ABHANDLUNGEN

Investment Protection and New World Order

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Throughout history, man's effort has been to strive towards the stability, well being and prosperity of his nation. In that process, trade, commerce and respect for property rights have played a dominant rôle giving rise to conflicts and resolution of conflict areas. Today, in the context of an inter-dependent world society regulated by the principles and purposes of the United Nations Charter, wider intercourse among nations and the need for their economic co-operation has further enhanced the role of trade and investments. Protection of investments has thus become a matter directly linked with the achievement of the objectives of the new world order.

Tracing through the pages of history from ancient times through the Middle Ages, one cannot but be struck by the fact that trade and commerce had as important a place as war and peace in the relations among nations. Treaties were concluded almost with the same degree of regularity among sovereign princes in Europe on matters concerning trading rights of each others' subjects and protection of their interests, as treaties of peace. Indeed the institution of the consul and a large body of customary law on the treatment of foreign nationals owe their origin to the need felt by merchants and traders to reside, sojourn and invest abroad. By the 15th century, trading communities of foreign nationalities, maintaining

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Abbreviations: AALCC = Asian-African Legal Consultative Committee; AJIL = American Journal of International Law; EEC = European Economic Community; ILM = International Legal Materials; MIGA = Multilateral Investment Guarantee Agency; OECD = Organization for Economic Co-operation and Development; OPIC = Overseas Private Investment Corporation; UNCTAD = United Nations Conference on Trade and Development.

warehouses, administrative offices and places of worship of their own, were in evidence in practically every port city from the Baltic to the Mediterranean and that soon extended to the Near East and the Levant. That had become a fact accepted by nations, and the rights and privileges of those communities had come under the protection of customary international law. That meant that if a foreigner was maltreated or his property rights were adversely affected by arbitrary action, his home state could legitimately remonstrate and demand reparation. In later years, when exchange of diplomatic missions became a regular feature, following upon the Treaty of Westphalia of 1648, some of the major functions entrusted to the envoy revolved around the protection of life, liberty and property rights of these merchant communities. By and large, the experience of Europe would tend to show that there was little interference with the rights, properties or investments of foreign communities, presumably in the knowledge that maltreatment of a foreign national by a sovereign prince was not likely to go unchallenged and might well have repercussions on the treatment of their own subjects. Thus, protection of trade, commerce and property rights of aliens may well be regarded as a settled principle of international law, where Europe was concerned, by the time the trading activities of European nations were extended to other parts of the globe.

A new chapter had begun with the advent of the Industrial Revolution and the discovery of the new continent. In the American colonies, populated by European settlers, investment was needed to build the infrastructure and their economies, but the treatment of those investments was governed by the laws of the mother country. The need to find markets for industrial produce and the search for raw material for industrial consumption led European nations to seek avenues in the Middle East, Asia, the Far East, and even parts of Africa. Trading factories were established and concessional rights were obtained from local rulers, and then friction began to arise. The metropolitan powers, determined to protect the interests and property rights of their subjects, demanded for their nationals the minimum standard of treatment that prevailed in Europe. What it meant was that irrespective of the way a ruler treated his own subjects, the personal and property rights of a foreign national were to be viewed as a matter of concern to his own home state. If a European subject was maltreated, reparation had to be made and punishment of the offender was demanded; if his concessionary rights were annulled, the same had to be restored, or if his property was taken, compensation had to be paid; and behind such demand stood the military might of the nation[1]. The doctrine of minimum standard soon became a weapon of intervention and colonial expansion; most countries in Asia and Africa were subjugated; the factors became rulers; and even China, Japan, Turkey and Persia were subjected to unequal treaties that guaranteed favoured rights to foreign nationals. The countries in Latin America, soon after their emergence as free nations in the latter part of the 19th century, were to challenge the basis of diplomatic intervention. But there again frictions arose, revolts were organised, and regimes opposed to favoured treatment for foreign nationals were toppled. Protection of investments thus became the centre of a power game.

A new era was ushered in the relations among nations, with the birth of the United Nations. The Charter recognised the right of self-determination of peoples; and the sovereign equality of nations, large and small[2]. New nations were born with full attributes of sovereignty; the Declaration on the Granting of Independence to Colonial Territories and Peoples completed the process of their emancipation[3]. Respect for international law and treaty obligations were reaffirmed. International machinery was to promote the economic and social advancement of all peoples, and with a view to creation of conditions of stability and well being for peaceful and friendly relations among nations, international economic co-operation was to be the cornerstone[4]. Here was the area where investments from developed countries in the form of capital, technology and skilled manpower was expected to play a major role in the development of smaller nations, and the upliftment of the economic conditions of their people. But the new nations, emerging from colonial domination, were suspicious of the foreign investor. They wanted to do away with the vestiges of the past and assert their new found freedom and sovereign rights. They went ahead with schemes of nationalisation and expropriation and imposed stringent conditions on the new investor including the possibility of nationalisation; but then the climate had begun to change, in slow gradual stages, and they are now beginning to look upon foreign investments in the light of the

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[1] B. Sen, A Diplomat's Handbook of International Law and Practice (3rd rev. ed. 1988), Chapter XII.

[2] Preamble to the UN Charter.

[3] The Declaration on the Granting of Independence to Colonial Territories and Peoples adopted at the Fifteenth Session of the General Assembly in 1960 paved the way for emancipation of colonial territories in Africa. In that year alone seventeen countries gained their independence, followed by four other countries in 1962.

[4] Art.55 of the UN Charter.

concept of partnership rather than confrontation[5]. The development of the law and State practice on protection of investments and property rights over the past three decades will now be discussed in this light with special reference to Asia and Africa.

Soon after the establishment of the Asian-African Legal Consultative Committee (AALCC) in November 1956, one of the issues that the Committee was called upon to consider, was the question of status and treatment of aliens, including their property rights[6]. This was in consonance with the Committee's objectives to advise its member governments on the problems faced by them after their independence and in that process to re-examine for themselves the hitherto accepted concepts of international law in whose emergence they have had no say.

The Committee's recommendations on the subject of property rights of aliens as contained in its Final Report made in 1961 were set out in the form of two draft articles which provided:

> "Art.11: Subject to local laws, regulations, and orders and subject also to the conditions imposed for his admission into the state, an alien shall have the right to acquire, hold and dispose of property;
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> Art.12: (1) The state shall, however, have the right to acquire, expropriate or nationalise the property of an alien. Compensation shall be paid for such acquisition, expropriation or nationalisation in accordance with local laws, regulations and orders[7]. ..."

Japan, however, put in a reservation on the provisions of Art.12 as, according to its view, just compensation should be paid for all acquisition, nationalisation or expropriation and not compensation in accordance with the local laws, regulations and orders.

