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Permanent Sovereignty Over Oil Resources, a Study of Middle East Oil Concessions and Legal Change, by Muhamad A. Mughraby; The Law of Oil Concessions in the Middle East and North Africa, by Henry Catton; The Evolution of Oil Concession in the Middle East and Africa, by Henry Catton

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BOOK REVIEWS

PERMANENT SOVEREIGNTY OVER OIL RESOURCES. A STUDY OF MIDDLE EAST OIL CONCESSIONS AND LEGAL CHANGE. By Muhamad A. Mughraby. Beirut, Lebanon: The Middle East Research and Publishing Center. 1966. Pp. xviii, 233. \$7.00.

THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA. By Henry Cattán. Dobbs Ferry, N.Y.: Oceana Publications, Inc., for the Parker School of Foreign and Comparative Law. 1967. Pp. xvi, 173. \$7.50.

THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA. By Henry Cattán. Dobbs Ferry, N.Y.: Oceana Publications, Inc., for the Parker School of Foreign and Comparative Law. 1967. Pp. xiv, 200. \$7.50.

A learned colleague complained recently that he found it difficult to pursue his study of the international legal problems of expropriation of foreign property "without being almost constantly distracted by petroleum fumes."¹ Readers of the by now quite voluminous literature on the treatment and protection of private foreign investment in developing countries will surely share this feeling. The problems of oil investments abroad have dominated to an extraordinary extent the legal debate and literature in this area. Lawyers associated, in whatever manner, with oil companies were among the first to perceive the presence and importance of current trends and attitudes regarding respect for contract and private property. As a result, they were among the earliest, and have continued to be among the most vocal, advocates of increased legal protection of foreign interests in developing countries. The spokesmen for the developing countries, on the other hand, have often argued their case, explicitly or implicitly, by reference to investments in oil or other natural resources. The rhetoric at international conferences and organizations has often reflected such concerns. Even with respect to the limited current judicial practice, a similar bias obtains: most of the few postwar arbitrations worthy of being cited in discussions of private foreign investment problems—from the *Abu Dhabi*² and *Qatar*³ cases to the *Aramco*⁴ and

1. Baade, *Permanent Sovereignty Over Natural Wealth and Resources*, in *ESSAYS ON EXPROPRIATION* 3, 17 (R. Miller and R. Stanger ed., 1967).

2. *Petroleum Developments (Trucial Coast) Ltd. v. the Sheikh of Abu Dhabi* (1951) (arbitration award), 1 INT'L & COMP. L.Q. 247 (1952).

3. *Ruler of Qatar v. International Marine Co., Ltd.* (1953) (arbitration award), 20 I.L.R. 534 (1957).

4. *Government of Saudi Arabia v. Aramco* (1958) (arbitration award), 27

*Sapphire Co.*⁵ arbitrations—relate to petroleum.

Concern with petroleum and petroleum investments is certainly not unjustified in view of their overwhelming importance for oil companies, oil-producing countries, and most other nations, which are consumers of the product. With reference to the United States, the importance of the oil industry, both domestic and foreign, needs little elaboration.⁶ Petroleum investment has been for a long time the single most important category of United States foreign investment. At the end of 1966, total United States direct investment abroad amounted to nearly fifty-five billion dollars; over sixteen billion of this, or just under thirty percent, was in petroleum. The proportion is higher when only investment in less developed countries is considered; of a total of about sixteen billion dollars at the end of 1966, petroleum investment accounted for over seven billion, nearly forty-five percent.⁷

Aside from its economic significance, the petroleum industry is a particularly appropriate subject for the study of legal and other problems of foreign private investment in developing countries. Despite its size in financial terms, this is after all a limited industry, with relatively few participants on either side (at least as far as production and marketing, as distinguished from consumption, are concerned). Moreover, the problems which arise in connection with petroleum are of vital importance to participants and are, therefore, highly visible and the objects of deliberate action on the part of companies and host countries. Most recent developments can be easily perceived and described in the microcosm of the oil industry: the increasing awareness on the part of less developed countries of the need for control over and increased benefit from their natural resources and their increasing power to impose conditions more to their advantage on private companies; the range of methods used to bring about such results, from requests and suggestions, to negotiations and agreed amendments, to boycotts, nationalizations and other radical measures; and overall, the continuing cooperation between private investors and host countries, the former in pursuit of profit, the latter in pursuit of enrichment of their governing elites or in search of economic develop-

I.L.R. 117 (1963).

5. *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.* (1963) (arbitration award), 35 I.L.R. 136 (1967).

6. For a stimulating study, somewhat impressionistic in its discussion of the international aspect, see R. ENGLER, *THE POLITICS OF OIL: PRIVATE POWER AND DEMOCRATIC DIRECTIONS* (1961). An excellent discussion of "the international oil industry in its political environment," is J. HARTSHORN, *OIL COMPANIES AND GOVERNMENTS* (2d ed. 1967) [hereinafter cited as HARTSHORN].

7. Rough calculations on the basis of the figures given by Lederer and Cutler, *International Investments of the United States in 1966*, 47 *SURVEY OF CURRENT BUS.* Sept. 1967, at 39.

ment. The factors responsible for these developments are also fairly easily apparent: political changes, changes in attitude, shifts in the allocation of power, progress in technology. In an introductory survey to one of the books under review, Dr. Cattán lists six "major developments which have influenced the course of the evolution of oil concessions": the equal sharing of oil profits, the concept of relinquishment of lands conceded but not developed, participation of the host government in the industry, the grant of offshore concessions in territorial waters and in the continental shelf made possible by technological advances, the enactment of national petroleum legislation, and the establishment of national and international agencies concerned with the oil industry.⁸ Political or even cultural changes are also important, of course, such as, in the present context, the changes in the political regimes of several Middle Eastern countries and the transformation of the international situation. These developments clearly parallel those that have occurred, at various degrees of intensity and with varying extent of success, in all areas of contact between developed and less developed countries and between foreign investors and host countries.

