INTERNATIONAL PROTECTION OF DIRECT FOREIGN INVESTMENTS IN THE THIRD WORLD

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I. INTRODUCTION

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 (LDC). Because of the need to ensure a steady flow of investment to LDCs and to improve the investment climate in LDCs, measures have been and are being taken to promote and protect direct foreign investment in LDCs.

We are not concerned here about public investment which is normally undertaken pursuant to a treaty between the lender (which may be a government agency or an international financial institution such as the World Bank) and a borrower in the State, which more often than not is a public enterprise, with the government serving as a guarantor. No State would assert that it was entitled by the exercise of power of *eminens dominium* (eminent domain) to terminate the right of an investing State or of the World Bank to recover the loan or investment it had made. Any such assertion would be contrary to public international law. However, very different considerations apply in the field of private investment which may take the form of loans (to governmental or private borrowers), portfolio investment, or direct investment by the purchase or acquisition of property in the State concerned, whether factory, oilfield, mine or plantation. Over the years, the world has witnessed a rash of repudiation or termination of contracts (with alien investors), nationalisation or expropriation of alien property, or "creeping" expropriation in several LDCs.[1] Most States have not been content to expect

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1. See A. Akinsanya, *The Expropriation of Multinational Property in the Third World* (1980); "Indigenisation or Nationalisation of Private Foreign Investments", in Ubogu *et al.* (Eds), *Development Planning in the ECOWAS* (1983), pp.365–409; "State Strategies Toward Nigerian and Foreign Business", in Zartman (Ed.), *The Political Economy of Nigeria* (1983), pp.173–178; *Economic Independence and Indigenisation of Private Foreign Investments* (1982). Also Brownlie, *Loaves and Fishes: Access to Natural Resources and International Law* (1978); R. B. Lillich (Ed.), *Valuation of Nationalized Property in International Law* (1975).

compensation for their nationals simply by relying on the Cordell Hull formula requiring States nationalising alien property for public purpose and without discrimination to pay "prompt, adequate and effective compensation". This is because some expropriatory measures have not been accompanied by "prompt, adequate and effective compensation". Indeed, such measures have been accompanied by partial or no compensation, while lump sum compensation agreements have acquired the character of customary international law.

Undoubtedly, there is no international law compelling a State to allow private foreign investments. Apart from a treaty, there is no right of establishment.[2] However, once an establishment has taken place—indeed, once an investment in a property has been acquired by an alien—if public interest (whatever the term means) requires that such a property be acquired, then the owner must be paid some compensation. As Bin Cheng noted:

> The rationale of compensation for expropriation consists in the fact that certain individuals in a community, or certain categories of individuals, without their being in any way at fault, are being asked to make a sacrifice of their private property for the general welfare of the community, when other members of the community are not making corresponding sacrifices. The compensation paid to the owners of the property taken represents precisely the corresponding contributions made by the rest of the community in order to equalise the financial incidence of this taking of private property.[3]

While it seems to be generally accepted that some form of compensation is necessary in the event of expropriation or taking of alien-owned property, various UN General Assembly Resolutions on Permanent Sovereignty over Natural Resources have cast serious doubts not only on the obligations of the taking States to pay some compensation; these resolutions obviously also support the position that the quantum of compensation is solely within the sovereign jurisdiction of the taking State rather than a matter subject to international legal standards.[4]

Thus, because of serious doubts about international law usually raised by those not well disposed towards the free enterprise economy, and because nationals of a number of capital-importing countries may have occasion to invest abroad, several such countries have introduced

2. For conditions under which aliens have the right to acquire property, see Akinsanya, *The Expropriation of Multinational Property in the Third World* (1980), pp.191–197.

3. See Bin Cheng, "The Rationale of Compensation for Expropriation" (1958–59) 4 Grotius Society Transactions 297.

4. See Akinsanya, "Permanent Sovereignty Over Natural Resources and the Future of Foreign Investment" (1979) 5 Nig.J.Int.Aff. 70–92; Akinsanya, *op. cit. supra* n.2, at pp.48–68; Akinsanya, "The United Nations Charter of Economic Rights and Duties of States" (1980) 30 Eg.R.I.L. 51–99.

municipal legislation to create a better feeling of investment security and encourage direct foreign investment. Some foreign investors have always maintained that measures unilaterally enacted to provide a better investment climate can easily be unilaterally revoked. Consequently, some capital-exporting countries have negotiated bilateral treaties for the mutual protection of the nationals concerned and for recourse to international arbitration, while international measures have been and are being taken to promote and protect direct investment in less developed countries.

