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RENegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience

Paul Kuruk*

Introduction

Foreign private investment between developing countries and transnational corporations (TNCs) has been the principal method through which developing countries have obtained much needed capital contributions and technical assistance to effectively exploit their rich reserves of natural resources. Significantly, in many of the early investment agreements, the TNCs came away with extremely generous concessions due to a stronger bargaining power reflected in their superior knowledge of industry-wide trends and support from their home governments and international financial institutions. With the implementation of the investments, however, as the developing countries became better informed about the industry and acquired a captive power over physical facilities associated with the investments, these countries have reexamined the contractual arrangements with their foreign partners and have often called for modification of investment agreements that did not meet their expectations. Resistance by the TNCs to such requests has invariably strained relations between the


3. To encourage foreign participation, the host countries found it necessary to grant incentives including tax relief, remittances of profit, foreign exchange exemptions, and limited export and import duties. See generally E.I. Nwogugu, The Legal Problems of Foreign Investment in Developing Countries (1965).

4. See infra notes 195-200 and accompanying text.

5. For example, in August 1968 the Zambian government renegotiated its agreement with the major aluminum companies in the country. See generally Simon Cunningham, The Copper Industry in Zambia: Foreign Mining Companies in a Developing Country (1981); Anthony Martin, Minding Their Own Business: Zambia's Struggle Against Western Control (1972).
participants and, sometimes, even prompted nationalization of the investments.\(^6\)

This article describes the use of the renegotiation process to resolve problems that arise in the relations between participants in transnational investment. It draws conclusions from the successful renegotiation of an agreement executed in 1962 under which the Ghanaian government guaranteed bauxite and hydroelectric power supplies to support the smelting operations of the Volta Aluminium Company, Limited (Valco) in return for revenues from taxes and from payments for electricity, water, and use of the country's port facilities. The agreement between Ghana and Valco was entered into as part of the Volta River Project (VRP). This project was an investment scheme that involved construction of a hydroelectric dam by the Volta River Authority (VRA), a government agency, to provide sufficient power for the production of aluminum at a smelter. The smelter was constructed and owned by two American transnational companies\(^7\) — Kaiser Aluminum and Chemical Corporation (Kaiser) and the Reynolds Metals Corporation (Reynolds) — through Valco, their Ghanaian subsidiary.\(^8\)

The article briefly outlines the problems that arose in the VRP after nearly two decades of operation. The article notes that the determination to address the problems of a bad national economy — problems believed to have been caused in part by what was seen as the uneconomic and inequitable terms of the investment agreement — compelled the Ghanaian government to renegotiate the agreement in the period from 1983 to 1985. The main benefit to the country under the revised agreement is the potential increase in revenue from the

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\(^6\) For example, in 1971, then-President Allende of Chile nationalized the Chilean Telephone Company (a subsidiary of International Telephone and Telegraph) after the company frustrated the governmental efforts to negotiate their contract. \(\text{EDWARD BOORSTEIN, ALLENDE'S CHILE: AN INSIDE VIEW 127-31 (1977)}\).

\(^7\) The VRP was made possible by generous contributions from international financial institutions including the International Bank for Reconstruction and Development (World Bank), the United States Export and Import Bank (Eximbank), the United Kingdom Export Credits Guarantee Department (UKECGD), and the United States Agency for International Development (USAID). The Ghanaian government alone received nearly $100 million in loans from those institutions to meet the cost of dam construction, while Valco obtained a $110 million loan from the Eximbank and an additional $32 million from its shareholders to finance the smelter construction.

\(^8\) The terms of the Volta River Project (VRP) are contained in a complex of agreements signed on February 8, 1962, by the government of Ghana, Valco, and the various financiers of the project. The main closing documents were comprised of a master agreement (defining the rights and obligations of Ghana and Valco), various loan agreements, a guarantee agreement between Ghana and Eximbank, and Valco agreements made with its shareholders on tolling and on management and technical services assistance. \(\text{See generally Master Agreement Between the government of Ghana and Volta Aluminium Company (1962) [hereinafter Master Agreement] (Composite Conformed Copy, as amended through January 30, 1985).}\)
project. The company also gained by securing terms that assured its international competitiveness.

After analyzing the factors affecting the outcome of the Ghana-Valco renegotiations and comparing the processes of the original negotiations and the renegotiations, the article offers some strategies for host countries on renegotiating transnational investment agreements. While the article appreciates the rationale for stabilization clauses in investment contracts, it rejects the attempts frequently made through such provisions to preclude review by host societies, arguing that investment agreements operate in a fluid environment and are affected by economic conditions unforeseen at the time such agreements are originally signed. The inclusion of review provisions in transnational investment agreements is, therefore, seen as an effective mechanism enabling the parties to readjust the terms of the arrangement to accommodate unexpected developments. The most important recommendation of the article is for host societies to prepare adequately before the renegotiations begin, and to adopt sound strategies during renegotiations. The development of local expertise, supplemented by use of foreign experts, will enable the host country to undercut the TNC's superior knowledge in the relevant industry.

I. PROBLEMS WITH THE ORIGINAL GHANA-VALCO ARRANGEMENTS

Ghana and the shareholders of Valco had different reasons for participating in the investment scheme. Viewing the hydropower component as the cornerstone of national economic growth, Dr. Kwame Nkrumah, the Prime Minister of the country at the time of the original negotiations, hoped to obtain sufficient energy from the project to facilitate the industrialization of the country and to provide a strong economic power base that could be used to promote African unity, preserve the country's political independence, and create internal stability. The possible integration of the Ghanaian aluminum industry...
through the processing of the country's bauxite into alumina for use at the Valco smelter was a secondary interest.\textsuperscript{11} Integration of the aluminum industry was expected to produce linkage effects in the economy, greatly aiding in the country's development.\textsuperscript{12} Although Nkrumah was not enthusiastic about the idea of aluminum smelting as part of the VRP, he agreed to it because it was a necessary condition to the external financing which he badly needed to get the hydroelectric project started.\textsuperscript{13} No doubt he was convinced that he could successfully accommodate the smelter without adversely affecting the power needs of the Ghanaian public.\textsuperscript{14} It is widely believed that his strategy was to accept the agreement so that once the project took off he would be in a position to renegotiate a better deal.\textsuperscript{15}

To Kaiser and Reynolds, the VRP provided an opportunity to obtain access to vast bauxite deposits and cheap hydropower in Africa to supplement their limited reserves in the United States.\textsuperscript{16} Under their agreement with the government, they were guaranteed nearly three-quarters of the energy produced. As a most-favored customer, they paid for this energy at the low rate of 6.265 mills per kilowatt hour (mills/kwh) fixed for thirty years.\textsuperscript{17} Although they also acquired mining concessions extending over forty square miles, they were under no obligation to exploit them.\textsuperscript{18} Incentives the government provided to the companies included low fees for water, port, and wharfage services,\textsuperscript{19} a ten year tax relief,\textsuperscript{20} exemption from foreign exchange regula-

\textsuperscript{12} Hart, supra note 9, at 42.
\textsuperscript{13} International lending institutions were reluctant to lend money where they were not assured that a reliable customer existed who would use the excess electricity left after the residential and business needs of Ghanaians were met. The involvement of aluminum companies satisfied banks that Ghana would be able to repay their loans with revenue from the sale of power to the smelter.
\textsuperscript{16} Aluminum Co. of America (Alcoa) at that time held a monopoly over those resources in U.S. industry.
\textsuperscript{17} Master Agreement, supra note 8, art. 12.
\textsuperscript{18} Id. art. 14.
\textsuperscript{19} Valco was guaranteed a continuous supply of water for which it paid three shillings for every 1000 gallons of water supplied. For use of port facilities, Valco paid £15,000 per year as rent and £5,000 to cover dredging costs. Provisions were also made for payment of harbor dues at one shilling per ton and wharfage charges at one penny per ton for cargo that was loaded and unloaded. See Water Agreement Between the Republic of Ghana and the Volta Aluminium Company, art. 7 (1962).
\textsuperscript{20} Ghana was required to enter into a tax treaty with the United States under the terms of which Valco shareholders would be deemed to have paid taxes in Ghana, thus qualifying for exemption from further tax in the United States. Valco was also certified as a pioneer company,
duty-free status for the company's alumina imports and aluminum exports, and firm guarantees protecting the investment.

Because the construction of the hydroelectric dam and the smelter was completed by 1967, it was possible to begin the immediate production of aluminum. Since then, Ghana has continued to meet its contractual obligation to supply energy to the Valco smelter, which in turn has produced aluminum ingots for its shareholders. By 1982, both parties appeared to have derived the benefits they expected from their participation in the project. Valco's self-described and somewhat understated gains consisted of $27 million in income that it applied toward tolling charge prepayments, and $20 million in dividend income that it declared in 1980. The country acknowledged benefits from the hydropower supply and from employment opportunities thereby entitling it to income tax relief under the 1959 Pioneer Industries and Companies Act. The tax relief enabled the company to make sufficient net earnings to recover the lower of either its total paid-up share capital, or one-half of the capital cost incurred by Valco in constructing the smelter. When the tax became payable, there was to be a freezing of the tax rates charged for a period of 30 years. Any tax assessed against Valco was to remain at the rates prevailing in January 1962. Master Agreement, supra note 8, arts. 31, 32, & 40.

21. Id. art. 33.  
22. Id. arts. 19-20.  
23. Assurances requested by Kaiser and Reynolds for the protection of the Valco investment came under various provisions dealing with nondiscrimination, expropriation, and indemnification. Additionally, the Government guaranteed Valco's rights would not be affected should Ghana enter into a confederation with other African States. To ensure Valco's influence in the Volta River Authority (VRA) so that the latter would not arbitrarily act against the company's interest, the governing board of the VRA was, for thirty years, to include a member nominated by Valco. Contractual disputes were to be settled by arbitration in accordance with international rules of arbitration. Finally, to insulate the scheme from future legislative changes, the law governing the agreement was the law of Ghana existing at the time of the execution of the agreement. Master Agreement, supra note 8, arts. 9, 35, 36, 38, 41, 48, & 49.

24. GHANA & NKRUMAH, supra note 10, at 156.  
25. The declared figures were misleading because the company's assessment ignores the real value of the investment which, using the blue book value of the shareholders' equity as a guide, had increased from $12 million to more than $136 million by the end of 1982. Louis Casely-Hayford & Rod Sims, Renegotiating the Price and Availability of Energy, in ESSAYS FROM THE GHANA-VALCO RENEGOTIATIONS, 1982-85, at 29 (Fui S. Tsikata ed., 1986). Valco's assessment also ignored the $12 million savings from its ten-year tax holiday. Owusu, supra note 15, at 2827. Other benefits not accounted for in Valco's self-assessment included exemptions from import and export duties as well as concessionary rates paid by the company for electricity, water, port, and wharfage services. The investment was obviously profitable to the company, enabling it to pay off its $220 million debt well ahead of schedule. Given that their initial risk was negligible (most of the risk was borne by the U.S. government), the Valco shareholders had obtained a low-cost smelter serving as an outlet for their alumina from Jamaica at little cost. Casely-Hayford & Sims, supra at 29.

26. Before the construction of the dam, electricity production in Ghana stood at 35 megawatts, but by the early 1980s, residential, commercial, and industrial customers other than Valco used 220 megawatts, representing a 500% increase in capacity. W. AFR., Nov. 14, 1982. If the power allocated to these domestic users had been thermally generated, it would have cost the country up to $36 million more in 1982 or an increase of $100 million annually from its foreign exchange reserves. Casely-Hayford & Sims, supra note 25, at 29; Ward Saunders, The Valco View, W. AFR., Jan. 24, 1983, at 194.
made possible by the VRP.

Despite the apparent mutuality of benefits, the Ghanaian public (as opposed to Valco officials) began to voice considerable dissatisfaction with the Ghana-Valco arrangements. Measured against the goal of supplying large quantities of electricity to support the country's industrial takeoff, the VRP was a major disappointment by 1982. Valco's right to seventy percent of the hydroelectricity left enough power for only five percent of the country's population of 12 million. This situation was further aggravated when drought problems at the dam low-

27. In 1982 Valco employed close to 2,500 Ghanaians, a group that made up well over 2% of the private labor force in the country. Nii K. Bentsi-Enchill, Valco's Role in Ghana, W. Afr., Jan. 24, 1983, at 197-98; Casely-Hayford & Sims, supra note 25, at 16. Probably overestimating the significance of the employees, the former Managing Director of Valco routinely stated that the withholding taxes paid by the employees constituted a form of revenue to the Government, while the local spending by such employees on "food, clothing, services, and other life necessities" boosted local business activity. Saunders, supra note 26.

