Some Legal Aspects of Foreign Investment In Developing countries

With Particular Reference to the Situation in Algeria

by

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Summary.

The present thesis deals with some of the legal aspects of foreign investment in developing countries with special reference to the republic of Algeria. It consists of four parts beginning with an introduction and ending with conclusions.

Part one is concerned with the economic impact of foreign investment in recipient countries. Its main purpose is to look at the possible contribution of foreign investment to a host country's industrial development in both positive and negative terms: how beneficial is foreign investment to the host country's economic development and how useless and even harmful it may be if not regulated properly.

The second part of the thesis deals with the current situation of foreign investment under contemporary international law; two important issues are thereby discussed: (1) the protection of foreign investment with emphasis on traditional rules relating to foreign property protection , and (2) the new challenges which these rules face presently, especially from the quarters of developing countries which constitute the majority of world states. The second issue concerns also the regulation of foreign investments, unilaterally, bilaterally and multilaterally, as well as the current problems involved in the possibility of having an international code of conduct to regulate the activities of MNCs over the world.

The third part focuses on some legal aspects of foreign investment in the republic of Algeria. It is divided into two chapters. The first chapter analyses the investment

climate in the era of president Boumedienne when the activities of foreign companies operating in the country were not regulated by any specific legislation dealing with foreign investment. The second chapter underlines the main improvements in Algeria's investment laws, especially under the current political and economic reforms which have followed the last October (1988) riots.

In the fourth part of the thesis , some general conclusions are made with respect to the situation of joint venture law in Algeria and the current international law of foreign investment. A heated debate is currently (1989) taking place within the Algerian parliament, to try to amend the existing law in accordance with current international business mechanisms and thereto parallel legal developments.

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My thanks to Allah, the Lord of Adam and his descendent and the Lord of this world and the hereafter for enabling me to complete this work.

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ABREVIATIONS

ACP: African-Carribbean-Pacific Countries.
AD: Algerian Dinar.
AJIL: American Journal of International Law.
ALCC: Asian-African Legal Consultative Committe.
APN: Assembly Populaire National.
B.E.A: Bank Exterieure D'Algerie.
BITs: Bilateral Investment Treaties.
BYIL: The British Yearbook Of International Law.
CC: Commercial Code.
CLUNET: Journal Du Droit International.
COL.INT'L: Columbia Journal Of International Law.
CPA: Credit Populaire D'Algerie.
CTC: Centre On Transnational Corporations.
DPCI: Droit Et Pratique Du Commerce International.
ECOSOC: UN Economic and Social Council.
EEC: European Economic Committy.(Common Market).
FCN TREATY: Freindship,Commerce And Navigation Treaty.
FLN: Front De Liberation National.
GA: United Nations general assembly.
GATT: General Agreement On Tariffs And Trade.
GDP: Gross Domestic Product.
GEO.WASH.L.R: George Washington Law Review.
HARVARD.INT'L J: Harvard International Law Journal.
ICC: International Chambre Of Commerce.
ICJ: International Court Of Justice.
ICLQ: International and Comparative Law Quarterly.
ICSID: International Center For The Settlement Of Investment Disputes.
ILM: International Legal Materials.
ILR: Annual Digest of Public International Law (continued as International Law Review).
ILW: Investment Laws Of the World.
IMF: International Monetry Fund.
INT'L ARB AWARDS: International Arbitration Awards.
JORA: Journal Officiel De La Republique Algerienne.
JWTL: Journal OF World Trade Law.
LDCs: Less Developed Countries.
MEC: Mixed Economy Company.

MEED: Middle East Economic Digest.
MEER: Middle East Excutive Reports.
MNCs: Multinational Companies.(Corporations).
MNEs: Multinational Enterprises.
MIGA: MUltinational Investment Guarantee Agency.
NIEO: New International Economic Order.
NYIL: Netherlands Yearbook Of International Book.
OECD: Organisation For Economic Co-operation and Development.
OPEC: Organisation Of Petroleum Exporting Countries.
OPIC: Overseas Private Investment Corporation.
OPU: Office De Publications Universitaire.
PCIJ: Permanente Court Of International Justice.
RASJEP: Revue Algerienne Des Sciences Juridiques,Economique Politique.
RCADI: Receuil Des Cours.Academie De Droit International. et Politique.
RGDIP: Revue Generale De Droit International Public.
S.A: Societe Anonyme.
SSL: Scandinavian Studies in Law.
TNC: Transnational Corporation.
UN: United Nations.
UNCITRAL: United Nations Commission On Transnational Trade.
UNCTAD: United Nations Conference On Trade And Development.
UN.DOC: United Nations Documents.
UNGA: Uinted Nations General Assembly.
UNTC: United Nations Center on Transnational Corporation.

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-Ordonance No 71-74 of November,16th,1971 relating to socialist managment of public enterprises.

-Ordonance No 75-58 of September,26th,1975 relating to the civil code.

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-Finance law of 1977 (JORA of December,29th,1976).

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-US-Mexico General Claims Commission,1926,p.100.

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-G.A.Res.3171(XXVIIII),28 UNGAOR.Supp.(No 30A)At 52,UN.Doc A\9030(1973),reprinted in 68 AJIL,38 1(1974).

-G.A.Res.3201,UNGAOR.Supp.(No 1) AT 3,UN.Doc.A\9559(1974).

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Part One.

The Economic Impact of Foreign Investment In Recipient Countries.

Chapter I: Introduction.

Interactions exist between law and economic, political and social factors in many areas of human life and society, and foreign investment is not an exception to it. In fact the correlation between these components has a dialectical dimension based on the interrelation of effects. On the other hand, law in such a context may also possibly be a matter of passive rules if it is not put into an active application as a regulating source of the public order. For the purpose of the present thesis, it is very difficult, if not impossible, to discuss and analyse the legal mechanism of any international economic issue without going through the legislation actually applied at a municipal level. Thus, studying the law and process of foreign investment has to be undertaken, but not in isolation from the remaining political and social factors.

It is widely accepted that a fundamental question central to the thinking of the relevant countries all over the world concerns the current system of the international economy, largely set up and influenced by the economically strong (Western) countries. The debatability of the current international economic system was actually raised as early as in the 1960s when a mass of new states were born under the principle of self-

determination under the auspices of the United Nations (UN). These states found themselves in a very critical situation; in fact some of them did not have the means to feed their peoples, so at this stage, they started to highlight the economic weaknesses which were the source of the situation. They concluded that the only way to cure their economic sicknesses and to achieve a so-called "Take off" was to seek the economic and financial assistance of the industrialised countries. This was, as a particular strategy, strongly emphasised in the Pearson report (1969). In it, it was recognised that external resources would positively contribute to reviving the economy of the needy countries.

The same orientation was stressed again by the Brandt Commision report (1980) by saying that a "massive transfer of resources" (1) should be made to developing countries in order to finance the global development programmes. After having experienced many complexities affecting international loan procedures and difficulties to get loans, opinions tended to regard foreign private investment with favour; in fact, developing countries were becoming "more responsive to direct foreign investment, and were exploring ways of increasing

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(1) Abena Daagye Oduro "The Flow Of External Resources To The Non Oil Developing Countries In The Seventies, With Special Reference to The Brasilian Case", Thesis submitted for the degree of M.Litt at Glasgow University, Nov 83, p.1.

inflows".(1)

The nature of the economic development process is dominantly considered to be a changeable mechanism which may have an impact on the whole process of the international economy. For this reason, several approaches have treated the problems which have been identified in the light of multiple methods and systems in all the countries concerned. These approaches relate to the improvement of those factors which have classically been considered as fundamental elements in any economic development process, namely, capital, land, labour as well as management.

All of these elements cannot yield results individually unless joined to other factors. For instance, capital, in spite of its crucial function and value in financing development projects, cannot improve the global national development rate without the existence of the remaining factors, and this observation applies equally to the other above cited factors.

In developing countries these factors are, on the whole, lacking, although some of these countries have an interesting percentage of labour and reserves of mineral resources; but even so, these are not sufficient to build up a complete economy of national importance. Therefore, to overcome such a complicated impasse, developing

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(1) UN. centre On Transnational Corporations (UNCTC), "Trends And Issues In Foreign Direct Investment And Related Flows", New York, 1985, Cited By Abena, Op Cit.

countries have to find and cope with foreign investment and to facilitate the access of such investment to their territories.However,this choice involves several matters, such as the suitable treatment of foreign investors as well as the effective regulation of their activities.

Many researches have been devoted to this subject, indicating its importance and consequences especially for developing countries in extreme need of assistance in order to break a vicious circle of underdevelopment.

Investment climate of Developing Countries, the Response to Foreign Investors.

National and international regulations of foreign investment involve a crucial issue both in legal and economic respects. This issue is the subject of a heated debate between industrialised and developing countries at the level of the UN or face-to-face negotiations. The purpose of the debate is to break the barrier of mistrust between the two parties. The source of this conflictual situation is to be sought in the contradictions found in their commercial relations, particularly in defining the concept of cooperation and in giving a precise definition to the interests of both of them. The right of the host country to regulate international business was demanded by the participants of the 1970 non-aligned conference held in Lusaka and reafirmed in the 1973 Algiers conference where it was mentioned that cooperation with foreign investors, especially MNCs, can only operate on the basis of the full sovereignty of recipient countries. After several challenges it was asserted that "the right

of nation states to regulate foreign investment is no longer in doubt". This right was admitted and largely explained by the UN general assembly in Resolution 1803, (1962) paragraph 2. It stipulated that:

"The exploitation, development and disposition of such resources as well as the import of foreign capital required for these purposes should be in conformity with rules and conditions which the people and nations freely consider to be necessary and desirable with regard to the authorisation of prohibition of such activities."(1) However, parallel to it, foreign investment in developing countries has many times been confronted with the nationalistic and revolutionary thinking of such countries. The reason behind this attitude was described by Arthur Lewis:

"At present, most of the less developed countries are in a state of reaction against nineteenth century imperialism. They have acquired a distaste for foreign capital and foreign administration, and they are more anxious to protect themselves from future exploitations than to take advantages of current opportunities".(2) Furthermore, the fear to be economically dependent is a further factor affecting the operational mechanism of foreign investment in the recipient country. In this

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(1) G.A. , Resolution, 17 UNGAOR. Supp, 17 at 15. UN Doc. A/52/7

(2) Lewis.A,"The theory of Economic Growth", London, 1955, p. 42.

respect, Dr Bayo Adedeji has remarked with regard to Africa that "African governments have long realised that political independence unaccompanied by economic independence is a sham. Indeed, decolonisation is a long process which involves not only the taking over of the political government of a country, its civil service and the management of its public enterprises, but also the ownership, control and management of the country's economy. Without a successful indigenization of the economy independence would remain very much a shell, an empty shell indeed."(1)

Generally speaking, foreign investment regulation can take several forms, as:

i) entry regulation or entry control; ii) restrictions affecting the operational work of the foreign firm, and iii) regulation of ownership and control.

i) The establishment of foreign enterprises on any national territory is deeply conditioned by the actual structure of and division in international economic life. It is, in this respect, interesting to know that both exporting and importing countries apply the regulations. However, the nature of regulation varies

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(1) Adedejti. B, "Indigenization as a factor of Rapid Economic Development",14th Juter-African public Administration and management seminar organized by the African Association for public Administration, Nov, 1975, pp.13-14 cited by Ijalaye.D.A,"The extension of corporate personality in international Law,1978,at p.232.

from one political regime to another, especially in a market economy system, entry regulations can take the form of determining the economic sectors which may receive the assistance of foreign investment, tax obligations, reducing the degree of disturbance within the local market and adjusting competition problems. However, under a planned economy system, the state may monopolise every aspect of foreign trade; therefore, entry regulations under this regime may be much more stricter and tighter and may depend on the discretion of the competent authorities and may involve compulsory registration. The aim of such restrictions is mainly to guarantee the proper performance of foreign investment under the supervision of the national authorities; it can be an instrument to safeguard the sovereignty of the host state.

ii) As regards restrictions affecting the operational obligations a foreign investing firm and iii) those affecting ownership and control, recipient countries have promulgated almost all types of foreign investment codes from flexible to restrictive ones for the sole purpose of regulating the general activities of foreign firms from beginning to end.

However, due to the powerful business bargaining power of most international companies, particularly multinationals, domestic regulations promulgated by host countries have thus far not yielded the intended effect. Therefore, the ultimate solution supposed to be appropriate has been the intervention of international

institutions to find effective arrangments to settle the complex questions. The UN Centre of Transnational Corporations (UNCTC) has highlighted this reality with the following statement:

"In view of transnational corporation operation in several state territories at the same time, no single state, by its own independent action, is in a position to acquire the information on their world-wide activities which is necessary for evaluating the information it may need of their operations within its territory. Moreover, individual states may find it difficult to carry out and enforce some of their decisions concerning transnational corporations. Finally, juridictional conflicts over transnational corporation activities partly involving the territories of other states. In all such cases, co-operation between the relevant authorities of the states concerned would help to enhance legal control over transnational corporation activities and avoid or resolve juridictional conflicts."

On another occasion, UNCTC has confirmed that:

"The power of the MNCs in facing any country is great. The size, monopolistic position and transnational activities of the MNCs weaken the bargaining power of any single LDC to handle the problems created by or to limit the power of MNCs. Indeed no single national jurisdiction can cope adequately and effectively with the global phenomenon of the MNCs. The situation of LDCs is worse in this respect than that of the developed

nations."(1)

Following these statements, the international community recognises the extreme need for a code of conduct "to create and enforce rules for foreign investment, as GATT does for world trade, with powers to protect the rights and security both of investors and host countries."(2) The main objective of the aforementioned code, therefore, is to organise a better mechanism of transnational business as well as the relationship between MNCs and governments of both recipient and home countries in order to flexibilise the flow of foreign direct investment in these needy countries, to be used in the service of national economic development.

With regard to the Algerian case and following the existence of considerable reserves of mineral resources, the Algerian government has chosen the short way to development. In fact, as soon as Algeria achieved its political independence, two investment codes were promulgated to encourage private investment for the sake of the whole development of the nation. However, after the 1970's, things were not as good as expected to be;

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(1) Ashour. A. s, "Self-Serving Practices of Multinational Corporations In Less Developed Countries", In Management International Review, 21 (1981), p. 76.

(2) "Weekly Report To Manages Of Worldwide Operations", In Business International, February, 15th, 1985, pp. 49-50.

consequently, the government decided to shift its investment strategy from dealing with direct foreign investment to another new process called "Mixed economy company". Since then, this mode has been the only contractual framework between Algeria and foreign firms. However, it should be noted that the country was lacking a proper legal system concerning foreign investment and its access to the country. This situation continued over more than a decade until 1982, when the parliament agreed to promulgate a law on mixed economy companies, amended in 1986, and waiting to be re-amended again in 1989.

In the present study we shall try to clarify, at least in a theoretical framework, the legal situation of foreign investment - particularly in Algeria under the current economic and political circumstances. This approach can offer to international businessmen an outline of the legal framework for investment opportunities in Algeria. In this respect, M.R. Road, a knowledgeable person in the United Kingdom has said:

"Algeria is the third largest Arab market after Saudi Arabia and Egypt. The UK's share was less than 3% compared with Middle East market share of over 9% last year. British failure to penetrate this market is variously attributed to lack of information about its potential and the erroneous believe that it is still a French preserve."

In order to illustrate the mechanism of international investment and its impact on the economy of the recipient state, the following methodology is

proposed for the present study to cover the main legal aspects of the subject with special reference to the republic of Algeria. The first part of the study provides a global overview of the impact of foreign investment in improving the economic situation in the recipient country; in this case, we shall first discuss some main factors, and then in the second chapter will try to clarify the contribution of foreign investment to the development of the national economy of the recipient country. The second part of the thesis will focus on international law relating to foreign investment, and will try to analyse two major legal problems relating to foreign investment in developing countries, namely, (1) the protection of foreign investment and (2) the question of how to regulate foreign investment in developing countries.

Lastly, we shall in the third part of the study assess the work of the Algerian legislator on the subject of foreign investment, particularly in the light of the new political and economic reforms applied by President Chadli Benjedid.

Chapter II

Economic Development Factors: An Overview.

The question of economic development is actually far from being academic. Economic development is the product of combined factors, historic, cultural and political. Hence, it is not "an abstract theoretical question but a concrete problem of vital importance"(1). Because of the various objectives of the economic development process, the difficulty of formulating an exact definition arises. In this respect, many attempts have been devoted to solve the matter, for instance the attempt of R.E.Baldwin:

"The economics of development is the study of the key economic relationships that determine the levels and growth rates of per capita income in less developed nations".(2) Another one was undertaken by the same author when he defined the development as "the exploitation of all productive resources by a country in order to expand real income".(3) He also described it as "a complex historical process, in which economic and noneconomic factors are closely interwoven".(4) What can be drawn from the said definitions as well as others is that economic development, stricto sensu, is an increase

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(1) See the preface of Alpert. P, "Economic Development", London, 1963.

(2) Baldwin. E,"Economic Development And Growth", second edition, Canada, 1972, p.2.

(3) Alpert. P, Op Cit, p.1.

(4) Ibid.

in per capita production which cannot happen without improving other productive factors. However, in its broad sense, it is a multi-dimensional process which may involve a global change in society.

The theoretical foundation of the economic development concept was laid in the past century. Since then economists have been searching to analyse the mechanism of this phenomenon. One doctrine, for instance, has described the development metamorphosis by starting from the concept of "stages", for example, through the market and exchange mechanism. On the other hand, Carl Marx has as an economist translated these changes into a historical dialectic process of production means. Riccardo and Malthus have created the classical theory of development based on two factors involving population growth and limitations on natural resources.(1) However, it is said that these factors "have not been uniformly depressive to the extent that Riccardo and Malthus supposed"(2)

Recently, economists have much stressed the crucial role of planning as a dynamic means to organise development programmes as well as "to achieve greater static and dynamic efficiency in resource allocation".(3) When considering this matter, one becomes as a Moslem,

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(1) Gill. R.T, "Economic Development: Past and Present", New Jersey, USA, 1960, pp. 21-38.

(2) Thirlwall.A.P, "Growth and Development", London, p.2.

(3) Thirlwall.A.P, Ibid, p.3.

obliged to discuss the development process from another angle which concerns Islamic thought and its unique approach on the matter. Basically, Islamic economic thought, mainly expressed in the holy Quran as well as in the teaching of the prophet Mohammed, is based on certain ethical values. It covers most of the development issues, including banking and investments, finance (1), taxation (2) and capital accumulation.

As far as the means of production are concerned, Muslim scholars have discussed the matter in different ways; some of them have agreed on the neo classical theory - by saying that land, capital and organisation are factors of development, A.Mawdudi is one of those who support this orientation.(3)

Some other scholars have reduced them to three elements only: nature, good work, including organisation and labour as factors beside the main element which is capital. Moreover, these factors have been reduced once more into two components, a material wealth including land and capital, as well as labour which includes

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(1) For more information on the subject see "Islamic banking and Finance", Conference papers, London, Butterworths, 1986.

(2) See Benshemesh. A, "Taxation In Islam", Leiden, London, 1970.

(3) Mawdudi. A, "Economics Of Islam", Islamic Publications, Lahor, 1969 cited by El Ashker. A, "The Islamic Business Enterprise", Croom Helm, 1987, p.4.

organisation and the remaining factors.

Concerning the investment process in Islamic thought, one can say that development projects have to be financed either through private savings or through tax revenues.(1) Moreover, it can take the form of two models, (1) one known as "Musharaka", which is a sort of commercial association between the bank and the client, in which each of them participates with its own means: the client with his capital and labour, whereas the bank can only intervene by a constant or decreasing capital. In the latter situation, the whole business will go to the client simply by repaying the bank's shares.

(2) The second form is "Mudaraba", which is merely a kind of partnership on the ground of a financial assistance given by the bank to the client who in turn provides the labour.

A third structure of investment involves a lending process, either directly or through a bank; however, in this particular transaction, interests are strictly prohibited.(2)

It has been in this respect mentioned, in the holy Quran, that:

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(1) Abu-saoud.M,"The Economic Order Within The General Conception Of Islam Way Of Life", Islamic Review, V55, No2, February 1967 and No3, March 1967.

(2) Al Naggar. A, "An Introduction To Economy Theory, The Islamic Approach", Dar Al Fikr, 1973 (In Arabic), cited by El Ashker, Op Cit.

"Those that live on usury shall rise up before Allah like men whom satan has demented by his touch, for they claim that usury is like trading. But Allah has permitted trading and forbidden usury".(1)

The reason behind this ban is the interest which is viewed as unproductive. The same will happen to those who accumulate capital without any serious purposes:

"Proclaim a woeful punishment to those that hoard up gold and silver and do not spend it for Allah's cause. The day will surely come when their treasures shall be heated in the fires of hell, and their foreheads, sides and backs branded with them..."(2).

Moreover, an Islamic government has to achieve the whole economic objectives by using actually existing production means. A.Khurshid, an eminent scholar, has suggested two main targets for Islamic economic development; (1) the maximisation of distribution within Islamic society for the purpose of global application. In this respect, the government must carry out the proper measures to fight the misuse of economic resources, extravagance, and to ban non-productive activities. Also, it has the right to confiscate whenever necessary, either

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(1) The holy Quran, text translated and commentary by Yusuf. A, Publication of Islamic Education Centre, Saudi Arabia, 1946, p.352.

(2) Ibid, p.314.

(3) Khurshid. A and Ansari. Z, (eds), "Islamic Perspectives, Islamic foundations", England, 1979.

with or without compensation. (2) As far as a just income distribution is concerned, taxation (Zaket) and inheritance play a crucial role to assist the needy persons within the society.

After this short reference to the concept of economic development in Islam, we may conclude that development factors are almost the same in both Islamic and non-Islamic doctrines; in fact the two sides have similar opinions about the role of capital, labour, land and mineral resources in addition to the organisational aspect all of them as dynamic factors of any economic development. In what follows below, the above described factors will be considered separately; their impact on development will be explained as seen from the angle of developing countries.

A. Capital

One of the common characteristics which almost all developing countries suffer from is the shortage of capital, as a major obstacle to rapid economic development. The definition of capital remains a matter of disagreement, T.R. Gill has defined it as "a stock of produced or man-made means, consisting of such items as buildings, factories, machinery, tools, equipment and inventories of goods in stock".(1) Another eminent economist has defined it as "a produced means of production" which indicates that it is the amount of past

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(1)Gill.T.R,"Economic Development:Past And Present",p.10.

production which is being used and processed to assist the actual production.(1) Therefore, having the required capital leads to the increase of national production capacity and output. The absence of such a factor causes poverty and creates a very low standard of living.(2)

Many reasons can cause the shortage of capital. For instance, a high proportion of population may systematically consume part of the national product in such a way that the government may have to spend much to fulfil people's demands, thus negatively effecting the national capital stock and its growth. Furthermore, the inefficient use of available capital reserves can also lead to capital shortage and obviously to underdevelopment of the country; an aspect of bad use of available capital in developing countries is the use of capital for unproductive projects.

In addition to what has already been mentioned above, it is to be noted that economic growth is mainly derived from the amount of available capital devoted to investment; this in turn depends on the amount of capital formation in any country. In this respect, W.W. Rostow has considered that the proper or standard level which can allow "to take off should be above 10% of national product available for investment".(3) Therefore, an

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(1)David.F.H,"Modern economics",p.263. (2) For more details about the subject see Nurkse. R, "Problems of Capital Formation In Underdeveloed Countries", Oxford,1953. (3) Rostow. W.W, "The Stages Of Economic Growth", Cambridge University Press, 1960, p.37.

increase in investment needs a considerable amount of domestic savings obtained either from tax revenues or from private savings. Also, national savings can be drawn from a surplus achieved through the reduction of consumption; this surplus will be used for the formation of capital. In most developing countries, the surplus consists largely of food; however, some of them, such as China, have successfully increased the amount of investment without reducing the ratio of consumption; they have increased the quantity of general available labour forces as an alternative to increased domestic saving and capital formation.(1)

Beside domestic saving, which includes saving by the government, business and households, foreign aid can also be a source of saving, obviously under reasonable conditions.

The importance of the process of capital accumulation in association with industrialisation and development has been explained by A. Lewis. He has defined the development process as a sort of shift "from being a 5 percent saver and investor to a 12 percent saver and investor".(2)

Professor Johnson too has described capital accumulation as an engine of growth and development:

"The condition of being 'developed' consists of having accumulated, and having established efficient

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(1) Kindleberger And Bruce,"Economic Development", 3rd Ed, p.89 (2) Lewis. A, "The theory of Economic Growth", London, Allen And Vuwin, 1955.

social and economic mechanisms for maintaining and increasing large stocks of capital per head in the various forms. Similarly the condition of being 'underdeveloped' is characterised by the possession of relatively small stocks of the various kinds of capital."(1)

Therefore, capital accumulation seems to be the only solution to achieve in order to come out of the vicious circle of underdevelopment due to low productivity within a country, leading to low per capita income, to low level of saving per head, to low levels of capital accumulation per head, to low productivity.(2)

Investment is thus a very dynamic aspect of the economic development process, it is considered as a key factor to develop the amount of capital formation. However, the inability to invest may be due to the lack of production factors in turn due, as a direct consequence, to shortages in savings. However, A.P. Thirtwall has argued that the barrier to capital formation may be due to the nature of the productive system of a particular country; this situation may make the investment process either complex and difficult or too risky. To overcome such obstacles, the government has to develop the external trade and resources as

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(1) Johnson. H.G, "Comparative Cost and Commercial Policy Theory for A Developing World Economy", In Pakistan Development Review, Supp (Spring 1969), p.9. Cited by Thirtwall, Op Cit, p.99. (2) Thirtwall, Ibid.

external transactions are sometimes much more important than domestic saving for investment, especially in the early stages of development.(1)

After this reference to the contribution which capital can make to the development process,one important question has to be raised. It concerns the economic value of capital formation; in other words, can capital in itself create development? Kindleberger and Herrick, in their book "Economic Development", have stated that despite the crucial role which capital formation plays, several reasons may intervene to lead to the conclusion that it cannot by itself explain economic development:

"first,the development process...does not always run smoothly or continuously.To explain it,one must go beyond the simple growth models in which capital leads to growth in income, which leads to more capital. Second, growth occurs at rates higher than can be explained on the basis of capital formation alone.Third,higher rates of economic growth are not uniformly accompanied, as our diagrams have shown, by higher rates of capital formation".(2)

B. Labour as a Factor of Development.

Any realistic study on the process of economic development has to stress the dynamic role of human capital as an effective factor. Modern economists have not given as much importance to this particular factor as a key element to economic growth as earlier great

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(1)Thirtwall,Ibid,p.224. (2)Kindleberger.C,Op Cit, p.95.

Growth of production

Average annual growth rate (percent)

	GDP		Agriculture		Industry		Manufacturing		Services	
Low-income	1965-80	80-86	1965-80	80-86	1965-80	80-86	1965-80	80-86	1965-80	80-86
economies	4.8W	7.5W	2.7W	4.9W	1.5W	10.6W	7.6W	11.2W	5.1W	6.6W
Ethiopia	2.7	0.8	1.2	-3.9	3.5	3.8	5.1	3.9	5.2	5.1
Bangladesh	2.4	3.7	1.5	2.7	3.8	4.6	6.8	2.1	3.4	4.7
Burma	3.9	4.9	3.7	4.7	4.4	6.3	3.9	5.8	4.0	4.8
Sudan	3.8	0.3	2.9	0.4	3.1	2.1	--	0.0	4.9	-0.3
Middle-income										
economies	6.6W	2.3W	3.4W	2.3W	7.0W	2.1W	8.2W	2.5W	7.6W	2.6W
Nigeria	8.0	-3.2	1.7	1.4	13.4	-5.1	14.6	1.0	8.8	-4.0
Nicaragua	2.6	0.2	3.3	1.4	4.2	0.3	5.2	0.8	1.4	-0.4
Thailand	7.4	4.8	4.9	2.9	9.5	5.0	10.9	5.2	8.0	5.6
Turkey	6.3	4.9	3.2	3.1	7.2	6.4	7.5	8.0	7.6	4.7
Upper middle-										
income	6.7W	2.5W	3.4W	2.4W	6.5W	2.5W	--	2.4W	7.7W	2.7W
Brazil	9.0	2.7	3.8	2.0	9.9	1.6	9.6	1.2	10.0	3.8
Yugoslavia	6.0	1.2	3.1	1.4	7.8	1.1	--	--	5.5	1.4
Algeria	7.5	4.4	5.8	3.2	8.1	5.2	9.5	--	7.1	3.6
Singapore	10.4	5.3	3.1	-3.5l	12.2	4.4	13.3	2.2	9.7	6.1
High income										
oil exporters	7.8W	-3.3W	5.7W	--	6.5W	--	9.6W	--	11.1W	--
Saudi Arabia	10.9	-3.4	4.1	10.3	11.6	-10.4	8.1	6.1	10.5	4.4
Kuwait	3.1	-0.9	--	--	--	--	--	--	--	--
United Arab										
Emirates	--	-3.8	--	--	--	--	--	--	--	--
Libya	4.2	--	10.7	--	1.2	--	13.7	--	15.5	--
Industrial										
market										
economies	3.6W	2.5W	0.9W	2.5W	3.2W	2.5W	3.7W	--	3.6W	2.6W
United Kingdom	2.2	2.3	1.7	4.1	1.2	2.0	1.1	1.2	2.9	2.6
Germany F.R.	3.3	1.5	1.4	3.1	2.9	0.7	3.3	0.8	3.7	2.1
Japan	6.3	3.7	0.8	1.0	8.5	5.0	9.4	7.8	5.2	2.9
United States	2.8	3.1	1.1	3.1	1.9	3.2	2.7	4.0	8.4	3.0

"World development Report 1988", Oxford Press, 1988, pp.224-225

classical economists such as Smith(1) and Marshal(2) have done. However, the idea of utilisation of human resources for the improvement of a national economy has been re-asserted many years ago, so there is no need for additional emphasis despite the technological change which has challenged the importance of the labour force in economic development.

The correlation between human resources and economic development can be seen in two forms; first, the labour force is considered as a means to organise the production process in combination with other development factors. Second, human resources may also be considered as consumers of products.

With regard to the case of developing countries, despite the high percentage of population, they still suffer from the lack of educated and experienced manpower. This chronic situation has been pointed out by P.G. Hoffman, managing director of the UN Special Fund:

"The underdeveloped countries need high level manpower just as urgently as they need capital. Indeed, unless these countries are able to develop the required strategic human resources, they cannot effectively absorb

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(1)Smith.A,"An Inquiry Into the Nature And Causes of The Wealth of Nations",Randon House, Inc, 1937, BookII.
(2)Marshall,A,"Principles of Economics", 8th Ed, Macmillan And Co Ltd,London,1930.

capital...."(1)

In addition, developing countries are also suffering from the problem of manpower distribution; in some low income economies, the agricultural sector has absorbed an important proportion of the labour force whereas in other fields of the economy, the situation is quite the reverse. In this respect, C. Steward has pointed out that: "economic development in its labour aspect is seen as a task of shifting workers from agricultural to industrial or commercial employment".(2) Also, if a very good return is expected from the labour force, the managerial sector too should be improved, because it "is the principle factor determining the productivity of labor, if we assume that capital and raw material inputs are the same". As far as wages are concerned, governments have to improve this sector because it may be of a greater importance to increase production and income.

It is worth noting in the respect that the humanitarian contribution in any development policy can be based on four main conceptual considerations:

-the economy must be organised for the people;

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(1) Hoffman. P.G, "One Hundred Countries And One Quarter Billion People: How To Speed Their Economic Growth and ours in the 1960s", Published by Albert. D And Mary Lasker foundation by committee for economic development, Washington D.C, 1960, p.35.

(2) Williamson. F.H And Buttrick.J,"Economic Development: Principles And Patterns", New York, 1954, p.104.

Labour force	Percentage of population of working age/15-64		percentage of labour force in agriculture		industry		services		Average annual growth of labour force (percent)		
	1965-1985		1965-80		1965-80		1965-80		1965-80	1980-85	1985-2000
Low-income economies	54W - 59W		77W-72W		9W-13W		14W-15W		2.1W	2.3W	1.9W
Ethiopia	52	51	86	80	5	8	9	12	2.1	1.7	2.2
Bangladesh	51	53	84	75	5	6	11	19	1.9	2.8	3.0
Burma	57	54	64	53	14	19	23	28	2.2	1.9	1.8
Sudan	53	52	82	71	5	8	14	21	2.4	2.8	3.1
Middle-income economies	54W - 57W		56W	43W	17W	23W	27W	34W	2.5W	2.5W	2.4W
Nigeria	51	49	72	68	10	12	18	20	3.0	2.6	2.9
Nicaragua	48	50	57	47	16	16	28	38	2.9	3.8	3.9
Thailand	51	59	82	71	5	10	13	19	2.8	2.5	1.7
Turkey	53	57	75	58	11	17	14	25	1.7	2.3	2.0
Upper middle-income	56W	59W	45W	29W	23W	31W	32W	40W	2.6W	2.3W	2.3W
Brazil	53	59	49	31	20	27	31	42	3.3	2.3	2.1
Yugoslavia	63	68	57	32	26	33	17	34	0.9	1.0	0.7
Algeria	50	49	57	31	17	27	26	42	2.2	3.6	3.7
Singapore	53	67	6	2	27	38	68	61	4.2	1.9	0.8
High income oil exporters	53W	54W	58W	35W	15W	21W	28W	44W	5.6W	4.4W	3.4W
Saudi Arabia	53	54	68	48	11	14	21	37	4.9	4.4	3.5
Kuwait	60	58	2	2	34	32	64	67	6.9	6.2	3.5
United Arab Emirates	--	67	21	5	32	38	47	57	--	5.2	2.1
Libya	53	50	41	18	21	29	38	53	3.6	3.7	3.5
Industrial market economies	63W	67W	14W	7W	38W	35W	48W	58W	1.3W	1.0W	0.5W
United Kingdom	65	65	3	3	47	38	50	59	0.3	0.5	0.2
Germany F.R.	65	70	11	6	48	44	41	50	0.3	0.7	-0.5
Japan	67	68	26	11	32	34	42	55	1.0	0.9	0.5
United States	60	66	5	4	35	31	60	66	2.2	1.2	0.8

-Any development strategy must consider human needs as its preliminary concern;

-emphasis must be given to the role of labour force in the development process.

-how to achieve the economic objectives in the service ofthe people.(1)

We conclude that developing countries can achieve, through work, the required development. To achieve this objective, governments have to recruit as much labour force as possible, especially in the productive sectors. On the other hand, training opportunities, either inside the country or outside it,have to be created. With this in mind, developing countries can at least fill some gaps in their economies as well as decrease the level of their dependence on industrialised countries.

C. Land and Mineral Resources as Factors of Economic Development.

The potential usability of natural resources is of great importance. They are considered as principal economic assets especially with respect to the economic life of developing countries. They can be defined as "anything found by man in his natural environment that he may in some way utilize for his own benefit." They

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(1) Comments given by Maillet. P On Dr Pajestka's paper, "Basing Development Strategy On The human factor" In Shigeto Tsuru" Human Resources, Employment And Development", International Economic Association,v1,1983.

include soil, seeds, fish, fresh water, coal, oil, sunshine, etc.

It has been, moreover, agreed that they consist of two types, renewable and non renewable. The first can be in the form of wheat or fish. It is still the subject of some models of economic growth. For this reason, they are fully exploited, sometimes to the point of running out. The second type, non renewable, appears in the form of oil, iron, coal, etc. The exploitation of mineral resources is emphasised by developing countries, partly because they have a limited source of income and partly because the income obtained from mineral resources is utilised to boost developing industries. The following quotation gives a better focus on the contribution of natural resources in the economies of the so-called "advanced countries today": "countries with high living standards are usually countries that are well endowed with natural resources and have succeeded in putting them to good use". Hence, the national use of natural resources is an ingredient of a country's development. Developing countries, however, have a large potential of minerals and other resources still awaiting exploitation and utilization. In this respect, at a UN conference on the application of science and technology for the benefit of less developed areas, (Geneva, 1963), the contribution of natural resources to the development process was under focus, and at the request of developing countries the conference requested some international organisations to

give support and assistance in this field, as almost all developing countries suffer from the shortage of exploration experts and technology. In fact they do not have an adequate knowledge about their mineral wealth. They are hence forced to turn to international investment in order to bridge this gap and get the maximum benefit of their own wealth, especially as a long-term proposition.

It is also worth mentioning that the development strategies of most developing countries have established common grounds between natural resources and economic growth, based mainly on the widespread international network of trade in mineral assets. The process of this mechanism is based on exporting raw materials to industrialised countries and importing technology either in the form of know-how or merely industrial machinery or consumer goods.

Finally, as I.L. Fisher has stated,"natural resources, therefore, in their economic meaning are far from being static. They are not simply stocks or flows of materials which remain constant until used. Instead, they are dynamic and shifting, and their economic value is relative to place, time, and the particular technological and cultural setting. Natural resources have significance only in conjunction with enterprise (which sees their economic value), capital equipment (which transforms and transports them), and labor (which is trained in the necessary techniques of mining,

farming, forestry, fishing, and manufacturing)."(1)

Therefore, the availability of natural resources does not lead to economic improvement unless it is accompanied by other factors. However, resources scantiness, as it has been described by one economist, is not an obstacle for economic progress. In fact Japan has achieved her "take-off" without a natural resource base, and it now ranks as one of the powerful economic countries.

The table below illustrates the third world share of mineral resources production, they may seem to be huge and certainly very adequate, but unfortunately they cannot give any help to them in their efforts to overcome their situation of underdevelopment, owing to the lack of technological expertise.

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(1)Fisher.T.L,"The Role Of Natural Resources",In"Economic Development: Principles And Patterns", Op Cit, pp.26-27.

Production of Selected energy Commodities
(Quantities in thousand metric tons of coal equivalent)

Continent	Year	Hard Coal	Lignite Bioeven Coal	Fuel-Wood	Coke	Crude Petro-leum	Conden-sate	Natural Gaso-line	Natural Gas	Other gases
World	1970	1911721	305594	388291	348615	3317048	8005	39069	1306068	322391
	1975	1939475	332539	437321	354530	3846304	6349	39933	1576495	311148
	1980	2229527	373860	506604	347322	4332444	12052	40146	1834488	315404
	1983	2282987	405098	538374	312700	3856726	27877	38386	1862520	294649
	1984	2378652	422370	552449	322562	3938171	27822	44391	1989040	301519
Africa	1970	57964	--	81693	4163	425041	1521	2	2658	2060
	1975	61501	--	94996	5055	350644	1985	0	13875	3260
	1980	98057	--	110692	2504	433964	7037	0	35349	4537
	1983	109945	--	120137	2806	315571	21179	0	45447	4905
	1984	110723	--	123476	2858	335496	23818	0	50810	4779
South America	1970	6131	37	55413	2915	348920	532	1086	24410	3248
	1975	7594	27	63502	3389	253291	380	1595	33354	3872
	1980	10009	23	70940	4989	259429	314	1504	45065	5858
	1983	11977	23	74029	5190	243451	564	1474	52586	7127
	1984	12779	23	80134	6682	256329	567	1537	56471	7741
Asia	1970	384139	7683	176360	67459	1140445	302	1966	35618	44146
	1975	489244	10912	208561	81243	1660905	442	3740	80624	49857
	1980	594380	25221	227188	85147	1652861	656	8382	114617	53154
	1983	684033	29600	238600	94927	1176023	2997	8158	124471	56209
	1984	744393	32922	242290	99561	1176039	3056	8699	141492	57453

		LPG (GPL)	Avia-tion gaso-line	Motor gaso-line	Kero-sine	Jet fuels	Gas diesel oil	Residual fuel	lubri-cate oil	electri-city
World	1970	122090	7296	716622	132314	123490	741311	1084289	41475	608732
	1975	151139	5199	878910	143634	134603	894979	1206521	44900	802289
	1980	181116	4884	970683	163446	158647	1048916	1274873	59106	1013000
	1983	202536	3904	966375	164438	161200	1004157	1031070	55386	1084945
	1984	211392	3913	987034	169812	170785	1044208	1022496	57923	1139891
Africa	1970	254	0	8647	2454	1509	10346	15787	421	10749
	1975	1857	21	13663	4320	3370	19063	26741	692	16156
	1980	2749	22	17310	6094	4049	27883	36030	821	23203
	1983	4012	33	20679	7778	4098	36060	41860	1156	26269
	1984	4559	36	21067	8229	4037	36188	42816	1304	27570
South America	1970	5420	232	28728	5520	7377	31056	96265	1152	13220
	1975	8692	160	37629	5744	5404	38541	80654	1457	20290
	1980	9050	184	39856	5441	8427	56788	85400	2004	33301
	1983	9719	204	42087	4942	9692	56911	63298	2049	38085
	1984	10651	208	43933	4862	9700	60564	61886	2083	40669
Asia	1970	11705	1206	51622	44257	21827	87644	276739	4081	79321
	1975	19316	843	73677	54741	21310	133429	314413	5173	117713
	1980	31846	525	96727	66446	24796	176898	333774	9053	164590
	1983	42438	321	105265	70649	27912	203966	292727	8909	181581
	1984	45133	361	111033	74344	28087	213312	298257	9448	204679

Source: Statistial Yearbook. United Nations, 1983-1984, pp.804-805.

