note 27, at 138.

64. *See, e.g.*, P. TERZIAN, *supra* note 27, at 158. The Saudi Arabian participation agreement of 1972, *see id.*, for example, provided for a phasing-in of government ownership to be completed in 1982. The Saudi Government's actual assumption of full ownership was made without publicity and without a formal, signed agreement. Zakariya, *supra* note 14, at 6 n.5.

65. *See, e.g.*, *infra* notes 96-99 and accompanying text.

66. *See, e.g.*, F. WADDAMS, *supra* note 1, at 324-26.

for example, did not sign a formal agreement validating its 100% ownership of the giant Aramco concession for a considerable period after the government effectively assumed full equity ownership.[67]

3. De Facto Acquiescence

In a number of cases in which host governments have unilaterally imposed changes in contract terms on oil companies, those companies have either continued to operate under the revised terms, without any formal modification of their contract,[68] or have surrendered their concession rights without making any claim against the government for compensation.[69] By continuing to operate after a host government unilaterally changes the terms of the contract, an investor can be considered either to have consented to the new conditions or to have waived any right it otherwise might have had under the original agreement to challenge such unilateral change.[70] Thus, Mobil's continued operations in Libya, even though under at least informal protest, can be construed as a consent or waiver.[71]

C. *The History of Mobil's Contractual Relations in Libya*

Mobil and the Libyan Government negotiated their original oil exploration agreements in 1955.[72] The terms of these

67. *See* Zakariya, *supra* note 14, at 6 n.5.

68. F. WADDAMS, *supra* note 1, at 326. Mobil itself, as a minority partner in the Aramco oil concession in Saudi Arabia, apparently accepted the unilateral changes in that concession agreement imposed by the Saudi Government. *See* Zakariya, *supra* note 14, at 6.

69. Exxon, for example, surrendered its rights in Libya without making any claim against the government. *See Poor Economics, Not Politics, Spurs Exxon's Libya Exit*, PETROLEUM INTELLIGENCE WEEKLY, Nov. 16, 1981, at 1.

70. *See infra* text accompanying note 143.

71. *Id.*

72. F. WADDAMS, *supra* note 1, at 83. The history of the petroleum industry in Libya dates back at least to 1912, when scientific surveys conducted during the Italian occupation revealed a "petroliferous odor" in many water wells. During the 1920s and 1930s, considerable exploration was carried out by Italian, British and Egyptian interests. Active drilling only began, however, following the enactment of the Petroleum Law of 1955, which was drafted with considerable assistance from the oil companies. ENERGY INFORMATION ADMIN., U.S. DEP'T OF ENERGY, THE PETROLEUM RESOURCES OF LIBYA, ALGERIA AND EGYPT 3 (1984). Forty-seven concessions were granted in late 1955 and early 1956, and an additional 30 concessions were granted from 1956 through 1958, altogether involving some 15 international oil companies.

agreements were largely derived from the 1955 Petroleum Law, which the government had drafted in order to attract foreign oil companies,[73] and which was generally favorable to such investors.[74] Mobil made its first discoveries in 1959[75] and began production by 1963.[76]

The parties first changed the pricing, stabilization and choice-of-law terms of Mobil's concession agreements in 1963.[77] The 1963 amendments introduced the concept of "posted prices,"[78] which were defined as: "the price f.o.b. [Libya] . . . arrived at by reference to free market prices . . . or if there is no free market for commercial sales of full cargoes of Libyan crude, then . . . a fair price fixed by agreement between the [Company and the Ministry] or in default of agreement by arbitration . . . ."[79] This change brought Libyan practice into conformity with that in most other OPEC states, where royalty and tax payments were determined not by reference to prices

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Ten oil fields were discovered before 1960, including the giant Amal field, located in Mobil's concession area. *Id.* at 5. Crude oil production in Libya began in 1961 and reached a peak level of 1.2 billion barrels in 1970. Since then, production has fluctuated, and in 1982, the last year in which Mobil operated in the country, production was only 316 million barrels, the lowest level since 1964. Based on the 1982 figures, Libya is the 12th largest oil producer in the world and the 6th largest producer in OPEC. *Id.* at 6. In 1984, Libyan production was 398 million barrels, ranking 13th in the world as a whole and 7th in OPEC. 18 INTERNATIONAL PETROLEUM ENCYCLOPEDIA 258-59 (1985).

The terms of the initial concessions were as prescribed in the 1955 Petroleum Law. *See* F. WADDAMS, *supra* note 1, at 57-58. At the time the law was drafted, the Libyan Government had no experience in oil taxation matters and no knowledge of practice in other countries. The oil companies thus succeeded in obtaining what, from their point of view, was an ideal contract, giving them virtually complete control over all aspects of operations, as well as only minimal fiscal obligations. *See id.* at 69.

73. *See id.* at 60, 68.

74. *Id.* at 68-69.

75. *Id.* at 76.

76. *Id.* Prior to the discovery of oil, Libya was one of the world's poorest countries, with per capita annual income of less than U.S.$35 when Libya became independent in 1951. S. GHANEM, *supra* note 32, at xix. By 1968, per capita income had increased to U.S.$1,239, and Libya was described as a case study in economic development with an unlimited supply of capital. *Id.* In 1981, per capita gross national product was U.S.$8,450, or within 10% of that of the United States. *See* WORLD BANK, WORLD DEVELOPMENT REPORT 1983, 149 (1983).

77. *1963 Agreement*, *supra* note 51.

78. For a discussion of Esso's introduction of posted prices in Libya, see S. GHANEM, *supra* note 32, at 61-90.

79. *1961 Amendments*, *supra* note 3, at 14. The 1963 agreement defined "posted price" by reference to the 1961 amendments to the Petroleum Law. *1963 Agreement*, *supra* note 51, at 3.

that the oil companies said they received in the marketplace,[80] but rather to prices that were largely the result of negotiations between the companies and the host governments.[81]

The 1963 amendment also changed the stabilization clause by providing that no change in the Libyan petroleum regulations that might be promulgated after the amendment date would affect the rights of the concessionaire without the latter's consent.[82] Finally, the 1963 amendments altered the choice of law clause in Libya's favor by adding, after "rules and principles of international law . . ."[83] the phrase, "but only to the extent that such rules and principles are not inconsistent with and do not conflict with the laws of Libya."[84] These changes made it clear that, when Libyan law was relevant to a contractual issue, Libyan law would apply,[85] and also permitted the Libyan Government to change at least some laws without infringing the contractual rights of the concessionaire.[86]

Mobil and the Libyan Government again amended the concessions, by mutual agreement, in 1966.[87] This amendment gave the Libyan Government increased income by treating royalties primarily as a deduction from income, rather than as a full credit against income taxes.[88] In return, Mobil gained somewhat stronger language in the stabilization clause[89] and a complete revision of the choice of law clause. The new choice of law clause provided that the governing law in any arbitration was to be "the principles of law of Libya common to the principles of international law and in the absence of such common

80. The oil companies could manipulate such prices so as to maximize their worldwide after-tax profits. *See* R. ENGLER, THE POLITICS OF OIL 41 (1961).

