

Third World Legal Studies

Volume 2

Article 2

1-2-1983

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Peter Slinn

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Recommended Citation

Slinn, Peter (1983) "Foreign Investment Contracts – Host Country's Concerns," *Third World Legal Studies*: Vol. 2, Article 2.
Available at: <http://scholar.valpo.edu/twls/vol2/iss1/2>

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Foreign Investment Contracts -
Host Country's Concerns

Peter Slinn

The topic of investment contracts embraces the whole range of economic activity in the developing world. This paper will focus upon mining development in a number of Commonwealth (mainly African) countries. An attempt will be made to examine the factors affecting contractual relations between investor and host, both in relation to existing operations (some of which have a history going back deep into the colonial past) and to new investment projects. In this context, it is proposed to examine models of the legislative and institutional framework provided by host countries. However, the legal analysis cannot be divorced from an awareness of the general economic factors which affect the respective bargaining strengths of host and investor.

Mining investment contracts have always presented particular problems in view of the size of the investment required, the long lead time before exploitation becomes profitable, the uncertain and unpredictable relationship between costs and world commodity prices and the wasting nature of the asset itself. The world economic climate of the nineteen-eighties, however, is particularly harsh and threatens both the viability of existing mining operations and the prospects for new investment in exploration and development. No discussion of the legal modalities can take place without awareness of the crisis now facing the mining industry in developing countries. This crisis, a symptom of the current world recession, involves factors outside the control of the individual investor and host country. Only global collective action will solve the underlying problems of the industry. With the best will in the world, it is difficult to achieve an equitable bargain between host and investor when the determinant price of the mineral produced is subject to such violent fluctuations.

The problem now is how to operate mines at a profit at all, rather than that of an equitable distribution of profits. Copper may be taken as an example. The first annual report of the new Zambia Consolidated Copper Mines, the 60% state-owned concern which mines one of the world's largest ore bodies, showed a loss of K173.6 million for the year 1981/2 despite increased production. No dividends were declared and the government was obliged to waive taxes. President Kaunda's only justification for keeping open unprofitable mines was the priority which Zambia, as a socialist country, should give to the fate of miners and their families.¹ With the world copper price in real terms at its lowest since the nineteen-fifties, even Bougainville, the Papua New Guinea mine the development of which in the early 1970's had proved so profitable as to compel, as we shall see, a renegotiation of the original investment contract, moved into the red in 1982.²

The implications for new investment are particularly grave. In a forceful passage, the Brandt Report drew attention to the virtual drying

up of exploration expenditure over large areas of the Third World and to the breakdown of traditional patterns of exploration and investment. The inevitable consequence of the current misallocation of mineral exploration effort, concluded the Report, would be "selective mineral shortages, price instability, severe inflationary influences and the failure of many developing countries to develop potential deposits...."³ In a gloomy account of mine closures, the London Economist speculated that even world economic recovery might not solve the problems of some actual and potential producers and pointed to signs that some metals are losing large chunks of their customary markets through substitution, as in the case of optical fibres for copper wire in the telecommunications industry.⁴ However, whatever the marginal effects of substitution, there is awareness in the consumer countries of the industrialised world that there may be a heavy future price to pay for the short-term benefit of low commodity import prices.⁵ The current crisis may provide some real impetus to the achievement of one of the principal features of the thrust towards a New International Economic Order, effective collective measures to introduce commodity price stabilisation schemes which, in the mining sector, will benefit both host producer countries and actual and potential investors from the capital exporting countries.

Even in the context of the current world depression, some commentators would deny that macro-economic factors relating to global problems of supply and demand are the true explanation for any decline in foreign investment in mining ventures in developing countries. Instead, the problem is attributed to the "political risk factor" involved in operations in such countries: their instability and unreliability is alleged to provide an unfavourable climate for an investment which, in the case of new mines, is unlikely to bear fruit for ten or more years. Investors, it is argued, are faced with the imposition of an initially onerous legal regime followed by the ever-present threat of repudiation of agreements even by the governments which themselves negotiated them.⁶ Hence, there is a preference for placing scarce new investment resources in what is regarded as the more secure environment of such countries as Australia and Canada.