D. Technological Efficiency as a Source of Economic Development.

Technology has become a very important aspect in any stage of production operations. In fact, without it we would not have sufficient production either in quantity or quality. Therefore, it is very indispensable indeed to economic development, because changing production techniques affect the whole mechanism of the economy.

Adam Smith, in the 18th century, used to consider as encouraging any attempt to invent new machines capable of improving labour productivity and skills. In his approach Schumpeter too has emphasised the economic function of new productive means:

"The slow and continuous increase in time of the national supply of productive means and of savings is obviously an important factor in explaining the course of economic history through the centuries, but it is completely over-shadowed by the fact that development consists primarily in employing existing resources in a different way,in doing new things with them, irrespective of whether those resources increase or not".(1)

Almost the same context is embodied in the following quotation: "...Economic development is not a mechanical process, it is not a simple adding up of assorted factors, ultimately, it is a human enterprise, and, like all human enterprises, its outcome will depend finally on the skill, quality and attitudes of the few who undertake

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(1) Schumpeter. J.A, "The Theory Of Economic Development",Oxford University Press,New York, 1961,p.68.

it."(1)

Generally speaking, technological progress carries with it the ability of a particular country to produce more and better goods by using a quantity of inputs. The successfulness of this operation depends mainly on education as well as encouraging research and inventions usually sponsored by state institutes, companies and universities and transformed into actions by either governments or private enterprises. Access to the modern technology is the main objective of developing countries in order to adjust the current technological imbalance between the haves and the have-nots. The way to get the required technology is in many cases difficult because industrialised countries are the only technology holders and to get it from them usually needs a powerful bargaining position,particularly in the form of buying trade marks and patent licences to develop new goods and to boost the national economy.

Talking about the four factors of economic development (capital, labour, land and mineral resources, technology) does not mean that other accessory factors like management and organisation as well as a chosen economic policy cannot also be effective means in an economic development process. In fact, they can produce valuable results in combination with the other principal factors.

Good organisation and management of economic activities, for instance, can determine the level of

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(1)Gill.T.R,"Economic Development:Past and Present",p.19.

labour productivity(1) within an enterprise. F. Harbison, in his analysis of enterpreneurial organisation as a factor in economic development, has given a practical example concerning some Egyptian factories in the 1950s, as they were then technologically at the same level as factories in the United States. However, labour productivity was in Egypt lower than what was achieved in America. The reason behind this difference was that Egyptians used to manage their industries by employing some primitive methods which were rather complex and less productive. Organisation can also be linked to the capital process, because using more capital within an enterprise will obviously need more organisation both in the production and administration fields.

With due regard to the impact of sociocultural factors on the economic development process, it should be noted that their effects cannot be seen directly but rather through the global behaviour of the population, for instance, through the behaviour of Mediterranean peasants who "spend considerable time in coffee houses, playing cards, arguing politics, or in contemplation, while sipping Turkish coffee or smoking on the water pipe."(2) which is just a waste of time and can affect the production mechanism within the countries' factories.

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(1) Harbison. F, "Enterpreneurial Organisation As A Factor In Economic Development", Quarterly Journal Of Economics, August 1956, pp.371-373. (2) Pepelasis. A And Others, "Economic Development", New York., 1961, p.165.

The same author has quoted another example found in some Latin American countries; it is the existence of a significant number of fiestas which can minimise hours of work and thus automatically decrease production.

The high rate of illiteracy in developing countries is also one of the sociocultural reasons for their underdevelopment, because such a problem can cause a delay in improving the country's access to new technology.

The intervention of the state in the economy may also be a factor in the economic development process. This role depends on the nature of the political regime chosen by the country.

A great proportion of developing countries have a certain approach to socialism. In it, state intervention appears permanently in the form of public enterprises. In such a case, the question is how to use this ideological aspect in a proper way and to act upon it in a manner that can serve the national economy without any fanaticism.

To sum up, all these factors can form the foundation of modern economic growth. However, having all of them is sometimes impossible, so to fill in the missing components, the state has to resort to foreign assistance in the form of either capital borrowing or foreign investment. The latter may be much more beneficial than the former.

UNCTAD has itemised these missing components in the economics of developing countries as follows:

"The structural policies of developing countries must have, consequently, as priority objectives: "the

mobilisation for a better distribution of financial resources either domestic or exterior, by freeing market prices and the more effective utilisation of human resources; more effectiveness of public sector; more big role to private enterprises including a best political environment to foreign investments; encouraging domestic saving and its allocation to development needs; adoption of appropriate measures to far-off social problems ensured from adjustment as well as to back away the poverty."(1)

In addition to what has been mentioned about developing countries and their problems, it may be admitted that developed countries too have been contributing to the complexity of these problems. They have exercised a predominant influence on the world economy and on international institutions. In this respect, a significant number of desirable and progressive decisions by UNCTAD have been stopped from entering into force; some other decisions have been revised in order to be under the complete control of developed countries.(2)

Such an influence can also take other forms and may use other methods, for instance, by weakening exports to developing countries or by raising the prices of some important products, in addition to their involvement in

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(1) Translated from French,"Evaluation Generale, Text Soumis A La Conference Par La Belgique au Nom du Group B", TD/L, 308, Du 28 Juillet 1987.

(2) UNCTAD, "Optic Of Countries Membered In Group D And Mongolia", TD/333 of 5/7/87.

creating economic crises, particularly in the form of lowering the prices of mineral resources, thus minimising the global revenues and aggravating the debt burden of the international community of states.

In this context, the group of 77 have pleaded to stress on the responsibility of developed countries in actual economic crises and asking them to flexiblise their attitude and to contribute positively to clear up the environment for a better international cooperation.(1)

The table below is sufficient to illustrate the actual financial situation of capital importing countries and the effect of better policies in industrial countries on their economies as estimated by the IMF.

Capital Importing Countries:Medium-
Term Implications Of Better Policies
In Industrial Countries,1988-1992.

Capital I.C	1988	1989	Average 1990-92
Current Account B	0.4	0.8	0.9
External Debt	-0.4	-2.3	-5.3
Debt Service	-0.5	-0.4	-0.6
Real GDP	0.1	0.2	0.3
Real GNP	0.1	0.3	0.3
Export Volume	0.9	1.3	1.2
Import Volume	0.6	0.8	1.2

Source: World Economic Outlook,
IMF, Washington, D.C, 1988.

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(1) Havana Declaration Adapted By The Sixth Ministerial Meeting Of 77 Group/TD 335 of 3/7387.

Chapter III

The Impact of foreign private Investment on the economic Development of recipient Countries.

The subject has, for a long period, been discussed by many authors. The idea and practice of using foreign capital go back to the nineteenth century, when very many countries were assisted, on a substantial scale, by foreign capital and expertise, particularly from and to Great Britain. With capital exports some countries also actually pursued foreign policy objectives. A. Madison has shown, with some statistics, that, as an example:"The annual net export of capital from India to Great Britain amounted to a sum corresponding to 1.5% of the national income of the subcontinent in the early 1920s".

British funds taken from the economic income of some overseas natural resources, was largely devoted to boost the economies of today's advanced countries,for instance, from the United States where British capital was invested in mining and railroads, and from Russia before the 1917 revolution, where foreign capital was invested in the fields of oil production, steel and coal industries.

Japan was, however, the only country which has not been assisted by a foreign investment process but rather by government loans.

After the first world war (1914-1918), the global amount of foreign investment coming from Europe widely decreased owing to new concepts introduced by the Bolshevik revolution of 1917 and its effects on some other countries. These new concepts mainly concentrated on the possibility to nationalise foreign assets in the recipient country, as required and justified by public

interest.As a result, exporting capital countries reduced their capital exports and the general level of foreign investment diminished.The United States gradually emerged however,as a big creditor country; her foreign investment rose by US $8.3 billions while the United Kingdom share continued to maintain its dominating rank, France was the third largest creditor. Most of foreign investment however, took the form of direct investment through many overseas subsidiaries.

The world economic collapse after 1929 affected considerably the flow of foreign investment, owing to the shortage of savings as well as importing restrictions and exchange controls.

At the end of the second world war (1939-1945), a new trend became noticeable. A considerable number of creditors had lost their dominant position as their countries were extensively devastated by war. Only the US had come out of the war in a better economic and financial situation, and it assisted the West European countries by launching the Marshal plan for the economic recovery of Western Europe.

Focusing on the history of foreign investment in North Africa and the Middle East, we may say that after the establishment of private and incorporated banks in the 1850s, both regions were flooded by a significant amount of foreign capital. However, following several bankruptcy cases, the creditors, mostly from European countries, found a golden opportunity to go further and favour a political occupation, whenever possible, for example, in Egypt (1882),Tunisia and Morocco. After these developments, private direct investments were devoted to

certain public projects such as railroads, water supply, gas and electricity,whereby many of the Europeans settled in the country benefited therefrom.Before the first world war, much if not all the attention of investors concentrated on the oil industry,particularly in Iran and Egypt,whereas investment in agriculture and manufacturing was nearly neglected. It is said that about US $44 billions accounted for long-term investment in both North African and Middle East countries. Great Britain claimed the majority of business operations by contributing about half of the said amount, followed by France (one fifth) and Germany (one sixth).By 1914, Middle Eastern countries carried a debt burden of about two billion US dollars, mainly in the public sector, and the rest in the private sector. North African countries had a public debt of about US $250 millions whereby a large scale of foreign investment was effected in the private sector. During the war (1914-1918), an imbalance was emerging as a new debt burden was added to some countries, for instance, to Turkey, whereas Algeria and Egypt succeeded in keeping their monetary situation balanced. Furthermore, in the inter-war period (1918-1939),the industrial sector in North Africa and the Middle East absorbed a huge amount of private capital, mainly from outside. Foreign capital contributions accounted for a higher level than before. It was estimated then that there had been a slight decrease in imported foreign capital; but the public debt had shown a considerable increase.

The Middle East has lately received an increasing amount of foreign investment, and the oil industry has taken the lion's share in investment programmes. However,

the contractual method adopted by the particular receiving countries for foreign investment has been subject to some modification,and many of them have preferred joint-venturing with foreign partners under the condition of maintaining a majority in the company and venture shares.

There has been and there is a growing recognition of the importance of foreign investment and its dynamic contribution in the development process, particularly after having realised that international borrowing (loans) is merely a burden which can become a very serious financial problem.

A. The positive Impact of foreign Investment on the Recipient Host Country's Economy.

The pro-investment school underlines the positive contribution of foreign investment in the third world development process:it argues that foreign investment can stimulate national domestic economic growth and improve efficiency. Foreign investment is considered as an effective means to obtain not only capital but also to transfer (receive) technology, new management methods as well as to create employment opportunities, etc. A great deal of attention has been devoted to foreign investment with regard to two basic facts: i) foreign investment is considered as the main missing component in third world economies; ii) the changing and more favourable character of foreign investment in countries suffering from the complex procedures of external commercial borrowing, in addition to actual cost, making borrowing more expensive than it is supposed to be (high rates of interest

Share of stock of foreign investment by home country in different developing countries(%)1980

	Australia	Canada	N.Zealand	Germany	France	Italy	Japan	UK	US	Total (inc. others)
Latin American and Carribean countries	0.3	3.2	---	5.9	3.1	2.0	3.5	10.1	62.1	100.0
Barbados	1.1	14.7	1.1	---	---	---	---	48.8	34.0	100.0
Trinidad	---	8.1	---	0.5	0.5	0.5	1.0	43.1	37.7	100.0
Jamaica	---	8.9	---	1.4	0.3	---	---	35.6	51.4	100.0
Brazil	0.2	3.0	---	11.9	4.9	2.4	8.4	9.4	47.8	100.0
Mexico	0.1	2.6	---	4.2	1.8	0.8	1.3	3.7	79.7	100.0
Africa	0.2	2.5	---	4.6	18.1	2.2	1.4	40.2	15.9	100.0
Kenya	0.8	0.6	---	3.8	1.0	1.0	1.0	75.6	7.9	100.0
Nigeria	0.1	1.1	---	7.0	6.5	1.6	3.0	53.6	16.6	100.0
Senegal	---	---	---	7.7	67.9	---	3.8	5.8	2.9	100.0
Zambia	0.7	0.3	---	3.4	0.3	1.1	0.3	73.0	15.2	100.0
Zimbabwe	0.2	2.5	---	---	0.4	0.2	---	86.8	7.1	100.0
Asia/Pacific Region	7.2	0.8	1.0	3.2	1.3	0.4	12.5	25.6	33.5	100.0
Bangladesh	1.5	---	---	3.0	1.5	---	1.5	36.3	42.4	100.0
India	0.6	1.7	---	6.7	1.5	0.8	2.1	39.1	39.5	100.0
Indonesia	5.2	0.7	---	3.7	1.4	0.4	20.9	12.6	38.3	100.0
Korea	---	---	---	1.9	1.2	---	49.1	2.1	43.3	100.0
Malysia	6.3	0.7	0.6	1.4	0.7	0.3	7.2	40.1	15.0	100.0
Singapore	6.4	0.3	0.6	3.0	0.8	0.2	7.7	29.4	34.4	100.0
Sri Lanka	---	---	---	2.0	---	---	1.0	75.5	16.3	100.0

Source: UNTC based on 1980 stock estimate

applicable in most loan agreements).This new approach can be detected in current statistical data which illustrates that the developing countries desire to maximise access to foreign investment in order to achieve the possibility of accentuated development programs (including inflationary trends) rather than beg food from advanced countries.

This necessitates a serious cooperation between both developed and developing countries, based on mutual trust to promote together the recipient country's economy with an equitable treatment of the foreign investor by the recipient country. In this respect, Timberger,in his report to the UN Committee for Development Planning, has expressed the following opinion;

"Efforts should be made by both developed and developing countries to stimulate private foreign investment which can play a strategic role in the economic development of developing countries by providing capital, technical services and know-how. There is a continuing need as part of an international development strategy to reconcile the legitimate desire of potential investors for equitable treatment with the legitimate concern of recipient countries that foreign investment should be undertaken in a manner consistent with their economic and social objectives. This matter should be the subject of a continuing dialogue..."

1. The Impact of foreign Investment on economic Growth.

The value of external investment may be judged in the light of its direct effect on the pattern of economic growth. Many national planners all over the world believe

in such a process and effect. For example, the Algerian national charter of 1976 acknowledged that: "The intensive resort to the foreign enterprises services for the realisation of development projects is the result of weakness which still affects the country in terms of means possession and the sell control of techniques and engineering". Furthermore, the Philippines omnibus investment code of 1987 in its article 2/1 stipulates that the current investment strategy aims mainly to "accelerate the sound development of the national economy in consonance with the principles and objectives of economic nationalism and in pursuance of a planned economically feasible and practical dispersal of industries and the promotion of small and medium scale industries, under conditions which will encourage competition and discourage monopolies..."(1)

The same orientation can be seen in the Korean foreign capital inducement Act, as amended on December, 31st, 1983, in which it has been mentioned that "the purpose of this act shall be to effectively induce and protect foreign capital conducive to the sound development of the national economy and the improvement of the international balance of payment, and to properly manage such foreign capital."(2)

These are but a few examples from many countries' laws and regulations that have the same purpose.

Therefore, the access of foreign investment to a recipient country can constitute an additional means to

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(1) For more details, see "Investment Laws Of The World", ICSID,V VII,New York,1987. (2) Ibid,p.1,Korea Section.

assist the growth of national income and can act as one of several missing factors of production which may help to increase the local general output. The process of production improvement can be seen after a year of production in a particular sector; the output coming from a given sector will create demands for output from other industry sectors and by such a mechanism the whole economy may flourish and aspects creating a competitive atmosphere and improving other factors, for instance, the size of the market.

It is said that in developing countries, there will be benefits as long as the business ventures with foreign investors earn profits. Moreover, foreign investment may intervene to complete the national domestic saving by supplementing some extra capital, automatically leading to a high investment rate as well as increasing capital accumulation. Moreover, foreign investment can be a source to increase foreign exchange reserves within the country, through international trade, because with a high output a surplus may be exported abroad, bringing a large amount of foreign currency to be used to develop other weak sectors of the economy.

2. The Impact of foreign Investment on Transfer of Technology.

Technology involves an effective ingredient in the production process and is considered to be part of the lifeblood of modern economic growth. It is not merely an additional aspect of growth but rather a crucial one. In this respect, J.A. Schumpeter has said:

"The slow and continuous increase in time of the

national supply of productive means and savings is obviously an important factor in explaining the cause of economic history through the centuries, but it is completely overshadowed by the fact that development consists primarily in employing existing resources in a different way,in doing new things with them, irrespective of whether those resources increase or not."(1)

A change in technique, however, will not be meaningful without possibly touching every relevant factor of economic development, for instance, for improving the standard of technical knowledge on equipment and machinery, retraining workers and developing skills, renewing enterprise management according to the new standard, creating new methods of internal and external trade and widening the size of the local markets in the country etc.

For developing countries, the matter is how to import such technology to help them improve their economies and to raise the living standard of their population. Some of them have in fact succeeded to use imported technology for their welfare; countries like Korea, Brasil, Hong Kong, Malysia India have become rapidly competitive with advanced countries and they have even their own multinationals operating in some other developing countries.

However, developing countries are also suffering

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(1) Schumpeter. J.A, "The Theory Of Economic Development (An Inquiry Into Profits, Capital, Credit Interest, And The Business Cycle), Harvard University Press, 1934,p.68.

Selected developed countries: Technology receipts from developing countries 1970-1985

	United States			United Kingdom			Federal Republic of Germany			Japan	
	Total reeipts from developing countries (millions of dollars)	percen-tage of total rec-eipts	percen-tage of receipts from affil-iates	Total receipts from developing countries (millions of pounds)	percen-tage of total rec-eipts	percen-tage of receipts from affil-iates	Total receipts from developing countries (millions of Deutsh M)	percen-tage of total rec-eipts	percen-tage of receipts from affil-iates	Total receipts from developing countries (millions of dollars)	percen-tage of total receipts
1970	557	22.3	88.2	---	---	---	---	---	---	---	---
1971	601	21.6	89.4	9.5	---	---	---	---	---	---	---
1972	644	20.9	88.8	---	---	---	---	---	---	---	---
1973	593	18.4	87.5	21.79	15.7	45.1	---	---	---	---	---
1974	724	18.9	87.0	28.71	16.9	48.1	---	---	---	---	---
1975	824	19.2	87.6	32.43	16.8	45.6	---	---	---	123	55.1
1976	806	18.5	85.1	69.46	26.1	81.5	---	---	---	159	56.6
1977	834	17.4	84.4	74.73	25.4	30.7	---	---	---	199	57.1
1978	1.039	18.0	84.3	79.52	24.4	35.1	---	---	---	402	69.4
1979	1.187	19.5	84.9	64.33	18.0	42.2	---	---	---	390	64.2
1980	1.442	20.7	85.1	71.26	18.8	40.9	73.4	7.3	95.9	434	61.6
1981	1.591	21.9	83.7	84.08	19.1	34.1	98.0	7.2	93.9	454	57.2
1982	1.492	20.9	78.6	---	---	---	119.6	10.0	95.8	404	54.4
1983	1.598	20.3	80.0	---	---	---	105.4	8.0	91.4	592	58.4
1984	1.501	18.6	81.3	---	---	---	144.1	9.8	76.4	---	---
1985	1.546	18.2	81.0	---	---	---	156.4	9.7	90.4	---	---

Source: United Nations centre on transnational corporations, "Transnational Corpporations And technology transfer: Effects and policy Issues", U.N., New York, 1987, p.8

from the shortage of research and development units and even if they have them these are too formal in addition to their weak relationship to domestic industrial enterprises.

Therefore, foreign investment can constitute an important channel "through which developing countries acquire proprietary technology from industrial countries."

Concerning the means employed by international firms to extend their contributions to develop the technological ground of the recipient country, the UN Centre on Transnational Corporations (UNCTC) in its research on transfer of technology has acknowledged the ability and role of TNCs to create the inventive spirit within the local industrial enterprises. This role can take the following scopes:

-Transfer of Skills; stimulation of local technological activities; and diffusion of techniques throughout the economy.(1)

a-Transfer of skills.

According to UNCTC, transnational corporations can link with local enterprises and help them train and instruct local skills to develop their technical knowledge and expertise, particularly as to how to run new industrial infrastructures or new approved machines and equipment. Furthermore, UNCTC has given an outlook about the technological situation of some developing countries.While in some of them transfer of skill is seen insufficient, as in Tanzania and Zambia, other countries

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(1) UNCTC, Op Cit, pp.35-40.

like Kenya have had the opportunity to get benefits from the localisation of staff over the period 1967-1972.(1)

Foreign subsidiaries operating in developing countries can also send some of the local workers abroad for further training to be able to work on new machines and equipment.

b-Stimulation Of local technological Activities.

The access of foreign investment to operate in developing countries can be an effective means to boost up the role of research projects within the recipient country. UNCTC has clarified the actual low expenditure given by TNCs to improve research and development in recipient countries because of the shortage of skills, the small size of the local market as well as low expenditure in this particular field. Furthermore, UNCTC has referred to the example of US transnational corporations' research and development expenditure and its impact on both developed and developing countries.

"In 1982, of a total of over 41 billion dollars in world-wide research and development expenditures by United States Transnational Corporations, the parent companies spent 91.1 per cent, their majority-owned foreign affiliates in other developed countries spent 8.2 per cent and majority-owned affiliates in developing countries spent 0.6 per cent."(2)

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(1) UNCTC, Ibid, p.36.

(2) Ozawa. T, "Technology Transfer and Control Systems: The Japanese Experience", In, Controlling International Technology Transfer: Issues, Perspectives And Policy Implications, Sayafi. Nejad. R.W, New York, 1981, p.379.

c-Diffusion Of Techniques through the Economy.

Engaging foreign firms to cooperate with local enterprises can boost the motivation of some key industrial sectors. In this respect, several recommendations have been suggested by UNCTC to allow the recipient country to exercise its full right in establishing a modern economy with the managerial assistance of foreign companies operating in the country. The intervention of foreign assistance in this field can be seen in the light of its competence to find the relationship between the industries and the global economy as well as change the ususl duties of staff from some particular sectors to others which are suffering from a lack of skills.

Foreign firms may also contribute in supplying a technical assistance to the local enterprises. This process will not be favourable without the existence of a certain adaptation to these techniques by domestic enterprise, otherwise the level of technological diffusion undertaken by foreign investors will be somehow low because of their firm expectation to lose, in addition that it will be negative for the whole economy of the recipient country.

Furthermore, foreign investment can take part in the economic development process of the recipient country by providing patents and trade marks as well as by participating in licencing and copyright contracts.

It is said that bargaining for the acquisition of technology is a very complex operation that needs a careful and wise technological policy combining the following data: "Strengthening the competitive climate;

removing ambiguity in government policies towards labour intensive technology; encouraging the acquisition of second hand equipment; and modifying dysfunctional labour laws."(1)

Moreover removing tariff and tax barriers on certain types of equipment has also been emphasised by the United Nations, as the elimination of such barriers will facilitate input accumulation leading to the improvement of production in the recipient country.

3. The Impact of Foreign Investment on Employment and Labour Force.

Foreign investment can also be a key factor to increase the global rate of employment in developing countries suffering of rising unemployment. It is said that two main reasons could be the source of such an unemployment problem: i) the impact of population growth and ii) the lack of an industrial infrastructire capable to recruit the surplus of the population. From another angle, and because labour force is very cheap in developing countries, foreign companies may look forward to get their shares in this bargain price market which sometimes can be an advantage to attract them.

In most host countries, conflicts can frequently arise in the field of employment and labour relations, particularly when the matter touches the relationship

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(1) United Nations, "The Acquisition Of Technology From Multinational Corporations By Developing Countries", New York, 1974, pp.47-48.

between multinational corporations and workers' associations. O. Clark (1) argues that the access of multinational corporations threatens the global interest of the workers, because of negative attitudes towards trade unions and also ability to cover realities by using their powerful international business positions. For this reason, all decisions concerning labour relations are not made by the subsidiaries' administrative boards but rather by the parent companies. Levinson(2), however, sees the role of multinational companies as an instrument to weaken the effectiveness of trade union activities within the enterprise; he states as one of multinationals advantages "the ability to locate investment in favourable circumstances relative to low wages, weak unions, laws and hospitable pro-management legislations".

Kujawa, on the other hand, points out the absolute no-change in labour relations if the matter concerns multinational companies. He calls for the need for another new phenomenon which is "transnational industrial relations" based on "labour management at the multinational level to determine output among one or

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(1) Oliver. C, "The Multinational Enterprise, The State And International Organisations: Industrial Relations, Employment And Other Problems", In, International Labour And The Multinational Enterprise, Ed, Duane Kujawa (New York 1977), pp.7-13.

(2) Levinson. C, "International Trade Unionism", (London 1977) p.88.

several national production systems".(1)

To sum up, a quotation from the International Confederation of Free Trade Unions can be very useful to clarify the industrial behaviour of multinational companies. It has acknowledged that:"the policies of MNCs may undermine the host countries' industrial relation systems, restrict workers rights to organise in defence of their interests, limit the rights of workers to enter into coordinated collective bargaining and exploit labour costs differentials."(2) From the debate on the impact of foreign investment on employment and labour relations, we can conclude that such a dynamic matter depends on the nature of the recipient country's legal and economic systems. In this respect, free market economies give less protection to the workers and their relations with the corporate administration, whereas in planned economies the concepts of work and trade union are aligned with the political regime and the worker's rights are constitutionalised, indicating that they occupy a powerful position. In such a situation, foreign firms have to increase the recruitment of local manpower and to treat them according to the actual laws and political principles.

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(1) Kujawa. D, "International Labour And Multinational enterprise", (New York, 1975), p.97.

(2) International Confederation Of Free Trade Unions (ICFTU), "Resolution Of Multinational Corporation And Conglomerates", ICFTU Economic And Social Bulletin, July-August, 1969, pp.10-17.

In addition to what has been said about the contribution of foreign investment in the national development process, the following points can be added:

-Foreign investment may open the door to exports to fill the foreign exchange gap in the host country;

-it can create a competitive climate between local factories;

-it can participate to fill the shortage of money supply and to make the procedure easy in case the project needs any extra fund;

-it may contribute to the growth of local enterpreneurship within the country;

-it can be an effective means to expand the local market.

Foreign investment could possibly be an adequate solution to the economic problems which developing countries face, yet some economists have some reservations about their access to the host country. These reservations are based on many considerations.

B. The negative Impact of foreign Investment on the recipient Country's Economy.

Anti-foreign investment economists accuse international investors of self-interest and uselessness. They often argue that a strong national bourgeoisie would be more beneficial than introducing foreign capital in the country; in fact some of them have referred to the process of foreign investment by saying that "the trouble with the foreign investor may well be not that he is so meddlesome, but that he is so moussy".

The marxist doctrine considers that development can be realised without the need of foreign capital. This reasoning is nowadays overtaken by the current economic circumstances which require a multiteral economic cooperation between each and every country whatever the ideology adopted. The actual Soviet attitude can be an example of this new trend.

The most serious attack against the access of foreign investors in the host country is that they carry a lot of uncertainties and they can be harmful to the local development strategy:

-foreign investment may provide capital but it may reduce foreign savings;

-the technology which may be transferred to the host country is not always appropriate for the recipient country;

-foreign investment may reduce unemployment but may destroy local traditional crafts thus raising unemployment in this particular sector;

-the management provided by foreign investment could be inappropriate, particularly owing to the high rate of illiteracy within the labour force;
-it can increase imbalances between the big and small regions within the country;
-it may direct the foreign trade according to its wish and profits;
-the cost of private direct investment can be too high.

Conclusions.

There is no doubt that the access of foreign investment can be very advantageous to developing countries suffering from several missing components in their economies. Such a role for foreign investment is recognised by almost all world countries, even by the Soviet bloc countries which initially embraced marxist economic thought. A short glance at the new Soviet joint venture law launched in January 1987, greeted by western companies with enthusiasm, can be a sign of a new era to deal with foreign investors wishing to operate in the Soviet Union. New York Times has recently reported on a number of contracts signed by a number of American companies with the Soviet Union.(1)

Moreover, China, after having been under the restrictive economic rule of the Communist regime, has succeeded to depoliticize the international commerce

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(1) Keller, "Joint Ventures, Russian Style", N.Y.Times, January 6th, 1987 At Di, Col 3.

sector and has been successful to attract foreign investment from 28 countries, with a value amounting to more than US $16 billion during the 1979-1985 period.(1) Additionally, the fifty laws launched by the Chinese government during the same period can thus prove the importance given to this particular sector of the economy which can bring much benefit to the country.

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(1) Moser. M, "Foreign Trade, Investment And the Law In The FRC", Oxford, 1987, p.90.

Part Two.

Current International law relating to foreign investment.

The legal side of foreign investment has been the subject of complex contradictions which have gone through different stages. The source of such a problematic situation is the conflictual nature of the West-South economic relationship rooted not least in the colonial era. Regardless of the politico-economic and social problems of less developed countries (LDCs) (see the first part of the present thesis), most legal issues have been generated mainly by the contractual method which LDCs have chosen as a legal mould to deal with western foreign investors, particularly in the last two decades (1960s-1980s). The problematic aspect of such agreements, which some authorities call "International Development Agreements", is the usual presence of the phenomenon of Multinational Corporations (MNCs) as a major contracting party. MNCs are a matter of grave concern for the developing recipient countries as to how to cope with those gigantic, professional and powerful entities in a manner which can reconcile two legitimate interests, namely, the right to development of LDCs, on the one hand, and the profit and other interests of the MNCs on the other. Accordingly, the call for the promulgation of an international system for the regulation of MNCs was clearly heard for the sake of an equilibrium of mutual interests based on fairness and equity.

In such a framework, complex legal concepts had to be discussed. Some such concepts, historically created and developed by dominant capital exporting countries as an epilogue to their national investments in earlier colonial regions and now developing host countries, involved a sharp confrontation around the property of aliens, state responsibility and the principle of national sovereignty over natural resources. Other important issues concerned such notions as backwardness, hunger and the right of LDCs to be developed. All these points dealt with the actual imbalance between the interests of the West and the South. The failure of the international community of states to codify the above mentioned and other related legal concepts, particularly the duty of a state regarding the proper treatment of aliens and their property is one aspect of the so to speak legal disorder which develops in the wake of semi-solutions not dealing with the essence of topics and issues crucial to both foreign investors and host countries. In this context, an eminent author's opinion on the work of the International Law Commission (ILC) on state responsibility may be quoted: "there is reason to believe that the Commission's long and laborious work on state responsibility is doing serious long term damage to international law and international society."(1)

The situation has become much more complex after the

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(1) Alott.Ph,"State Responsibility And The Unmaking Of International Society",Harvard Int'l law,1988,no29,1,p.1.

emergence of many newly independent states since 1945 and their call for an immediate abolition of almost all regulations and laws made in the previous era under and by colonial ruling states.

Since the end of 1970, however, efforts have been redoubled to soften the acuteness of the matter. These efforts have been initiated by states which have embraced a nationalistic approach to their development strategies, particularly within the framework of international business. Among those countries are the USSR as a representative of the socialist bloc, as well as Mexico, which is considered to be a typical state with regard to its reaction to the old system of protection based on the Calvo and other national treatment doctrines.

The practical field of this new trend can be assessed with reference to the Soviet attempt to reduce the acuteness of the matter by promulgating her historical decree of 1987.(1) In it, it is stated that the mixed enterprise property will not be subject to requisition of confiscation through administrative procedures. The new Mexican guidelines on foreign investment (1984) mark a progress towards stable principles applicable to economic relations between the West and the South, particularly in the field of foreign assets protection, hitherto a hot issue in international business.However,despite this improvement in the attitude of host capital importing states, no overwhelming change

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(1) See, Pravda, January 27th, 1987

has been effected on the side of capital exporting countries and capital exports from them.

In order to highlight the current situation at the level of international law relating to foreign investment, the two chapters which follow below will deal with the relevant complex issues concerning the protection and legal regulation of foreign investment within the host country.

Chapter IV

The Protection of foreign Investment; traditional Rules and new Challenges.

The debate on the protection of foreign investment constitutes the cornerstone of modern transnational investment law, whereby disagreements form a serious obstacle. These disagreements have begun to exhaust the efforts of many international institutions and organisations involved in lengthy debates which are becoming "rather banal".(1) The amount of effort spent on this matter shows, however, the importance attached to the whole matter while not concentrating on the aspect of economic cooperation, which two-thirds of the world badly need. In this respect, one eminent author has said: "En règle générale, les questions d'investissement sont analysées sous l'angle de la protection; elle sont rarement abordées sous celui de la cooperation économique".(2)

In this situation involving a conflict of interests, however, a crucial question comes up. It concerns the ability of contemporary international law to adjust itself to and regulate the actual patterns of international affairs. The current (anarchical) state of

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(1) Falk. R.A, "The Changing Structure Of International Law", New York, 1964.

(2) Laviec. J.P, "Protection Et Promotion Des investissements Etude de Droit International Economique", Geneva, 1985, p.2.

international law can be regarded from an ideological angle, as it has been observed by Lord Showcross: "The existence of the divided world at this time with the competing ideologies of communism and private enterprise, of dictatorship and freedom make it quite impossible for all the countries of the world to agree upon a general body of fresh rules in regard to this matter of foreign investments."

Therefore, to analyse the new international legal machinery relating to foreign investment protection, we shall throw some light on traditional ideas and principles underlying international customary law. Most Western jurists have had a strict approach to it, both academically and practically.

A: Traditional rules relating to property protection.

1) The doctrine of an international minimum standard of civilisation. (1)

According to this doctrine, based in Western countries on the classical concept of "Laissez faire" and the sanctity of the human individual and his property, the host state must not treat aliens below the international minimum standard of civilisation if aliens happen to be living or working or running businesses in the sovereign territory of the host country. Further,any arbitrary act, described as an express violation of the

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(1)Sometimes called "The International Minimum Standards Of Justice", however, both civilisation and justice are abstract concepts which are widely interpreted.

minimum standard, leads systematically to the international responsibility of the given host state. This responsibility carries as a legal consequence the right of the aliens's home state to intervene through "diplomatic protection". Therefore, if by chance the level of national treatment falls below the international minimum standard, diplomatic protection may be invoked.

Schwarzenberger is of the opinion that foreign assets can be expropriated but only under the precondition of public interest, excluding discriminatory treatment and including adequate, prompt and effective compensation as considerations which must be kept in mind at all costs.(1) Originally, this theory was claimed as a legal formula in 1910 by Elihu.Root, the former secretary of state of the United States, although it had been invoked earlier on several occasions of state practice. With regard to the context of the theory, it was actually suggested to govern the conduct of the territorial sovereign state and the limits of freedom of action recognised under international law.

The minimum standard doctrine was also developed to challenge another theory favouring "the national treatment standard" initially embraced by Latin American countries under the influence of the Calvo dectrine. It was agreed that "Although the international minimum standard has received wide support in legal writing and

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(1)See Moore.J"A digest of international law",Washington, 1906, V .(VI), pp. 252-312, 321, 700, 725 and 770.

in juridical practice, the exact content of the standard in respect of protection of property has never been fully established."(1) This opinion was also documented by the failure of the Hague codification conference in 1930 to reach an agreement on state responsibility.(2)

The resulting situation was due to the opposition of capital exporting countries to a theory which lacked and lacks logic on the one hand, and unilaterally favours only the welfare of capital exporting countries on the other. On this point Lissitzyn illustrated that the international minimum standard "can no longer be counted on to protect the interests of foreign investors in all the less developed countries."(3)

It can thus be said that although the current attitude of capital exporting countries still adhers to traditional concepts of foreign property protection, the doctrine seems to exist like an illusion, based on assumptions marked by abstractness and vagueness; it raises not least significant questions as to how to put it into concrete action. In other words, it stands on

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(1) See Bring. O.E, "The Impact Of Developing States On International Customaty Law..",In S.S.L, V.24, 1980, pp.103-4.

(2) See Queen. H, "Responsibility Of State For Damages Caused In To The Person....", AJIL, (XXIV), 1930, pp.500-513-514.

(3) Lissitzyn,O.J,"International Law today and tomorrow, Netherlands, 1965, p.79.

simple presumptions which cannot be proven. Eagleton has mentioned the indefiniteness of the standard as a source to possibly abuse the weaker states. As a remedy he suggested to look for "a more precise statement of what is expected of the host state, and a more impartial interpretation and enforcement of the requirements by the community of nations."(1) If we admit that an alien operating in a foreign country is subject to all domestic laws and regulations, we tacitly agree that the whole legal system will be applicable whether convenient or inconvenient for him except if there is an international convention between the alien's home country and the host country. It thus seems fair to conclude that the treatment of an alien has to fall within the ambit of the host state's laws and jurisdiction; however, international conventions have to be considered.

As far as case law is concerned, the uncertainty and the lack of concrete rules of the standard doctrine were clearly illustrated in the NEER case in 1926 when reference was made to "...an insufficiency of governmental action so far short of international standard that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to

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(1) Eagleton,C."Responsibility Of States In International Law", New York, 1928, p.86.

international standards is immaterial."(1)

A further legal question deals with this doctrine. It concerns the possibility to give an alien some extra rights in case the national standards fall below the international minimum standard. Previously, both doctrine and case law regarded with favour the application of the international minimum standard. The Robert claim case supported this opinion: "The same treatment as that given to all other persons...with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But equality is the ultimate test of propriety of acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilisation."(2)

After 1945, however, legal opinions evolved. Several new questions emerged, particularly involving the issue of equality of states, sovereignty and their freedom to maintain the flow of international capital and to dispose of their wealth and resources "without prejudice to any obligations arising out of international economic cooperation based upon the principle of mutual benefit and international law."(3)

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(1) UN reports Of Internationl Arbitral Awards, V(IV), p.61 2. (2) UN-Mexico general claims commission, 1926, p.100. (3) UNGAOR, 10th sess, Annexes, Agenda Item, 28-I(A/3077 (1955)), p.39.

For further details about the International minimum standard, see Friedman. S,"Expropriation In International Law" London, 1953, pp.137-139; White, "Nationalisation Of Foreign Property", London, 1961, pp.38, 240; Mumery.D,"The Protection Of International Private Investment, Nigeria And The World Community", USA, 1968, pp.41-47; Kronfol.Z,"Protection Of Foreign Investment ", Leyden, 1972, pp.13-18; O'Connel.D,"International Law", London, 1970, V.(II), pp.694 and 780-781; Lillich.R,"International Law Of State Responsibility For Injuries To Aliens", USA, 1983, p.10. You can also consult the following cases: The NEER case, Annual Digest Of Public Int'l (AD) 1925.26, no 154.