The Committee had thus by a majority decision left the matter of treatment of "foreign property" to be governed entirely by local laws, regulations or orders without expressing any view on the question as to what standard of treatment would be admissible under local laws or what would be the position if the compensation prescribed for nationalisation or expropriation under such law was illusory. This was because of divergence of views within the Committee itself. Whilst some members were of the view

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[5] In the course of the general debate at UNCTAD VI, Belgrade (1983) the Secretary General of the AALCC called for a concept of partnership between the North and the South as well as between the countries of South *inter se* as the new strategies of the eighties.

[6] The reference was made by the Government of Japan under the provisions of Art.3(b) of the Committee's Statutes which made it mandatory to consider legal problems referred by member governments.

[7] Report of the AALCC, Fourth Session. Tokyo 1961, p.43 at 49.

that the foreign property should receive national standard of treatment, others went to the extent that in certain situations alien property could be expropriated without compensation or with payment of only nominal compensation that could be less favourable than the national standard. Japan adhered to the more moderate of the prevailing traditional concepts that there shall be no taking of property without just compensation[8].

The background on which the Committee dealt with this question needs to be explained in order to fully appreciate its recommendations. At that time most of the countries in Asia emerging from colonial rule were burdened with long-term contracts and concessions granted by the previous regimes and those related to both the agricultural and mining sectors like tea, rubber, tin, coal etc., which constituted the wealth of those nations. Moreover, in some countries like Indonesia or Burma, the concessions related even to vital systems of communication posing problems of national integration and security. For example, the thousands of islands spread over vast areas of the ocean comprising the Indonesian archipelago could be connected only by steamship lines owned by a Dutch company. In Burma, communication between the upper regions of the country and the delta in the south were in the hands of the British owned Irrawadi Flotilla company. It was incumbent in the national interest that those rights and concessions should be annulled and brought under State ownership or control, but there was little money in the State coffers which would be sufficient for payment of "prompt, adequate and effective compensation" or even "just compensation".

Secondly, property rights have never been looked upon with the same degree of sanctity as in the West. To the common man they were seen as instruments of oppression and exploitation, whether it be by the local money lender or the landholder. They wanted to do away with the colonial law that guaranteed those property rights. The new rulers of newly independent nations had to respond to the mood of the people and they saw no reason why the property rights of aliens should be viewed differently[9].

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[8] Record of discussions at the Third (1960) and Fourth Sessions (1961) of the AALCC – unpublished.

[9] For example clause (4) of Art.23 of the Constitution of Burma (since abrogated) laid down "Private property may be limited or expropriated if the public interest so requires but only in accordance with law which shall prescribe in which cases and to what extent the owner shall be compensated" (emphasis added). Art.27 of the Provisional Constitution of the Republic of Indonesia provided "(1) Expropriation of any property or right for the general benefit cannot take place, except with indemnification and in accordance with regulations as established by law".

Even India had at that time carried out an amendment to its Constitution restricting the power of the Courts to question the adequacy of compensation under a law made by parliament[10]. That amendment was primarily intended to meet the needs of the agrarian reform but was applicable to all situations – a factor which perhaps accounted for the views expressed by the Indian Attorney General, departing from a long line of judicial precedents which spelt out the principle that there could be no acquisition of property except for a public purpose and upon payment of "just compensation".

It may be stated that in one view of the matter the "alien property" the Committee was primarily dealing with, was not strictly speaking foreign investments because at the time of the investments, they were by the citizens of metropolitan powers made in their own colonial territories and governed by local laws and had the status of domestic investments. It could therefore perhaps be argued that such investments would continue to be governed by local laws notwithstanding the change in the regime. Another way of looking at the problem could be that on the independence of the colonial territories, such investments acquired the character of "vested rights of foreign nationals" and thus came under the protection of international law. In any event, to the extent the principles laid down were of general application, they were certainly at variance with the "minimum standard" doctrine as they contained no guarantee that the legislative or executive action that authorised expropriation or nationalisation would provide for just compensation.

However, the trend of thinking in various regions of the world by that time had undergone or was undergoing radical changes in the matter of property rights of aliens and the "minimum standard" doctrine in its strict form had to a large extent been watered down.

In the first place, the Calvo doctrine in Latin America was well established and rigidly adhered to by most of the countries of that region. Although the Calvo clause was aimed at restricting the right of diplomatic protection of the home State of the alien, an impression had gained ground that a foreign national by agreeing to be bound solely by the decision of the authorities of the host State (State of investment) impliedly agreed to be

[10] Art.31 (2) of the Constitution had provided no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which fixes the compensation or specifies the principles on which the compensation is to be determined. By the Constitution (Fourth Amendment) Act 1955 a provision was added to the effect "and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate".

governed by local laws and regulations. This was reflected in the Seventh Latin American Conference held in Montevideo in 1933 and later reiterated in the foreign investment code promulgated under the Andean Pact in the form of twin principles that international law merely required the host State to accord national treatment to aliens, and that national courts have exclusive jurisdiction over disputes involving aliens[11]. In the famous diplomatic exchanges of the US Government in respect of Mexican nationalisation of agrarian land it was thus asserted that nationalisation was a legitimate exercise of Mexico's sovereign right to restructure its economy and that US investors were not entitled to higher compensation than Mexican owners[12].

Secondly, the establishment of socialist States in Eastern Europe, entailing extensive nationalisation of foreign property challenged the assumption underlying the Western concept of protection of private property or the sanctity of contracts. The socialist States asserted their unfettered sovereign rights to nationalise foreign property and denied that international law imposed any limitation on such right[13]. Thus, the Soviet Union for example at first rejected any obligation to pay compensation, although this position has later been qualified by the recognition of a duty to pay some compensation for nationalised property.

Thirdly, even Western nations had come to accept the principle that it was the right of a sovereign State to acquire, expropriate or nationalise the rights in property of a foreign national upon payment of "prompt, adequate and effective compensation" departing from the classical formulation of the minimum standard doctrine in its extreme form prohibiting expropriation of foreign property altogether and imposing sanction of restitution upon the expropriating state[14]. Even in the matter of payment of compensation some states had merely insisted on what is called "just compensation" and here again they had been ready to show a degree of flexibility based on the capacity of the expropriating State. For example, immediately after the Second World War the industrially advanced nations began to appreciate that the actual attainment of compensation for their nationals in

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[11] See Art.50, 51 of the Foreign Investment Code.

[12] Diplomatic Exchanges between USA and Mexico, Reply of the Mexican Foreign Minister August 19, 1938.

[13] G. E. Vilkov, Nationalisation and International Law, Soviet Yearbook of International Law (1960), p.78; G. I. Tunkin, Theory of International Law (1974), p.86.