This paper is divided into three parts. The first examines the *raison d'être* for international protection of direct foreign investment in the Third World. The second discusses measures that have been and are being taken to promote and protect direct foreign investment while the third takes a look at the future of international protection of such investment in the Third World.

II. THE PURPOSE OF INTERNATIONAL PROTECTION OF DIRECT FOREIGN INVESTMENT IN THE THIRD WORLD

IT has been stated that one major deterrent to the flow of investment to LDCs is the rash of expropriations, revocation of contractual agreements (with alien investors) or "creeping" expropriation in several LDCs. Several capital-exporting countries, particularly the United States, have always discouraged expropriation and, unlike several LDCs, did not consider it as a solution to the problems of economic independence and economic development. For example, while the United States does not question the right of a sovereign State to expropriate alien assets, it has always taken the position that such a lawful exercise of power of eminent domain is contingent on the payment of "prompt, adequate and effective compensation".[5] More significant, the United States maintains that the taking of alien-owned property without *adequate* compensation spoils the investment climate and drives or scares away the much needed private capital for economic development in LDCs.

Since expropriation of alien assets is a lawful exercise of power of eminent domain, the investor State expects the taking State to discharge its obligations under international law by making reparations to a dispossessed alien investor. It is when a taking State is not making and does not make serious efforts, or fails to discharge its obligations, or when there is a "denial of justice" to a dispossessed alien investor that an investor State, as a matter of duty and right, makes diplomatic representation on behalf of its national. For example, if the United States believed that its national had not received "just" compensation although all local remedies might have been exhausted, attempts were made to submit the matter to international arbitration or adjudication with a view to reaching a compensation settlement. Mixed claims commissions were sometimes set up to decide on the validity and amount of claims.

5. See Akinsanya, *op. cit. supra* n.2, at pp.25–46.

Where diplomatic representations or negotiations have failed to resolve investment disputes, there has been recourse to covert or overt intervention to obtain compensation and restore *status quo ante*. The United States, and to a lesser degree the United Kingdom, has actively intervened, covertly or overtly, on behalf of its nationals involved in investment disputes abroad. Mention must be made of direct or proxy interventions in Iran (1954), Guatemala (1954), Egypt (1956), Cuba (1961), British Guiana (1963), Brazil (1964), Dominican Republic (1965) and Chile (1973), following expropriation proceedings in these countries.[6]

In some instances, non-recognition, withdrawal of recognition or rupture of diplomatic relations has followed expropriations. Thus, after the abortive military intervention by the Western European powers in the Soviet Union, following large-scale Soviet expropriations of private property, the United States (until 16 November 1933 under the Litvinov Assignment Agreement)[7] and a number of countries including Belgium, Holland and Switzerland withheld diplomatic recognition of the Soviet government. Additionally, in the wake of various Cuban decrees expropriating alien-owned but largely United States-owned property, and following much closer co-operation between the Soviet Union and Cuba, the United States not only withdrew diplomatic recognition of Cuba but, on 3 January 1961, also terminated diplomatic and consular relations with that country.[8]

In some other instances, capital-exporting countries, notably the

6. See Akinsanya, *Multinationals in a Changing Environment* (1984), pp.252–306; Akinsanya, *op. cit. supra* n.2, at pp.300–310. It must be added that Western European powers intervened militarily in the Soviet Union following large-scale expropriations of private property by the Bolshevik regime. See Akinsanya, *op. cit. supra* n.2, at p.281.

7. Under the agreement, the United States accorded the Soviet government diplomatic recognition and recognised the extra-territoriality of Soviet expropriation decrees while the Soviet Union assigned to the United States all sums due to the Soviet Union as the successor of former Russian governments from United States nationals. These funds were to be used to pay compensation claims of United States nationals whose assets were expropriated by the Soviet government. See J. W. Garner, "Recognition by the United States of the Government of Soviet Russia" (1935) 16 B.Y.B.I.L. 171–173.