81. *See, e.g.*, *Tripoli Agreement*, *supra* note 30.

82. *1963 Agreement*, *supra* note 51, at 7-8.

83. *Id.* at 9.

84. *Id.*

85. F. WADDAMS, *supra* note 1, at 106. While the oil companies did not like the change, no company filed for arbitration under this clause for 10 years. *Id.*

86. *Id.* at 108-09. In theory, the amended agreements permitted the government to amend the Petroleum Law, but not the Regulations, without the concessionaires' consent. In practice, however, the new agreements gave the companies the most effective possible guarantee of stability. *Id.*

87. *1966 Amendment*, *supra* note 60; *see also* F. WADDAMS, *supra* note 1, at 139-51 (describing the process of negotiation leading to passage of a new petroleum law in 1965 and the subsequent amendment of concession agreements).

88. *See 1966 Amendment*, *supra* note 60, at 5.

89. For the text of the revised stabilization clause, see *supra* note 60.

principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals."[90] In effect, this amendment reversed the previous contractual scheme, in which Libyan domestic law had been the primary source for interpretation of the oil concessions, and instead made international law paramount.

In 1970, following the overthrow of the monarchy in Libya by revolutionary military forces led by Col. Muammar Qaddafi,[91] Mobil and other oil companies operating in Libya agreed to give up their dominant role in setting oil prices[92] and to adhere to a schedule of periodic price increases intended to govern the price situation until 1975.[93] Under the 1970-1971 agreements,[94] prices were set by agreement in formal negotiations, rather than declared unilaterally by either party.[95]

The next major change in relations between the Government and the oil companies operating in Libya occurred in 1973-1974. In addition to the changes that resulted from Libya's implementation of general OPEC policies[96] concerning prices, tax rates and equity interests for the government,[97] all of which were implemented in Libya in 1973-1974, Libyan Law No. 82 of 1974[98] gave the government the unilateral power to determine posted prices. This law allows the government to

90. *Id.* at 25. The oil companies had encouraged the change in the governing-law clause, which had at first been strongly resisted by the government. F. WADDAMS, *supra* note 1, at 142. Eventually, the Libyan government accepted the new choice of law provision as an indication of its intention to be fair and equitable. *Id.*

91. For an account of the 1969 military coup, see R. FIRST, LIBYA: THE ELUSIVE RESOLUTION 99-118 (1974) and O. EL FATHALY & M. PALMER, POLITICAL DEVELOPMENT AND SOCIAL CHANGE IN LIBYA 38-41 (1980). The first Prime Minister of the revolutionary government, Dr. Mahmud al Maghribi, had previously been a lawyer for Exxon. In the first weeks after the revolution, no substantial change in oil company operations was anticipated. F. WADDAMS, *supra* note 1, at 229.

92. *See Tripoli Agreement*, *supra* note 30 (pricing arrangements negotiated by companies and host government, rather than being set unilaterally by companies); *see also* M. TANZER, *supra* note 32, at 125.

93. *Tripoli Agreement*, *supra* note 30.

94. These agreements are described in F. WADDAMS, *supra* note 1, at 233-45.

95. *See, e.g.*, the complex pricing arrangements of the 1971 Tripoli Agreement. F. WADDAMS, *supra* note 1, at 241-42.

96. *See generally* P. TERZIAN, *supra* note 27, at 163-202.

97. The 1971 Tehran agreement provided for a 55% tax rate, an initial increase of 35 cents per barrel in posted prices, additional phased price increases, and a five-year assurance of stability. F. WADDAMS, *supra* note 1, at 239-40.

98. *Law No. 82*, *supra* note 36.

alter each concession agreement, without the concessionaire's consent, by adding a new clause authorizing the Minister to set prices "in the event of change in circumstances or basis for determining the prices of crude oil or derivatives thereof in the market."[99]

From 1975 through 1982, Mobil and other companies producing oil in Libya continued to operate under these new terms even though the concessionaires had not explicitly agreed to the unilateral setting of posted prices by the government.[100] Mobil evidently protested these unilateral changes,[101] but did not request a referral to arbitration under the concession until the end of 1982, when Mobil simultaneously announced its withdrawal from the concession and its invocation of the arbitration procedure.[102]

Late in 1981, the United States Government urged United States oil companies to withdraw from Libya.[103] Mobil withdrew at the end of 1982 without making any agreement with the Libyan Government for the termination of the concession.[104] Shortly thereafter, the company filed an arbitration claim alleging that Libya's actions with respect to the setting of posted prices had deprived it of a fair return during the 1975-

99. *Id.* at 1.

100. *See Libya*, WORLD OIL, Aug. 15, 1984, at 118 (indicating that reduced operations by a number of companies were continuing).

101. In 1981, for example, Mobil temporarily halted production in a dispute over pricing. Cowell, *Libya Pressed to Revise Tough Oil-Price Policy*, N.Y. Times, Nov. 23, 1981, at D2, col. 4.

102. Mobil did file a notice of intended termination early in 1982, Mobil Oil Corp., news release (June 9, 1982) (available at the offices of the *Fordham International Law Journal*), but officially withdrew only at the end of that year. *See* MOBIL CORP., 1982 ANNUAL REPORT 6 (1983).

103. Mossberg, *U.S. Is Boosting Effort to Isolate Libya's Qadhafi*, Wall St. J., Dec. 8, 1981, at 4, col. 1. Exxon, the United States company with the largest Libyan production, did withdraw. Friedmann, *Exxon to End its Oil and Gas Output in Libya*, N.Y. Times, Nov. 13, 1981, at 1, col. 4. Other United States companies, however, including Occidental and the Oasis Group, comprising Amerada-Hess, Conoco and Marathon, stayed on in Libya. As of mid-1985, these companies were still producing in Libya, although Occidental had sold a 25% share in its Libyan concession to an Austrian firm. *See Africa: When Will the Problems End?*, WORLD OIL, Aug. 15, 1985, at 110. The remaining U.S. companies operating in Libya were ordered by the U.S. government to cease operations by Feb. 1, 1986. *See* Weinraub, *President Breaks All Economic Ties with the Libyans*, N.Y. Times, Jan. 8, 1986, A1, col. 6, at A7, col. 1.