[14] B. Cheng, General Principles of Law as applied by International Courts and Tribunals (1953), p.49–50; A. K. Kuhn, Nationalisation of Foreign Owned Property and its Impact on International Law, AJIL Vol.45 (1951), p.708–712.

cases of nationalisation of property must be dependent upon a variety of factors. These considerations were instrumental in settling the claims of the US nationals against the Federal People's Republic of Yugoslavia by agreement of July 1948 under which the United States accepted a lumpsum payment of 17 million dollars in full settlement of the claims of American property owners whose property in Yugoslavia had been nationalised, although the actual market value of that property was much greater[15]. The post war 1945 nationalisation agreements concluded between the Government of the United Kingdom and the Latin American countries provide for the payment of just and equitable compensation for the expropriation of British owned properties in that part of the world. But the actual compensation paid as a result of the Anglo Mexican Agreement concerning the expropriation of British owned oil properties in Mexico appears to have amounted only to about one-third of the real value of the oil properties taken. In the Anglo-Argentinian and the Anglo-Uruguayan Purchase Agreements the compensation agreed upon appears to represent about 60% of the capital value involved. In the agreement between the United Kingdom and Poland, and in the agreement concluded between the United Kingdom and Czechoslovakia (1949) the compensation stipulated is understood to be one-third of the value of the British investments nationalised by those countries. In the case of Yugoslavia (1949) the settlement appears to represent 50% of the value of the British investments. By and large, it is said that the United Kingdom agreed to insist merely on the principle of compensation in case of expropriation but the amount of such compensation had been settled at figures ranging from one to two-thirds of the value of British investments in the countries concerned, without taking into account the value of contractual rights. The United Kingdom has been content to waive portions of British claims, taking into account equitable considerations such as the general post war difficulties and the scarcity of foreign exchanges in developing countries[16].

Moreover, the upsurge of freedom and radical nationalism in Asia and Africa led to a move to do away with all foreign property especially in the natural resource sector. In Mainland China, nationals of several Western powers as well as Japan, who had enjoyed privileged positions under treaties that were termed as unequal, lost all their property and concessio-

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[15] L. B. Orfield/E. D. Re, Cases and Materials on International Law (1955), pp.534–535; Kuhn, ibid., p.710.

[16] G. Schwarzenberger, The Protection of British Owned Property Abroad: Current Legal Problems, Vol.5 (1952), p.295.

nary rights under sweeping moves of expropriation during the cultural revolution. Iran under Prime Minister Mosadek decided to do away with the British concessionary rights in oil and nationalise the property of the Anglo Iranian Oil Company whose majority stock was owned by the British Government. In East Africa, the move noticeable was similar and in that process the properties owned even by nationals of Third World countries like India and Pakistan came under confiscatory regimes without payment of any compensation whatsoever.

Almost at the same time as the AALCC was examining the question of investments and property rights of aliens from the legal perspective, the matter was being debated at the political level before the General Assembly of the United Nations. Also in those debates almost all the newly independent countries asserted that concessionary and contractual rights obtained by foreigners during the colonial period could be done away with under municipal legislations as they posed serious problems to their own development and constituted an affront to their sovereignty. The debates led to the adoption of a resolution by the General Assembly on the Permanent Sovereignty over Natural Resources in 1962[17]. This was followed by the Charter on Economic Rights and Duties of States in 1974[18] and the Declaration of the Establishment of a New International Economic Order[19] in the same year. These resolutions and declarations recognised that every State had the right to freely exercise full permanent sovereignty over its wealth, natural resources and economic activities. It was declared that each State had the right to nationalise, expropriate or transfer ownership of foreign property in which case "appropriate" compensation was to be paid by a state adopting such measures taking into account its relevant laws and regulations and all circumstances that the State considered pertinent[20].

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[17] G.A. Resolution No.1803 (XVII) 1962.

[18] Resolution No.3281 (XXIX) 1974.

[19] Resolution No.3201 (S-VI) 1974.

[20] The relevant provisions of Chapter 2 of Art.2, para.2 of the Charter on Economic Rights and Duties of States are in the following terms:
"(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investments; (b) ...; (c) To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful

It was also provided that in the case of controversy, the same was to be settled under the domestic law of the nationalising State and by its tribunals unless it was mutually agreed by all States concerned that other peaceful means might be sought. In other words, these resolutions and declarations basically enunciated four principles, namely, (i) States have the sovereign right to control the entry of foreign investment and to regulate all activities in relation thereto; (ii) the right to nationalise foreign property is an inherent attribute of national sovereignty and the exercise of this fundamental right is not subject to any condition beyond the duty to pay "appropriate" compensation having regard to all the circumstances; (iii) State contracts or investment agreements freely entered into with foreign companies are to be respected subject to sovereign power of the host State to call for re-negotiation or revision or even to take unilateral action for modification of such contracts on the basis of changed circumstances; (iv) while a State may grant special incentives to attract foreign investments in accordance with its development objectives, it is not required to accord preferential treatment to foreign nationals.

Thus, the concept of nationalisation or expropriation only for a public purpose and upon payment of "prompt, adequate and effective compensation" or even "just compensation" was done away with and replaced by provision for payment of "appropriate" compensation which was difficult to define without any guidelines as to what such compensation might be. No judicial tribunal has been able to apply the formula, and in the ultimate analysis it has become no more than a rule of thumb!!

The Declaration on the New International Economic Order together with the Charter on Economic Rights and Duties of States constituted the high water mark in the statement of aspirations of developing countries for their economic sovereignty and development. It was, however, soon realised how difficult it would be to implement them, because the principles contained in the declaration and the charter envisaged greater co-operation and investments by industrialised nations in developing countries for their growth, and at the same time they contained elements of possible conflict which were clearly stated in the charter itself. The development strategies under the Plan of Action were based on some kind of moral obligation on the part of affluent nations to help the less developed by way of development assistance, transfer of technology, skilled manpower and managerial expertise but at the same time the Plan of Action asserted the right of the

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means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means".

host State to control the investments and to expropriate such investments or to annul contracts, if need arose or at the mere pleasure of the government, upon payment of what was termed as appropriate compensation. The Lima Declaration adopted at the Second UNIDO (United Nations Industrial Development Organization) Conference in 1975, describing industrialisation as a dynamic instrument of growth called for rapid industrialisation of developing countries and fixed a target of 25 % for their share in total world manufacture by the year 2000[21]. At about this time in the ongoing debates on the new order of the oceans, the concept of exclusive economic zone was being debated which could bring the vast potential areas of natural resources in a belt of the sea adjacent to their coast within national jurisdictions[22]. Large sums of money and advanced technology were likely to be needed for the exploration and exploitation of these resources. But the investments from industrialised countries were slow in forthcoming because the confidence of the private sector, who had the patented technology and finances, was shaken; they were unsure of the stability of the investments. This was more noticeable in areas where long term commitments were to be made or where the investments related to exploitation of natural resources. There had been confiscations and expropriations in the past; business men had learned to take the risks; their governments had taken up their cause; there had been protests and claims; but now for the first time the international community in solemn declarations was endorsing the legality of action of nations to expropriate property on payment of what may be termed "appropriate compensation" as a part of the new international economic order which was meant to transform a colonial economy into one with structured and balanced economic growth.