28. According to the Managing Director of Valco, Ward Saunders, Valco's commitment to buy for its own use a little over half of the power to be generated by the Akosombo dam enabled the Volta River Project to proceed. Without Valco's commitment, Akosombo could not have been financed, and Akosombo has been a major element in Ghana's development . . . . [By] all applicable standards, Valco's presence in Ghana has generated the beneficial, social and economic elements to be anticipated from establishing a large industrial complex in a community.

Saunders, supra note 26. Similarly, the director wrote that the Volta River Project is an excellent example of cooperation between a host country and multinational companies to achieve a mutually beneficial productive enterprise. Its accomplishments to date should be a source of justifiable pride to Ghana and to its private enterprise participants. We further believe that the project will provide increasing benefits to the people of Ghana in the years to come.


29. Referring to a letter by Saunders to the media, a commentator wrote: "Mr. Ward Saunders' letter . . . makes interesting reading. The impression one gets from reading his letter is one of a desperate Managing Director trying to defend his company's position. . . . I think it is about time a company like Valco realizes that Ghanaians are fed up with their tricks." Kofi Asante, Letter, The Legon Observer, Dec. 19, 1980, at 352-53. Another writer expressed his frustration thus:

Volta River Project, Valco and Bauxite Development, The Legon Observer, May 29, 1980, at 171. Yet another writer drew these conclusions about the scheme:

Owusu, supra note 15, at 2824.

ered energy production and forced an emergency rationing of power, even for essential services such as hospitals. The company’s monopoly over electric power also frustrated the Government’s efforts to attract investors, both for a proposed alumina plant and for the development of some national industries, because the country could not guarantee to supply the potential investors with the amount of energy that they desired.

Another source of friction in relations between the Government and Valco was the thirty-year guarantee of power to Valco at a very low rate. Valco increased its tariffs three times between 1972 and 1977 under conditions of rising energy costs in the wake of the oil crises, but these increases still failed to keep up with the prevailing international price for energy and failed to satisfy the Ghanaian public. Compared to revenues from the sale of electricity to other users of the VRA’s power, revenues from energy sales to Valco did not correspond to the amount of energy allocated to the company. The


34. Bentsi-Enchill, *supra* note 27, at 199. Because Valco exercised its right under the Master Agreement to increase its power allocation, potential investors from Japan, Hungary, and Iran were unable to obtain guarantees of sufficient power for their proposed schemes. Interview with Fui Tsikata, in Accra (Oct. 8, 1989) [hereinafter Interview with Fui Tsikata].


36. The third and fourth amendments to the Power Contract in 1972 and 1973 increased the contractual rate of 2.625 mills/kwh to 2.75 mills/kwh and 3.125 mills/kwh respectively. The fifth amendment of June 3, 1977, provided that for the years 1976, 1977, and 1978, the rate would be 4.5 mills/kwh, for 1979, 4.6 mills/kwh, for 1980, 4.75 mills/kwh, and for 1981 and each year thereafter the rate would be 5 mills/kwh, provided energy consumed each year was not more than 370,000 times 8760 kwh. But starting in 1976, if the company’s energy usage exceeded 370,000 times 8760 kwh, then the base tariff would be 6.75 mills/kwh. See *VRA Electricity Tariff to Valco*, THE LEGON OBSERVER, Apr. 11, 1980, at 123-25.


38. It had fallen to one-quarter of the weighted average of the price for power to smelters in the Western states, one-quarter of the average rate paid by smelters owned by Kaiser, and about one-fifth the rate paid by Ghanaian consumers. In 1962 the 2.625 mills/kwh rate was equal to rates paid by aluminum producers in other parts of the world. *Mining J.*, Jan. 14, 1983, at 19.

39. One writer, for instance, characterized the tariff changes as based on Valco’s policy of “dishing out occasional pittances . . . whenever it . . . [was] likely that some pressure . . . [was] about to be exerted on it to pay more for its power.” *VRA Electricity Tariff to Valco*, *supra* note 36, at 125.

40. For instance, in 1977 Valco used 65% of the VRA’s energy and accounted for 41% of the revenue while the Electricity Corporation of Ghana used 24% and provided 39% of the revenue. *Volta River Authority*, *supra* note 30, at 22, 37. Valco, however, defended its low rates because it was a baseload user. See Casely-Hayford & Sims, *supra* note 25, at 22.
rates paid by the company for other services were similarly unsatisfactory.\textsuperscript{41}

As far as the Ghanaian government was concerned, after nearly two decades, the project had done little to improve the country's balance-of-payments position. By 1982, revenues from power payments to the VRA, taxes paid to the Government, and contributions to a Valco trust fund totaled only $220 million, most of which went toward debt-financing.\textsuperscript{42} While the low revenues from power sales were the direct result of the concessionary energy rate, the company's meager income tax payments could be attributed to a combination of factors. First, Valco had a lower tax rate as compared to other companies operating in the country.\textsuperscript{43} Second, the company could manipulate income figures by conveniently pricing the resources transferred to and from its shareholders.\textsuperscript{44} Finally, the company maintained unsatisfactory tolling arrangements with its shareholders that effectively minimized its taxable income.\textsuperscript{45}

Yet another disappointment to Ghana was Valco's failure to ex-

\textsuperscript{41} Water consumers paid rates 20 times higher than those of Valco, while port users paid harbor and wharfage dues 45 times as high as the fees paid by the company. Casely-Hayford & Sims, supra note 25, at 28. The company's concessionary rates cost the Government up to 2.6 million cedis (about $1 million in U.S. dollars) by the time of the revision. Fui Tsikata, \textit{Dealing with a Transnational Corporation}, in \textit{Essays from the Ghana-Valco Renegotiations}, 1982-85, supra note 25, at 1, 3.

\textsuperscript{42} Twenty-three million dollars from the Valco Fund was spent on educational and other charitable projects in Ghana. This was required by the trust deed creating the fund, while the bulk of the power payments by Valco to the VRA, totalling $161 million, went toward debt financing under the terms of the agreement. Only $34.5 million went to the Government chest as revenue after the company started paying taxes in 1980.

\textsuperscript{43} While other companies paid tax at a 55\% rate, Valco's rate was set at 40\%. Master Agreement, supra note 8, art. 30.


\textsuperscript{45} Under the arrangements, Valco charged its shareholders a fee corresponding to 60\% of the price of aluminum produced. However, the Government felt that if the arrangements had been between unrelated parties, a 65\% rate would have been more appropriate, thereby increasing the company's earnings. Taxable income was further reduced by the company's consistent failure to charge shareholders premium rates for superior metal that it produced from time to time. Quite naturally, under the existing arrangement where the shareholders paid for the superior metal at prices agreed upon between themselves and Valco, the company was not interested in maximizing its revenue out of deference to its relationship with its shareholders. Furthermore, an omission in the original contract regarding the time Valco would be required to tender the aluminum to its shareholders enabled the company to attract lower tolling fees for its aluminum products by holding higher inventories during times of falling prices. Casely-Hayford & Sims, supra note 25, at 28.
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exploit the country's bauxite deposits. Not only were concessions guaranteed to Valco for this purpose, but as further encouragement, a provision was included for the establishment of a mining company as a subsidiary of Valco. Even though Ghanaian bauxite was of acceptable quality, by 1982 Valco had taken no steps to exploit and use that bauxite. Valco cited high financial costs, problems in the aluminum industry, and Valco's conviction that such an undertaking would not be useful for the country's development as reasons for its decision.

Others, however, disagreed with the company, citing evidence indicating that an alumina plant was both economically and technically feasible. Such critics also hypothesized that Valco was reneging on its contractual promise as part of an industry-wide strategy to avoid a total integration of the aluminum industry in any Third World country.

The original agreement was criticized for reducing the possibility of other beneficial linkage effects in the country. For instance, Valco preserved its option to transport alumina from Jamaica in ships other than Ghana's shipping line. Also, although local substitutes were available, the company imported most of the smelter's construction and operation materials. From Ghana's perspective, Valco's activities

46. Ghana hoped that the company would mine and process the country's bauxite for use at the smelter. Under the prevailing arrangement, raw bauxite was produced in Ghana by British interests and exported to Britain for processing into alumina. Ironically, Valco then imported alumina from bauxite mines in the United States and the Caribbean (owned by its shareholders) to be processed into aluminum ingot at the smelter. Subsequently, Kaiser and Reynolds exported this ingot for use in the other plants or sale in other markets.

47. Master Agreement, supra note 8, art. 11(C).

48. Valco projected that an alumina plant to process Ghanaian bauxite would cost about $800 million. Saunders, supra note 26, at 196.

49. As Valco put it, "[A] detailed study has shown that the project has a negative cash-flow for the first seven years of operation and a very low rate of return. . . . [S]uch a project will not solve Ghana's economic problems even if it could be financed." Ronald W. Graham, Structural Problems in the World Economy: A Case Study of the Ghana-Valco Renegotiations, in ESSAYS FROM THE GHANA-VALCO RENEGOTIATIONS, 1982-85, supra note 25, at 87, 100.

50. These include the studies done in 1966 by Kaiser Engineers, in 1975 by the Bauxite Alumina Study Company Limited (jointly owned by Valco's shareholders and a Japanese consortium), and in 1977 by the ALUTERV-FKI, a Hungarian chemical company. See Tsikata, supra note 41, at 6.

51. The single exception was in Surinam where the industry was fully integrated. Even then, Alcoa, the company located there, never believed the colony would ever be granted independence by the Dutch. The alleged strategy, if indeed true, was applied in Guinea, Jamaica, and Guyana, where bauxite mines and alumina plants, but no smelters, could be found. It is also seen in Cameroon, which has a smelter, but neither bauxite mines nor alumina plants. This contrasts with the situation in developed countries like the United States, France, and Australia where the industry is fully integrated. Volta River Project, Valco and Bauxite Development, supra note 29, at 174. Constructing a smelter in Ghana would not only have reduced Valco's bargaining position in the country, but also would have enhanced Ghana's attempts to become an integrated producer of aluminum. See Graham, supra note 49, at 100.

52. Master Agreement, supra note 8, art. 24.
contributed little to the generation of skills in the country, and the company remained a kind of enclave industry cut off from the rest of Ghana by the company's maintenance of its own road system, security network, school, and hospital. This arrangement severely reduced any possibilities for the company to have cultural, social, economic, or technological contact with mainstream Ghanaian development.53

The Ghanaian legal community had also grown quite uneasy about technical problems in the agreement that threatened to limit the country's sovereign rights. Some of the stabilization clauses were perceived as overreaching and as providing an overly broad protection of the Valco investment,54 while other clauses, especially those on taxation,55 appeared to restrict unduly the government's ability to apply general fiscal policies to Valco. Equally disturbing were attempts to freeze the applicable contract law as of January 22, 196256 — attempts that raised serious conflict of laws57 and constitutional law problems.58

53. *Imperialism and the Volta Dam II*, W. Afr., Mar. 31, 1980, at 572 ("Government regulation of the operations of the smelter was thus minimized, allowing Valco to become a typical enclave industry, apparently isolated from the rest of Ghana and replete with its own roads, security, port, school and hospital. Cultural, social, economic and technological contact with the mainstream of Ghanaian development is therefore minimized.").

54. For instance, the provision protecting the interests of the shareholders against nationalization read:

In the event of expropriation of, nationalization of, or intervention in, the whole or a substantial part of any of the properties, rights or interests whatsoever of Valco, or in the event of expropriation or nationalization of any of the shares or securities of Valco being in either case expropriation or nationalization, or being intervention by the government or any Ghanaian authority, then at the request of any of the shareholders of Valco the shares or remaining shares held by that shareholder should forthwith be nationalized or expropriated.

Master Agreement, *supra* note 8, art. 38(B). When such nationalization has taken place, "all liabilities and funded debts of Valco shall become the responsibility, liabilities and funded debt of the Government." *Id.*, art. 38(C).