8. For more on United States–Cuban relations following large-scale expropriations of United States assets by the Castro regime, see Akinsanya, *op. cit. supra* n.2, at pp.121–127, 283, 302; Akinsanya, *Multinationals in a Changing Environment, op. cit. supra* n.6, at pp.252–306.

TABLE 1. Bilateral treaties for the reciprocal promotion/encouragement and protection of investment in the Third World since World War II

Treaties concluded with major capital-exporting countries

US[1]	*UK*	*France*	*Other EEC Member States*	*Other Western Europe/ North America*	*Soviet Bloc*
Congo Rep. (NDA)	Bangladesh (1980)	Egypt (1974)	Belgium/Indonesia (1980)	Canada[3]	Rumania/Egypt (1976)
Costa Rica (not yet signed)	Egypt (1975)	Equ. Guinea (1983)	Belgium/Zaire (NDA)	Finland/Egypt (1980)	Rumania/Gabon (1977)
Egypt (1982)	Indonesia (1976)	Indonesia (1974)	Belgo–Lux./Rwanda (1983)	Japan/Egypt (1977)	Rumania/Sudan (1978)
Ethiopia	Korea (1976)	Korea (1975)	Belgo–Lux./Bangladesh (1981)	Sweden/Malaysia (1979)	Yugoslav./Egypt (1977)
Gabon (NDA)	St Lucia (1983)	Malaysia (1975)	Belgo–Lux./Indonesia (1982)	Switz./Egypt (1973)[4]	
Guinea (NDA)	Singapore (1975)	Mauritius (1974)	Belgo–Lux./Sri Lanka (1982)	Switz./Costa Rica (1975)	
Ghana (NDA)	Yemen (1982)	Morocco (1975)	W. Germany/Ivory Coast (1985)	Switz./Honduras (1966)	
Iran (1955)		Nepal (1983)	Netherlands/Cameroon (1973)[2]	Switz./Indonesia (1974)	
Ivory Coast (NDA)		Pakistan (1983)	Netherlands/Egypt (1976)	Switz./Jordan (1976)	
Korea (1956)		Singapore (1975)	Netherlands/Indonesia (1968/1971)	Switz./Malaysia (1978)	
Liberia (NDA)		Sri Lanka (1980)	Netherlands/Ivory Coast (1971)	Switz./Mali (1978)	
Morocco (1985)		Tunisia (1974)	Netherlands/Kenya (1970)	Switz./Singapore (1978)	
Nicaragua (1956)		Zaire (1975)	Netherlands/Korea (1975)	Switz./Sri Lanka (NDA)	
Nigeria (1962/1974)			Netherlands/Malaysia (1972)	Switz./Sudan (1974)	
Pakistan (1959)			Netherlands/Morocco (1971)	Switz./Syria (1977)	
Panama (1982)			Netherlands/Senegal (1972)	Switz./Tanzania (1965)	
Senegal (1983)			Netherlands/Singapore (1973)	Switz./Tunisia (1961)	
Sierra Leone (NDA)			Netherlands/Tunisia (1972)	Switz./Zaire (1972)	
Somalia (NDA)			Netherlands/Uganda (1970)		
Sudan (NDA)			Italy/Chad (1969)		
Togo (NDA)			Italy/Ivory Coast (1969/1971)		
Tunisia (NDA)					
Zaire (1984)					

Notes: 1. The list of countries with which the USA has concluded bilateral treaties for promotion/protection of investment is not exhaustive.
2. The Netherlands has concluded bilateral agreements for encouragment/promotion of investments with some 20–30 countries.
3. Canada has concluded a number of investment guarantee agreements with several less developed Third World countries.
4. Switzerland has bilateral agreements for encouragement/promotion of investments with over 30 countries.
NDA—No date available.