104. *See* Ibrahim, *Libya Warns Mobil to Drop Claims or Face an Audit*, Wall St. J., Sept. 26, 1984, at 42, col. 3.

1982 period.[105] Mobil asserted that the Libyan actions in setting posted prices unilaterally "destroyed the economic value" of the concessions.[106] The primary reason for Mobil's claim was the Libyan Government's attempt to capture 100% of any increases in market prices for oil by increasing posted prices, on which royalties and taxes were based, faster than market prices.[107]

II. *GOVERNMENT PRICE-SETTING AND THE CONCESSIONAIRE'S RIGHT TO A FAIR PROFIT*

Since the 1960s, resource-producing Third World states have attempted to gain control of the mechanism by which prices for their exports are determined. This attempt is a central element in these governments' efforts to establish a "new international economic order."[108] More specifically, since the 1970s, OPEC member states, including Libya, have asserted their authority to set prices for the oil that they export.[109] However, if prices that the governments set have the effect of reducing corporate profits this price-setting action may lead to conflicts between the host governments and the oil companies.

For some time after 1973, the higher oil prices set by OPEC governments produced higher profits for the transnational oil companies as well.[110] During this period, there was

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105. *See* Mufson, *Mobil Pulls Out From Libyan Oil Fields, Saying Terms of 1955 Pact Were Violated*, Wall St. J., Jan. 5, 1983, at 2, col. 3.

106. MOBIL CORP., 1982 ANNUAL REPORT 6 (1983).

107. At the post-1975 rates of 16.67% royalty and 65% income tax, the Libyan government would theoretically obtain 70.81 cents for every dollar increase in the oil price, assuming no corresponding increase in costs, in the form of an additional 16.67 cents in royalty, plus 65% of the remaining 83.33 cents. If, however, the government raised the posted price by $1.41 for each $1.00 increase in the market price, then the government would capture the full $1.00 increase, taking 23.5 cents in royalty (16.67% of $1.41), plus 65% of the remaining $1.175. Oil companies generally regarded Libyan crude prices fixed by the Government as being higher than justified by market conditions. *See* Ibrahim, *Libya Might Cut Crude Oil Price by $1*, Wall St. J., Nov. 18, 1981, at 1, col. 1.

108. *See generally* LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, *supra* note 56.

109. *See* A. SAMPSON, *supra* note 26 at 255-59.

110. The return on total assets of crude oil and gas producing companies, for example, increased from 6.3% in 1972 and 7.7% in 1973 to 11.6% in 1974. S. SUNDER, OIL INDUSTRY PROFITS 27 (1977). The pattern of oil company profits after the 1973-74 and 1979-80 price increases is graphically shown in CHASE MANHATTAN BANK, FINANCIAL ANALYSIS OF A GROUP OF PETROLEUM COMPANIES 1983 (1984). For

little incentive for the companies to challenge the new system of price-setting, because the higher prices fixed by the government coincided with higher profits reported by the companies. This identity of interest between the companies and the oil-producing states continued generally through the further oil price increases of 1979-1980.[111] After 1980, however, as world market prices for oil weakened,[112] and OPEC began to lose its commanding position in the world oil market,[113] the interests of the companies and the governments diverged. The desire of governments to maintain per-barrel revenues at as high a level as possible meant that the posted or official selling prices[114] were set at levels that might reduce or eliminate oil-company profits.[115]

This growing divergence in host government and oil company interests is reflected in Mobil's argument that the company did not earn a "fair" profit or receive a "fair" price for its oil.[116] Assuming that Mobil establishes that it had a contractual right to a fair profit, the company must then establish what level of profit should be considered fair.[117] In view of the high

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the large oil companies as a group, profits increased moderately in response to the 1973-74 price increases, then declined, but increased sharply following the 1979-80 price increases. *Id.*

111. The weighted average price of OPEC crude oil was $12.90 per barrel in 1978, $18.60 in 1979, $30.50 in 1980, and $34.30 in 1981. WORLD BANK, COMMODITY TRADE AND PRICE TRENDS, 110 (1983-84 ed.).

112. Prices for some crude oils dropped from a high of more than $40.00 per barrel in 1981 to barely $30.00 by the end of 1984. BRITISH PETROLEUM CO., B.P. STATISTICAL REVIEW OF WORLD ENERGY 12 (1985).

113. OPEC's production decreased from 31.5 million barrels per day in 1979, or 61% of non-Communist world production, to 18.3 million barrels per day, or 43% of such total production, in 1984. *Id.* at 5.

114. During the period that the transnational oil companies controlled the sale of most crude oil traded internationally, the relevant prices for government revenue purposes were the posted prices, on which taxes and royalty were calculated. *See* A. Sahakian, *supra* note 48, at 55. During the 1970s, host governments gradually took over responsibility for marketing an increasing share of the oil produced in their territory. For these governmental sales, the relevant prices, which determined the ultimate government revenue, were the official selling prices quoted by government oil companies or marketing agencies. *See* Tanzer & Zorn, *supra* note 32, at 37.

115. For an example of how this process would work in practice, see *supra* note 107.

116. This claim is based on the "fair price" language of the concession agreement. *See 1963 Agreement*, *supra* note 77, at 6.

117. One leading analyst of the oil industry has suggested that:

> There is no reason . . . why the oil companies should earn greater profits than is necessary to induce them to continue investing in the country and to

risk involved in oil exploration and production and the highly volatile nature of oil prices,[118] any attempt to specify an a priori level of fair profit appears to be highly speculative.

Whatever the level of a "fair profit" might be in the oil industry, it is not clear that an investor may ever successfully assert a claim against a government whose taxation decisions effectively reduce the investor's profits. International precedents indicate that, in the absence of specific contractual undertakings or treaty provisions, governments are not generally precluded from imposing taxation that may have had the effect of depriving a foreign national of profitability.[119] Even when, as in the United States, there are constitutional limits on the government's ability to take property,[120] the amount of a tax has rarely been held to be confiscatory.[121]

However, in *Government of the State of Kuwait v. American Independent Oil Co.*,[122] an oil-industry arbitration case in which such a stabilization clause was included in the concession agreement,[123] the arbitrator indicated that the panel might have reached a different result in a case involving a stabiliza-

> compensate them for their initial risks. In other words, if excess profits are to be earned, a producing country can complain of exploitation to the extent to which it is unable to obtain them for itself.