Again a strong opposition was in different forms developed by a great number of states led by Latin American states and followed by socialist countries and eventually by the newly independent African and Asian states. Their arguments centered around three basic questions: Sovereignty, property, and lastly the current trend towards a new international economic order. These concepts will be considered in what follows in the present chapter.

2) Acquired rights doctrine.

The legal issue of protection was basically raised with regard to expropriation which some exporting capital countries considered to be an illegitimate act with regard to the principle of "pacta sunt servanda" as a principle interpreted by the Permanent Court of

International Justice as an important point governing state contracts. It was remarked that: "The principle of pacta sunt servanda...applies not only to agreements directly concluded between states but also to those between a state and foreigners."(1)

The aquired rights doctrine was initially applied in the sphere of conflict of laws. It has created several legal issues raised mainly by some well known jurists, such as Pillet(2), Niboyet(3), Dicey(4) and Cheshire(5). Therefore, as said by Lalive "The origin of the principle of aquired rights is found in legal individualism and it has been used as a defence against state interference with the interests and rights of individuals and as a plea in favour of social status quo".(6)

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(1) Losinger Case,P.C.I.J; Series C,No 78(1936); see also Wehberg, 53 A.J.I.L, 1959, p.786 in which he concluded that: "The principle is valid exactly in the same manner, whether it is in respect of contracts between states or in respect of contracts between states and private companies."

(2)Piller,"La Theorie General Des Droits Aquis", RCADI, 1925, p.489.

(3)Niboyer, "Traité De Droit International Privé Français", Paris, 1944, V.3, p.294.

(4)Dicey.A, "Conflict Of Laws", 8th Ed, London, 1968,p.12.

(5)Cheshire, "Private Int'l Law", 8th,London,1970.pp.28.

(6)Lalive.P,"The Doctrine Of Aquired Rights",1965,pp.151.

Hence, the acquired rights doctrine may be treated as only an appendix of the international minimum standard doctrine, as shown by the British government's statement in 1914, about the Portuguese religious properties case, in which it was said "Respect of property, respect of acquired rights, those are the legal principles of all civilised countries."(1)

On the other hand, a great number of cases have endeavoured to support the theory of acquired rights in international law. In the CHORZOW factory case (1928), the Permanent Court of International Justice stated that "The action of Poland...is not an expropriation-to render which lawful only the payment of fair compensation would have been wanting, it is a seizure of property, rights and interests which could not be expropriated even against compensation"(2). Similar opinions may be found in the case of German interests in Polish Upper Silesia before the PICJ in 1926(3); in the German settlers in Poland case (1923)(4); the Oscar Chimm case (1934)(5); and the Interhandel case (1959)(6).

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(1)Cited by Fachiri in 6 (British Yearbook Of International law), 1925, p.168.

(2) Factory at Chorzow, Merits, Judgement no.13, 1928, P.C.I.J., Series A, no.17.

(3) Merits,Judgement no 7,1926,P.C.I.J.,Series A,pp.22,42

(4) P.C.I.J., 1923, Series B, no 6. pp.35,36.

(5) P.C.I.J., 1934, Series A/B, no.63, pp.81,88.

(6) I.J.J. pleadings, 1959, pp.121, 122 and 131, 133.

With respect to arbitration two famous cases may be mentioned: the Arabia-Aramco arbitration (1958)(1) and the Sapphire International Petroleum case.(2) The acquired rights doctrine therefore appears to acquire two major facets, the first of merely historical value, prohibiting expropriation in any circumstances; however, if such an act happens, the alien has the right to claim reparation. This solution was underlying The "Kellog doctrine" asserted by United States against Mexico in 1926(3). The second facet confirmed the host state's right to expropriate, provided that the act was not discriminatory, in the public interest and included reparation in the form of an adequate compensation. Thus, the theory does not apply as an absolute concept but rather as a legal condition based on fair compensation in case of expropriation. This latter thought was supported by O'Connell: "The doctrine merely indemnifies the titleholders from complete and arbitary destruction of their interests."(4) Therefore, the acquired rights doctrine has simply been another method developed by western jurists to embody the principle of lawful expropriation in operational practice.

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(1) See 27 International Law Reports, pp.168.

(2) See 35 International Law Reports, pp.136-138.

(3) See Lippruau, "Vested Rights And Nationalisation In Latin America, "5 Forreign Affaires", 1927, pp.359,360.

(4) O'Connell.D, "State Succession In Municipal Law And International Law," Cambridge, 1967, V.I. p.266.

There is thus no justification to consider it as a fundamental improvement in international customary standards. Moreover, it has suffered failure in a number of cases, for instance in Cook v Sprigg(1), Sanchez v US(2) and the West Rand Central Gold Mining Co v R.(3)

Looking to the contexts of these cited cases, we find that the successor (Now third world) states are not obliged to maintain the previous municipal legal systems; any claim for rights acquired under international law would have to be heard only within the framework of requirements concerning compensation for lawful expropriation. Several states have applied this in practice, among them Algeria under the Evian treaty of 1962 with France, in which it was agreed that French Companies will hold all acquired rights relating to the "Sahara Subsoil". The Algerian government, despite the agreement, nationalised the remaining French companies.

The doctrine has been exposed to many attacks,a most severe one being probably by Friedman,who has described it as "obscure, ambiguous and indefinable"; he also said that it "finds no support in judicial decisions...and can not therefore be raised to the dignity of a principle of

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(1) See AC 1899 pp.572 cited by Delupis.I, "Finance And Protection Of Investment In Dcs", p.109.

(2) Delupis, Ibid, p.110.

(3) Delupis, Ibid, p.110.

international law".(1)

Kaechenbeek has remarked that the acquired rights doctrine cannot be an effective means to solve the outstanding problems of nationalisation because of its inadequacy and powerlessness.

Bedjaoui, as repporteur on state succession in the International Law Commission, has commented that: "In the present era of decolonisation, the principle of (Acquired rights) may be no longer valid in view of new nations' sovereignty over their natural wealth"(2). Delupis has found no validity for this doctrine in public international law: "The theory of acquired rights was never justified at any time in public international law. It has at times been borrowed like a "Cliché" from the field of conflict of laws, which is its true field"; he remarked that "If a state wishes to introduce quite a different type of economic or political system, acquired rights do not enjoy any special protection to argue that public international law actually forbids a newly independent state to organise its political units as it pleases, and surely international law cannot bind a newly independent state to a certain political and economic cause."(3)

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(1) Friedman.C, "Expropriation in International Law", 1953, p.126.

(2) Bedjaoui.M, Year book of Internatonal Law Commission, 1968, V.2, p.115.

(3) Delupis, op cit, p.113.

Therefore, in the light of the above mentioned opinions, one may conclude that the doctrine is rather an abstract concept, full of uncertainties; its supporters want to avoid the well known rule of "Qui in territorio est, etiam meus subditus est" (which means If somebody is in my territory he is also subjected to me). Moreover, the doctrine cannot assist the rapid develoment of investment law because it cannot offer a solution to questions raised by international business activities. What matters and needs attention concerns the newly independent states and their recognised right to act upon new forms of regulations. This particular right takes its legitimacy from the doctrine of the fundamental change of circumstances.

3) Prompt, Adequate and effective Compensation: The conflictual Formula between industrialised and developing Countries.

Before examining the concept of prompt, adequate and effective compensation with regard to the measure of expropriation, it is worthwhile to look at the historical background of expropriation. In fact, it is not possible to understand the present situation without having a look at it.

Generally speaking, the right to take over foreign assets has never been subject to any disagreement; its international legitimacy comes from the territorial sovereignty exercised by independent states over their natural wealth and resources, recognised by the United

Nations General Assembly Resolution 626(VII) (December,2nd, 1952) as follows: "The right of peoples freely to use and exploit natural wealth and resources is inherent in their sovereignty and is in accordance with the purposes and principles of the Charter of the United Nations."(1)

This right has been given an official status by capital exporting countries, for instance, France, United States and United Kingdom with reference to the Egyptian nationalisation of the Suez canal company in 1956. It was in this respect noted, in a statement on August 2nd, 1956, (paragraph 2) that: "they (the three governments) do not question the right of Egypt to enjoy and exercise all the power of a fully sovereign and independent nation, including the generally recognised right under appropriate conditions, to national assets, not imposed with an international interest, which are subject to its political authority".(2) The validity of this right was confirmed by a considerable number of cases,for instance, the Anglo-Iranian Oil Co v S.U.P.O.R. and Kuwait v American Independent Oil company known as Amenoil case (1982).

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(1) UNGA, Official Record, 7th session, supp no.20 (A/2361), p.18.

(2) White. G,"Nationalisation Of Foreign Property", London, 1961, p.46.

As to opinion in Islamic law (shari'a) on the matter, Islam disagrees with the capitalistic concept of private property (notion of private property), and also with socialism which considers public property as the only means to win the battle of adequate production. Islam as divine law recognises many co-existing forms of property. In order to maintain a balance between the human desire to possess things and the duty of the state derived from the concept of "vice regency" of God on earth, Islam applies an approach of two categories of ownership. This approach gives to Islamic thought a quality of pureness and uniqueness based on solid moral and ethical values. The approach gives to individuals the freedom to produce and to consume goods within limits laid down in the holy Quran. On its side, the responsibility of the state is to protect human and civil rights as well as supervise the proper application of divine rules (El houdoud). It is also the duty of the state to orientate and organise the economic, political and social affairs of the population; for this reason it is sometimes a necessity for the state to take an individual's property if public interest requires it. Under Islamic law, such a measure has to be followed by fair compensation. The same rule and procedure can be applied to vacant and unexploited property, in accordance with the well-known principle, "Land belongs to whom who cultivates it".

With respect to the question of fundamental rules governing expropriation of foreign assets under international law(1), although "neither doctrine nor case law has yet adopted a conclusive position as to the basis of international responsibility," international lawyers seem to agree that private property can be taken, but under three major conditions, otherwise an action for the non-validity of the measure can be initiated against the expropriating state. These conditions are:

a) The public Motive.

A legal expropriation must be in the public interest of the host country. This condition was primarily raised in the Walter Fletcher Smith case(2) when the arbitrator argued about the invalidity of the expropriation measure brought before him, because it was oriented to serve a private company. The same argument was asserted against Cuba after the promulgation of law 851 (1960) followed by three resolutions when 195 American business companies

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(1) Fifth Report Of The Special Rapporter Of The Int'l Commission On International Responsibility, UN. Doc. A/CN.4/125 1960.

(2) Fifth Report Of The Special Rapporter officer Of The Int'l Commission On International Responsibility, UN. Doc. A/CN.4/125 1960.

were nationalised. The Cuban measure was challenged before the US courts on the basis that the nationalisations were not based on the public utility rule. Domke has pointed out that the Cuban resolution no 1 of August 8th,1960 implementing the nationalisation law no 851 of July 6th, 1960, included the following: "It is hereby declared that these expropriations are effected for reasons of public necessity and use for national interest". It was argued that two different purposes co-existed at one and the same time, one political and the other national. In such a dichotomy, how could one identify and distinguish the justified intention and purpose from the wrong? Again, with regard to the Indonesian expropriation of Dutch owned enterprises, the Netherlands government argued as follows: "The preamble to the act (sic. Act for the nationalisation of Dutch-owned enterprises of December 31st, 1958) shows that the measures are not based on the general interest but have been taken for the purpose of exerting pressure in a political dispute."(1) However, the Indonesian nationalisation law stated that: "The nationalisation... is intended to provide the Indonesian society with the greatest possible benefit..."

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(1) About the subject, see AJIL (54) 1960.

The above cited cases show how difficult it may be to prove the existence of justified public interest underlying a nationalisation measure and to distinguish it from unjustified motives and purposes. International law does not provide any solution to tackle this kind of problem. Not least, the notion of public interest as a legal concept differs from country to country, from legal system to legal system and from political regime to political regime. As a result it is at this stage not possible to agree on an international standard of public interest. Probably, a possible solution which could be appropriate would be to abandon the traditional principles and try to set up a new international legal system applicable to expropriation and nationalisation.

b) The non-discrimination Rule.

The content of this rule is not clear, nor is it clear what exact points and purpose the promoters of this theory intended. The rule lays down that an alien shall enjoy the same treatment as any national of the host country; this means that the expropriation of foreign assets should be able to pass the test of equal applicability to aliens or nationals. However,any measure which affect an alien's private property without affecting the property of others may justify the alien concerned to claim to be subject to wrongful

expropriation. The rule has been tested in a number of cases, for instance in the Anglo-Iranian oil company case after the company was expropriated by the Iranian government under the Iranian oil nationalisation act of May 1st, 1951. The British government claimed that the nature of the Iranian legislative act was discriminatory. With regard to Indonesian expropriations, the government of the Netherlands pleaded that the expropriation was discriminatory: "The measures are only directed against Dutch-owned enterprises and therefore discriminatory since they exclusively affect the property of aliens of one particular nationality."(1)

The Sabbatino case is also of interest for the rule of non-discrimination. It was held that the Cuban nationalisation under the 1960 law was explicitly directed against American citizens.

Similar opinions were expressed in other cases, such as in the Romanian nationalisation of American businessed(2), the Oscar Chinn case (1934) and the case of Phosphates in Morocco.(3)

When defining the rule of non-discrimination, even eminent judges have not been able to supply specific criteria to judge the discriminatory or non-

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(1)Netherlands-Indonesia, "Netherlands Nte Of December 18, 1959 Regarding Nationalisation Of Dutch-Owned Enterprises", AJIL 54(1960), p.485.

(2)See White.G,"Nationalisation Of Foreign Property",p120

(3)Phosphates In Morocco, Judgement, 1938, P.C.I.J., Series A/B, No 74, p.10.

discriminatory act of a host state. In the developing countries' perspective, international business relationships with developed countries are always surrounded by a strong ring of doubt, suspicion and fear due to the belief that the spirit of the colonial era may still prevail. Developing countries want to keep their economies safe from alien interference whatever its aim. For this reason they try to improve their internal business climate especially for their nationals. On this ground if the national public purpose requires the expropriation of any aspect of commercial activities in which several companies (foreign and domestic) are involved, they rather expropriate foreign companies than domestic ones though the latter too are private companies. Such measures seem sometimes adequate to cope with the demands of the economic situation of developing countries which are obliged to depend on themselves to have their own industry and technology. However, if a situation involves two different foreign companies active at the same time in the same host state, two considerations have to be distinguished:

i)Are two or more foreign companies working in the same sector of development (for example natural resources)?

ii) Are two or more foreign companies active in separate sectors of development?

As far as the first situation is concerned, in case the host state decides to expropriate them under the public purpose condition, the expropriation law must cover all of the companies except if a bilateral treaty signed between the host country and the companies home

state provides otherwise. Such a situation obtained after the signature of the Evian treaty in 1962, affecting the situation in Algeria. It provided for a special status for French companies active in the hydrocarbons sector. Thus, because of this treaty, the Algerian governmemt could not act against and expropriate them; however, other multinational subsidiaries for instance, of Shell, Mobil, Esso, were nationalised. Until 1971 French oil companies were not nationalised.

Concerning the second situation, expropriation could be effected for two reasons, either for the public purpose which may justify the government to expropriate one particular company and not others, or the sector in which one of them is active becomes strategically crucial and is consequently declared closed for foreign companies; for example, in Algeria, after 1965, several sectors like banking,transport and telecommunication were nationalised as crucial sectors of the national economy.

Discrimination as an important legal issue of expropriation is thus related to the public purpose rule. Therefore, the same evaluation can fit both of them. The most striking question on this subject is: can discrimination alone constitute a violation of international law? Piper (1) responded to this question positively, by saying that the rule can by itself be an effective argument to challenge the validity of an expropriation measure in a host state.

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(1) Piper, "New Directions In The Protection of American Owned Property Abroad",4 Int'1 Trade L.J.1979,pp.315,319.

c) Compensation; its legal Implications.

Despite a rich literature devoted to this particular issue, competant lawyers are still facing uncertainty not so much on compensation itself but rather on how to compensate and on which basis.

In the Barcelona Traction case the judge noted that: "In states having different types of economic and financial problems, international law has become increasingly permissive of actions involving nationalisations. In place of what used to be denounced as illegal expropriation, the issues now turn largely on the measure of compensation, since even the famous General Assembly Resolution on permanent sovereignty over natural resources provided that compensation is due."(1)

Hence, any measure of expropriation without fair compensation is unlawfu., even if it is not discriminatory. Western jurists created some conditions for compensation; these conditions are: compensation has to be prompt, adequate and effective; but the matter is surrounded by very complex controversies.

The reason for it is the existence of two different international systems relating to the legal protection of foreign investment. One system is rooted in the colonial era and reflects the point of view of industrialised countries, while the second one is a very new one and is backed by the third world countries, as embodied in UNGA resolution 3281 (1974) and named the *Charter of Economic*

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(1) ICJ Reports, 1970. p.167.

Rights and Duties of States. It is considered to be a legal framework for the new international economic order (NIEO). In such a situation most writers on the subject agree on the impossibility to reach an international agreement between the two sides, despite many efforts from both sides. Several suggestions have been made, for instance, the attempt of some capital importing countries to adopt appropriate national legislation as a framework of investment codes favouring foreign investors. Such a solution, however, did not satisfy the investors, because it is not only a matter of legal guaranty but also one of protection of investors' activities against interference by authorities of the host country. A new legal phenomemon has emerged as a result, in the form of promotion and protection treaties (discussed in the next chapter).

To realise how difficult it is to have a unified international law on the matter of investment protection, it is sufficient to discuss briefly some new international business cases.

In the Liamco v Libya(1) arbitration case (1981), the sole arbitrator, Dr Mahmassani, considered the international law of compensation as "unsettled law"; he, in fact himself used a new term,"equitable compensation", instead of "prompt, adequate and effective compensation."

With regard to tangible property, the sole arbitrator agreed that Liamco should be compensated with

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(1) Libyan American Oil Co v Government Of Libya Arab Republic, April 12th, 1977. In 20(ILM), 1(1981).

a minimum damnun emergens, ie, the value of the nationalised corporal property, including all assets and various liabilities incurred.(1)

In the Aminiol case,(2) it was declared that states are, on the basis of their sovereign rights, allowed to nationalise foreign owned property, and such a right can be exercised even over an express stabilisation clause. Following such a nationalisation measure, appropriate compensation should be given to indemnify the expropriated company to compensate for its fixed assets and for its loss of future profit with regard to all pertinent circumstances.

With respect to the American International Group Inc v Iran case(3), the USA claimed that the expropriation measure by Iran was unlawful under international customary law as well as under the American-Iranian treaty of Amity, Economic Relations and Consular Rights of August 15th, 1955. The Tribunal rejected the plaintiff's claim, and stated that the traditionally asserted "standard" of prompt, adequate and effective compensation had been repudiated by modern developments of international law; instead, a standard of "partial compensation should be applied, based on references contained in resolutions of United Nations organs and from post-war settlement practice". The tribunal added

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(1)Ibid. (2)Arbitration Between Kuwait And American Independent Oil Company, March 24th, 1982, In "21 ILM" 1982. (3)Iran-US claims Tribunal,4(1983),Rep.96 and 23(ILM) 1984.

that:"Even if the standard of compensation were held to be 'just' compensation for 'full value', it would be inappropriate and unreasonable to value the property as a going concern(1) "taking into account not only the net book value(2) of its assets but also such elements as goodwill and likely future profitability had the company been allowed to continue its business under its former management."

The most striking case is perhaps the recent INA corporation v Iran case(3). The main objective of the case is to find out"the appropriate level of compensation to be paid" to the injured company. Arbitrator Lagergren referred to the idea of partial compensation when dealing with the position of the nationalising host government which applied the expropriation measure under the imp;ementation of fundamental and large scale economic reforms. The arguments submitted by him were based on some precedent cases, like Texas Overseas Petroleum Co/ Californian Asiatic Oil Co v Government of Libyan Arab Republic (17 ILM, 1978; 53 ILR 389 (1977)), in which the

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(1) Going concern is computed by multiplying a profit figure for an agreed year or number of years by another figure (ie. ten or more) to determine the investment value. See Muller, "Compensation For Nationalisation: A North-South Dialogue", 19 Columbia Journal of Transnational Law, 1981, p.39. (2) Book value is the total assets minus total liabilities.

(3) INA Corp v the Islamic Republic Of Iran, AWD 184-161-1, The Hague, August 31st, 1985.

arbitrator said that "The test of appropriate compensation" is a new legal phenomenon actually accepted by a great majority of jurists. He mentioned some other quotations found particularly in the Aminiol case in which the arbitrator referred to the suitability of "appropriate compensation" in the context of "an enquiry into all the circumstances relevant to the particular concrete case".

Arbitrator Holtzman in affirming the validity of the traditional principles, interpreted "appropriate compensation" to mean "full" or "adequate". His arguments were derived from the UNGA Resolution 1803, this resolution has been accepted by a great number of industrialised capital exporting countries. What can be concluded from this brief discussion is that host countries, which are most of the time developing countries, cannot bear the burden to pay the cost of their nationalisations in the manner requested by industrial capital exporting countries. This situation could, however, be very detrimental to North-South economic relations which are already not in favour of third world countries as the needy parties seeking to develop thenselves economically with the financial and technological assistance of industrialised countries. A new compromise is noticeable on the horizon, particularly through the new legal phenomenon of bilateral treaties, but even this will not stop developing countries to assert their absolute right to call for a new international economic order on the basis of an effective international cooperation for the benefit of all members

of the international community of states.

It may be concluded that the traditional rules of compensation seem to have received exaggerated emphasis and attention and their validity is very debatable. Scholars like O. Bring have argued that these rules have not even been worked out and tested in state practice, as shown in the light of a list he managed to draw up with some cases. He reached the conclusion that, among thirty judicial or arbitral settlements, only three cases have adopted the classical concept of "adequacy", applied by Zambia in 1969, Peru in 1976 and Brazil in 1964. The rule of promptness did not even have a single example for support among the given cases. Dominantly the book value of the expropriated property was used for reference as to the effectiveness rule; he remarked that almost all compensations were paid in both hard and convertible currency, or by reinvesting the actual payment in the debtor state. The latter compensation method was used by Algeria after the 1971 nationalisations of French oil companies.

The Hull formula was sometimes rejected by those who created it, for instance by the US court of Aooeals which did not accept it in the Banco Nacional De Cuba v Chase Manhattan Bank case. In the Charzow case too (1928), the PCIJ decided to give to the injured person "payment of fair compensation".

In the 1922 Norwegian Shipowners claims, the tribunal decided to give "just compensation" in form of "fair actual value at the time and place" by taking into

consideration all circumstances. (1)

As far as doctrine is concerned, Friedman noticed that "It is nothing short of absurd to pretend that the protestation of the rule of full, prompt and effective compensation...in all circunstances is representative of contemporary international law". (2) Schachter observed that"The Hull formula,admittedly rejected by a great many states, has become largely political rhetoric, perceived on both sides as symbolic in the confrontation between North and South". He evaluated the formula by saying:"To present it as an effective element of investor protection is, at best, an exaggeration, if not an illusion". (3)

For developing countries as host states, compensation is based on state's financial capacity; it should not hinder development reforms. This idea was originally carried out by Mexico in its response to the Hull formula:

"your government is not unaware that our government finds itself unable to pay the indemnity to all affected by the agrarian reform, by insisting on payment to American landholders". (4)

Partial payment is also one of developing countries'

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(1) Norwegian Shipowners claims (Nor v US), IR. Int'i Arb. Awards 307, 3339-341 (1922).

(2) Friedman, "National Courts And The International LegalOrder", 34 Geo, Wash, L. Rev, 1966, pp.443,454.

(3) Shachter, AJIL, 1984, V.78, pp.125-126.

(4) Road, "Compensation For Takeovers In Africa", 11 J. Int'l Law And Economics, 1977, p.528.

demands, particularly under the current international economic circumstances.

As far as international debt is concerned, a new legal question has been raised concerning the possibility to expropriate this debt if it is required by the development reform of the host state. The cause of such a new procedure could be the continuing growth of international lendings to developing countries, particularly under worldwide economic crises and the sudden fall of oil prices.

It therefore seems that loans and bond issues may be expropriated if the process of taking such properties is not arbitrary or discriminatory. However, how is compensation to be effected in such a case? Third world countries are unable to pay anything beyond their financial means. Efforts are required to simplify loan agreements procedures by extending repayment periods and reducing or minimising interest rates to allow the borrowing countries to use loans for productive projects which can be a source of income in the long run.

B: The new Challenge to classical international Law relating to the Protection of foreign Property.

The Euro-American approach to international customary law concerning the protection of foreign assets is no longer accepted by the dominant opinions of the world community. Since the appearance of the Euro-American rules, their acceptability has been challenged. Initially the reaction was aimed at the exaggerated diplomatic protection and interference by Western

countries in Latin America. The real reinforcement of an opposition was worked out by Carlos Calvo before the Russian Bolschevik revolution of 1917. Later, the emergence of new independent states in the 1960s ushered in a new stage against the old approach to state responsibility. This new challenge involves two legal concepts: i) state sovereignty over natural resources and ii) the call for a new international economic order. To evaluate these new legal challenges, let us use the following as a methodology.

1. Latin American Countries and their Rejection of traditional international Rules of State Responsibility.

As stated above, the Latin American challenge was expressed as a reaction to the abusive diplomatic interference of Western countries to enforce their citizens' claims against host states. The Argentinian lawyer Carlos Calvo, in his well-known book "El derecho Internacional teoretico y practico de Europa y America" published in 1868, established a doctrine (Calvo doctrine) involving two main principles: under the first principle Calvo emphasized a sovereign state's right to be free from any kind of external interference, be it diplomatic or by the use of force. This principle was based on the principle of equality between states. With the second principle, in responding to European and US American demands for a privileged legal treatment of their citizens, Calvo asserted the "equality of treatment" of both aliens and nationals under the jurisdiction of the national courts of the host state. Thus, a new doctrine 'the national treatment doctrine',

was born challenging the classical concepts of state responsibility. Following this development, most Latin American states effected the constitutionalisation of the doctrine, for instance, Mexico in 1917, where in Art 17 it was declared that: "Private property nay only be expropriated for a public purpose and against compensation". Within the context of the same Article the equal treatment between aliens and nationals was stressed and the concept of diplomatic protection was rejected if it concerned property matters. Mexico has shown its resolve to apply the doctrine against the United States on several occasions, for instance, under the Agrarian reform of 1917-1938 and the oil nationalisation of 1938-1939. Also under the influence of the Calvo doctrine, Latin American countries have put into practice a new contractual clause adopted to eliminate the traditional concept of concession contracts.

To ensure the full practical fulfilment of the "National Treatment" doctrine in all of the Latin American countries, several meetings were organised. At the first one, the Pan-American conference, held in Washington in 1889-1890, fifteen American states pleaded for the adoption of a resolution for the equality of treatment between national citizens and aliens as a principle of American law.(1)

At the seventh conference of American states, held in Montevideo in 1933, a generally agreed resolution was adopted. In it, the following quotation was included:

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(1) Cited By Bring, Op. Cit, p.113.

"The conference reaffirms once more, as a principle of international law, the civil equality of the foreigner with nationals as the maximum limit of protection to which he may aspire in the positive legislations of the state."(1)

The 1933 conference also adopted the Convention on the rights and duties of states. Article 9 reaffirmed the Latin American states' orientation; it was stated that "foreigners may not claim rights other or more extensive than those of nationals"(2)Article 8 restated the states' disagreement with external intervention by aliens' home states.At this point the United States made a reservation against the forementioned Articles 8 and 9, based on the inadequacy of their provisions with regard to "the law of nations as generally recognised and accepted".(3)

The pressure exercised by the US as the largest supplier country of capital to Latin American states wa clearly shown in the adoption of the Bogota Economic Agreement signed at the ninth international conference of American states held in Bogota in 1948. Article 25 of the Agreement reads as follows:

"The states shall take no discriminatory action against investments by virtue of which foreign enterprises or capital may be deprived of legally acquired property rights, for reasons or conditions different from those that the constitution or laws of each country provide for the expropriation of national

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(1) See UNCTC, "Bilateral Investment Treaties",1988,p.243

(2) Ibid. (3) Ibid.

property.

Any expropriations shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner."(1)

On the basis of this article, the Bogota agreement did not enter into force as eight Latin American states made reservations and expressed their opposition.

Following the establishment of the Andean common market in 1969, the Latin American states participating in it agreed to adopt the Andean foreign investments code or "decision 24", promulgated on December 31st, 1970. The code is merely a legal response of the Andean states to international customary law relating to state responsibility. This was expressed by C. Meyer, the assistant secretary of state for inter-American affairs when he said that: "...finally, perhaps the key long-term consideration today is that capital wants to know the rules of the game, whatever the host country decides they may be".(2) Article 15 of the code is a practical effect; it keeps the external credits transaction of foreign companies at a certain level, Particularly with regard to

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(1) Noveva Conferencia Internacional Americana, Actas y Documentos, V(VI), Bogota, 1953, pp.146-147, cited by Bring, op. cit. p.114.

(2) Mayer. C, "Latin America: What Are Your Priorities?", 90 Dept Of State Bull.440,442(1969),cited by Convey T.O, "The Andean Foreign Investment Code: A New Quest For Normative Order As To Direct Foreign Investment",66 AJIL 1972 p.764, F3.

the hundred percent shares enterprises. Article 50 expresses the agreement of the participant states to the doctrine of "national treatment". Under the Article, the governments of the participating countries "are forbidden to accord to foreign investors more favourable treatment than national investors". Furthermore, Article 51 provides that: "In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts from the national jurisdiction and competence of the recipient country or allow the subrogation by states to the rights and actions of their national investors."(1)

The Article thus legitimises the actual reaction of the Andean pact countries against international jurisdiction; they reject, with few exceptions, the international convention for the settlement of investment disputes as a jurisdictional tool and express their opposition to deal with the new framework of bilateral investment treaties.

2. The socialist Countries and their Attitude to international customary Law

The question of international customary law on state responsibility has been strongly challenged by Communist states, using some new concepts which are different from those used by Latin American countries. The reason for these differences is ideological rather than legal, rooted in marxist thought. Basically, Communist countries

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(1) Convey, Ibid, p.773.

reject almost all of the aspects of international legal obligations with particular reference to the payment of indemnisation for any nationalisation of foreign owned property. This ideological attitude has been formulated by Soviet jurists who have supplied many arguments against the objectivity of international law as a legal apparatus to regulate the legal aspects of property between sovereign states. In this respect Vitkov remarked that: "international law does not consider the nature of property rights nor does it regulate property relations within a state."(1) Hence, the typical norm of foreign treatment must not fall under the application of international law but rather under the local law of the host country. Moreover, the state must approach the equality of treatment between the socialist enterprise and the foreign company under the global politico-economic structure of the socialist state. Under this thought, Communist countries demonstrated their total rejection of the traditional legal theory of state responsibility, while subsequently agreeing to pay compensation for nationalisations effected after the 1917 Bolshevik revolution. Their arguments are based on references to the historic background of those rules of international law which cannot be applied under the current principles of the international community. Tunkin referred to these principles as follows: "principles of respect for state sovereignty, non interference in

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(1) Vitkov "Nationalisation And International Law", 78 Soviet Y.B.I.L., 1960.

internal affairs, equality of states...good neighbourly fulfilment of international obligations".(1)

Starting with 1960s, after the cold war was slightly scaled down, Communist jurists undertook a new orientation towards the establishment of a new international law within a framework of peaceful coexistence and friendly relations.(2) They have called to renewed efforts to codify and harmonise new international legal rules to serve the welfare of the world population and soften the mutual attitudes of states with different political, social and economic systems. The "peaceful coexistance" theory has been actually taken from the so called Pancha Shila, the Sino-Indian agreement of April, 1954, concluded between Chou En Lai and Nehru. In it it was referred to "Mutual respect for territorial integrity and sovereignty; non-aggression; non-interference in internal affairs; equality of states; and mutual advantage".(3) Moreover, the Soviet bloc has appealed to the whole international community for an agreement on a new international law. In this respect Tunkin has affirmed that: "No state may profoundly disagree as to the nature of norms of

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(1) Tunkin, "Theory of International Law", 1974, p.86.

(2) See, for example, Tunkin in a letter to the Times (London) of February 25th, 1963, cited in "The International Court Of Justice And The Western Tradition Of Int'l Law, 1987, p.12.

(3) Kozhevnikov. F.I, "International Law A Textbook For Use In Law Schools", 1957, p.17.

international law, but this agreement does not create an insurmountable obstacle to reaching an agreement relating to accepting specific rules as norms of international law."(1) Therefore, the Soviet attempt was made in order to depoliticize international law in a manner that would make the conflicting parties forget the ideological aspects and state a new international peaceful era covering the field of transnational business and cooperation between the states as members of the international community. The idea of peaceful coexistence was later on formulated by a special committee of the UN General Assembly in accordance with the UN Charter and a corresponding Resolution was adopted in October 1970.(2)

Despite their continued opposition to traditional customary law, as clearly manifest in their refusal to adopt the UN GA Resolution 1803, the socialist countries introduced a considerable improvement in their attitude towards the access of foreign investment in their territories. Some of these countries have, in fact, gone so far as to sign some bilateral treaties with Western capital exporting countries for the purpose of acquiring technology and know-how. Romania and Yugoslavia are in this respect, the best examples. In fact the Romanian government has developed this approach through a number

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(1) Tunkin. G.I, "Coexistence And International Law", 95 Recueil Des Cours, 1958.

(2) Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States A/RES/2625(xxv) 24 Oct 1970.

of agreements, for instance, with Germany (January 10th, 1981); with Austria (1977); with Belgium (May 1st, 1980); with France (August 1st, 1978); with Italy (March 6th, 1979); with Great Britain (November 22nd, 1976). As far as legal incentives are concerned, Socialist countries are trying to facilitate the work of foreign investors in a Communist state like the USSR by giving great hopes to foreign companies with the promulgation of the 1984 decree on mixed enterprises. The decree will allow Soviet state enterprises to enter into joint-ventures with foreign companies. G. Burdeau has remarked that: "En publiant solennellement en première page de la Pravda du 27 january 1987 l'essentiel des décrèts adoptés le 13 janvier précédent par le Conseil des Ministres de l'URSS sur les entreprises mixtes, l'union soviétique rompt avec une tradition de soixante-ans qui paraissait éminement symbolique du système soviétique. C'est aussi, en meme temps qu'un tournant politico-economique, une brèche significative dans le dernier modèle parfaitement "orthodoxe" de monopole d'état du commerce extérieur existant dans un pays industrialisé"(1). This historic act, though it does not cover every aspect of international investment, such as the law applicable in case of disputes, is a preliminary stage towards an effective economic openness to international technology and know-how. This objective has been clearly mentioned

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(1) Burdeau. G, "La Nouvelle Legislation Sovietique Sur Les Entreprises Mixtes: Premiers Commentaires", J.D.I, 1987, p. 304.

within the preliminary provisions of the foresaid decree, as the USSR has been suffering from a backwardness in the field of industry and agriculture.

3. The Impact of Afro-Asian Countries on international Law relating to foreign Property protection.

The current conflict on the law of investment and state responsibility is actually between exporting capital countries and third world countries, particularly after the emergence of new sovereign states in former colonial territories. These new independent states, as soon as they achieved their political independance, found their economies to be in a very bad situation; this obliged them to open their doors and call for foreign assistance through very generous investment codes.

This policy was seen to be the only economic path available to come out of a vicious circle of underdevelopment and poverty after a period of colonialism. The Algerian code of investment of 1963 (discussed below later)is a good example for it. This strategy of most of the Afro-Asian countries was, however, no longer appropriate; "the decision-makers have shifted the priorities from attracting foreign capital to exercising full sovereignty over a certain enterprise or economic branch" on the territory of the host state, according it just and equitable treatment but not legal guaranty. Thus, the principle of states' right to permanent sovereignty over their natural resources became the legal argument and has been expressed in 1952 in a UN GA Resolution which declared that "the right of people

freely to use and exploit their natural wealth and resources is inherent in their sovereignty"; in addition, the Resolution acknowledged the right to nationalise "natural wealth and resources wherever deemed desirable...for...(the states')own progress and economic development."(1) Amazingly, the Resolution did not provide anything concerning the compensation for expropriated foreign property. In 1962, the well-known UN GA Resolution 1803 stated that in case of expropriation "the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures...and in accordance with international law".(2) The contents of Resolution 1803 seemed to please most capital exporting countries as they expressed their consensus on the Resolution. The USA upholds firmly this particular Resolution as a legal framework of contemporary international law on investment protection. In this respect Neville qualified the Resolution as "the last clear expression of the consensus on the principle that sovereign states were bound by contractual obligations with private enterprise".(3)

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(1) The Right To Exploit Freely Natural Wealth And Resources G.A.Res.626, 7 UN GAOR Supp (No20) At 18,UN Doc. A/2361(1952).

(2)G.A.Res.1803,17 UN GAOR, Plenary (Agenda Item 6), UN.Doc. A/5344/Add.1A/L412/Rev.2(1962).

(3) Neville,"The present Status Of Compensation By Foreign States...", 13 Vand.J.Transnational L.51,63(1980)

Since then the confrontation with and challenge of the validity of international customary law has continued, and it has been invoked that the relevant customary law had developed at a time when the Afro-Asian countries were, as colonial territories, under the control of Western states. Therefore, they have had no opportunity to participate in the codification of the rules and had not given their consent to them. This argument was clearly expressed in the Ethiopian delegates' statement: "Existing provisions of international law on the topic under discussion had been formulated without the participation of the less developed countries and did not adequately meet the needs of those countries for whom the problem of sovereignty was of particular importance."(1) Former judge Guha-Roy, in an article in 1961, confirmed this idea by saying it is "Probably impossible to reform the law as long as the old international law of responsibility continues to be weighted in favour of the stronger states...yet this is the effect of the extension of the existing law on the subject to states which neither were parties to the growth of this law in custom nor even adopted it on a reciprocal basis with other states.Unless two states have their nationals in each other's territory in appreciable numbers, the question of reciprocity hardly arises. This basis of reciprocity was available among the European

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(1) 32 UN ESCOR (1179th mtg) (1961). See Generally Permananent Sovereignty Over Natural resources, G.A.Res. 2158,21UN.GAOR. Supp(no16)29,UN.Doc.A/6316(1966).

states when practices laid the foundation of this law."(1)

The challenge of LDCs to the application of customary law to new legal facts was further seen in the 1970s, in nationalisation measures affecting a large part of the third world countries, particularly in the hydrocarbons sector. These measures were considered to be a revolutionary refusal of the principle of an international minimum standard and were at the same time a reflection of the absolute right of developing countries to develop their own ways of development. Thus, the influence of the Third World on contemporary international law can be seen under two aspects and concepts of permanent sovereignty over natural resources and the call for a new international economic order. In this regard Tunkin said that "The development of international law (was) increasingly influenced by independent Afro-Asian and Latin American countries. The overwhelming majority of the Afro-Asian states vigorously advocated the substitution of obsolete principles and rules in international law by new, progressive ones."(2)

The principle of sovereignty has thus been asserted by developing countries to emphasise the importance of national independence and economic self-dependency. Under the pressure of these countries, in the UN General Assembly, Resolution 3171 was passed to indicate that

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(1)Guha. R,"Is The Law..Int'l Law?",55(AJIL),1961,p.863.

(2)G.A.Res 3171 (XXVIII),28 UN GAOR Supp. (NO30A)At52,UN. Doc A/9030(1973),Reprinted In 68 AM.J.Int'l Law 381(1974)

"each state is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each state carrying out such measures." (Art. 3)

The UN GA later drafted the declaration(1) and programme of action(2) on the establishment of a new international economic order (NIEO); it was passed by consensus of the UN GA members on May 7th, 1974. The objective of the NIEO is to promote the "economic advance and social progress of all peoples", "based on equity, sovereign equality, interdependence, common interest and cooperation among all states".