Sources: A. Akinsanya, *The Expropriation of Multinational Property in the Third World* (1980), pp.328–329; Akinsanya, "State Strategies Towards Nigerian and Foreign Business", in Zartman (Ed), *The Political Economy of Nigeria* (1983), p.157; Akinsanya, "Indigenisation or Nationalisation of Private Foreign Investments", in Ubogu *et al.* (Eds), *Development Planning in the ECOWAS* (1983), p.374; ICSID, *News from ICSID*, Vol.2, No.1, [illegible]

France, Italy, Switzerland, Canada, Sweden, Rumania, Japan, Yugoslavia, the Netherlands, Luxemburg and the Federal Republic of Germany with several less developed countries as is shown in Table 1. These treaties make provisions for the "most favoured nation" treatment, "just" compensation for expropriation, settlement of investment disputes by diplomatic negotiations, conciliation or binding arbitration.

Article 4 of a typical Swiss agreement on the reciprocal promotion and protection of investments with other LDCs, which is more comprehensive than any other investment treaty, states thus:

> Neither of the Contracting Parties shall take measures of expropriation, nationalisation or dispossession, either direct or indirect, against investments belonging to nationals or companies of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law and provided that provision be made for effective and adequate compensation according to international law. The amount of compensation, which shall have been fixed at the time of expropriation, nationalisation or dispossession, shall be settled in the currency of the country of origin of investment and paid without undue delay to the person entitled thereto, whichever shall be its place of domicile or residence.

In Western parlance, compensation for expropriation necessitated by "public interest" shall be "prompt, adequate and effective". The Swiss treaty also covers "creeping expropriation" or "indirect expropriation", used to describe those measures having an effect similar to direct expropriation. It defines "investments" as comprising:

> every kind of asset and more particularly, though not exclusively:
> (a) movable and immovable property as well as any other rights *in rem*, such as mortgages, liens, pledges, usufructs, and similar rights;
> (b) shares or other kinds of interest in companies;
> (c) titles to money or to any performance having an economic value;
> (d) copyrights, industrial property rights (such as patents for inventions, trade marks, industrial designs), know-how, trade names and goodwill;
> (e) business concessions under public law, including concessions to search for, extract or exploit natural resources.

Several bilateral treaties on the promotion and protection of investments make references to facilities offered by the International Centre for the Settlement of Investment Disputes (ICSID) for the settlement of investment disputes between one contracting State and nationals of the other contracting State. First, some treaties specifically require each contracting State, upon any request from an investor who is a national of the other contracting State, to submit investment disputes to ICSID conciliation/binding arbitration. Examples are the treaties concluded between the Netherlands and Indonesia; Yugoslavia and Egypt; the

United Kingdom and Bangladesh; France and Singapore; and the United States and Senegal. Second, some treaties simply provide that investment agreements concluded between one contracting State and nationals of the other shall, if the investor so requests, include a provision for the submission of disputes to ICSID, as in the treaty between France and Malaysia, or that investment agreements may make reference to ICSID arbitration "upon agreement by both parties" as in the treaty between Sweden and Malaysia of 3 March 1979 (Art.6). Third, provisions of some bilateral treaties include a reference to the possibility that the parties consent to ICSID conciliation/binding arbitration while some require the parties to give "sympathetic consideration" to such a possibility. For example, Article IX of the treaty between the Netherlands and Kenya of 11 September 1970 states that:

> The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall give sympathetic consideration to a request on the part of such national to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment.

This means that each contracting Party retains its freedom to decide, in the light of prevailing circumstances, whether or not to have recourse to ICSID conciliation/binding arbitration or some other form of settlement. Fourth, bilateral investment treaties concluded by the United States and the United Kingdom with several LDCs make reference to ICSID, the "additional facility" of ICSID, the Court of Arbitration of the International Chamber of Commerce, or *ad hoc* international arbitration under the UNCITRAL Arbitration Rules as a means of resolving investment disputes. Mention must be made of the treaty between the United States and Panama (not yet a party to the ICSID Convention); the United States and Senegal; and between the United Kingdom and St Lucia of 18 January 1983 (under which the parties "may agree" to refer an investment dispute, if not amicably resolved within three months, to ICSID, the Court of Arbitration of the ICC or *ad hoc* international arbitration under the UNCITRAL Arbitration Rules).

Finally, other bilateral investment treaties contain provisions relating to:

(a) limitations on the categories of disputes which may be submitted to ICSID;
(b) conditions precedent to recourse to ICSID, such as negotiations within a stated period of time and exhaustion of local remedies;
(c) identifying the governmental party, namely the party to the dispute;
(d) identifying the investor, who must necessarily be a national (juridical/natural) of another contracting State; and
(e) defining what is meant by the term "investment".

