

Dr . Issam Al-Asali

LL.B , LL.M , LL.D

Diploma In Financial & Economic Control

Attorney At Law

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Office : Sahet Al-Najmeh , Jadet Abdul Wahab Al-Inglizi

Bldg No. 15 , Damascus – Syria Tel : 2218797

**The International Legal Protection
Of Foreign Property**

SUMMARY OF THE THESIS

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The International Legal Protection of Foreign Property

One of the dominating problems of today is to create a satisfactory and stable climate for the flow of private foreign investment. This is because the economic development of developing countries depends to a large extent on private foreign capital, and because they may not move to the areas where they are most needed unless reasonable conditions for security exist. Various measures have been taken recently to deal with the problem of providing legal security for foreign investment. The fundamental purpose of these measures is to promote the economic development of the developing countries. The protection of foreign investment is a means toward this end, and is by no means the only one.

The present study is addressed to the crucial question: how much and how little protection does international law afford to foreign investment? In particular, it deals with one set of measures which are essential for the flow of private capital to the developing countries. The measures in question are legal guarantees given directly by states to foreign investors assuring them of the safety of their investments insofar as the latter are affected by state action. However, it is the international law aspects which are chiefly discussed and which receive the main emphasis. Anyhow, the relationship of international law to the contemporaneous political, economic and social realities can not be neglected.

Part one is introductory. It is an attempt at a statement : of the meaning of the foreign capital, the non-commercial risks that cause losses to foreign investments and the peaceful settlement of international

disputes. Part two is concerned with the minimum standard of international law for the protection of foreign investment. Part three is devoted to the question of raising minimum standard dealt with in chapter two.

I wish to express my gratitude to my supervisor, Dr. Muhammad Aziz Shukri, for his advice and guidance.

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This Thesis dedicated to my late parents.

Issam Al-Asali .

Part One

Foreign Capital

Its meaning, the non-commercial risks that cause losses to foreign capital and the international peaceful dispute settlement.

Chapter 1

The Meaning of Foreign Capital

Importation of foreign capital is necessary for a country's economic development. This is not a novel phenomenon. In the past, especially during the nineteenth century, foreign capital contributed greatly to the economic development of several countries. The United States is a prime example.

Foreign investment in the nineteenth century and the beginning of the twentieth came from private sources. There was no foreign public investment, that is, no investment of capital owned by a foreign government or public authority. Capital was in the main invested indirectly, through the buying of bonds or similar securities. Direct investment ⁽¹⁾, mostly in enterprises producing primary goods for export, played a part, but generally a minor one in relation to the total of foreign investments. In reviewing past conditions, one should also note the extraordinary size of foreign investments.

The period between the first and the second World War may be regarded, from the standpoint of international investment, as one of transition. Public

(1) "Direct" investment is investment in an enterprise controlled by the investor, while "portfolio" or "indirect" investment is investment in securities held by investors not exercising any managerial control.

capital movements acquired some importance, partly because of the large intergovernmental loans made during and immediately after the First World War.

Private capital, however, continued to dominate the field of foreign investment. Foreign investment during the interwar period remained concentrated in the developed countries.

In the years since the second World War certain new trends have appeared while those manifested in the interwar period have acquired full force.

A first new factor of major importance is the extraordinary part played by public investment. Since the last war public capital, in the form of inter-government lending as well as other forms, has dominated the international financial scene. The chief creditor government is that of the United States, either directly or through a number of special financial agencies, such as the Export-Import Bank of Washington and the Development Loan Fund. In recent years several other states, including the Soviet Union, have begun to offer long-term loans. Public capital is also provided by international financial agencies, such as the International Bank for Reconstruction and Development (IBRD or World Bank), the International Finance corporation (IFC), and the International Development Association (IDA) .

Another new form of public financing which today plays an important role is "economic aid", namely, capital in any form granted to foreign states without any obligation of repayment or payment of interest. At present, most funds of this *type* are provided by individual states. A limited number of grants is also provided by some international agencies in connection with technical assistance projects or relief operations.

During the first postwar years, public capital accounted for almost all international capital movements. Public capital is of principal importance in the present-day international scene, especially with regard to the developing countries.

Apart from the growth of public international investment, several other important changes have occurred with regard to foreign investment. To begin with, if past and present levels of national *income*, world production, and international trade are taken *into* account, an important relative decrease will be noted in the private capital invested abroad during the postwar years, as compared with investments during the nineteenth century.

Even at its present levels, private foreign investment falls short of the needs of developing countries, not only because of its inadequate amount but also because of its form and direction. It has been noted that in the nineteenth century private capital went mainly to the underdeveloped countries of the regions of recent settlement, was mainly indirect in form, and was heavily concentrated in transportation and other public utilities. Today, direct investment prevails over indirect.