As far as the protection of foreign property abroad is concerned, paragraph 4(e) of the declaration provides for the "full permanent sovereignty of every state over its natural resources and all economic activities. In order to safeguard these resources, each state is entitled to exercise effective control over resources and their exploitation by every means suitable to their own situation, including the right to nationalize or to transfer the ownership to its nationals; this right is an expression of the full permanent sovereignty of the state. No state nay be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."

The most controversial issue between the majority

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(1)G.A.Res.3201,UNGAOR.Supp.(No1)at 3,UN.Doc A/9559(1974)

(2)G.A.Res.3201,UNGAOR.Supp.(No1)at 3,UN.Doc A/9559(1974)

who voted in favour of the NIEO and the six[1] minority Western nations is the provision of Article 2/2(c), which emphasises the right to "nationalize, expropriate ownership of foreign property, in which case appropriate compensation should be paid".

This proves that the traditional rules, compensation has to be prompt, adequate and effective, are rejected by the majority of the world community of states. The article seems to decrease the legal value of compensation as an obligation in case of expropriation; in fact, the expression "should be" in the text can be used as a strong legal proof that there could be cases in which compensation would not be required. Beside what has been said about the forementioned Article, the Resolution has highlighted other issues relating to compensation; for instance, the amount of payment should not exceed the net book value of the expropriated property, bearing in mind the financial capacity of the recipient state as well as its jurisdiction over all activities of foreign companies operating in its territory; this right of the recipient country includes the entry regulations and the host state's control during the operational period of the foreign company.

However, states can either use incentives to attract the flow of international capital or they can restrict their access in their territory. In case of any change of circumstances, the host state has the right to call for

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(1) Only six countries voted against the resolution, they are US, GB, Germany, France, Belguim, Denmark.

an urgent negotiation of any international contracts with foreign firms. Such action can be undertaken either bilaterally or unilaterally and this is what has been agreed between all developing countries.

It can be concluded that although a number of authors described the NIEO as an order formulated "at a very high level of generality and abstraction, and in need to be further refined and developed in more concrete secondary principles in order to be immediately utilisable in actual community problem- solving or conflict-resolutions(1), it has some validity as an international attempt with the purpose to achieve a world code that can harmonise the actual lengthy debate about the law of state responsibility related to foreign investment. It reinforces, at the same time,the suspicion against the current mechanism of international economic, trade and finance institutions charged to narrow the widening gap in income between developed and developing countries, particularly within the framework of international debt. On this point, Resolution 3202 calls for "(d)ebt renegotiation on a case by case basis with a view to concluding agreements on debt cancellation, moratorium, rescheduling of interest subsidization."(2)

If we narrow the focus a bit to deal specifically with the profound question of the real contribution of

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(1) Macwhinnery.E, "The international Court of Justice And The Western Tradition Of International Law", Op.cit, pp.11-12.

(2) Resolution 3202, Op.cit, Art 1, Para.2 (g) (1974).

Afro-Asian countries and their impact on international law, it can be noted that these states, starting from the 1960s, have had their participation becoming effective not before 1969, African francophone states have agreed for an association with the European Community. Article 9 of the agreement between them provides that: "The association states shall treat nationals and companies of member states on an equal footing in respect of their investments and of capital movements resulting therefrom."(1)

This article, which applies the principle of reciprocity for "giving and taking advantages", sanctions the equality doctrine to bring both nationals and aliens together under the standard of national treatment.

Further, at the fourth session of the Asian-African Legal Consultative Committee (AALCC), held in Tokyo in 1961, a resolution was adopted in which Art 12 stipulated that the host state has the right "to acquire, expropriate or nationalize the property of an alien". Such action will be then followed by an indemnity paid "in accordance with local law,regulations and orders"(2). Therefore,the participating states wanted to maintain the national approach in dealing with the subject of

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(1) Sohn, "Basic Documents Of Regional Organisations", V.IV, New York, 1971, p.1708, cited by Bring, Op.cit, p.115, footnote no.63.

(2) Asian-African Legal Consultative Committee, Fourth Session Tokyo, 1961, p.49, cited by Bring, Ibid. p.116, Footnote No.64.

aliens treatment, and this is what has also been expressed in the report of the AALCC secretariat by saying that "In the context of modern society the doctrine of the minimum standard of treatment has been somewhat outmoded".(1) Concerning the acquired rights doctrine, the participants rejected the theory on the ground that it merely was a mirror of the previous international maximum standard formula.

OPEC, as an Afro-Asian organisation, has also contributed to the development of international law on state responsibility. Under "the Yamani participation program" oil producers have taken the decision to maintain the majority of shares within any mixed company which joins a local enterprise with foreign firms. However, in case of expropriation, a compensation has to be given under the book value of the expropriated foreign owned property.

This decision, taken by OPEC members, has changed the fixed ordinary compensation method favoured by the multinational petroleum companies within their concession contracts.

The Interarab Investment Guarantee Company is another regional institution which functions as a typical mechanism in international investment law. It "institue un système endogène de garantie des investissements dans la mésure ou seuls sont admis à cette garantie les investissements en provenance et à destination d'un état

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(1) Ibid,pp.131-132,cited by Bring,Ibid,Footnote,No.66.

arabe"(1). The Company was created by 15 Arab states in order to help each other to improve the community level of development. The reasons behind the establishment of this Company were mainly the "fears of Arab investors concerning political risks in other Arab countries."(2) Before the establishment of this Company among Arab nations, there had been some attempts in some specific sectors to solve the outstanding matters of investment abroad, among them the multinational convention on the payment of current accounts and capital transfers signed on September 7th, 1953, between Egypt, Jordan, Iraq, Lebanon, Saudi Arabia and Syria. With the given political instability of these countries at that time, the convention could not succeed, so it failed. Thereafter, it was thought that bilateral treaties could reduce political risks within the Arab community. This new possibility was used mainly by Kuwait as a major Arab capital exporting country.(3)

Such treaties, described as indefinite as well as vague, correspondingly lacked effectiveness and hence were not capable to produce the expected result. So, it

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(1) Bouhacene. M, "Droit International De La Cooperation Industrielle", OPU, Algiers, p.63.

(2) Shihata. F, "Arab Investment Guarantee Corps", JWTL, V.6, 1972, p.187.

(3) For example the agreement between Kuwait and Iraq dated October 25th, 1964; Kuwait-U.A.R., Feb 12th,1966,Kt-Sudan, May,69.

was thought that the solution would be to bring all Arab countries together under a multinational convention for the investment and transfer of Arab capital. However, because of political instability in Arab states, particularly at the end of the 1960s and the beginning of the 1970s, the convention could not enter into force. Nonetheless, the inter-Arab Company, though covering just a limited sector of international investment, could potentially be an effective means to encourage investment among Arab countries, particularly in the current international economic crisis and the collapse of the oil prices which has put many oil producers in a critical economic situation.

Chapter V

Towards an effective foreign Investment Regulation

Introduction

In the first part (Chapter IV) of Part two of the present thesis, uncertainties of international customary law as a legal framework for contemporary international business relations have been generally discussed. The uncertainties in question have been also admitted by Western legal scholars, for instance, by Horn, Schnitthoff and Buxham. In fact, these particular writers have agreed on the idea that "Growing international economic interdependence and cooperation require legal mechanisms for cooperation and conflict resolution not found in traditional legal concepts." Hence, the classical system is no longer suitable for modern international business transactions and it has to be possibly discarded and be replaced by a new one on the basis of new orientations. This thinking, however, will never be crowned by successful results unless a new aspect of multilateral cooperation is tabled for negotiations between members of the whole international community of states. This requirement has however been met with sharp opposition from the powerful Western countries with "their antagonism towards any efforts aimed at redistributing global wealth". Consequently, it seems that the objective of the requested new international economic order will hardly be capable to be reached under the current state of the North-South relationship. On this point, it is said that one of the causes of failure is the lack of an adequate preparation

as essential before entering into the dialogue. For the subject of the present thesis, the lack of adequate preparation has been also due to the inconvenient forgetfulness of developing countries to enact appropriate regulations governing all of the various aspects of commerce, trade and international business both within the host country's borders and within regional regulatory institutions. Currently, after recognising the importance of this crucial question, an enormous network of national and international rules and regulations have been launched to try to reduce international tensions and to solve the actual outstanding political and economic problems. It should be added that the need to set up a meaningful regulatory mechanism also sought to achieve the full consolidation of national sovereignty over natural resources. This particular factor has almost always been in fact a key issue, an important source of the actual conflictual relations between the Northern and Southern countries. Moreover, the subject of investment regulation has becone more complicated with the emergence of new powerful business entities in the form of multinational corporations; they in fact influence if not control a great part of world business and are engaged in very specific projects of development which usually need sophisticated technology and a large amount of capital. MNEs are described as having a multinational ownership; whatever their ownership, they are very large companies which create the problem of how to control their activities when dealing with them. Therefore, from the

developing countries' perspective, the main problem which needs to be considered carefully is how to put the operational work of these gigantic multinational companies under an effective control of the host country where they operate, that is, in a manner that could serve the national development strategy. Current indications are that in many cases, multinationals have begun to regard investment in many areas of the Third world, especially in Africa, as a risky venture. This riskiness has been felt to exist mainly because of political and economic instability in many capital importing countries, particularly after the 1970s or a period of massive nationalisation. Therefore, many host states have found it very hard to attract foreign capital to finance their development projects. This state of affairs has been obliging these countries to give a new and fresh look at the situation and to pay much attention to their laws and regulations for the sole purpose to moderate their attitude towards international investment.

It is in the light of this situation that the present thesis will treat the subject of investment regulation. Thereby the objective will be to show the current orientations related to the subject, particularly within the framework of international codes of conduct, through which multinational companies would be subjected to a specific regulation.

The present chapter will concentrate on i) host states' unilateral investment regulations, ii) bilateral regulations especially under the new legal machinery of bilateral treaties on promotion and protection of

investment. Lastly, the focus will be on multilateral regulation, to see how the current situation of international investment could be followed by a global arrangement. It will thereby be necessary to consider how far the current attempts of international bodies may be crowned by success towards the establishment of unified rules in the strategic sector of international investment.

A. Unilateral Regulation of foreign Investment in the host Country.

The acceptance of foreign investment in the host state may reflect the choice of a technological strategy. Developing countries, as soon as they achieved their political independence, made efforts to orientate their economies in accordance with their own development needs and plans. Such policies heralded a system of arrangement and elaborations either in accordance with legislated rules or executive regulations adopted directly by the government. Touching as it does politics and ideologies, foreign capital is considered to be a new facet of Western domination and a possible danger against the sovereignty of the newly independent states. To resolve the therewith generated dilemma, certain measures were envisaged to safeguard the economy of the developing country, particularly in some vital sectors such as international commerce.

Using such data, UNTCTC(1) has classified capital

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(1) UNCTC, 1978, pp.13-14.

importing countries' policies towards the activities of multinational companies in three major categories: The first group is formed of African states and a few Asian and Central American states. The investment policies of this particular group are characterised by a liberal strategy and the application of a great number of investment incentives. Following such generous offers to foreign investors, a mass of foreign investment is supposed to be attracted to satisfy the capital needs of the countries in question. The second group is composed of the remaining Asian, Mediterranean and North African countries. Their policies are in favour of mixed (joint venture) enterprises as the only type of doing business with foreign companies. Their treatment towards foreign capital and companies is described as discriminatory and the business incentives they offer are of short duration. The third and the last group is fully dominated by Latin American countries. Their attitude is very well known. Within their territories foreign capital participation is very limited, and the access by foreign capital to these countries is subject to several conditions, the most common among them being official authorisation usually given by the competent authorities as well as the application of the Calvo doctrine in case of conflict.

In 1983 the UNTCTC undertook another survey to see whether there is any improvement in the attitude of developing countries towards attracting international capital,and now a typology approach has been suggested, and three categories have been proposed. Within the first typological group are countries which have not been able

to attract the expected amount of foreign investment while offering generous incentives and encouragment for it.

These countries belong to the Lomé Convention concluded with the European Community. From this experience, some experts have drawn the conclusion that having an open and liberal policy alone is not enough, because there are other factors which are of more strategic importance than legal incentives, for instance, the size of the local market and the availability of natural resources. The second typological group consists of countries which used to be against the idea of offering incentives to attract foreign capital and investment, but now they are potentially more attractive for investors and can be fertile areas for foreign companies. This change has affected several countries, for instance, China after 1979, Cuba after 1982 as well as Egypt with the investment law 43/1974. Other countries can be included in this group, such as Vietnam, Tanzania, Algeria. Lastly, the third typological group consists of the so to speak "the newly industrialised countries", considered to have large-size markets as well as flexible investment policies. These criteria have enabled them to attract a world record of foreign investment approved to cover many development projects. At a lesser level, these countries of the third group have their own companies abroad and, under the desire to safeguard them, are applying a flexible attitude towards foreign investment. Countries belonging to this group include Mexico, Brazil, South Korea, Hong Kong, Singapore, Malaysia, India.

After the collapse of oil prices and owing to the effects of world economic decline, the attitude of most capital importing countries, especially of those which have suffered from the dramatic decrease of oil revenues, like Algeria, are becoming much more flexible with regard to encouraging the access of foreign investors to operate in their territories. In fact, most of them prefer to tender to foreign investors to participate in the execution of their development projects rather than go through the procedures of concluding international loan contracts, all the more as the latter are becoming very difficult to get.

The thereby emerging particular agreements are, however, very complex as well as costly in terms of profit rates, especially those concluded under the auspices of IMF and the IBRD bank. Therefore, this new trend makes it very necessary to establish an effective structure of international investment regulation for the purpose of filling the gap created by the collapse of oil prices without thereby sacrificing the national sovereignty of the host country.

In order to achieve such a delicate objective, developing countries have requested the UN to deal with the task of working out an international regulation to lay down some rules governing the activities of multinational corporations as well as the transfer of technology.

Various studies have been devoted to this particular subject. The methodology they involve can be structured as follows:

A. Unilateral Regulation of foreign Investment.

Under this heading two aspects the theoretical side of the matter, and examples as study cases may be considered.

The theoretical Dimension.

Several typologies of national regulatory systems of foreign investment have emerged. Among them, two proposals have been selected, the first proposed by P. Julliard, and the second suggested by M. Bouhacene.

1) The typology proposed by P. Julliard.

He has distinguished between three types of national regulatory systems and has given them three different names: Incentive regulation; control regulation and, lastly dissuasion regulation.

a) Incentive regulation corresponds to the theory of special treatment promoting a favourable climate to foreign investors in a host country. This tends to develop a mutually favourable relationship between the host country and the foreign company's home state for the fundamental goal of attracting international capital and orientating it to serve the national economy. It is said that countries which adopt this approach are always in favour of doing business within a framework of international investment contracts.

b) Control regulation. This type of regulation rests on the "equal treatment" doctrine which requires to consider a foreign investor as an ordinary businessman like any other national private businessman. Instead of

the contractual technique, countries which embrace this type have their own procedure chosen and elaborated under an administrative act on the basis of which the final decision is made either to grant the foreign investor authorisation to invest in the territory or to refuse it.

c)Dissuasion regulation. Countries applying this approach consider the admission of foreign investment to be a serious threat to the independence of the host country. On this ground they usually do not allow access to foreign investors to operate in their territory. However, in some cases they do, but under severe conditions and clauses usually included in a contract which is the only reference in case of dispute.

Julliard regards incentive dissuasion regulation as the only example which corresponds to traditional business relationships between the North and the South. The control regulation falls within the ambit of capital movements between developed countries. In order to reinforce his theory, Julliard has undertaken two case studies, one on the republic of Egypt as representative of the incentive regulation. The second study case, on dissuasive regulation, concerned Argentina, known as the most strict country towards the access of foreign investment in its territory.

2) Typology suggested by H. Bouhacene.

Bouhacene, in his thesis entitled "L'évolution des Relations Juridiques dans les Rapports Industriels entre Pays d'inégal Développement" (1962),has proposed a new distinction between a system of regulation emphasising

incentives (Règlementations de caractère incitatif accentué) and a system of regulation of moderate incentives (Règlementations de caractère incitatif attenué). This distinction and differentation shows how important it is to attract international capital; as mentioned by Bouhacene it "is always connected with internal forces or external pressures that are inescapable from". Despite the need for foreign assistance, developing countries are not prepared to accept the actual lack of order in the international economic system. To explain his approach, Bouhacene has referred to some cases which are not unique but rather examples to show the general tendency of third world investment strategy. Under the first category he has defined, he has suggested to look at the experience of Tunisia and Egypt, whereas under the second category the Algerian and Argentinian cases are examined.

a) Regulation with Emphasis on Incentives.

For this type of regulation, Tunisia and Egypt offer the best cases to study.

- The Republic of Tunisia

Tunisia is considered to be a most attractive country in Africa as well as in the Arab world. Abundant foreign investment has been encouraged by a liberal regime adopted by the state. Generous investment codes have been launched in order to offer tremendous incentives to foreign investors. At the level of legislation, Law no 69-35 of June 26th, 1969, relative to

the code of investment(1) enacted especially to promote foreign investment in the country, the intended objective is clearly seen within the context of Article 1 of the Code: "The present law entitled code of investments provides for the creation of favorable conditions for investments in Tunisia and for the specification of the terms of their encouragement,guarantee and protection..". Again under law 74-74 of 1974, the government attempted to promote the access of foreign investment in the field of manufacture in Tunisia's less developed areas. The 1980s witnessed a very important improvement, in fact a mass of laws and regulations were promulgated to cover several aspects of the national economy, for instance, tourism(2), industry(3), research in production and commercialisation of renewable energies(4) and, lastly, the field of agriculture and fisheries(5). In addition, often other golden opportunities for investment in the field of food processing, electronics and textiles exist. The impact of French investors is heavily felt within the framework of commerce and business. All commercial

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(1)Further details about the Code and other laws see ICSID "Investment Laws Of The Qorld", Oceana Publication Inc. New York. 1988, Tunisia.

(2) Law no.86-85 of Sept 1st, 1986, concerning the encouragement of tourism investments.

(3) Law no.87-51 of August 2nd, 1987, concerning the Industrial Investment code.

(4) Law no.85-48 of April 25th, 1985.

(5) Law no.88-18 of April 2nd, 1988.

operations are governed by the provisions of the commercial code of 1959. In its context, just two types of business enterprises are open for foreign investors; they are the corporation (Société anonyme) and thelimited liability company (société à responsabilité limitée).

To facilitate the procedural matters, an administrative body was established by the government in 1973, "the investment promotion agency of Tunisia". Its role is

- to assist promoters of investment projects in drafting and concluding agreements, in dealing with tax and financial advantages as well as other incentives offered by the law;
- to conduct investigations that are related to the creation or extension of industrial projects;
- to embark upon any study with the purpose of facilitating investment in Tunisia and to remove all obstacles that can prevent the flow of foreign investment.
- to develop the information sector in collaboration with both local and external institutions in order to propagate knowledge on actual investment opportunities in Tunisia.

With regard to the admission procedures, foreign companies cannot set up branches in Tunisia without getting a permit from the ministry of economy; application for a branch must be sent to this ministry in six copies containing the following information:

- A letter from the parent company indicating the nature

of the business activity of the company as well as the reasons for intending to set up such kind of business in Tunisia;

- The department of internal commerce must provide some information and remarks or comments of the parent company. These have to be made using a special administrative form;
- A copy of the company's internal operational rules governing its own affairs must be provided with a list of all the shareholders and their nationalities;
- A biography of the proposed branch manager must be given to the department of internal commerce;
- The proposed manager must be equipped with power of attorney given by the company, ordering and enabling to act for the company;
- An official authorisation in the form of a resolution must be submitted by the company's board of directors to permit the establishment of the branch.

Because of such procedural and administrative complexities there are not many branches of foreign companies in Tunisia. The form of business company open to foreign investors (S.A. and S.A.R.L.) are not very suitable for them. However, joint business ventures as new types of commercial activities have been thus far successful in Tunisia.

Investment Incentives offered by Tunisian Law.

A great number of investment incentives are offered to attract international investment, particularly under the current industrialisation strategy with the purpose to maximise benefits drawn from imported technology.

These incentives can be classified into several categories. In the present thesis the most important ones will be mentioned.

1 - Tax credits, always available under different tax laws,

2 - Other income tax exemptions, available for foreign investors, concerning,

- Companies specialised in producing goods for export are free from the duty to pay corporate income tax in the first ten years of operation. In the second ten years, they will be again exempt from tax but just at at percentage of 90%,

- Companies exporting not less than 20% of their output have to pay tax at a reduced rate of 10% of profits drawn from exports,

- Companies are also exempt from tax for part of business done in a particular period as well as from patent tax for twenty years at a rate of 1%.

- Companies producing goods for domestic consumption receive 40 to 90% exemption from corporation income tax. This advantage is granted during the first five years of operation with the possibility of extension to ten years. Any export of more than 10% during the first five years gives to the investor the right for another one year extension.

- "the 20 years incentive applies on registration fees in the event of the sale of asset items at reduced rates of 9% for the business assets generally, 7% for real estate, 4% for furniature and equipment, and 2% for merchandise."

- Companies working for export may be exempted from the

required registration fees before starting export operations.

3 - As far as tax rebates, refunds and options are concerned, Tunisian tax law provides:

- In case of staff accommodation construction, companies operating in Tunisia can benefit from a 50% depreciation allowance during the first five years of work,

- if companies purchase materials or equipment from abroad, refunds for them are available within one month of purchase. However, companies have to prove that these materials and equipment bought from abroad are really necessary and are not available in the local market. However, turnover taxes of these items have to be paid, with the possibility for refund later on.

- Refunds for expenses are available for companies which have their own training programmes.

4 - As far as finance is concerned, Tunisian banks can give industrial loans to companies investing in development projects; such loans are made by some specific monetary institutions, for instance, the Banque de développement économique de Tunisie; Banque générale d'investissement and Fonds de promotion et de décentralisation industrielle (FOPROD). In its attempt to encourage exportation, Tunisia has made a new amendment to the industrial investment code (Law 87-57 of August 2nd, 1987), granting 100% tax exemption on removable capital, due on interest from loans for financing investment, for those companies exporting all their output. Several export inducements are available to companies which export part of their output.

5 - Tunisia offers 14 free trade zones to companies wishing to invest their capital in the territory. This offer includes a complete customs-duty freedom and turnover tax exemption on equipment, raw materials, semi-finished products. Some other advantages as incentives are also available in these 14 areas, for instance, relating to finance and insurance.

After this brief survey on the investment climate in Tunisia it could be said that despite the shortage of natural resources as well as other factors, Tunisia has succeeded to attract a considerable number of foreign investors, particularly in some vital sectors such as tourism. The way chosen by the government is to open the door for international capital and for this reason a great number of advantages and choices have been granted to foreign investors. However, what is the real contribution of international capital to the development of the country?Is Tunisia now an industrial state after a relatively long period of openness? In other words, is it sufficient to have such policy to promote economic development? Before answering these questions it is worthwhile to survey also the case of Egypt in order to come to a general conclusion to assess the impact of liberal investment policies and laws on the whole national economy of a host state.

- The Republic Of Egypt.

Under the initiation of an open-door policy, Egypt has sought to attract international capital. Right after the Nasserist era, which nearly closed Egypt to the entry of international capital into the national economy, Law

no.65 of 1971 was issued to establish a new legal framework concerning the investment of Arab funds and the creation of free zones. Following this historical measure, some investors, particularly from Arab countries, got access to the country. In the aftermath of the October 1973 war, the Egyptian government started to reconsider the situation which was characterised by a necessity for change. The government favoured the promulgation of the well-known law no.43 of 1974 relative to Arab and foreign capital investment and the creation of free zones. The law emphasized the country's need for additional foreign exchange as well as technology in order to improve the national economy then extensively disrupted by the war with Israel. On this ground, the government started to consider improving the role of the private sector as a key factor to release development projects. Various ways were suggested, the most accepted one being in favour of some efforts towards improving the investment atmosphere of the country by removing all obstacles and complexities as well as encouraging the full participation of the private sector in every field of the economy.

Under law no.43 of 1974, as amended by law no.32 of 1977, two types of investment are permitted to take part in the development of the national economy, i) investment through economic projects and ii) investment through the invested capital. Article 1 of the law stipulates that "the term 'project' in the application of the provisions of this law shall mean any activity included within any of the spheres therein specified and approved by the

board of directors of the general authority for investment and free zones". However, 'invested capital' as defined by Article 2 of the law in the application of the provisions of this law shall be deemed to mean the following:

- Free foreign currency duly transferred to the Arab Republic of Egypt,
- Machinery, equipment, transportation equipment, raw materials and commodity requirements imported from abroad,
- Intangible assets, such as patents and trade marks,
- the free foreign currency spent on preliminary studies, research,
- Profits released by the project.

Incentives given by Law no.43 of 1974 (as amended by Law no.32 of 1977)

They can be itemised as follows:

1. As far as income tax exemptions and reductions are concerned, the following incentives are granted:

- Newly set up companies can get tax exemption for a period of five years, with the possibility of another three years if the competent ministry of finance and economy approves it.
- Companies already working in Egypt can also get exemption for a period of five years if shareholders agree to increase the capital of the company.
- An extension of up to 10 years can be given to companies which are operating in economically outlying districts.
- Companies operating in Egypt can get an exemption of up

to 5% from the business tax on income when tax holidays expire.

- In case of reinvestment of profit, companies can obtain the forementioned tax holiday.

- Companies' profit can be subject to exemption from withholding and other taxes up to five years. This period can be extended to eight years for some particular incomes and up to 5% shareholders could get another exemption from the project duration tax.

- Companies movable assets as well as the distributed profits and income tax given by foreign labour are exempted from stamp duties, authorisation, registration and notarisation fees for one year starting from the real commencement of operations.

- Foreign investments operating in the free zones is subject to some extra incentives, for instance, local taxes exemption, privileges with respect to exchange control regulations and the right to choose the proper free zone for their projects.

- Companies investing in the free trade zones of Cairo, Alexandria, Port Said and Suez are free from interest, dividend and royalty taxes.

- Foreign experts working in Egypt are free from the income progression tax affecting income coming from outside the country.

- An exemption may be granted to companies outside the industrial free zones for a period of five years. In certain cases this period may be extended to eight years.

- Companies owning shares in other companies (at least 90%) can get exemption from tax on profits derived from

them.

- Financial support can be given to companies which purchase new equipment either in local markets or from abroad.

- Companies' assets may be depreciated at a rate of 2% to 30% annually, with special rates applicable to heavy machines (10%), typewriters (12.5%) and trucks (25%).

2. Egyptian government does not give loans to foreign companies operating in Egypt, however, the tax for foreign borrowings can be reduced to 5%.

3. The Egyptian government does not grant any incentives whatsoever for any export by foreign companies, however, an export licence is not always required from the ministry of economy and other competent authorities.

4. Companies wishing to import machinery from abroad are exempted from customs tarriffs and taxes. In addition, "foreign goods entering into or departing from the Egyptian free zones in Cairo, Alexandria, Suez and Port Said for foreign destination are not subject to customs duties."

5. Companies working in the free trade zones under Law 43 of 1974 are exempt from company taxes on their profits, import duty, individual taxes.

6. Locally manufactured goods, made in free zones and entering Egypt can be free from customs duty. However, if these goods are at least 40% Egyptian made, they can get access to Egypt with 50% customs duty payable on them.

7. Sales or turnover tax does not exist.

8. Article 7 of law no.43 treats the matter of nationalisation as follows:"Projects may not be

nationalised or expropriated, nor may invested capital be confiscated, seized or sequestrated except through lawful processes". The provision given in this Article is of a unique nature as it does not refer to any of the principles applied in most African investment laws (international customary law relating to state responsibility), particularly the question of compensation. Ironically, under the bilateral treaties on promotion and protection of foreign investment signed by the government of Egypt, this attitude seems to be rectified in fact within these treaties. Egypt has agreed on almost all traditional rules which have been rejected by nearly all the other states concerned. For instance, the US-Egypt bilateral investment treaty (Sept 29th, 1982) (Art III(1)) refers to an agreed standard of compensation ("prompt, adequate and freely realisable"); the treaty has been strongly recommended by the Reagan administration in the USA as a prototype for future investment agreements with other developing nations. The Egyptian bar criticized, however, the attitude adopted by the Egyptian government, when the law was promulgated, as being far from the views of other developing countries.

9. As far as settlement of investment disputes is concerned, four methods are available under Law no.43 of 1977 (as amended in 1977): 1) through agreement with the investor; 2) through agreement with the investor's home country; 3) under a specific convention on settlement of investment disputes between the state and the nationals of other states; lastly, 4) under international arbitration.

Conclusions:

The above short survey of the fundamental principles and rules applied by both Tunisia and Egypt in their investment policies and unilaterally elaborated laws to govern the flow of international capital in a manner that could serve national economic development, shows that many similarities exist between them. Their approaches to attract foreign investment are nearly identical as far as economic strategy is concerned.

However, there is a most important question to be asked: how suitable have the legal rules been to achieve the expected results in both countries? Is their strategy enough to promote a healthy national economy?

Developments show that both Tunisia and Egypt are nowadays facing serious economic problems both internally and externally. Both countries are suffering rising inflation, rising prices, problems with the elimination of food subsidies and their impact on the cost of living, income mis- and redistribution etc. We may therefore say development based on the contribution of international companies is undoubtedly an imperfect economic development which may even harm the national economy and even if the latter undergoes development, one serious aspect of the situation being the question of heavy external debt. Therefore, under these circumstances, we may state that the investment laws of Tunisia and Egypt have (as yet) not succeeded to break the vicious circle of underdevelopment. The type of regulation applied by Tunisia and Egypt does not by itself

constitute an effective legal instrument to change profoundly the current situation of developing countries. Politically, it disrupts if not destroys the unity of Third world and their struggle against the existing international economic "misorder".

b) Regulation having an attenuating incentive Character.

As regards the second type of regulation, described as also having an incentive character, calls on the foreign investors to invest in certain sectors within certain limits in the host state. Foreign companies are therewith controlled by strict laws and regulations. Countries which have chosen this type of regulation want to safeguard their national economy from any external pressures, notably in the current relative anarchy of the world economy.

For illustrating this type of regulation, two cases will be presented below, from Argentina and Algeria.

- Argentina:

Argentina, a Latin American country, basically opposes the theory that favours giving foreign investors a treatment more favourable than that accorded to her nationals. This choice is clearly seen in the content of Article 1 of foreign investment Law 21 382 (as amended by Law 22 208) enacted in 1980. It lays down that:

"foreign investors who invest capital in this country to promote economic activities, or to expand or improve existing activities in any one of the forms described in Article 3, shall have the same rights and obligations as those granted in the Constitution and by

other legislation to national investors, subject to the provisions of this law and of special or promotional regimes".

Certain sectors considered as vital for the economic independence of Argentina, are closed to foreign investors, so they are prohibited to foreign investors and reserved only to national investors. Under the above mentioned law, six forms of investment are permitted to foreign nationals and are mentioned in Article 3 as follows:

1- Convertable foreign currency operations;

2- Transactions affecting capital goods, spare parts and accessories. The approval given by the authority can specify the goods to which the approval shall apply.;

3- Foreign investors may participate in profits or capital in local currency;

4- Foreign investors may deal with convertable foreign loans and;

5- Other tangible assets governed by some specific provisions.

6- Foreign investment may be under any other forms agreed by the competent authorities.

As regards the administrative investment climate in Argentina, Article 4 introduced a rule. According to it, before any access to investment in Argentina, the interested foreign investor must get an official permission from the executive authority under some specific regulations. However, projects approved by the executive authority are to be considered as a positive

contribution to national economic development.

As far as capital incentives are concerned, they are mainly granted specifically to those who are investing in the open sectors such as informatics, telecomunications and machine tools manufacturing. The required form of doing business in Argentina is the joint-venture with local companies. The latter have to own directly or indirectly not less than 51% of the capital (Art.2/2). However, there are other types of business entities, for instance, Sociedad Anonima or S.A. which usually invite the public to buy company shares; Sociedad de responsibilidada limitada or S.A.R.L. in which shares cannot be transferred; Sociedad Mixta which is a combined form involving both public and private sectors; Sociedad Anonima Con Mayoria De Capital Estatal (state majority stock company) in which the government holds at least 51% of the total company shares; Sucursal of branch of a parent company operating outside Argentina; these usually have a legal representative with power of attorney; Sociedad Accidental o en participacion (joint venture) which is a business entity usually with partners who act as general managers with unlimited liability for company's debts. Other partners are liable only to the extent of their capital contribution; Comerciante (sole proprietor), with an individual businessman, even a foreigner, who must obey the rules, for instance, by keeping commercial books in complience with the commercial code, he must be an adult capable to enter into commercial contracts and has to be registered in the

commercial registry. Unlike Algeria, Argentina allows the foreign company to select a mediator (agent) who can be an individual or a company in order to regulate the required administrative procedures as well as signing agreements with domestic companies.

Within S.A. and S.A.R.L., foreign investors can own 100% of the shares, as a very generous incentive given to foreign companies, to attract as much international capital as possible in the struggle against insuperable economic difficulties in the country.

Investment Incentives:(1)

Incentives offered by Argentinian law are as follows:

1- In case of purchase of new stock issues, companies can deduct a maximun of 10% of the total of income taxes. However, 50% of tax can be deducted when buying domestic issues and supplementing them with the investor's own capital.

2- Foreign companies may be exempted from or enjoy reduced rates for up to ten years as to tax and customs duties. However, to be qualified for such particular incentives, companies must devote at least 20% of the project value to purchasing capital goods; this percentage may be reduced to 10% for certain undertakings.

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(1) Diamond And Diamond, "Capital Formation And Investment Incentives Around The World", 1988, Argentina, V.2, pp.19-33.

3- Foreign investors working in Zone I may enjoy exemptions of up to 100% in the first four years. However, this proportion will decreawe to 10% for the tenth year. In Zone II, exemptions are granted at levels of up to 50% only, for the first four years; this will be reduced to 5% in the tenth year.

4- Companies involved in certain industries in eight provinces of the country's northwest may qualify for a 50% exemption from income taxes for ten years as well as enjoy partial reductions on profit and stamp taxes.

5- Investment and economic operations located in Zone I may qualify for exemptions on income, profits and substitute inheritance taxes at rates of up to 100% for the first four years, 85% for the fifth, 70% for the sixth, 55% for the seventh, 40% for the eighth, 25% for the ninth and 10% for th tenth year. These incentives apply only to investments in some specific industrial areas such as steel, petrochemicals, cellulose, mining, fishing and low-cost housing construction work. The tax exemptions in question may also be extended to investment in other provinces like Formosa, Chaco, Corrietes and Misiones but at different rates: 100% for the first five years, 90% for the sixth, 80% for the seventh, 70% for the eighth, 50% for the ninth and 30% for the tenth year.

6- Companies involved in manufacturing may be exempted from tax, up to 100%, on equipment and installations spending if these are directly related to the manufacturing process. However tax income is limited to 60% only.

7- Shareholders profits may enjoy exemption from dividend withholding tax.

8- Foreign companies not resident in Argentina and using ships to carry containers are allowed to claim up to 85% reduction of the 45% corporation tax, or $6_{3/4}$%.

9- Companies operating in the provinces of Rio Negro, Neuquen, Chubut and Santa Cruz are exempted 100% from income tax for the first five years and 20-80% for the following four years. However, companies working in some specific fields like oil exploitation, finance, insurance and aluminium industry cannot claim such tax privileges.

10- Companies engaged in scientific work may enjoy a 50% tax credit on investment in equipment .

11- Income tax reductions are also extended to the steel industry.

12- Companies involved in exploration or exploitation of hydrocarbon resources by providing capital and technology are paid in cash for the extracted oil and gas.

13- As far as loans are concerned, Argentina, owing to its financial difficulties, does not authorise any capital loans as an extra assistance to foreign-owned companies. However, local firms can enjoy such concessions, usually granted for special projects. On the other hand, foreign companies can get medium- and long-term loans at normal interest rates. A considerable number of banks are active to serve and to assist development projects, among them the Banco Nacional Desarrollo (Banade); Banco Santafesino de Inversion y Desarrollo, which is a public owned bank. Also some other banks operate to assist specific projects, for instance,

the Banco Hipotecario Nacional (National Mortgage Bank), created to finance housing and mortgage bonds business; La Caja Nacional de Abharro y Segmo, which is an important institution devoted to assist land and building projects.

14- Industrial goods including machinery and raw materials imported for steel production are exempted from duties and surcharges. However, if such equipment and machinery are required in other industrial fields like petrochemicals, chemicals, fertilisers, petroleum, natural gas and rubber industries, they are always exempted from certain duties and surcharges.

15- Partial reduction in stamp duties nay be granted for 10 years to companies operating in some specific industries in eight provinces of Argentina's Northwest. These companies can in addition get complete exemption from duties and surcharges on any imported machinery.

16- Argentinian law permits importing goods and materials to increase local products and exporting them.

17- The country provides 13 transit zones for goods shipment from third countries to its five neighbouring countries. There are in addition five other trade zones provided to facilitate access to investment.

18- Capital goods bought in Argentina can get a reduced value added tax of 8%. The tax rates on other products and services are different. For instance, services as hotels and garages are taxed at less than 16%; petroleum products are taxed at a rate of 2%; medical goods $4_{1/4}$%; tax is 10% on home appliances. Furthermore, companies with less than 120.000 Argentine australes(150.000$) of

operations volume and companies involved in export-import trade with an aggregate value of less than 1.200.000 A.A. (1.500.000$) in volume are exempted from the value added tax.

Thus, an enormous change marks the general economic system of Argentina, in order to reduce its external debt which may otherwise become a real threat and burden; by developing a new economic pattern Argentina may be able to return back to real economic growth as well as increase its participation in world trade, The change in Argentina's legal approach to foreign investment does not mean that Argentina has dropped its principles against the rules of traditional international law, as the already mentioned Article 1 of the new law has re-affirmed this reality. On the other hand, an Argentinian type of international business regulation seems much better than that adopted by Tunisia and Egypt, because it gives to the state the possibility to develop its economy with the assistance of international investment and at the same time provides protection to the national economy from any external interferences. With such a strategy Argentina may become one of the biggest industrial and agricultural states in Latin America.

- Algeria.

Several laws have been recently passed with the objective to persuade private companies, both foreign and domestic, to participate in the development of the country. The strong effects of the current international

economic crisis, including the fall in oil price which has brought a drop of more than 30% in 1986 export revenues, could be the main reasons of this sudden transformation. Under this dramatic economic situation, the government has decided to increase its dealings with foreign investors by providing legal incentives and guaranties, especially in some specific fields, for instance, oil exploration.

The best legal framework suitable for foreign investors willing to operate in Algeria is the joint venture regulated under Law no.82-13 of August 28th, 1982. Surveying the provisions of the law, we see that the joint venture has to be in the form of a société anonyme (limited liability company) in which the local company shares may not be under 51% of equity.

A written protocol must be drawn to clarify the responsibilities of the two partners of the joint venture under the authority of an interministerial order issued by the minister of finance, minister of planning and organisation of the national territory and the supervising minister. A foreign parent company can also open a branch in the country, however, for such a branch the company must apply for it to the secretary of state of foreign commerce. In this case, the provisions of Article 12 of the Law no.78-02 of February 11th, 1978 apply. The use of commercial agents (intermediaries) is banned. The most important point in this aspect is that not all economic sectors are open to foreign investment; some sectors are still inaccessible because of their relevance to national sovereignty.

Below, some light will be cast on the investment climate in Algeria because the situation in Algeria is the subject of the third part of the present thesis.

Investment Incentives granted by Algeria under the Law no.82-13 related to the Formation and Activities of Mixed Economy Companies.