For example, with respect to (a) above, Article 6 of the treaty between Bangladesh and the Belgo-Luxemburg Economic Union of 22 May 1981 provides, in general terms, that "any investment dispute may be submitted to ICSID conciliation/arbitration" except matters relating to tax disputes, while investment treaties concluded between the United States and several LDCs exclude from ICSID jurisdiction disputes arising (a) "under the export credit, guarantee or insurance programs 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".

In addition, some capital-exporting countries have provided insurance coverage to their nationals' investments abroad against war, civil war, rebellion, revolution, insurrection or similar disturbance in the host State, inconvertibility, expropriation, confiscation or requisition by the host government. For such a purpose, government or quasi-government agencies/corporations are established by the government, as for example:

United States—Overseas Private Investment Corporation.
Australia—Export, Finance and Insurance Corporation.
Denmark—Danish International Development Agency.
Norway—Norwegian Agency for Development Aid.
Japan—Export Insurance Division, Ministry of International Trade and Industry (EID/MITI).
Canada—Export Development Corporation.

France, Sweden, Switzerland, the Federal Republic of Germany and the United Kingdom also provide insurance coverage for their nationals' investments abroad.

The United States has concluded investment guarantee agreements with several LDCs which include Belize, Brazil, Cameroon, Chile, Costa Rica, Dominican Republic, Ecuador, Egypt, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Jordan, Kenya, Korea, Liberia, Malaysia, Malta, Nepal, Nigeria, Pakistan, Philippines, St Kitts–Nevis, Saudi Arabia, Somalia, Sudan, Taiwan, Thailand, Tunisia, Turkey, Uruguay, Zaire and Zambia. Since these agreements provide insurance cover for United States investors against inconvertibility, expropriation or revocation of contractual obligations, they enable the United States government to settle the claims of its nationals and go to arbitration. The United States government then succeeds to the subrogation rights of its nationals. The principle of subrogation has found expression also in Article 7 of the Swiss Investment Agreement which states, *inter alia*:

> Where one contracting Party has granted any financial security against non-commercial risks in respect of an investment by a national or com-

pany in the territory of the other contracting Party and payment has been made by the first contracting Party to its own national or company, the other contracting Party shall recognise the rights of the first contracting Party by virtue of the principle of subrogation to the rights of the investors.

Between 1981 and 1984, the Overseas Private Investment Corporation (OPIC) issued a total of $12.8 billion of insurance coverage for 438 investment projects, compared with $8.6 billion in the first ten years of its operation. During the 1984 fiscal year, OPIC settled 21 inconvertibility claims with cash payments of over $25 million and a $6 million indemnity agreement. OPIC and its predecessor, Agency for International Development, have paid, guaranteed or provided indemnities for more than $445.5 million in settlement of 187 insurance claims.[16] OPIC suspended its insurance programme in Ethiopia because the government of Ethiopia has not made compensation with respect to an expropriation claim filed by an OPIC-insured investor. There were several unresolved expropriation claims by United States investors in Ethiopia. For a time, OPIC also suspended its insurance programme in Jamaica because the government of Jamaica enacted a bauxite levy and tried to acquire equity interests in bauxite/alumina enterprises insured by OPIC.

The Export Finance and Insurance Corporation, whose primary function is to encourage and expand trade with overseas countries by protecting Australian exporters against losses arising from a range of risks not normally covered by commercial insurers:

(a) insures exports of consumer and capital goods;
(b) insures overseas investments and provides direct lending facilities;
(c) insures Australian enterprises against civil war, war, rebellion, revolution, insurrection or similar disturbance in the host State, inconvertibility, confiscation or requisition by the host government, imposition of import restrictions or cancellation of valid import licences; and
(d) provides insurance cover for all classes of overseas business transactions.

To be eligible for insurance coverage, the investments must: be new, direct and able to assist in the socio-economic development of the host State; allow a reasonable measure of equity participation by the nationals of the host State; and, above all, be in Australia's "national interest" (whatever the term means).