On the other hand, the oil industry remains an essentially peculiar industry. Conclusions to be drawn from a study of its operations can be applied only with difficulty and with many qualifications to other areas, especially to areas not involving extraction of natural resources. The size of the investments at stake, the strategic value of the product for the states concerned (state of nationality of company owners, consumer states, host states), the vital importance of this single product for the very few producing states, the peculiar if romantic history of relationships between companies and producers in the not so distant past, are all factors which differentiate oil investments from investments in manufacturing and from most other operations of foreign private investors in developing countries. The discussion, therefore, of the problems of foreign investment by reference, exclusively or principally, to the problems of the oil industry distorts the focus of legal literature and debate. Although some basic problems remain the same for all investments in developing countries, many other problems differ radically. Such distortion occurs whatever the side from which one looks at problems—the risk of expropriation or cancellation of contract does not obtain for manufacturing investments to the same extent that it does for oil; on the other hand, the need for regulation or control in order to maintain or re-establish national sovereignty over resources obtains in different manners

8. H. CATTÁN, *THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA* 6-25 (1967) [hereinafter cited as CATTÁN, *EVOLUTION*].

in the case of oil and in that of manufacturing investments.⁹

These background facts explain why the appearance of the books under review is particularly welcome. They deal specifically and in detail with the legal aspects of oil investments and they do not pretend to cover the whole area of foreign investment, nor do they extend their conclusions to any other aspects of the foreign investment area. Although they are not the first studies of the law of oil concessions, they are without any doubt the most systematic and exhaustive. As their titles make clear, the two authors cover, the one in a single book and the other in two, largely the same subject matter. The main thrust of their respective books, however, is different as is their attitude toward law in general and toward the function of law in that particular area.

Although it is not my intention to compare the two books paragraph by paragraph or even chapter by chapter, a general comparison of the distinctive approaches and concerns of the two authors is quite instructive. The most convenient way to start is by a brief outline of the basic structure of their respective works.

Dr. Mughraby¹⁰ starts with a short and very general chapter on "national economic development and international economic disintegration," intended to provide some basic economic and historical background. He begins to deal *in concreto* with his topic in the second chapter, where he analyzes carefully the evolution of the legal concept of "permanent sovereignty over natural resources," especially within the United Nations.¹¹ From that point, he begins his argument: to re-establish their national sovereignty over oil resources, the host countries have acted in two main directions. First, they have sought to secure "control from within" through insistence on joint ventures involving a partnership between foreign investor and host government in the ownership and operation of oil companies. Part Two of Dr. Mughraby's book is devoted to the study of "the concept of legal-economic partnership"; it is essentially an overview of such joint ventures in the Middle East oil industry, followed by a detailed analysis of recent joint venture agreements in two countries, Iran and the UAR. In the second place, oil-producing countries have tried to exercise "control from without" through bargaining with the oil companies. But there is now a new element, in that the host countries are acting collectively, through the Organization

9. See Ebb, *Private Foreign Investment in Developing Countries*, in *DEVELOPMENT: INTERNATIONAL LAW AND ECONOMICS* 63, 64 (Armstrong ed. 1967); cf. *Financing of Economic Development: Promotion of Private Foreign Investment in Developing Countries, Summary and Conclusions*, at 16-17, UN Doc. E/4293 (1967).

10. M. MUGHRABY, *PERMANENT SOVEREIGNTY OVER OIL RESOURCES* (1966) [hereinafter cited as MUGHRABY].

11. Cf. G.A. Res. 1803 (XVII), 17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1962).

of the Petroleum Exporting Countries (OPEC). The author discusses in some detail the structure and status of the Organization and describes the bargaining over a particular issue. The Fourth Part of the book, on "permanent sovereignty and legal change," contains the author's conclusions; he advances the concept of "mutual equivalence of contractual advantages" as the basis for a dynamic conception of evolving long-range relationships between host countries and oil companies.

Dr. Cattán's two books do not offer as clearly a thesis or an argument, although they do represent a well-reasoned and fairly well-defined position on the related issues, comparable though often opposed to Dr. Mughraby's. In the *Evolution of Oil Concessions*, Dr. Cattán starts with a "historical review," already noted for its useful summary of major developments since 1950. He then embarks on a clause-by-clause analysis first of the financial conditions and then of the general conditions of oil concessions; the detail and clarity of his exposition must be particularly stressed—this is a most helpful introduction to the complexities of oil concession terminology and methods. The book finishes with a discussion of host government participation in the oil industry, which consists in large part of descriptions of related experiences in the UAR and Iran. The second of Dr. Cattán's books,¹² devoted to the law of oil concessions, is divided into two uneven parts, dealing respectively with the "legal rules and principles relative to oil concessions," and with the problems of dispute settlement. The first and longer part starts with a general discussion of "state contracts" (contracts between a state and a person not its national) and then deals more specifically with the legal "nature" of oil concessions. The next chapter covers at length the applicable law and the manner in which it is chosen. In the remainder of that part the author examines the problems of the legal order in (or under) which oil concessions, or some of them, are concluded and operate, and the mutual equivalence of benefits as a legal principle governing oil concessions. The second part covers briefly conciliation procedures and deals in detail with the procedures and problems of arbitration.

Even so rough an outline indicates some basic similarities and differences between the two authors. They cover in the main the same subjects, although they attribute differing importance to particular issues. They are both essentially moderate, in legal or political terms, in that they approach pragmatically the basic problems of the area. Neither adopts a really extreme position, either on the side of the host countries or on that of the oil companies, although each of them inclines, in effect

12. H. CATTÁN, *THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA* (1967) [hereinafter cited as CATTÁN, LAW].

if not in intention, toward one of these sides. Dr. Mughraby rejects outright nationalization as a desirable course of action for the host countries on clearly pragmatic grounds: "[i]t is beyond dispute that national governments cannot, at present, afford either the capital, the know-how or the marketing outlets. . . . Hence, [nationalization] is not a workable solution for many years to come."¹³ Dr. Cattán, on the other side, although stressing "sanctity of contract," is obviously aware and in no way disapproving of the whole process of negotiations, pressure and counterpressure, and continuous change, which is the actual context of the operation of oil concessions.

