

of a welding defect. The company incriminated was not very happy with my conclusions and put its case aggressively before the principal of my university. Under such circumstances it is essential to remain calm and unhurried.

The qualities and abilities required of an expert are numerous and varied. His mandate must never be performed on a cut-price basis, or entrusted to less competent colleagues. His work always offers the stimulation of a permanently-renewed challenge, a noble, rewarding and fascinating enterprise.

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Supremacy of the Renegotiation Clause in International Contracts

M. SORNARAJAH*

Much of the doctrinal writing about international contracts relating to foreign investments has concerned the building up of a model based on investment protection. This has led to a static model of an international investment contract being created, the object of which is to confer as much protection as possible on the foreign investor. However, this model has proved inadequate for regulating the long-term and dynamic relationship between foreign investor and host state. The static model favours concrete, immutable rules, which are passed off either as constituting international law, or an intermediate system variously termed transnational law, *lex mercatoria*, international contract law or general principles of the law.¹ The static model of an international investment contract and the theory of the existence of some supranational system safeguard such contracts and reinforce them and are said to provide the best protection for foreign investment.

In an article in the *Journal of World Trade Law*,² I examined the theory that a supranational system of law does exist, and that it protects the investment contract between an alien and a host state. The conclusion of that article was that there were insufficient bases for claiming the existence of such a law. This article considers some criticisms made of that view and rejects them. It then examines the main clauses on which the static model of an international investment contract is based, and argues that in the context of the policy considerations involved in the process of foreign investment, such a

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¹ These techniques are discussed in the recent excellent monograph by W. Peter, *Arbitration and Renegotiation of International Investment Agreements* (1986) pp. 96-110. The work is referred to hereafter as Peter, *Arbitration and Renegotiation*.

² M. Sornarajah, *The Myth of International Contract Law* (1981) 11 *J.W.T.L.* 3, p. 187; The view is more fully stated in M. Sornarajah, *The Pursuit of Nationalized Property* (1986) pp. 79-153.

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model is unlikely to prove resilient enough to deal with potential disputes. It is suggested that the static model should be replaced by one that would be more consistent with the policy objectives and the context in which such contractual relationships operate.

I. REVISITING THE MYTH OF INTERNATIONAL CONTRACT LAW

Events since the publication of the view that the existence of an international contract law is a myth have not justified any alteration of that view. The strongest statement of the existence of an international contract law remains Professor Dupuy's award in *Texaco v. Libya*.³ In the literature on arbitration, that award has not evoked uniform support. Departures from it in the related group of awards, *Liamco v. Libya*⁴ and *BP v. Libya*⁵ cast doubts on whether its principles are readily identifiable, if in fact international contract law does not exist. More recent arbitral awards, such as *S.P.P. v. Egypt*⁶ and *Amco v. Indonesia*,⁷ contain support for the theory, but their authority is severely shaken by procedural and other errors which review bodies have found in them. Statements in the Iran-US Claims Tribunal's awards also contain support for the theory of an international contract law, but the rhetoric and the politics of the American and Iranian judges on these tribunals makes determination of the value of their statements a matter for conjecture. The fact that the Tribunal operates in the context of many predetermined rules also makes it difficult to accept that the pronouncements of the tribunals will have universal value as creating precedents for an internationally accepted law.

There is evidence that an international contract may be emerging, but there are also contrary indications. The norm of permanent sovereignty law continues to be articulated as a peremptory norm of international law.⁸ Contractual mechanisms ensuring host country control over ventures in which there is a foreign component are increasing. The investment codes of many countries have sought to exercise control over foreign investment.

³ (1977) 17 I.L.M. 1.

⁴ (1980) 20 I.L.M. 1.

⁵ (1979) 13 I.L.R. 297.

⁶ (1983) 22 I.L.M. 752.

⁷ (1985) 24 I.L.M. 1022.

⁸ I. Brownlie, *The Legal Status of Natural Resources in International Law* (1979) 162, Hague Recueil 240.

In this context, the claim that there is an international contract law governing foreign investment cannot be accepted. There seems to be some progress towards the devising of a *lex mercatoria* to govern private commercial transactions,⁹ but here too some authorities believe that these claims are overambitious, and the notion of a transnational law governing investment disputes and foreign investors is a long way from becoming a reality.