The attitude of the private sector in not coming forward to make substantial investments abroad or even curtailing their investments was found to be equally detrimental to the interest of industrialised nations. Their economies were faced with stagnation. One of the methods adopted by several Western nations to arrest this trend was to fall back upon and widen the scope of the schemes for state insurance which had been elaborated earlier with a twofold objective, namely, to protect the investment of the private investor as well as to encourage the promotion and continuance of

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21 Cf. Report of the Independent Commission on International Development Issues, North-South: A Programme for Survival (1980), p.172.

22 See the negotiating texts for the Third United Nations Conference on the Law of the Sea.

such investments by their nationals. In the United States, following upon large scale expropriation of American property in certain developing countries in the mid fifties and the sixties, the public at large and even some multinational corporations had expressed their extreme reluctance to get into investments abroad. As this was likely to be detrimental to the American economy generally and also to the role of the United States in world affairs, the government introduced certain schemes of insurance under legislative authority to be administered by State corporations in order to provide a form of guarantee to the investor against his loss of investment[23]. Under these schemes if loss was suffered by an investor due to any act or omission by the State where the investment was made, the investor could lodge a claim before the State corporation without having to pursue what is often regarded as fruitless litigation before the local courts. Investment guarantee insurance was introduced in France shortly after the promulgation of nationalisation decrees in one of its former colonies. A law was passed making it compulsory for investors or contractors doing business abroad to take out a policy of insurance. In Britain a similar scheme was adopted known as EGCD and in the Federal Republic of Germany as Hermes (-Kreditversicherung AG). In Canada investment guarantees were provided by the Export Development Corporation on behalf of the State.

Apart from the formulation of the insurance schemes at the national level, some of the countries continued their efforts to negotiate bilateral treaties for investment protection with developing countries. During the first development decade when US assisted investments in developing countries under various aid programmes were extensive, the United States entered into quite a number of investment protection agreements. These agreements, however, did not spell out the standard of treatment to be accorded to the investment, but merely provided that the governments parties to the treaties would consult between themselves concerning investment projects in the developing country by the nationals of the United States with regard to which investment guarantees could be given by the United States under its laws and regulations. It was further provided in these bilateral agreements that the United States would not issue any guarantee with regard to a project unless it was approved by the country of investment. The host government in its turn agreed that where such

[23] The Overseas Private Investment Corporation (OPIC) was created under US Legislation in 1961 following upon the Cuban nationalisation of American properties. (See AJIL Vol.73 [1979], p.104). In 1985 OPIC's services were available in regard to US investments in more than 120 countries.

guarantees were given by the United States and payments were made in accordance with those guarantees, it would recognise the right of the United States to any claim or cause of action or the right of the investor arising out of any situation which led to payments being made in terms of the guarantee. Canada also entered into similar agreements with several developing countries since the year 1971. These agreements provided for guarantees being given by the Government of Canada through its agent, the Export Development Corporation, in respect of the Canadian investments in the developing country concerned, the transfer of the rights of the investor to the government where payments had been made under the guarantee as also modalities for settlement of disputes. The Federal Republic of Germany, however, in its agreements concluded since the year 1963, dealt with the substantive question of treatment of the nationals of the Federal Republic of Germany and companies registered therein. Thus the treaties provided for security of investments, protection from expropriation, payment of adequate compensation in tangible form in the event of nationalisation, repatriation of capital and profits and also the settlement of disputes. The agreements concluded by the Netherlands since 1964 followed the pattern of the German investment protection agreements and the same pattern was adopted in agreements entered into by Switzerland, France, Belgium, Denmark and Norway. However, the number of such agreements on the substantive questions of treatment and protection of investments were limited, and virtually confined to countries which were ready to accept the concept of free economy like Malaysia, Singapore or Indonesia after the overthrow of the Soekarno regime.

In 1972 the World Bank took an important initiative to encourage investments in developing countries through preparation of a scheme for the establishment of an international investment insurance agency. The types of risks which were proposed to be covered by the scheme under World Bank auspices included *inter alia:*

i) expropriation, confiscation or any other type of governmental action or inaction which deprives the investor of effective control over all the benefits of its investments;

ii) governmental restrictions on conversion and transfer of assets and profits; and

iii) armed conflict or civil unrest.

Although the Executive Directors of the Bank had approved of the proposal, the scheme could not be brought into being as it was difficult to reconcile the conflicting positions of member States on some of the important issues and the scheme therefore had to be abandoned.

However, another initiative taken by the Bank a few years earlier to create stability and confidence in investments by providing a machinery under international auspices for settlement of investment disputes had met with a modicum of success. A convention was concluded in 1965 under which an international centre for settlement of investment disputes was established, providing for an international forum for settling disputes between a government and a private investor. But the success of the scheme was somewhat limited due to the unwillingness of Latin American States and a number of other countries including India to accede to the Convention. The reluctance of Latin American countries to do so was by reason of the impact of the Calvo doctrine as incorporated in their laws or the constitutions which provided for investment disputes to be settled only by national courts.

The result was that the investment climate whether it be in the shape of pure investments, joint ventures, turnkey type of projects or economic collaboration could not be improved.

Many developing countries were still slow to realise that there could be no substantial increase in the flow of investments without adequate protection against interference by local authorities, facilities for repatriation of capital and profits and guarantees against expropriation or nationalisation. They chose to point their finger at industrialised nations for lack of earnestness in providing adequate financial assistance and transfer of technology[24]. They talked of economic co-operation among developing countries as a possible alternative but even here there was scant success. A few joint venture arrangements in limited areas or some capital assistance proved to be merely a drop in the ocean.

The oil producing countries who had vast amounts at their disposal since the price hike in 1973 chose to invest in industrialised countries where investments would be safe and returns adequate. Here they demanded a new form of protection, that is guarantees against the fall of the real value of investments by reason of currency fluctuations[25]. In so far as developing countries were concerned, the oil producing countries restricted themselves to concessionary lending of direct economic assistance for a limited number of projects, rather than entering into investments in the true sense. Even in regard to the modest investments made in the sister Arab countries, they established an Inter Arab Investment Guarantee Corporation

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[24] See the repetitive debates before the Second Committee of the General Assembly, at UNCTAD Sessions and meetings, and the Summit meetings of non-aligned nations.

[25] Euro-Arab Dialogues in 1979 and 1980.

under a convention to which some 18 Arab States were parties[26]. The purpose of the corporation was to provide insurance coverage to Arab investors in investments between the contracting States to be given in the form of reasonable compensation for losses resulting from risks which were not of a commercial nature. These included measures taken by public authorities in the host country whereby the investor was deprived of substantial rights in respect of investments including confiscatory or expropriatory measures such as nationalisation as well as restrictions imposed on the investor concerning the repatriation of the principal of his investment and earnings. It was clear therefore that even investors within the region were not likely to come forward without adequate safeguards.