Some of the incentives offered to attract foreign investment are:

1- Goods exported from Algeria are exempted from tax;

2- Goods imported from abroad as transit goods are always free from aggregate production tax;

3- In case of reinvesting joint operation profits will be free from tax at the rate of 20% instead of the normal rate of 60%;

4- Profit taxes can be exempted up to five years;

5- Real property acquisitions, used in production, can be totally or partially exempted from tax, depending on the location of the operation;

6- Commercial and industrial businesses are taxed at a rate of 24%;

7- In its attempt to encourage joint ventures, the government has exempted commercial and industrial international businesses from:

a) Transfer taxes of all real property purchases;

b) Property taxes for five years, starting from the first day of purchase;

c) Industrial and commercial profits are free from taxes for the first three years; for the fourth at a rate of 50%, and 25% for the fifth year;

d) Taxes on supplementary remuneration;

8- Joint venture operations can also get an 80% tax reduction; reinvested industrial and commercial profits can benefit from a reduced rate of 20%;

9- In case of gas exploration, a deduction of 27.5% of the net profits can be offered to a company, and up to 50% on oil wells;

10- Refunds can be given to certain companies for production tax imposed on goods and equipment purchased for the establishment or expansion of the company;

11- Certain companies are allowed to transfer up to 50% of their profits annually;

12- The government may assist companies investing in some particular sectors of the economy, including joint ventures which has to be followed by contributing a certain proportion of interest;

13- The export sector being under public control, only a few authorised companies investing in hydrocarbons may get export inducements;

14- Customs duty exemptions are not available;

15- Merchandise exported from Algeria may get exemption from turnover taxes.

The above short description of incentives given by Algeria to foreign investors wishing to operate in the country allows the conclusion that Algeria does not give foreign investors an indefinite margin; the margin is subject to certain limits. Algerian investment laws still carry the nationalistic approach. However, to correlate the legal texts with the reality, especially in the light of the current economic situation, new perspectives are needed to stimulate foreign investment and ensure a close

relationship with them.

- Conclusions

The unilateral regulation of foreign investment by the host country is a very important and urgent issue. It involves, in fact, always a question of national sovereignty. It is in this respect said that: "its growing urgency corresponds to the global expansion of the multinational enterprise and to the desire on the part of developing countries to achieve development on their own terms."(1) . The way adopted by the host country depends on the nature of the political regime as well as the economic reasoning underlying it in the country. In such a situation several ways can be selected for the purpose to attract international investment bearing in mind that legal incentives are just one among several factors which may promote the flow of foreign investment into a country.

Despite all that is offered by most of the host states in order to secure the assistance of foreign firms, unilateral measures prove to be insufficient and more measures may be needed.

Regarding this particular point, it has been said that:

"En dépit de l'importance des avantages consentis, on ne peut pas dire que les investisseurs étrangers aient

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(1) Lessard D. and Hansen E.,"Host Government Regulations And Incentives for Foreign Direct Investment", in "Negociating Foreign Investments A Manual For The Third World", p.3.iB i.

manifesté un vif engagement à l'égard des investissements en capitaux dans les pays en voie de développement."(1)

To counteract such insufficiencies, fair international regulatory measures may be required, but are such measures possible under the present circumstances?

B. Bilateral Regulation of foreign Investment:

To compensate for the failure of unilateral regulation efforts to attract foreign investment, some capital importing countries have decided to go beyond internal regulatory measures by supplementing them with intergovernmental investment treaties with capital exporting countries. The objective of this new measure is to elaborate further rules and standards suitable for attracting foreign investment. By concluding bilateral investment treaties, developed countries will have additional protection and guaranty for their individuals and corporations to be able to invest in the peaceful business climate in a host state, and this is why in such treaties the emphasis is on the protection aspect rather than on the promotion of foreign investment within host states. The UN GA Resolution of 1954 recommended to "take such other steps as may be feasible and mutually acceptable to stimulate the flow of capital to underdeveloped countries and more especially to: a) negotiate appropriate treaties, arguments or other

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(1) Dahan.M, "Problèmes Juridiques des Transferts de Technologie...", Paris, Pédone, 76/77, p.70.

arrangements(1).

Therefore, inspired by the idea that an effective investment protection and promotion policy can only be achieved under a friendly relationship with developing countries, industrialised states start dealing with the new mechanism of investment treaties. When studying this development, it may be worthwhile 1) to discover how much stability, effectiveness and promotion could be released by such bilateral arrangements and 2) to investigate whether such arrangements are appropriate for developing countries. These two questions, and others, may be examined in the light of the following points:

- What is a bilateral investment treaty and what is its juridical nature?
- What is the historical background of measure taken before the emergence of bilateral treaties?
- What is the effectiveness of these treaties in the current international environment?

1) Bilateral Investment Treaties, Definition and Legal Nature.

An ensemble of various terms and concepts have been used to analyse the theoretical aspect of investment treaties. What is a treaty?

P. Julliard has defined an investment convention as "A bilateral agreement concluded between sovereign

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(1) Resolution 824(IX) Of December 11th, 1954, recited by Nwogugu, E.I, p.119.

states"(1) signed to clarify the juridical framework of the business relationship between both capital exporting and importing countries in order to facilitate capital outflows by eliminating no commercial risks that usually face foreign investors. Furthermore, they trace a global scheme which "define publically and solemnly a counterbalance ensemble of rights and duties for each part of the contract".(2)

The measures tackled by these treaties are always fourfold: treatment, protection, investment guaranties and finally investment promotion. They have several features, among them the following:

1 - A bilateral investment treaty is an agreement concluded between sovereign states. In this regard we have to distinguish between an investment treaty and a transnational investment contract, although both of them share the quality of being a consensual act. The first point to differentiate between them is the status of the parties. A transnational investment contract is always identified by having (1) a private party on the foreign side and (2) a host state on the other side; normally, the latter participates indirectly through one of its enterprises under public or private law. Therefore, a transnational investment contract is not an international treaty as far as the status of the contractual parties is

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(1) Julliard. P, "Les Conventions Bilatérales D'investissement Conclues par la France", Journal Du Droit International V.106, 1979, p.274.

(2) Ibid.

concerned. This opinion is based on Article 2 of the Vienna Convention of the Law of Treaties in which it is mentioned that: "a) 'treaty' means an international agreement concluded between states..". From another angle, certain bilateral conventions provide for some special agreements between the two parties. For instance, the convention signed between France and Malaysia stipulates in Article 5 that: "Les investissements effectués en vertu d'un accord spécial de l'une des parties contractantes avec des enterprises appartenant à des nationaux ou sociétés de l'autre partie, seront régis par les dispositions dit accord spécial". It is noteworthy that several terms are used to express the meaning of 'contract', for instance, engagement, obligation, dispositions or condition. Article 3(2) of the convention signed between Great Britain and Indonesia stipulates that: "Each contracting party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other contracting party", the same term has been used in Art. 7 of the agreement between Germany and Zambia; and Art.XIV of the agreement between the Netherlands and Malaysia. The multiplicity of available terms has generated several arguments because it keeps the door widely open for any interpretation and at the same time it creates the problem of uncertainty and stabilisation of the convention.

2- A bilateral investment convention is often represented as a two-party agreement: This new form of bilateral treaties has been adopted to fill the gap left by the

failure to establish an international regulation of a multilateral character. The reason behind this failure are economic confrontations between countries in the context of a misorder in the international economy.

Investment treaties have been mostly concluded between industrialised capital exporting states, on the one hand, and developing countries on the other; between western countries and socialist states in Europe and Asia, for instance with China, Hungary, Romania and Yugoslavia; between socialist planned economy countries and developing countries; and between newly industrialised countries and developing states. By 1987, about 265 treaties had been agreed and signed. However, about 55 of them have not yet entered into force. More than half of Third world countries have been involved in such treaties, precisely 70 developing countries, including 13 from the Asian and Pacific areas, 12 from North Africa and the Middle East, about 30 from African countries South of the Sahara , and some 15 Western hemisphere countries.(1) However a large number of countries have not expressed interest in the idea of concluding such treaties with due regard to the aspect of national sovereignty of the host state.

3- The majority of bilateral treaties on the promotion and protection of investment share one common trait which is the emphasis on the aspect of protection of foreign entities abroad, while the aspect of national economic

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(1) Statistics taken from "Bilateral Investment Treaties", London-Boston, 1988, p.7.

development of the host state is dealt with with less enthusiasm. In fact this is the case when the main contents of these treaties are examined. It is claimed that by protecting foreign assets from non-commercial risks, the access of foreign investments to operate in host countries can be promoted and that this is the aim of every host state. This reasoning could be accepted only if the given foreign investment would really contribute to the development of the host states, without detrimental consequences for their national economy or security.

4- Bilateral investment treaties englobe all aspects of the economy, although some investors may prefer to invest in some specific sectors. However, in case there is no possibility to reach general agreement, it might still be a chance to agree on another type of treaty which we would call a project or sectionally specific agreement.

This type of agreement was initially developed by the Asian-African Legal Consultateve Committee (AALCC) in a treaty prototype developed (drafted) in 1985. Some examples are given at the end of this Part II.

5- Such treaties deal with four main points: treatment, protection, guaranties and, lastly promotion.

The treatment of foreign investors within a host state is considered to be the backbone of a bilateral investment treaty. It in fact is at the same time a conflictual matter which necessitates great attentions by industrialised countries. It involves an ensemble of rights and duties which have to be provided to foreign investors from the time of their entry in the host

country till their operations are terminated.(1) The point of treatment involves three major aspects, 1) general treatment standards which include the concept of equitable treatment, seen as the cornerstone of any treatment; 2) non-arbitrary actions against foreign investors, and lastly, conpensation. There may be provision for special treatment, which mainly covers some important aspect, for instance, currency transfer and convertability for the currency wanted to be transferred.(2) Protection of foreign investment involves also an ensemble of rules recognised by international law their purpose is to safeguard foreign investment from injurious actions.(3) To achieve this aim, efforts are required particularly in lowering non-commercial risks and overcoming all obstacles whatever their nature.

Guaranty of investment is actually an insurance to cover any harmful measures that can affect the investment, particularly in the case of expropriation of foreign assets by the host state. A great emphasis is given to the matter of compensation for any losses. Compensation should be transferable to the investor's home country. It should be noted in this respect that the required compensation is always under the traditional consideration, in fact many of the investment treaties contain provisions with regard to the classical formula of adequate, prompt and effective compensation.

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(1) Julliard. P, Op. Cit, p.275.

(2) Bilateral Investment Treaties, Op. Cit, pp.40-68.

(3) Julliard. P, Op. Cit, p.275.

As far as investment promotion is concerned, it seems that it is considered to be a cleverly thought legal device promoted by developed countries in order to shelter the old principles and rules under the new legal approach of reciprocity. In many cases reference to a treaty is in terms of promoting foreign investment in the host country. For example, the 1980 agreement between Belgium and Cameroon stipulates that the Belgian government will take "les mesures propres à inciter ses opérateurs économiques à participer à l'effort de développement de la république unie du Cameroun comformèment à ses objectifs prioritaires".

2) The historical Background of bilateral Investment Treaties:

Bilateral economic and commercial agreements have gone through several evolutions. The first attempt was in the form of "friendship, commerce and navigation (FCN) treaties". The original typology of such treaties was developed during the nineteenth and early twentieth centuries by the USA and GB and perhaps the best example is the treaty of Amity, Commerce and Navigation of May 12th, 1825 between the United Province of Rio de la Plata (subsequently Argentina) and the United Kingdom.(1) After the use of such treaties, several principles were established, particularly in the area of private property protection abroad. However, after the first world war (1914-1918), these rules stated to decline as some new

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(1) Schwarzemberger. G, "Foreign Investments and International Law", London, 1969, p.91.

political and ideological approaches emerged from the 1917 Russian revolution. A number of concepts influenced the trend of thinking on certain aspects of contemporary international law, for instance, on public interest and the role of the state in controlling the national economy; expropriation as a legitimate right of the state; state monopoly on international commerce and foreign exchange control, etc. After 1918, friendship, commerce and navigation treaties were still regarded to be an important source of inspiration and instrument to solve the existing problems of expropriation and foreign investment mistreatment; they were concluded mostly by the United States and some European countries, to establish a peaceful climate for international commercial activities and to safeguard the interests of one contracting state in the other and to facilitate the freedom of navigation on territorial waters. In addition, these treaties used the reciprocal method between the parties and they were concluded for a long duration. Initially, they used to be between industrialising countries, such as the treaty between the USA and France in 1778 and the one agreed between US and GB in 1815. However, after the discovery of mineral wealth in (what is now Third world) countries, a significant number of FCN treaties were concluded with the latter, for example, between the USA and Columbia (1951); the USA and Haiti (1951); the USA and Uruguay (1949); the USA and Pakistan(1959), etc. The conclusion of such treaties was expanded to other capital exporting countries, for instance, the agreements concluded by Germany with

Pakistan, Malaya, Greece, Togo, Morrocco, Liberia and Thailand. Japan also concluded two such treaties with Pakistan and the Republic of the Philippines in 1960. Two years later, Switzerland signed somewhat similar commercial agreements with some newly independent countries, such as Senegal(1962), Niger (1962), Guinea (1962), and Ivory Coast (1962).

It seems in conclusion that this type of treaty was favourable for capital exporting countries, particularly the USA. The US department of State confirmed in this respect that: "American investors need a proper measure of security against undue risks likely to plague their foreign operations. It has not been intended to shield the investor against the economic risks to which venture capital is subject but to reduce the special hazards to which overseas investment may be exposed by reason of unfavourable laws or judicial conditions. Rigid exchange controls, inequitable tax statutes, a drastic expropriation law are not conductive to the free flow of capital, and it is against obstacles of this kind that these are directed".(1)

The fundamental clauses in a FNC treaty deal with such issues as:

The Access of Investment in the host State:

Each party shall give to the nationals or companies of the other contracting party free access to the territory of the recipient country.

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(1) Commercial Treaty Program Of The US, Op. Cit, p.4, cited by Nwogugu, Op. Cit, p.122.

For instance, in the US-Nicaraguan FNC treaty of 1956, Art.II(I) states that: "Nationals of either party shall be permitted to enter the territories of the other party and remain therein:

a) for the purpose of carrying on trade between the territories of the two parties and engaging in related commercial activities;

b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and

c) for other purposes subject to the laws relating to the entry and sojourn of aliens".(1)

For a better achievement of these objectives, American prototype agreements regard national treatment with favour. A similar approach is found in British treaties, for example, in the treaty of friendship, commerce and Navigation of December 20th, 1951, between GB and Muscat and Oman.

Protection and Guaranty of foreign owned Assets.

With regard to protection, both Britain and the USA are very particular as to international customary rules. Protection is always included in their FCN treaties with developing countries. In the FCN treaty between the USA and Nicaragua, Article VI(3) stipulates that no contracting state shall "take unreasonable or discriminatory measures that would impair the legally acquired rights and interests within its territories of

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(1) See also, Art. 2(1) of US-China Treaty Of 1946.

nationals and companies of the other party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they supplied".

Moreover, in some FCN treaties, such as the US-Korean treaty, Article VI(4) and in the US-China treaty, Art.VI(2) lays down that foreign-owned property cannot be expropriated except for the public purpose, without discrimination and by paying a prompt, adequate and effective compensation. Any settlement of and dispute has to be submitted to arbitration rather than to national jurisdiction.

Transfers:

Under FCN treaties, investors are free to transfer their capital and profits. However, owing to some problems created by these operations, especially the question of the negative effect of transfers on the national balance of payment, several measures have been taken to allow the receiving country to apply exchange restrictions whenever the circumstances require it. In this respect, Article VII(5) of the US-Israeli FCN treaty clarifies that it will possible "In periods of exchange stringency to apply exchange restrictions to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people and necessary to the avoidance of serious economic instability". Furthermore, any misuse of this right shall not be acceptable. The US-Korean FCN treaty, concluded in 1956, in Article XII(4) refers to this situation by saying that: "Exchange

restrictions shall not be imposed by either party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims,investments,transport, trade and other interests of the nationals and companies of the other party, nor to the competitive position thereof."

Settlement of disputes:

Conventional provisions for the protection of foreign investment are numerous, the settlement of business disputes is an important aspect of such provisions which can be found in all FCN treaties. However, the usual technique adopted by FCN treaties is to make use of an arbitration clause, therewith withdrawing the given dispute from the host country's national courts' jurisdiction.

FCN treaties in addition deal with other issues such as favourable tax treatment; import and export taxes; the right to lease and purchase lands, patents, trade marks; commerce and navigation, freedom, right to compete with local firms.

After the widespread conclusion of FCN treaties by industrialised countries, other types of agreements were considered for the sole purpose to cover non-commercial risks, such as expropriation; revolutionary conflict damages and transfer restrictions. For this reason, several institutions have been created to supervise such matters. The United States has played an important role in this respect, especially under the auspices of the Overseas Private Investment Corporation (OPIC) set up in 1948. Following these attempts, efforts were made to set up an international insurance scheme as a means to solve

the question of investment protection. After many efforts, the Convention of Multilateral Investment Guaranty Agency (MIGA) was established. It is still open for signature by states.

3) The Effectiveness of bilateral Investment Treaties (BIT) in the current international economic Situation.

Bilateral investment treaties have initially been created by developed countries to secure their investments in developing states. It is a new method to impose traditional principles of customary international law on countries which have principally rejected them. Probably for this reason, 55 bilateral investment treaties have not yet entered into force. This however does not mean that developing countries are opposed to the access of foreign investment in their territories or are against the idea of foreign investment protection. For the majority of them, the flow of international capital is a crucial economic factor in their development; but this latter cannot be promoted unless side by side with safeguarding their national sovereignties. That is the reason why they are imposing certain restrictions and attaching certain considerations to the access of foreign investment. On the other hand, as already hinted above, concluding BITs does not automatically lead to the flow of international capital to states which need it, as several cases illustrate this. Among them is the case of the African region which still suffers from a shortage of foreign investment although a considerable number of African countries have already signed BITs with capital exporting countries. On

the other hand, countries like Libya, Algeria, Nigeria and Zimbabwe are not interested in such treatiees. Therefore, "in practical terms, unless the host country can offer a secure profit-making venture to the foreign investor, the existence of a bilateral treaty will not in itself attract an investment."(1)

Paradoxically, countries like Argentina, Mexico and Brazil have received considerable amounts of foreign investment (about 49.5% of the total direct investment in 1985) although they are not involved in any BITs. With this fact as a basis, it may be concluded that bilateral BITs investment treaties cannot be a final decisive factor for attracting foreign investors; BITs are just one aspect among several factors which help to attract international capital to a host country.

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(1) See, "Bilateral Investment Treaties", London, Boston, 1988, p.2.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

REVISED DRAFT OF MODEL AGREEMENTS FOR PROMOTION AND PROTECTION OF INVESTMENTS a/

MODEL A

AGREEMENT between the Government of .....

and

the Government of ..... for the Promotion, Encouragement and Reciprocal Protection of Investments.

The Government of .....and the Government of .....

Recognizing in particular the need to promote wider co-operation between the countries of the Asian-African region to accelerate their economic growth and to encourage investments by developing countries in other developing countries of the region;

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a/ The model agreements are intended to provide possible negotiating texts for consideration of governments. They are merely models and not adhesive texts. The possibility that the texts would be modified or altered in the course of bilateral negotiations to suit the needs of the parties is clearly contemplated.

The AALCC has prepared three drafts model which are described as follows: Model A: Draft of a bilateral agreement basically on similar pattern as the agreements entered into between some of the countries of the region with industrialised States with certain changes and improvements particularly in the matter of promotion of investments. Model B: draft of an agreement whose provisions are somewhat more restrictive in the matter of protection of investments and contemplate a degree of flexibility in regard to reception and protection of investments. Model C: draft of an agreement on the pattern of Model A but applicable to specific classes of investments only as determined by the host State.

Also Recognizing that reciprocal protection of such investments will be conducive to the attainment of desired objectives in a spirit of partnership;

Desirous to create conditions in which the investments by each other and their nationals would be facilitated and thus stimulate the flow of capital and technology within the region;

Have agreed as follows:

Article 1

Definitions

For the purpose of this Agreement

(a) 'Investment'

(Alternative A)

'Investment' means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares, stocks and debentures of companies or interests in the property of such companies;

(iii) claims to money or to any performance under contract having a financial value, and loans;

(iv) copyrights, knowhow (goodwill) and industrial property rights such as patents for inventions, trade marks, industrial designs and trade names;

(v) rights conferred by law or under contract, including licence to search for, cultivate, extract or exploit natural resources.

(Alternative B)

'Investment' includes every kind of asset such as

(i) shares and other types of holdings of companies;

(ii) claims to any performance under contract having a financial value, claims to money, and loans;

(iii) rights with respect to movable and immovable property;

(iv) rights with regard to patents, trade marks and any other industrial property; and

(v) contractual rights relating to exploration and exploitation of natural resources.

(Alternative C)

'Investment' means:

(i) in respect of investment in the territory of (First Party).....

(ii) in respect of investment in the territory of (Second Party).....

(b) 'National'

(Alternative A)

'National' in respect of each Contracting Party means a natural person who is a national or deemed to be a national of the Party under its Constitution or relevant law.

(Alternative B)

'National' in respect of (First Party) ..... means ..... and in respect of (Second Party) means .....

(c) 'Companies'

(Alternative A)

'Companies' means corporations, partnerships or associations incorporated, constituted or registered in a Contracting Party in accordance with its laws [and includes such entities in which nationals of a Contracting Party have substantial interest and majority shareholding].

(Alternative B)

'Companies' means in respect of the (First Party) .....

..... and in respect of the (Second .....
Party).....

(d) 'State Entity' means a department of government, corporation, institution or undertaking wholly owned or controlled by government and engaged in activities of a commercial nature.

(e) 'Returns' includes profits, interests, capital gains, dividends, royalties or fees.

(f) 'Host State' means the country in whose territory the investment is made.

(g) 'Territory' means:

(i) In respect of the (First Party) .....;

(ii) In respect of the (Second Party) .....

Article 2

Promotion and encouragement of investments

(i) Each Contracting Party shall take steps to promote investments in the territory of the other Contracting Party and encourage its nationals, companies and State entities to make such investments through offer of appropriate incentives, wherever possible, which may include such modalities as tax concessions and investment guarantees.

(ii) Each Contracting Party shall create favourable conditions to encourage the nationals, companies or State entities of the other Contracting Party to promote investment in its territory.

(iii) The Contracting Parties shall periodically consult among themselves concerning investment opportunities within the territory of each other in various sectors such as industry, mining, communications, agriculture and forestry to determine where investments from one Contracting Party into the other may be most beneficial in the interest of both the parties.

(iv) [Each Contracting Party shall duly honour all commitments made and obligations undertaken by it with regard to investments of nationals, companies or State entities of the other Contracting Party]. c/

Article 3

Reception of Investments

(i) Each Contracting Party shall determine the mode and manner in which investments are to be received in its territory.

(ii) The Contracting Parties may determine that in a specified class of investments, a national, company or State entity of a Contracting Party

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c/ There were some differences of views on the need for inclusion of this clause.

intending to make investment in the territory of the other Contracting Party including collaboration arrangements on specific projects, shall submit its or his proposal to a designated authority of the Party where the investment is sought to be made. Such proposals shall be processed expeditiously and soon after the proposal is approved, a letter of authorisation shall be issued and the investment shall be registered, where appropriate, with the designated authority of the host State. The investment shall be received subject to the terms and conditions specified in the letter of authorisation.

(iii) The host State shall facilitate the implementation and operation of the investment projects through suitable administrative measures and in particular in the matter of expeditious clearance of authorisations or permits for importation of goods, employment of consultants and technicians of foreign nationality in accordance with its laws and regulations.

Article 4

Most-Favoured Nation Treatment

(i) Each Contracting Party shall accord in its territory to the investments or returns of nationals, companies or State entities of the other Contracting Party treatment that is not less favourable than that it accords to the investments or returns of nationals, companies or State entities of any third State.

(ii) Each Contracting Party shall also ensure that the nationals, companies or State entities of the other Contracting Party are accorded treatment not less favourable than that it accords to the nationals or companies or State entities of any third State in regard to the management, use, enjoyment or disposal of their investments including management and control over business activities and other ancilliary functions in respect of the investments.

Article 5 d/

National Treatment

(i) Each Contracting Party shall accord in its territory to the investments or returns of nationals, companies or State entities of the other Contracting Party treatment that is not less favourable than that it accords to the investments or returns of its own nationals, companies or State entities.

(ii) Each of the Contracting Parties shall extend to the nationals, companies or State entities of the other Contracting Party, treatment that is not less favourable than it accords to its own nationals, companies or State entities in regard to management, control, use, enjoyment and disposal in relation to investments which have been received in its territory.

Article 6

Repatriation of Capital and Returns

(i) Each Contracting Party shall ensure that the nationals, companies or State entities of the other Contracting Party are allowed full facilities in the matter of the right to repatriation of capital and returns on his or its investments subject, however, to any condition for re-investment and subject also to the right of the host State to impose reasonable restrictions for temporary periods in accordance with its laws to meet exceptional financial and economic situations [as determined in the light of guidelines generally applied by the IMF or such other criteria as may be agreed upon by the parties]. The capital and returns allowed to be repatriated shall include

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d/ Some countries do not favour 'National Treatment' for foreign investments.

emoluments and earnings accruing from or in relation to the investment as also the proceeds arising out of sale of the assets in the event of liquidation or transfer.

(ii) In the event of exceptional financial or economic situations as envisaged in paragraph (1) of this article, the host State shall exercise its powers to impose reasonable restrictions equitably and in good faith. Such restrictions shall not extend ordinarily beyond a period of .... As any restriction in operation thereafter shall not impede the transfer of profits, interests, dividends, royalties, fees, emoluments or earnings; as regards the capital invested or any other form of returns, transfer of a minimum of 20 per cent in each year shall be guaranteed.

(iii) Repatriation shall be permitted ordinarily to the country from which the investment originated and in the same currency in which the capital was originally invested or in any other currency agreed upon by the investor and the host State at the rate of exchange applicable on the date of transfer upon such repatriation, unless otherwise agreed by the investor and the host State.

Article 7

Nationalisation, Expropriation and Payment of Compensation in Respect Thereof

(i) Investments of nationals, companies or State entites of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except [for a public purpose] [in national interest] of that Party and against prompt, adequate and effective compensation, provided that such measures are taken on a non-discriminatory basis and in accordance with its laws.

(ii) Such compensation shall be computed on the basis of the value of the investment immediately prior to the point of time when the proposal for expropriation had become public knowledge to be determined in accordance with recognized principles of valuation such as market value. Where the market value cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account, inter alia, the capital invested, depreciation, capital already repatriated and other relevant factors. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The determination of the compensation, in the absence of agreement being reached between the investor and the host State, shall be referred to an independent judicial or administrative tribunal or authority competent under the laws of the expropriating State or to arbitration in accordance with the provisions of any agreement between the investor and the host State. The compensation as finally determined shall be promptly paid and allowed to be repatriated.

(iii) Where a Contracting Party nationalises or expropriates the assets of a company which is incorporated or constituted under the laws in force in its territory and in which nationals or companies or State entities of the other Contracting Party own shares, it shall ensure that prompt, adequate and effective compensation is received and allowed to be repatriated by the owners of the shares in the other contracting Party. Such compensation shall be determined on the basis of the recognized principles of valuation such as the market value of the shares immediately prior to the point of time when the proposal for nationalisation or expropriation had become public knowledge. The compensation shall include interest at a normal commercial rate from the date of nationalisation or expropriation until the date of payment. If any question arises regarding the determination of the compensation or its payment, such questions shall be referred to an independent judicial or administrative tribunal or authority competent under the laws of the expropriating State or to arbitration in accordance with the provisions of any agreement between the investor and the host State.

Article 8

Compensation for losses

[(i) Nationals, companies or State entities of one Contracting Party whose material assets in the investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by that Contracting Party treatment regarding restitution, indemnification, compensation or other settlement, no less favourable than that it accords to (its own nationals, companies or State entities or to) nationals, companies or State entities of any third State]. e/

(ii) Nationals, companies or State entities of one Contracting Party who suffer losses in the territory of the other contracting Party resulting from:

(a) requisitioning of their property by its forces or authorities; or

(b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation;

shall be accorded restitution or adequate compensation and the resulting payments shall be allowed to be repatriated.

Article 9

Access to courts and tribunals

The nationals, companies or State entities of one Contracting Party shall have the right of access to the courts, tribunals both judicial and administrative, and other authorities competent under the laws of the other

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e/ Several participants had reservations on the provisions of this paragraph.

Contracting Party for redress of his or its grievances in relation to anymatter concerning any investment including judicial review of measures relating to expropriation or nationalisation, determination of compensation in the event of expropriation or nationalisation, or losses suffered and any restrictions imposed on repatriation of capital or returns.

Article 10

Settlement of Investment Disputes

(i) Each Contracting Party consents to submit any dispute or difference that may arise out of or in relation to investments made in its territory by a national, company or State entity of the other contracting Party for settlement through conciliation or arbitration in accordance with the provisions of this Article.

(ii) If any dispute or difference should arise between a Contracting Party and a national, company or State entity of the other Contracting Party, which cannot be resolved within a period of ..... through negotiations, either party to the dispute may initiate proceedings for conciliation or arbitration unless the investor has chosen to avail himself or itself of local remedies.

(iii) Unless the parties have reached agreement to refer the disputes to conciliation under the provisions of the International Convention for the Settlement of Investment Disputes between States and Nationals of other States 1965, conciliation shall take place under the UNCITRAL Conciliation Rules 1980 and the assistance of ..... may be enlisted in connection with the appointment of Conciliator(s).

(iv) Where the conciliation proceedings have failed to resolve the dispute as also in the event of agreement having been reached to resort to arbitration, the dispute shall be referred to arbitration at the instance of either party to the dispute within a period of three months.

(v) Any reference to arbitration shall be initiated under the provisions of the International Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 or "The Additional Facility Rules" of ICSID, whichever may be appropriate. In the event of neither of these procedures being applicable, the arbitration shall take place in accordance with the UNCITRAL Arbitration Rules 1976, and the appointing authority for the purposes os such rules shall be .....

(vi) Neither Contracting Party shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting Party has failed to abide by or to comply with the award rendered by the arbitral tribunal.

Article 11

Settlement of disputes between Contracting Parties

(i) Disputes or differences between the Contracting Parties concerning interpretation or application of this agreement shall be settled through negotiations.

(ii) If such disputes and differences cannot thus be settled, the same shall, upon the request of either Contracting Party be submitted to an arbitral tribunal.

(iii) An arbitral tribunal shall be composed of three members. Each Contracting Party shall nominate one member on the tribunal within a period of two months of the receipt of the request for arbitration. The third member, who shall be the chairman of the tribunal, shall be appointed by agreement of the Contracting Parties. If a Contracting Party has failed to nominate its arbitrator or where agreement has not been reached in regard to appointment of the chairman of the tribunal within a period of three months, either Contracting Party may approach the President of the International Court of Justice to make the appointment. the chairman so appointed shall not be a national of either Contracting Party.

(iv) The arbitral tribunal shall reach its decision by majority of votes. Such decision shall be binding on both the Contracting Parties. The tribunal shall determine its own procedure and give directions in regard to the costs of the proceedings.

Article 12

Subrogation

If either Contracting Party makes payment under an indemnity it has given in respect of an investment or any part thereof in the territory of the other contracting Party, the latter Contracting Party shall recognize:

(a) the assignment of any right or claim from the party indemnified to the former Contracting Party or its designated Agency; and

(b) that the former Contracting Party or its designated Agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of such a party.

Article 13

Exceptions

Neither Contracting Party shall be obliged to extend to the nationals or companies or State entities of the other, the benefit of any treatment, preference or privilege which may be accorded to any other State or its nationals by virtue of the formation of a customs union, a free trade area or any other regional arrangement on economic co-operation to which such a State may be a party.

Article 14

Application of the Agreement

The provisions of this Agreement shall apply to investments made after the coming into force of this Agreement [and the investments previously made which are approved and registered by the host State (in accordance with its laws) within a period of .....from the date of entry into force of this Agreement]. f/

Article 15

Entry into force

[This Agreement shall enter into force on signature].

or

[This Agreement shall enter into force as from .....]

or

[This Agreement shall be ratified and shall enter into force on the exchange of instruments of ratification] g/

Article 16

Duration and Termination

This Agreement shall remain in force for a period of .... Thereafter it shall continue in force until the expiration of twelve months from any date on which either Contracting Party shall have given written notice of termination to the other. [Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ..... years after the date of termination] h/

In WITNESS WHEREOF the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at ....., this ..... day of ..... 1980. (In the ..... and ..... languages, both texts being equally authoritative).

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f/ There were some differences of views about the past investments being covered.

g/ Alternative provisions.

h/ There were some differences of views whether past investments should be covered.

For the Government of

.....

For the Government of

.....

TREATY
BETWEEN
THE UNITED STATES OF AMERICA
AND

.....

CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America

and .....

Desiring to promote greater economic co-operation between them, particularly with respect to investment by nationals and companies of one Party in the territory of the other Party, and

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties,

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and

Having resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment,

Have agreed as follows:

Article I

1. For the purposes of this Treaty,

(a) "Company of a Party" means any kind of corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;

(b) "Investment" means every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

(c) "National" of a Party means a natural person who is a national of a Party under its applicable law;

(d) "Return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;

(e) "Associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

Article II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favourable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favourable, subject to the right of each party to make or maintain exceptions falling within one of the sectors or matters listed in the annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall

not be less favourable than that accorded in like situations to investments and associated activities of nationals or companies of any third country, except with respect to ownership of real property. Rights to engage in mining on the public domain shall be dependent on reciprocity.

2. Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments.

3. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

4. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

5. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties.

7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

8. The treatment accorded by the United States of America to investments and associated activities under the provisions of this Article shall in any State, Territory or possession of the United States of America be the treatment accorded therein to companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.

Article III

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, include interest at a commercially reasonable rate from the date of expropriation, be paid without delay, be fully realizable, and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation and any compensation therefore, conforms to the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favourable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.

Article IV

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Except as provided in Article III, paragraph 1, transfers shall be made in a freely convertible currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations; (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgements in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

Article V

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

Article VI

1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party;

(b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company, or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiations, which may include the use of non-binding, third-party procedures. If the disputes cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures. Any dispute-settlement procedures regarding expropriation and specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws, and applicable international agreements regarding enforcement or arbitral awards.

3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") or under the rules of the Additional Facility of the Centre ("Additional Facility"), for settlement by conciliation or binding arbitration, at any time after six months from the date upon which the dispute arose. Once the national or company concerned has so consented, either Party to the dispute may institute proceedings before the Centre or the Additional Facility provided

(i) the dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute settlement procedures, and

(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to a dispute.

If the Parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

(b) Each Party hereby consents to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration, or, in the event the Centre is not available, to the submission of the dispute to ad hoc arbitration in accordance with the rules and procedures of the Centre.

(c) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States done at Washington, 18 March 1965 ("Convention") and the Regulations and Rules of the Centre or, if the Convention should for any reason be inapplicable the Rules of the Additional Facility shall govern.

4. In any proceeding involving an investment dispute, a Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

5. For the purposes of this Article, any company legally constituted under the applicable laws and regulations or either Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall, in accordance with Article 25 (2) (b) of the Convention, be treated as a national or company of such other Party.

Article VII

1. Any dispute between the Parties concerning the interpretation or application of this Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the Model Rules on Arbitral Procedure adopted by the United Nations International Law Commission in 1958 as referred to in the United Nations General Assembly Resolution 1262 (XIII) shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decision within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceeding shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

Article VIII

The provisions of Article VI and VII shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programmes of the Export-Import Bank of the United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

Article IX

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization, that entitle investments or associated activities to treatment more favourable than that accorded by this Treaty in like situations.

Article X

1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

Article XI

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Articles VI and VII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

Article XII

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 3 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at ....., on the day ..... of ....., in the English and ..... languages, both texts being equally authentic.

FOR THE GOVERNMENT
OF THE UNITED STATES OF AMERICA

FOR THE GOVERNMENT
OF .....

C. Multilateral Regulation Of Foreign Investment.

When it is realised that developing countries are unable to regulate the business activities of international companies, especially MNCs that dominate the scene, the necessity of an international regulation under the auspices of international, inter-regional and/or regional organisations becomes clear.

Current efforts to subject MNCs to an international code of conduct show that an effective regulation of the operations of such giant enterprises is beyond the capacity of individual states.

Thus, cooperation between states is required to find and develop a legal mechanism to regulate international business operations.

Highlighting some of the crucial aspects of this complex question, many proposals have been made. Surveying them, we shall review first the historical roots of international business agreements and their evolution, with particular reference to the aspect of international investment. We shall then draw some conclusions and appraise the effectiveness of the multilateral regulatory method.

1) The historical Background Of international Business Agreements; their Evolution.

The purpose of searching for a global system to cover foreign investment mechanisms is mainly to facilitate the access of international capital to developing countries. It has been thought that a multilateral regulation of transnational businesss may

revive tha past active role of foreign investment also in host developing countries. The UN Secretary-General, in his evaluation of some bilateral agreements' provisions, reported that: "It is not likely that this technique could offer a comprihensive solution to the problem; the expansion of such a bilateral network is not only a necessary slow progress, but it is bound to remain highly selective in its geographic scope especially since some capital-supplying countries are likely to be in a better position for securing such treaty protection for their investors than others."(1)

Therefore, within the context of a better regulation of international commercial transactions, a new approach was adopted to establish a multilateral investment code as an alternative to both unilateral and bilateral regulations.

However, to make this project a reality, states have to give their consent to the proposed rules and principles by implementing them within their respective national legislative frameworks.

Multilateral regulation of foreign investment has been a process that has had to go through several stages, undergoing gradual development involving previous attempts surveyed below.

a) The international Convention on the Treatment Of Foreigners.

It was signed in Paris (November 5th to December 4th

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(1) UN. Doc. Eç3325, 26 Feb.1960, p.71, cited by Nwogugu, Op. Cit, p.135.

1929) under the auspices of the League of Nations. Its sole purpose was to apply the standard of national treatment. Aliens in the field of taxation and other fields relating to property were to enjoy legal protection as to their foreign-owned assets and were not to be deprived of their assets and property except for "legally recognised reasons of Public utility, in accordance with the legal procedure in force".(1) Fair compensation was to be given thereby to the injured person. However, after a sharp disagreement between the contracting countries on fair compensation, the conference ended without producing any agreement(2)

b) The Havana Charter for an international Trade Organisation. (ITO).

The Charter was agreed at the conference on trade and employment held in Havana (Cuba), from 21st November 1947 to 24th March 1948. Article I of the Charter defined the purpose of the Charter as follows:

"to foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment".(3) As far as foreign

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(1) Article 11.

(2) Potter, AJIL, 24(1930), pp.748-51.

(3) UN Conference On Trade Ane Employment: Final Act And Related Documents, N.Y. (April 1948).

investment is concerned, Article 12 of the Charter established some conditional measures for a favourable investment climate in developing countries, by recognising the recipient states' role to implement laws and regulations in order to protect foreign investors' property from any discriminatory acts. Besides, Article 12 provided for concrete obligations to be fulfilled by each contracting state, for instance:

- To take any appropriate safeguard necessary to ensure that foreign investment is not used as a basis of interference in its internal affairs or national policies;
- To prescribe and give effect on just terms to requirements as to the ownership of existing and future investment;
- To prescribe and give effect to other reasonable requirements with respect to existing and future investment.(1) Moreover, capital importing countries have to bear the full responsibility in case of any breach of the following obligations:
- To provide reasonable opportunities for investment, acceptance of them and adequate security for existing and future investment, and
- To give due regard to the desirability of avoiding discrimination as between foreign investments.(2)

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(1) Article 12 (1)(c).

(2) Article 12 (12).