A recent critic of the earlier statement of this view has raised objections. Dr. Wolfgang Peter, in his excellent survey of renegotiation of international investment agreements,¹⁰ considered the view and rejected it on three grounds. Firstly, he relies on "contract" practice to rebut the view that there could be subjectation of international investment contracts to international law. However, contract practice does not unequivocally support reference of disputes to a supranational system. As Dr. Peter points out in his book, "There is a clear policy trend of host countries to impose their municipal law as the law exclusively governing state contracts".¹¹ Later in the book, he refers to "a seemingly irreversible trend to apply the host country's municipal law in a majority of investment agreements".¹² Other studies of investment contracts confirm this view.¹³ In addition, reference to any law other than the municipal law of the host state may be regarded as *ultra vires* of the state party to the contract, either because it is unconstitutional, or because it violates investment laws which specially require reference of disputes to domestic law.¹⁴ The second argument that "dominant opinion" favours the existence of transnational law does not merit much consideration. The fact that there are more journals in capital-exporting countries and more academics to write for them does not mean that the case of the capital-importing countries has no merit. Dr. Peter's final refuge is the inscrutable Art 18(1) of the 1965 ICSID Convention (International Convention for Settlement of Investment Disputes), which states that, in the absence of a choice of law by the parties, the law applicable to the investment contract is the municipal law of the host state and "such rules of international law as may be applicable".¹⁵ The drafting history of the clause shows the difficulties which

⁹ B. Goldman, *The Applicable Law - the lex mercatoria*, in J. D. M. Lewis (ed.) *Contemporary Problems of International Arbitration* (1986).

¹⁰ W. Peter, *Arbitration and Renegotiation*, pp. 91-110.

¹¹ p. 87.

¹² p. 167.

¹³ Eg. E. Schanze, *Mining Ventures in Developing Countries* (1983).

¹⁴ See generally *Framatome v. Atomic Energy Organisation of Iran* (1983) 8 Y.C.A. 94.

¹⁵ The text of the Article reads, "The Tribunal shall decide a dispute in accordance with such rules as may be agreed by the parties. In the absence of such agent, the Tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

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accompanied it.¹⁶ In any case, the formulation does little to solve the central issue, which is whether there is a distinct body of international law which applies to investment contracts, or whether the rules of international law as contained in the documents associated with the New International Economic Order, which simply refer the matter back to the municipal law of the host state, preclude the possibility of international rules. Efforts to disprove the view that there is no concept of a supranational body of law relating to investment contracts between a state and a foreigner have not succeeded. The new developments in the area do not provide unequivocal support for either view.

Given that the static model of an investment contract and the supporting theory of a body of transnational law which gives validity and force to the contract seem suspect, the question remains as to what the preferred investment contract model should be. Before this question is examined, it is necessary to address the policy issues relating to the area.

II. POLICY CONSIDERATIONS

The view that there should be a supranational system to give binding force to a foreign investment contract is usually justified on the policy ground that the flow of foreign investment into developing countries is facilitated by maintaining a system which ensures its security and stability. This policy justification is one-sided in that it emphasizes the concerns of the foreign investor alone. In as much as the flow of foreign investment and its attendant benefits are valuable to the development process, the protection of economic sovereignty, and being sure that the foreign investment benefits the host economy, are valid goals for the host state. These considerations should not be forgotten when a state is a party to the contract.¹⁷ Whereas the profit motive is the major consideration for the multinational investor, a state has other considerations to take into account, not only at the time of the contract, but also through the whole contract period. Legal considerations may play only a minor role in these decisions.