On the other hand, and in view of these similarities, their approach to law and to legal process could hardly be more different. Dr. Mughraby is concerned with the process of legal change, its goals, methods, and possibilities. He advances an interpretation of recent developments which imports some unity to otherwise diverse and fragmented events. He further presents an articulated theory for the general area ("permanent sovereignty") as well as for the particular legal problem of oil concessions ("mutual equivalence"). Dr. Cattán, on the other hand, is essentially interested in the law "as it is." He is clearly aware of, and quite obviously knowledgeable in, the political, economic, and other forces involved but he does not deal with them except incidentally; his is an essentially static view. Perhaps the symbol of his approach is the division of his study into two parts, presumably independent although related, one dealing with the substance of oil concessions and its evolution and the other with the form—the "law." Dr. Cattán chooses not to treat his subject as a never-ending process of agreement, negotiation, operation, adjustment, and readjustment to rapidly changing social, economic, and technological conditions. He sees and describes instead particular provisions from a succession of oil concessions, casually mentioning occasionally some reasons for the changes without any attempt to derive conclusions or to present theories. He has collected materials for comparison between contracts but does not himself engage to any serious extent in the actual comparisons. That this is a quite respectable and defensible attitude goes without saying. At the same time, two points must be made: first, such an approach provides little orientation or guidance to the reader as to future developments in a rapidly changing industry; second, in the particular historical context of the oil industry, a static approach tends to inure to the benefit of one side, namely, the oil companies. If the latter point is not self-evident, some of the discussion in the balance of this review should provide support and clarification.

13. MUGHRABY 53-54.

As already noted, both authors discuss at length the modalities and, to a lesser extent, the problems of government participation in oil production in association with oil companies. Dr. Cattán's description¹⁴ is perhaps more exhaustive, and he deals with one recent case, that of the Franco-Algerian Cooperative Association, which presumably crystallized too late for Dr. Mughraby to include in his study. On the other hand, the latter is interested, at least in part, in the manner in which the ventures, once established, have actually worked: he provides in that connection an interesting and significant review of the effects of bringing a joint venture into the "public sector" in the United Arab Republic.¹⁵

Government participation in joint ventures is certainly an important recent development and the trend in its direction is quite definitely continuing. In early April 1968, for instance, an agreement in principle was announced between the Government of Libya and the French (state-owned) companies *Société Nationale des Pétroles d'Aquitaine* and *Entreprise de Recherches et d'Activités Pétrolières* for the formation of "an association . . . for research and exploitation."¹⁶ This will be the first such joint venture in which the Libyan Government participates. Still, this is not a unique or even a particularly original method of imposing governmental controls over vital sectors of the economy. Dr. Cattán reminds us indeed that government participation on the oil-consumers' side is quite common: witness the partial or total ownership by the British, French, and Italian governments of their respective oil companies.¹⁷ A far more original and thereby interesting recent departure from the established patterns of action has been the attempt at collective decision-making and action on the part of oil-producing countries through the creation in 1960 of OPEC, the Organization of the Petroleum Exporting Countries, which now has nine members.¹⁸ It is characteristic of Dr. Cattán's approach that he deals with this major development rather casually, devoting a page and a half to discussion of the creation and structure of OPEC¹⁹ and incidentally referring to it in connection with particular points and provisions in oil concessions as to which OPEC has established policies.²⁰

14. CATTÁN, *EVOLUTION* 121-51.

15. MUGHRABY 74-75.

16. See 12 *MIDDLE EAST ECON. DIGEST* 300 (1968).

17. CATTÁN, *EVOLUTION* 127. For a discussion of the role of consumer countries' governments in international oil affairs, see HARTSHORN 255-67.

18. Abu Dhabi, Indonesia, Iran, Iraq, Kuwait, Libya, Qatar, Saudi Arabia, and Venezuela. For some recent discussions of OPEC, see, in addition to MUGHRABY 124 ff., HARTSHORN 335-48 and D. HIRST, *OIL AND PUBLIC OPINION IN THE MIDDLE EAST* 100-19 (1966).

19. CATTÁN, *EVOLUTION* 23-25.

20. *Id.* 41, 54-55, 97, 105.

For Dr. Mughraby, as already indicated, the creation and operation of OPEC constitute the second main direction followed by the host countries in seeking to re-establish control over their oil resources.²¹ He develops in this connection a number of theories or suggestions, the most interesting of which is the submission that OPEC constitutes an organ of "transnational collective bargaining," analogous to trade unions in the domestic legal order. The microcosm of oil again reflects here large-scale developments: the "group of seventy-seven" in the United Nations Conference on Trade and Development may be understood in similar terms, although the difference in size and area of operations is, of course, a quite significant differentiating factor. Dr. Mughraby may indeed go a little too far in his attempt to establish a precise analogy between collective bargaining in the area of domestic industrial relations and the operation of OPEC in the international oil industry. The broad analogy is sufficiently arresting in itself to be useful, with no need for further argumentation, or for establishing exact correspondence between the two in terms of their dealing with basic factors of production or other such rather elementary economic propositions. In concluding his discussion of the analogy, the author stresses that in the international environment, where no protective legislation for the weaker members of the community is possible, "a greater degree of freedom of contract between economically weak and economically powerful parties" can be achieved "only by the resort of the weaker party to collective action through voluntary collaboration with other weak parties sharing the same economic objectives."²² From these findings, he deduces the "significance of economic interest as the most important unifying factor in international legal relations."²³ To bolster his argument, he narrates in some detail the story of the bargaining over "royalty expensing."²⁴ This is a most instructive case, both as an illustration of the operation of OPEC as a unified group and as an indication of the achievement of limited objectives through compromise rather than insistence on far reaching goals and direct confrontation.