It was in this setting that the AALCC once again came on the scene. During the discussions, at its Doha Session held in 1978 followed by the Seoul Session in 1979, on Economic Co-operation within the Asian-African region, the Committee was asked to prepare a scheme and legal framework for regional co-operation in industry. It was in this context that the question of investment protection was taken up by the Committee but the expression "investment protection" was still taboo to some of the vocal elements in the Group of 77. For example, the delegate of Syria speaking at the Jakarta Session of the Committee in 1980 had stated that:

> "It is my belief that the concept of protection about which we are speaking today is an antiquated concept imposed by the multinational corporations on the poor underdeveloped countries which fall victims to the control of foreign capital ... In my view what is called bilateral agreements for investment protection is a dangerous matter threatening the sovereignty of the developing countries and providing an outlet from which the countries exporting the foreign capital could interfere in the internal affairs of the developing countries threatening their national interests at any time and for any trivial reason. History is full of such instances from which we should draw our lesson"[27].

On the other hand, during the same meeting, Kuwait attached the highest priority to the study on the law of investment protection in order to pave the way for regional co-operation in an effective manner when a political decision is taken for the purpose[28]. Indonesia considered the suggestion to have bilateral umbrella agreements in a favourable light as it might facilitate

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[26] The Convention was concluded in 1974; up to 1977 18 Arab States had become parties by means of ratification or accession.

[27] Verbatim Record of Discussions at the 21st Session of the AALCC held in Jakarta in April 1980 (unpublished), pp.82–83.

[28] Ibid., p.93.

effective protection of investments in a practical manner[29]. Pakistan favoured the drawing up of a regional investment protection agreement in order to secure and protect the rights as well as to determine the obligations of the potential investor of one country of the region in another[30]. Sri Lanka strongly supported measures of investment protection under constitutional guarantees as well as bilateral investment protection agreements[31]. The Philippines, however, sounded a note of caution when the delegate said "it should also be borne in mind that the permanent sovereignty of states over their natural resources as provided in the declaration on the establishment of a new international economic order should be taken into account"[32].

Even though some favourable response had emerged on the question of investment protection at the Jakarta Session of the AALCC in 1980, it was considered advisable at that stage to proceed with caution and find an expression which would convey the idea of protection but was likely to be more acceptable to the developing countries of the region. It was therefore decided to use the term "stable but flexible relations" between the investor and the host country in the future discussions.

At the first Ministerial meeting on regional co-operation in industries held in Malaysia, under the Chairmanship of the then Acting Prime Minister, in December 1980[33], protection of investments were sought to be supported on the following basis:

> "In any programme for promotion of mutual co-operation or assistance, whether through location of major industrial plants or capital participation by way of investments in industrial projects or joint venture arrangements for imparting or transfer of technology, it is a matter of fundamental importance for success of any scheme or venture that some sort of stability in the relations between the investor and the host government must be foreseen. The investor would need to know in advance the investment climate in the host country particularly in regard to protection of investments as also the conditions for repatriation of capital and profits. The investor would also need to be satisfied

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29 Ibid., p.115.

30 Ibid., p.117.

31 Ibid., p.121.

32 Ibid., p.113.

33 The Ministerial meeting was held in Kuala Lumpur from 8th to 12th December 1980 under the auspices of the Government of Malaysia and the AALCC. The meeting was attended by Industry Ministers and officials from Bangladesh, Egypt, Indonesia, Iran, Iraq, Republic of Korea, Democratic Republic of Korea, Malaysia, Nepal, Pakistan, Philippines, Qatar, Saudi Arabia, Singapore, Sierra Leone, Somalia, Sri Lanka, Syria, Thailand and Turkey.

that the terms and conditions on which he has agreed to invest could reasonably be expected to continue to be operative for the period of investment and that nothing should be done by the host government to the detriment of the investor in derogation of the agreed terms of the conditions. Nevertheless, a certain degree of flexibility should be contemplated since it may well happen over the life of an investment that what was fair and equitable at the beginning may no longer be so in the light of changed circumstances."

A distinction was also sought to be drawn between purely commercial investments made primarily with profit making objectives on the one hand, and those classes of investments through which substantial benefits accrue to the host country in the shape of investments in developmental projects on the other. It was emphasised that in the latter classes of investments stable but flexible relations was a *sine qua non*[34].

Some of the leaders were convinced of the need for affording protection to investments in order to create stable but flexible relations but they wanted some form of legal basis which would not be inconsistent with the principles enshrined in the Resolution on Permanent Sovereignty over Natural Resources or the Charter of Economic Rights and Duties of States. It was pointed out that even though the Resolution and the Charter had recognised the untrammelled discretion and absolute supremacy of national law and jurisdiction in the matter of nationalisation, compensation, revision or termination of contracts, there would be no derogation from those principles if a State in the unfettered exercise of its sovereignty were to decide upon acceptance of certain practices and norms in regard to protection of investments, or if it chose to enter into investment protection treaties under which the contracting parties may agree to be bound by certain rules in regard to conditions under which nationalisation may take place or the measure of compensation to be paid.

The Ministerial meeting recognised the need to create stable but flexible relations between the investor and the host government, particularly where the investments were made by one developing country in another. There was general agreement at the meeting that the investment climate should be promoted through adequate provision for protection of investments, repatriation of capital and profits as well as a procedure for settlement of disputes. They indicated the desirability of formulation of a draft model umbrella investment protection agreement for consideration by the member governments[35].

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[34] AALCC Study presented at the Ministerial meeting (unpublished).
[35] Report of the Kuala Lumpur Ministerial meeting, 1980 (unpublished).

This was a significant development. Although some individual States had entered into bilateral investment protection agreements by then, it was the first time since the adoption of the Charter of Economic Rights and Duties of States that a Ministerial meeting of the Asian-African States recognised the concept of investment protection, although at that time it was meant to be applicable to the countries of the region. The recommendations of the Kuala Lumpur meeting were endorsed by another Ministerial meeting held in Istanbul in September 1981 at the invitation of the Government of Turkey in collaboration with the AALCC.

Subsequent to the Istanbul meeting, extensive consultations were carried out with various governments in the region with a view to preparation of a draft investment protection agreement. These consultations revealed a good deal of divergence in State practice and the attitude of States towards bilateral umbrella investment protection agreements as well as in the matter of treatment of foreign investments. As a result of the overall survey of the position held by various governments within the Asian-African region it became apparent that a uniform approach in the matter of promotion and protection of investments through the formulation of a single draft of a bilateral treaty, however desirable, might not result in adequate response in practical terms. It was therefore felt that the AALCC study on the subject could perhaps contemplate preparation of models for three different types of bilateral agreements. This approach was considered to be particularly desirable as the primary objective that was aimed at was to create a climate in which governments would be prepared to accept the concept of promotion and protection of investments. It was felt that through preparation of various alternative drafts it might be possible to promote such bilateral agreements in the manner acceptable to the governments concerned based on terms and conditions suited to their political philosophy. It may be observed that a single model text incorporating a set of provisions which may represent a common standard acceptable to a group of States and basically reflecting their negotiating position is extremely useful when the model agreement is intended for use by a small group of nations having identity of interest and approach on economic issues. But a common position had yet to emerge among Asian-African States in regard to investments which would make it possible for the governments of the region to accept a uniform set of norms.