The investment process is long drawn out and the transfer to it of static models based on the domestic law of contract is inappropriate. Domestic models emphasize *pacta sunt servanda* as the cardinal principle of contract law, simply because they deal with transactions of short duration between roughly

equal parties. Where the parties are not at equal bargaining strength, divergences from this model began to appear, interfering significantly with the static notions of freedom of contract and its binding force. On a comparative law basis, it may be correct to say that the domestic legal systems have always wavered between the doctrines of *pacta sunt servanda* and *clausula rebus stantibus*, which permit changes to the contractual obligations if they affect the equilibrium of the contract.¹⁸

In international investment contracts, there is little scope for the doctrine of *pacta sunt servanda*. A doctrine based on flexibility is preferred, having regard to the nature of one of the parties (a government, in theory acting on behalf of its people) and the long-term duration of the contract, which means that it is subject to the political changes that occur in the internal as well as in the regional and international scene. The very fact that a state is a party to the contract introduces instabilities into it. State contracts, particularly in developing countries, are entered into by elites who are prone to favour the inflow of investment without regard for nationalist sensitivities, capable of succumbing to bribery and extremely vulnerable in the face of political protests. The lawyers who devise supranational legal systems to insulate investment contracts seldom take these realities into account and formulate systems which, due to lack of flexibility, are designed to promote conflicts rather than be accommodating.

*SPP v. EGOH*¹⁹ illustrates the above points. A regime which was losing touch with its people entered into an agreement with a Hong Kong-based subsidiary of an American company for building a tourist complex near the Pyramids. Political opponents of the regime, sensing the growing unpopularity of the government, presented the project as an indication of the government's disregard of the cultural past of the Egyptian people and provoked nationalist sentiments against the Sadat regime. The matter was debated in the Egyptian legislature and a decision to terminate the project was taken. The circumstances of the dispute illustrate the difficulties attendant on a state contract. Although an investor can hope to make handsome profits from such a project, the risks involved are also great. The static model answer is that the risk to the contract arising from changed circumstances must be borne by the state. This assumption need not always be correct, however. Risk allocation may justify the foreign party who came in search of greater profits having to bear the cost of its miscalculation.²⁰ On the domestic market, a

¹⁸ Some modern writers have derived static and monolithic models of contracts in domestic law theory as well. See e.g. P. S. Atiyah, *Essays on Contract* (1986) pp. 1-9.

¹⁹ (1983) 22 I.L.M. 752.

²⁰ On risk allocation and state responsibility, see I. Brownlie, *The Legal Status of Natural Resources in International Law* (1979), 162 *Hague Recueil* 249.

¹⁶ J. Cherian, *Investment Contracts and Arbitration* (1975).

¹⁷ See further, J. P. Carver, *The Strengths and Weakness of International Arbitration Involving a State as a Party: Practical Implications* (1985) 1 *Arb. Intl.* 179.

businessman carries the risk of business failure. There is little reason why the rule should be entirely different in the international sphere. A state that imposes undue risks on foreign investment will not receive any, and that remains the strongest deterrent to unfairness.

The structuring of a contract to avoid conflicts is preferable to the technique of drafting an inflexible contract with a sword of Damocles hanging over the state party, threatening consequences such as arbitral awards, attachments in pursuit of such awards, and litigation in pursuit of property subject to the contract in foreign courts.²¹ The dynamic contract would have clauses which would facilitate meetings between parties whenever the contractual equilibrium changes, so that they might smooth out a fresh approach in the light of the changes. This would enable the contract to be mutually profitable until the objectives behind it are achieved. For a lasting relationship, in which both partners achieve their objectives, it is more fruitful to try to develop that kind of clause than to concentrate on those such as the stabilization clause which aims at performing the politically and legally impossible task of continuing the sovereignty of the state within its own territory. Instead, the aim should be to ensure that the contract contains appropriate mechanisms for maintaining contractual equilibrium in the face of changed circumstances.

III. REJECTION OF STATIC MODELS

Given these policy considerations, a question arises concerning the cluster of clauses which would promote the objectives behind long-term contracts. Before this question is dealt with, the nature of the static model of international contracts based on the stabilisation clause, and the reasons for rejecting it as inconsistent with the policies stated above, must be considered.