The "investors' backlash" in effect seeks to reverse the trend of the nineteen-seventies. In those years, host/investor negotiations tended to produce modifications of earlier contracts, (or new contracts) which were regarded as reflecting a modern principle of equity in that they yielded an enhanced benefit element for the host country. A striking example of this trend was the re-negotiation in 1974 of the Bougainville Copper Agreement which itself only dated back to 1967. The 1967 Agreement was negotiated between a territorial administration, then subject to Australian control, and a locally incorporated subsidiary of Rio Tinto Zinc. By the time of the achievement of local self-government at the end of 1973 (preparatory to full independence in 1975), the terms of the deal had begun to look less advantageous from the standpoint of the host government. In particular, the tax concessions granted to Bougainville Copper Ltd. (in which the local government had only a 20% stake) appeared over generous in the light of high initial productivity during a period

of buoyant world copper prices. The mine had commenced production in 1972, and net earnings were AS 158.4 million in 1973, the first full year of operation. Under the terms of the 1967 Agreement, however, these earnings were to be exempt from PNG taxation until 1976, and the government's receipts from royalties, etc., were limited to AS 35 million. The prospect of high profits throughout the period of the tax holiday created strong local pressure for renegotiation, particularly in the light of the political threat to independence posed by a secessionist movement among the Bougainville islanders, who were not anxious to share "their" wealth with the distant mainland. The Company, having been extremely reluctant to negotiate at all, resisted fiercely when talks did take place. Eventually, after six months of hard bargaining, and a threat by the government to legislate unilaterally, the original agreement was modified by the curtailment of the tax holiday and by the introduction of an imaginative additional profits tax formula.⁷ The effect of these changes would give the PNG government 61% of the profits earned in the first half of 1974.⁸

The successful outcome of the Bougainville renegotiation was a great achievement for the team from the Technical Assistance Group of the Commonwealth Secretariat which had sustained the inexperienced government of PNG during the tough bargaining sessions with a powerful multinational. However, the "investors' backlash," to which reference has been made, may be seen in part as a response to such phenomena. The Bougainville agreement was not an old concession lost in the mists of the colonial past; it had been negotiated only seven years before the foreign investor was compelled to accept radical modifications of the original deal under the pressure of political change. A good example of investors' reaction to such pressures is contained in the report on Mineral Development in the Eighties produced in 1976 for the British-North American Committee under the guidance of Ian MacGregor, then Chairman of AMAX, the major U.S. mining house. This report detailed the alleged sins of developing countries regarding nationalisation of existing investments and attempts to assert "total domestic control" of new projects. The reinvigoration of the investment climate therefore depended, it was argued, on a recognition by the developing countries of a "mutuality of interest" with the foreign sources of sorely needed capital, know-how and management; only a return to the basic principle of sanctity of contract could give adequate protection to a viable investment system.⁹ This approach inevitably demands that the governments of host countries, in order to ensure that they "behave," submit to the internationalisation of investment contracts for example, by accepting compulsory arbitration procedures and by becoming subject to the threat of credit sanctions in the event of alleged breach of contract.

The prospect of renewed pressure on the negotiation position of developing countries vis-a-vis foreign participators in minerals development contracts should be seen in the light of the historical evolution of the present legal environment. For the external guarantees which investors now seek may be seen as a substitute for the legal security once offered by the framework of colonial rule, by which concessions were protected by governments which otherwise reflected an

investor's ideal of passivity.¹⁰ In this context, Zambia, the home of one of the world's largest copper mining operations, provides a good example of the "old economic order" founded upon concessions traceable to the very beginning of colonial rule.