Article 11(1)(b) laid down that: "No member shall take unreasonable and unjustifiable action within its territory injurious to the rights or interests of nationals of other members in the enterprise, skills, capital, arts or technology which they have supplied". Further, the same Article encouraged the establishment of an international body to promote and secure the flow of foreign private capital to the needy host countries within the scope of a multilateral investment code.

The Charter has been, as a convention, negatively described by some quarters; some of them even qualified it as "weak and unsatisfactory"(1) whereas others found that the charter "...did more to affirm the right of under-developed countries to interfere with investments than it did to affirm the right of the investors themselves."(2) An attitude was manifested by an American business organisation which asserted that the Havana Charter "not only affords no protection for foreign investments of the United States but it would leave them with less protection than they now enjoy".(3) Confronted by such criticism, the Havana Charter failed to harmonise the interests of both capital exporting and importing countries.

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(1) Nwogugu, Op. Cit, p.109.

(2) Gardner, "Sterling-Dollar Diplomacy", 1956, p.366, cited by Nwogugu, Ibid.

(3) A statement by the national foreign trade council, cited by Nwogugu, Ibid.

c) The economic Agreement Of Bogota(1)

A conference in Bogota was held in November 1947 immediately after the Havana conference. It mainly dealt with questions of proper investment policy and financial and technical cooperation between Latin American countries. It was thus a regional conference in which twenty one states participated.

Chapter 2 of the agreement was drafted as a theoretical framework for effective technical cooperation between the countries. It was seen as the only way to improve the national economies concerned. It required that all states encourage research work, training and development studies.

Chapter 3 was devoted to the question of financial cooperation between the participating states, in a manner similar to that which applied between the western countries after the second world war under the Marchall Plan. Such cooperation would not be effective without the availability of some facilities for loans, their re-payment as well as the development of local money markets and national savings to be able to finance development projects both in the short and long run. As far as private investment is concerned, the provisions included in the Bogota agreement are quite similar to those found in the Havana charter: private foreign investment should receive equitable treatment and any discriminatory action against them should be directly followed by an

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(1) It is the ninth conference of American states, Bogota, columbia.

international obligation. On this basis, Article 25 provided: "The states shall take no discriminatory action against investments by virtue of which foreign enterprises or capital may be deprived of legally acquired property rights...Any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner". The participating countries also undertook to flexibilise their tax laws without discrimination (Art 27).

The economic agreement of Bogota faced a number of reservations; eight Latin American states strongly opposed the provisions of Art 25 favourable to US policy in the region which could be a threat to their sovereignty. The Bogota agreement failed to provide for a multilateral regulation of foreign investment within the American sphere.

d) The ICC Code of fair Treatment for Foreign Investments

This code was actually agreed in 1949 under the auspices of the International Chamber of Commerce (ICC) at its Quebec congress in Canada. Articles 3 and 4 clarified the main objective of the code by prohibiting any attempt to impose "discriminatory, political, legal or administrative measures designed to hamper investments" especially measures relating to the nationality of investors. However, in the field of national defence projects, discrimination between investors was considered to be acceptable. Concerning the aspect of expropriation, Article 11 of the code stipulated that:

"(a)The property of investors...shall in no circumstances be liable to measures of expropriation or dispossession except in accordance with the appropriate legal procedure and with fair compensation according to international law;

(b) Any national law enacting expropriation or dispossession shall state explicitly the purpose and condition of such expropriation or disposition;

(c) The introduction of a system of exchange control shall not exempt (a state party) from its obligation to carry out the transfer of the compensation due for expropriation or dispossession;

(d)...The compensation shall be payable in cash or in readily marketable securities of an equivalent value. The cash or the proceeds of the sale of the securities shall be freely transferable forthwith at the rates of exchange prevailing at the time of expropriation or dispossession. The transfer shall be in the currency of the foreign creditors, unless otherwise agreed." However, any disputes arising from the application of the code has to be looked before the international court of arbitration unless otherwise agreed."

The ICC code was seen as an appropriate body of rules, fit to cover the outstanding problems of investment protection in general; however, due to the lack of provisions concerning some other specific points, for instance, the non-interference of foreign investors in the political matters of the host states, some quarters found it faulty.

e) The ABS-Showcross Draft Convention.

The objective of this draft convention appeared to be theoretically effective; it in fact, regrouped together some important concepts, for instance, increasing international cooperation and encouraging commercial relations development. The global objectives of the draft were as follows:

"The high contracting parties:

Believing that peace, security and progress in the world can only be attained and ensured by fruitful co-operation between all peoples on a basis of international law and mutual confidence; appreciating also the importance of encouraging commercial relations and promoting the flow of capital for economic activity and development; and considering the contribution which may be made towards these ends by a restatement of principles of conduct relating to foreign investments; have resolved for this purpose to conclude the present convention."

This took the equitable treatment doctrine as a starting point (Art I). In Art III more details were given about the question of depriving the foreign investor from his private properties by emphasising on its legitimacy under the old formula of prompt, effective and adequate compensation. Article VII suggested a suitable remedy in case of disputes between the parties, by going through the application of arbitration procedures. However if the parties disagreed about the proper means to settle the given problem, the dispute would be brought before the International Court of

Justice (ICJ) to look at it.

The draft convention was an attempt to reduce the acuteness of foreign investment protection problems and to find an adequate method to solve them in a manner which could serve the parties' interests on both sides. The draft seemed, however to be incapable to provide an adequate approach to it as it emphasised greatly the old principles of state resopnsibility.

f) The Convention for the Settlement of Investment Disputes between States and Nationals Of Other States.(1)

This Convention has been considered as on of the most successful attempts to minimise the (high) tensions between capital exporting and importing countries. It was sponsored by the International Bank for Reconstruction and Development (IBRD) in 1965 and came into force on October 14, 1966. Under it, the International Centre for the Settlement of Investment Disputes (ICSID) was established, as a new specialised business institution to settle investment disputes between the contracting states and the nationals of other contracting states and to promote a better business atmosphere between host states and foreign private investors, for the purpose to increase the level of attractiveness of particularly developing countries. These objectives were mentioned in the final report on the Convention of the World Bank's Board of Governors, in which it has been said:

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(1) For more Details See Schawarzemberger, Op. Cit, pp.135-151.

"The creation of an institution designed to facilitate the settlement of disputes between states and foreign investors can be a major step towards promoting an atmosphere of mutual confidence and thus stmulating a larger flow of private international capital into countries which wish to attract it".(1)

The report added that:

"private capital will flow to countries offering a favourable climate for attractive and sound investments, even if such countries, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investments into its territories, which is the primary purpose of the Convention."(2)

Thus, influenced by such favourable possibilities, a considerable number of countries from both sides signed the Convention. Up to 1986, 93 states had joined the Convention. With regard to investment disputes, about 18 disputes have already been brought before the ICSID for arbitration and two disputes before the ICSID for conciliation.

The majority of the developing countries, still not accepting the possibility that a dispute arising between them and foreign investors can be solved before an international arbitration body continue to include the application of internal law in major clauses in their

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(1) See, 4 International law Materials (ILM), 1965.

(2) Ibid.

contractual relations with international business entities. The ICSID clause is also not included in all bilateral investment agreements; the ICSID in fact appears in just a few such agreements concluded before 1970s, for instance, in the treaty between Belgium and Morocco (1965), Denmark and Indonesia (1968), France and Tunisia (1965), Norway and Indonesia (1969).

g) The OECD Draft Of 1967 on the Protection Of foreign Property.

The OECD Resolution of October 12, 1967, contained an emphasis on some traditional customary principles, for instance, by referring to "recognised principles relating to the protection of foreign property", thus concretely reflecting the OECD countries' opinion on the question. It has been stated that without such principles, the mechanism of international economic cooperation would not run properly. Article 1 of the 1967 draft stated that "each party shall at all times ensure fair and equitable treatment to the property of the nationals of other parties". This provision of Article 1 was borrowed from the ABS-Showcross draft convention in which the rule of fair and equitable treatment of foreign property was treated as the proper standard to apply to the relationship between an investor and the host country.

Under Article 3 of the draft, the lawful expropriation is subject to the following conditions:

"- The measures are taken in the public interest and under due process of law;

- The measures are not discriminatory; and

- The measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto". The question of compensation is thus under the OECD draft convention merely a confirmation of the already established customary international law generally accepted by the OECD members. This confirmation of customary law was undertaken without questioning its debatable aspects. As such it was difficult to accept particularly from the perspective of Third world countries which consider the matter as highly political related to the sacred principle of national sovereignty.

The OECD draft was generally received negatively by the international community as the drafters had neglected to deal with the point of view of the Third World countries on the matter in general and particularly in the light of the current economic situation which is not in favour of capital importing countries. The OECD proposal thus re-expressed the same orientation which had influenced privious international attempts, and was unable to improve any of the aspects of the existing problems. As a result, it did not rise to the level of implementation.

h) The Multilateral Investment Guarantee Agency (MIGA)(1)

The main purpose of the related convention was clarified by A.W. Clausen, the former president of the World Bank and chairman of the Administrative Council of ICSID. He stated that: "The MIGA convention directs MIGA to encourage the amicable settlement of disputes between investors and host countries. If a conflict arises nevertheless, MIGA will be placed in a unique position to facilitate an amicable settlement and to make sure that matters are discussed on the basis of legal and economic criteria only.

In other words, as in the case of ICSID, MIGA should contribute significantly to the depolitisation of investment disputes".(2)

The creation of MIGA as a new institution to solve international business disputes may be considered as an indication that the previous attempts, conventions and agreements, international or regional, had actually failed to fulfil expectations attached to them. Article 2 of the MIGA convention highlighted the Agency's practical objectives by indicating that MIGA shall:

"(a) issue guarantees, including co-insurance and reinsurance, against neo-commercial risks in respect of investments in a member country which flow from other

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(1) The constitution text of MIGA can be seen in 24(ILM), 1985, p.1605.

(2) 1986-1,3 news from ICSID 5 cited by Akinsanya A, "International Protection Of Direct Foreign Investments In The Third World", 36 ICLQ, p.1, p.72.

member countries:

(b) carry out appropriate complementary activities to promote the flow of investments to and among developing countries; and

(c) exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objectives".

Therefore, according to its objectives, MIGA seeks to maintain a favourable atmosphere for both foreign investors and host countries. The types of risks to be covered are well known: expropriation measures, whatever their legal nature, seen as discriminatory and not fair: currency transfer risks, damages caused by non-commercial risks, such as war, revolution, civil disturbances. However, payment for damages is limited to the cost of less than 150 percent of MIGA's unimpaired suscribed capital as well as its reserves and the portion of its covered reinsurance as may be determined by the board of the Agency.

MIGA can also work in collaboration with other regional agencies as well as with the member countries' domestic institutions set up to achieve the same purpose. In this respect, Article 19 says that: "the agency may enter into arrangements with such entities on the details of such co-operation, including in particular the modalities of reinsurance and co-insurance." Such a cooperation is therefore a way of getting external assistance required to complete the services which MIGA has to render.

With respect to the settlement of disputes, MIGA

provides for the possibility of a peaceful settlement. The MIGA board has authority to look at questions relating to the interpretation or application of the provision(s) in question in the Convention. The MIGA Council has been given the responsibility to examine appeal cases before a final decision is taken. In case of disputes between MIGA and its member countries, the matter shall be settled by negotiation, conciliation and arbitration, as can be seen from Annex II of the draft convention. Disputes concerning the interpretation or application of guaranty and reinsurance contracts shall be brought before an arbitration committee (Art 58) under the habitual conditions of international arbitration.

MIGA is still a very new international institution, and any assessment at this stage would surely be premature. However, it may be appropriate to predict that it may not have the consensus of all of the Third World countries because it carries several classical concepts, for instance, observing the international minimum standard in the treatment of foreign investors, investment disputes must be solved under the procedures of conciliation and arbitration. Moreover, accepting MIGA convention may mean rejecting the Charter of Economic Rights and Duties of States, particularly the provisions of Article 2(c).

Furthermore, the close relationship between MIGA and international financial institutions may indicate something about the nature of future treatment between MIGA and developing countries which sign the convention. In other words, these financial institutions may be

expected to surely influence MIGA to adopt strategies favourable to them in its dealings with developing countries, particularly with regard to the possibility of interference in their internal affairs.

2. The Third World Approach to the Regulation of Multinational Corporations (MNCs).

The multinational corporation is a huge business entity with a significant number of subsidaries spreading outside the seat (siège social) of the parent company. Its regulation is considered as a new important issue facing the international society, because these companies "embody an unprecedented concentration of financial power, technological know-how and productive capacity which has enabled them to occupy a dominant position not only in the trade of developing countries but in world trade in general".(1)

Practically, such corporations claim or control about 80-90 percent of world trade.(2) A survey of 350 MNCs, done in 1980, has shown that they share among themselves 25.000 foreign affiliates spreading all over the world, claim total sales of $22.635 billions and get net earnings of about $100 billions. They employ about 25

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(1) K.K.S. Dadzie, address to the 6th session of the United Nations Commission On TNCs. See, Official Records Of ECOSOC, UN Document Suppl(No.10) E/1980/40/Rev. 1, Cited by Acquaah, Op. Cit, p.43.

(2) Acquaah K, Ibid.

million people.(1)

Their immense economic power can also be seen from their shares in international investments. They have about $625 billion of foreign direct investments in 1983, in which the share of investments in developing countries had increased to $150 billion or about to an estimated quarter of the whole amount. Since they hold such power, the fear of their political interference exists; as Reymon Vernon has concluded "they were capable of putting sovereignty at bay".(2)

Accordingly, world countries are facing a dilemma involving the potential technological contribution of MNCs, which means the possibility of boosting the local rate of development, and parallel to it, a threat of losing the national sovereignty of at least part of it. This dilemma has been described by Behrman as follows:

"The host government is caught in a 'love-hate' syndrome. It wants the contributions to wealth and economic growth that the multinational enterprise can provide because they contribute to its power within the country, as well as internationally. At the same time, it dislikes and fears the results: the incursions on national sovereignty and technological independence. The host government finds multinational enterprises difficult to live with, but, so long as it seeks to increase national power, equally unpleasant to live without....It

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(1) Acquaah. K, Ibid.

(2) Vernon.R, "Sovereignty At Bay", New York, Basic Books, 1971.

appears to the host government that a trade-off may be required between sovereignty and greater wealth."(1)

Accepting such a factual situation, host countries usually expect the international society to produce a harmonising code of conduct to regulate the activities of the MNCs, as felt on several occasions. In one of the UNCTC modalities paper, it was stated that:

"A code of conduct on transnational corporation... represents an effort to formulate expectations which governments collectively feel justified to hold with regard to the conduct of transnational corporations. It becomes thereby a "source" of law for national authorities as well as for the transnational corporations... In this manner, the code may become a springboard for legally creative action by national courts and other authorities..."(2)

Hence, the primary objective towards the codified regulation of the activities of MNCs is to organise their integration into the national economy of the host country in which they operate. However, because of their transnational character, an effective regulation could be very hard if it takes the form of individual effort. In this case, the only method which could satisfy both parties would be to regulate such powerful

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(1) Aquaah. K, Op Cit, p.44.

(2) UN Commission On Transnational Corporation: "Certain modalities for implementation of a code of conduct in relation to its possible legal nature", UN Doc. E/C.10/AC 2/9, December 22, 1978.

corporations multilaterally under the auspices of an international organisation; but, how can the international society act for it in the current circumstances? In other words, are there any specific factors that can be considered and used to solve the matter?

On this particular question, one eminent author has said that

"since no sovereign state appears to be able to control (TNCs') global activities, the third world insists that an international organisation draw up guidelines that will regulate the transnationals. But here there is a basic fear on the part of the first world that due to two factors, this demand of direct international regulation of transnationals may lead to something which is unacceptable: the birth of a world government. If an international entity is given an independent income of its own...and it acquires the ability to operate directly against an entity without regard to that entity's sovereign, then two necessary preconditions for an effective world government have been satisfied."(1)

The expression "world government" is actually an illusory term created and used just to be able to respond negatively to the Third World demand for an international regulation. However, even if we accept such a new strange term, it does not fit the requirement of an international

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(1) Ferguson C.C, "Redressing Global Injustice: The role Of Law", in Rutgers law review 33(1981), pp.410/422.

legal framework of MNCs. In fact, reference to "world government" is merely a new orientation to curb the business power of MNCs as an important stage for a real international economic cooperation without any political integration.

During the primary negotiations of the foresaid code, some other matters were raised, among them the question of the legal nature of the code. Developing countries supported the idea of having a strict formally binding code which would carry obligations as well as sanctions; it would either be in the form of a multilateral convention or a treaty. However, MNCs' home countries prefer to put the question under the free will of the parties by adopting some broadly formulated rules and principles.

Developing countries favouring a proper code of conduct want to achieve a better standard of economic and social welfare by using the services of MNCs to overcome their weakness. The code for them is a means to regulate MNCs as business companies and not to regulate governments. However, industrialised states, which have given an enormous assistance to MNCs, see the code as a means to handle an international legal system for both MNCs as well as governments. Their actual objective behind this particular demand aims at ensuring a specific treatment according to international customary law completely rejecting the discriminatory treatment of foreign investments, whereas developing countries see that "non discriminatory treatment for foreign and domestic enterprises, would mean, in practice,

discriminating in favour of TNCs."(1)

With regard to the classical question of compensation in case of expropration, the draft code still suffers from the absence of the usually outstanding solutions to the existing issues.

Industrialised countries still stress the old principles of prompt, adequate and effective payment whereas developing countries maintain the usual response: to pay compensation in case of expropriation but only according to their laws and regulations. Besides, any compensation dispute would be brought before the expropriating state's jurisdiction under its laws.

Therefore, for the above mentioned as well as other reasons, the project of an international code of conduct to control MNCs seems not running in the right direction; no improvement has been achieved in recent years, although some UN bodies have achieved some results concerning the codification of some specific issues relating to international business. The best example for such a result is the UNCTAD code on transfer of technology, not yet in force owing to some yet outstanding and unresolved problems.

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(1) Rodriguez. M, "the Negotiations On The United Nations Code Of Conduct Of Transnational Corporations: Some Issues", The CTC Report (summer, 1982), UN Publications, Sales No E.82.II.A.14, cited by Acquaah, Op. Cit, p.117.

- Conclusions and Appraisal

It is still highly unlikely that the entire international community will one day adopt an international code of conduct particularly applicable to foreign investment. History has divided the world into two parts, the haves and the have-nots, and thus far it has made the industrialised countries the only holder of capital and technology. For this reason, developing countries cannot act alone, the participation of the technology holders is required for the purpose of setting up a balanced international society. There is no other alternative to cope with this factual situation. Even the so-called and slowly emerging South-South cooperation is currently challenged by several questions. Perhaps the most important one among them is the nature of the political systems adopted by developing countries as well as the lack of an adequate organisation ready to co-ordinate a joint position with the aims to encourage an economic turnaround.

In the current economic situation, the majority of developing countries are obliged to call for foreign investments to take part in their development process and they are trying to make the investors' position comfortable and beneficial with maximum guaranties. A.Akinsanya has in this respect, emphasised how "Private investors invest to make profits and not for reasons of benevolence. Thus, if they make profits they expect, albeit not unnaturally, to keep them, subject to payment of appropriate taxes to the local authorities; if they

acquire property, they expect to be entitled to keep it. The feeling of insecurity in these respects is, perhaps, the major deterrent to the flow of direct foreign investment in less-developed countries."

With this reasoning as a basis, attention has been devoted to the establishment of a favourable investment climate at the level of law in the form of unilateral, bilateral and multilateral measures. However, as regards the effectivemess of such legal arrangements, it should be noted that although they are crucial and important to strengthen the rights of investors, yet they still represent just one factor among many factors affecting the flow of foreign direct investments. The most striking example in this respect is the case of ACP(1) countries, especially those in Africa. Even though they have generously granted a large number of incentives and guaranties, they still suffer from a shortage of international investments in their economies, especially from the European Community. The reason is clear: the investor, before he makes up his mind to invest in any country, takes into account the global environment surrounding the given project. The legal regulation of international investment represents, however, but a small proportion of the whole system which governs the investment mechanism, and a very complex situation exists. In comparison, the systems proposed by the above mentioned efforts and types of regulation represent but

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(1) On the problem of investments in the ACP countries, see, "The Courier", No.102, March-April, 1987.

one and not new facet of the traditional customary law which the majority of Third World countries strongly reject. Thus, how can success be expected with reference to traditional approaches in new and complex situations? The question which has to be challenged first is how to develop a new mechanism of international investment. Thereafter progress may depend on negotiating the proper method of investment regulation. At the same time, developing countries would have to strengthen their position before negotiating with industrialised states by maintaining their unity, because, as J.K. Nyerere has said, "making separate bilateral or multilateral deals weakens the third world bargaining position."(1)

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(1) Nyerere. J.K, "Unity For A New Order", In "Dialogue For A New Order", Edited By Khadija Haq, Pergamon Press Inc, p.8.

Part three

Some Legal Aspects of foreign Investment in Algeria.

Chapter IV

The investment climate under the presidency of H. Boumedienne

The legal regime governing international business between Algeria and foreign partners has passed through several and difficult states. A lesson evolving from this development favours the view that foreign investors are accepting the currently reformist view of the Algerian government.

Professor N. Terki has explained the reasons for this change:

"Parmi les multiples raisons qui expliquent cette évolution, la crise économique qui frappe de plein fouet les pays exportateurs du pétrole, en raison de la chute brutale de prix du baril,occupe une place particulière. Et ceci est d'autant plus vrai que l'exportation de ce produit représente pratiquement l'unique source de dévises dont le pays a pourtant grandement besoin pour faire face à l'importation et au remboursement de sa dette extérieure.

Une autre justification complémentaire réside sans doute dans l'impossibilité dans laquelle se trouve la puissance publique de faire face, seule, aux investissements considerables exigés par le développement de la recherche des hydrocarbures sur un domaine minier d'une imminse superficie."(1)

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(1) See, R.A.J.E.P, 1987.

The above quotation, though it concerns investments in the field of hydrocarbons,applies equally to the other industrial sectors while the hydrocarbons sector still remains the major financial source in Algeria. The new investment policy is directed to compensate for the shortage of hard currency in the wake of the collapse of oil prices.

In order to understand the legal framework of foreign investment in Algeria, it is indispensable to use the historical approach to find out the nature of the major legislative instruments and their evolution.

Algeria is starting to review its approach to the liberalisation of the economy as well as the political reforms as promised by the President of the state after the October 1988 riots.

In what follows below, in addition to the historical approach, some light will be cast on the present legal position of foreign investment in Algeria, especially under the newly promulgated laws and regulations, such as the joint venture law of 1982 (as amended in 1986 and waiting to be reamended in 1989). At the same time, the impact of politico-economic factors on investment laws and regulations in Algeria will be mentioned and the conflictual relationship between ideology and the access of foreign investment in Algeria will be pointed out. By focusing on the evolution of Algeria's investment laws and regulations, the Algerian model of development and the strategies adopted since independence in 1962 may become clear.

A pragmatic approach to Algeria's development policy

has passed through a number of phases. The objective of the policy has been political rather than economic, preoccupied with the protection of the newly born state from any external interference, particularly from possible interference from states belonging to the (capitalist) Western bloc.

However, at the same time, the Algerian government has wanted and wants to safeguard and develop the country's economic independence, obviously not through complete isolation from international commercial relations with the North (Europe) but through relations that may benefit the national development.

Only in 1965 did Algeria begin to define a national strategy of development. Since this historical year, the government has continued to project the planification of the country's economic development.

Several plans were launched, for instance, the first three-year plan (1967-1969) and the seven-year perspective (1966-1973). By the 1970s a new era was dawning as a very busy time full of activities and efforts both in external and internal respects. It is not possible to evaluate Algeria's development strategy in the light of all its dimensions. For this reason, in the present thesis, only some particular aspects with a direct impact on the law of foreign investment in Algeria will be considered.

Generally speaking, Algeria did not have until 1982 any special regulations for foreign investment. However, the activities of private investment, both national and international, were regulated under the investment codes

of 1963 and 1966, respectively.

As far as private national investment is concerned, it was in 1900 that the private industrial sector entered the field of production. From 1900 to 1954, the industrial sector grew smoothly under French colonial power, particularly in some specific fields like food processing and textiles.

However, when in the 1950s the Algerian revolution began, the whole economy slowed down as the French authorities devoted and concentrated economic resources on fighting Algerian resistance in the struggle for independence. Starting 1959, the French government (of De Gaulle) wanted to correct mistakes by previous French authorities in Algeria and started to make efforts to boost the economy as well as the social welfare of the population. Several projects were on the agenda, for instance, the Constantine plan (1959-1962). Between 1961 and 1963 the number of private industrial and commercial enterprises was estimated at about 2000 in Algeria.

To compensate for the departure and emigration of French businessmen after the independence in 1962, national authorities thought that the best way to fill the gap left behind by the French was to encourage the development of the private sector. For this purpose two investment codes were promulgated, the first in 1963, offering several incentives to attract foreign investments. The second code, launched in 1966, aimed at encouraging both foreign as well as national potential investors.

The period 1966-1967 witnessed a new orientation

towards the public sector (socialist sector) after the first expropriation measures were applied to take over foreign-owned property. From 1968 to 1970, a number of state-owned companies (sociétés nationales) were established in replacement of the expropriated companies.

The 1970s were marked by numerous laws and regulations as codes involved in the legal regulation of foreign firms active in Algeria. Among these laws are Ordinance 71-22 of April 12, 1971, related to the participation of foreign firms in the field of hydrocarbon exploration; the Socialist Management of the Enterprises law (1971); Civil and commercial codes of 1975; the institution of 1976 and the 1978 code concerning the state monopoly over international commerce, in which the "non-exploiter" private was encouraged but only agreement with the ideological line of the party. Since then considerable efforts have been made to clarify the actual role of such a crucial sector in the national economy. In 1982 a new code was promulgated after an important resolution was adopted by the F.L.N. party", that is, the only party which existed until then, resolution of the Party's central committee in its 6th session (22-24 December, 1981). The following statistics illustrate the origin of the capital invested in and used by Algerian private industrial enterprises created between 1900 and 1971.

If the evolutionary stages of foreign investment regulation in Algeria since 1956 is mentioned, Algeria may be described as a land attracting investment owing to the abundance of hydrocarbons. A considerable amount of

international capital was devoted to explore and exploit the precious black gold of oil. The majority of efforts to explore and exploit were undertaken by French companies, under the provisions of the (French) sahara Petroleum code (Le code Pétrolier saharien de 1958).

When after more than seven years of struggle against the French, Algeria achieved its political independence in 1962, the newly born state found itself economically strongly linked to France as a "sort of inpendix" as it has been described by B.Hamza. In order French economic power and influence in Algeria the new government adopted a socialist ideology also for planning the national economy. This choice was solemnly declared by Ferhat Abbas in his opening speech before the Algerian constitutional assembly on March 25, 1962. He made the following statement:

"Our republic will evolve towards a socialist economy...and unless we industrialise the country with protection against monopolies, how can we raise our country out of underdevelopment and erase the stamp of the middle ages..."

The Evian Accords between Algeria and France laid down the organisatinal framework of the future economic relationship between Algeria as an independent state and France. The agreements were based on two basic points: (1) French engagement to assist the economy of Algeria; (2) Algerian engagement to respect and protect French persons and possession. Concerning these two aspects, Ben Bella affirmed the solemn engagement of his government to respect the Evian Agreements irrespective of a number of

debatable implications to the detriment of Algeria(1)

This indicated the concern of the Algerian authorities about the consequences of possible external economic interference and the need to harmonise ideology and access to foreign investment.

Concerning ideology of the state, it was emphasised that "the power belongs to the population and the land to the farmers". The real development of Algeria passed through the state's control over the production means.

Adopting socialism as a model for development in Algeria meant the establishment of limitations and obstacles to both national private and foreign investment. In fact the so-called parasitic private sector was frozen particularly during the agrarian reform of the 1960s and 1970s. With regard to the aspect of foreign investment in Algeria, a distinction is to be made between those investments which already existed (old investments) and those which could be recruited in the future (new investments).

The old investors (i.e. French companies) could enjoy the guaranties found in the Evian Accords. The new ones had to be under a new orientation of the state, for instance, involving cooperation with national public enterprises within the framework of mixed companies.

The reasons of such an ideological option were explained by s. Mahroug, the former finance minister:

"Si l'Algérie a repudié sans hésiter la voie capitaliste du développement économique, c'est parce que

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(1) Official Gazette of Algeria (JORA),October 26th,1962.

le capitalisme a imposé ses lois pendant plus d'un siècle de colonisation et qu'il s'est révélé incapable de satisfaire les besoins les plus élémentaires de la population". The same trend in policy was observed later on in the 1976 national charter, in which in chapter 7, part 2, p.16, the following was stated:

"Two choices face Algeria for its industrialisation, namely i) to keep the network and the industrial units inspired by neo-colonialist theories regarded as the only ones corresponding to the aspirations of the less-developed countries, or to refuse to admit that underdevelopment is an indelible weakness for nations who suffer from imperialist and capitalist alienation, and ii) to set up an industrial policy geared to an intensive and global industrialisation. Algeria stands without hesitation in favour of the latter alternative."

This view can serve as a background to analyse the correlation between the concept of foreign investment and the nature of the political system in Algeria.

The sudden departure of French settlers created several problems, among them the factual matter of the so-called "vacant properties" and their management. This question had been included in and regulated by the Evian Accords, but later many commercial and industrial companies were found without proper management, while the Algerian national economy was at that time in extreme need of each and every source of income. Regarding this matter, the government issued an Ordinance on August 24th, 1962, on the basis of which several administrative procedures were promulgated to organise a new management

for companies that were in state of inactivity for more than two months.

Under this Ordinance, a manager was to be appointed to deal with the aspect of company management. To make it easier for him, he was given the power to select some administrative managers to activate inactive companies. The 1962 Ordinance was amended and interpreted by a decree on November 23rd, 1962, which instituted the role of "management committees" within the inactive industrial and other companies. The committee has to be appointed by the workers' assembly of each "exploitation" unit and its members; the president of the committee is usually appointed as an administrative manager of the enterprise.

The Ordinance of 1962 was abrogated after four years by another Ordinance(1) which transferred the responsibility of the governor to the state. Article 1 provided that "The property of movable and immovable vacant properties is devoted to the state". The broadness of this Article created a very heated legal debate among lawyers. Borrella interpreted the French expression "bien vacants" to mean "domestic premises" only. His argument was based mainly on a radio speech given by the former president Houri Boumediene on May 8th, 1966, in which he had referred to the concept of "domestic premises" to explain "vacant properties". However, this was an isolated opinion by virtue of the Martefou case (La Société d'exploitation des transports) v Société

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(1) In Official Gazette Of The Republic Of Algeria, May 6th, 1966, p.344.

Eclairage Technique in which the court confirmed that companies can also be vacant properties and can therefore become state properties.(1)

As a new state, and in the absence of the basic elements of industrial development process (capital, infrastructure and skilled manpowers), Algeria found itself obliged to call for foreign investors particularly in the field of hydrocarbons. Other sectors were regrettably seen not as crucial sectors and therefore not allowed to receive any external assistance.

The promulgation of the 1963 Investment Code created a relief for foreign investment and to give more guaranties to productive investment in Algeria.

Article 3 of the Code gave the green light to foreign individuals to invest their capital freely without any conditions. However, investing legal persons (companies, agencies, offices) must be of a public nature and must respect the local laws and regulations as well as residence regulations subsequent to July 1st, 1962.

In summary, the 1963 Investment Code contained the following main legal points:

- When investing the company, a foreign investor could establish his own residence wherever he wanted, but in doing so, he had to observe of the provisions of law (Art 4);
- Investors were protected from any kind of illegal expropriation which could be effected, however, whenever

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(1) Terki R, "Les Societes Etrangers En Algerie", OPU, Algiers 1976, p.12.

the public interest required it. Expropriation would be accompanied by a fair compensation to the injured person (Art 6);

- Foreign companies approved by the administrative authorities would have an absolute right to enjoy all benefits cited in Art 9;
- Foreign investors could benefit from incentives mentioned in Art 9, for instance, exoneration (total, partial or degressive) from land tax for a period of ten years; exoneration from industrial and commercial benefits for a period of five years;
- Foreign investors could also transfer their profits as well as capital to their original countries.

In summary, the 1963 Investment Code was actually a foreign investment code because it was launched purposely to attract foreign investors and it did not offer anything to encourage Algerian private investors. The reason for it might be the non-existence of the domestic private sector at that particular time.

Ironically, a deeper look into the context of the text reveals several contradictions, of which the most important one perhaps is the contradiction between the code and the ideological option of the state, particularly when it is realised that the legislator has broken the ideological barrier and has adopted the open-door policy, actually copying from the experience of other African countries.

A year later, the F.L.N. party members met at their first congress in Algiers, April 12-16, 1964. At the end of the congress, a very important charter was launched

(The Algiers Charter). This meeting reminded the government members that Algeria is a socialist country and it should not turn back. With this in mind, the congress drew attention to the following points:

- The eventual nationalisation of the mineral wealth;
- Avoiding foreign capital participation, except when it is beyond the country's financial means to do so.(1)

It is since then that Algeria's nationalisation machinery has started to move in accordance with a defined policy. It was really a matter of a "particular juridical notion compared with the general principles of nationalisation either in France or in any other country".(2) To find out how important was to gain control over the country's wealth, it is important to look at the following table concerning the nationalised economic sectors, and to note some observations related to the information.

ECONOMIC SECTOR OR ECONOMIC BRANCH	DATE OR PERIOD OF NATIONALISATION	OBSERVATION
Agriculture	1962/1963	Total control
Monetary Institutions	DEC 1962	Creation/CL.CBA
Commerce/Industry	1963	Control over 2500 shops
Transport	1964	Total Control 14 Companies/SNTV

SOURCE: Mahiou,"le Pétrole Algérian",SNED,1974,p.49

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(1) Algiers charter, Ibid, Part 2, section 6.

(2) Garreau.C, "Structures Et Realites Juridiques Des Nationalisations Algeriennes", pp.73-89, in Revue International De Droit compare V.17, 1965.

Furthermore, the decree of May 14, 1963 allowed the state "to put under its protection properties whose method of acquisition, operation or utilisation could disturb law and order or the social peace."(1)

Hence, with the feeling that development cannot be achieved without the acquisition of modern technology and know-how, the government started to encourage state-owned enterprises to take part in international investments, particularly in joint-ventures with foreign companies.

Therewith, a new legal concept of joint-ventures began to develop, in the service of the ideology adopted and the type of economy chosen by the republic of Algeria. Several companies were created particularly in the field of hydrocarbons.

Under the so-called "the 1965 revolutionary readjustment", a new regime took power. The aim of this change, as described by the former (and late) president H.Boumediene was to create an "authentic socialist society". As far as foreign investment is concerned, he declared that Algeria is ready to cooperate with other states as well as foreign companies on condition that cooperation will not lead to any sort of exploitation and neo-colonisation.

As a first step, the new government decided to take control of several exploitation units producing raw materials, except the hydrocarbon sector which was then under the complete imperative control of multnationals.

As far as the French companies were concerned, they

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(1) Article 1 of the 31st December, 1963, decret.

were oranised under the provisions of the Algero-French oil agreements signed in Algiers on July 29th, 1965, which also covered the engagement of France to assist the achievement of Algeria's industrial plans. To clarify the legal nature of these important agreements, it is necessary to look at their contexts. The two parties agreed on the following points:

- Maintaining the previous trade contracts between the two parties;
- Plea for joint-ventures as a new type of cooperation between the two states, especially in exploring new oil fields. On this ground, the first Algero-French oil company named "ASCOOP" (Association co-operative de pétrole) was established;
- Introducing new fiscal measures for the concessioned companies;
- The net price of crude oil and direct tax will be decided by the parties;
- Introducing a new phase of cooperation between SONATRACH and French companies, particularly in the field of technical training of Algerian personnel and guaranteeing to sell Algerian products on French markets;
- Increasing SONATRACH's share from 40.51% to 50% within SNREPAL company and in the new planned joint-ventures between Algeria and France.

After this preliminary stage of Algero-French commercial relations, Algeria effected the promulgation

of a new investment code.(1) The contents of the code reflected nationalistic touch as it gave priority to the national private sector by offering it several important fiscal advantages (Arts 14-15). However, the so called vital areas of the national economy continued to be reserved to state monopoly and its independent organisms (Art 2). It was under the same article mentioned that an implementation decree would be issued to define what the vital sectors of the economy were; but the decree was not issued. The practical result of the Article was that it gave to the state complete freedom to interpret what these vital sectors could be. However, this undefined point created at the time a strong obstacle for those who wished to invest in these particular (vital) fields of the economy.

Furthermore, the 1966 investment code expressly sanctioned the joint-venture approach under conditions mentioned in its Article 3. However, generally speaking, the incentives granted by the code were judged, compared with other African counties' laws, as incapable to serve the flow of international capital to Algeria.

F.Lefebre has concluded that "Les avantages prévus par le code des investissements (le code de 1966), en faveur des entreprises ayant été agrées par les authorités compétentes, étaient très reduits par rapport à ceux accordés dans la plupart des états Africains."(2)

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(1) Ordonance n=66-284 of Sept 15th, 1966.

(2) Lefèvre.F,"Algerie",Guide Juridique Fiscal et Social Des Enterprises Etrangères",Second Edition,Paris,1984,p16

The nationalisation provisions too were also given an unfavourable reception by the international investing community. In this respect, one competent scholar confirmed this reality by saying that:

"The 1966 code suffered the same fate as the 1963 code, in that one of its most important provisions was changed just before it was promulgated. Whereas the draft law stated that in no case would the government nationalize a company during the first ten years of its existence, the final text states simply that a company will not be nationalized except where the public interest requires it 'imperatively', that such nationalization can be effected only by legislative action; and that a just indemnity will be paid automatically within a period of nine monthes."

The above mentioned statement by an American author who wanted to criticise the code, seems to be in support of the classical approach of the United States towards the right of nationalisation. However, whatever the criticism might be, Algeria, as a full sovereign state, has the absolute right to add or to take out anything she wants from any legislation promulgated in the name of the democratic republic of Algeria.

Furthermore, it should be remembered that nationalisation is a sovereign right recognised by the whole international community, and as long as the Algerian government fulfills the traditional conditions required by international law, it can exercise its right freely without any external interference from other countries.

With the intention to make the way of development shorter, Algerian policy-makers started to give some priority to industry as a fertile field for effective investment. In order to maintain this choice, the government planned to establish the first industrial infrastructure. For this reason it devoted a significant amount of expenditure. This new economic strategy was initially considered as a first step towards the idea of multiplicity, regarded by the planners as a master key to get out from the vicious circle of underdevelopment.

In order to illustrate how important the industrial sector was at that particular time, the following table is herewith included.

INDUSTRIES	PLAN 67-69	PLAN 70-73	PLAN 74-77
MINES/QUARRIES	0.17	0.7	1.1
IRON/STEEL	0.97	1.9	5.9
MECHANICAL/	0.14	1.3	6.2
ELECT INDUST			
GAS/ELECTRIC	0.10	0.7	1.5
CHEMICAL IND	0.46	0.51	4.0
DRINKS/FOOD	0.16	0.47	1.47
PROCESSING/			
TEXTILE	0.18	0.52	1.42
LEATHER/SHOES	0.06	0.06	0.17
PAPER/WOOD	0.05	0.60	1.60

SOURCE:PLANNING MINISTRY

As far as the administrative climate is concerned,

the government, through the adopted ideology put some restrictions on complete participation by the private sector, both domestic and foreign Articles 20-27 of the 1966 investment code were envisaged as legal framework for them. Consequently, several commercial companies were withdrawing from activities in Algeria. In fact some statistics showed that only 100 foreign companies still remained in 1970 in Algeria as compared with 800 enterprises in 1962.(1)

Considering the private national investment, it should be noted in this respect that the 1966 code was seen as being favourable to local investors. According to the National Investment Commission, a large number of development projects were agreed, as the following table shows:

YEAR	NUMBER OF PROJECTS	AMOUNT OF INVEST (THOUSANDS OF A.D)
1967	65	35902
1968	220	136299
1969	279	251652
1970	123	145932
1971	41	41164
TOTAL	728	610952

SOURCE: SYRIE ET MONDE ARABE,N=238.