21. MUGHRABY 119-57.

22. MUGHRABY 154.

23. *Id.*

24. Until the early 'sixties the uniform practice in financial relations between oil companies and host governments had been to treat royalty payments as part of the total fixed proportion of profits due to the host state and, therefore, to treat them as credits against tax liabilities. At their fourth Conference, in 1963, the OPEC countries recommended that each member country should initiate negotiations with the oil companies concerned "with a view to working out a formula whereunder royalty payments shall be fixed at a uniform rate which Members consider equitable and shall not be treated as a credit against income tax liability." OPEC, Resolution IV.33. Complex negotiations followed, detailed in MUGHRABY at 140-49, which resulted in a compromise, accepted by now in most petroleum-producing countries. See also HARTSHORN 341-43; CATTAN, *EVOLUTION* 41.

Since publication of Dr. Mughraby's book, another major operation under the auspices of OPEC has taken place, this time in Libya.²⁵ In late 1965, the Libyan Government asked the oil companies already operating in the country on the basis of earlier concessions to accept amendment of the concessionary terms to provide for expensing of royalties and for a change in the method of computing tax payments, both resulting in considerably higher tax liabilities for the companies. From the very start, several companies agreed to the new terms; a number of others, however, were quite unwilling to amend their earlier concessions—which had already been amended once, as a result of the amendment of the Libyan Petroleum Law in 1961. To persuade the recalcitrant companies, the Government used four major "arguments": first, the new amendments to its oil law provided that no new concession would be granted to companies refusing to amend their earlier concessions in accordance with the new terms;²⁶ second, it promised to accept without further dispute the tax declarations for earlier years of any company consenting to the amendment, thus eliminating a serious possibility of charging the companies for additional taxes; third, OPEC issued a resolution, published after the end of the negotiations but appropriately leaked before the final capitulation of the companies, to the effect that no member country would issue new concessions to a company (or a parent or subsidiary thereof) which did not agree to amend its earlier concessions as proposed by the Libyan government;²⁷ and fourth, and last in time, the Libyan Government declared that it might stop the exports of any company not agreeing to the amendment of the oil concessions. How far this last threat, which would appear essentially to involve a violation of existing contractual undertakings, was decisive is subject to debate;²⁸ at any rate, the measure was never taken since the remainder of the companies capitulated in January 1966. The action threatened brings to mind, of course, earlier measures or threats of measures in violation of existing contracts in other petroleum-producing countries. But it is the first three measures that are of particular interest as examples of sophisticated bargaining methods, through a combination of offer and withholding of rewards rather than threat of

25. For a description and analysis of the Libyan "operation," see HARTSHORN 17-26. Cf. the accounts in the trade journals, especially 63 OIL & GAS J., Oct. 18, 1965, at 70; Nov. 1, 1965, at 48; and Dec. 20, 1965, at 49; 64 OIL & GAS J., Jan. 10, 1966, at 48-49; Jan. 31, 1966, at 130-31; 32 PETROLEUM PRESS SERVICE 267-68, 427 (1965); 33 PETROLEUM PRESS SERVICE 7-9 (1966).

26. See article XI of the Royal Decree Law, promulgated on November 22, 1965, in 5 INT'L L. MATERIALS 445, 454 (1966).

27. OPEC Resolution X, 63 in 5 INT'L L. MATERIALS 532 (1966).

28. It is interesting to note that this last measure, reported in HARTSHORN 18-19, was not widely reported in the trade press. There is, for example, no reference to it in the reports cited *supra* note 25.

punitive action. Obviously, particular circumstances are controlling; the importance of new concessions in Libya is greater than in some other countries whose oil resources are already better developed. No special point need be made of the third and most original of these measures, the collective action on the part of members of OPEC; its potential importance is obvious.

All in all, OPEC has taken a rather moderate approach to the problems of relations with oil companies. As a recent observer has noted:

[w]hat distinguishes OPEC in its dealing with the oil companies from Arab governments in general is the thoroughness and consistency of its approach. . . . It is conscious that by general Arab standards [its aims] are 'moderate' objectives, capable of fulfilment, with give-and-take on both sides, through normal channels of negotiation. . . . In order to make further progress, . . . the technocrats had to go beyond the preconceived generalities and essentially emotional arguments about 'exploitation' and 'monopoly' and make a study of the oil industry in its broadest context and in painstaking detail. This was the only way to counter the company's deliberately technical arguments against improving the producing countries' terms.²⁹

At the same time, OPEC has been quite effective in promoting the immediate interests of its members. Its most recent success has been the abolition of a 6.5 percent discount allowance, to which the major oil companies agreed in January 1968; as a result, the governmental revenues of the host countries were expected to increase by about 250 million dollars a year.³⁰

Success, however, breeds problems. Once its initial battles are won, where is OPEC going? Its ultimate and clearly most significant objective is the stabilization of prices and production.³¹ But when that objective is considered, certain fundamental problems arise. First, assuming that companies will cooperate, how far can prices be pushed? Here is where a third party, until now ignored in this review as it is in the books reviewed, comes into play: the oil-consuming nations include in their number some of the most powerful developed countries. It may be unnecessary to waste too much sympathy on the oil companies, as the "man-in-the middle"—they have too much power and ability to be proper

29. D. HIRST, *supra* note 18, at 108.

30. See 12 MIDDLE EAST ECON. DIGEST 40 (1968).

31. See, e.g., a recent OPEC paper presented to the Sixth Arab Petroleum Congress (March 1967), *Collective Influence in the Recent Trend Toward the Stabilization of International Crude and Product Prices*. Cf. HARTSHORN 344-48.

objects for sympathy.³² Still, it is true that their production, pricing, and distribution policies are affected by pressures on both the producing and the consuming sides. Reference to the interests and possible action of consumers completes the picture of the international oil industry and makes clearer the existence of limits to the bargaining power of oil producers.³³