In Denmark, the Danish International Development Agency provides guarantees against political risks in connection with Danish invest-

16. Overseas Private Investment Corporation, *Annual Report 1984*; OPIC, *TOPICS*, Winter 1985.

ments in LDCs. To qualify for such guarantees, the investments must b such as will help in the economic development of the host State and th host government must approve such investments. In Norway, th government has an agency (Norwegian Agency for Development Ai providing guarantees or insurance cover for Norwegian direct inves ment against expropriation. Canada provides investment guarante through its Export Development Corporation (EDC). The programm which provides cover for a period of 15 years against inconvertibility c inability to repatriate earnings on capital, expropriation, war, revo ution or insurrection, can be terminated only by the investor and not b the EDC. According to a statement by the Canadian High Commissio

Almost any right that an individual or firm might acquire in a foreig enterprise is eligible—including equity, loans, management or technic service contracts, royalty and licensing agreements . . . Only new pr jects in developing countries receptive to foreign interests are accepted b the EDC. Virtually all industrial and service sectors are eligible for gua antee coverage, the major criterion determining support being the max misation of benefits to Canada and the host country. Investors are however, required to obtain official host government approval from th foreign state signifying its approval of the project or activity by the foreig enterprise and the Canadian investor's investment in that project o activity.

The statement emphasised that "mainly joint ventures" would be pro vided with cover while "loans to foreign governments, portfolio invest ments, investments solely in land, short-term investments, investment in oil and mining exploration and any investments which are highl speculative in nature are excluded from coverage".

Since 1969, the Netherlands has been providing insurance cover fo Dutch foreign investments against "non-commercial risks" subject t the following conditions:

(a) that there is a stable political climate in the host State;
(b) that a project should not exceed a total value of 20 million Dutc guilders;
(c) that the project, which "should potentially strengthen the econom of the receiving country", should be new, meaning that only a extension of an existing project is eligible for insurance cover.

In Japan, the EID/MITI provides insurance against expropriation. war and inconvertibility for its nationals (natural or juridical) wit equity, loans and investments in all parts of the world.

An investment guarantee programme, concluded by the major capital-exporting countries with several LDCs, assists in preventing problems normally associated with expropriation in two ways. In the firs place, it reduces the likelihood of an expropriation since insurance i provided for approved projects by the host government. Second, in the

event of expropriation, prompt compensation can be made to the insured while the insurer who has succeeded to the subrogation rights of the investor pursues agreed procedures for settlement. Although fears have been expressed that the principle of subrogation may lead to confrontation between governments, by and large expropriations of approved and insured projects in LDCs without compensation have only necessitated the suspension of an investment guarantee programme in the country concerned. Examples are OPIC-insured programmes in Ethiopia and Chile under President Salvador Allende Gossens in the early 1970s.

Aside from bilateral agreements for the encouragement and protection of direct foreign investments in several LDCs, several efforts have been taken to conclude multilateral conventions for the promotion and protection of direct foreign investments.[17] In particular, mention must be made of the following Conventions.

1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958—62 contracting States.
2. European Convention on International Commercial Arbitration, 21 April 1966—20 contracting States.
3. The Convention for the Settlement of Investment Disputes between States and Nationals of Other States, 14 October 1966—88 contracting States.
4. The Lome Conventions, I, II and III, between the EEC and African, Caribbean and Pacific States—74 contracting States.
5. Inter-American Convention on International Commercial Arbitration, 30 January 1975—8 contracting States.
6. Convention Establishing the Multilateral Investment Guarantee Agency—at their annual meeting in Seoul, South Korea, on 11 October 1985, the Governors of the World Bank approved the Convention. Korea, Turkey, Ecuador, Senegal and Sierra Leone immediately joined the Convention.

None has proved more successful than the World Bank Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, and principally because of the large number of LDCs that are parties to the Convention. These include Haiti, Thailand and Ecuador which became the 91st, 92nd and 93rd signatories to the Convention on 30 January 1985, 6 December 1985 and 15 January 1986 respectively.[18]

17. Arthur S. Miller, "Protection of Private Foreign Investment by Multilateral Convention" (1959) 53 A.J.I.L. 371–378; Richard N. Gardner, "International Measures for the Promotion and Protection of Foreign Investment" (1959) Proc.A.S.I.L. 255–266; Stephen M. Schwebel, "International Protection of Contractual Arrangements", (1959) *idem*, 266–273. See also (1963) 2 I.L.M. 1103–1109.