The static notion is built on a series of propositions. The first is that "economic development agreements" by their very nature require contractual stability and must therefore be construed as supporting the static model. This result flows, whether or not the contract contains a stabilisation clause, merely from the fact that the host state is a developing one, and the foreign investor is a citizen of a developed state. The reasoning is contained in the award in *Revenue Copper Brass Inc. v. OPIC*.²² It cannot be regarded as consistent with principle,²³ as it subjects developing states to a rule of contract which does

²¹ Whether these strategies are workable is discussed in Sornarajah, *Pursuit*.
²² (1978) 17 I.L.M. 1321.
²³ Principle would require that in the absence of a choice of law, the applicable law would be that of the state with which the contract has its closest connection, which would be the law of the host state.

not apply to developed states, thereby violating the doctrine of sovereign equality.

The second proposition is that the inclusion of for example stabilisation clauses, choice of law clauses and arbitration clauses subjects the contract to a law regime, variously termed transnational law, general principles of law or international law.²⁴ This legal regime is said to create conditions which ensure that the contractual obligations remain unchanged throughout the prescribed period of the contract. Breach of the contract results in immediate liability²⁵ and the party affected by it could have recourse to arbitration, so that the damages could be assessed and the award in which they are incorporated enforced. This technique bypasses the rules of customary international law devised for investment protection in that it makes a remedy immediately available to an alien.²⁶ To the extent that it promotes the interest of the home state in what is technically an international tort committed against it, it may be difficult to reconcile this technique with the theory of state responsibility, but it is too late now to raise this point.

The more arguable theoretical objection to the technique is that it seeks to undermine state sovereignty and that, however possible this may be in the case of treaty with another sovereign state,²⁷ it may not be possible to surrender sovereignty to an alien, or a foreign corporation, by agreeing to a stabilisation clause which limits the legislative sovereignty of the state regarding activity within its territorial boundaries.

Where the activity concerns natural resources, there are even greater theoretical objections to the contractual model based on the stabilisation clause. Authorities on international law regard the principle of permanent sovereignty over natural resources as one of *jus cogens* in international law. This kind of principle overrides treaty provisions. That being the case, a stabilisation clause restricting the state's legislative sovereignty by a contract with an alien, relating to natural resources, cannot have much force.

In contracts other than those involving natural resources, theory requires that a government should not be tied down for excessively long periods by commitments given to foreign corporations. Such obligations may interfere with its paramount functions, which are the protection of the national economy and security.



²⁴ See authorities discussed by Peter, *Arbitration and Renegotiation*, pp. 98-99.
²⁵ In classical international law, there is doubt as to whether a breach of a foreign investment contract creates immediate liability in international law. There is a view that such liability ensues only where no local remedies are provided.

²⁶ On the rules of state responsibility, see C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1964).
²⁷ *U.S. Wimbledon* [1926] P.C.I.J. Series A No. 1.

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The arguments to rebut these theoretical difficulties are based on expediency rather than logic. It is not much of an argument to say that foreign investment flows are facilitated in circumstances where optimum conditions eliminate the risk of government interference with the contractual structure. Under the legal regime presently in favour, these flows occur in a situation created for conflict, in that it predisposes the investor to an inflexible position at a time when his pile of bargaining chips is low, and the state is party to a confrontation situation as political and economic factors may indicate a change in the contractual structure. From the point of view of both the foreign investor and the host state, a contractual arrangement which would cater to their mutual interests and keep alive their relationship is preferable. Investment flows facilitated in the context of such a relationship are more meaningful than those based on a theory of threatening the host state with a sledgehammer.

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IV. THE DYNAMIC MODEL

The rejection of the static model of international contracts requires its replacement by a model that furthers the policy objectives described above. This model should be based on the notion that finds favour with many domestic legal systems, i.e. that in long-term contracts the maintenance of a contractual equilibrium is of central importance. The contract must contain devices which will facilitate the maintenance of this equilibrium. In long-term contracts it is subject to change; the survival of the contract and the efficient functioning of the relationship depends on its being maintained.

Delaume puts this idea across well when he contrasts clauses such as the stabilisation clause, which are intended to "freeze" the contract in its original state insulating it from future changes, and "stipulations reflecting the evolutionary character of long-term agreements."²⁸ About these stipulations, he observes:²⁹

"Depending upon the circumstances, these 'dynamic' clauses may be aimed at preserving the competitive position of the investor within the host country or at increasing the benefits accruing to the host country so as to bring them in line with those derived by other countries within the same geographical area or from the same sector of economic production".