A second, more immediate, problem is that cooperation among producing countries cannot be taken for granted. Assuming relatively stable total production, these countries would be (and are) competing directly with one another in a zero-sum-game situation—what one gains the other loses. Even under the traditional pattern of operation, host countries exert pressures on oil companies to increase production, although this often entails decrease of production in other countries. Iranian pressure on the Consortium for a continuing increase in oil production is only the latest such example.³⁴ The presence of national oil companies, or even the collaboration between host governments and oil companies in production, exacerbates such competition. A perceptive reviewer of Dr. Mughraby's book has already observed that

there is an implicit conflict between the role of OPEC and the function of the joint venture agreements. OPEC signifies a confrontation between united producing countries against hostile foreign oil companies, whereas the joint venture scheme depends on mutual cooperation between the country and the oil company.³⁵

In the context of competition between oil producing countries this contradiction becomes particularly significant; it is no longer sufficient to argue that joint ventures are appropriate for new agreements, while OPEC and collective bargaining relate to the revision of older concessions.³⁶ Distinctions in terms of new versus old arrangements are, or will soon be, no longer valid. The old concessions have all by now been revised, while several oil producing countries continue to grant new concessions. It is the competition between producers in a relatively stable market that lies at the root of the tension.

32. For a thoughtful review of this problem, see HARTSHORN 375-88.

33. An OPEC official has suggested that a "possible long-term solution" would be the establishment of "joint undertakings on an integrated basis between the Governments of producing countries and both the Governments of consuming countries and foreign private enterprises." See F. PARRA, *THE DEVELOPMENT OF PETROLEUM RESOURCES UNDER THE CONCESSION SYSTEM IN NON-INDUSTRIALIZED COUNTRIES* 50 (1964).

34. See 12 *MIDDLE EAST ECON. DIGEST* 265, 377 (1968); 34 *PETROLEUM PRESS SERVICE* 3 (1967).

35. Thompson, Book Review, 5 *ALBERTA L. REV.* 363, 364-65 (1967).

36. MUGHRABY 193.

Events in early 1968 have shown that differences in attitude and general orientation among OPEC members remain very important. On January 9, 1968, the formation of an Organization of Arab Petroleum Exporting Countries (OAPEC) was announced.³⁷ Its members are Kuwait, Libya, and Saudi Arabia; membership is open to any Arab country for which petroleum "is the principal and basic source of national income," but Iraq was invited to join and declined. The charter of the new organization provides that:

The principal aim of the organization is the cooperation of the members in various forms of economic activity in the oil industry, the realization of the closest ties between them in this field, the determination of ways and means of safeguarding the legitimate interests of its members, individually and collectively, the unification of efforts in the industry to ensure the flow of oil to its consumption markets on equitable and reasonable terms, and the creation of a suitable climate for the capital and expertise invested in the oil industry in the member states.³⁸

Its members say that OAPEC is intended to be a source of strength for OPEC; its charter expressly binds its members to abide "by the ratified resolutions of OPEC." However, there is little doubt that the formation of OAPEC has, and was intended to have, political consequences. It appears to represent an attempt by the politically moderate or conservative Arab nations to keep petroleum policies on an economic and technical level and to avoid their being directly and extensively affected by purely political—ideological or other—considerations (such as those relating to the Arab-Israeli conflict)—in the words of an expert, "to maintain a purely economic approach to the development of the oil sector to the exclusion, as far as possible, of dangerous political crosscurrents."³⁹ No open negative reaction has come from other OPEC members. In fact, Venezuelan spokesmen applauded the creation of OAPEC and declared that it should be expected to strengthen OPEC. From Egypt, however, came a call for an association of Arab national oil companies, to operate as a consortium either independently or in joint ventures with foreign firms. Such a grouping, it was said, would not conflict with OAPEC, and would in fact complement it, while, at the same time, it would pave the way for a confrontation with the interna-

37. For up-to-date reports of related developments, see 12 MIDDLE EAST ECON. DIGEST *passim* (1968).

38. Agreement for the Establishment of the Organization of Arab Petroleum Exporting Countries, signed on January 9, 1968, article 2, 7 INT'L L. MATERIALS 759 (1968).

39. Faud Itayim, editor Middle East Economic Survey, quoted in N.Y. Times, April 7, 1968, § F, at 1.

tional oil cartels.⁴⁰ Some steps in this direction have already been taken through several recent agreements on cooperation and coordination among national Arab oil companies. While it would be premature and unjustified to speak of a permanent split in OPEC, one must repeat that despite the existence of common interests cooperation is no easy task.

In the context of such rapid change in the substance and form of relationships between oil companies and host states, through complex processes of negotiation and concomitant pressures and counterpressures, is there anything left for the lawyer, except for a prudential assessment of chances and probabilities, which any experienced observer could make as well? Such negative first impressions are misleading. While concern for judicial aspects may be, in the main, absent, negotiations and discussions are conducted within a specific legal framework; legal principles and instruments set outside limits; they often determine the starting point from which the bargaining process begins; and they make clear some consequences that the parties' actions entail. This is where the differences in their conception of law and its role between the two authors under review become relevant; for such differences affect in important ways the shared understanding of the parties as to their initial bargaining position and the courses of action open to them.

Legal argument has many functions and assumes many forms. Some of the most basic differences between the two authors are symbolic in nature; although symbols are not to be condemned, or excluded from legal discourse, they must be understood and treated as such. To deal with reality one must go beyond symbolic reference. Dr. Cattán emphasizes the importance of the contractual element in oil concessions; while admitting the presence of "public law" elements, he insists that it is as a *sui generis* contract that the oil concession in the Middle East can be best understood.⁴¹ Dr. Mughraby, on the other hand, admits casually the partly contractual character of concessions but stresses instead the overriding concept of "permanent sovereignty over natural resources." But sovereignty is today becoming more and more a sort of residual concept—what is left after the limitations on the freedom of states have been determined constitutes the content of sovereignty. In the context of natural resources, "permanent sovereignty" raises some interesting questions, if it is to be understood in any substantive legal sense. One is reminded unavoidably of the initial intimate relationship between ownership and sovereignty.⁴²

40. 12 MIDDLE EAST ECON. DIGEST 279 (1968).