The major mines of the Zambian copperbelt were developed by private foreign enterprise over thirty years prior to independence in 1964. This development took place in almost perfect laissez-faire conditions: the colonial government neither played any significant role in the creation of the industry nor placed any restraint on the activities of the operators. The mineral rights themselves were enjoyed neither by the Crown nor by the local chiefs or tribes. The British South Africa Company, incorporated by Royal Charter in London in 1889, had acquired mineral concessions which purported to cover virtually the entire country in the course of "opening up" the territory in the eighteen-nineties. The Company, in turn, made grants of prospecting and mining rights, often in perpetuity, to the enterprises which actually carried out the operational development of the copperbelt. The colonial state was thus excluded from any contractual relationship between the owner of the mineral rights and the assignee prospecting and operating companies. In the 1930's, recommendations by mining law experts for the establishment of some modest measure of legislative control over operations were vetoed either by the Colonial Office or effectively by the mining companies. The arguments of fifty years ago are still heard today. A proposal that the local government should have a statutory power to compel commencement or continuance of mining operations and, in certain circumstances, to confiscate unworked locations, was dropped as likely to frighten away investment capital. One of the mine operating companies, Rhodesian Selection Trust Ltd., successfully resisted a proposal to establish some measure of governmental control over mining grants as likely to create "so grave a feeling of uncertainty as to diminish if not completely destroy the zeal and enterprise" with which the mineral resources were being prospected and developed.¹¹ Here, indeed, was an environment which perfectly acknowledged the principle of sanctity of contract on which by Mr. MacGregor and his colleagues still rely. There could be no question of using the threat of expropriation even as a last resort. Indeed, the old economic order was a complete inversion of the new order which asserts the sovereignty of the host country over its own natural resources.

On Independence in 1964, therefore, the new Zambian government inherited no tradition of government involvement in the mining industry.¹² It was only after a fierce struggle that the British South Africa Company surrendered its mineral rights so that these were vested in the new state.¹³ The rights of the assignee operating companies, however, were unaffected; the government had acquired a royalty income but little else changed. Yet copper was the Zambian economy, providing in 1965 71% of government revenue and 93% of exports.¹⁴ Given the dominance of copper, it was hardly surprising that President Kaunda saw the road to economic independence as involving the establishment of a measure of equity participation in and legislative control over the mining industry. What is significant for present purposes, however, is

that the terms of the government "take-over" of a 51% interest in the mine operating companies. These terms were the product of complex and protracted negotiations which yielded for the vendor companies of the Roan Selection Trust and Anglo-American groups extremely strong legal safeguards in their new role as minority shareholders in the restructured companies, Roan Consolidated Copper Mines (NCCM) and Nchanga Consolidated Mines (NCM). Thus the bonds and loan stock by the issue of which payment for the majority interest was effected were unconditionally guaranteed by the Republic and therefore not dependent upon future profits; elaborate contractual arrangements and special provisions in the articles of association of RCM and NCCM left management, financial control and marketing in the hands of the minority shareholders. The latter were also guaranteed access, in the event of any alleged breach of the agreements by the Zambians, to the arbitration procedure provided for under the World Bank Convention on the Settlement of Investment Disputes between States and Nationals of other States.¹⁵

Thus, although the original invitation from President Kaunda to negotiate the terms of the take-over could not be refused by the mining companies -- "a very bitter pill" as it was later described by the then chairman of RST, Sir Ronald Prain -- the investors operated in a not unfavourable negotiating climate.¹⁶ The "invitation" had placed the onus on the companies to draft their own proposals for the take-over as a basis for discussion, a distinct tactical advantage. Moreover, the government was to be dependent on future co-operation with the minority shareholders. There was a general anxiety to avoid the Congo (Zaire) situation of 1966 when the Belgian investor, Union Miniere, had responded to nationalisation decrees by stripping the mines of plant and even of typewriters.