The Convention which came into force on 14 October 1966 created the International Centre for the Settlement of Investment Disputes (ICSID) whose *raison d'être* is to offer an international machinery for the settlement of investment disputes between contracting States and nationals of other contracting States, and to promote a climate of mutual confidence between investors and States favourable to increasing the flow of direct foreign investment to LDCs under reasonable conditions. As the report of the World Bank Board of Governors submitted to member governments on the Convention states:

> The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.[19]

The Report emphasised:

> Private capital will continue to 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.[20]

Undoubtedly, the ICSID Convention is essentially an instrument for the protection of direct foreign investment, particularly in the Third World. Not only have several LDCs become parties to the Convention, they have also enacted investment laws accepting ICSID facilities for resolving investment disputes.

In essence, the ICSID is not solely a machinery for the settlement of investment disputes between contracting States and nationals of the contracting States. It is also aimed at promoting an atmosphere of mutual confidence between investors (nationals of contracting States)

18. For details on the Convention, C. F. Amerasinghe, "Dispute Machinery in Relations Between States and Multinational Enterprises—With Particular Reference to the International Centre for the Settlement of Investment Disputes" (1977) 11 Int.Law. 45–59; Amerasinghe, "Model Clauses for Settlement of Foreign Investment Disputes" (1973) 28 Arb.J. 232–257; Amerasinghe, "Jurisdiction *Ratione Personae* Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (1974–5) B.Y.B.I.L. 227–267; Amerasinghe, "The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation" (1976) 9 Vand.J.Transnat.L. 793–716; P. F. Sutherland, "The World Bank Convention on the Settlement of Investment Disputes" (1979) 28 I.C.L.Q. 367–400.
19. See (1965) 4 I.L.M.
20. *Ibid.*

and States (contracting States) conducive to increasing the flow of resources to LDCs under reasonable conditions. These features were also characteristic of the proposed convention for establishing the Multilateral Investment Guarantee Agency (MIGA) which is also aimed at stimulating investment flow to LDCs. Thus, the proposed MIGA and ICSID share a common objective, namely the encouragement of the flow of resources to and among LDCs by eliminating, or least reducing, political risk, as a deterrent to such investment.

The ICSID provides a forum for resolving investment disputes and, in the process, inspires confidence in host countries and investors that such disputes will be resolved efficiently according to the legal and economic merits of the case. In *Alcoa Minerals of Jamaica/Kaiser Bauxite Company/Reynolds Jamaica Mines and Reynolds Metals Company* v. *Jamaica*, the ICSID Tribunal found that an attempt by the government of Jamaica to withdraw from ICSID jurisdiction controversies relating to the "bauxite levy" was a contravention of the ICSID Convention and that the case fell within ICSID jurisdiction. To date, two disputes have been submitted to ICSID conciliation and 18 disputes to ICSID binding arbitration. Given the experience of the ICSID, there is no doubt that an international arbitral tribunal accepted by States and nationals of other contracting States has manifest advantages in expedition and economy; more significant, it keeps investment disputes out of the arena of international politics.

On the other hand, the MIGA would not only provide technical assistance to countries on how to improve investment conditions, but would also provide insurance cover against such non-commercial risks as inconvertibility, expropriation, war and civil disturbance and repudiation of legal commitments by the host government. Upon a claim, MIGA will be subrogated to the rights of the investors against the host State. MIGA, like the Overseas Private Investment Corporation, will then pursue these rights with the host State, thus acting as a buffer between investor and host State, and minimising government-to-government confrontation. A. W. Clausen, the former president of the World Bank and chairman of the Administrative Council of ICSID has put it succinctly:

> 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 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 depoliticisation of investment disputes.[21]

21. 1986—1, 3 *News from ICSID* 5.