41. CATTÁN, LAW 19-30.

42. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927), reprinted in M. COHEN, LAW AND THE SOCIAL ORDER 45 (1933). Dr. Mughraby's incidental treat-

The difficult legal problems which arise concerning oil concessions relate to the basic frame of legal reference, not to details of implementation or incidental interpretation. It is essentially the conflicting demands of states and companies for repeated revision and continuing security of expectations that are ultimately involved in the somewhat formal debates one finds in the literature on "the law applicable to" concession agreements. Dr. Mughraby tackles the issue of revision directly. He states:

[t]he principles governing revision of concession agreements may be invoked under two distinct sets of circumstances:

1. Where a gross inequality of bargaining power had prevailed at the time of signing the agreement leading to a state of unequivocal contractual advantages.
2. Where changes in circumstances render such terms of already executed concession agreements impracticable, or necessitate the addition of new terms without which the equivalence of the contractual advantages is greatly impaired.⁴³

On reflection, it would seem that the first category clearly fits only the cases of manifest inequity brought about through the operation of the colonial system. All other situations would come under the second category: in a business situation, it is most difficult to determine fairness or equity without reference to time, the position, aspirations and skill of the parties, and the economic and technological background. What is fair reward for financial risks under widely varying conditions cannot be fixed with any degree of certainty or consensus. The terms of reference are thus continuously changing. Faced with changing (indeed escalating) demands on the part of the host countries, in a context of changing internal (political, psychological) and external conditions (markets, transport, technology, even utilization), we must seek to determine equity, equivalence, and fairness *in concreto*, with respect to the particular situation at the time claims are made—not looking back to correct past conditions. What is then needed is a legal frame of reference that will provide maximum flexibility to all parties—adaptation to changing objective conditions, reasonable stability of expectations, and avoidance of catastrophic crises. It is because of this felt need that suggestions have been advanced for the creation (or recognition—a clearly "constitutive" recognition in this case) of a "new" body of law (more precisely, a new body of international law),⁴⁴ called by some authors "transnational"

ment of the state as landlord and sovereign is a rather oversimplified reference to a complicated and jurisprudentially significant topic. MUGHRABY 191, 194.

43. MUGHRABY 176.

44. For a discussion of the alternatives in that respect and strong support for the public international law character of the law in question, see W. FRIEDMANN, *THE*

law,⁴⁵ founded on the "general principles of law recognized by civilized nations."

Such a body of law serves several functions. Its most obvious, but not most important, function would be to make available to those concerned a set of legal principles for application in situations where the domestic law of the host state is still undeveloped in the relevant area. Some of the most influential essays in this area⁴⁶ and three out of the four cases⁴⁷ that can be said to recognize the applicability of such a body of law appear to be primarily founded on such an understanding of its function. In the past few years, however, the situation has been changing very fast in the less developed countries. In the oil law area, for instance, most oil producing Middle Eastern states have by now enacted comprehensive petroleum statutes.⁴⁸ This trend will continue unabated, if not intensified. Although extensive gaps will surely continue to exist in the laws of many less developed countries—at the very least familiarity and usage will be lacking in some areas of the law—this cannot be the principal rationale for a "transnational" law of the type under discussion.

The second function of such a body of law would be to enhance the security of foreign investors by establishing certain standards for the treatment of their contractual and other rights. It would thus indirectly serve the host countries' interests, as well, by encouraging responsible investors rather than speculators and by rendering unnecessary the grant of special, rigidly binding, guarantees and assurances. Transnational law is thus expected to fulfill in part the functions of the traditional "minimum standard of international law," but it would do so more effectively precisely because it lies outside the rigid formal structure of traditional international law.

CHANGING STRUCTURE OF INTERNATIONAL LAW 170-81 (1964).

45. Recent usage of this term is, of course, attributable to the influence of Philip Jessup's *Transnational Law* (1956). The present context may be somewhat different from his; cf., A. FATOUROS, *GOVERNMENT GUARANTEES TO FOREIGN INVESTORS* 283-95 (1962); G. HAIGHT, *The Development of Transnational Investment Law Through International Organizations*, in SOUTHWESTERN LEGAL FOUNDATION, *PRIVATE INVESTORS ABROAD—STRUCTURES AND SAFEGUARDS* 99 (V. Cameron ed. 1966); Lalive, *Un récent arbitrage suisse entre un organisme d'état et une société privée étrangère*, 19 ANNUAIRE SUISSE DE DR. INT'L 273, 284-302 (1962); Lalive, *Contracts between a State or a State Agency and a Foreign Company—Theory and Practice: Choice of Law in a New Arbitration Case*, 13 INT'L & COMP. L.Q. 987, 998-1002, 1006-11 (1964). See also, in the more traditional international law context, K. BORCHERS, *VERTRAGE VON STAATEN MIT AUSLANDISCHEN PRIVATPERSONEN* 164-68 (1966); C. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURY TO ALIENS* 116-19 (1967); and cf. the detailed elaboration in a particular context by Philippe Kahn in an article to be published in Volume 44 of the *Indiana Law Journal*.

46. See, especially, McNair, *The General Principles of Law Recognized by Civilised Nations*, 33 BRIT. Y.B. INT. L. 1 (1957).