President Kaunda's announcement on 31 August, 1973, of the immediate redemption of the bonds and loan stock and of the cancellation of the management and marketing contracts might appear a classic example of renegeing on existing agreements and of "changing the rules of the game" in the manner so often complained of by investors. However, President Kaunda found that he was unable unilaterally to denounce the contracts without invoking the legal sanctions attendant upon breach of the 1969 agreements; further detailed negotiations with Anglo-American and Amax (as successor to RST) were therefore required before the agreed termination of the management, marketing and other service contracts in November, 1974 (Anglo) and February, 1975 (Amax). Compensation totalling K55 million was paid. Sales and marketing were now placed in the hands of the Metal Marketing Corporation (MEMACO), a 100% state-owned company.¹⁷ NCCM and RCM became self-managing companies. Their existence as separate entities, however, reflected the corporate structures developed in the pre-independence era. So, in May, 1981, President Kaunda announced, as a process of rationalisation, the merger of the two companies to form Zambia Consolidated Copper Mines Ltd (ZCCM). Again the consent of the minority shareholders was required; agreement on the merger was announced in December, 1981, and implemented in March, 1982.¹⁸

Zambia thus presents a case-study of the evolution since Independence of relationships between host government and foreign investor from the starting point of negligible government involvement in the mining industry, the latter situation being a legacy of the pattern of development during the colonial period. This evolutionary process has taken place in a crisis-ridden environment -- the settler rebellion in Zimbabwe with its particular impact on fuel supplies and on the transportation of copper exports, a major disaster at the Mufilira mine, fluctuating and often depressed copper prices. Inevitably, too, there have been problems of management and administration. The cumbersome parastatal structures, through which the state's holdings in the mines have been channelled, have proved a fertile field for incompetence and inefficiency. However, through all these difficulties, the consensual legal framework governing the relationship between host government and external investor has been preserved, however precariously at times. The corporate successors of the operating companies who first developed the mines of the copperbelt over fifty years ago still have a major stake in the new company, ZCOM, in which the private and corporate foreign stake initially amounted to nearly 40% of the equity.¹⁹

The Zambian experience has continued relevance for the rest of Central and Southern Africa. For well-known political and historical reasons, the independence of Zimbabwe was delayed until 1980, and the independence of Namibia is yet to be achieved. Both these countries have important mining sectors in foreign ownership and must work out new host country/investor relationships. The predicament of Zimbabwe, where a socialist government is now in power, is a particularly delicate one. The country's mining industry is largely in the hands of multi-national mining houses such as Anglo-American, Rio-Tinto-Zinc, Lonrho and Union Carbide.²⁰ The scope for major state participation in existing mining operations is limited by the government's own perception of investment priorities, although 1982 saw two significant moves in this direction. In October, the government announced plans to acquire a 40% stake in the Wankie Colliery, thus replacing Anglo-American as the largest shareholder in the country's only coal producer; in November, proposals were announced to convert a government loan of ZS 2.7 million to assist the Empress Nickel Mine into an equity stake in Rio Tinto Zimbabwe.²¹

The Zimbabwe Government's major initiative has been directed towards establishing control over the marketing of the country's minerals. The Minerals Marketing Corporation of Zimbabwe Act, 1982, establishes a Minerals Marketing Corporation of Zimbabwe to act 'as the sole marketing and selling agent' for all minerals produced in Zimbabwe. The Act provides that it will be an offense to sell minerals, either inside or outside the country, except to the Corporation or with the authority of the Corporation or in accordance with a contract negotiated by the Corporation. The Corporation will have the option to purchase any mineral offered for sale on terms agreed with the seller, and, in the case of all export contract, the Corporation will normally receive all proceeds of sale on behalf of the sellers. The Corporation will be empowered to limit the size of stockpiles of minerals which may be kept by producers and to order the termination of existing export

contracts.²² Taken in all, the proposed legislation adds up to a major exercise of state power drastically curtailing the contractual freedom of the producers. Clearly, the Act has been drafted with the property guarantees contained in the Independence Constitution in mind; in the exercise of its powers, the Corporation will be obliged to take into account the interests of any producer for whom the Corporation may be acting and the common interest of all producers of minerals.²³