Arguably, this provision extended protection not only to the original investment of Valco, but also to future acquisitions, regardless of their relevance to the company's activities. Thus, it could be triggered by the government's acquisition of non-business-related property owned by Valco, such as a stretch of beach used by its executive officers. Akilagpa Sawyerr, *Some Legal Issues Arising from the Negotiation of the Valco Agreement, in Essays from the Ghana-Valco Renegotiations, 1982-1985, supra* note 25, at 60, 66-67.

55. The contract provided that taxes were to be assessed "in accordance with the provisions of the Income Tax Ordinance of 1943 as amended and in force on [2-1-62] without any regard to any amendment made subsequent to the said dates, whether or not such amendment is deemed to have come into operation on or before the said date." Master Agreement, *supra* note 8, art. 30(C).

56. *Id.* art. 47.

57. The conflict of laws problems had to do with the difference between the choice by the parties of a law to govern their contract — the proper law of the contract — and the incorporation in the contract of a specified body of laws. Albert Venn Dicey & J.H.C. Morris, Conflict of Laws 732-34 (1975). The latter is a convenient procedure for making the incorporated law part of the contract. The significant result is that subsequent alterations in law do not affect the intent of the law as incorporated. Unlike the incorporated law, changes in the proper law can affect the operation of the contract. Roland Brown, *Choice of Law Provisions in Concessions and Related Contracts*, 39 Mod. L. Rev. 625, 638 (1976). Interestingly, although Valco agreed to the adoption of Ghanaian law as the proper law of the contract, the company expected that such
Other provisions purporting to limit the legislative power of the state were also soundly criticized.\textsuperscript{59}

Finally, the absence of adequate safeguards against industrial pollution in the agreement worried Ghanaian environmentalists who were alarmed that the smelter’s continuous discharges of fluoride would have a disastrous effect on nearby fishing and harbor communities.\textsuperscript{60}

II. RENEGOTIATING THE GHANA-VALCO AGREEMENT

As a result of the above criticisms, the Ghanaian government felt pressured to review its agreement with Valco.\textsuperscript{61} The main grounds for review were that the agreement was no longer equitable\textsuperscript{62} given changed economic circumstances and that governmental sovereignty over natural resources empowered Ghana to restructure the natural resource development contract with Valco in the best interests of the country.\textsuperscript{63} The latter argument was used successfully in connection with investment agreements\textsuperscript{64} that were seen to unduly restrict the host country’s ability to exploit its natural resources for effective economic development;\textsuperscript{65} this argument was particularly compelling where the investors reaped excessive and windfall profits.\textsuperscript{66}
Pointing to the absence of review provisions in the agreement and relying on the principle of the sanctity of contracts, Valco opposed the efforts to review the contract. The company argued that like a bargain struck at the market exchange, the agreement represented a set of benefits to be preserved regardless of subsequent unforeseen developments that may have adversely affected the expectations of either party to the contract. To forestall the possible counterargument that it had accepted the principle of review by approving piece-meal power rate increases in the 1970s, Valco emphasized that those early concessions had been made in a spirit of magnanimity. The company even resorted to what were in fact ad hominem arguments by pointing to the propriety of the principles and vision of Kwame Nkrumah. Valco argued that any contract Nkrumah entered into could not be unfair. To emphasize the point, the company repeated ad nauseam remarks of the late President indicating that the agreement was equitable.

The government of the Provisional National Defense Council (PNDC) was ushered in after a successful military coup on December 31, 1981. The head of the PNDC, Flight Lieutenant Jerry John Rawl-

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67. The doctrine, which advocates strict adherence to contractual obligations, has also been recognized in international law. See Joseph L. Kunz, The Meaning and Range of the Norm of Pacta Sunt Servanda, 39 AM. J. INT'L L. 180 (1945); Peter D. Gaffney, Contract Sanctity Going the Way of the Dinosaur, OIL AND GAS J., July 2, 1984, at 28.

68. Graham, supra note 49, at 95.


70. This is typical of TNCs, as they often justify their high returns on the grounds of the exceptional skill and risks they had shown in undertaking the investment projects. See generally Faber & Brown, supra note 66, at 115.


72. It probably considered those increases to be ex gratia payments. See Tsikata, supra note 42, at 3.

73. In response to charges that the Ghana-Valco agreement was onerous for Ghana, a company official argued, "It is ... ironic indeed that Dr. Nkrumah, who signed the Valco Agreement on behalf of the Government of Ghana and who is the author of 'Neo-Colonialism: The Last Stage of Imperialism,' should be accused of imposing upon Ghana a neo-colonial status." Ward B. Saunders, The Volta River Project, Valco and Bauxite Development, THE LEGON OBSERVER, Sept. 19, 1980, at 229; see also Tsikata, supra note 41, at 2.

74. In defending the original arrangements, Ward Saunders wrote, Let me close by quoting Dr. Nkrumah on the negotiations which resulted in the Valco arrangement: "... I wish to emphasize that in all our negotiations with the management of Valco they have always demonstrated a genuine desire to arrange this company in a way which would be fair and equitable to both them and to Ghana. An example of this good faith of Valco is their initiative in creating a special (Valco) Fund which will guarantee to Ghana more revenue from the project than could be expected under normal conditions." Saunders, supra note 73, at 231-32.

The company also wrote, "[T]he view that President Nkrumah, with full knowledge and advice from acknowledged experts, did not obtain a fair and equitable arrangement for Ghana is based largely on myth, which disparages the abilities of Ghana's first leader." Saunders, supra note 26, at 195.
ings, arrived with a vision of social revolution and with the intention to transform the country into a participatory democracy. Real power, according to Rawlings, lay with the people, and they exercised this power by being involved in overseeing the affairs of state. Accordingly, every citizen was charged with supervising public officials and judging offenders. Through constant vigilance, Rawlings's supporters hoped that inequality and exploitation would be eliminated from their society. External forces, according to the new Ghanaian government, were as responsible as the unscrupulous elite for the continuous economic subjugation of the country; thus, Ghanaians were also to act as watchdogs against the excesses of foreigners operating in the country.

As part of this wave of civil accountability, the Government called for scrutinizing all foreign investment arrangements in order to ensure that most of the benefits were not going to the foreign investor at the expense of the Ghanaian economy. The VPR caught the attention of the Government by virtue of its sheer size and potential importance to the economy. The VPR was quickly earmarked as one of the arrangements with external forces that needed to be scrutinized.

The PNDC's determination to review the Ghana-Valco arrangement immediately became apparent to the Valco executives. For the first time in the history of the project, Valco was dealing with a government that showed serious opposition to the existing arrangement and refused to be persuaded by the economic rationalizations which had typically convinced officials in the previous regimes.

75. Graham, supra note 49, at 94.
77. The institutional changes made to accommodate these objectives included forming defense committees in every community, neighborhood, and workplace. Various investigating commissions and public tribunals were also established to involve the public in the administration of justice. These tribunals operate alongside the traditional courts. Although public hearings are held, the courts are "not fettered by the technical rules which in the past perverted the course of justice and enabled criminals to go free." Id. at 69.
81. It employed over 1% of the national labor force and was the third major foreign exchange earner for the country after cocoa and gold. Casely-Hayford & Sims, supra note 25, at 16.
82. Other investors targeted were Firestone and Unilever. See Kwesi Garbrah, Development and the Debt Trap, W. Afr., Apr. 30, 1984, at 922.
83. For example, during the People's National Party (PNP) Administration of Dr. Limann, the VRA approached Valco to revise the rate structure from 12 mills/kwh in 1981 to 18 mills/kwh by 1983. Valco's reply, repeated even during the early days of the PNDC, was that "Ghana's inflationary conditions and the level of the exchange rate" made it commercially impossible for them to accept more than a small increase in the rate. Telegram from Ward Saunders (managing director of Valco) to the VRA (Apr. 6, 1982), quoted in Graham, supra note 49,
could be no doubt that the PNDC's approach to the Valco arrangement was in sharp contrast to the "parochialism of past political partisanship and posturing" that crippled previous efforts to revise the agreement.85

Obviously disturbed by the increasingly critical pronouncements from the Government, the company remained lukewarm in its attitude toward the PNDC. Before long, rumors surfaced of the company's plans to destabilize the new Government.86 Matters took a dramatic turn when the PNDC government expelled three Valco employees for spying.87 Investigations later revealed that these Valco employees had reportedly engaged in systematic maneuvers to crush the popular uprising and to abort the revolutionary process going on in the country.88 Valco's express regret at the deportation orders only incensed the public.89

Amidst this tension, the Government authorized the Secretary of Lands and Natural Resources to evaluate Valco's operations in Ghana and to recommend ways of reviewing the Ghana-Valco arrangements.90 A technical committee was set up under the chairmanship of Mr. A.N.E. Amissah, a former member of the Board of Trustees of the Valco Fund,91 to assist in the review. Over an eight-month period, the committee made a detailed study of the Ghana-Valco agreement and other relevant documents. They collated information from national agencies linked to the project92 and gathered information from international sources about the worldwide operations of Kaiser and Reyn-

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84. Owusu, supra note 15, at 2826.
85. One writer considers the failure of successive governments between 1966 and 1982 to revise the VRP to be "a direct reflection of their subservience to imperialism." Graham, supra note 49, at 95.
87. These expelled employees were Terry Dean Swanny and Clyde Maclean Spears from the United States and Siegfried Prangenberg from the Federal Republic of Germany. Foreign Intelligence Agents Arrested, Daily Graphic, Mar. 5, 1982, at 1.
88. Id. at 4.
89. Denying the allegations of espionage, the company expressed outrage at the suggestion that they would be involved in plans to overthrow the Government. Foreign Intelligence Agents Arrested, supra note 87, at 1, 4. The company's response was perceived to be insincere and only strengthened the Government's resolve to revise the agreement. As the Government warned in a public statement: "We shall resist with our very lives, if necessary, all attempts by any forces who place their narrow interests above those of our country and our people." Id. at 4.
90. Tsikata, supra note 41, at 6.
91. As a member of the board, he had criticized key parts of the agreement that set out how the Fund's contributions were to be calculated.
92. The principal agencies that were contacted included the Bank of Ghana, the Customs and Excise Department, the Internal Revenue Service, the Tema Development Council, the Ghana Water and Sewerage Corporation, and the Environmental Protection Council. The insti-
olds, Valco’s shareholders. In June 1982 the committee came out with findings sharply criticizing the company and recommended renegotiations.\(^9\)

Despite increased pressure, the Government ignored public demands to nationalize the smelter\(^9\) out of prudent recognition that such a move not only would have been economically unrewarding,\(^9\) but also would have risked a diplomatic confrontation with the United States.\(^9\) Such a confrontation would have had potentially adverse consequences both on U.S. aid to the country\(^9\) and on the country’s foreign investment climate.\(^9\) Instead, the Government accepted the

\(^9\) In its report the committee observed that for 15 years, in the face of extreme economic adversity, Ghana had continued to discharge its obligations under the Master Agreement as part of its desire to maintain cordial relations with the company, and also to extend maximum protection to foreign investment in the country. However, as the committee concluded, the Valco agreements had placed an intolerable strain on the country’s good intentions. It was, therefore, necessary for the Government to take urgent steps to publicly disclose and correct gross disparities shown to exist in the nature and working of the Valco agreement. In particular, it urged the Government to request from the company a new set of legal arrangements that would be equitable and just to the company and that would also hold a reasonable balance between the interests of Valco and the government of Ghana. \textit{Id.}

\(^9\) Through strikes and demonstrations, Valco workers protested what they considered to be politically motivated company layoffs and production cutbacks in June 1982. The workers urged the government either to unilaterally introduce changes to the terms of the agreement, or to nationalize the company’s interests. \textit{Workers Demonstrate Against Valco Cuts, supra note 86.}

\(^9\) Nationalization of the Valco smelter would have had little impact on the country’s economy given the poor development of Ghana’s aluminum sector in a world industry dominated by a few giant companies who regulate the production and sale of the various aluminum inputs and end-products. To be used by the smelter, Ghana’s bauxite would need to be processed into alumina. With no existing domestic processing facilities, it is doubtful that the country would have been able to finance the establishment of processing facilities from its own sources. Any attempts to purchase alumina from the aluminum cartel would have been counterproductive because the cartel members either would have refused to sell or simply would have inflated the prices beyond the reach of the fledgling Ghanaian industry. Even if the Ghanaian government could have afforded a processing smelter, it would have been difficult to sell the aluminum in the world market as the aluminum cartel would probably have retaliated by boycotting Ghanaian aluminum products. The feasibility of successfully operating the smelter was another uncertainty under the original arrangement. The highly technical aspects of the operations were reserved to expatriates so that after nationalizing the smelter, Ghana would have had no skilled personnel to operate it.