Penrose, *Profit Sharing Between Producing Countries and Oil Companies in the Middle East*, 69 ECON. J. 245 (1959).

118. Even before the large price increases of the 1970s, the posted price of Libyan crude oil fluctuated between $2.55 and $3.34 per barrel, a difference of 31%. S. GHANEM, *supra* note 32, at 301.

119. *See, e.g.*, Kugele v. Polish State, 6 Ann. Dig. 69 (Upper Silesian Arbitral Tribunal, 1932). Two cases decided by United States agencies suggest, however, that taxation that is merely a disguised form of expropriation may violate international law. *See* Corn Products Refining Co. Claim, 22 I.L.R. 333 (U.S. Int'l Claims Comm. 1955), in which the U.S. International Claims Commission held that the imposition by Yugoslavia of a tax, in the form of a unilaterally imposed mortgage in favor of the state, equal to 1300% of average annual profits and three times the value of the property in question, amounted to expropriation. *Id.* at 334; *see also* U.S. INT'L CLAIMS COMM., 11TH SEMIANNUAL REPORT TO THE CONGRESS FOR THE PERIOD ENDING DEC. 31, 1959, 31-32 (1960) (reporting the Commission's decision that a Czechoslovakian requirement that 80% of a real property owner's gross rental income be deposited with the government amounted to confiscation).

120. *See* U.S. CONST., amend. V.

121. *See, e.g.*, Commonwealth Edison v. Montana, 453 U.S. 609 (1980) (upholding 30% severance tax on coal).

122. *Aminoil Arbitration*, 21 I.L.M. 976 (1982).

123. The validity of the stabilization clause was upheld in the *Aminoil Arbitration*, although the clause was held not to be specifically applicable to the nationalization at issue in that claim. *Aminoil Arbitration*, 21 I.L.M. 976, 1023 (1982).

tion clause that applied unequivocally to the government action at issue.[124] The award in *Aminoil* failed either to define a normal and reasonable level of profits, or to set out methods of calculating profitability, required incentives, or measures of compensation for risk.[125] This award does not, therefore, provide a clear and definite guideline for application to other oil-concession situations.

The only language relating to the fair-profit issue in the Libyan concession agreements is the "fair price" provision.[126] This language was not specifically interpreted in the previous Libyan arbitrations,[127] which dealt with outright nationalizations. There is a substantial question whether, in a high-risk industry like petroleum exploration and production, the "fair price" language can realistically be read to imply a guarantee of fair profits. In view of the general uncertainty in the oil market for much of the 1975-1982 period,[128] it would be difficult to show that any particular prices were manifestly unreasonable.

If the fair-price language alone will not support a claim for breach of the concession agreement, Mobil might, alterna-

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124. The arbitrator in the *Aminoil Arbitration* noted that:

> [a]ssuming that a normal level of profits has been determined having regard to the total capital invested, it would be ordinary business practice in the case of a concession intended to last, to add a reasonable profit margin that would preserve incentives, and allow for risks, whether commercial or technological.

Aminoil Arbitration, 21 I.L.M. 976, 1038 (1982).

125. Between 1967 and 1973, overall rates of return on net assets of the ten largest United States oil companies ranged from 11% to 15%. Rates of return on foreign operations were generally more volatile than those on United States activities. Mobil's profitability in this period ranged from 10.3% to 15.6% on worldwide operations (including the United States), and from 10.8% to 21.2% on non-United States activities. Profits for almost all oil companies increased substantially in 1974, following the 1973 OPEC price increases. *See* STAFF OF SENATE COMM. ON FINANCE, 94TH CONG., 2D SESS., 1975 PROFITABILITY OF SELECTED MAJOR OIL COMPANY OPERATIONS 2-3 (Comm. Print 1976). More recently, the profits of 22 large oil companies, including Mobil, in 1982-1983 were less than 6% of total assets and between 12-13% of shareholders' equity. CHASE MANHATTAN BANK, *supra* note 110, at 24. No information is available on the profitability of Mobil's operations in Libya; the company's annual reports and SEC Form 10-K reports do not show Libyan activity separately.

126. *1963 Agreement*, *supra* note 77, at 6.

127. *LIAMCO Arbitration*, 62 I.L.R. 141 (1977); *TOPCO Arbitration*, 53 I.L.R. 389 (1977); *B.P. Arbitration*, 53 I.L.R. 297 (1974).

128. *See* WORLD BANK, *supra* note 111, at 110 (indicating the large variation in oil prices in the 1972-1982 period).

tively, argue that the basis of the entire contractual undertaking, the reasonable expectation of the parties,[129] was that the total effect of all fiscal arrangements, including royalties, taxes, and prices, would allow Mobil to earn a reasonable profit. The changes in the Libyan fiscal system may justify a concessionaire's decision to withdraw from the concessions, because such changes can be interpreted as a fundamental change of circumstances.[130] However, it is doubtful that the fiscal changes alone could support a claim for damages resulting from the denial of a concessionaire's right to a fair profit, unless such a claim stemmed from a stabilization clause in the concession agreement.

III. *EFFECT OF THE STABILIZATION CLAUSE*

The stability of contractual arrangements is a principal concern of transnational corporations investing in oil and mining ventures in developing countries.[131] In the absence of specific contractual language indicating the intention of the parties, there is no general international legal obligation on the part of a host government to permit foreign investors to make a fair profit.[132] However, when a concession agreement has been negotiated on the basis of a shared understanding of the range of likely profits, the agreement may oblige the government to give the investor the benefit of the bargain that was negotiated. If this position is accepted, such an obligation would be based on the incorporation of the shared fiscal understanding into the substance of the concession agreement, which would then become binding on the host government as a result of the investor's legitimate reliance on the agreement.[133] The investor in this situation could argue that, at a minimum, the host government has some responsibility to observe the maxim *pacta sunt servanda* and to refrain from taking

129. *See* 1 A. CORBIN, CORBIN ON CONTRACTS § 112 (1963).

130. *See, e.g.*, *Aminoil Arbitration*, 21 I.L.M. 976, 1044 (1982) (separate opinion of Fitzmaurice, Arb.).