In Zambia a state mineral marketing monopoly was not introduced until after the state had acquired a majority shareholding in and managerial control of the producer companies. In Zimbabwe the legislation precedes any significant state participation. The government, through the Corporation, thus achieves a measure of control without a large financial commitment at the production stage. Government will be able to regulate the export market and eliminate the possibility of transfer pricing. (In responding to attacks on the proposed legislation, Mr. Mugabe had accused the multi-nationals of "milking" the country by exporting to overseas associate companies at give away prices.²⁴ However, the government's intervention at the marketing stage will not be without commercial risk in view of the fluctuating levels of mineral prices on world markets. The Zimbabwe Chamber of Mines' reaction to the proposed legislation was predictably hostile: the Chamber argued that the Act would discourage, if not eliminate, future investment in mining and would adversely affect customers' willingness to buy Zimbabwe minerals as "in our experience major consumers are reluctant to work with Government bodies"; there was also a fear of "creeping expropriation", as the Act would give the government "powers to nationalise the mining industry by taking over its entire commercial function and its current assets." The Chamber's arguments recall those of the Zambian Mining companies when faced with the prospect of modest legislative measures in the nineteen-thirties.²⁵

Zambia and Zimbabwe are both examples of countries with long-established mining industries where the host country's problem has related primarily to the establishment of an adequate degree of ownership and control over existing operations. A number of options are available, in addition, in the areas of fiscal regime and of exchange control, so as to ensure the adequacy of the host's "take" and a respectable level of re-investment. Even countries with established industries, however, are anxious to encourage prospecting and exploration, where heavy expenditure may be incurred with no guarantee of reward. In countries with no significant existing production, the incentive required is all the greater. Here, the essential starting point is a legislative regime which provides a secure and defined framework for negotiation, even though a major project such as Bougainville, discussed earlier, will require legislative effect to be given to a special agreement.²⁶ A well drafted mining law of general application will give clear notice to the potential investor of the host country's concerns and expectations in such key areas as state participation, exploration expenditure and the employment and training of local citizens.

A good example of such modern mining legislation is the Mining Act, 1979, of Tanzania, a country where there has been little existing

development and where lack of local capital resources points to the need to attract suitable overseas investment. The Act indicates clearly the government's priorities in the granting of mining licences. Provision is thus made for the inclusion in a prospecting licence of the right to acquire on behalf of the state "on stipulated terms, or on terms to be agreed, an interest in any mining venture which may be carried on in relation to...the prospecting area" (section 32). The licence must also include particulars of the licensee's proposals for the employment and training of citizens of Tanzania (section 31) and (in the case of a mining licence) a report of "the goods and services required...which can be obtained within the United Republic and the applicant's proposal with respect to the procurement of those goods and services" (section 37). The legislation thus provides a check-list of matters which must be dealt with, to the satisfaction of the host government, during the course of the licence negotiations, as well as an assured environment for the investor in that, if he carries out the agreed programme of prospecting and exploration satisfactorily, he will be guaranteed an opportunity to develop, on an agreed basis of participation, any deposits proved.

This is not the place for a detailed examination of the appropriate fiscal regime, but clearly this is a vital concern to the host government and to the investor, particularly where the host country's equity stake is relatively small. A useful precedent is provided by the additional profits tax formula worked out in the Bougainville re-negotiation of 1974. This is designed to ensure that the investment is not crippled by an onerous fiscal burden when profit levels are low, but that the host government will receive automatically an increased share of receipts when the investor's earnings reach a "kick-in" rate of return on capital stock.²⁷ Clearly, a flexible fiscal regime of this kind, if introduced at the outset of a project, helps to avoid pressure for re-negotiation if the investor's rate of return subsequently appears to reach (for the host country) unacceptably high levels. It would also be desirable to include an "old-fashioned" ad valorem royalty provision so that the host country receives some income from production (the depletion of its wasting asset) even when profitability is low or non-existent.