\(^9\) This was possible because the agreement authorized the assumption of the rights of Valco’s shareholders by U.S. public agencies should those rights ever be threatened. Even in the absence of the contractual provision, a similar result could have been inferred under international law, permitting the U.S. government to seek redress on behalf of Valco if its Ghanaian interests were nationalized. For an historical perspective on this right of intervention, see Eduardo Jimenez de Arechaga, \textit{State Responsibility for the Nationalization of Foreign-Owned Property} 11 N.Y.U.J. INT’L L. & POL. 179 (1978); John F. Williams, \textit{International Law and The Property of Aliens}, 1928 BRIT. Y.B. INT’L L. 1 (1979).


\(^9\) Like other developing countries, Ghana is continually seeking to attract foreign private
committee's recommendations and, on December 7, 1982, invited Valco to renegotiate the agreement. Valco's prompt acceptance of the Government's invitation made it unnecessary to implement a standby plan to seek a judicial determination of the country's right to renegotiate the terms of the investment agreement in the absence of a review provision.99

At the formal opening of the renegotiations on February 14, 1983, Ghana's demands included increases in the power, water, wharfage, and port rates, as well as the normalization of taxation arrangements. Other issues tabled for discussion pertained to Ghanaian representation on the board of directors of Valco, a review of the tolling arrangements between Valco and its shareholders, the adoption of stricter environmental controls by Valco, and finally, a discussion of Valco's role in the integration of the aluminum industry in Ghana.100

These demands — which in effect meant a complete overhaul of the original agreement — caught the Valco team off guard because it had arrived at the meeting only expecting to tackle the usual request for an increase in the energy rate. Valco officials had no immediate response by way of tangible proposals or counterarguments. They could only beg the indulgence of the Ghana team to entertain more specific proposals later in the week.101 As deliberations proceeded, it became apparent that the Valco team had not come with a sufficient mandate to discuss the Ghanaian proposals, and five days into the negotiations an adjournment was granted at the request of Valco to enable it to obtain authorization from its shareholders to negotiate the new issues that had emerged.102

The second round of negotiations opened two months later on April 13, 1983. It was much more productive than the first. Negotiations ended on a positive note as agreement was quickly reached on increasing the fees paid by the company for water and for the use of port facilities.

and public financial inflows from investors who need to be assured of the stability of their operations. Any unilateral government action redressing the imbalance in the Ghana-Valco contract would have been seen as evidence of the government's general policy towards investment agreements and would have provoked profound suspicion about its good faith intentions. Conceivably, the U.S. government and Valco's shareholders would have mounted a hostile campaign against any further investment projects by U.S. nationals in Ghana. In the past, attempts were made to block loans to countries that nationalized U.S. private property without adequate compensation. Marshall T. Mays, The Protection of Overseas Investment, in MULTINATIONAL CORPORATIONS AND GOVERNMENTS 61, 72 (Patrick M. Boarman & Hans Scholhammer eds., 1975).

99. See generally Sawyerr, supra note 54.
100. Interview with Akilagpa Sawyerr, in Accra (Oct. 5, 1989).
101. Interview with Fui Tsikata, supra note 34.
During the third round of discussions, the parties had nearly reached an agreement on a price to be paid for electricity when Valco suddenly requested that an allowance be made for the extra costs of operating in Ghana. 103 Not long after, Valco repudiated a principle agreed to in the second round, that of fixing the energy rate by reference to the weighted average world price. 104 When the company failed to come out with a meaningful alternative 105 the Ghanaian team walked out of the negotiations on May 27, 1983, alleging bad faith on the part of Valco. 106 The walkout seemed to be a deliberate maneuver by the Government to test the company’s seriousness in the negotiations. 107

The stalemate continued for a while, with Valco holding out in hopes that widespread dissatisfaction with the Government’s austerity program would result in a change of leadership. 108 In any case, Valco stood to gain from political infighting that was occurring between groups represented in the PNDC. 109 Additionally, public outcries against how the Government had handled investigations into the abduction and murder of three judges and an army officer 110 had further

103. Valco argued that it incurred increased labor costs as a result of the unfavorable exchange rate of the country’s currency.
105. The company proposed a base power rate of 12.5 mills/kwh to be indexed to a base of 80 cents/lb for the average realized price of primary aluminum for the four major North American aluminum companies, Alcoa, Alcan, Kaiser, and Reynolds. The Ghana team was soon to discover that the four company average realized aluminum price had never in its history reached 80 cents/lb, and at the time of the negotiations, was in the range of 55 cents/lb. Making the necessary adjustments under the Valco proposal would in effect have set the power rate at 8.6 mills/kwh, a rate that the government considered inadequate.
106. A Government statement announcing the breakdown of talks observed that throughout the first rounds the Valco team appeared to have hardened their position on the major issue of the power rate thereby making any progress on that or other issues quite impossible . . . . [For example,] in response to persistent pressure from the Ghanaian side to come forward with realistic proposals which could form the basis for further discussion, . . . [Valco proposed a rate that] in present circumstances, is exactly the same as the rate they pay under the current arrangement, and which in the long run term is even lower than the rate the government had rejected as inadequate in the second round . . . .
The Ghanaian team therefore concluded from “the present posture of Valco [that] further talks [were] unlikely to produce the kind of results which would be acceptable to the government and people of Ghana.” Ghana-Valco Talks Deadlock, W. Afr., June 6, 1983, at 1362.
107. In a statement announcing the termination of the discussions, the head of the Government team charged that Valco had “treated with contempt Ghana’s invitation to engage in serious good faith negotiations,” and cautioned that the Government was committed to its people and would not refrain from taking any steps it considered necessary to enable it defend their interests and discharge its duty to them. Interview with Akilagpa Sawyerr, supra note 100.
109. At that time, the New Democratic Movement and the June 4 Movement, both left-wing organizations, were divided on the issue of the Government’s implementation of IMF policies in its economic recovery program.
110. There were strong suspicions that the Government was trying to cover up the involve-
weakened the Government’s attempts at collective leadership. There was, therefore, the possibility — however remote — that through its intransigence, the company would eventually be dealing with an increasingly less effective administration.

Surprisingly, after a three month lull the Valco team called for the resumption of talks. A combination of factors pushed Valco back to the bargaining table. First, the company was probably responding to the Government’s terse warning during the breakdown of talks that if Valco did not show more seriousness in future negotiations, the Government was already “studying very carefully a range of measures to obtain its objectives by other means.”111 Additionally, a noticeable waning of left wing influence in the Government coalition,112 a reduction in anticapitalist propaganda, and increased governmental overtures to the International Monetary Fund may have convinced Valco that the Ghanaian investment climate had improved and that the company could continue to operate successfully in Ghana.113 Furthermore, a change in management at Valco may have affected the decision to return to the bargaining table. The new managing director generally was seen as a more realistic and practical negotiator than his predecessor.114

When discussions resumed in the fourth round, the negotiating sessions went uninterrupted until the entire process was concluded in the sixth round. Following approval of the preliminary drafts, the revised agreement was executed on January 30, 1985, by representatives of the government, shareholders, and other parties involved in the project.115

III. ANALYSIS OF THE REVISED AGREEMENT

In addition to accepting fee increases for use of land, water, and port facilities,116 Valco agreed to pay a base power rate of seventeen
mills/kwh that was linked to a metal price so that the government could share in the company's market risk.\textsuperscript{117} When energy production was reduced as a result of conditions of force majeure,\textsuperscript{118} the available power was to be allocated according to a predetermined formula with priority given to essential services.\textsuperscript{119} The tolling arrangements between Valco and its shareholders were revised to require Valco to charge the shareholders a higher tolling fee.\textsuperscript{120} To close the loophole in the old agreement that had enabled Valco to value production at times when charges were low, production was now valued at the end of the month in which it was cast.\textsuperscript{121}

As a condition to Valco's right to import duty-free materials needed for the smelter's operation, duties were now imposed on a number of items including personal vehicles, furniture, fittings, food, commissary supplies, and maintenance supplies for hospital, housing, and clubs.\textsuperscript{122} Although the company was exempted from paying import duties on plant vehicles,\textsuperscript{123} safety equipment, quality control

\textsuperscript{117} The base power rate of 17 mills/kwh is set for 2700 gigawatt hours (gwh) to 2760 gwh of energy offered to Valco, but if less than 2700 gwh is supplied, then the base power rate is to be reduced by $\frac{x}{275}$ where $x$ equals 2760 minus the number of gigawatt hours of energy supplied to Valco. In calculating the rate, one-third of the base power rate is taken as a constant, while the remaining two-thirds is adjusted by multiplying the base power rate by a fraction determined at six monthly intervals, of which the numerator is the average London Metal Exchange cash settlement price for aluminum ingot and the denominator is 73 U.S. cents/lb. However, in no event is the price payable by Valco for electricity to be less than 10 mills/kwh. Power Contract Between the Volta River Authority and the Volta Aluminium Company (as amended through Jan. 1985), art. 12(A) [hereinafter Revised Power Contract].

\textsuperscript{118} Conditions of force majeure refer to those events which the parties to a contract agree to be outside their control and the happening of which would excuse the performance of their contractual obligations. See BLACK'S LAW DICTIONARY 581 (5th ed. 1979).

\textsuperscript{119} Under normal conditions, Valco would be guaranteed 2760 gwh of energy but should power production at the dam fall below 4343 gwh, it would receive a reduced energy allocation. This reduced portion is calculated under the assumption that the company would take 73\% and 90\% of the first and second cuts respectively, and thereafter, receive only sufficient power for maintenance. On the other hand, should energy production exceed 4343 gwh, Valco would have had the option of purchasing the excess energy at a price that takes into account the economic benefits Ghana would derive from increased operations by Valco. Id. art. 5(A).

\textsuperscript{120} This was initially set at 68\% of the London Metal Exchange (LME) cash settlement price per ton of aluminum ingot but was to be reduced to 62\% after three years. Long Term Tolling Contract Between Volta Aluminium Company and Kaiser Aluminum and Chemical Corporation (as amended through Jan. 1985), art. 14(A).

\textsuperscript{121} Id. art 17(E).

\textsuperscript{122} Other dutiable imports include (a) printing and drafting supplies and equipment, library supplies, stationery, and data processing supplies and equipment, (b) medical supplies and equipment, (c) school and recreational supplies, (d) incentive awards, (e) safety awards, and (f) cloth. Master Agreement Between the Government of Ghana and the Volta Aluminium Company (as amended through Jan. 1985), art. 20(B)(ii)(a) [hereinafter Revised Master Agreement].

\textsuperscript{123} The term includes buses, pickups, trucks, ambulances, and fireworks used solely for
equipment, laboratory equipment, and other items, it was required to pay customs duties on materials used in production including aluminia, fuel, lubricant, and equipment. Necessary quantities of good quality production materials of these types were available in Ghana at commercial prices.

Other fiscal matters agreed upon included the imposition on Valco of a forty-six percent income tax, customs duties, stamp duties, road taxes on vehicles that Valco operates outside the smelter site, and other taxes of a "minor character." Where changes in the Ghanaian tax laws significantly reduced economic benefits to the Government or to Valco from the operation of the smelter, adjustments were to be made to ensure that the affected party would continue to enjoy the same economic benefits it would have enjoyed but for the change in law. A withholding tax of five percent also was placed on all dividends to Valco shareholders that had accumulated by the end of December 1981. Further dividends would be withheld at fifteen percent or the lower rate prescribed by any applicable treaty to which Ghana was a party.