The predominance of direct investment *in* the postwar period is in part due to the lack of confidence generated by the defaults and currency devaluation of the 1930s. It is also attributable to changes in the domestic economic conditions in the creditor countries⁽¹⁾ and to the increased needs for some primary products. Direct investment is not necessarily safer than portfolio investment, but it is undertaken by entrepreneurs, "professional risk-bearers, " and it generally offers higher profits. The shift from portfolio to direct investment may be considered as one of the main causes of the increase in public foreign investment, since the latter tends to cover the activities which in the past were financed through portfolio investment.

¹ Chiefly the presence of profitable domestic investment opportunities and the increasing importance of institutional investors, such as banks and insurance companies, whose charters or policies preclude investment in foreign bonds.

Direct foreign investment is heavily concentrated in industries producing primary goods for export. Petroleum production is the most important single industry. Manufacturing accounts for another large part of direct foreign investment. Investment in mining and smelting amounts to about 10 percent of total U.S. direct investment, while public utilities account for about 8 percent.

The unequal distribution of foreign private capital, with respect both to geographical areas and to industries, is to some extent counterbalanced by the effects of public capital. A high proportion of public capital is directed today to the developing countries. The situation was not the same in the first postwar years. Net total exports of public capital by the United States in the five-years period 1946-1950 amounted to \$ 28 billion, out of which less than \$ 2 billion went to developing countries. By 1954, however, the developing countries received more than 50 percent of U.S. government grants and credits; since then their proportion has steadily increased. Total world movements of public capital follow similar lines, and the same trend may be noted in the direction of the world Bank's loans.

Foreign Capital and Economic Development

Of the factors affecting economic growth, the availability of capital is one of the most important. Economic development is achieved through the productive employment of labour and the full utilization of natural resources. Capital is needed for the realization of both these objectives. The productive employment of labour presupposes a raising of the general level of education and the acquisition of technical skills, the formation of a body of capable administrators and entrepreneurs, and provision of adequate tools and machinery, as well as

the raising of the standard of living of the whole population through improved sanitation and medical care. For the exploitation of natural resources, on the other hand, a number of basic facilities are needed, such as roads, railways, and other means of transportation, and the harnessing of electrical power and other forms of energy. In most developing countries today, particular emphasis is laid on the development of manufacturing industry. This emphasis has ample justification from an economic standpoint and also from a political and social point of view. On the other hand, industrialization should not result in the total neglect of other sectors of economy, especially agriculture.

It is evident that none of the objectives just noted can be achieved without substantial outlays of capital. In order to educate masses of people, to build roads, or to import machinery, one has to invest sizable amounts of capital. Of course, capital by itself is not sufficient. Several other factors are necessary as it has already been noted. Furthermore, the absence of certain basic facilities, the existence of "bottlenecks" in many important sectors of the economy, and the reluctance of local entrepreneurs to undertake long-range investments in new and unexplored fields render most developing countries' capacity to absorb capital very low. Thus, sometimes such countries are unable to find any immediate productive use for capital when it is offered. Despite such necessary qualifications, however, it remains true that no development is possible without capital. And today capital is very scarce in the developing countries.

The Scarcity of Domestic Capital

This is valid with regard to domestic as well as to foreign capital. To begin with, the limits of domestic financing in developing countries are very restricted. Authors have spoken in this connection of a "vicious circle of poverty," of a "circular constellation of forces tending to act and react upon one another in such a way as to keep a poor country in a state of poverty."

In conjunction with this basic process, a conglomeration of particular forces affects both the volume and direction of available savings. Consumption is kept

at a relatively high level, not only as a consequence of the low income of the majority of the population, but also because of prevailing habits of "conspicuous consumption", today strengthened by awareness and imitation of the consumption standards prevailing in the advanced countries, The general climate of economic, and sometimes political, insecurity, on the other hand, encourages the non-productive use of whatever capital is available namely, investment in luxury goods or real. estate, and the pursuit of commercial and financial rather than industrial occupations, in view of their higher and faster profits. Therefore, though certain possibilities of improvement de exist, domestic financing of economic development in the developing countries is bound to be limited.

Chapter Two

Non-Commercial Risks

The non-commercial risks that cause losses to foreign investments and may entail the international responsibility of states include, among others, the following; (1) Expropriation; (2) Exchange Control and Restrictions; (3) War, Revolution, or insurrection.

(1) Expropriation

The strongest possible measure against an investor's interests in the taking of his property without compensation or with inadequate compensation. Accordingly, the fear of expropriation constitutes a serious deterrent to private foreign investment in developing countries.