²⁸ G. R. Delaume, *Transnational Contracts*, Booklet 6, p. 28 (1986).

²⁹ *Ibid.*

*The Aminoil Award*³⁰ illustrates the fluctuations that can occur in a geographical area and an economic sector of production which can upset the contractual equilibrium. The dispute concerned a concession agreement between Kuwait and the American Independent Oil Company (Aminoil), entered into in 1948 when Kuwait was still under British control. The concession was to last for sixty years and it was a typical concession agreement then current in the oil industry in the Middle East; the oil company fixed the prices and paid an annual royalty to the Sheik. An additional agreement was concluded in 1961, when Kuwait achieved independence,³¹ and in addition to a stabilisation clause, it contained one on the renegotiation of the agreement, in pursuance of which a draft agreement was reached in 1973.

The oil industry underwent rapid transformation during this period. The formation of the Organisation of Oil Exporting Countries (OPEC) and the collective flexing of muscles by the oil-producing nations changed the balance of power in the industry from the oil companies to the oil-producing states. Decisions taken by OPEC led to dramatic increases in the price of oil. These "windfall" profits benefited oil companies such as Aminoil. The profits came from the increased price of the product, rather than from any increased effort by the producer. OPEC counteracted this by deciding to increase the government "take" from the oil companies. Unable to secure compliance with this OPEC decision, Kuwait unilaterally terminated its agreement with Aminoil. The ensuing dispute was submitted to arbitration.

A distinguished panel of arbitrators³² accepted in their award that the contract itself had been structurally changed as a result of events in the petroleum industry and the region. They treated the stabilisation clause as preventing confiscatory measures, but not as preventing nationalization.³³ The tribunal required that the stabilisation clause should expressly provide against nationalization for it to be effective against such measures. It treated the state's right to nationalize as so fundamental that it required any contractual limitation on it to be "expressly stipulated for, and be within the regulations governing the conclusion of state contracts and that the limitation

³⁰ For the text of the award, see (1982) 21 I.L.M. 976. For commentaries on the award, see A. Redfern, *The Arbitration between the Government of Kuwait and Aminoil* (1985) B.Y.B.I.L. 65; TFA Riyadh, *Most Countries Permanent Sovereignty over Natural Resources and Protection of Foreign Investors: Some Reflections on the Recent Kuwait/Aminoil Arbitration Case* (1983) 39 *Revue Egyptienne de Droit International* 55; F. R. Teson, *State Contracts and Oil Expropriations* (1984) 24 *Va. J.I.L.* 323.

³¹ Redfern, *Op. cit.* at p. 72.

³² Professor Paul Reuter, Professor Hamed Sulran and Sir Gerald Fitzmaurice. Sir Gerald Fitzmaurice wrote a separate opinion. Redfern agrees with the view of Higgins who observed that the separate opinion "was really in agreement with the dispositive of the award" Redfern, *op. cit.* B.Y.I.L. at 105.

³³ Para. 93-94.

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should cover only a relatively limited period."³⁴ Coupled with the tribunal's earlier view that it did not see "any reason why a government that was pursuing a coherent policy of nationalisation should not have been entitled to do so progressively"³⁵, this opinion considerably whittles the scope of the stabilisation clause. It simply means that stabilisation clauses do not effectively prevent what has been described as "creeping nationalization", since their whole aim is to prevent subsequent legislative changes by the state affecting the contract. This aim cannot be achieved, if the tribunal's view is correct, where the legislative changes constitute an economic programme for restructuring the economy of the state.

This view of the tribunal is bolstered by further arguments. There is recognition in the award of a presumption against "a limitation on the sovereign rights of the state".³⁶ There is acceptance that the "contractual equilibrium"³⁷ may change in such a way that the state's "interest had become predominant".³⁸ Finally, there is acceptance of the fact that changed circumstances could alter the internal character of the contract and that, when this happens, clauses such as the stabilisation clause may not prevent changes being made in response to the new situation.