The purported limitation of Ghana's sovereignty under the original agreement was solved in the revised agreement by amending the offending clauses to provide the desired protection of Valco's investment while acknowledging Ghana's sovereign rights. The nationalization and choice of law clauses were revised to incorporate principles of international law to guide disputes that might arise under the contract. Further, the provision freezing the tax law as applied to plant operations, and excludes any such vehicles made generally available for the use of any Valco employees.

124. These included equipment for training, development, janitorial needs, and laundry. See Revised Master Agreement, supra note 122, art. 20(B)(ii)(b).
125. Id. art. 20(C).
126. Id. art. 30(A).
127. A change is minor if, alone or in combination, it does not exceed $100,000 in one year or $250,000 over a five year period. Id. art. 30(A)(v)(a) & (b).
128. If the affected party is the government, the adjustments should not result in the imposition of any additional burden on Valco in excess of the benefit Valco may have derived from the change in the laws of Ghana. For this purpose economic benefits are considered to be significantly reduced if the amount involved in a given year exceeds $100,000, or if the change affects more than one year prior to the next review, if the cumulative amount involved before such review exceeds $250,000. Id. art. 30(C).
129. A total of $12,304,000 had accumulated in dividends.
130. Revised Master Agreement, supra note 122, art. 30(E).
131. Under article 47, the agreement is governed by and construed in accordance with the law of Ghana and applicable rules of international law. The parties agreed that the legislative competence of Ghana as a sovereign is defined by its constitutional instruments and might only be exercised within the limits ordained by established rules of international law. Id. art. 47.
132. Sawyerr, supra note 54, at 69.
Valco in 1962 was replaced by a provision that recognized Ghana's power to alter its tax regime. Finally, it was agreed that contract reviews would be conducted every five years, guided by the principle of normalizing operations of the company.\footnote{133}

Under the new formula for determining power rates, Ghana shares in the risks of production, and stands to gain from higher power rates when world metal prices increase. The ability of the VRA to allocate energy\footnote{134} to essential services whenever energy output is reduced at the dam eliminates the cost previously borne by the government under the original contract to supply Valco at the expense of local needs.

Greater revenue would also be available from higher taxes and increased payments by the company for water and port services. The imposition of duties on various imports of Valco is a laudable one as it signals the reduction of a cost hitherto incurred by the country under its previous “no import duty” policy. The revision of the tolling arrangements would significantly increase the taxable income of the company. Under normal conditions,\footnote{135} the Government would gross at least forty-three million dollars in revenues each year.\footnote{136}

The renegotiated agreement is also beneficial for Valco. While Valco appeared to have “lost” by agreeing to pay higher fees for Ghana’s services, the increased cost of production is not expected to affect the company’s international competitiveness. The new base power rate of seventeen mills/kwh is still considerably lower than the rates paid by other smelters worldwide\footnote{137} and it is also lower than the

\footnote{133} The parties agreed to meet during the last quarter of 1988 and every five years thereafter to consider whether the agreement was operating fairly to each side. They also agreed to discuss any problems that arise from the practical operation of the agreement. At each review, the parties would examine the base power rate and make any adjustments necessary to ensure that this rate equals the average world price of power supplied to aluminum smelters. They would adjust the tolling charges to ensure that the portion of the value of aluminum produced but not covered by the tolling charge includes an amount representing the value of alumina purchased on long term contracts and of alumina freight, and amounts representing services provided by the Valco shareholders valued on an arms length basis, i.e., as if a third party were selling Valco’s entire production in the form of ingot on the market. Where the parties are unable to reach agreement on the adjustments to be made to the base power rate or the tolling charge, the matter is to be referred to an independent expert whose opinion is conclusive and binding. Revised Master Agreement, supra note 122, art. 49.

\footnote{134} Casely-Hayford & Sims, supra note 25, at 43.

\footnote{135} This assumes an 80% production capacity and a metal price of 73 cents per pound. Id.

\footnote{136} Indeed, since the implementation of the revised agreement, the country has made substantial economic gains from the project. In 1987 the company paid $25 million in taxes, the highest since it began production in 1967. The figure, which was slightly higher than two-thirds of the taxes paid by the company up to 1984, was obtained in spite of reduced operations at the smelter. Payments to the VRA in 1986 were also the highest in the company’s history, standing at $18 million. Valco, Report and Financial Statements for the Year Ended December 1987, at 4 (1987) (unpublished report).

\footnote{137} Casely-Hayford & Sims, supra note 25, at 36.
rates paid by other customers of the VRA.\textsuperscript{138} Furthermore, the company was able to preserve some of the concessions of the original agreement despite the obvious criticisms that had been leveled against them. For example, the benefits derived from the retention of the duty-free status of imported alumina\textsuperscript{139} and exported aluminum ingots\textsuperscript{140} more than compensated for the relatively minor duties now placed on items such as private vehicles and furniture. In addition, the easing of Ghana's foreign exchange restrictions on Valco now makes it possible for Valco to declare dividends without interference from the Government.\textsuperscript{141} Valco scored a definite victory by securing a right of preemption to excess energy produced by the government. The enforceability of the new power allocation formula under conditions of force majeure means that the company is always guaranteed a minimum of energy for its operations.

Admittedly, making the whole contract subject to Ghana's legislative power is much less assuring to Valco than the stabilization clause of the original agreement — where the contract was governed by such laws of Ghana as existed in 1962. However, by conceding to application of international law as part of the law of Ghana, the new provisions directly confer the same protection upon Valco without the need for express contractual assurances. Eliminating otherwise redundant and irritating clauses affecting the country's proud status as a sovereign by redrafting the provision on guarantees of international investment has removed a major source of academic opposition from Ghana's legal community. By far, the greatest gain to the company is the more durable agreement it has obtained.\textsuperscript{142} The alternatives to a negotiated settlement, whether nationalization or a legislated solution, would have severely interfered with the company's operations. Protracted litigation was also avoided and now the company can look forward to more peaceful operations.

While the revised agreement provided gains for both parties, it nevertheless failed to address some issues that were the subject of concern in the early 1980s. For instance, the only solution to the environmental control problem was a general undertaking by Valco during the renegotiations to "develop and implement a programme of studies

\textsuperscript{138} Togo, Benin, and the Ivory Coast could conceivably pay 40-50 mills/kwh for the electricity they receive from the VRA.

\textsuperscript{139} Revised Master Agreement, supra note 122, art. 20(B).

\textsuperscript{140} Id. art. 19(A).

\textsuperscript{141} This is, however, subject to the company having enough funds in Ghana to meet its local obligations. Id. art. 33.

\textsuperscript{142} Casely-Hayford & Sims, supra note 25, at 44.
and work for the control of environmental hazards resulting from the operation of the smelter . . . in consultation with the Environmental Protection Council and in accordance with the laws of Ghana." 143 Although this concession by Valco was extremely mild, it was not incorporated in the final document. A more effective strategy would have been to provide for an independent assessment of the environmental costs of the company’s operations, compensation of environmental claims, and the institution of environmental controls similar to those undertaken by aluminum companies in the United States.

With respect to Ghana’s representation on the board of directors of Valco, both sides had agreed to an amendment of Valco’s articles of incorporation to require the appointment of two directors to the board by the Ghanaian government. 144 At the beginning of the renegotiations, Valco had eight directors, six of them appointed by Kaiser, and the remaining two by Reynolds. Yet, because the parties did not reach any firm agreement on the numerical limit of board members, Ghanaian representation could be but a token presence should Valco decide to substantially increase the size of its board.

Interestingly, the Government rejected an invitation by Valco to acquire up to twenty percent of the equity of Valco at current book value, although indicating its readiness to enter into discussions at a future time over the terms of such an acquisition. 145 Although the reasons for the Government’s rejection are not clear, accepting the offer would have brought some benefits to the country. Government acquisition of shares in Valco would not only mean greater revenues from dividends, but also would be an incentive to begin processing the country’s bauxite because, as an equity owner, Ghana would be responsible for supplying a proportionate percentage of the alumina used by the plant. Equity ownership would also ensure that the country received a firm portion of the aluminum produced at the smelter; accordingly, the Government’s position is worth reconsidering in future negotiations.


144. Id., para. 9. Given that Valco already had representation on the VRA Board, it was hard for Valco to reject the Government’s request that it have reciprocal representation on the Valco board.

145. Interview with Akilagpa Sawyerr, supra note 34.
IV. FACTORS AFFECTING THE OUTCOME OF THE RENEGOTIATIONS

The year Valco was invited to renegotiate the Master Agreement was a particularly disappointing one for Kaiser, Valco's ninety percent shareholder. To Kaiser officials, 1982 meant "[h]ard times for the company . . . the worst economic downturn since the Great Depression . . . [and] the toughest business year" they could remember.\textsuperscript{146} In contrast with the steady profits it had made in the 1970s, Kaiser experienced a record loss of $115 million in 1982\textsuperscript{147} as a result of "lower aluminum volume, higher costs and inadequate prices" caused by a general economic slump.\textsuperscript{148}

To stave off the decline, Kaiser reduced its aluminum operating capacity in order to lower its inventory and other carrying costs.\textsuperscript{149} As a result, its average annual worldwide production of primary aluminum fell from 1.03 million to 617,000 tons.\textsuperscript{150} While a number of its plants worldwide shut down as part of the new corporate strategy,\textsuperscript{151} the Valco plant was allowed to operate normally,\textsuperscript{152} producing more than 174,000 tons of primary aluminum per annum.\textsuperscript{153} At that level of production, the Ghanaian plant, then aptly described as a dependable source of aluminum,\textsuperscript{154} increased its contributions from seventeen percent of Kaiser's global production to about thirty percent, thereby making it an extremely useful component of Kaiser's international operations.

Valco was invaluable because it had lower energy costs than other smelters worldwide. In 1982, while smelters in Japan, Taiwan, France, and the United States paid an average of forty-five mills/kwh, Valco paid less than ten mills/kwh for its power.\textsuperscript{155} Therefore, it was not surprising that leading industrial journals considered Valco to be

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\item \textsuperscript{146} KAISER ALUMINUM & CHEMICAL CORP., 1982 ANNUAL REPORT 2 (1982) [hereinafter 1982 KAISER REPORT].
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id. at 6.
\item \textsuperscript{149} They also reduced their salaried work force by about 25%, and reduced the annual common stock dividend from $1.40 a share to $0.60 a share. \textit{Id.} at 2.
\item \textsuperscript{150} \textit{Id.} at 35; KAISER ALUMINUM & CHEMICAL CORP., 1988 ANNUAL REPORT 42 [hereinafter 1988 KAISER REPORT].
\item \textsuperscript{151} In the United States, Kaiser closed down the Chalmette and Ravenswood smelters.
\item \textsuperscript{152} It was only in 1983 that drought conditions on the Volta Lake forced the closure of a number of the Valco potlines.
\item \textsuperscript{153} VOLTA ALUMINUM COMPANY, LIMITED (VALCO), 1982 ANNUAL REPORT 5 (1983).
\item \textsuperscript{154} Id.
\item \textsuperscript{155} ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ALUMINUM INDUSTRY ENERGY ASPECTS OF STRUCTURAL CHANGE 33-40 (1983).
\end{itemize}
“the cheapest source of primary metal in Kaiser’s supply system.”

In the context of international competitiveness, Valco was important to Kaiser because Kaiser had become increasingly overburdened by reliance on short duration power contracts for its U.S. plants. For example, in 1982 the Bonneville Power Administration announced a fifty-two percent increase in the power rates it charged Kaiser’s Mead and Tacoma smelters, a revision that would cost the company 52 million dollars more annually. This sharp increase in energy costs forced the company to reduce its smelting operations and to stop expansion plans in the domestic plants affected. Since the Valco smelter was its cheapest facility, Kaiser was anxious to maintain it as an integral part of its international operations.

Valco’s labor supply was also significant. Although Valco employees were well paid by Ghanaian standards, their wages paled in comparison to those of their counterparts in the United States. They were also more docile. But for the politically motivated worker demonstrations early in 1982, Valco had enjoyed a fairly stable relationship with its employees. This was in sharp contrast to the unpleasant labor troubles Kaiser had experienced in the United States problems that eventually forced the closure of Kaiser’s Ravenswood smelter in 1982.