The Bougainville experience suggests another lesson of vital importance to host governments in negotiating resource agreements which may have momentous consequences for the nation's future - the need for the highest level of legal and other technical expertise to be available at the negotiating table. The availability of such expertise will enable the proposals of powerful multi-national corporations to be subject to proper scrutiny and will enhance the prospects of a deal which will be seen to be fair to all parties. Such a deal runs less risk of subsequent repudiation by a government which otherwise may see expropriation or some other unilateral act of sovereignty as the only way out of an inequitable bargain. The risk of such a rupture is obviously greater where the contract in question is a legacy of colonial rule, as was even true of the original Bougainville Agreement of 1967. However, the achievement of equality in bargaining strength remains a problem in a world in which the proliferated small and weak nation states have jurisdiction over potentially valuable resources -- a classic example being the small

island states of the Pacific with claims over huge off-shore exclusive economic zones. Here the problem of unequal bargaining strength makes outside assistance imperative. In this regard, valuable work has been done in recent years by the Technical Assistance Group (TAG) of the Commonwealth Fund for Technical Co-operation, which has fielded a "Robin Hood" team of economists and lawyers to assist the small countries of the Commonwealth in negotiating resource agreements.²⁸ The "nuts and bolts" issue of the availability of negotiating skills in any host/investor bargain should be seen in the context of the wider question which informed the Brandt Report's analysis of the current crisis in world mineral development: "Measures are needed to speed up exploration and exploitation of deposits in developing countries, while assuring a full share of the benefits of mining, processing and exportation to the host country governments."²⁹ There seems to be a large measure of agreement on the need to perfect international arrangements for a financing facility to relieve the host and the investor of the heavy and uncertain burden of exploration expenditure. This availability of "neutral" funding would arrest the decline in exploration activity and would enable host and investor to negotiate an exploitation contract, as Brandt put it, "on the basis of assured and equally shared knowledge."³⁰ There is the capability for such funding through the UN agencies, the Lomé arrangements and through regional organisations. Progress in this direction may also be seen as complementing schemes for the stabilisation of mineral export prices, fluctuations in which are the downfall of so many budgetary plans in developing countries.

If order can be brought into world mineral development, perhaps future projects may avoid the sad fate of the Selibi-Pikwe copper/nickel project in Botswana, the bright early hopes of which have been so vividly conveyed in Sir Ronald Prain's recently published autobiography.³¹ Despite a political environment stable enough to satisfy the most suspicious investor and the most careful negotiation of development contracts after an extended period of exploration, a combination of technical difficulties and depressed metal prices appears to have ensured that, even operating at full capacity, the mine will be unable to service the loan charges and to achieve profitability.

The successful exploitation of the mineral resources of Third World countries is an undertaking which requires wholehearted co-operation between host and investor. It is perhaps not too optimistic to hope that, from the evidence presented in this paper, some ground rules for that co-operation have emerged and have been recognised by the parties concerned.