The effect of the tribunal's views on stabilisation clauses is to deny them force in two circumstances. Firstly, if the state embarks on a programme of economic reform, the stabilisation clause will not make the contract immune to legislative changes made in this connection. It may, however, be judicially possible to devise a clause which excludes these legislative changes, provided it is for "a relatively limited period".³⁹ Secondly, though the tribunal expressly stated that the case did not involve the application of the *clausula rebus sic stantibus* principle,⁴⁰ it recognised that there could be a change in the nature of the contract itself "brought about by time and the acquiescence or conduct of the parties".⁴¹ If this occurs, the alteration of the contract cannot be fettered by the stabilisation clause.

³⁴ Para. 95: The text reads: "No doubt contractual limitations on the state's right to nationalize are judicially possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulations governing the conclusion of state contracts; and it is to be expected that it should cover only a relatively limited period of time. . . . A limitation on the sovereign rights of the state is all the less to be presumed where the concessionaire is in any event in possession of important guarantees regarding its essential interests in the shape of a legal right to eventual compensation."

³⁵ Para. 86.

³⁶ Para. 95.

³⁷ Para. 98.

³⁸ Para. 99.

³⁹ The tribunal's exception is stated with caution. There are arguments that such restrictions are judicially impossible. For a survey, see Sornarajah, *Pursuit*, pp. 119-137.

⁴⁰ Para. 101.

⁴¹ *Ibid.*

Some writers put forward the view that stabilisation clauses may still be useful in that they provide a leverage for renegotiating the contract.⁴² This view has limited validity, since serious doubts have been cast on the usefulness of the stabilisation clause.

V. PRIMACY OF THE RENEGOTIATION CLAUSE

In contrast to the stabilisation clauses, which are aimed at maintaining the rigidity of the contract throughout its course, there is a group of clauses aimed at ensuring that the contractual structure is flexible enough to withstand the changes taking place in the environment in which it operates. The contention advanced in this article is that avoiding friction between the parties is best done by inferring such clauses in international contracts in which they have not been included.⁴³ The evolution of this norm would mean that these clauses would be inferred, despite the fact that the contract itself is based on a rigid structure and includes a stabilisation clause. Firstly, the superiority of the flexible model which includes dynamic clauses, e.g. concerning renegotiation and hardships, are discussed. After demonstrating that contracts including such clauses serve the aims of international investment better, the authorities which favour the evolution of a norm requiring that renegotiation clauses are read into all international contracts are canvassed.

(i) DYNAMIC CLAUSES

These clauses should not be seen as providing escape routes which enable parties to withdraw from their contractual obligations. Rather, they should be regarded as mechanisms which would act "as a form of insurance against the abrupt termination of a long-term, and hopefully profitable association".⁴⁴ Chief among such clauses are those concerning renegotiation, hardship and *force majeure* and those providing for conciliation by a third party. A brief survey of the function of these clauses is appropriate.

⁴² W. Peter, *Arbitration and Renegotiation*, p. 146.

⁴³ As Smith and Wells observed: "Insufficient attention has been given by lawyers and others to conflict avoidance and resolution in a context other than formal adjudication". D. N. Smith and L. T. Wells, *Conflict Avoidance in Concession Agreements 1976-17* Harv. I.L.J. 51 at p. 52.

⁴⁴ G. R. Delaume, *Transnational Contracts*, *op. cit.*, p. 29.

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note emphatic language.

(ii) RENEGOTIATION CLAUSES

Foreign investment contracts, which are usually of long duration, involve an "obsolescing bargain" in which the preceptions of the parties regarding the usefulness and profitability of the venture and their relative bargaining strengths undergo constant changes.⁴⁵ In addition, the economic and social conditions surrounding the contractual relationship could undergo significant changes. As Stoecker has observed:⁴⁶

"Terms of agreements become progressively out of date as economic conditions change and multinational corporations can no longer expect to freeze conditions at one point in time by iron-clad contract terms. . . . If an investor tries to force adherence to terms that no longer reflect the hosts' economic capability and contribution, the likelihood of an explosive confrontation and unilaterally imposed change increases."⁴⁷

Contractual mechanisms which provide for reassessment of the relationship in the light of changes in the operational environment of the contract will avoid confrontation between the parties and ensure that pressure does not build up until boiling-point is reached.⁴⁸