Given Valco’s importance in terms of stable aluminum supplies and low smelting and labor costs, the Valco shareholders saw the wisdom in acting reasonably to prevent a shift in public sympathy and to prevent any unilateral action from the Ghanaian government. They came to the conclusion that renegotiation was the only way to

156. METALS WK., Feb. 4, 1985, at 1.

157. 1982 KAISER REPORT, supra note 146, at 8. According to Cornell Maier, Chairperson of Kaiser Aluminum & Chemical Corp., the rates had been increased 800% over their 1981 rates, impacting the company by at least $160 million a year by 1985. See S.F. BUS. J., Apr. 22, 1985, at 3.

158. 1982 KAISER REPORT, supra note 146, at 8.

159. Currently, the average daily wage for eight hours work in Ghana is 300 cedis (about U.S. $1.00) while it is $34.00 in the United States.

160. For example, it had difficulties negotiating a new labor agreement with workers at the Chalmette plant. Talks broke down over Kaiser’s request to remove its employees from the umbrella of the aluminum industry’s master contract previously negotiated with the general union. See METALS WK., Oct. 24, 1983, at 3.

161. This was still true even in 1988. Thus, following the acceptance in 1988 of the MAXXAM Inc. Group’s buyout offer by Kaiser Technology, Ltd., the parent company of Kaiser Aluminum & Chemical Corp., William Shedonberg, an analyst at Smith Barney, indicated that although he thought MAXXAM would probably sell off some of Kaiser Technology’s other foreign operations, he believed they would probably not consider selling the “operation in the West African nation of Ghana because it [was] a relatively cheap source of ingot.” L.A. TIMES, May 24, 1988, Business Part 4, at 1.

save their profitable investment. It would not only bring stability to their operations in Ghana, but could even lead to better terms for the company. Although concern for the financial stability of the VRA was a factor in the agreement to renegotiate, Valco was motivated by more immediate self-interests. During the renegotiations, the company tried to focus discussions on the profitability of its operations.

Various economic, political, and social forces strengthened the country's bargaining position. Perceived injustices in the terms of the Master Agreement under the harsh economic conditions of the early 1980s had galvanized a large cross section of the public against the company. For instance, Valco could not justify either the low power rate or the monopoly that Valco had over energy supply during a period of dwindling national foreign exchange reserves and insufficient electricity supplies for critical sectors of the Ghanaian economy. The unrelenting public protests against the company obviously bolstered the confidence of the Ghanaian negotiators as did the keen interest exhibited by the World Bank and the international business community in the negotiations.

The posture Ghana adopted was equally invaluable; the Government's resoluteness convinced Valco to take the renegotiations more seriously than it had taken previous efforts to review the contract in the 1970s. Throughout the discussions, it reaffirmed its full support of the team which in turn dutifully kept the Government abreast of developments through regular written and verbal reports prepared by a ministerial subcommittee set up to oversee the negotiations.

By far, the most important factor that influenced the outcome of the negotiations was the markedly improved negotiating skills of the Ghanaian team. Composed of experts in areas pertinent to the Ghana-Valco arrangements, it proved to be an equal match for the

163. Graham, supra note 49, at 105-06.
165. See Casely-Hayford & Sims, supra note 25, at 35.
166. Workers Demonstrate Against Valco Cuts, W. AFR., June 28, 1982, at 1726.
168. A mining industry journal assessed that Ghana had a "strong case" during the renegotiations. See METAL BULL., Jan. 7, 1983, at 19, quoted in Casely-Hayford & Sims, supra note 25, at 33.
170. The negotiating team reported almost daily to the Secretary for Lands and Mineral Resources. Between rounds it also provided written accounts to the ministerial subcommittee comprising the Secretaries for (a) Lands and Mineral Resources, (b) Finance and Economic Planning, and (c) Fuel and Power.
171. It included Professor Akilagpa Sawyerr (Vice-Chancellor of the University of Ghana) as leader, Louis Casely-Hayford (Chief-Executive of the VRA), E.A.K. Kalitsi (legal advisor of the
smaller, yet sophisticated, Valco team. They In preparation for the renegotiation, members of the Ghanaian team worked hard to improve their knowledge of the strengths, weaknesses, and goals of aluminum companies. They also spent a great deal of time analyzing the international costs of production and marketing strategies in the industry to make up for the advantage the Valco representatives enjoyed due to daily exposure to the industry. The information gathered by the Amissah Committee in the eight months preceding the renegotiations helped the government team develop sufficient expertise on the industry for arms' length negotiations. Use of a number of foreign experts by the negotiating team was a very wise move, for given their extensive knowledge on the art of negotiating with multinational companies, the experts were able to guide the Ghanaian team to clarify its objectives and to develop coherent strategies in negotiations.

The Ghanaian team had a strong sense of discipline that made it possible to maintain a great deal of formality. But for rare interventions agreed on beforehand, only the leader of the Ghanaian team spoke during the early rounds. However, when the negotiating teams broke into working groups to discuss technical issues in subsequent rounds, there was more open discussion, subject to approval at plenary sessions presided over by the team leaders. At the conclusion of every negotiating day, the Ghanaian team held separate review sessions of the day's proceedings in order to coordinate strategies for the next negotiating sessions. As a rule, a member of the team was as-

VRA), and Fui Tsikata (a law professor known for his critical views on the operations of TNCs). Other members were A. Addae, Karen Akuwumi, I. Odoi, Y. Sanni Lampety, Audrey Quaye, Lauretta Lampety, and Stephen Nortey. Mike Faber and Rod Sims, experts from the Technical Assistance Group of the Commonwealth Fund for Technical Cooperation, and Roland Brown from the U.N. Centre on Transnational Corporations, provided technical support to the team. The Ghanaian team also benefitted from the advice of leading international economists such as Makbul Rahim and Raj Kumar from the Commonwealth Secretariat, an Argentine named Carlos Varsavsky, and Carlton Davis, Executive Director of the Jamaican Bauxite Institute.

Reynolds, as a passive partner, left the actual negotiations to the Kaiser management, which sent the following representatives: Ward Saunders (Managing Director), John Miller (Deputy Managing Director), E.A.K. Akuoko (Substitute Director), J.V.L. Philips (Deputy Resident Manager), Wall Scott (an accountant), Gordon Rogers (international tax counsel), John Buckman (an industrial engineer), Hall Coulter (Plant Manager), and Christopher Sam (an Indian national working as the company's financial analyst). The names were provided by John Miller, Managing Director of Valco, during an interview in Oakland, California, on January 17, 1989 [hereinafter Interview with John Miller].

172. Id.

173. Id.

174. Although the government accepted the Amissah Committee's recommendation in June 1982 to renegotiate the Ghana-Valco arrangement, it refrained from issuing the letter of invitation until December of that year, after the nucleus of the negotiating team had been formed and an agenda prepared for the negotiations. Tsikata, supra note 41, at 7.

175. Ansah, supra note 35, at 8.

176. Id. at 6-8.
signed the task of observing the negotiations closely and in particular of noting important hints from the company's side that suggested significant shifts in position. For each meeting, the guiding principles for the discussions were set out clearly by the Government team and thoroughly rehearsed. The team frequently made written proposals and demanded written responses in the belief that written answers were likely to be more accurate than verbal ones.177

From the outset of the negotiations, in a clear effort to discourage any attempts by Valco to undercut the team and negotiate more favorable terms from other political organs in the country, the Ghanaian team made it clear that the negotiating team was a cohesive unit that enjoyed full governmental support. Nevertheless, the company tested the unity of the team. For instance, following the collapse of talks after the third round, the company tried to negotiate directly with the Government. However, the Government rebuffed the company and used the occasion to reaffirm its full confidence in the Ghanaian negotiating team.178 As a rule, members of the Ghanaian team refused to disclose their personal views about the contract talks, repeating only the official positions taken by the Government.

It is to the credit of the negotiators that they came to an early decision on formulating agreements at their meetings. Two conflicting positions had been presented. The first called for drafting the appropriate legal formulation as soon as each agreement was reached, while the second required a broader agreement on policy matters that would be put into precise legal language later by draftsmen. The eventual compromise was to conclude a general agreement, referred to as the Heads of Agreement, to which would be appended the technical agreements formulated during the negotiations.179

Things went well until the negotiating team conceded the drafting of the final agreement to the Valco lawyers, who naturally resolved any ambiguities in favor of the Valco shareholders.180 This incident illustrates the role lawyers can play in negotiations due to their different cultural backgrounds.181 Much to the dismay of the Ghanaian negotiating team, the U.S. lawyers, trained in an adversarial system, were not inclined to protect the interests of all parties in the negotiations. The Ghanaian lawyers had naturally assumed their own egalita-

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177. Tsikata, supra note 41, at 8-11.
178. Interview with Fui Tsikata, supra note 34.
179. Sawyerr, supra note 54, at 71-72.
180. Id. at 73.
rian inclinations when they conceded the right to draft the final language to the U.S. lawyers.\textsuperscript{182} Fortunately, these problems were quickly removed at the next round of negotiations.

This tactical error by members of the Ghanaian team at the conclusion of the renegotiations should not blur their impressive negotiating record. The Ghanaian team's knowledge about the aluminum industry caught the Valco team by surprise. The company, therefore, lost no time in calling for an adjournment in the first round\textsuperscript{183} so Valco could revise its strategies in order to deal with a group whose skills and experience it could no longer underrate. The Ghanaian team understood Valco's negotiating strategies and effectively defended against them. Thus, the Ghanaian team not only was able to expose falsified data Valco presented in support of Valco's position,\textsuperscript{184} but also it was able to demonstrate the fallacies in a number of Valco's arguments.\textsuperscript{185} Holding the talks at the VRA headquarters\textsuperscript{186} strengthened the Ghanaian team psychologically; as the host, it could more readily influence the agenda.

A tactic effectively employed by the team was its skillful use of the media. The ground rules for the renegotiations barred contact with the press except through occasional joint statements released by both parties. Still, the Ghanaian team believed that its cause was justiciable and that a total blackout on its general demands and postures would have severely restricted its bargaining power. At convenient times, therefore, it unilaterally contacted the press to publicize its position in an attempt to gain public sympathy.\textsuperscript{187} Contact with the media was

\begin{footnotesize}
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\item[182.] Sawyerr, supra note 54, at 73-74.
\item[183.] Talks with Valco Resume, supra note 102, at 971.
\item[184.] Tsikata, supra note 41, at 9-10.
\item[185.] For instance, the Ghanaian side painstakingly explained how the exchange rate in Ghana did not affect Valco's operations in the manner alleged, and also showed that the price of aluminum metal had never risen as high as the company contended.
\item[186.] Except for the formal opening ceremony and a drafting session in London, all the meetings were held at the VRA boardroom. A drafting session took place in the London office of Kaiser's lawyers because the Commonwealth Secretariat, where the meeting would otherwise have been held, could not be opened on a Saturday to accommodate the tight schedule of the drafting team. Interview with Fui Tsikata, supra note 34.
\item[187.] Ghanaian overtures to the media took place even before the start of the renegotiations. For example, three members of the Amissah committee who had gone to London in early December 1982 to consult with the Technical Assistance Group of the Commonwealth Secretariat arranged a meeting with representatives from leading industry journals such as the Mining Journal and Financial Times. At the meeting, participants were shown a fact sheet describing Valco and some of the problems that had arisen with its operations in Ghana. The tactic worked well because the participants came away feeling that Ghana's call for a review of the 1962 Agreement was fully justified. As Ghana had quite rightly calculated, the journalists filled their respective newspaper columns with accounts of the VRP project and called Ghana's request for renegotiations reasonable. The timing was perfect because the newspaper reports were released just three weeks prior to the start of the renegotiations. See, e.g., Mining J., Jan. 14, 1983.
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supplemented by the Government’s constant contact with the diplomatic community to apprise them of developments at the renegotiations.\(^{188}\)

**V. COMPARISONS WITH THE PROCESS IN THE ORIGINAL NEGOTIATIONS**

There has been a remarkable change in the bargaining powers of Valco and the Ghanaian government since the original contract. In 1962, Kaiser and Reynolds came out with very generous terms\(^ {189}\) because of the upper hand they had in what were essentially negotiations involving unequal parties.\(^ {190}\) Although it is tempting to see this inequality in terms of the sizes of the companies vis-à-vis the country,\(^ {191}\) a far more plausible explanation for the Government’s relatively weak bargaining methods is its relative lack of information about the industry.\(^ {192}\) As two of the “Big Six,” the affectionate name of the six largest aluminum companies of the world,\(^ {193}\) Kaiser and Reynolds effectively controlled the information about prices, costs, reserves, alternative expansion paths, and production conditions, thereby enabling them to make better forecasts of business trends, which helped them to form their demands during the negotiations. The Government, on the other hand, generally did not have the same incentive as the aluminum companies to acquire detailed knowledge of the aluminum industry. While it is the everyday function of the companies to acquire information about the industry in order to survive, the Government’s interest was limited to obtaining tax revenue, and very little effort was made to amass technical information about the industry.\(^ {194}\)

As is typical in many host country-TNC negotiations,\(^ {195}\) the bar-

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188. After the breakdown of talks at the end of the third round, the Secretary for Finance and Economic Planning met with representatives of some African countries to clarify the nature of the Government’s negotiations with Valco and accused the company of negotiating in bad faith.