The problem of expropriation is in itself but one aspect of the more general question of the status of private property in the present national and international

social setting. In broad terms, it is correct to state that the right of private property has never been an absolute one, in the sense that it has always been determined, and thereby limited, by law. In the last century, especial emphasis was placed on the rights of property owners rather than on their corresponding obligations. In our times, the emphasis has changed. The limitations imposed on private property by the laws in effect in the various states have greatly increased in scope as well as number. The "social function" of property and the consequent duties of property owners are now stressed.

State action often affects private property indirectly, through measures regulating the exercise of property rights. But direct state action, resulting in the deprivation of individuals of their property, is also possible. The state's right to expropriate the property of its subjects has been well-established for a long time, both in positive law and in legal theory. However, the manner in which this right is exercised and, ultimately, the whole conception of expropriation have changed radically in our days. During the nineteenth century, expropriations were generally rare and their legality depended on certain strict conditions: private property was not to be taken except for a public purpose and against payment of adequate compensation. Since the end of the First World War, the picture has changed completely.

A great number of expropriations have occurred in a great number of states. Today, expropriations are generally associated with social, political and economic reforms, They are large-scale operations and they assume a variety of forms, the most important of which is "nationalization", that is, the taking over by the state of the ownership and operation of whole sectors of the economy . The "classical" theory of international law was largely founded on the nineteenth century Western European conception of private property,

Questions with respect to expropriations arise in international law chiefly when a state expropriates the property of aliens within its territory. It is generally accepted that expropriations in violation of international commitments of the state are internationally unlawful. Normally, a direct consequence of any expropriation

of alien property is the expropriating state's obligation to grant fair compensation to the aliens affected. Whether as a condition for the expropriation's legality or as an obligation arising out of the act of expropriation, the payment of compensation is well-established in modern state practice as well as in theory and judicial practice.

The expropriation of foreign owned property has a special appeal to the peoples of developing countries, which can be explained on several grounds. From a strictly economic point of view, there may be serious profit to a country's economy from the expropriation of foreign holdings. This profit is often bound to be limited, however, in view of the possible reactions of the states affected by such measures and the present conditions in most developing countries. Psychological considerations are also important: the widely felt fear and resentment of the Western powers account in part for the incidence of expropriations of the property of their nationals. Finally, in some of the developing countries, private property never had the "sacrosanct" character it had in nineteenth century England or the United States, while at the same time, the powers of the state in most such countries are, either traditionally or because of their present condition, much wider than they are in Western Countries.

It is easy enough to understand how the fear of expropriation operates as a deterrent to private foreign investment, It may be that its importance is sometimes overemphasized, at least as far as outright expropriation⁽¹⁾ is concerned. Existing surveys certainly do not indicate that businessmen consider expropriation one of the principal deterrents. Whatever its exact rank, the fear of expropriation is a serious obstacle to foreign investment. The existence of an obligation to compensate on the part of the expropriating state may not be

⁽¹⁾ In contradistinction to the so-called "creeping expropriation", that is, the gradual taking over of an enterprise through increasing economic controls, taxation, and other government measures, which may actually be more feared by foreign investors.

always sufficient assurance to the investors, if they fear that such compensation may be inadequate or may be granted only after a long time.

In any legal system in which a line can be drawn between legal and illegal forms of interference by the State with property rights, it is advisable to limit the term "expropriation" to lawful forms of such interference.

Thus, "expropriation" in international law signifies lawful forms of interference with foreign property rights by a territorial sovereign or any of its subordinate organs in accordance with international law.

By way of contrast, the term "confiscation" is limited to any form of such interference amounting to an international tort.

(2) Exchange Control and Restrictions

Foreign exchange control has a long history but, like other mercantilist policies, it had disappeared from the peace time practice of states in the nineteenth and early twentieth centuries. It made its appearance again in the interwar period and has been extensively used since the end of World War Two. In recent years, its dominance has begun to decrease, but it still incontestably constitutes an all-important feature of the international financial scene.

In its typical form, exchange control involves a monopoly of , all foreign exchange by a central agency which handles all imports and exports of foreign currencies and allocates the available foreign exchange,. Exchange restrictions may also involve the use of multiple exchange rates, that is to say, different currency rates for different categories of transactions.

The basic purpose of exchange control is the protection of a country's balance-of-payments position through the limitation of effective demand for foreign exchange and the full utilization of available foreign currency, Its original objective, in the early thirties was the limitation of outward movements of capital

in times of financial crisis. Such control involves restrictions on capital outflows only, without any limitation on current transactions (payments which are not for the purpose of transferring capital.) This form of control is still permitted, under the provisions of the International Monetary Fund Agreement. ⁽¹⁾ However, in view of the continuing national and international financial difficulties, of the necessities of its operation and of its suitability as a tool of economic policy, exchange control soon spread over all international transactions. It also came to serve a variety of subsidiary purposes: protecting currency parities, providing public revenue, or supporting domestic industries.