131. *See* Asante, *supra* note 54, at 409.

132. *See, e.g.*, Kugele v. Polish State, 6 Ann. Dig. 69 (Upper Silesian Arbitral Tribunal, 1932) (holding that taxation and license fees, even if they made a business unremunerative, did not amount to a taking of property).

133. *See* Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553, 579 (1981).

unilateral action that would deny the expected benefits to the investor.[134]

A. *The Libyan Stabilization Clause*

In the Libyan case, this general argument for contractual stability is reinforced by the specific stabilization clause contained in the Mobil concession agreements.[135] Libya's imposition of unilateral price-setting authority under Law No. 82[136] was, on its face, a violation of the stabilization clause's promise that changes would be made only with the concessionaire's consent.

In previous oil-industry arbitrations, stabilization clauses have uniformly been upheld as valid self-imposed limitations on the sovereignty of host governments.[137] There is contrary opinion, however, that when circumstances have fundamentally changed after the date of the concession agreement,[138] the state can, by unilateral legislation, abrogate its prior commitment to contractual stability and adjust the agreement to the new situation.[139] This view has not, however, generally found favor with arbitrators.[140] Thus, an arbitrator might find that the stabilization clause in the Libyan concessions retained its validity through the 1975-1982 period. Identical clauses have been upheld by arbitrators in the previous Libyan arbitrations dealing with nationalization of oil concessions.[141]

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134. The application of *pacta sunt servanda*, the principle that agreements are to be carried out according to their terms, to foreign investment contracts has been recognized, e.g., in *TOPCO Arbitration*, 53 I.L.R. 389, 462 (1982) and Sapphire International Petroleums Ltd. v. National Iranian Oil Co., 35 I.L.R. 136, 181 (Cavin, Arb. 1963).

135. See the text of stabilization clause *supra* note 60.

136. *Law No. 82*, *supra* note 36, at 1.

137. *See, e.g.*, *TOPCO Arbitration*, 53 I.L.R. 389, 476-78 (1977).

138. The extent of the change required for a state to argue that the former contractual arrangements should no longer apply is not necessarily self-evident. A leading proponent of the changed-circumstances doctrine, for example, does not attempt to define exactly when that doctrine would apply in specific cases. *See* Zakariya, *supra* note 56, at 264-65.

139. *Id.* at 274-75.

140. *See, e.g.*, *Aminoil Arbitration*, 21 I.L.M. 976, 1024 (1982) (finding a change in the content of the parties' agreement, rather than changed circumstances).

141. *See, e.g.*, *LIAMCO Arbitration*, 62 I.L.R. 141, 170 (1977); *TOPCO Arbitration*, 53 I.L.R. 389, 477 (1977).

B. *Waiver, Estoppel and Modification*

Despite the changes made by the Libyan Government after 1975, Mobil continued to operate in Libya through 1982.[142] This continuation of operations raises the issues of waiver, estoppel, and possible modification of the concession agreement by conduct.

Even if an arbitrator held that the stabilization clause retained its vitality until Mobil's withdrawal from Libya in 1982, the arbitrator could also find that the corporation had effectively waived its rights or that it is estopped from claiming damages. Both of these defenses could arise because Mobil voluntarily chose to remain on the scene and to operate under the unilaterally imposed terms for an additional seven years after the first alleged breach of the contract by the government.[143]

The waiver and estoppel arguments are Libya's most persuasive points in opposition to Mobil's claim. These arguments are supported by analogy both from domestic United States precedent and international law. The prevailing rule in most United States jurisdictions[144] suggests that, unless a company can demonstrate that it objected consistently to the unilaterally imposed regime, and that it paid any taxes and royalties resulting from the unilateral change only under protest, an arbitrator might find that the corporation had waived any claim. Such a conclusion appears to be especially likely after a period of continued operation lasting as long as the seven years that Mobil remained in Libya.[145] An analogous rule of public international law suggests that a state may be considered bound by general norms of international law unless it has clearly registered its objections and taken consistent action to preserve its status as a "persistent objector."[146]

While Mobil did register some objections to the post-1975

142. *See supra* text accompanying notes 100-02.

143. *See Aminoil Arbitration*, 21 I.L.M. 976, 1024 (1982).

144. *See* 17 Am. Jur. 2d *Contracts*, §§ 390, 393 (2d ed. 1964).

145. *See, e.g.*, Tibbetts Contracting Corp. v. O. & E. Contracting Co., 15 N.Y. 2d 324, 206 N.E. 2d 340, 258 N.Y.S. 2d 400 (1965) (continued acceptance of benefits under a contract with knowledge of breach constitutes a waiver).

146. Waldock, *General Course on Public International Law*, in 106 RECEUIL DES COURS 1, 49 (1962) (clear and unambiguous objection required, dating from the time the objecting government first became aware of the objectionable rule).

Libyan tax regime,[147] the corporation apparently did not take any formal legal action to protest the imposition of the levies until after its withdrawal at the end of 1982.[148] Moreover, the Libyan Government responded to some of the oil companies' objections prior to 1982, by adjusting posted prices and granting discounts.[149] Such a pattern of continued operation and negotiated compromises with the host government suggests that Mobil and Libya had an ongoing contractual relationship, in which any potential claims by the corporation, respecting earlier government action, were either waived or eliminated as the result of a de facto modification of the agreement. Such a modification would occur when the parties' conduct indicated that they recognized that their contract had effectively incorporated the government's unilateral changes.[150]

C. *Stabilization and Administrative Contracts*

If the arbitrator considered the Libyan concession agreements to be "administrative contracts,"[151] the stabilization clause would not necessarily determine the outcome of the arbitration proceeding. Administrative contracts, a category of agreements between states and investors, permit some unilateral adjustment by the state.[152] Two of the three arbitrators who have considered Libyan concession agreements that are very similar to the Mobil agreement have concluded that these

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147. *See* Mobil Oil Corp., news release (June 9, 1982) (announcing Mobil's intention to withdraw from its Libyan concession).

148. *See* MOBIL CORP., 1982 ANNUAL REPORT 6 (1983) (announcing withdrawal as of the end of 1982 and the filing of the arbitration claim).

149. *See* 15 INTERNATIONAL PETROLEUM ENCYCLOPEDIA 98 (1982) (discount to Occidental).