47. Cases cited in notes 2, 3 and 4 *supra*.

48. CATTAN, *EVOLUTION* 20-22. And cf. MUGHRABY 116.

Both authors studied view the problem in a manner not significantly departing, at first blush, from the one given here, although neither of them adopts the "transnational law" label, as to which I too have now some doubts. Dr. Mughraby treats the subject quite incidentally and briefly, indeed surprisingly so, in the narrow context of choice of law clauses in joint venture agreements.⁴⁹ He concludes that the various "indications" on applicable law "may serve to put certain limitations on the application of local law to certain cases, . . . and to establish certain international standards of justice with which the local law is required to comply. . . ."⁵⁰ Dr. Cattán discusses the matter at greater length⁵¹ and concludes that "resort to general principles of law in oil concessions has an auxiliary or residuary character" and that this tends to make the concept "a residuary 'common law' of certain classes of State contracts."⁵²

The matter does not end here, however. Apparent agreement on the functions of transnational law is often misleading. The existence of such a body of law is suggested by various writers for different reasons. There is, no doubt, some basic agreement. Most supporters of the concept would agree that, through its continuing application to state contracts, transnational law will presumably develop reasonably precise and certain standards and criteria. Moreover, because of its limited special area of application, it should succeed in developing principles and procedures designed to promote the continuing cooperation of the parties rather than limiting itself to sterile apportionment of blame and damages after the fact. It should reflect, that is, the actual degree of flexibility and readiness to negotiate and compromise that oil companies and host governments have generally shown rather than the rigid legalisms of the rhetorics from either side.⁵³

Agreement even on these features is possible because there is no concrete reference to substance. When the substantive principles of such law are considered, it becomes clear that the law's essential purposes are conceived differently by its several advocates. Under one view, such a body of law should be accepted as existing because it would help to temper the rigid application of contractual provisions and it would make possible the application of equitable concepts. Under other views, such a body of law, if applicable, would tend to give to the concession contract even a stronger role than it has now. It would tend to make relationships more "stable," *sc.* rigid. The two positions are not only distinct but often

49. MUGHRABY 109-16.

50. MUGHRABY 114.

51. CATTÁN, LAW 58-72, 113-17.

52. *Id.* 68.

53. *Cf.* HARTSHORN 311. But see also the delightful story—unfortunately too long for quotation—*id.*, 309-10.

opposed. While the agreement as to the existence (or desirability) of transnational law remains valuable, it is not helpful to disregard or confuse these basic differences of opinion in order to reach a non-existing substantive consensus.

It is in this context that the much debated analogy between oil concessions and *contrats administratifs* acquires its significance. Dr. Cattán discusses this question in a peculiar manner, by inquiring into the possible applicability of *droit administratif*, i.e., administrative law French style, to oil concessions.⁵⁴ He then takes great pains to point out that there is no such body of law in many of the legal systems involved. What he seems to miss throughout this exercise is that the application of a legal concept by analogy does not involve adoption or application of a whole branch or system of law. Admittedly, not all jurists who have dealt with this matter approach it in precisely the same manner and, unfortunately, Dr. Cattán fails to identify the authors he is answering. The nearest to an assertion that oil concessions are *contrats administratifs* that I have been able to find is in a paper by a Libyan jurist submitted to the Fifth Arab Petroleum Congress.⁵⁵ But even there it is admitted that the local law overrides the author's theoretical observations on the "nature" of the contract. Where the point is advanced in a less polemical spirit, it takes the form of a suggestion of analogy.⁵⁶ What is suggested is that the operative principles of the law of government contracts, found most clearly in French administrative law but by no means absent in their substance in other legal systems, should be applicable to oil concessions and other similar agreements. Dr. Cattán joins issue, somewhat indirectly, with that position, by pointing at the several differences between the "public service concessions," which are typical administrative contracts in French law, and the oil concessions in Middle Eastern countries.⁵⁷ But, first of all, the *concession de service public* is not the only administrative contract in French law; other instruments, such as public works contracts (*marchés de travaux publics*)

54. CATTÁN, LAW 72-86.

55. N. SAID, THE LEGAL NATURE OF A PETROLEUM CONCESSION CONTRACT AS AN ADMINISTRATIVE CONTRACT, in FIFTH ARAB PETROLEUM CONGRESS (Cairo 1965). Similar but more ambiguous affirmations or assumptions can be found in other papers submitted to Arab Petroleum Congresses; e.g., O.P.E.C., FROM CONCESSIONS TO CONTRACTS, in FIFTH ARAB PETROLEUM CONGRESS (Cairo 1965); S. ALLAM, STATE CONTROL OVER CONCESSION COMPANIES, in FOURTH ARAB PETROLEUM CONGRESS (Beirut 1963). I have been unable to locate the, by now legendary, papers by Mr. Frank Hendryx, submitted to the First and Second Arab Petroleum Congresses, 1959 and 1960, which seem to defend a related thesis, although references to and quotations from them have appeared in much of the abundant literature in response and rebuttal printed, and on occasion reprinted, in the United States.

56. See, e.g., A. FATOUROS, *supra* note 45, at 196-209; W. FRIEDMANN, *supra* note 44, at 200-06.

57. CATTÁN, LAW 75-83.

and supply contracts (*marchés de fournitures*), are also classed in that category and they differ considerably from Dr. Cattani's chosen example. In the second place, the precise criteria for the distinction between administrative and private-law contracts in French law cannot be applied literally and out of context in other systems and situations. To argue, for instance, that while administrative contracts must contain "regulatory clauses" which can be altered unilaterally by the state, oil concessions do not include such clauses and their provisions "can be varied only by the mutual consent of the parties,"⁵⁸ is to mistake conclusion for premise. If the matter were already that clear on the face of the contract, there would be no need for analogies. Thirdly, to support the analogy one must refer to basic principles and point out that certain important features which are present in the administrative contract concept, as developed by French legal theory, also obtain in the case of oil concessions: the relationship between the state *qua* sovereign and the private contracting party, the need for establishing between the two a system of continuing relationships of cooperation and not a sequence of one-shot transactions,⁵⁹ and the importance of the relationship for the operation of the governmental machine—although the degree of importance of oil concessions for the host state is far higher than in most of the often routine contracts covered by the French theory.