192. See Faber & Brown, supra note 66, at 113-14.

193. The rest are Alcoa, Alcan, Pechiney Ugine Kuhlman, and Alsuisse.


gaining power of Kaiser and Reynolds was strengthened by indirect support from the U.S. government and from a number of its agencies. Consistent with its policy of using aid as a form of subtle support for the corporate system,\textsuperscript{196} the U.S. government approved the use of Eximbank loans for the VRP on the condition that U.S. aluminum companies be partners in the VRP.\textsuperscript{197} Even the United States Agency for International Development (USAID) took the unusual step of agreeing to Kaiser's request to guarantee fully the Valco investment\textsuperscript{198} because the U.S. administration viewed the VRP as crucial to the attainment of its political\textsuperscript{199} and economic\textsuperscript{200} objectives in Africa. This tacit support of aluminum companies by the U.S. government was a big boost to Valco and provided the company with a measure of credibility in its negotiations with the Ghanaian government.

A major weakness in the Government's position during the original negotiations stemmed from the overwhelming passion of Nkrumah for the project. Even before serious negotiations began with the aluminum companies, Nkrumah had already committed himself to the project — not only by his statements, but also by the infrastructure

\textsuperscript{196} Private foreign investment has traditionally been important to the U.S. government as an effective complement to its aid program, as a way of procuring strategic raw materials for the United States, and as a means of assuring U.S. access to the global market. Herbert Salzman, \textit{How to Reduce and Manage the Political Risks of Investment in Less Developed Countries, in Global Companies: The Political Economy of World Business}, supra note 190, at 85, 92-93.

\textsuperscript{197} JAMES MOXON, \textit{VOLTA: MAN'S GREATEST LAKE} 202-03 (1969).

\textsuperscript{198} Before the company could obtain international financing for the smelter, it was required to secure a broad U.S. guarantee protecting it from the effects not only of nationalization of the smelter, but also of taxation and labor troubles. Despite criticisms that the guarantee was a business favor at taxpayers' expense and would confer undue market advantage to Kaiser at the expense of its competitors, the Kennedy administration agreed to meet Kaiser's request. See RICHARD MAHONEY, JFK: ORDEAL IN AFRICA 164-70 (1983).

\textsuperscript{199} President Kennedy, who had become quite alarmed that Nkrumah might make good on a threat to invite the Russians to participate in the project, saw U.S. support of the scheme as the most effective way of curbing the spread of Russian influence in Africa, and in particular, of preventing the Russians from taking control of Ghana's bauxite and hydroelectric power and sealing off the West's access to such strategic resources. See MAHONEY, \textit{id.}, at 164; RONALD GRAHAM, \textit{THE ALUMINUM INDUSTRY AND THE THIRD WORLD} 183-84 (1982). U.S. participation would also constitute sweet revenge following the U.S. government's failed policy in the Aswan Dam where at the last minute it withdrew its funding of the project and left the Russians to complete it. See HART, supra note 9, at 44-45. In addition, the U.S. government hoped that its support would encourage Ghana to remain nonaligned and also enhance U.S. African policy. See \textit{generally} AFRICAN PERSPECTIVES: PAPERS IN THE HISTORY, POLITICS AND ECONOMICS OF AFRICA (Christopher Allen & R.W. Johnson eds., 1970).

\textsuperscript{200} The economic benefits to the United States of encouraging international investments such as the VRP were stated by Eugene Black, former World Bank President, to include substantial and immediate market opportunities for U.S. goods and services, the development of new overseas markets for U.S. companies, and the orientation of national economies towards a free enterprise system in which U.S. firms would prosper. HARRY MAGDOFF, \textit{THE AGE OF IMPERIALISM} 176 (1969).
construction he began in order to support the proposed project.\textsuperscript{201} To the companies it appeared that Nkrumah needed them more than they needed the VRP.\textsuperscript{202} Without agreement on the part of the companies to utilize part of the hydroelectricity to be produced, no international loans would have been available to finance the project.\textsuperscript{203} The companies were, therefore, able to publicly conceal the critical nature of their own demand for electricity, making it appear that they were but reluctant partners who needed to be wooed by the most generous of terms. Because the country was determined to get the project going, Ghana was not inclined to use bluffs and delays as bargaining strategies.\textsuperscript{204} During the renegotiations, however, no such consuming desire for the operation of the VRP was evident. Ghanaians had grown disenchanted after almost twenty years of operations during which the promised bonanza of foreign exchange had not materialized. They were, thus, less concerned about discontinuing the project. This time it was the companies that were more anxious to get the project going in order to reduce the losses they were experiencing in a declining world aluminum industry.

The dominance of the ruling party in Parliament in the 1960s adversely affected the original negotiations. It effectively stifled any opposition that could have provided the Government negotiating team with cause to reconsider the largess of its concessions. No public debates were ever held about the proposed project; consequently, the Government did not have the opportunity to gauge the strength of public reactions to the scheme.\textsuperscript{205} On rather infrequent occasions the President had appeared before Parliament to provide bare sketches of progress in the talks. The comments that followed the President's infrequent presentations not only showed how gullible the House was, but also showed how grossly misinformed it was about the objectives of the scheme.\textsuperscript{206}  

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\textsuperscript{201} These included roads, houses, water supplies, markets, and electric power. Moxon, \textit{supra} note 197, at 100-01.

\textsuperscript{202} For example, in a letter to Nkrumah in 1960 Edger Kaiser wrote about his initial reluctance to participate in the aluminum venture, and about how he continued with the project only because Nkrumah wanted the project pressed forward. \textit{Id.} at 106.

\textsuperscript{203} See Hart, \textit{supra} note 9.

\textsuperscript{204} Ghana's only serious threat was its intention to approach the East if the West was not forthcoming in financing for the project. The threat worked because the U.S. State Department was determined to avoid another Aswan fiasco.

\textsuperscript{205} The former Managing Director disputes this, claiming that "the arrangements [were not] secretly arrived at with only a few aware of the terms." According to this official, "[t]he entire Master Agreement and related documents were widely publicized in Ghana and submitted to and approved by the national Assembly on two occasions." Saunders, \textit{supra} note 73, at 195.

\textsuperscript{206} Take, for instance, the following strong praise of the project's potential by a government member:
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Even internal obligations undertaken by the Government in connection with the project received little attention in Parliament. For instance, the bill creating the VRA, the hub of the entire project, was debated under a certificate of urgency such that all stages for voting on the bill took no more than an hour. In contrast to the open and extended public debates on the VPR before and during the renegotiations, the legislature, at this earlier stage, had little opportunity to analyze the bill.

During the original negotiations the Government team was neither as well-informed nor as organized as the team that renegotiated the Ghana-Valco agreement. The original team was made up of senior government officials with limited background knowledge of the aluminum industry. Coordinating the original negotiations could have posed some difficulty given the existence of several political units, each with some influence over the negotiations. Thus, while a cabinet minister led the country's delegation in the original negotiations, matters of policy were decided by a cabinet committee under the chairship of the President. Complicating this further was a special secretariat which was set up to assist the negotiations and to conduct the routine work of bringing the project forward.

The Government team of the 1960s also suffered from destabilizing changes in its membership. The Finance Minister, Gbedemah, who had conducted the negotiations on behalf of the Government since

The implementation of this project envisaged by [President Osagyefo] will bring relief to all of us. Both men and women in all walks of life will be required to give their services to the huge project. It will be a feather in Ghana's cap as an independent country to have such a gigantic project. With this hydroelectric power in our country, many factories will be established, and we shall be in a position to manufacture most of our commodities. The project will help solve many problems such as unemployment, for men and women will get enough work to do.

This view was patently false as the plans for the project had deemphasized its labor aspects. Besides, the limited power supply provided to the private manufacturing sector certainly could not hold the kind of promise envisaged by this government official. Furthermore, contrary to popular expectations, irrigation was not a main objective of the project; there were no plans to extend irrigation more than a few miles from the dam. HART, supra note 9, at 28.

At that time, a bill had to go through both the first and second consideration stages as well as a third reading before it became law.

Provisions of the bill were kept secret from House Members until five minutes before the debate. HART, supra note 9, at 29.

Under the leadership of K.A. Gbedemah (Finance Minister), and E. Ayeh-Kumi (Chairman of the Development Secretariat), the team consisted of cabinet ministers and senior civil servants. It received advice from S. Ratnam, whose services were made available by the Government of India; Weisfelt, a member of the U.N. staff in Guinea; and W. Molyneux, of Cooper Brothers and Company, Chartered Accountants. See REPUBLIC OF GHANA: THE VOLTA RIVER PROJECT-STATEMENT BY THE REPUBLIC OF GHANA 11 (1961).

Id.
1956, lost his position as a negotiator and fled the country in 1961 at the most critical stage of the discussions. His absence was no doubt a big loss to the Government, given his experience, his familiarity with the negotiations, and the respect he had developed by working with the aluminum companies and with international financial institutions. Gbedemah's involvement in the original negotiations demonstrates the problem with placing the full responsibility of negotiating a complex foreign investment on the shoulders of a Government minister already saddled with other national commitments. Such a minister simply does not have the time to grasp the detailed aspects of the project and is unable to effectively participate in the negotiating sessions. It is to the credit of Gbedemah that he ably handled the negotiations with Kaiser, the World Bank, and the U.S. State Department. However, a better strategy would have been to appoint a team of experts to handle the original discussions, as occurred during the renegotiations.

Cohesiveness appeared to have eluded the Government team during the original negotiations. Gbedemah held views different from Nkrumah regarding the best strategy to secure U.S. support of the scheme. He did not agree with Nkrumah's tactic of announcing an alliance with the Soviets to force the hand of the United States if U.S. help was not forthcoming. At one stage Gbedemah even suggested to a U.S. State Department official that the official request the White House to "express with great directness and force" its concern about Ghana's communist ties. This was one indication that Gbedemah was conniving with the U.S. government to make a retraction of Nkrumah's pro-Soviet propaganda a condition of U.S. participation in the project. Before long, Gbedemah was involved in a conspiracy, actively supported by the U.S. State Department, to overthrow Nkrumah. The discovery of his treason forced him into exile in 1961. Given the coziness that characterized Gbedemah's relationship with his counterparts at the bargaining table, it is conceivable

211. Id.
212. DENNIS AUSTIN, POLITICS IN GHANA 406-07 (1964).
213. According to George Woods, an advisor to Kaiser on the financing of the VRP, it was Gbedemah, more than anyone else, who sold him on the VRP project. MOXON, supra note 197, at 70 n.1.
214. He worked hard to get the negotiations moving when the State Department stalled the talks on account of Nkrumah's pro-Soviet pronouncements. Id. at 104-05.
216. Id. at 167.
217. Id. at 172-74.
218. MOXON, supra note 197, at 104-05.
that some of Ghana's demands may have been compromised. It is suspicious that the World Bank quickly offered Gbedemah a high profile position soon after he went into exile. In sharp contrast, the head of the Government's renegotiating team, Professor Sawyerr, held the same ideological views as the PNDC government. According to company officials, Professor Sawyerr came across as a firm negotiator, eager to obtain better terms for Ghana. He allowed very little room for cozy politics.