The said Commission set up several criteria to be followed by investors wishing to take part in any new

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(1) Bennahmane. A, "The Algerian Development Strategy And Employment Policy", 1980, p.60.

national development project. The criteria were as follows:

- Projects had to be integrated with domestic production;
- They had to create as many opportunities of employment as possible
- They had to make a maximum use of local resources and raw materials
- They had to satisfy the national market demand, particularly demand by low income groups;
- They had to secure an amount of savings and earnings of foreign exchange;
- They had to be located in Algeria.

With reference to the brief outline of the contents of the code, it may be asked whether the code could be applicable to matters related to foreign investment in Algeria. This question was asked by Christian Haberli in his research paper on "Foreign investments in Africa". After analysing the context of the code, he reached the conclusion that the code achieved its objectives in terms of being more favourable to domestic investment than the 1963 code. It failed, however, to establish a proper legal status for foreign investments. As evidence for his conclusion, Haberli quoted some statistics to prove his point that under the 1966 investment code no international investment contracts had been agreed between Algeria and foreign companies. However,some agreements had been signed with some national private companies only within the organisational framework of mixed enterprises.

It is probably true that the 1966 code did not bring too many opportunities for Algeria to attract the desirable amount of international capital. If so, why did it take a long time to abrogate it?

The reason for it is an obvious one: foreign investment in the republic of Algeria has always been considered to be a new facet of colonialism and imperialism. Algeria has been one of the first developing countries to expressly condemn the current international economic system, including international law governing the flow of capital to underdeveloped host countries. Theoretically, the 1965 regime seemed interested to call for the assistance of foreign experience; President Boumedienne himself, once stated that: "Algeria must inspire confidence so that domestic and foreign capital will be encouraged to invest in the country's progress.(1)

Under his well known policy concentrating on the necessity of developing heavy industries, particularly in the field of hydrocarbons and steel, President Boumedienne said then that: "There is no economic independence without national heavy industries (...) selling cast iron would earn more than selling iron, and selling steel would earn more than selling cast iron. This is an elementary fact which we have taken account of."(2) He also confirmed that "Without steel there is no

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(1)See "Algeria Changes Course",in Africa Report,Nov 1965

(2)Cited By Doucy.A And Monheim.F, "Les Revolutions Algerienne", Fayard, 1971, p.76.

development."(1) Following these statements some international companies were attracted to take part in establishing Algeria's first hydrocarbons and steel infrastructures, despite the negative effects of the 1966 investment code. They were awarded the implementation of immense projects, for instance, the El Hadjar Steel and iron complex, Constantine mechanical engineering complex and Sidi Bel Abbes agriculture machines complex.

When dealing with the international companies involved in the projects, a legal problem emerged: how to establish a proper arrangement with these gigantic corporations in a manner that would not harm the national economy?

Thus, in the context of Algeria's aspirations and needs, the contractual arrangement with foreign partners passed through four main stages: 1) The separate contracts stage; 2) the turnkey contract stage; 3) the production planning stage, and, eventually, 4) the mixed economy enterprise stage.

1 - <u>The separate contracts stage.</u>(Technique de decoupage en lots).

Before embarking on the functional analysis of Algeria's contractual models adopted mainly at the time of Presisent Boumediene, it is worth saying that contract is actually a capitalistic concept, historically promoted by the liberal policy of "Laissez-Faire". As such it constitutes the core of the current conflictual

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(1) El Djeich, A.N.P.(Army National Populaire) magazine Algiers, July, 1972, p.29.

situation between developing countries wishing to have a balanced regime and developed countries which are the countries of anchorage of the transnational corporations usually interested in the first place on stability and predictability in business and economic matters.(1)

The Algerian separate contracts model contained two major agreements: 1) the supply of equipment and 2) provision of services agreements, usually attached to the suppliers responsibility, whatever their number. In other words, "each of the parties is directly responsible to the concerned national enterprise for the supplies or performance of the work entrusted to him under the terms of contracts."(2)

The most striking example of such a model was the establishment of the El Hadjar steel production complex. As a gigantic complex, it depended on the participation of several foreign firms of different nationalities, as can be seen from the table below. Not willing to jeopardize their capital, these foreign companies accepted to operate with such a model of contracts. The reason for it was may be twofold: 1) the size of the project itself and 2) the limited guaranties given by the government(3) and the law.

This type of contract can involve, however, many

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(1) Snyder.F.E and Sathirathai.S, "Third world Attitude Towards International Law", 1987, p.696.

(2) Hamza, Op. Cit, p.285.

(3) Salem.M and Alli,"Strategie Contractual Aux Maghreb", In Annuaire Afrique Du nord, 1974, p.149.

SEPARATE CONTRACTS PASSED BETWEEN SNS AND FOREIGN FIRMS,EL HADJAR COMPLEX (COST IN MILLIONS OF A.D)

YEAR	TYPE OF CONTRACT	FOREIGN PARTNERS	COST
1964	1.ENG CONT.	SOFRESID(F)	94
	2.REALISATION CONT.	SIDL & CAFL(F)	312
	3.ENG CONT.	LENGIPROMEZ(SWE)	<633
	4.EQUIP CONT.	TIAJPROEXPORT(USSR)	
1967	5.SUPP & PLAN EREC.	HOESH(W.GERMANY)	44
1969	6.SUPP & PLAN ERECT.	WEAN(UK)	50
1971	7.TURNKEY CONT.	TIAJAPROMEXPORT(USSR)	1500
	8.ENG CONT.	SOFRESID(F)	37
	9.SUPP & PLAN ERECT.	INNICENT & MARELLI	446
1973	10.ENG CONT.	ATKIS(UK)	169
1975	11.TURNKEY CONT.	COPPERS FRANCE(F)	152

NB: EXCLUDING CONTRACT 11.

SOURCE:

-MINISTRY OF INDUSTRY & ENERGY (1974), "THE INDUSTRIAL REVOLUTION, PP.73, 79.

-ANNUAIRE DE L'AFRIQUE DU NORD (DIFFERENT VOLUMES).

-CHAULEUR.P,"LES FLUX D'IMPORTATION DE TECHNOLOGIE DANS LE SECTEUR PUBLIC EN ALGERIE", R.A.S.J.P, V.XVI, NO 4,

DEC, PP.685-687.

-OTHER SOURCES INCLUDED:

"INDUSTRIES ET TRAVAUX D'OUTRE MER."

"MARCHES TROPIC AUX MEDITERRANEENS"

"EL MOUDJAHID".

SOUCRE: B. HAMZA, P. CIT. PP.376-377.

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economic and legal drawbacks, some of them being the following:

- With regard to the number of foreign partners, it could be very difficult to control their activities;
- Using this model would never permit the Algerian side to get the requested technology because no national partners would participate also because of the size of the project
- A national state enterprise may be the only partner from the Algerian side. This drawback may not have been a serious one at the time, as Algerian enterprises at the time lacked experience anyhow and could not have borne heavy technological and other responsibilities. This sort of arrangement may in practice be very costly for a new independent state like Algeria.

2 - **Turnkey Contract Method:** (French clefs en main).

This type of contract can be used for selling a prepared manufacture, start it up and deliver it to the client without any participation from the latter. It has just two parties, the local enterprise and the supplier who has the duty to do everything until he hands the whole project to the local national enterprise. In case the latter cannot start producing itself, it could seek

the help of the foreign contractor by extending the contractual relation to another type of contract called management contract.

In the context of Algeria, the planners adopted this type of contract after they saw that the first model of concluding separate contracts with separate contracting enterprises could not fulfill the expected objectives. Official statistics indicate that about 67% of all contracts signed during the period 1970-1973 were turnkey contracts, covering mainly the petrochemical industries. Later on the government found it very difficult to cope with turnkey contracts. The following disadvantages could be the main reasons for it:

- Adopting this model can be financially very costly although it may appear to be a little cheaper than the first one of separate contracts;
- It makes the national enterprise very passive, without any effective participation in the performance of the project;
- There is no guaranty that the given already finished project will work and produce properly after delivery to the local enterprise, though the requirement is the successful start of the project.
- It may be accompanied by an absence of an effective transfer of technology, because this particular model, as said before, is just selling industrial equipment which most of the time issophisticated and difficult to cope with.

Thus, the turnkey contract model was found to be not as beneficial as expected. As a result, Algerian planners

suggested another form of contract called "production planning".

TURNKEY CONTRACTS IN THE PETROCHEMICAL INDUSTRY

YEAR	TYPE OF CONTRACT	FOREIGN PARTNER	COST
1967	TURNKEY	TECHNIP(F)	267
1967	//	HUMPHREY & GLASGOW(UK)	36
1974	//	KREBS(F)	116
1975		CREUSOT-LOIRE(F)	401

NB: EXCLUDING GENERAL SERVICES. SOURCE: YACHIR.F,(1980), OP.CIT,PP.683-684,CITED BY HAMZA,OP. CIT,ANNEX 5:4,P.378.

3 - **Production Planning contracts:**

The negative performance of turnkey contracts necessitated for the authorities another choice. It was product planning which required a complete collaboration from the foreign side, particularly through satisfactory production both in quantity and quality beside the full management of the project and personnel training. Therefore, the underlying rationale of production planning is to assure a long period of guaranty after starting production.

The first contract agreed under this type of arrangement was actually a turnkey contract initially signed with DIAG, a Federal German company to build the Constantine engine and tractors complex. However, due to some problems, this contract was converted into a production planning contract at a cost of 535 million

A.D.(1)

It was very hard for DIAG to accept this new task. While other contracting firms had reserved their position; French firms, for instance, shared the opinion of DIAG:

"faced with this type of contract, the French industrialists have several objections. To start up, the duration of the operation by which an enterprise provides services and supplies equipment must be prolonged.

An average of 3 to 5 years is required to gear up production in an industrial plant in the mechanical industry. In addition, the functions of the French enterprise are modified. The enterprise does not only proceed in installing equipment, but also training personnel who will run the plan at a profit rate and with qualities identical to those obtained by the French factories."(1)

Therefore, although events demonstrated the positive impact of plant in production contracts on national development, particularly in the field of training and management, it would not be correct to say that they are free from any criticism. Here are some of its drawbacks:

- It is said that in the production planning method

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(1) Hamza.B, Op. Cit, notes, p.360.

(1) Germidis.D, "Le Maghreb, La France Et l'Enjeu Technologique", Edition cujas, 1976, p.77. Also see, "Les Societes De Service: Un AN Apres Le choc: Etude realisee Par Le Ministere De Lundustries Et De La Recherche", 21/3/75.

involving "the presence of the constructor for a long term", and paying for it, the national enterprise as a partner may remain inactive till the end of the project. The existance of manpower training as a clause is not enough for the local enterprise to be really ready to cope with the whole project after the departure of foreign contractors.

- By applying this model, expenses will be high, the table below shows the cost of the Constantine Engine and Tractors complex. It can be seen from it how expensive it can be to deal with this particular type of contract.

NATURE OF THE EXPENDITURE	COST IN A.D.	PERCENTAGE
COST OF ESTABLISHMENT	33.050.000	6.0%
ENGINEERING	2.900.000	0.5%
LAND & INFRASTRUCTURE	29.500.000	5.4%
BUILDING 6 CIVIL ENG	21.141.000	16.6%
EQUIPMENTS	187.392.000	34.1%
CUSTOMS 6 TAXES	83.137.000	15.1%
BUILDING 6 ERECTION	7.300.000	1.3%
TOOL-STOCK	30.000.000	5.5%
PATENT 6 LICENCES	3.304.000	0.6%
TECHNICAL ASSIST/TRAINING	77.159.000>	14.9%
TRAINING CENTER	4.439.000>	
TOTAL	549.321.000	100.0%

SOURCE: MINISTERE DE L'INDUSTRIE, COUTS SURCOUTS, ALGER, P.25.

- The plant in production system may hide or cover the

incomperence of national enterprises. Furthermore, the system takes a long time to implement and that can be unfavourable for the Algerian planners when preparing the annual balance of payments, and it may also be an obstacle to proceed with other development projects.

After such failures the Algerian government decided to forget dealing with direct investment and to replace it by another legal arrangement called the mixed company or joint-venture system. Thinking about dated since independence (1962) but it was not subjected to a proper regulation,though both the 1963 and 1966 investment codes mentioned it. The reason for adopting such a policy was clarified by former president Boumediene in 1968.He said:

"We cannot, at any time, collaborate with the exploiting foreign capital. Any other position would mean poverty and destitution. We have undergone, in this field, an experience that ended in a failure, because the foreign capital, despite the facilities and guarantees that were granted to it, could not rid itself of its two effects: Exploitation and fear. (...)

"This is why in the light of our experience, we have founded our policy on a strict cooperation with the foreign partners who accept it within the framework of our fundamental options and revolutionary orintations (...) therefore, the foreign capital can only play a complementary role, according to clearly defined conditions that inhibit it from exploiting our country's

economy."(1)

Practically,Algeria's rejection of direct investment was seen in the Ammonia and Ammonium Nitrate complex of Arzew. This particular project was planned to be realised in an association between Sonatach and the French company Société Nationale des Pétroles d'Aquitaine "SNPA". However, owing to some unacceptable conditions, Sonatrach rejected to be associated with the French company.

The evolution of Algeria's contractual relations with foreign firms was founded on Boumedienne's theory on encouraging heavy industries, thought to be necessary at this stage. On this ground, he ordered to build as many industrial infrastructures as possible. However, owing to the shortage of capital and the lack of expertise, it was necessary to enter into ventures with foreign companies, as Algerian public enterprises were lacking experience for such highly demanding production processes. In fact, most of the projects were not based on serious studies necessary before starting work. Algerian personnel have been weak in this particular respect. For this reason, they turned again to external assistance. Foreign experts did their work without knowing the economic and the social circumstances of the country; this is why all the contract models did not fit Algeria's development strategy. At the same time, there was another weakness in the structure of Algeria's technological policy, "the absence of an institutional organism for the

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(1) Balta.P & Rulleau.C, "La Strategie De Boumediene", Sindbad, 1978, Paris, 1967.

incorporation and integration of the important technology."(1) This critical situation created several problems, the most serious one perhaps being the external debt which started to become burdensome because of the multiple borrowing contracts signed by the government to finance already approved huge industrial projects.

The 1970s were the most important era particularly with respect to several laws and regulations that were then launched to organise the field of investment. Earlier, the Ordinance 69-107 of December 31, 1969, had been brought into effect. In it Article 40 stipulated that the creation of any industrial or commercial enterprises by foreign capital or any modification of capital or shares or any operation whereby foreigners obtained an effective management and control would be subject to the prior authorisation of the National Investment Committee. Hence, any application forms submitted by foreigners (individuals, companies, associations,agencies etc.)for the sole purpose to set up industrial or commercial entities had to pass through the control of the National Investment Committee. This formal administrative procedure, set up by Article 40, actually reinforced the provisions of Articles 20-27 of the 1966 investment code. In other words, the National Investment Committee exercised a control over all the various types of investment involving foreign capital. This function touched the establishment of the enterprise; modification of its capital; shares acquisations; and the exercise of

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(1) Hamza, op. cit, p.278.

indirect control over the enterprise's activities.(1)

It is in this respect said that the Committee's control, exercised under article 40, had grown more than that exercised under the 1966 code. Article 41 of the said Ordinance required that prior authorisation must also be secured for any modification of the invested capital of the company approved under the 1966 code, and which could be transferred to persons who managed the company legally or actually. This specific authorisation was granted by the Finance and Planning ministry. Any failure to comply with the mentioned provision could have serious consequences, for example, exclusion from all incentives and advantages as well as other sanctions.

This procedure was the first step towards a new bureacratic era which would be quite costly for Algeria, particularly in its attempts to attract foreign investment. The beginning of 1970s also witnessed Algeria's move to recover control over its natural resources and to ensure a total independence in the field of hydrocarbons.

This attempt was motivated by two major reasons: (1) the decline of the concession system after the conclusion of the contract between SONATRACH and GETTY OIL company on October 19th,1968.(2);and (2) the failure of the 29th,

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(1) Beldacem.K & Amadio.M, "La Pratique Du Code Algerian Des Investissements Privees", D.P.C.I.,T2 no 2, p.198.

(2)See Lokmane. F, "L'Association Getty - Sonatrach", meneographed thesis for a D.E.S,public law, Algiers,1975.

1965 accords between Algeria and France.(1) For these reasons,the government decided to take over the country's natural wealth(2) under the well-known Ordinance of April 12th, 1971(3), considered to have launched a new legal system of petroleum investments in Algeria.

The Ordinance defined the legal basis of foreign companies' activities in the field of liquid hydrocarbons research and exploitation. Gaseous hydrocarbons were excluded from direct exploitation by foreign companies.(4)The Ordinance expressly defined gaseous hydrocarbons as: "propriété exclusive de l'état les gaz associés aux hydrocabures liquides de tous gisements d'hydrocabures situés en Algerie."

The most striking point within this new regulation was the decision to reject the concession system previously in force with respect to the multinationals. As an alternative, the government adopted the concept of "mixed company" to associate SONATRACH with foreign companies. The venture would constitute a commercial

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(1)Chevalier.U.M, "Le Nouvel Enjeu Petrolier", Paris, 1973, p.129.

(2) Ordinance no. 718 of Feb 24th, 1971 (J.O.R.A. Feb 25th, p.227); Ordinance no.71-10 of Feb 24th, 1971 (J.O. R.A. of Feb 25th, p.227)

(3) Ordinance no.71-22 of April 12th, 1971, (J.O.R.A. of April 13th, p.366), definissent le cadre dans lequel s'exerce l'activite des societes etrangeres..... hydrocarbons lequides.

(4) Article 7 of the 12th April Ordinance.

company under Algerian law with the seat (siège social) in Algeria. Under such an association, the foreign share would be limited to 49%, and SONATRACH would hold 51% of the total shares. This formula was applied in the SONATRACH-GETTY association mentioned earlier. The foreign partner accordingly would not be interested in the possession of the title but only in the exploitation. Furthermore, under the new law the structure of the association would be based on two main administrative bodies: The board of directors and the administrator. The board would be composed of some representatives from both the foreign company and SONATRACH; however, the latter, on the basis of its control of majority of shares, would enjoy within the association more powers when taking decisions.Foreign partners having the minority percentage of shares would not have the power to block or freeze the decision of the board.

The second organ, the administrator, was to be appointed by the board, after a proposal tabled by SONATRACH, from among its representatives. His duties would be to control, to manage and to administrate the association. For all these functions, he would have an assistant appointed by the board on the basis of a proposition tabled by the minority partner, among its representatives (Art. 4 & 5 of the Ordinance).

The foreign partner would be in charge of financing the research and exploration operations. In case of finding any commercial output, he would be able to claim a certain percentage of profit.

Beside the financial side, a foreign partner would

be required to pay taxes to the state treasury on the basis of the quantity of extracted oil.

As soon as the new regulation came out, three mixed enterprises were created with the participation of French companies: ALTREP (between SONATRACH and CFP); REPAL (between SONATRACH and SOPEFAL & SOFREPAL represented by El Algérie), and finally an enterprise between SONATRACH and El Algérie. All these associations were subjet to the new petroleum regulation, except REPAL in which SONATRACH retained 75% of the company shares.

Algeria's nationalisations had initially a political origin and they generated a legal process. A year earlier, the former president had declared:

"Certain groups have been unable to understand that Algeria is today an independent country. They persist in believing that oil questions are not a matter of complete and total Algerian sovereignty but a sort of co-sovereignjty.

"We say to them: no, the oil is ours as is the gas, since they are well and truly found in Algeria.(...) If we were able to analyse Algerian oil, we should discover that the blood of our martyrs is one of its constituents because the possession of this wealth was paid for with our blood; moreover, foreign capital which was invested in the exploitation of oil has for the most part been recovered and reunerated."(1)

A few months later, Boumediene pointed to an urgent necessity to take over the oil exploitation and declared

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(1) El Koudjahid, July, 1970, p.2.

total nationalisation. On this occasion he remarked that:

"We are sovereign and we can take any decision which follows naturally from the normal exercise of sovereignty. Nationalisation is a right of the Algerian state, recognised by the United Nations and we announce officially that we shall compensate all the companies affected by these measures on the same basis as companies which have previously come under state control..."(1)

It was a historical decision, and became an internationally well-known case and served as a typical model for other Third World and O.P.E.C. countries. In this connection, G.D.Bernis has stated that: "En recouvrant sa souverainité absolue sur ses richesses pétrolières, l'Algérie n'a cependant pas seulement remporté une victoire stratégique sur un terrain ou le capitalisme mondial est particulièrement sensible. Elle a montré la voix aux autres pays producteurs qui, déjà, réclament une participation dans les sociétés concessionnaires et renforce ainsi le front de la lutte des pays sous-developpés."(2)

Following this development, the Algerian political system started to work against the so to speak neo-colonialism and the application of customary international law. This can be observed as a new trend in the context of the fourth summit of non-aligned countries, held in Algiers in September 1973, in which

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(1) El Djeich, March 1971.

(2) De Bernis. G.D, "Les Problemes Petroliers Algeriens", R.A.J.S.P., 1973.

all the participants confirmed the intangible principle that every country has the right to adopt the type of social and economic system judged as favourable to its development. Also, there was affirmation of the inalienable right of countries to exercise their national sovereignty over their resources and over all internal economic activities.

With regard to nationalisation, the participants agreed that any decision to exercise the right of a complete control over natural resources by any means including nationalisation should follow the goals and principles of the UN Charter. The summit set up, furthermore, some guidelines in the field of foreign investments.In this respect the participants agreed that:

- All foreign investments should be subject to an authorisation given by the competent authorities under a system of centralised governmental control;
- There should be assurance that foreign investment assisted the local efforts for a better integration, particularly in the matter of an effective transfer of technology and know-how;
- The reinvestment of the profits should be considered as a new investment and should be subject to a new authorisation from the host country;
- Foreign investors should not be allowed to buy national possessions except in very special and justified cases.
- Some precise regulations over questions relating to the payment of profit should be elaborated;
- It was crucial to close the doors before foreign investors in some particular sectors of economy, for

instance, in the communications sector, defence, banking.

These points were submitted to the UN General Assembly in its Special Session on raw materials in April 1974. On this occasion President Boumedienne in a speech interpreted nationalisation as a means to liberate natural resources from the influence of foreign petroleum companies and not as an ideological option. He said (French translation) that: "...le point de vue de l'Algérie est-il que la nationalisation doit etre considérée d'abord non point comme une option idéologique mais comme un moyen de libération visant essentiellement à dégager nos resources naturelles de l'emprise étrangère, pour les placer sous le controle des nationaux et donner ainsi à leur exploitation une identité nationale. La nationalisation des matières premières devient, en definitive, une condition fundamentale du développement économique."

These principles were later on constitutionalised both under the National Charter and the constitution. As a fundamental source of the nation's policies and state laws, the National Charter stressed the need for modern technology and know-how on the basis of a real transfer of technology. The following paragraph clarifies this point:

"The intensive resort to the foreign enterprises services for the realisation of development projects is the reflection of weakness which still affects the country in term of means, possession and the self-control of techniques and engineering...

Particular attention must be accorded to the

contratual formula which correlates national organisms and their foreign partners. These formulas must express, in juridical terms, the rigorous methods to get down to work in order to bring foreign firms to agree to an effective transfer of their technologies...and not to put back on their Algerian partners the risk which must remain to them".(1)

In addition, the 1976 Constitution, in its Article 25, sanctioned the principle of sovereignty over natural resources, the subject of the UN GA in her session of 1974. Thereafter, the government decided to take over control over all foreign trade activities. For this reason, the 1978 law on state monopoly over foreign trade(1) was launched. Article 1 of the law stipulates that: "...importation and exportation of goods and services are fields of activity reserved exclusively to the state." Article 7 provides that state organisms defined by Art. 3 should maintain the importation and exportation of goods and services within the organisational framework of an annual program of importations approved by the government.

In general terms, the 1978 law clarified the sphere and the consequences of the monopoly on international commercial activities. All imports of goods with some exceptions had to be accordingly carried out by some designated public enterprise under an open general licence known as a global authorisation for importation monopoly. The particular enterprises were to supply the

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(1) Law No.78-02/Feb 11th,1978 in J.O.R.A/Feb 14th,p.114.

imported goods to the whole country. Different categories of important goods have come into application under a decree launched relatively recently on December 22nd, 1984. The essential goods are found in a special schedule within the decree. The appointed enterprises are allowed to deal also with the non-essential goods listed under "B" of the schedule.

Other public enterprises as well as private companies can also import goods from abroad and they can apply for another type of import licence known as "Authorisation globale d'importation * fonctionnement* (A.G.I.) or "Authorisation globale d'importation"(A.G.I.) *objectifs planifiés*.(1) These licences are granted by the deputy minister of external trade and they are subject to renewal.

The applicable provisions were subjec to some exceptions itemised as follows:

- According to Article 106 of the 1977 finance law (published in J.O.R.A. on December 29th, 1976, p.1260) and Articles 156 and 159 of the 1985 finance law (published in J.O.R.A. of December 31st, 1984, p.1737) as well as Article 159 of the 1986 finance law (J.O.R.A., December 29th, 1985, p.1337), foreign companies working on civil engineering or construction projects either individually or within a joint-venture with an Algerian national enterprise are free to import materials needed in their work, one cause for this particular exception

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(1) Decret 83.642/ nov 5th, 1983, Art 7, Decret 84.390, op. cit Art, 6.

could be the housing shortage which the country suffers from.

The A.G.I. *fonctionnement* and the A.G.I. *objectifs planifiés* cannot be granted to private companies with needs which are requested but are not so important. However, instead of an A.G.I. they may get another type of import licence, as can be seen from Articles 3 and 4 of the May 10th, 1986 Decision.

It is very useful to add that the 1978 law has prohibited the use of commercial agents as intermediaries between local companies and foreign firms. This rule entails on conviction, penalties prescribed in Articles 128, 248 and 423 of the Algerian criminal code.

Conclusions.

The evolution of Algeria's legal machinery governing foreign investment shows clearly how difficult it is to deal with this particular sphere of international co-operation, particularly if it concerns a young state like Algeria.

The reason behind this situation is the conflictual nature between the interests of both the host country and foreign investors. M. Salem, in his thesis on foreign investments in Algeria, has dealt with this point and has stated that: "L'ecemple algérien met en évidence les difficultés de définition d'un équilibre entre les nécessités locales et les intérets étrangers, malgré l'existence de liens de coopération avec l'état dont

relèvent la majorité des investisseurs,"(1)

As to economic development, the industrialisation strategy chosen by Algeria has been based on the complete utilisation of natural resources as vital to implement development programmes. This necessitated to call for external technical assistance. However, owing to the lack of experience, the new independent state faced many problems in dealing with foreign professional companies which were mainly multinationals. In order to shorten the path of development, the government decided to buy ready-made technology instead of "improving the local technique capacity" though this took place in terms of a tiny proportion. Involved in such a situation, the country became more instead of less dependent on external forces; in fact, most of the industrial projects executed at the time of Boumedienne's presidency were financed by international borrowings.

Later, it became known that huge industrial complexes were operating at below capacity levels and often needed constant maintenance which only foreign technology could master.

Algeria's experience showed that technological mastership could not be transferred but only mastered by a collective industrial practice. In this regard, M.Liassine has remarked:

"Nous constatons en Algérie que le transfert de technologie collectif est médiocre(...). Actuellement, il

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(1) Salem.M, "Les Investissements Etrangers en Algerie". Thesis submitted for a doctrate in law, Dijon,1973,p.451.

y a un phénomène d'inefficacité collective qui nous coute très cher".(1)

Under the political pressure of the previous regime, the Algerian legislator could not do much to improve the pattern of investment law in a manner which would increase the country's opportunities to attract as much international investment as possible to build and develop the country particularly as an economic proposition.

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(1) Liassine.M, "Une siderurgie En Algerie-Pourquoi?". l'aier arabe, Algiers, No 2, January, 1973.

Chapter VII

A Decade After The Death Of President Boumedienne

After being elected as head of state in 1979, president Chadli Ben Jedid suggested to adopt a new economic strategy involving a gradual shift away from his predecessor's policy. This new orientation may be highlighted by dividing the subject into two sections, to examine first, rather briefly, the new economic policy (reform) based mainly on Algeria's first and second five-year plans; and to discuss, secondly, the position of investment legislation in Algeria from the foreign investors' point of view: in other words, are the relevant laws suitable as a legal framework for a better integration of foreign investment in Algeria, with particular regard to the current circumstances obtaining in the international economy?

A: The New Economic Policy.

Leaving its initial approach to adopt a more liberal approach to the internal economic system, the government, under the presidency of Chadli Benjedid, has put into effect some programmes and reforms in order to foster the economic growth (especially after the 1986 oil price collapse). In June 1980 after an extraordinary congress of the Front of Liberation National (FLN), the government adopted the 1980-1984 development plan. Disagreeing with Boumedienne's industrial policy, the congress agreed to cancel or postpone th large investment projects planned by his government, for instance, a liquefied natural gas (LNG) plant at SKIKDA, a steel works at JIJEL and a new aluminium plant.

The objective of the new plan is to minimise tensions and to reduce the existing economic and social embalances already diagnosed in the previous era. The plan tends, moreover, to create a favourable environment for a strong national economy with an organisational framework of towns (communes) and cities (wilayas) with corresponding regional plans. This procedure marks the new government's change of direction,from a state-control of the economy to the idea of decentralisation and democratisation as effective means to integrate the economic activities at the regional levels and thus improve public sector productivity.

"Les plans communaux et de wilayas (...) cadres privilègiés d'expression des aspirations sociales et de développement des initiatives au niveau local en conformité avec les objectifs du plan national (...) doivent etre (...) les instruments d'adaptation des programmes de développment qu conditions concrète locales, com;lexes et variées, et d'intégration et de cohérence de l'ensemble des activités économiques et sociales, au niveau régional."(1)

In addition the congress discussed the idea of purifying the economy from any obstacles whatsoever which could block or delay its good working order. In this respect it was recommended that:

"Le congrès donne la priorité à l'élimination des

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(1) The paragraph is taken from the 1980 FLN congress report, found in Ecrement.M, "Independence Politique E Liberation Economique", ENAP/OPU, 1986, p.299.

rigidités bureaucratiques dans le fonctionnement del'économie, l'amélioration de sa fluidité, la guarantie d'une large autonomie de gestion aux différents niveaux de décision assurant une plus grande efficacité sociale des programmes et des actions (...)."(passage quoted FLN report)

"Les mécanismes d'orientation, d'encadrement, d'organisation et de controle du fonctionnement de l'économie devront etre mise en place et developpés dans tous les domaines (...).

Ces mecanismes s'appuiront en priorité sur le développement de la programmation intersectorielle et des relations contractuelles à tous les niveaux d'échanges, la mise en oeuvre des instruments de politique des couts, des prix et du crédit cohérente avec les objectifs d'efficacité et d'équilibre économique à moyen terme".

Investment planification was qualified as having a stratigic role in the national development; in this respect it was agreed that:

"De plus la planifaction des investissements devra mettre en oeuvre les modalités de décentralisation des décisions en conformité avec le développement, aux niveaux régional et d'entreprise, du système de planification et des prérogatives des différents échélons. Cette adaptation doit viser l'utilisation plus intensives des compétences à tous les niveaux, la plus grande efficacité social des actions et la reduction des délais et des couts des projets."

Lastly, the congress insisted on the necessity of controlling the execution of production and development

plans. Regarding this matter, the congress reported:

"Le congrès insiste sur le renforcement de l'exercice du controle par les institutions et les organes auxqelles est dévoluée cette fonction, notamment en matiére de suivi de l'exécution des plans de production et de developpement".(1)

"Il insiste également sur la nécessité de sanctionner positivement ou négativement les résultats de ce contrôle ou de ce suivi."

As far as the global investment programme is concerned, the congress stressed the importance of increasing productivity in agriculture and the light industries. A first five-year plan (1980-84) programmed an agricultural investment of 23 billion A.D. (Algerian Dinars), to permit to reorganise such an important sector. Following this new agricultural reform, a considerable number of measures was agreed on, among them the establishment of B.A.D.R. (Banque de l'Agriculture et du Développment rural) in June 1982, which later on played a dynamic role in simplifying credit pricedures, notably in favour of small farmers. Industrial investment, as a promising sector, has benefited too from a wide programme applicable to projects which remain to be realised (Reste à Réaliser) "R.A.R.", representing about 50% of the total authorisations of public investment expenses effected to cover the sectors of energy, mines and industry. In order to know the

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(1) Ecrement, Ibid, p.302. See Ibrahimi, R.A.S.J.E.P, V(xviii),No 1, Mars, 1981, p.117.

following detailed description of the total amount devoted to the industrial sectors illustrates the real contribution of the industrial sector made in the 1980-1984 plan.

SECTORS	R.A.R (%)	NEW INVESTMENTS (%)	TOTAL (%)
HYDROCARBONS	35.9	45.8	40.7
ELECTRICITY	===	14	9.4
PETROCHEMISTRY	===	==	2
MINES	===	==	1.6
SIDERURGY	8.1	10	9
MECHANICAL & ELC	14.1	==	11
CONSTRUCTION			
LIGHT CHEMISTRY	===	==	3.2
METRIALS OF CONST	===	8.8	5.7
FOOD PROCESSING	11.2	==	7.2
TEXTILE INDUSTRY	8.5	==	4.8
LEATHER INDUSTRY	===	==	0.5
WOOD,PAPER INDUSTR	===	==	2.9
LOCAL INDUST	===	==	2
TOTAL	100	100	100

SOURCE: MINISTRY OF PLANIFICATION AND TERRITORY AMENAGEMENT (M.P.A.T.)

Because of the hydrocarbons prices crisis in 1983 and 1984, Algerian export revenues dropped by 15-20% compared with 1982. Consequently, the public investment programme was reduced to 350 billion A.D. instead of 400 billion A.D. as the amount actually agreed before the oil

crisis. Both industry and agriculture were affected by this unexpected and unwelcome change.

Despite the negative impact of oil prices the 1980-1984 plan sought to be successful. An improvement was indeed made in the national economy by a little more than 6% annually in 1984-1985; the balance of payments was stable and the external debt was btween 1980 and 1983 reduced when previous industrial projects were cancelled.

In its efforts to encourage private sector production as an important aspect in the new economic reform process, Algerian parliament promulgated on August 21st, 1982, law no.82-11 relating to the private national economic investment. The objectives of the law are laid down in article 8:

- To contribute to and widen the national productive capacity;
- To create employment;
- To mobilise national savings and satisfy people's needs;
- To effect the so to speak "complementarity" of the socialist sector;
- To participate in the execution of a balanced regional development policy.

Article 11 itemises the major fields in which the private sector could effectively participate. They are:

- Services which have as object industrial repairs and machine maintenance;
- The complementary medium and small industries, to boost the socialist sector production, notably in the field of transformation and valorisation of agricultural raw

materials or other products destined for home consumption;

- Fishing;
- The sub-contracting in the sense of the current legislation and regulations;
- Buildings and public works, tourism, hotel business and other services related to it;
- Transport of persons and merchandise by road and current laws and regulations applicable to them.

These fields of private investment must be evaluated in the light of the following criteria for consideration as having a development potential by the specialised authorities:

- Creation of employment opportunities;
- Valorisation of resources, raw materials and local semi-products;
- Widening and diversifying the final consumption products spectrum;
- Developing national capacities of execution, maintenance and sub-contracting activities;
- Substitution of domestic products to imported products;
- Localisation of development factors in the interior regions of the country and in deserted zones.

The organisational framework of this private national economic investments is found under title III, Chapters 1-3 of the Code. The relevant provisions include many restrictions of a bureaucratic character. Thus, persons who want to start a business must follow several complex procedures before they can really launch their business activities. At the same time, the advantages and

guaranties granted to encourage the flow of private investment are not very favorable. The code betrays in fact a political touch and cannot be trusted.

Hence, national private investment law is intended to allow local private companies to stand on their own feet in order to participate in improving output and efficiency.

However, despite the restrictive character of the new law. it has achieved considerable sucess. According to statistics presented to the third national conference on development (February 1985), more than 1000 private investment projects had been agreed, 273 by the national commission of investment for an amount of 2.1 billion A. D., and 745 by "wilayats" for an amount of 1.3 billion A. D. These projects are intended to create about 20.000 employment opportunities. For a better organisation of such a crucial sector, the "office national pour l'orientation, le suivi et la coordination de l'investissement prive" (O.S.C.I.P.) was created by a Decree in January 1983. It gives to the private sector an institutional framework in which it may maintain an effective role in the development process.

By the end of 1984, the parliament (A.P.N.) had approved Algeria's second five year plan (1985-1989). It was the government's next step to liberalise the economy despite the worldwide problem of low oil prices. Investment spending was set at a level of 550.000 million A.D., a 39.1% increase from the 400.00 million A.D. level allocated in 1980-1984 plan To find out the differences between the first and the second plans, the following

table may be consulted:

SECTORS	PLAN 80/84	PLAN 85/89	INVESTMENT
AGRICULTURE/HYDRO	11.8%	14.2%	+67.7%
HYDROCARBONS/INDUST	38.6	31.3	+12.8
MEANS OF REALISATION	5.0	3.4	-5.0
TRANSPORT	3.2	2.7	+15.4
STORAGE & DISTRIBUT	3.2	2.8	+21.5
TELECOMMINICATION	1.5	1.4	+33.3
ECONOMIC INFRASTRU	5.8	8.2	+96.1
RAILWAY INFRASTRU	1.3	3.2	+256.0
HABITAT	15.0	15.4	+43.3
EDUCATION,FORMATION	10.5	8.1	+6.6
HEALTH	1.7	1.4	+14.3
COLLECTIVE EQUIPMENT	2.4	7.9	+358.3
TOTAL	100	100	100

SOURCE: M.P.A.T.

Consumption is expected to grow by 5.8 per cent annually, compared with 7.3 per cent in the previous plan; imports by 6% a year and gross domestic product (G.D.P.) by 6.5% annually. Agriculture again is to be given greater emphasis, particularly in developing new lands for crops and livstock production, in order to satisfy peoples needs. On the other hand, industry share drops from 38.6 per cent to 31.3% in the new plan. It has been given the function to complement agriculture through expenditure on products and materials such as tractors,

machine tools, fertilisers, irrigation pipes.

Hydrocarbons, as usual, are given priority (about 32.2% of the whole industry spending). As a major export earnings sector, hydrocarbons will continue to be the principal source of income for other development sectors. However, to be able to fulfil such a huge expectation, exploration of hydrocarbons will receive about a third of induatrial spending. Moreover, much encouragment will be granted to foreign companies to invest in this particular sector.

Since the cooapse of oil prices in 1986, measures have been drawn up by the government in order to improve Algeria's balance of payments, the aim behind this specific strategy being mainly to maintain the country's economic and political independence and not to allow any outsider to interfere in the internal affairs of Algeria.

On this point, the government decided to cut investment spending which later on falls below the target set in the second five year plan.