Accordingly, the work in the AALCC proceeded on the formulation of three model drafts. Model A proceeded basically on the pattern of the agreements entered into by some of the EEC countries but with certain changes. The provisions contained in the model draft stipulated that each contracting party shall encourage and create favourable conditions for the nationals of the other contracting party to invest capital, technology and other forms of assets in its territory through the according of fair and equitable treatment and ensuring protection and security for such investments. It also provided for periodical consultations between the contracting parties concerning investment opportunities, and for specification of terms and conditions of investment in the letter of authorisation. The most favoured nation clause was incorporated in the draft agreement which also provided for full freedom and facilities in the matter of repatriation of capital and return on investments subject to any reasonable restrictions for temporary periods to meet exceptional financial or economic situations and subject also to any condition for re-investment which may be stipulated at the time of the reception of the investment. As regards nationalisation and expropriation, it was provided that such measures should be taken on a non-discriminatory basis and in accordance with law and that adequate and effective compensation should be paid. It also provided for settlement of disputes between the investor and the host State under various alternative procedures which included international arbitration and conciliation.

Model B contemplated that subject to general norms set out in that agreement the host government shall specify in respect of each investment the terms and conditions relatable to repatriation of capital and profits as well as the principles for determination of compensation in the event of expropriation or nationalisation which shall not be altered during the period of investment.

Model C was meant to apply to specific classes of investments in mining and other natural resources sector but the terms and conditions contained therein were basically similar to Model A.

In the course of further debates on the draft Models it was recognised that although the Committee's mandate was to prepare model agreements for promotion and protection of investments among the countries in the Asian-African region, the matter could not be considered in isolation as the approach of the governments in this regard was bound to have its impact on protection of foreign investments emanating from developed countries in other regions. It was pointed out by some representatives that there ought not to be any distinction in investment protection between investors from developed and developing countries since investments both in capital and technology were obtained primarily from industrialised States. Moreover many of the developing countries had become investors during the past decade and held extensive investments in Western countries which could not be adequately protected in the absence of reciprocity. The models were basically approved as being suitable for general application at the Tokyo Session of the Committee in 1983 and were formally adopted at the Kathmandu Session in 1985[36]. The Model Draft B does not appear to have any practical utility beyond providing an alternative negotiating text to certain countries but it had served a very useful purpose in ensuring co-operation of those who were not prepared to accept the standard of treatment accorded to foreign investments under Model A.

During the progress of work within the AALCC on the subject which began in 1978 a great deal of development had been taking place in various regions of the world. Some countries had liberalised their laws and regulations; and even at an earlier point of time the provisions in the constitutions of quite a number of newly independent countries provided for protection of investments. But their impact had become limited on promoting investments because experience had shown that the constitutions were often abrogated and laws could be easily changed on successive changes in regimes. There was nothing to prevent this from happening as such steps could be justified on the basis of the Charter of Economic Rights and Duties of States or the Resolution on Permanent Sovereignty over Natural Resources. A number of developing countries had offered attractive incentives in the shape of allowing a controlling interest in equity participation in projects; a larger share of profit for the investor in joint venture arrangements; exemptions from taxes or substantial concessions in the matter of taxation; and liberal rules on repatriation of profits. But the complexities of laws and administrative difficulties and delays involving several government departments had rendered such schemes almost nugatory.

On the other hand, the decisions handed down by some of the international tribunals in oil nationalisation cases had raised doubts and revived the suspicion of the developing countries that if an occasion were to arise the minimum standard doctrine might still prevail. For example, in *Texaco v. Libyan Arab Republic*[37] the sole arbitrator went to the extent of holding that the right of a State to nationalise could not prevail over the guarantees contained in the stabilising clauses in the provisions of an international contract, a doctrine of law which had long been discarded even by industrialised nations. In that view of the matter he came to the conclusion that

[36] The Models are reproduced in ILM Vol.23 (1984), p.237. The writer would wish to acknowledge his debt of gratitude to A. Broches, former Vice President and General Counsel of the World Bank, for his continued advice, guidance and formulation of ideas throughout the work of AALCC on investment protection.

[37] ILM Vol.17 (1978), p.1.

the act of nationalisation was itself unlawful irrespective of the question of compensation and ordered restitution of the rights under the contract. In *LIAMCO* v. *Libyan Arab Republic*[38] which concerned the same Libyan decree of nationalisation, another arbitrator by referring to the Resolution on Permanent Sovereignty over Natural Resources, held that the act of nationalisation would have been lawful if compensation had been provided. However, whilst recognising the principle that under the aforesaid Resolution only "appropriate" compensation was admissible, he awarded very substantial damages as compensation. Again in the *ARAMCO*[39] arbitration, the Arbitral Tribunal had come to the conclusion that the award was to be made in accordance with the principles of international law because the law to be applied was not the law of Saudi Arabia since the parties intended to withdraw their disputes from the jurisdiction of local courts. However, in the case of *AMINOIL* v. *State of Kuwait*[40] the approach of the arbitrator was far more acceptable which demonstrated the lack of uniformity in the application of the law.

Nevertheless, the governments of both the industrialised nations and developing countries have shown their readiness to stabilise relations in the matter of investments, and have demonstrated a great deal of flexibility inspite of doctrinal differences. Since the year 1978, more than 200 bilateral investment protection agreements on a substantive basis have been concluded which have spelt out in detail the conditions for reception and treatment of investments, including the question of repatriation of profits and the measures of compensation in the event of expropriation or nationalisation[41]. The agreements entered into by the EEC countries as well as Switzerland, Sweden and Japan by and large follow a similar pattern. These provide for fair and equitable treatment or most favoured

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[38] ILM Vol.20 (1981), p.20.

[39] *Government of Saudi Arabia* v. *Arabian American Oil Company*, International Law Reports, Vol.27 (1963), p.117.

[40] *State of Kuwait* v. *AMINOIL*, ILM Vol.21 (1982), p.976.