Foreign exchange control is of particular importance to the developing countries. The fluctuations in the prices of primary products, which are these countries' principal exports, constitute a constant source of balance-of-payments instability. The effort to industrialize places great strains on their balance-of-payments⁽²⁾.

Furthermore, such countries are vulnerable to the adverse effects of movements, particularly in view of the latter's tendency to occur in times of financial difficulties. Besides being needed to protect a country's balance-of-payments position, exchange control constitutes today one of the main tools of the developing countries' economic development policies.

Originally set up by municipal legislation, exchange control led necessarily to the conclusion of numerous bilateral arrangements between, countries ("payment agreements"). Later, certain multilateral convention were also

¹ I.M.F. Agreement, Article VI (3).

² Developing countries need foreign exchange to buy equipment for the establishment of new industries and the raw materials necessary for their operation. Their other expenditures before and during such operation will also be probably used in part, directly or indirectly, for imports.

concluded, the most general and most important of which is that instituting the International Monetary Fund. The Fund's members undertook not to impose exchange restrictions on current transactions, to furnish certain information to the Fund regarding their financial conditions, and to abide by its decisions or suggestions. At the same time, the Fund disposes of reserves which its members may use to weather temporary difficulties.

Despite the development of treaty law on the matter, customary international law seems to have involved no special rules regarding exchange control. The general principle applicable is that a state has exclusive competence to regulate monetary matters. Consequently, the imposition of exchange control and restrictions is in no way unlawful in international law.

The existence, or possibility of future imposition of exchange control constitutes a major obstacle to foreign private investment., Foreign investors have, at best, to submit to various requirements, formalities and delays, whenever they wish to transfer their earnings their capital outside the country of investment. At worst, they may *not* be allowed to take such funds out of the country, or they may be permitted to, take out only a fraction. Exchange control also affects foreign enterprises in that it renders difficult the employment of foreign technical or managerial personnel, in view of the limitations on the transfer of their salaries abroad.

The problem is not an easy one to solve. Under present conditions the developing countries cannot be expected to eliminate all measures of exchange control or to guarantee that none will be imposed in the future. And foreign investors are justified in preferring to invest their capital in stable advanced countries or in industries less affected by exchange control.¹ Any improvement

¹ The presence of exchange restrictions is an additional cause for predominance of foreign investment in primary-goods industries producing for export. Since their receipts are usually in foreign currency, it is easier to have them transferred to the investors' own currency, despite certain possible limitations and other difficulties.

in the investment climate of capital-importing countries will then have to be a compromise between the two extreme positions. The measures to be taken fall mostly within the competence of the governments of the capital-importing countries, which should limit the effects of exchange control on foreign investment even if they do not eliminate it altogether.

Chapter Three

The International Peaceful Dispute Settlement

A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter claim or denial by another. In the broadest sense, an international dispute can be said to exist whenever such a disagreement involves governments, institutions, juristic persons (corporations) or private individuals in different parts of the world. However, the disputes with which the present work is primarily concerned are those in which the parties are two or more of the sovereign states or international organizations.

Article 33 (1) of the United Nations Charter provides that:

“ The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice ”.

The various methods of peaceful settlement are not set in any order of priority.

(1) Negotiation

Negotiation is the principal means of handling disputes threatening the maintenance of international peace and security and all other disputes as well. In fact in practice, negotiation is employed more frequently than all the other methods put together. Often, indeed, negotiation is the only means employed, not just because it is always the first to be tried and is often successful, but also because states may believe its advantages to be so great as to rule out the use of other methods, even in situations where the chances of a negotiated settlement are slight. On the occasions when another method is used, negotiation is not displaced, but directed towards instrumental issues, the terms of reference for an inquiry or conciliation commission, for example, or the arrangements for implementing an arbitral decision.

Thus in one form or another negotiation has a vital part in international dispute settlement. But negotiation is more than a possible means of settling differences, it is also a technique for preventing them from arising, and prevention is always better than cure.

FORMS OF NEGOTIATION: Negotiations between states are usually conducted through "normal diplomatic channels", that is by the respective foreign offices, or by diplomatic representatives, who in the case of complex negotiations may lead delegations including representatives of several interested departments of the governments concerned. As an alternative, if the subject matter is appropriate, negotiations may be carried out by what are termed the "competent authorities" of each party, that is by representatives of the particular ministry or department responsible for the matter in question- between trade departments in the case of a commercial agreement, for example, or defense ministries in negotiations concerning weapons! procurement. Where the competent authorities are subordinate bodies, they may be authorized to take negotiations as far as possible and to refer disagreements to a higher governmental level.