The existence of a renegotiation clause facilitates the adaptation of the contract to changes. It is the antithesis of a stabilization clause which seeks to freeze the contract and make it immune to later changes.⁴⁹

The aim of the renegotiation clause is to provide an opportunity for the parties to restore the contractual equilibrium if previously identified triggering events occur.⁵⁰ These are usually stated loosely, so that they can encompass a wide variety of circumstances. Though this may lead to imprecision in the contract, the technique accommodates the idea that friction between the parties can be avoided by renegotiation. Hardship and *force majeure* clauses are regarded as types of renegotiation clauses permitting

⁴⁵ See R. Vernon, *Long Run Trends in Concession Contracts* 1967, 61 A.S.I.L. Prethes 81; M. Radetzki, *Market Structure and Bargaining Power* in S. Sideri and S. Johns, *Mining for Development in the Third World* (1979) pp. 123-142.

⁴⁶ W. Stoecker, *Renegotiation in International Business Transactions* (1981) at p. 313.

⁴⁷ See discussion in *ibid.*, pp. 313-318.

⁴⁸ The ever-changing nature of long-term construction contracts in which "the centre of gravity of the contract" keeps shifting is detailed in C. Wiegand, *The Applicable Substantive Law in the Case of International Construction Contracts* in K. Boeckstiegel (ed.), *Contracts and Dispute Settlement in Civil Engineering and Construction of Plants* (1984).

⁴⁹ The view that the two clauses can co-exist in a contract taken by some writers (e.g. Peter, *op. cit.*, pp. 143-147) is, it is submitted with respect, incorrect.

⁵⁰ See M. Barrels, *Contractual Adaptation and Conflict Resolution* (1985) pp. 51-52, who identifies possible triggering events.

contractual adaptation or suspension of the agreement in the event of certain changes.⁵¹

(iii) HARDSHIP AND *FORCE MAJEURE* CLAUSES

Though a distinction is sometimes drawn between these two types of clauses, their main object is the same. They seek to reduce the damage that may result to one of the parties because the contract is performed in changed circumstances. The literature on these clauses focuses largely on the attitudes of domestic systems to changed circumstances.⁵² National systems merely frustrate an inability to move away from nineteenth century notions of contract law, conceived in sedate times when sudden changes in external circumstances were rare and government interference in commercial life was non-existent. In English common law, the prevailing doctrine is still that the sanctity of a contract must not be disturbed, and that a party must be held to the contract despite the fact that supervening events make it onerous for him. Hardship and *force majeure* clauses circumvent the strict rules of frustration in national legal systems, enabling the parties to adjust their contracts in the light of changed circumstances, or terminate them unilaterally.

(iv) ANALYSIS

The inclusion of clauses in international contracts promoting contractual flexibility ensures that disputes are avoided by allowing the parties to adjust their long-term contracts to changed circumstances. National systems would recognise the inclusion of such clauses. Where they are not included in international contracts, it must be recognised that they should be inferred. The justification for such an inference is given by policy reasons. The promotion of an atmosphere in which the objectives of the contract can be achieved is necessary. The inference of the "dynamic" clauses in international contracts in which they do not exist promotes this atmosphere and such a norm is already being developed in international practice. The next section canvasses the authorities on the basis of which such a norm can be established.

⁵¹ B. Oppetit, *L'adaptation des Contrats Internationaux aux Changements de Circonstances: La Clause de Hardships* (1971) 101 J.D.I. 794.

⁵² For a discussion, see Peter, *op. cit.*, pp. 118-120; For comparative studies, see H. J. Berman, *Excuse for Non-Performance in the Light of Contract Practices in International Trade* (1963) 63 Col. L.R. 1413; H. Smith, *Frustration of Contract: A Comparative Attempt at Consolidation* (1958) 58 Col. L.R. 287; P. Hay, *Frustration and its Solution in German Law* (1951) 10 Am. J.C.L. 345.