150. The decision of the arbitrators in the *Aminoil Arbitration* suggests that a concession agreement may be modified by a course of conduct subsequent to the unilateral action of one of the parties, although this finding was not essential to the holding in that case. *Aminoil Arbitration*, 21 I.L.M. 976, 1024 (1982).

151. Administrative contracts include: (a) contracts to which at least one party is an administrative body and which have as their object the carrying out of public works, (b) contracts providing for the occupation of public lands, and (c) contracts to which one party is an administrative agency and in which either the obligations of the other party include the carrying out of a public service or, if the public service aspect is only an indirect object of the contract, there are provisions which impinge on what would otherwise be common or public rights ("clauses exorbitantes du droit commun"). M. WALINE, DROIT ADMINISTRATIF 565, 572 (9th ed. 1963).

152. *Id.* at 605-06.

concessions are not administrative contracts.[153]

However, even if an arbitrator did conclude that the oil concession agreement was an administrative contract, there are limits beyond which a government may not go in imposing unilateral changes without incurring liability to the investor.[154] This is especially true when such adjustments significantly alter the economic expectations of the parties.[155] If the Libyan Government's unilateral setting of posted prices deprived Mobil of the profit that the concessionaire could reasonably have anticipated in the event of a successful exploration effort, then even classifying the concession as an administrative contract would not necessarily eliminate the government's liability.[156] The corporation's claim would, however, still be subject to the waiver and estoppel defense.[157]

D. *Stabilization: Remedies and Damages*

Two further issues that relate to the stabilization clause in the agreement are: 1) whether Mobil had a right to repudiate its own contractual obligations and withdraw from Libya prior to the end of the concession term[158] and 2) to what extent any damage claim by Mobil could include lost future profits for the period between the time Mobil actually withdrew and the scheduled termination of the concession in the year 2011.

1. The Right of Withdrawal

In the Libyan case, Mobil chose "self-help" termination,[159] by withdrawing from the concession area and ceasing

153. *LIAMCO Arbitration*, 62 I.L.R. 141, 169 (1977); *TOPCO Arbitration*, 53 I.L.R. 389, 463-68 (1977). In the *B.P. Arbitration*, the arbitrator did find that the concession agreement was an administrative contract, 53 I.L.R. 297, 327 (1974), but held that Libya nonetheless breached the agreement by nationalizing the company's interests. *Id.* at 355.

154. *See* L. NEVILLE BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW 129-30 (3d ed. 1983).

155. *See* M. WALINE, *supra* note 151, at 847.

156. *See B.P. Arbitration*, 53 I.L.R. 297, 327, 355 (1974).

157. *See supra* text accompanying notes 143-46.

158. The original term of the concessions ran until the year 2011. *See When Do the Concessions End?*, *supra* note 22, at 449.

159. That is, Mobil abandoned its operations under the concession prior to obtaining a judicial or arbitral judgment that Libya was in breach of its obligations. *See* Ibrahim, *Libya Warns Mobil to Drop Claims or Face an Audit*, Wall St. J., Sept. 26, 1984, at 42, col. 3.

operations before obtaining an arbitral decision that the government breached the agreement. This approach was endorsed by an arbitrator in the recent *Aminoil* arbitration.[160] However, when a concessionaire decides to withdraw unilaterally, as in the *Aminoil* case, it takes the risk that an arbitrator will subsequently find that the government did not commit a material breach of the agreement or that the company had waived any claims arising from any such breach. If the arbitrator decides for the government, the concessionaire might itself be liable for damages suffered by the government[161] as a result of the withdrawal.

2. Damages for Lost Future Profits

Given the unpredictable nature of the international oil industry and the volatility of oil prices,[162] it would be difficult for a company in Mobil's position to prove damages for hypothetical future profits. No previous international oil exploration and production agreement arbitrations have awarded damages for loss of future profits from ongoing operations,[163] and, in

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160. *See Aminoil Arbitration*, 21 I.L.M. 976, 1044 (1982) (opinion of Fitzmaurice, Arb.); *see also* Sapphire International Petroleums Ltd. v. National Iranian Oil Co., 35 I.L.R. 136, 182 (Cavin, Arb. 1963).

161. *See, e.g.*, Kuwait's counter-claims in the *Aminoil Arbitration*, 21 I.L.M. 976, 1027 (1982). Such damages may include, for example, the cost of obtaining replacements for the concessionaire's technical experts, and any loss on sales that would have been made to the concessionaire.

162. *See supra* text accompanying note 118.

163. There are, however, numerous examples of awards for lost future profits in other industries. *See, e.g.*, Benvenuti et Bonfant v. People's Republic of the Congo, 21 I.L.M. 740, 759 (Int'l Centre for Settlement of Investment Disputes 1980); Pomeroy v. Government of Iran, 2 Iran-U.S. Claims Trib. Rep. 372, 386-87 (1983); Lighthouses Arbitration (Fr. v. Greece), 23 I.L.R. 299, 300-01 (Perm. Ct. of Arb. 1956). Even in the oil industry, damages for lost future profits have not been awarded in disputes concerning exploration and production concessions, but such damages have been awarded with respect to contracts for the marketing and distribution of refined products, which are not subject to the uncertainty associated with crude oil prices. *See* AGIP Co. v. Popular Republic of the Congo, 21 I.L.M. 726, 738-39 (Int'l Centre for Settlement of Investment Disputes 1979) (future profits recognized in principle, but only a nominal amount awarded under this heading). While some crude oil exploration and production concession agreement arbitrations have accepted the theoretical possibility of an award in respect of lost future profits, *see* Sapphire International Petroleums Ltd. v. National Iranian Oil Co., 35 I.L.R. 136, 186 (Cavin, Arb., 1963), no award of damages appears to have been made on the basis of an arbitrator's attempt to calculate such lost profits. In the *Sapphire* case, damages were awarded for the loss of concession rights even before any exploration had been car-

view of the post-1982 depression in world oil prices,[164] the measure of any such damages would be highly speculative.

IV. *CREEPING EXPROPRIATION*

While Mobil's arbitration claim characterizes the Libyan Government's unilateral increases in posted prices[165] as a breach of contract, these actions might also be seen as "creeping expropriation." Such a claim would be based on the theory that the Government's interference with the concessionaire's rights was of such significance that it constituted a de facto taking of Mobil's property.[166] Generally, an investor raising a claim of creeping expropriation will assert that the government continually harassed the investor or exercised regulatory control of the investor's operations to such a degree that it deprived the investor of effective control.[167] Alternatively,

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ried out; the arbitrator recognized that proof of the amount of potential lost future profits was impossible. *Id.* at 187-88.