[41] The United Kingdom alone has concluded some 20 such agreements since 1980 with countries in various parts of the world such as Belize, Cameroon, Costa Rica, Egypt, Jordan, Lesotho, Malaysia, Panama, Papua New Guinea, Paraguay, Republic of Korea, Senegal, Sierra Leone, Sri Lanka, St.Lucia, Thailand and North Yemen. Switzerland is party to more than 30 investment protection agreements with various countries including those in Latin America such as Costa Rica, Ecuador and Panama. The member states of the EEC including Belgium, France, Netherlands, Italy and the Federal Republic of Germany as well as Scandinavian countries like Sweden have also concluded numerous bilateral agreements. Japan is also a party to investment protection agreements with some of the developing countries including Sri Lanka and Egypt.

nation treatment in the territories of the contracting States for the investment of their nationals; repatriation of capital and returns, subject to certain conditions on re-investment and subject also to situations of financial emergency in the host State; payment of compensation in the event of nationalisation or expropriation or for losses suffered; access to courts and tribunals and settlement of disputes. In regard to nationalisation or expropriation it is generally provided that such measures can only be taken on a non-discriminatory basis for a public purpose and in accordance with the laws of the host State upon payment of prompt, adequate and effective compensation. In the treaties concluded by the United States, however, provision is usually made for full value of expropriated interests as compensation as well as application of "international law" in the treatment of investments; and that is why the United States has not been able to conclude more than a few treaties on a comprehensive basis with developing countries, because they are still suspicious of what may be interpreted as international law and want to guard against the revival of minimum standard doctrine[42]. Specific mention might be made of treaties concluded between Switzerland and Latin American countries where provisions have been made against arbitrary or discriminatory treatment, and it is specified that adequate compensation shall be paid in case of expropriation without attempting any guidelines for computation of such compensation. It is still unclear whether the Latin American States would agree to any forum except their national courts if disputes were to arise. Of particular significance are the treaties concluded with China by Sweden in 1982, followed by France, Belgium, Romania and the Federal Republic of Germany. In the German-Chinese treaty, the standard of treatment for investments is stipulated as being in accordance with the principles of international law, whilst in the agreements between China and France, the domestic law of the host State is applicable; and in the treaty between Belgium and China, domestic law in conjunction with the principles of law generally recognised by civilised nations has been regarded as the governing principle. The process of stabilising relations in the matter of investments appears to have proceeded a step further with the conclusion of the Lomé Convention III between the EEC and the ACP (African, Caribbean, and Pacific States) countries on December 8, 1984. The objectives and principles as set out in Art.I para.3 of the Convention are "to intensify their efforts to create, with a view to a more just and ba-

[42] The United States has been able to conclude treaties on a substantive basis only with Panama in 1982, followed by Egypt on September 29, 1982 and Turkey in 1986.

lanced international economic order, a model for relations between developed and developing states ...".

One of the important features in the recent treaty practice that one notices is an element of mutuality and the provision for reciprocal rights and obligations. This is not only because of the concept of sovereign equality of States as recognised in the UN Charter, but also for the more practical reason of greater mobility of the people and progressively wider investments and property assets held by nationals of developing countries in industrialised States. For example, the flow of direct investments to the United States alone which stood at around 1 billion US dollars in the early seventies had continued to grow since 1973, reaching its peak in the year 1981. In the year 1979 the investments had reached the figure of nearly 12 billion US dollars followed in the subsequent years by approximately 17 billion in 1980, 24 billion in 1981, 14 billion in 1982, 12 billion in 1983, 22 billion in 1984 and 14 billion dollars in 1985[43]. Thus, the extensive investments and substantial assets held by Iran in the United States were primarily responsible for the conclusion of the agreement for the constitution of an international tribunal for adjudication of claims of US and Iranian nationals, which is evidence of recognition of the concept that compensation had to be paid when the contractual or property rights of an alien are adversely affected by State action or inaction. The decisions of the tribunal may have some impact on future development of the law.

It may be stated that in order to further stabilise relations, the Western nations have continued to show the same degree of flexibility in the matter of compensation for nationalised or expropriated property as they had done in the post war nationalisation cases. Recent claim settlements negotiated by Britain and the United States have spelt out the principle of "just and equitable" compensation rather than "prompt, adequate and effective" compensation. This is borne out by the agreement signed in mid September 1983 with the Tanzanian Government which agreed to pay a British based multinational approximately US$ 12,500,000 as lumpsum compensation for eighteen companies nationalised in September 1978. In April 1984, the British based Mitchell Cotts Group agreed to accept payment of £2,600,000 from the Ethiopian government as compensation for nationalisation in 1975 of a subsidiary company engaged in plantations. Ethiopia also paid under an agreement with the United States, concluded in December 1986, a lumpsum of 7 million dollars in settlement of claims of US nationals including corporations as compensation for properties effected

[43] See survey of Current Business.

by nationalisation. A settlement was also reached on the same basis between the United States and the People's Republic of China on March 2, 1949[44].

Notwithstanding the progress made towards stabilising the investment climate and the improvement in relations between developed and developing countries, the investment flow to the developing nations has continued to dwindle over the years. The investments from the United States which had reached the figure of 25 billion in 1979 and 19 billion in 1980 showed a sharp decline from 1981 when the investments stood at less than 10 billion dollars. The 1983 figures show US investments at a little over 5 billion followed by 4.5 billion dollars in 1984 and the same level in 1985[45]. The total direct investments from OECD countries also show a gradual decline to 9.5 billion dollars in 1980 and 6.3 billion dollars in 1983, excluding the investments in the petroleum sector[46]. The bulk of US investments were concentrated largely in a few countries namely Argentina, Brazil, Mexico and Panama in Latin America, Egypt, Hong Kong, Singapore and Indonesia in the Asian-African region. The poorer nations in Africa inspite of many incentive schemes, were hardly able to attract any investments.

There were various causes, mainly economic, for this declining trend in investments. Firstly, due to the recession and protectionist policies in industrial countries, the growth rate of export oriented industries in developing countries, which offer investment opportunities, had been considerably retarded. Secondly, the market drop in commodity prices had drastically reduced the export earnings of many developing countries and consequently the attractiveness of investments in the agricultural and mining sector, which had accounted for a large proportion of overall foreign investments. Thirdly, the lack of improvement in infrastructure including power generation, had added to the cost of production, and the advantages of cheaper labour in developing countries were offset by new labour saving technology. In other words, the investments in traditional areas were no longer profitable. Furthermore, the balance-of-payments difficulties of heavily indebted nations stood in the way of attracting the large volume of foreign investments needed to expand their production facilities[47]. However, there were many untapped investment opportunities in the natural

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44 See AJIL Vol.73 (1979), p.487.

45 See note 43.

46 Investing in developing countries OECD November 82; Development Co-operation, OECD, 1984.

47 I. F. I. Shihata MIGA and Foreign Investment (1988), introductory chapter.

resources sector and especially the vast resources of the exclusive economic zone which could be profitably exploited through Western technology. But the investors were not ready to enter this area, not only because it would require large scale capital outlay and long-term commitments, but also because of unsettled conditions and the volatile regimes in many developing countries especially in Africa. Furthermore, the shadow cast by the Resolution on Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties of States had continued to linger. The unfettered right of a State to nationalise or expropriate investments was seen to hang as the proverbial "Sword of Damocles". Even the bilateral investment protection agreements and the change in the attitude of several developing countries in the matter of investment protection could not completely remove apprehensions of the investors[48].