FOOTNOTES

1. Times of Zambia, Sept. 25, 1982; ZCOM, First Annual Report, year ending 31 March, 1982.
2. Bougainville Copper Ltd., 1981/2 Annual Report.
3. Independent Commission on International Development Issues, North-South: A Programme for Survival, 155-56 (1980), [hereinafter cited as Brandt Report].
4. The Economist, February 20-26, 1982, 76.
5. A Tighter Squeeze for Producers, Financial Times, May 25, 1982.
6. These arguments are analysed and criticised in Faber and Brown, Changing the Rules of the Game: Political Risk, Instability and Fairplay in Mineral Concession Contracts, 1980 Third World Quarterly, 100, 102-105. As members of the Technical Assistance Group attached to the Commonwealth Secretariat, the authors of this paper have a wealth of practical experience of negotiating resource agreements on behalf of developing countries. Infra, text related to note 28.
7. Infra, text related to note 27.
8. Faber, Bougainville Re-negotiated, Mining Magazine, Dec., 1974, at 446-49. The agreements are incorporated in PNG legislation - see Mining (Bougainville Copper Agreement) Ordinance, 1967 and the Mining (Bougainville Copper Agreement) (Amendment Act) 1974.
9. British-North American Committee, Report (1976). For an analysis of the concept of contract in this context, see Asante, Stability of Contractual Relations in the Transnational Investment Process, 28 Int'l & Comp. L.Q. 401 (1979).
10. Asante, Re-structuring Transnational Mineral Agreements, 73 Am. J. Int'l L. 335, 337 (1979).
11. Quoted in Slinn, The Mining Ordinance of Northern Rhodesia: A Legislative History 1924-1958, 23 J. Afr. L. 84, 91 (1979).
12. In Zaire, by contrast, the Belgian colonial government had been much more actively involved in the finance and development of the mining industry to the surprise of contemporary British observers: See, for example, S.H. Frankel, Capital Investment in Africa 301 (1938).
13. The Recovery of the Mineral Rights, in M. Faber & J. Potter, Towards Economic Independence 40-61 (1971).

14. Figures quoted from The Mining Yearbook of Zambia in A. Martin, Minding Their Own Business: Zambia's Struggle Against Foreign Control 146 (1972).
15. Economic Independence and Zambian Copper 219-55 (M. Bostock & C. Harvey, eds. 1972); W. Stoeber, International Business Transactions 37-107 (1981).
16. Sir R. Prain, Reflecting on an Era 176 (1981).
17. Ushewokunze, The Legal Framework of Copper Production in Zambia, 6 Zambia L.J. 75 (1974). Christopher Ushewokunze is now Secretary for Mines in Zimbabwe, where proposals for a Minerals Marketing Corporation have been implemented recently: infra, text related to note 22.
18. Amalgamation of Mining Companies (Special Provisions) Act, 1982 (Zambia).
19. Joint RCM and NCCM Company Announcement, Dec. 22, 1981.
20. For analysis, see D. Clarke Foreign Companies and International Investment in Zimbabwe 60-80 (1980).
21. Financial Times, Oct. 27, 1982 and Nov. 4, 1982.
22. Minerals Marketing Corporation of Zimbabwe Act, 1982, Sections 20, 37, 38, 39, 44 and 52.
23. Section 16 of the Declaration of Rights in the Constitution of Zimbabwe (dealing with protection from compulsory acquisition of property) does not affect laws providing for "the orderly marketing of any ... mineral ... in the common interests of the various persons otherwise entitled to dispose of that property...." Section 16(9)(a). This should be read in conjunction with section 22 of the Act. Clearly, however, there will be a possibility of a court holding that a particular exercise of powers by the Corporation is not in the common interests of the producers and therefore ultra vires the Constitution.
24. Financial Times, Jan. 25, 1982.
25. Representations by the Chamber to the Secretary for Mines, copy in the writer's possession. For the earlier Zambian example, see text related to notes 19-21.
26. The investors may seek to rely on such legislation to restrict the host government's future freedom of action. In the Bougainville case, the 1967 Ordinance contained a provision which required the consent of the Company to any subsequent legislation affecting the Agreement. This provision was deleted in the 1974 amending Act.

27. Faber, supra note 8.
28. This is a field where inter-Commonwealth co-operation is seen at its most effective; see the comments of Arnold Smith, the first Secretary-General of the Commonwealth, in Stitches in Time, the Commonwealth in World Politics 127-29 (1981).
29. Brandt Report, supra note 3, at 156.
30. Faber & Brown, supra note 6, at 118-119 contains the seedcorn of the Brandt passage.
31. R. Prain, supra note 16, at 180-92.