164. *See supra* note 112.

165. *See supra* note 107.

166. As early as 1926, the Permanent Court of International Justice held that interference with a foreign investor's contractual rights could give rise to a claim for the taking of property, even if no nationalization was involved. *See* German Interests in Polish Upper Silesia (Merits), 1926 P.C.I.J., ser. A, No. 7. Continual interference with a concessionaire's freedom of action, sufficient to impair the concessionaire's ability to operate profitably, has also been held to constitute a de facto expropriation. *Id.* at 22.

Such de facto or creeping expropriations have also been found in more recent cases, especially in developing-country mineral projects in which host governments unilaterally imposed new taxes, levies or licensing requirements that substantially reduce the concessionaire's profits. *See generally* Higgins, *The Taking of Property by the State*, in 176 RECEUIL DES COURS 267, 322-54 (1983) (describing circumstances in which state actions may amount to creeping expropriation). In several cases arising from the imposition by Jamaica of a levy on bauxite production and export, such taxation has been held to be the equivalent of creeping expropriation. *See, e.g.*, Revere Copper and Brass, Inc. v. Overseas Private Investment Corp., 17 I.L.M. 1321, 1354 (Am. Arb. Ass'n 1978).

While the Libyan government did not seize the physical assets of Mobil, it might be argued that the unilateral setting of posted prices amounted to a taking of a contractual right, i.e., the right to a "fair price," pursuant to Clause 8(5)(b) of the concession agreement. *1961 Amendments*, *supra* note 3, at 14. The taking of contractual rights has frequently been held to be expropriation. *See, e.g.*, Starrett Housing Corp. v. Iran, [1984] Iranian Assets Litig. Rep. 7685, 7701 (Iran-U.S. Claims Tribunal, 1983); *see also* Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307 (1962).

167. *See, e.g.*, the actions listed in S.P.P. (Middle East) Ltd. v. Arab Republic of Egypt, 22 I.L.M. 752, 760-61 (Int'l Chamber of Commerce Ct. of Arb. 1983) (revocation of land transfer, stop-work order, and sequestration of assets).

some definitions of creeping expropriation require a pattern of fiscal measures on the part of the government that destroys the economic value of the concession.[168]

In the petroleum industry, however, there is a global pattern of government regulation and determination of production rates and prices by government authorities.[169] Most governments of petroleum-producing states exercise some unilateral authority over oil-producing companies, through conservation statutes[170] or fiscal legislation.[171] In the Mobil-Libya dispute, if the concessionaire argued that Libya's actions constituted creeping expropriation, Mobil would need to show that the government's manner of regulation and control was so different from the normal pattern in the industry that it constituted a true taking of property, and not mere regulation. In view of both the unilateral price-setting authority assumed by virtually all the OPEC governments during the 1970s,[172] and the production restrictions imposed on companies by many of those governments,[173] such a claim would appear difficult to sustain.

If, despite the preceding analysis, a claim for compensation for creeping expropriation were to be recognized by an arbitrator in the Mobil-Libya situation, such a holding would represent a significant expansion of the creeping expropriation doctrine as previously applied. If the arbitrator bypassed previous standards for determining when creeping expropriation had occurred, such as government harassment or measurable economic loss, it is unclear whether a satisfactory new standard for determining the existence of a creeping expropriation could readily be devised.

168. *See* B. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 106-09 (1959).

169. *See* K. HOSSAIN, *supra* note 22, at 245-46 (listing items normally regulated by government).

170. *Id.* at 50-51. Such regulation applies even in the United States. *See, e.g.*, RAILROAD COMM. OF TEXAS, STATEWIDE RULES FOR OIL, GAS AND GEOTHERMAL OPERATIONS (1983) (detailed rules governing oil and gas operations in Texas).

171. K. HOSSAIN, *supra* note 22, at 52-54; *see generally*, G. Barrows, Changes in World Exploration/Exploitation Terms (Address to Association of International Petroleum Negotiators, Oct. 20, 1982) (description of current fiscal arrangements in producing states) (available at the offices of the *Fordham International Law Journal*).

172. *See supra* note 34.

173. *See generally* A. SAMPSON, *supra* note 26, at 238 (example of the power of producing countries to impose production restrictions on short notice).

V. *PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES*

Both possible bases of Mobil's claim against the Libyan Government, breach of contract and creeping expropriation, arise from traditional norms of international law, which are widely recognized to be based largely on Western legal concepts.[174] In recent years, the continuing validity of many of those norms has been challenged, principally in the series of United Nations General Assembly resolutions dealing with "permanent sovereignty over natural resources"[175] and with the "New International Economic Order" (NIEO).[176]

The substantive content of the permanent sovereignty principle remains uncertain.[177] At a minimum, the principle recognizes that states own the natural resources within their territory, and that they may dispose of those resources as they see fit.[178] Some commentators would extend the principle further, to include the right to nationalize natural-resource concessions[179] and to adjust the terms and conditions under which a concessionaire operates to meet changing circumstances.[180]

However, most commentators agree that the permanent-sovereignty principle does not bar a government from freely accepting self-imposed limitations on its powers that result from contractual agreements with foreign investors. A similar view has been taken by those arbitrators who have considered the effect of the permanent-sovereignty principle.[181] Thus, absent any contractual limitations, a government may be free to

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174. *See* Anand, *Attitude of Asian-African States toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55, 57 (1966).

175. G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962); G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9400 (1973).

176. G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974); *see also* G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974) (Charter of Economic Rights and Duties of States).

177. Hossain, *Permanent Sovereignty over Natural Resources*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, 34 (K. Hossain ed. 1980). *But see* Gess, *Permanent Sovereignty over Natural Resources*, 13 INT'L & COMP. L.Q. 398, 448 (1964) (identifying principles contained in Resolution 1803).

178. *See* Hossain, *supra* note 177, at 35.

179. *Id.* at 36-38.

180. *See* Zakariya, *supra* note 56, at 264.

181. *See, e.g.*, *Aminoil Arbitration*, 21 I.L.M. 976, 1021 (1982); *TOPCO Arbitration*, 53 I.L.R. 389, 473-74 (1977).

set export prices and control production. If that government has previously agreed with a concessionaire to restrict its freedom of action in controlling prices and production, the government may be liable for damages if it subsequently breaches the agreement.