In the case of a recurrent problem or a situation requiring continuous supervision, states may decide to institutionalize negotiation by creating what is termed a mixed or joint commission. If negotiation through established machinery proves unproductive, "summit discussions" between heads of state or foreign ministries may be used in an attempt to break the deadlock.

SUBSTANTIVE ASPECTS OF NEGOTIATION: For a negotiated settlement to be possible, the parties must believe that the benefits of an agreement outweigh the losses. If their interests are diametrically opposed, an arrangement which would require one side to yield all or most of its position is therefore unlikely to be acceptable.

LIMITATIONS OF NEGOTIATION: Negotiation is plainly impossible if the parties to a dispute refuse to have any dealings with each other. Serious disputes sometimes lead the states concerned to sever diplomatic relations, a step that is especially common when force has been used.

Similar consequences flow from the use of non-recognition to deny standing to the other party to a dispute, or as a general mark of disapproval.

Here the problem is that official channels are never established. The consequences are demonstrated by the Arab-Israeli situation where Israel's refusal to acknowledge the P.L.O has prevented direct negotiation.

Although negotiation must be regarded as basic, it may also be impossible, ineffective or inappropriate. As a consequence use of methods described below may be essential if any progress is to be made.

(2) Mediation

When the parties to an international dispute are unable to resolve it by negotiation, the intervention of a third party is a possible means of breaking the impasse and producing an acceptable solution. Such intervention can take a number of different forms.

The third party may simply encourage the disputing states to resume negotiations, or do nothing more than provide them with an additional channel of communication. In these situations he is said to be contributing his "good offices". On the other hand, his job may be to investigate the dispute and to present the parties with a set of proposals for its solution. This form of intervention is called "conciliation". Between good offices and conciliation lies the form of third party activity known as "mediation".

Like good offices, mediation is essentially an adjunct of negotiation, but with the mediator as an active participant, authorized, and indeed expected, to advance his own proposals and to interpret, as well as to transmit, each party's proposals to the other. What distinguishes this kind of assistance from conciliation is that a mediator generally makes his proposals informally and on the basis of information supplied by the parties, rather than his own investigations, although in practice such distinctions tend to be blurred and in a given case it may be difficult to draw the line between mediation and conciliation, or to say exactly when good offices ended and mediation began.

Mediation may be sought by the parties or offered spontaneously by outsiders. Once under way it provides the governments in dispute with the possibility of a solution, but without any antecedent commitment to accept the mediator's suggestions. It therefore has the advantage of allowing them to retain control of the dispute, probably an essential requirement if negotiations are deadlocked on a matter of vital interest. On the other hand, in a face saving compromise is what is needed, it may be politically easier to make the necessary concessions in the course of mediation than in direct negotiation.

If a dispute concerns sensitive issues, the fact that the proceedings can be completely confidential is an advantage in any case. As with other means of dispute settlement, however, not every international dispute is suitable for mediation. The first requirement is a willing mediator. Mediation may be performed by international organizations, by states or by individuals.

Mediation cannot be forced on the parties to an international dispute, but only takes place if they consent. Once mediation has begun, its prospects of success rests on the parties, willingness to make the necessary concessions. The chances of a successful mediation often hinge on its timing. Sometimes mediation may be able to achieve a partial solution. By facilitating the parties' dialogue, providing them with information and suggestions, identifying and exploring their aims and canvassing a range of possible solutions, a mediator can play a vital role in moving them towards agreement. Though success will often be incomplete and failure sometimes inevitable, the mediator's job is to do his best for the parties and trust that they will reciprocate.

(3) Inquiry

When a disagreement between states on some issue of fact, law or policy is serious enough to give rise to an international dispute, their views on the matter in question may be difficult or impossible to reconcile. In such a case either or both of the parties may refuse; to discuss the matter on the ground that their position is "not negotiable". Alternatively, negotiations may drag on for years until one side abandons its claim, or loses patience and attempts to impose a solution by force. It follows that negotiation, even if assisted by good offices or mediation, cannot be regarded as an adequate means of resolving disputes.

With states and with individuals, experience demonstrates that the risks of impasse are greatly reduced when a disinterested third-party is brought into a dispute to provide the parties with an objective assessment. Internationally a number of methods of achieving this have been developed. The method with which this chapter is concerned is called "inquiry".