In the final analysis, no analogy is ever fully compelling in and by itself. There is always a choice between analogies (as between legal principles) and one decides on the basis of an assessment of the relevance of various criteria and a judgment as to the desirability of the consequences that flow from adoption of the one or the other possible analogy. What at least some supporters of the *contrat administratif* analogy are suggesting is that the legal consequences which follow from this manner of perceiving the issues are preferable to those that follow from an understanding of the oil concession in purely or predominantly contractual (private-law-contractual) terms. In other words, it is not because the analogy is compelling that one accepts the legal consequences but because one considers the consequences appropriate that one adopts the analogy. This is elementary (even over-simplified) legal realism, but one should not lose sight of simple truths when dealing with complex subjects.

What is particularly attractive about the legal effects which flow from the adoption of the *contrat administratif* analogy is that they appear to provide and account for a reasonably well-delimited orderly process of

58. *Id.* 79.

59. For the role of the principle of cooperation between state and private contracting party, see, 2 A. DE LAUBADÈRE, *TRAITÉ THÉORIQUE ET PRATIQUE DES CONTRATS ADMINISTRATIFS* 18-21 (1956).

legal change, in an area where social change is fast-paced as well as inevitable.⁶⁰ It must be admitted that even in the absence of such a theoretical construct the parties would eventually adjust their relationship to changing conditions, as they have in fact done in the recent past. However, a legal approach or theory which can make explicit, account for, and indeed assist the process of change is to be preferred over an approach that relegates change to non-legal factors and processes. An illustration of the difference between the two approaches is found in the treatment of the concept of "mutual equivalence of contractual advantage" by the two authors under review. No doubt, this is a fluid and ambiguous term, incapable of clear or stable definition. It is in fact a legal standard, which merely points to certain areas and tests and establishes them as relevant or significant. By itself, in the abstract, it provides no answer. For Dr. Mughraby, this concept constitutes the "basic jurisprudential content" of the law of "permanent sovereignty."⁶¹ Recognizing the inherent difficulty of the principle, he seeks to provide some concrete guidelines for its implementation.⁶² These guidelines, however, not only are far too summary and incomplete but also rest on the assumption of the existence of some indeterminate "decision-making bodies" which may "take the form of arbitration tribunals, conciliation commissions, administrative courts or the OPEC High Court."⁶³ Far more elaboration *in concreto*, perhaps in part through study and reformulation of past developments, in addition to current proposals or negotiations, is needed to render the concept operational.⁶⁴ Still, the author at least tries to grapple with this issue and to account for related past and future developments. Dr. Cattani, on the other hand, devotes a short chapter to the discussion of this issue (in which Dr. Mughraby's book is rather surprisingly not cited), and reaches opposite conclusions. He maintains that the fifty-fifty arrangements between investors and host countries have introduced this principle in practice, but according to him

the introduction of the principle of equivalence of benefits in oil concessions did not possess any legal significance. Such

60. Perhaps it should be added that social change in this area is also radical and continuous. *Contra*, G. HAIGHT, *supra* note 45, at 103, who argues that "social change does not necessarily change law." His examples, however, show clearly that he is referring to temporary and non-radical changes. This is a matter of degree, of course, but then so is everything else, at least in matters legal.

61. MUGHRABY, 161; and *cf. id.* 161-201. It is in this context only that Dr. Mughraby refers to the analogy with the *contrat administratif*; *cf. id.* 184-90.

62. *Id.* 196-201.

63. *Id.* 196.

64. In this connection, the insights from Canadian law contributed by Professor A. R. Thompson are quite useful; Thompson, *Sovereignty and Natural Resources—A Study of Canadian Petroleum Legislation*, 1 VALPARAISO L. REV. 284 (1967).

equivalence was neither required by any legal system nor dictated by any legal consideration. But the adoption of this principle has shown that the parties to oil concession agreements were not unmindful of practical and equitable considerations.⁶⁵

A final inquiry must complete this journey into petroleum law and lore and, most appropriately, bring us back to the point made at the very beginning of this review. How relevant are these problems and considerations to transactions, investments, and relationships other than those relating to oil? In particular, how applicable is "transnational law" to such other areas? The answer must be speculative, since the little authority there is and most of the debates relate, directly or indirectly, to petroleum. It would seem that transnational law as here understood would be clearly applicable to relationships arising out of mineral concessions, where conditions, as to order of magnitude, technology, processing, and marketing, are *grosso modo* similar to those in petroleum. Large-scale "economic development agreements,"⁶⁶ even if not primarily involving mineral or other natural resources, probably present enough similarities to fall in the same general category. Some problems arise as to medium-size manufacturing investments, undertaken on the basis of formalized undertakings usually founded on foreign investment or industrial promotion legislation. In most cases involving such investments the domestic law of the host state would be applicable. However, if transnational law is understood to be not a complete and elaborate body of law but a set of "residuary" principles importing certain standards of justice and fairness for both parties, there is no reason why even such investments would not come under it. The incidence and extent of utilization of this law in such cases might be much lower than with respect to natural resources or large-scale investments but that in itself is not too significant. A far more difficult question is how far such law might be applicable or even relevant to relations between developed states and foreign corporations or individuals. Logical consistency (the virtue of small minds, but also of egalitarians) would dictate that it should apply, but it is difficult to imagine the precise conditions for such application. One can only lamely

65. CATTAN, LAW 130.

66. This concept, as used by Lord McNair, *supra* note 43, Hyde, *Economic Development Agreements*, 103 HAGUE ACADEMY OF INT'L L., RECUEIL DES COURS 271 (1962), and W. FRIEDMANN, *supra* note 44, at 177, usually involves exploitation of natural resources. But it is not necessarily synonymous with "agreement for the development of natural resources" (is an oil concession an "economic development agreement"?) and, in some instances, the magnitude of the undertaking, its long-range character, and other such features may be sufficient to bring it in that category, even though the relationship to natural resources is not predominant. The *conventions d'établissement* of francophonic African states, for instance, would seem to be clear cases of "economic development agreements," whatever their precise content.

conclude with the observation that much more study and speculation on the needs and possibilities for use and development of what has been called transnational law are needed.

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