The principles of the New International Economic Order[182] are similarly not fully defined in international law. The Charter of Economic Rights and Duties of States,[183] the most comprehensive and widely supported version of NIEO principles, provides that states may nationalize resource investments in accordance with their own domestic legislation, and does not refer to any international standard of compensation.[184] Nothing in this formulation, however, appears to bar a state from freely undertaking the same kind of self-imposed limitations which are generally permissible under the permanent-sovereignty principle. A stabilization clause would, therefore, appear to have some international legal effect notwithstanding any invocation of the doctrine of permanent sovereignty or principles of the NIEO.

Even if the substantive content of permanent sovereignty or the NIEO could be determined, and if that content strengthened the host-government position in disputes like that between Mobil and Libya, it is not clear that these principles have become established norms of international law.[185] Any recog-

182. For a general summary of NIEO principles, see generally, Bulajic, *Legal Aspects of a New International Economic Order*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, 45-65 (K. Hossain ed. 1980).

183. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974) (Charter of Economic Rights and Duties of States).

184. *Id.* § 2(2)(c).

185. *See* O'Keefe, *The United Nations and Permanent Sovereignty Over Natural Resources*, 8 J. WORLD TRADE L. 239, 245 (1974). United Nations General Assembly resolutions are widely regarded as not being sources of international law in themselves. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 14 (2d ed. 1973); J. CASTANEDA, THE LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 11 (1979); Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure*, 34 BRIT. Y.B. INT'L L. 1, 3-5 (1958); Sloan, *The Binding Force of a Recommendation of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1 (1948). When a general Assembly resolution reflects an international consensus, however, the text of the resolution may be regarded as a convenient expression of the current state of international custom. *See* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 5 (1963). In the view of most commentators, only those resolutions that command support from all major groups of states, both geographic and ideological, can

nition by an arbitrator of either permanent sovereignty or the NIEO as enforceable legal principles would represent a significant change in the generally recognized international law governing host governments and foreign investors.

CONCLUSION

Mobil's arbitration claim against the Libyan government raises novel issues. Previous international arbitrations concerning mining and oil investments have involved either nationalization[186] or creeping expropriation.[187] In the Mobil-Libya dispute, there has been no actual nationalization, and

be regarded as having such a custom-declaring character. *See* Mendelsohn, *The Legal Character of General Assembly Resolutions: Some Considerations of Principle*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, 96-97 (K. Hossain ed. 1980). Of the various General Assembly resolutions which embody the permanent-sovereignty principle, only resolution 1803, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962), was adopted with the support of all the major capital-exporting countries. Resolution 1803 was recognized by the arbitrator in the *TOPCO Arbitration* as embodying customary rules of international law. *See TOPCO Arbitration*, 53 I.L.R. 389, 491-92 (1977). The same arbitrator, however, held that subsequent resolutions on permanent sovereignty, which commanded less than unanimous support from interested states, were at most *de lege ferenda*. *Id.* at 493. Most of the capital-exporting states either abstained or voted against these subsequent resolutions. *See, e.g.*, H. STEINER & D. VAGTS, *supra* note 8, at 466 (United States objections to General Assembly resolution 2158). Similarly, the resolutions on the NIEO, G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974) (New International Economic Order); G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974) (Charter of Economic Rights and Duties of States), also appear to support the rights of resource-owning states to change the rules applicable to foreign investors. *See, e.g.*, art. 2 of the Charter of Economic Rights and Duties of States, G.A. Res. 3281, which states that compensation for nationalization should be determined in accordance with the domestic law of the nationalizing state and does not refer to international legal standards. These resolutions, however, were adopted only after a number of capital-exporting states voiced explicit reservations about such an approach. Among the states opposing the nationalization language of G.A. Res. 3201, for example, were the United States, the United Kingdom and West Germany. *See* Brower & Tepe, *The Charter of Economic Rights and Duties of States: a Reflection or Rejection of International Law?*, 9 INT'L LAW. 295, 307 n.64 (1975).

In the *TOPCO Arbitration*, the Libyan Government attempted to invoke the permanent sovereignty, NIEO and Charter of Economic Rights and Duties of States resolutions. *See TOPCO Arbitration*, 53 I.L.R. 389, 484 (1977). The arbitrator concluded, however, that the Charter of Economic Rights and Duties of States was not a part of international law, *id.* at 492-93, and that the principle of good faith required that the government perform its contractual obligations, notwithstanding the resolutions. *Id.* at 494-95.

186. *See, e.g.*, *supra* note 4 (Libyan arbitration cases cited therein).

187. *See, e.g.*, Revere Copper and Brass, Inc. v. Overseas Private Investment Corp., 17 I.L.M. 1321 (Am. Arb. Ass'n 1978).

the creeping-expropriation claim appears relatively weak.[188] The case thus focuses primarily on breach of contract issues, which have not often been addressed by arbitral tribunals in natural resource concession cases that do not involve nationalization or expropriation.

In practical terms, a determination of the validity of a claim like Mobil's will generally turn on the facts of the specific case. In particular, an arbitrator will be required to determine the meaning of the language in the concession agreement referring to "fair" prices,[189] and whether there was also an implicit contractual commitment to permit the concessionaire to earn a fair profit.[190] Even if an arbitrator found that the concessionaire had a contractual right to a fair profit, he might nonetheless determine that, over the entire period of the concession prior to the government's unilateral action, the concessionaire had earned such a fair profit. Most importantly, a concessionaire's willingness to continue operations for several years after the government's unilateral imposition of new conditions can reasonably be said to amount to a waiver, estopping the concessionaire from asserting a breach of contract claim.

It is these traditional contract law arguments, and not new legal theory regarding permanent sovereignty over natural resources, or the New International Economic Order, that appear to control in a case like the Mobil-Libya dispute. When a host government stops short of nationalization, the foreign investor must make a choice: either to withdraw promptly or to continue operations and, in effect, to accept the new rules of the game. The investor cannot continue to operate under the new rules while they remain satisfactorily profitable, and then, after an extended period of such operation, shift its position and argue that it is entitled to damages dating back to the time of the initial change in the rules. From the point of view of developing countries, this analysis suggests that, even when a concession agreement has been "internationalized," the foreign investor may be held subject to new rules imposed by the

188. *See supra* text accompanying note 169-73.

189. *See 1963 Agreement*, *supra* note 77, at 4.

190. *See supra* text accompanying notes 116-25.

government, at least in situations in which the investor wishes to keep operating in that state.

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