The MIGA Convention will come into force when five developed and 15 developing countries with a combined subscription of at least $360 million ratify it.[22]

IV. THE FUTURE

IN spite of the obvious advantages of the facilities provided by ICSID and the benefits to be derived from the MIGA, many LDCs do not, in general, support international arbitration, which has been seen by capital-exporting countries and proponents of the ICSID as promoting international trade and providing flexibility and fair dispute-settlement mechanism for the investor and host State.

As can be seen from Table 2, almost all the Latin American nations reject international arbitration. Only Paraguay and El Salvador are members of ICSID. Costa Rica signed the Convention on 29 September 1981 and has not yet deposited the ratification instrument. Paraguay and El Salvador concluded bilateral treaties with France providing for the settlement of investment disputes by ICSID while Paraguay and Costa Rica concluded similar treaties with the United Kingdom. Yet a large portion of direct foreign investment is concentrated in Latin America. Several Latin American countries (including Brazil) are not parties to the ICSID Convention because their constitutions do not permit accession to international arbitration, because of their bad experience with international arbitration, and because they regard international arbitration as an impermissible external interference in their internal affairs. Put simply, the attitude of Latin American countries towards the ICSID Convention and international arbitration has been traditionally articulated in the Calvo doctrine. First, they regard diplomatic protection by an investor State as contrary to the sovereignty of the host State, especially where the investor has bargained away his right to diplomatic protection in a contract concluded with the host State. Second, they believe that investment disputes should be settled by local courts. It was small wonder then that they rejected the basic concepts inherent in the Convention in a document that became known as "El No de Tokyo" at the annual meeting of the Board of Governors of the World Bank in 1964.[23]

To sum up, we have been examining international measures for the promotion and protection of direct foreign investments in the Third World. We have taken the position that, in spite of the merits of a multi-

22. See S. K. Chatterjee, "The Convention Establishing the Multilateral Investment Guarantee Agency" (1987) 36 I.C.L.Q. 76 (this issue).

23. For criticisms of the ICSID Convention, see P. C. Szasz, "The Investment Disputes Convention and Latin America" (1971) 11 V.J.I.L. 256–265.

TABLE 2. Third World States parties to the World Bank Convention on Settlement of Investment Disputes by region as at January 1986

Africa	*Middle East, Pacific, Asia*	*Latin America, the Caribbean*
Benin, Republic	Bangladesh	Barbados
Botswana	Fiji	Costa Rica
Burundi	Indonesia	Ecuador
Cameroun Republic	Korea	El Salvador
Central African Republic	Kuwait	Jamaica
Chad	Malaysia	Haiti
Congo, People's Republic	Nepal	Paraguay
Egypt	Pakistan	St Lucia
Ethiopia	Papua New Guinea	Trinidad and Tobago
Gabon	Philippines	
Gambia	Saudi Arabia	
Ghana	Singapore	
Guinea	Solomon Islands	
Ivory Coast	Sri Lanka	
Kenya	United Arab Emirates	
Lesotho	Western Samoa	
Liberia		
Malagasy Republic		
Malawi		
Mali		
Mauritania		
Morocco		
Niger		
Nigeria		
Rwanda		
Senegal		
Seychelles		
Sierra Leone		
Somalia		
Sudan		
Swaziland		
Togo		
Tunisia		
Uganda		
Upper Volta		
Zaire		
Zambia		

Sources: ICSID, *1984 Annual Report* (Washington DC, ICSID, 1984), pp.18–19; ICSID, *1985 Annual Report*, pp.16–17.

lateral convention such as the ICSID Convention and the MIGA Convention,[24] bilateral agreements for the reciprocal encouragement and protection of capital investments offer the most practical and effective means of affording treaty protection to alien investors in the Third World.

24. To date, 28 developing and 5 industrialised countries have signed the Convention. This represents 41 per cent of the authorised capital of $1.082 billion. The countries signing the Convention (in the order) are South Korea, Turkey, Ecuador, Senegal, Sierra Leone, St Lucia, Grenada, the Netherlands, Jordan, Italy, Vanuatu, Zaire, Equatorial Guinea, Saudi Arabia, Uruguay, the UK, Chile, Canada, Morocco, Benin Republic, St Christopher and Nevis, Bolivia, Barbados, Colombia, Ivory Coast, Togo, Egypt, Nigeria and the US. See the *Guardian* (Lagos), 4 July 1986, p.13.

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