"Inquiry", as a term of art, is used in two distinct, but related senses. In the broader sense it refers to process that is performed whenever a court or other body endeavors to resolve a disputed issue of fact. Since most international disputes raise such issues, *even* if legal or political questions are also present, it

is clear that inquiry in this operational sense will often be a major component of arbitration, conciliation, action by international organizations and other means of third party settlement. Our present concern is with inquiry in another sense, not as a process which any tribunal may be required to perform, but as a specific institutional arrangement which states many select in preference to arbitration or other techniques, because they desire to have a disputed issue independently investigated. In its institutional sense, then, inquiry refers to a particular type of international tribunal, known as the commission of inquiry and introduced by the 1899 and 1907 Hague Conventions.

Envisaged by the Hague Conventions as an institution for the management of the relatively narrow range of disputes, inquiry has been employed in cases in which "honour" and "essential interests" were involved, for the determination of legal as well as factual issues, and by tribunals whose composition and proceedings more closely resembled courts than commissions of inquiry as originally conceived.

This lateral extension of the commission's role has not, as might have been expected, generated a corresponding increase in business. On the contrary, the four inquiries between 1905 and 1922 were followed by a forty year gap until the Red Crusader Inquiry in 1962, and despite the elaborate provisions of the Bryan Treaties and a General Assembly resolution ⁽¹⁾ urging the use of fact-finding procedures, there has been no case since. These apparently contradictory tendencies tell us a good deal about the settlement of international disputes in the modern world. When sovereign states are concerned, form is subordinate to function. Since international disputes are infinitely various in their circumstances and subject matter, it is not surprising that in their search for acceptable procedures states have adapted the inquiry technique to provide a range of institutional solutions, from the "pure" fact finding to the near arbitration. As a means of dispute settlement the international commission of inquiry can still produce useful results.

¹ Resolution 2329 (XXII) December 18, 1967.

(4) Conciliation

Conciliation has been defined as :

"a method for the settlement disputes of any nature according to which a commission set up by the Parties, either on a permanent basis or on an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and define the terms of a settlement susceptible of being them, or of affording the Parties, with a view to its settlement such aid as they may have requested".⁽¹⁾

The eclectic character of the method is at once apparent. "If mediation is essentially an extension of negotiation, conciliation, puts third party intervention on a formal legal footing and a way comparable, but not identical, to inquiry or arbitration. For the fact-finding exercise that is the essence of inquiry may or may not be an important element in conciliation, while the search for terms "susceptible of being accepted", by the parties, but not binding on term, provides a sharp contrast with arbitration and a reminder of the link between conciliation and mediation.

All conciliation commissions have the same functions: to investigate the dispute and to suggest the terms of possible settlement. What a commission does and how it goes about its work depend in the first place on the instrument setting it up. But much also depends on how the parties choose to present the particular case, and how the members of the commission see their role. Consequently, though the practice of conciliation commissions exhibits many common features, significant differences of approach to the most basic matters are also to be found.

What sort of process is conciliation? Overview is that it is to be regarded as a kind of institutionalized negotiation. The task of the commission is to

¹ The quotation is from Article 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in 1961.

encourage and structure the parties' dialogue, while providing them with whatever assistance may be necessary to bring it to a successful conclusion.

Clearly a commission's views as to the nature of conciliation are likely to exercise an important influence on its work. A commission which sees conciliation as a form of quasi-arbitration, or which is required to perform this function by the parties, will naturally tend to operate more formally than one which sees itself primarily as a forum for negotiation.

A conciliation commission has a duty to examine the nature and background of a dispute and so usually equipped with wide powers of ; investigation. Unlike an inquiry, however, whose whole raison d'être is to illuminate the dispute, a conciliation commission has as its objectives the parties' conciliation. Its investigative powers are thus simply a means to an end. As a result, if it becomes apparent that the exposure of some matter might *make* conciliation more difficult, that line of investigation is unlikely to be pursued.

Many of the disputes handled by conciliation commission have raised questions of law and this is reflected in their membership, which has usually been made up of lawyers, through diplomats and individuals with particular expertise have also been employed.

Whether a commission is engaged upon investigation, or the formulation of proposals and the work of conciliation, the confidentiality of its proceedings is essential to its prospects of success. Disputes invariably raise delicate issues; it is much easier for governments to offer concessions privately, and so secrecy has been the general rule.

In current practice conciliation, though not much used, retains a modest place among the procedures available to states. Like inquiry, the process from which it developed, conciliation offers a procedure adaptable to a variety of needs and demonstrates the advantages to be derived from structured involvement of outsiders in the settlement of international disputes.