Although the Government took advice from foreign experts during the original negotiations, several of these experts had close links to Valco, which called the objectivity of their advice into question. In the peculiar arrangement of the VRP, Kaiser advised the Government on developments in the industry. This role — combined with a close personal relationship between Edgar Kaiser, the President of Kaiser, and Nkrumah — left open the possibility that self-serving advice from Kaiser may have been uncritically accepted. For example, Kaiser recommended that the Ghanaian government employ Cooper Brothers, an accounting firm used by the Kaiser Corporation, to create analysis supporting Ghana's application for a World Bank loan. Kaiser then arranged for George Woods of First Boston Bank to advise Ghana both on how to evaluate Cooper Brothers' work and on how to prepare the actual application for financing the Volta scheme. The objectivity of Woods as an aide to the Ghanaian government becomes more suspect when one considers his background as director of Kaiser Steel (part of the Kaiser Corporation) from 1952 to 1963, President of the World Bank from 1965 to 1968, and Chair of the Kaiser Family Foundation after 1968.

With these maneuvers, Kaiser was able to effectively dominate two conflicting sides in the VRP negotiations, acting first on its own behalf in its negotiations with the Ghanaian government on a power rate, and then as an advisor to the Government in its discussions with the World Bank. These discussions turned out to involve an evaluation of the power rate agreed upon by Kaiser and the Government. Because of these questionable ties, it appears that none of these foreign advisors could have been relied on to provide the same critical perspective of the aluminum industry as was provided by the international consultants during the renegotiations.

From this comparative discussion, it is clear that several of the

219. He refused the job offer.
220. Interview with John Miller, supra note 172.
221. GRAHAM, supra note 199, at 178.
222. HART, supra note 9, at 50.
mistakes made in the original negotiations were not repeated in the renegotiation of the Ghana-Valco Agreement. A dramatic improvement in the country's methods of dealing with Valco resulted. To a very large extent, this accounted for the successful outcome of the 1983-85 renegotiations.

CONCLUSIONS

The arguments — both those supporting and those rejecting the right to renegotiate\(^{223}\) — are difficult to apply to investment contracts\(^{224}\) involving more complex considerations\(^{225}\) than the relatively simple market exchange of commodities which the rules of contract have traditionally regulated.\(^{226}\) TNCs, as exemplified by Valco in the period preceding the Ghana-Valco renegotiations, have resisted attempts to renegotiate transnational investment agreements, fearing that such attempts would destroy a much needed stability in their business operations.\(^{227}\) Host countries, on the other hand, convinced that investment schemes operate in a fluid economic environment,

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223. See supra notes 62-74 and accompanying text. See generally Geiger, supra note 62.
225. To begin with, the doctrine of equality in bargaining that is assumed to be the basis of contracts, and thus the justification for precluding any reviews, was not present in many of the early investment contracts. TNCs, armed with sufficient information of the industry and backed by a host of national and international agencies, entered the original negotiations with a superior hand. They were able to take advantage of the ignorance or diplomatic weakness of their bargaining partners. With help from their network of supporting agencies, the TNCs pressured the host country into granting them generous terms. During the colonial era, it was normal policy of the colonial government to give home companies extremely generous concessions, probably as a way of keeping imperial control of the economy. See, e.g., the concessions made to the British Aluminium Company by the colonial government, in Graham, supra note 199, at 128. Such contracts could not, therefore, be said to have been entered into freely by the people of the colonial territory.

Furthermore, trying to justify the right to modify investment contracts under the theory of sovereignty is hardly appropriate to investment contracts, which by their very nature require cooperation and stability and rarely contemplate premature termination. Indeed, for any mutual benefits to be derived at all, such contracts must go the distance.

227. TNCs desire stability in their operations because the investments generally require large capital outlays, especially in the extractive industries where vast sums of money may be needed for survey and exploration as much as ten years before production actually begins. For an accurate analysis of expected returns, or to satisfy the conditions for loans from banks, the companies often require the host government to spell out the entire range of fiscal impositions for the whole life of the agreement. Thus, stabilization clauses are included in the arrangement as a matter of sound investment because any alterations of the financial package could substantially reduce the company's financial returns and disrupt the financing arrangements, which are often based on the assumption that the business will continue to yield a high return sufficient to enable prompt repayment of the loans. From this perspective, companies have been particularly reluctant to accede to requests for renegotiations, as the renegotiations inevitably lead to changes in contractual arrangements. See Faber & Brown, supra note 66, at 111-13.
have viewed with suspicion any stabilization arrangements that denied them the right to modify investment agreements. It would appear, therefore, that the main sources of tension in the relations between the two parties has been first, the failure to address satisfactorily the concerns of the host country, and second, the attempt to fit the investment within the rigid framework of an ordinary contract with no possibility for review.

Because terms of agreements become progressively outdated as economic conditions change, no reasonable investor can expect to freeze the legislative and fiscal environment of the investment agreement. As a compromise, it is necessary for both parties to the investment agreement to see it as a flexible arrangement and to try genuinely to accommodate adjustments in order to ensure fairness to each other. Although this method involves accepting the principle of renegotiations, the legitimate concern of the TNCs for stability should be respected by qualifying the right to modify the agreement in some fashion. Thus, it may be useful to spell out clearly the conditions that would trigger renegotiations, either by reference to a fixed term (e.g., five years), or after a material change of fundamental circumstances (such as excessive profits, world market price change, or change in home country legislation). The scope of such renegotiations could also cover either the whole operation or be limited to key provisions such as the fiscal regime, pricing, or employment.

Agreeing to review the investment arrangements in good faith provides an effective means of guaranteeing the stability of the invest-

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228. The problem host countries have with these arrangements is not so much that they have to make fiscal guarantees as the fact that they are compelled to make elaborate and immutable guarantees based on incomplete information. Id. at 113-14. A government typically is forced to calculate the elements of the financial requirements over a long period, at a time when it does not have enough knowledge of the potential of the economic resource in question. Owing to its weak bargaining power and its anxiety to get the project started, the country frequently enters into long term agreements before even conducting the necessary feasibility study of the resource—arrangements that disproportionately benefit the TNC. With time, however, as the government's information about the resource improves and where the investment turns out to be more profitable for the company than originally envisioned, the government feels cheated and calls for renegotiation.

In the event of a windfall to private investors, the government would feel that whoever negotiated the deal sold the country's heritage too cheaply, and would endeavor, consistent with its responsibilities to present and future generations, to review the contract. When the tide changes, as it must, the government will attempt to rectify the situation. Id. at 115.


230. Id. at 262-68.

ment; it dissuades the host country from taking unilateral action.\textsuperscript{232} The description of a concession agreement as an "agreement to make concessions"\textsuperscript{233} is clearly humorous, but it reflects an understanding of the dynamism inherent in the investment contract that makes it necessary for the parties involved to maintain a continuing give-and-take relationship. Renegotiations constitute the only mechanism by which the frustrations of all parties\textsuperscript{234} can be checked in the long term interests of the whole contract.

The case study of the VRP illustrates the changing power relationships between a transnational company and a host country over the life of an investment project\textsuperscript{235} as their relative contributions to the project change. At the beginning of the contract, Valco's contributions were greatest due to its capital, managerial know-how, sophistication in the aluminum industry, and ties to the U.S. State Department. Ghana's bargaining position was originally very weak because it lacked expertise in the aluminum industry and also because its desperation to get the project started was well known. Thus, it was easy for Valco to wring favorable concessions from the Government. Over time, having gained sophistication about the industry, the Government found that Ghana's share of the revenues no longer matched its contribution to the project, and that Valco's contributions to the national economy had declined relative to the rewards it was taking out of the country. As the production facilities (such as the smelter) could not easily be removed, the country now held the investment captive, making the threat of expropriation a constant negotiating strength.

A generalization from this study is that there is a good chance a host country will request review of an investment project when the country is going through serious economic problems that are believed to be aggravated by exceptionally generous terms granted to a TNC in an investment arrangement.\textsuperscript{236} The PNDC government inherited a

\begin{itemize}
\item \textsuperscript{233} The comment is attributed to the foreign partners in the LAMCO project in Liberia, \textit{cited in Asante, supra} note 69, at 413.
\item \textsuperscript{234} The argument for renegotiation has been stated as if it benefits only the host country. The reverse is also true, as the experience of the Shashe copper project in Botswana reveals. In that case, renegotiation was requested by the participating TNC because changing conditions rendered its obligations under the agreement unduly onerous. Brown, \textit{supra} note 57, at 629; Asante, \textit{supra} note 69, at 414 n.16.
\item \textsuperscript{235} \textit{Smith & Wells, supra} note 181, at 1-25.
\item \textsuperscript{236} \textit{Thakoor Persaud, Conflicts Between Multinational Corporations and Less Developed Countries: The Case of Bauxite Mining in the Caribbean with Special Reference to Guyana} 77-78 (1980).
\end{itemize}
Transnational Investment Agreements

grave economy riddled by severe balance of payments problems, declining foreign exchange reserves, and a huge national debt. The VRP was perceived as contributing to this state because the low power rate paid by the smelter decreased potential government revenue. Committed as it was to undertaking a rigorous economic recovery program, the Government decided that revamping the largest foreign investment scheme in the country would be the most logical step to redress the situation.

The inherent tension frequently seen in a host country's view of foreign investors may be expressed in the period leading up to the renegotiations. Although the host country may want the benefits brought by TNCs, it often sees the companies as instruments of economic and even political domination. In Ghana such views played a role in the decision to review the VRP contract. The incident involving the three expelled Valco employees confirmed the Ghanaian government's distrust of TNCs as instruments of subversion. In approaching renegotiations, both sides should be aware of the existence of suspicions such as these. Tension may be decreased if the company's representatives includes experienced people knowledgeable about the culture and attitudes of the developing country and competent to formulate an effective strategy to allay any unfounded mistrust. This approach narrows any cultural differences and improves a mutual understanding of each other's goals.

By requesting renegotiations, the host government should realize that it runs the risk of a conflict, and hence should make only those demands that would appear to be morally and economically defensible. In Ghana, freezing the power rate that Valco had been charged for thirty years, despite the steep increases in world energy costs, was a provision that the government knew even the most partial observer would find unfair. In the renegotiations the Government team was concerned mainly with showing how this and other provisions in the original agreement had fallen out of step with prevailing practice in the international aluminum industry. This was a far more reasonable negotiating strategy than demanding to take control of the investment. The nonthreatening nature of the country's position found wide appeal from the international business community, whose support proved to be a significant factor in the outcome of the renegotiations.237

A TNC's receptivity to renegotiation is affected by its own analysis of attendant risks as well as the importance of the investment to the company. Dealing with a civilian government where changes in gov-

237. See supra notes 168 and 187 and accompanying text.
ernmental policies were usually adopted after lengthy parliamentary debates and numerous ministerial meetings (with frequent opportunities for lobbying by company officials) was less risky for Valco than dealing with a military government like the PNDC. In the civilian situation, Valco could use the democratic process to resist renegotiation; Valco used this strategy successfully during the civilian administrations preceding the PNDC. The PNDC's administrative style — where government policy is usually made by a few top government officials — allowed very little opportunity for Valco lobbyists. Furthermore, a strong government like the PNDC could have followed through with threats to take unilateral action while suffering few adverse domestic political consequences. In such a risky situation, Valco was forced to reevaluate the importance of its investment and to respond favorably; otherwise, by adopting a confrontational attitude it stood to lose its very promising and inexpensive international operation.

The renegotiation process is more successful when both parties recognize it as a give-and-take session rather than a zero sum game. In Ghana, the net result was an increase in potential revenues, but along with that benefit came an assumption of some production risks previously borne by the company. This result could not have been reached simply by requesting renegotiations. Of far more importance was the Government team's preparation for renegotiations. Based on the Ghanaian team's success, it seems beneficial for host countries to develop local expertise regarding the international industry within which the TNC is operating. It undercuts the advantage the TNC previously enjoyed and makes it easier to expose any false statistics presented by the TNC during the discussions. Foreign experts can also provide useful information on behavioral tendencies and tactics of TNCs within the industry.

By maintaining a unified front, a government team can make a coherent presentation of issues, thereby increasing its effectiveness. Specific strategies would, of course, depend on the circumstances of each negotiation. The use of delay, bluffs, threats, and written submissions were effective in the Ghana-Valco encounters. Thus, any developing country contemplating renegotiations is well advised to plan carefully because its negotiating strategy could make or break its case.