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VI. INFERENCE OF THE RENEGOTIATION CLAUSE

Opinion is divided as to the legal system which governs an international state contract, some holding that it is governed by the national system of the contracting state, and others holding that it is governed by some supra-national system. Whatever the position is, there are certain rules which have an overriding effect on all international contracts. Thus, the rule that appropriate compensation should be paid for breach of an investment contract applies even when the contract is governed by the national system of the state party. It is submitted that the norm requiring the renegotiation of contracts between states and aliens belongs to the same category of rules which cover international contracts. What authority is there for such a proposition?

(i) CODES OF CONDUCT

There may be obligations due to the foreign party being a multinational corporation. The efforts to draft an international code of conduct for multinational corporations are in a preliminary stage. However, authorities believe that the provisions of the draft code do not have moral weight, and may mature into rules of international law. Section 5 of the Draft Code of Conduct on Transnational Corporations states a duty to renegotiate an international contract in certain circumstances.⁵³ It reads as follows:

"In the absence of contractual clauses providing for review or renegotiation, transnational corporations should respond positively to requests for review or renegotiation of contracts concluded with governments or governmental agencies in circumstances marked by duress, or clear inequality between parties, or where the conditions upon which a contract was based have fundamentally changed, thereby causing unforeseen major distortions in the relations between the parties and thus rendering the contract unfair or oppressive to either of the parties."⁵⁴

⁵³ S. 5 of the Code of Conduct on Transnational Corporations (E/C. 16/AC. 2/8. See remarks of Dr. S. Asante in (1983) 79 A.S.I.L. Predges at p. 393 who suggested that renegotiation in the event of changed circumstances would not depend on the existence of a clause in the contract. The possibility of provisions of non-binding codes amounting to *lex mercatoria* is raised by Lord Wilberforce in International Law Association, *Arbitration under International Commercial Contracts* (1982) p. 27.

⁵⁴ The section continues: "With the aim of ensuring fairness to all parties concerned, review or renegotiation in such situations should be undertaken in accordance with applicable legal principles and generally recognised legal practices". Also see O. Lando, *Renegotiation and Revision of International Contracts*:

There are similar principles stated in the Code of Conduct on the Transfer of Technology.⁵⁵ Though these provisions are in draft codes, they indicate the claims of a substantial group of states which support the view that changed circumstances should lead to renegotiation, particularly where they affect state interests adversely.

(ii) ARBITRAL AWARDS

The duty to renegotiate, even in the absence of a renegotiation clause, derives support from arbitral awards. Besides the *Aminoil* Award⁵⁶ discussed above, which indicated how the judicial structure of the entire contract could be altered as a result of the changes in the political and economic environment of the contract, there are other awards which support such a proposition.

In *S.P.P. v. Egypt*,⁵⁷ the project for constructing a tourist complex in pursuance of a contract between S.P.P. Ltd. and the Egyptian General Company for Tourism and Hotels (EGOTH) was interrupted by political opposition to the project. The government intervened, rescinding the contract and the subsequent arbitration implicated both the state tourist agency and the government. The political storm created by the project and the subsequent government intervention were both beyond the control of the tourist agency.⁵⁸ The tribunal, though it conceded this point, took the view that the tourist agency and the government could not be separated. The tribunal observed:⁵⁹

"On the facts, there can be little doubt that the events of May/June 1978 were beyond EGOTH'S reasonable powers of control. It was a decision taken at the highest levels of state on a matter simply as one of *force majeure*, we would be faced with the difficult question of whether the extremely close connection between EGOTH and the government, exemplified by the fact that EGOTH was at all times under the control of the relevant minister, permits the doctrine of *force majeure* to be applicable."⁶⁰

⁵⁵ UN Doc. TD/Code TOT 20, 9-10.

⁵⁶ See discussion above.

⁵⁷ *S.P.P. (Middle East) Limited v. The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels* [1983] I.L.M. 752.

⁵⁸ The tourist complex was to be built close to the Pyramids. The opposition to the project was worldwide and not confined to Egypt.

⁵⁹ Para. 63.

⁶⁰ Courts have not shirked answering this "difficult question" in a manner favourable to the state agency where there is room to believe that the agency and the government acted independently. Here, the tribunal inferred that the ministerial link with the government negated the possibility of independent action. Since state agencies would normally be subject to ministerial control, the tribunal's view is consistent with the view of the House of Lords in *Rolimpex*.

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