In 1984, President Clausen of the World Bank revived the Bank's earlier initiative to provide an insurance scheme under multilateral auspices to cover political risks of investments. The climate was ripe for the experiment with the changing attitude of governments towards investments, but it was due to the persistent promotional efforts and dynamism of General Counsel Ibrahim Shihata that the Bank was able to bring into being a Multilateral Investment Guarantee Agency (MIGA) within a remarkably short time frame under an international convention[49]. This new initiative had certain features which made it more attractive than the earlier scheme

[48] The situation was discussed at a high level meeting on International Economic Cooperation – Strategies for the 80s, sponsored by the AALCC and the American Society of International Law, held in New York in December 1984. The meeting was attended by representatives of the Governments of Bangladesh, China, Egypt, India, Indonesia, Japan, Kenya, Mauritius, Nepal, Nigeria, Philippines, Sierra Leone and Thailand. The US Government Offices represented were the office of the US Trade Representative, the Department of State (Office of International Finance and Development and the Office of the Legal Adviser) and the Department of Commerce. The World Bank was represented by the Vice-President and the General Counsel as well as the Vice-President for Energy and Industry. The UN Agencies represented were the UN Development Programme and the Commission on Transnational Corporations. The OECD also participated through its Deputy Director for Finance and Fiscal Affairs. The Industry and Banking interests represented at the meeting included the Exxon Corporation, the National Association of Manufacturers, the Chase Manhattan Bank, IBM, World Trade Americas, Far East Corporation, Brown Brothers, Harriman & Co., W.R. Grace & Co., R.C.A., Pfizer Incorporated, General Electric Company, and the US Council for International Business. Another meeting with the same pattern of participation was held in December 1985 to consider the possible effects of MIGA in generating investments with the added co-sponsorship of the Inter-American Juridical Committee.

[49] The Convention was approved at the Bank's Annual meeting in Seoul on October 11, 1980.

introduced in 1972. First, whilst the earlier proposal had envisaged an agency closely linked with the World Bank financed and controlled by developed countries, the 1984 scheme contemplated an autonomous body which, though maintaining close links with the Bank, will be financed and controlled jointly by the developed and developing countries. Secondly, the previously debated project had visualised a mere insurance facility, whilst MIGA was designed to provide a forum for policy co-operation in investment matters between the investor countries and countries of investment as well as the private investor.

It is yet to be seen whether the MIGA will be able to generate a greater flow of investments to the developing countries, and especially to the sectors where they are most needed, in the immediate future. The same would depend largely on economic factors like availability of money supply in industrialised countries and profitability of the investment, but MIGA will certainly go a long way in confidence building and creating conditions for stability. The involvement of a multilateral agency linked with the World Bank itself is bound to reduce possibilities of arbitrary action on the part of the host country, sometimes preventing the loss from occuring at all, and in the event it should occur, mitigating the extent of the loss[50]. Furthermore, it may even have a wider impact. MIGA represents a multilateral will in favour of stability and protection of investments which taken together with bilateral investment protection agreements could help to remove the adverse psychological effect on investors that had been created by the Resolution on Permanent Sovereignty over Natural Resources or the Charter of Economic Rights and Duties of States.

Moreover, in the inter-dependent world community of today the concept of investment protection and respect for just and equitable rights of the investor cannot be viewed merely from the angle of promoting investments. It is to be looked upon as contributing to building of stability and confidence in the relations among nations in wider areas. It adds to the credibility of a government which respects the rights of an investor and demonstrates that it can be relied upon to fulfill its international commitments. That is perhaps the reason why China, soon after its emergence from the cultural revolution, promptly issued its investment code guaranteeing the stability of foreign investments, settled compensation claims for expropriated property in the past, and even went to the extent of entering into bilateral investment protection agreements. This has helped to remove suspicions and restore the faith of the nations in the new regime for its

[50] Shihata (note 47), introductory chapter.

rightful role in world affairs and respect for international law. Similarly, Uganda, after the overthrow of President Idi Amin openly declared that it would respect property rights of investors to establish confidence in the new government[51].

Thus, India, where the reception of foreign investments had encountered difficulties due to bureaucratic hurdles, has nonetheless continued to maintain a sustained record of fair treatment of foreign property even though it has not entered into any bilateral treaty for protection of investments. By way of example it may be stated that at the time when banks were nationalised, foreign banking was excluded from the operation of that law, and when oil companies were taken over, fair and adequate compensation was paid. The countries in the socialist block, who do not recognise the sanctity of private property rights as a part of their philosophy and are not anxious to invite foreign investment, with a few exceptions, outside the CMEA block (COMECON), have been ready to settle claims for past expropriations[52]. This is presumably because of their desire to establish that they can be relied upon to honour their commitments when dealing with the West. Furthermore, it should be noted that even with countries where investment opportunities are few, due to economic feasibility or lack of profitability, the Western nations have gone ahead with negotiation and conclusions of bilateral treaties perhaps to establish the principle that property rights and investments need to be respected as an essential prerequisite of the new world order in an inter-dependent world community.

Moreover, experience has shown that whenever property rights of foreign investors have been affected through arbitrary action in violation of international law, world peace and security has been disturbed. To mention only a few recent examples, it may be pointed out that in the wake of nationalisation of the Suez Canal Company, a situation developed that brought nations to the brink of war which could be brought under control only through the intervention of the Security Council and an international conference on the Suez. Here the act of nationalisation was not seriously

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[51] Statement by the Ugandan Minister of Industry at the Istanbul Ministerial meeting on Regional Co-operation held in September 1981.

[52] Apart from the post war claims settlements by certain Eastern block countries, Czechoslovakia concluded an agreement with the United States on January 29, 1982 under which it agreed to pay a sum of US$ 81,500,000 as compensation for claims of US citizens arising out of nationalisation, expropriation and other restrictive measures. An agreement on similar basis between the United Kingdom and Czechoslovakia for settlement of outstanding British claims was also signed on January 29, 1982. Arrangements were also worked out for payment of compensation by Romania in 1976 and by Poland more recently.

challenged, but Egypt had been the victim of an act of aggression, on the pretext of safeguarding the freedom of navigation in the international waterway. Cuban expropriation cases in 1961 are another example where tension mounted to an extent that threatened peace and security in the Western hemisphere. In Iran, the Mosadek Government was toppled, albeit in an internal revolution, but it was suspected to have been engineered by vested interests because of the nationalisation of the Anglo-Iranian Oil Company. Again, the Brandt Commission has seen fit to comment on the suspected hidden hand of multinationals in their attempt to bring down the Allende regime in Chile[53].

The future of developing nations and their growth will depend on a stable world order free from frictions and tensions and that order would undoubtedly be strengthened by injecting a sense of morality in the behaviour pattern of nations. Whatever might have been the justification for annulling concessions or expropriation of property acquired under colonial regimes, morality demands that an investor who comes at the invitation of a State and contributes to its development and economic growth should be treated with fairness.

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[53] See note 21, p.189.