(5) Arbitration

The means available for the settlement of international disputes are commonly divided into two groups. Those considered so far : negotiation, mediation, inquiry and conciliation, are termed diplomatic means, because the parties retain control of the dispute and may accept or reject a proposed settlement as they see fit. Arbitration and judicial settlement, on the other hand, are employed when what is wanted is binding decision, usually on the basis of international law, and hence known as legal means of settlement.

Judicial settlement involves the reference of a dispute to the World Court or some other standing tribunal, such as the European Court of Human Rights. Arbitration, in contrast requires the parties themselves to set up the machinery to handle a dispute, or series of disputes, between them.

FORMS OF ARBITRATION

Whether states are drafting a general undertaking to refer future disputes to arbitration, or negotiating a compromise (agreement) for submission of a dispute that has already arisen, the first decide the kind of tribunal to be appointed. One possibility is to set up a commission consisting of equal numbers of national arbitrators, appointed by the parties, and a neutral member (or umpire) to whom cases are referred if the national members cannot agree.

Another form of arbitration derives from the long established practice of referring a dispute to a foreign head of state or government for decision.

If neither a mixed commission nor a sovereign arbitrator are considered appropriate, another possibility is to refer the dispute to a specially qualified individual, normally a jurist, for decision. The 1899 Hague Convention established a list of arbitrators, styled, inappropriately, "the Permanent Court of Arbitration". and created a bureau with premises, library and staff, which still exists to facilitate arbitration and other forms of peaceful settlement. Provided a suitable individual can be found, using a single arbitrator can be quicker and less

expensive than convening a larger body, though the demands on the person chosen are correspondingly increased.

The form of tribunal most commonly found in modern treaty practice is the collegiate body consisting of uneven number of persons, generally three or five, with the power to decide the case by majority vote.

The Selection of Arbitrators

The membership of a collegiate tribunal. like the appointment of a single arbitrator, is a matter for negotiation between the parties. with each side generally appointing one or more "national" arbitrators and the remaining "neutral" members being agreed between them. If the parties can settle the composition of the tribunal at an early stage it will be possible to name the members in the arbitration agreement.

For obvious reasons the result of a collegiate arbitration often turns on the decision of the neutral member or members. Deciding who they shall be is therefore extremely important to the governments concerned, which may sometimes find it difficult to agree on suitable candidates. To take account of this. arbitration treaties often provide that in the event of disagreement the neutral members may be appointed by the President of the International Court or some other disinterested party.

Terms of Reference

Just as the appointment of arbitrators is in the hands of the parties, so it is for them to determine how the proceedings are to be conducted and what question or questions the arbitrator will be asked. The 1899 and 1907 Hague Conventions laid down rules Which have provided the procedural framework for many subsequent arbitrations; more recently these have been elaborated through the work of the International Law Commission, the International Law

Association and other bodies. Ultimately, however, it is for the parties to agree the procedural arrangements and so here, as elsewhere, they can exercise a high degree of control over the handling of their dispute.

The definition of the issue is important because it establishes the scope of the arbitrator's jurisdiction. By defining the issue broadly the parties can use arbitration to remove a major obstacle to good relations. Conversely (and more commonly) by defining the issue narrowly they can prevent an investigation of wider questions which might create more problems than it would resolve, or exclude from arbitration particular issues for which negotiation or some other means of settlement is considered more appropriate. If the compromise fails to define the issue with sufficient particularity, damaging disputes over exactly what has been agreed are likely to arise.

An arbitrator only has authority to answer the questions referred to him and if he exceeds his jurisdiction his award can be challenged as a nullity.

Basis of Decision

No less important than the definition of the issue is the parties' directive to the tribunal as to the criteria it shall apply in making its decision. Frequently the tribunal's instructions are to decide the matter in accordance with international law.

If the parties are agreed that a solution in accordance with international law would not be appropriate, they can instruct the arbitrator to decide the dispute on some other basis.

The parties' ability to specify the law the arbitrator is to apply also enables them to employ municipal law, either alone, or in combination with some other system. Reference to municipal law is, of course, particularly common in commercial arbitration, especially in arbitration agreements between a state and an entity other than a state.

If the parties wish to increase the arbitrator's freedom still further they can authorize him to take into account what is fair and reasonable as well as the rules of international or municipal law.

Effects of the Award

An arbitral award is binding, but not necessarily final. For it may be open to the parties to take further proceedings to interest, revise, rectify, appeal from, or nullify the decision. Whether Such steps are permissible, and if so, whether the new case can be heard the original tribunal, or must be brought before another body, like the International Court, depends partly on general international law, but mainly on the terms of the arbitration agreement.

An arbitrator clearly has no jurisdiction to give an award if the instrument from which he claims to derive his authority is invalid, not yet in force, or has terminated.