Algeria's Budgets 1986-1987 (AD Million)

	1987	1986	%CHANGE
REVENUE	96.000	90.500	+6
HYDROCARBONS	22.000	29.000	-24
OTHER	74.000	61.500	+20
EXPENDITURES	108.000	104.000	+3
CURRENT COSTS	63.000	59.500	+6
INVESTMENTS	45.000	45.000	==
DEFICIT	-12.000	-14.000	-14

The 1986 Buget: Revised Investment Expenditure

By Sector. (AD Million)

SECTORS	GOVERNMENT INVESTMENT	NON GOVERNMENT PUBLIC SECTOR INVESTMENT
INDUSTRY	2.006	25.051
OF WHICH:		
RURAL ELECT	1.000	=====
AGRICULTURE	950	3.154
FORESTS	876	106
HYDRAULECS	5.167	282
FISHING	30	60
REALISATION	140	1.960
TRANSPORT/CO	6.022	3.672
STORAGE/DIST	15	2.770
HEALTH & S.W	2.575	=====
TOTAL	45.150	47.471

This development was expected by the authorities. (While drafting the second five-year plan, finance ministry officials affirmed that: "We have drawn up the new five-year plan but it is very difficult to predict what will happen to our income over the period to 1989".) For the moment, the 550.000 million A.D. (110.000 million dollars) spending target has not been revised. We will try to reach it by a better development of our resources, in terms of more construction by local companies and restructing the financial system."(1)

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(1) See, MEED, May, 3rd, 1985, p.8.

After the fall in world oil prices, already mentioned above, and in accordance with a decentralisation policy, the government decided to give public companies and banks sufficient breathing space to make their oun decisions. A great power has been given to the managers of such entities. Under this new trend, companies can reinvest their profit and decide their profects spending far from any control over their business operations. As one manager says: "At least we are finally in a position to make our own mistakes and learn from them."

On this matter, a law was issuec in January 1988(1), to define the legal framework of such a radical reform. Article 7 stipulates that: "the public economic enterprise has a full juridical capacity to stipulate, engage and to sign contracts in an autonomous manner...". Beside what has been said about companies7 freedom and autonomy, a new banking law was promulgated in August 1986(2) complemented and modified by law number 88.06 of Janujary 12, 1988, to legitimise the new government attempt to restructure the credit system. The reform is intended to give more autonomy to Algeria's five commercial banks.

"The plan is to let the banks operate as proper commercial banks (not just as surrogates for the central

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(1) Law n=88-01 of January 12th, 1988.

(2) Law n=86-12 of August 19th,1986 related to the regime of banks and credit.

bank)" one observer said.(3)

This will also facilitate borrowing either from external or internal sources. On the other hand, the central bank (Banque Centrale D'Algérie) has been given some additional responsibilities, for instance, managing the money supply, the dinar exchange rate and foreign exchange reserves.

To compensate for the shortage of foreign currency, Algeria introduced new regulations in ofder to encourage foreign and local nationals to open currency accounts at either Crédit populaire d'Algerie (CPA) or the Banque extérieure d'Algérie (B.E.A.) "no matter what is the origin of the funds". Such a measure seeks to promote some new financial resources to overcompensate losses of income from hydrocarbons falling prices.

No new hydrocarbons exports are being developed and provate exporters are given the right to retain up to 10% of their foreign exchange earnings in order to finance their own imports.

Public companies are allowed to have foreign currency accounts to be able to pay their import needs.

An appeal was launched to improve the quality of Algerian made goods, in order to win some international contracts for such goods abroad.

As far as Algeria's external debt is concerned, 21.000 million dollars according to statistics published by the weekly "Algérie Actualité"(2), the government is

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(1) MEED March 14th, 1987, p.6.

(2) See MEED, November 7th, 1987, p.4.

embarking on a package of austerity measures to avoid rescheduling (which means repaying debt in full to governments and banks). The Algerian government is trying to join other Third World debting countries in their attempt to call the Paris club for negotiations to reduce debt burdens. It should, in this respect, be noted that recently the government has arranged a standby agreement with IMF, in which an estimated 625 million $ will be provided. It includes:

1 - A one year (201.7 million $) standby loan;

2 - A compensatory and country financing facility (423 million dollars);

3 - A loan of 250-300 million $ given by the World Bank to adjust some important economic sectors in the country, for instance, agriculture, industry and finance;

4 - A funding estimated at about 110 million $ for the Mitidja irrigation project and about 63 million $ loan for ports;

5 - Up to 20.000 million export credits given by Algeria's trading partners. (Information taken from MEED, May 5th, 1989, p.19.)

B: The New Regulatory Regime Of Foreign Investment.

As indicated in the previous section 1, Algeria's new economic policy is aimed at facing the effects of the oil price crisis in the 1980s in order to maintain a favourable balance of payments and to fulfil the people's need for a favourable development strategy. To achieve these objectives, the government has taken the wise decision to promote integration within the economy and to create a suitable climate for both foreign and domestic capital investments in the country. For this purpose, the authorities envisage all kinds of investments for the sole purpose to implement some important infrastructural industrial and agricultural projects seen as vital for the development process.

In the framework of worldwide economic processes, Algeria's industrial programme offers interesting prospects for international companies wishing to invest in the country. Moreover, the current economic and political reforms can have an immediate effect of establishing a new legal infrastructure for the regulation of foreign investments, particularly with respect to the exploration and development of oil and gas reserves as a key point for the whole national economy.

In application of the principle of reciprocal benefit and ensuring a beneficial integration of foreign investment with the Algerian economy, the government is invariably permitting only foreign investments which involve the establishment of joint-ventures between public-owned enterprises, as regulated under the new law 88-01 of January 12th, 1988, and international firms.

There are some specific goals behind this policy: mainly i) to enhance access to advanced technology and ii) to ensure economic benefits for the whole nation. The oil industry continues to be an important source of foreign exchange; it still plays a major role in Algeria's economic development, though non-hydrocarbons exports now enjoy priority; but Algerian officials have confirmed that the hydrocarbons sector will remain the cornerstone of the economy in the next few years. The government policy continues to encourage foreign investment in oil exploration, by adopting new measures that offer the investor both profitability and stability. In the present section of the thesis, two main bodies of investment law in Algeria will be reviewed. They are: the Law No 82-13 to improve the functioning of mixed economy companies (hereafter MECs), as amended by Law 86-13 of 1986, and Law No 86-14 of August 19th 1986, related to the activities of prospection, research, exploitation and transport by hydrocarbons canalisation.

1) Law No 82-13 As Amended By Law No 86-13, Related to Mixed Economy Companies.

The idea of doing business without automonous direct private investment was suggested at the time of President Boumedienne in the 1960s and 1970s, after discovering that foreign investors were only interested in financial profit.

Since then, a wide variety of attempts have been made to promote this type of business, particularly in the oil industry. The first and well-known example in this respect is the development of the Ammonia and

Ammonium Nitrate complex at Arzew, a project which was started in the form of a joint-venture between Sonatrach and SNPA with at least 51% of the shares reserved to Sonatrach.

B.Hamza has affirmed that two forms of mixed enterprises(1) have attracted most of the attention of foreign investors. The first one is the engineering enterprise, widely spread to cover Algeria's huge complexes planned at the time of President Boumedienne, for instance, in the steel industry, Genisider, Sidal, Realisider, Casider. The second form of mixed enterprise is the production enterprise mainly used by Sonatrach in the field of hydrocarbons. It has given to the state-owned enterprises the opportunity to participate in accordance with their abilities particularly in providing raw materials and labour force. To this second form of mixed enterprise belong Alfar, Algeo, Alfluid, Altest.

As far as the legal aspect of MECs is concerned, Algerian joint ventures were established without proper regulation properly under specific rules. In fact, until 1982, such joint-ventures did not have a juridical mould, although some rules of the 1975 commercial law, concerning stock companies, applied to them.

When viewed as a whole, the 1982 code, as amended in 1986, provides a complete systematic regulatory regime; but it still is insatisfactory for foreign businessmen wishing to invest in the country. An amendment draft was

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(1) See Hamza, Op Cit, pp.340-341.

in Spring 1989 under discussion by APN (Algerian Parliament).

The following pages provide a brief outline of the statutory framework of the 1982 law, as amended in 1986, and discuss the suitability of its provisions in the light of the circumstances.

a) Definition Of MECs And their Legal Nature.

The mixed economy company can be defined as a joint stock partnership company formed between one or more state-owned companies and one or more foreign firms, in which the state(s) company(ies) hold at least 51% of capital participation incorporated within the framework of the national development plan and governed by the objectives of economic and financial profitability.

In an article published in 1983, N.Terki defined the mixed economy company as "a legal entity permitting one or more state-owned enterprises to cooperate with one or more foreign firms with a view toward carrying out a predetermined objective within the framework of the general plan of development".(1)

This attempt to define the concept of a mixed economy company is a little outdated, especially after the promulgation of the 1986 amendment of the 1982 joint-venture law, in addition to the fact that it is incomplete and full of generalities, whereas the above given proposed definition provides a detailed explanation

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(1) See Terki.N, "Joint Venture Enterprises", Translated Into English By Patricia Dunn. J.D, International Bureau of Fiscal documentation, 1985, p.35.

about the concept of joint-venture in the context of Algeria's economy as compared with other Third World countries. In fact, the structure and typology of Algerian joint-venture law is typical to Algeria, particularly in some aspects of the law, for instance, the protocol of agreement and the management system.

With respect to the motives behind the promulgation of Law 82-13 concerning the formation and functioning of the mixed economy company(1) N.Terki has shed some light in two particular respects. The first motive was the failure of the 1966 investment code to absorb the expected amount of foreign investment, especially in the form of autonomous subsidiaries established in the territory of Algeria. Under such rather discouraging conditions, joint-ventures seemed to be suitable and preferable mechanism for the type of Algerian economy, as a best means to attract foreign companies seeking to invest their capital in Algeria. The second motive was the willingness of authorities to deal with this particular type of business association rather than with direct investment which had produced a number of gaps and posed several problems for both sides, that is, foreign investors and the host state.(2)

In general, the mixed economy company is a joint stock company governed by the commercial code (Ordinance no 75-58 of September 1975),particularly by Articles 592-

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(1) JORA Of August 31st, p.1189.

(2) Terki.N, Op Cit, p.35.

716, 763-765, 806-836, 544-551, 716-743, 763-795, and 836-841 which are Articles applicable in general to all types of companies but not to unincorporated associations, for instance, associations with participation formed under Ordinance 71-22 of April 12th, 1971 (JORA, April 13th, 1971, p.366), which defines the legal framework of foreign companies undertaking research and exploitation of liquid hydrocarbons, as amended by law No 86-14 of August 19th, 1986. This provision was given under Art 2/2 of the 1982 relating to joint venture. (the law).

Furthermore, the law does not apply to mixed economy companies with seats (siège social) located outside Algeria (2/3). In such a case the normally applicable law is the law of the country where the company is registered. Also, the law does not apply to a mixed economy company created by international conventions (2/1). Such a company is usually governed by the provisions of the relevant convention.

The amount subscribed by foreign firms in the MECs is limited to 49%(1) of the registered capital. This indicates Algeria's desire to have a majority status in the management of the company (Art 22).

Art 25 of the law provides that "the proportion of

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(1) The amendment bill proposes to offer to the foreign party the majority shareholders (65%) in certain joint ventures, however, the profect could not stand before the radical attitude of some members of the parliament (APN).

the Algerian financial participation in the capital of the economy is reflected in the organs of the mixed economy company".(1) With such a provision, the government confirms the majority position of the national enterprise in every managing organ of the company, for instance, on the board of directors and the general meeting of shareholders.

As regards the contribution of MECs to the national development process, the new Article 3 bis stipulates that MECs must work in accordance with national plans and the principle of economic and financial profitability.

Furthermore, these companies have to be under an obligation to achieve results (Art.33/2). This could be a warning to all MECs involved in the accomplishment of Algerian development projects to make efforts to achieve them within a reasonable time and in a perfect condition. M.C. Radziwsky has described such an obligation (given in the privious Article) as "Unusual obligation. Its implications and penalties are unknown".(2)

Other major topics addressed by the 1982 law (as amended in 1986) include the formation and statutes of MECs, management structure and the rights and obligations of foreign partners in particular.

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(1) Radzieewsky.M.O, "Mixed Economy Companies", Middle East Executive Reports, (MEER), Washington, 1987, p.10.

(2) Ibid, p.11.

The Establishment And Statutes Of MECs:

The 1975 Commercial Code contains several provisions with regard to the formation of MECs, almost all related to joint-stock companies (S.A.), unless otherwise provided by the new 1982 law (as amended in 1986) (Art 20 of the law).

This type of company is public in nature(1), formed between two shareholders (A socialist state-owned enterprise and a foreign firm or firms) (Art.3)(2).

They constitute a legal existence of their own, which often starts from the date of registration in the commercial register. The liability of shareholders is limited to their capital subscription and agreeing to share the profits and losses. The formation and the status of MECs are major points in the protocol agreement usually concluded before the real start of the company activities, between the foreign company and the state-owned enterprise.

The protocol agreement is actually a unique system adopted by Algeria. Andrieux and Frilet have pointed out

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(1) Terki. N. confirmed that "Due to the majority participation of the state enterprise and the necessity to take into consideration the minority interests of the foreign partner, it is sometimes considered a company falling under private law and at other times a company under public law.

(3) It is an exception to the provision of Art 592 of the commercial code which requires the number of shareholders in S.A. at less than 9.

this originality by saying that: "Law 82-13 gives the shareholders agreement au extraordinary and, as far is known, completely original significance."(1) Therefore, the protocol represents an important organisational document under which the parties express their final agreement. Article 53B is /2 of the 1986 amendment provides that the protocol agreement is governed by the civil code of 1975 (2); this provision clarified the juridical nature of the protocol as an international contract and not as a promise to contract as illustrated by Art 3/2 of the law.(3)

The protocol will not have any legal effect unless approved by an interministerial decision (Arrete) taken jointly by the minister of finance, minister of planning and the sponsoring ministry of the associated socialist enterprise (Art 10 of the law). A notary has the responsibility to check and authenticate whether the company partners have the decision before preparing the constitutive act of the MEC (Art. 11 of the law). In case of modification of the protocol agreement during the operational period of MEC, the founders must follow the same formalities and procedures as before at the stage of

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(1) Frilet.A, "Algeria's Mixed Economy Companies", MEER, 84, p.9

(2) Ordinance Of September 26th, 1975

(3) Abdelkhalek.O, "Mixed Economy In Algerian Law", Arab Law Quarterly, v.3, part 2, May 1988, p.175; also Terki. N, Op. Cit., p.36.

the constitution, unless there is a substantial change. This amendment must be then expanded to the statutes of the company in order to be harmonised with the protocol agreement and it shall not come into force before being condirmed by a notary, in accordance with the procedure mentioned in Art. 11 of the law (Art. 30)

According to Art. 4 of the law (as amended in 1986), the protocol must contain the following points:

- The aims, the field of operation and the duration of the mixed economy company;
- The obligations and responsibilities of each party;
- The methods by which each party will contribute to the mixed economy company in whatsoever means, skills, technology (patent, methods, programs, documentation, etc) and the necessary finance to achieve the objectives set up by the company;
- The time schedule and the suitable method for training and the effective Algerianisation of the managerial and technical personnel;
- The methods and time for the payment of the company's capital (two years according to the nature of the envisaged activity (Art. 23));
- The provisions relating to remunerations, social security and transfers concerning the personnel put at the disposal of the mixed economy company;
- The ways and means to ensure a real transfer of technology and know-how, especially for the promotion of exports.

In addition, the protocol may provide some other additional information such as:

- Certain crucial decisions of the board of directors and general assembly which need a vote of a third majority (Art. 29 Bis/3), particularly concerning the decisions for the nomination fo the director-general and senior officials; some important contracts (i.e. loan agreement, supply contract, purchase or sale of land); increase or reduction of share capital;
- Information related to the employment by MECs of their directors under the provision of Art. 29.

It should be noted that the restrictions imposed by virtue of Article 5 of the old version of the mixed economy company law have been cancelled by the 1986 amendment. By doing so, Algerian the legislator wants to demonstrate a certain degree of flexibility in permitting earlier restrictive clauses to be included in the protocol agreement. This reflects the new Algerian investment policy which intends to enable the foreign investor to have a balanced status in relation to the local enterprise. The original provisions of Article 5 read as follows:

In any circumstances, the protocol agreement will not have consequences for the concerned socialist enterprise:
- For imposing restrictions upon its (their) volume of activities;
- For prohibiting it (them) from utilising other more advantageous technological processes or from improving the imported processes;
- For obliging the Algerian partner to supply itself in equipment, raw materials, semi-finished goods and

technological processes exclusively from the foreign partner or from any other supplier designated by him.
- For limiting their power to fix prices of products elaborated on the basis of the imported technology.(1)

As mentioned before, a MEC is a joint-stock company (Art. 20), that is, a commercial company in its form, whatever its objectives may be (Art. 544/2 commercial code (CC)). It has endowed with such a form to enable it to fulfil its commercial aims autonomously. Its duration was initially limited to 15 years (Art 21/1) in case the parties agreed, its duration could be extended. The parties had to express this within the framework of an additional (supplimentary) agreement, at least twelve months prior to the expiry of the initial term. However, under the 1986 amendment, the parties can agree on any period up to 99 years.

The renewal of the contract can be effected any time before the expiry of the term. Furthermore, the MEC must have its seat (siège social) in Algeria (Art. 3); however, companies with their seat(1) outside the country, exercising an activity in Algeria, may be governed by Algerian law (Art 50 of the Algerian civil code).

With regard to management, the system of MECs is divided into two administrative bodies. At the first

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(1) For more discussion about the ontext of Article 5 of the old version see, Radziewsky.M.C, Op. Cit, p.10.
(2) For more details about the theoretical debate of "Siège Social" See, Abdelkhalek, Op. Cit, p.179.

level, the board of directors constitutes the highest organ of the company; it is composed of at least five members from the two parties according to their stock participation in the capital of the country (3 for the socialist enterprise and 2 for the foreign company) (Art 27/1). The partners may replace or substitute directors in such manner as to not affect "the equilibrium and division of responsibilities between the representatives of the parties" (Art 13/2). In addition, Art. 19/2 of law 82-13 included a provision about an assistant general-director proposed by the foreign partner and approved by the constituve general assembly of MECs, to assist the general director within the limit of statury dispositions in accordance with the protocol agreement. This provision has been concelled by the legislator in the 1986 amendment. The reason it is unknown but whatever the motive, such a provision could have jeopardized the attractive nature of the law, since attractivity for foreign investors is an overriding intention of the legislator in promulgating the new law.

The chairman of the board is appointed by the socialist national enterprise(1) and he is in charge of the general management of the company. According to Article 637 of CC, the chairman is in charge to deal with third parties in the name of the company. The members of

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(1) Terki.N confirmed that the sponsored minister for MEC is the one who actually suggest the chairman of the board

the constitutive general assembly, ordinary and extraordinary of the mixed economy company and the methods of their designation are determined by the protocol agreement (Art. 26/2 of the law).

The provisions regarding the general assembly are found in detail in the CC, Arts, 641-655.

In its attempt to accelerate the transfer of technology as well as professional training as an urgent process to develop the national output, the authorities, by promulgating the 1986 amendment, have made it clear that foreign investors should have the right to take part in the management of MECs, particularly with regard to the increase and reduction of share capital and allocation of profits. In this respect, Article 8 of the amendment law stipulates that: "The present law guarantees to the foreign partner(s) of the mixed economy company the right to participate in the organs of management and in decision-making in conformity with the provisions of the Commercial Code and the statutes of the company, particularly with regard to the matters of:

- increase or decrease in capital,
- the allocation of profits.(1)

Besides, Art. 29 Bis creates an exception to the major modality of voting in the general assembly and the board of directors, it reads "except in cases foreseen in the protocol of agreement, defined in the statutes of the

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(1) Radziewdsky.M.C, Op. Cit, p.11

mixed economy companies and requiring decisions of a two-thirds majority, decisions within the general assembly or the board of directors are made by a simple majority of members." This provision is without doubt a considerable improvement from the Algerian side; but is it enough?

As regards other legal aspects of the joint venture, the law 82-13 confirms the competence of the Algerian juridictional system to deal with disputes arising from the exercise, or in connection with the interpretation of the rights and obligations of the parties in MEC. However, Art. 53 of the law stipulates that any dispute arising between MEC and a state enterprise not involved in the protocol agreement shall be settled through obligatory arbitration foreseen under Ordinance no 75-44 of June 17, 1975, relating to conflicts arising from relations between state enterprises.(1)

Art. 53/2 illustrates that any disputes arising between the founding members of the mixed economy company falls under Algerian jurisdiction in application of domestic law and the parties cannot insert an arbitration clause in the protocol agreement of the mixed economy company.

Algerian authorities are planning to use the chance offered by recent government efforts to liberalise the economy, to plan to improve some aspects of the 1982 law (as amended in 1986). It may be changed to offer more

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(1) See, Issad.M, "L'arbitrage En Algerie", Revue De L'Arbitrage",1977, No.3, p.228 and seq.

attractive provisions, such as the right to settle investment disputes through international arbitration.

Furthermore, "in case where the public interest requires the recovery by the state of stock in the possession of the foreign partner, such a measure carries with it, ipso jure (...) payment, within a maximum of one year, of an indemnity equal to the written down value of the stock". (Art. 48 of the 1982 law.)

In summary, it may be said that Algeria has indeed demonstrated a considerable improvement in developing and maximising the possibilities of admission of foreign investment into the country. However, all the efforts that have up to now been made are unlikely to satisfy international firms expecting another variety of reforms. The law of mixed economy companies is currently (1989) before the Algerian parliament and expectations are that a new amendment of the law will be launched soon to cover some of the gaps which have been pointed out by critics in the 1982 law (as amended in 1986). A major practical problem confronted by the foreign investor has to do with uncertainties with respect to incentives and guarantees accorded to him. In this respect, an eminent writer has said that: "the real problem is not the quantum of the incentives and concessions, but the effectiveness and duration of their enjoyment."(1)

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(1) El Sheikh.F.R.A,"The Legal Regime of Foreign Private Investment in The Sudan and Saudi Arabia", Cambridge, 1984, p.335.

However, the point which affects significantly the flow of international capital to Algeria is that most of the aspects relating to external trade and business transactions are strongly linked to the political orientation of the state, and one may hence wonder whether this would be the proper way to achieve the goals adopted by the authorities, particularly in the light of the current chronic economic crises.

2) Law No. 86-14 Of August 19th, 1986, relating to the Activities Of Prospection, Research, Exploitation and Transport by Hydrocarbons Canalisation.

As noted above, the oil industry was and will remain the cornerstone of Algeria's economic development in the coming years. This dependence on hydrocarbons export earnings is a direct consequence of the country's failure to exploit non-hydrocarbons products at a satisfactory level. With this in mind, and in order to expand Algeria's oil reserves which may run out relatively soon, the government has decided to encourage foreign companies to find new reserves, by adopting a new legal framework of foreign participation in oil exploration and production.

The new legislative proposal is justified for several reasons. A first reason behind it could be the sharp impact of economic crises which have produced some chaotic economic results both at the national and international levels, especially after the fall of the crude oil prices at the beginning of 1983 and 1986.

The second reason is the inability of the public enterprises (Sonatrach and its subsidaries) to face alone

the huge challenge and mobilize the necessary resources and energy to develop hydrocarbon research in the field of petroleum on a large scale.

The not completely satisfactory experience of Sonatrach in this respect could also be a further reason behind the new Hydrocarbons policy adopted recently by the government. Sonatrach is now completely ready to enter into cooperation without any obstacles with any foreign company in shared business associations.(1)

Since the Ordinance No 71-22 of April 12, 1971, foreign companies may participate only in oil exploration and production within the framework of an association with Sonatrach, this may take either the form of a subsidiary or a commercial company with the registered office in Algeria. The application field of the new law is expanded to cover prospecting, research and exploitation of both liquid and gaseous hydrocarbons. Therefore, a foreign firm has therewith the chance to venture into other hydrocarbons operations. In addition, the new legislation focuses on the maritime space, including territorial waters, the continental shelf and the exclusive economic zone.

Art. 20 of the new law has again emphasised the associative form of Algero-foreign venture subject to certain conditions as follows:

Art. 9/2 refers to the strategic role of the public sector within a venture which can only be undertaken by

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(1) Terki.R,"La Loi Algerienne de 1986 et L'encouragement Des Investissements Etrangers...", Op cit, pp.801-802.

way of an exclusive reglementation of the national enterprise.

Art. 11/1 obliges the state company (Sonatrach) and the foreign partner firm to get an administrative authorisation which gives the association a non-exclusive right to execute within a defined perimeter preliminary works of hydrocarbons exploration and excludes research "forages".

In case of a commercial oil discovery, the research permit holders have the right to demand a temporary authorisation to exploit the hydrocarbons within an allocated period. The national enterprise may also request an exploitation permit if the hydrocarbons were discovered within an unlimited perimeter pursuant to research permit provisions. (Art. 11/4).

Art. 12 provides that the holder of a mineral title can renounce its enjoyment totally or partially. Furthermore, the administration has the right to withdraw the title from the holder in case the latter does not fulfil the agreed contractual engagement or fails to execute the conditions prescribed by virtue of Art. 14 of the 1986 law.(1)

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(1) Art 14 of the 1986 law stipulates that:"Le titulaire d'un permis d'exploitation est tenu d'appliques a la delimination a la mise en production et a L'exploitation. Les règlès et methodes permettant de preserver les gisements, d'assurer leur conservation et de porter au maximum leur rendement èconomique, nottament par l'emploi des mèthodes de rècupèration."

Under the new law the structure of the association must be established under the framework of a convention between the national enterprise (sonatrach or one of its subsidiaries) and the foreign petroleum company which cannot be any one but one from a country which is able to justify "the necessary financial and technical capacities that can lead to a satisfactory prospection, research and exploitation and which is disposed to devote appropriate financial and technical efforts".(Art. 26)

The accord must define "The rights and obligations of the parties, notably their participation in investments, in risks and in results. The minimum works programme and the profit-sharing of the foreign partner in case of discovering exploitable commercial liquid hydrocarbons."(1)

Moreover, the convention has to include a protocol which defines the rights and obligations of the foreign partner, particularly "the regime of importations and transfer of funds, its financial and technical engagements as well as the applicable fiscal regime and the possible reduction of the tax burden susceptable to be agree by the state".(2)

In addition, the foreign petroleum company has to establish a subsidiary on Algerian territory under local law (Art. 24). The subsidiary is to have its seat (siège social) in Algeria as well as available a list of

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(1) Art. 4.1 decret No.87-159 of July 21st, 1987, p.768.

(2) See, Art. 4/2 of The 1987 decree, Op. Cit. In Terki. N, Op. Cit, p.806.

nationalities of both juristic and physical persons which hold more than 10% of the company capital (Art. 32 and 3).

Art. 2 of the Decree No 87-158 of July 1987 (JORA, July 22, p.767, 1987) establishes the new control system to be exercised by the government over foreign companies operating for prospecting, searching and exploiting hydrocarbons. It lays down that "Foreign companies must provide to the minister charged of hydrocarbons before the approbation of any contract or protocol, the documents and information relating to characteristic elements of the control of their enterprises. Also they have after the approbation of the protocols and contracts inform the hydrocarbons minister about the modifications which affect the characteristic elements of this control."(1)

It should be mentioned in this respect that the mentioned accord and protocol cannot be enter into force unless approved by a decree (Art. 5 of the Decree 87-159).

As far as the form of such associations is concerned, it can have the legal structure of a commercial company or partnership as indicated in Art. 3/1 of the Ordinance No 71-22 of April 12, 1971 within the scope of a mixed economy company enjoying full legal personality. Moreover, under the law of August 19, 1986 (Arts. 22, 24 and25) and Decree No 87-159 of July 21, 1987 (Art. 3), the association can be agreed under either

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(1) See, Terki.N, Ibid, p.806.

a production sharing contract or service contract. However, whatever the form of the association, Sonatrach must hold at least 51% of the shares.(1) Under Art. 27 of the new law, the Algerian legislator attaches the functions of prospection, research and exploitation to the foreign partner unless otherwise provided in the protocol or in the contract. This provision is the opposite of that given in Ordinance of April 12, 1971, in which it was mentioned that the national company (Sonatrach) holds the role of operator within a mixed economy company with a foreign firm.

Therefore, the new provision, laid down in the mentioned Article, will benefit the foreign company, which will be able to get an exceptional authorisation to import materials and products from abroad in order to use them in its operations of exploration, research and exploitation of hydrocarbons. (Art 22/a of the law 78-02 of February 11, 1978, relating to the monopoly of the state over international commerce). This special offer shows the new government's approach, adopted to increase the flow of international investment particularly in the field of hydrocarbons exploration. This "sacrifice" makes in fact the state drop part of its monopoly over international commerce, in order to be able to get some

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(1) For more discussion about the majoritary participation of Sonatrach, see, Terki.R, "La Societe Mixte De Droit Algerien en Matiere de Recherch et D'exploitation Des Hydrocarbures Liquides", DPCI, 1983, T.9, No.1, pp.17-19.

new resources in the long run. However, giving the foreign partner the role of operator does not mean that the national enterprise will lose the effectiveness of controlling the company and therefore of the exploitation. Art. 10 of the 1987 Decree stipulates that: "decisions launched by the board of directors-in which the public enterprise holds a superior representation as compared with the other partner-are taken by the majority voices of present or represented members. (Art. 12 of the 1987 decret.)

However "the decisions relating to the partial consistence and notably withdrawal from the association with respect to all or part of this parcel require the unanimity voices of present or represented members" (Art 12/1 of the 1987 Decreet). Moreover, Art. 13 of the same Decree refers to the right of the foreign partner to assure under the delegation of the board, the management of the company and exercise all other powers which the parties can contractually confide in him.

It should be mentioned that under the previous law (71-8 of April 24, 1971), if the foreign investor discovered an exploitable deposit of dry and humid gas, he lost the right over this discovery and would not get any indemnisation whatsoever for it, whereas under the new law he has the right to ask for a refund of all expenses linked with this discovery as well as the payment of a bonus according to the conditions laid down in the association contract (Art 23/1 of the 1986 law). Besides, the parties have the power to set up a mixed economy company for the object of exporting the gas

pumped out from the deposit discovery.

In case a commercial liqid hydrocarbons deposit is exploited the share of the foreign partner will be treated under the formula agreed within the association (Art. 8 of the 1987 Decree). Thus, the sharing out will be as follows:

If the association takes the form of a joint-stock company, the shares can be distributed either in form of production divided up between the parties or by adopting the traditional solution of profits sharing.

However, if the association takes the form of a partnership, each partner will draw his share of production in the field at the cost price and in the proportional share of his participation percentage.

If the given association is based on a "production sharing out contract", the foreign company will receive her part from the discovered production deposit (FOB) and will be exonerated from any petroleum taxes.

If the association is established by a "service contract", the payment given to the foreign partner will be made either in nature or in cash.

The new regulations have also given to the foreign partner the right to withdraw his share from the association and invest it partially or completely another company in which he directly or indirectly holds the majority of shares with voting rights (Art. 5/1 of the 1987 Decree). Apart from this possibility, the foreign partner does not have the right to withdraw his shares from the association until he gets the agreement of the public enterprise and the minister of hydrocarbons,.

(Art. 5/2-3 of the 1987 Decree)

Furthermore, the public enterprise has the right to take over the foreign interests before any other acquirer. However, if it refuses to exercise this particular right, the foreign partner can propose acquisition to a third person. In this case, the new candidate takes over all the guaranties to the public enterprise. The latter may decide whether the association will proceed for the agreed operations or the candidacy of the newly appointed third party will not be agreed. In this case, the establishment convention of the association will be terminated while safeguarding the interests of the foreign partner (Art. 6 of the 1987 Decree).

Incentives given under the new Regulation:

They can be itemised as follows:

- If the association uses the form of a "sharing production contract" or "service contract" with payment in nature, the foreign partner benefits from an exoneration of all tax burdens as well as all petroleum fiscal obligations. (Art. 8 of the 1987 Decree)
- However, in case of a partnership of joint-stock company, each of the parties is individually responsible for the taxation of his production share.
- The activities of liquid or gaseous hydrocarbons exploitation are subject to a fiscal burden and to results tax with rates differing according to "the importance of the efforts devoted to the research, exploitation or investments, to the artificial recuperation effectuated in the regions, zones which

present exeptional difficulties" (Art. 36 of the 1986 law). It should be noted that a new regulation was launched recently (1989) to classify the areas of prospection, research and exploitation of hydrocarbons into three zones (N, A and B).(1)

The classification is based on the "geographic and geologic difficulties which need exceptional financial efforts".(2)

- Tax rates which are applicable to the value of extracted deposit hydrocarbons and situated in the zone N (Annex I of the 1987 Decree) are fixed at 20% (Art 40 of the 1986 law). However, this rate is reduced to 16.25% in the zone A (Annexe II of the 1987 Decree) and to 12.50% in the zone B, which means including all other areas, also those which are located in the sea (Art. 5 of the 1987 decret).

Art 42 of the 1986 law stipulates that the tax is based on the quantity of hydrocarbons produced and deducted after the operations in the field excluding "the quantity of hydrocarbons which are either consumed for direct needs of the production, of reintroduced in deposit of lost or useless."

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(1) See Decree No 87-157 of July 21st, 1987 (JORA Of July 22, p.763 Relating to the classification Of Hydrocarbons Zones.

(2) Yacine.H, "Apercu Sur La Nouvelle Loi Relative A La Recherche Petroliere", Algerie-Energie No.10 cited by Terki.N, Op. Cit, p.813.

Moreover, a tax regulation will be made at the discretion of the minister of hydrocarbons in cash or in nature. In the latter case the delivery will be made in a liable fee "with a normal delivery of the extract products by transport installations" (Art. 43 of the 1986 law).

- A foreign firm is also exempted from other taxes, for instance, from the professional activities tax and all other profit taxes established by the state or a public collectivity (Wilaya or Commune) as well as other taxes on revenues distribution coming from such an activity.(Art. 57 of the 1986 law) Besides, the foreign company is given the right to apply for exoneration from the unique global tax on production and on services benefits (Art. 58).

- Petroleum activities are subject to different tax rates on results. They are about 85% in the zone N, 75% in the zone A and 65% in the zone B.

- All materials, equipment and products imported by the foreign company and needed in its exploration, research and exploitation activities are exempted from customs duties (Art. 58/3 of the 1986 law).

- Art 60 of the 1986 Law gives to the foreign companies the right to have a reserve for their depreciation outside Algeria; the rates are laid down in an annex attached to the 1986 Law with reference to their net profits (Art. 60 of the 1986 law).

As far as the settlement of investment disputes is concerned, the new 1986 Law has divided the procedure for it into two stages. under Article 63 of the Law, the

parties can bring their disputes before the Commission of Conciliation. If this procedure fails to solve the matter, the dispute may be dealt with under the local domestic law (droit commun). This does not apply to French companies which are subject to the provisions of the Algero-French arbitration agreement signed on March 27, 1983.(1)

N. Terki has contributed to the debate concerning the question of juridictional competence under Law No 88-04 of January 12, 1988, modifying and completing the Ordinance No 75-69 of September 26, 1975. Article 2 of the Law has given to the national enterprise the freedom to control its economic and business destiny particularly in its international relations with foreign firms, by having the right to submit business disputes with foreign partners to arbitration commissions.

In conclusion it may be said, as seen above, that the Algerian new petroleum law has gone through many changes to encourage foreign companies to undertake exploration, research and exploitation in the country.

However, these changes still remain rigid compared with the laws and regulations of other developing countries such as those of Tunisia, with new rules dealing with the exploration and production of liquid and gaseous hydrocarbons (Decree Law No 85-9 of September 16,

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(1) See for more details about this convention, Mebroukine.A, "Le Reglement D'arbitrage Algero-Francais Of 27/03/83", Rev. De L'Arbitrage, 1986, pp.191-232.

1985).(1)

It has been reported that Mohamed Meziane, director for international exchanges at the energy ministry, says the 1986 hydrocarbons laws offer prospects for association or production-sharing agreements with international firms, However, he adds that some aspects could be improved including clauses about double taxation and exporting proceeds from production sharing agreements...The hydrocarbons law may be amended to offer more attractive terms. International firms want improved legislation on international arbitration - indeed some are understood to be awaiting clarification on this before signing exploration agreements."(2)

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(1) For more details about the context of the law see Frilet. M, Esq, "Legal Development In Algeria And Tunisia", MEER, October, 1986, pp.10-11.

(2) Noted By Jon Marks "Opening Up The Oil Industry", MEED, April 21st, 1989, p.8.

Part Four:

Chapter VIII: General Conclusions.

The present study undertook to clarify the conflictual situation in which both developed and developing countries exist with regard to foreign investment. The focus of foreign investors is directed toward a profit and toward how any business operation can secure a maximum benefit without exposure to non-commercial risks. In this respect, a member of the Algerian parliament has said during the debate on the Algerian joint venture laws' second amendment that:
"we need to put before our eyes the fact that international investors are characterised by narrow and racist vision, and make their investments in foreign countries for quick profits."(1) Foreign investors have in turn very frequently complained loud and long about the obstacles which block their business involvment in a host country. In a large number of cases, their criticisms have succeeded to make governments liberalise the mechanism and patterns of their national economies as well as investment laws , in order to attract private investors and foreign companies. Host countries, which are mostly developing countries, have on their side attempted to deal with foreign investments in such a way that their national sovereignty will not be jeopardised through the operational work of foreign companies.

However, the conflict between developed and developing countries concerns not only the protection of sovereignty

(1) MEED, August, 4th, 1989, p. 20.

and the security of the host country, but also how to improve the current international business system generated mainly by colonial countries with economic monopolies in the colonial era, and to attempt to replace it by a new or at least fairer and juster system. However, since the conclusion of an international multilateral agreement on the above matters is relatively impossible, at least at this particular moment, it is very difficult to compromise between both sides'demands. As a consequence, the cost of a resolution of the conflict would have to be shared between the two parties. For developing countries, cooperation South-South can also be a suitable remedy for a general economic stabilisation, but can it resist the pressure of the current international economic situation?

Algeria, for a long time described as having a radical economic system, is becoming more flexible towards the access of foreign investments, especially after discovering that local public enterprises were relatively weak in terms of finance and technology and could not be majority shareholders in joint ventures with foreign companies. As a consequence, several ways have been introduced to improve the current critical economic situation of the country, especially as Algeria is also heavily indebted and cannot afford to borrow the hard currency needed for industrial development.

Despite the general welcome extended to the easing of restrictions on joint ventures, Algeria still presents some drawbacks for foreign investors. Up to now, just 10 mixed economy companies have been set up " at the same , it is by hundreds, even by thousands that joint ventures have seen

the light in socialist and Maghreb countries."(1) Furthermore Algerian authorities say that , after the new trend towards close cooperation with other neighbouring Maghreb countries, Algeria has to develop its foreign investment legislation so that it develops its own production industries and does not simply become an open market for products from her neighbouring countries. This indicates that the currently applicable law on joint ventures does not quite fit into the new international economic mechanism in which a pragmatic and rather liberal approach to foreign investment seems necessarily to prevail.

Realists among Algerian officials admit that the only solution to get out of the present financial and economic dilemma is to flexibilise Algerian attitudes to promote a better legal atmosphere for joint ventures.

At a more general level relating to foreign investment and international law, it is clear that of customary international rules the one on the protection of property is prevailing in current developments, while a more satisfactory arrangement will still have to be sought to equally protect or at least promote the economic development interests of the developing host countries with reference to the capabilities which foreign investors may have and the contribution they should make.

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(1). El Moudjahid of Thursday, July, 20th, 1989, p. 2 and found in MEED. Ibid.

The term contribution is related, however, to economic evaluations and judgments, to which international lawyers will have to refer and on which they will have to depend when developing legal rules not only for the protection of foreign investors but equally for the economic protection of the host countries in need of such protection with respect to their weak economies. If the protection of the foreign investor is based on the principle of the sanctity of private property, the protection of the economic interests of host countries and their coordination with investors'interests will have to be enshrined in the principle or right of developing countries and peoples to adequate development. This has been thus far, however, a very complex area of ongoing debate and a clarification of the situation is not yet in sight. As a result, most probably a pragmatic approach to foreign investment and its protection, and the interests of host countries and their protection, will continue to prevail.

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