Cases in which the legality of the arbitrator's appointment is in question are rather rare. More commonly, the issue is whether an arbitrator has exceeded his authority by failing to follow his instructions. A clear case of excess of jurisdiction will arise if an arbitrator fails to obey the parties' directive as to the law to be applied or if the award deals with issues other than those referred for decision.

An award will also be a nullity if in its handling of the case the tribunal has transgressed a basic rule of judicial procedure. The principle that no one may be a judge in his own cause prohibits the members of all arbitral tribunal from identifying with, or taking instructions from, either of the parties.

The principle that both sides must be given a fair opportunity to present their case is likewise of fundamental importance. Failure to give reasons for a decision can also be a ground for nullifying an award. Other grounds for nullifying an award are fraud, which includes deceit in the presentation of a case to the tribunal or corruption of a member of it and "essential error ".

Arbitration provides the parties to a dispute with the opportunity to obtain a decision from a judge or judges of their own choice . This is important because if

governments are to be persuaded to refer disputes to third parties they must have confidence in those who are to give the decision. An arbitral tribunal also has the subject matter of the dispute and the criteria for its decision laid down by the parties. Thus another advantage of arbitration is that it can be used to produce a solution to a selected problem and on any agreed basis. Finally arbitration, unlike inquiry and conciliation, results in a decision which is binding. Consequently, provided that no problems of interpretation, nullity, etc., arise, an arbitral award should dispose of the dispute.

(6) The World Court

Judicial settlement involves the reference of disputes to permanent tribunals for a legally binding decision. It developed from arbitration, which accounts for the close similarity between the two, and for most of the present century has been available through a number of courts of general or specialized jurisdiction. The term " World Court" embraces two courts, the Permanent Court of International Justice(P.C.I.J.), set up as part of the 1919 peace settlement and its successor the International Court of Justice (I.C.J.), found in 1945 as the principal judicial organ of the United Nations.

Jurisdiction

The Court's powers to decide disputes are defined in its statute and are known as its contentious jurisdiction. According to the statute only states may be parties to contentious proceedings and the Court's authority in such cases depends on the consent of the states concerned. The principle of concensuality is as fundamental to adjudication by the Court as to arbitration and means that unless all the states involved in a particular dispute have given their consent there is no jurisdiction. to give a decision.

A state's consent can be given in a number of different ways. Consent can be given before the dispute arises by means of a compromissory clause in a treaty, or a declaration under Article 36 (2) of the court's statute. Alternatively,

consent can be given after a dispute has arisen by means of a special agreement between the parties, or in response to the unilateral reference of a dispute to the Court. Once a legal act indicating consent has been performed jurisdiction may be established, even if the state is unwilling to litigate when an actual case arises. There is thus no contradiction between the consensual basis of the Court's jurisdiction and the fact that the Court is regularly called upon to consider and frequently rejects as ill-founded objections to its jurisdiction from unwilling respondents.

In addition to its contentious jurisdiction the statute entitles the Court to exercise two further kinds of jurisdiction: an incidental jurisdiction and an advisory jurisdiction. By virtue of its incidental jurisdiction the Court has the power, *inter alia*, to indicate interim measures of protection, to allow intervention in a case by third parties and to interpret a previous judgment. Because these powers are conferred by the statute, their exercise by the Court does not depend on the consent of states.

The purpose of the Court's advisory jurisdiction is to enable it to give legal opinions at the request of international organizations. The details and functioning of the advisory jurisdiction are outside our present scope.

Membership of the Court

The court is composed of 15 judges, elected for a nine year term by the Security Council and General Assembly of the United Nations. At the end of his term a judge is eligible to stand for re-election and elections are staggered in such a way that five judges - one third of the Court - are elected every three years. According to the statute (Article 9) the election of judges is to be carried out in such a way that: "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured." The importance of this requirement can hardly be overemphasized. Unless the distribution of seats on the Court is seen to reflect the balance and

diversity of the international community as a whole, it is likely that states which consider their ideas to be inadequately represented will not regard the Court as an appropriate body to handle their legal disputes. Moreover, in such circumstances the Courts authority, perhaps even its competence, to interpret and apply law for the world must be considered doubtful. Article 9, then, is directly concerned with the political under-pinnings of adjudication and international law.

As permanent members of the Security, Council, France, the United Kingdom, the United States, the Soviet Union and China are regarded as entitled to have a judge of their nationality on the Court. It now seems also to be agreed that the 10 remaining seats on the Court should follow the pattern of "equitable geographical distribution" agreed for the Security Council after its enlargement in 1965.

The members of the Court must be demonstrably competent as individuals to decide the cases which come before them. Article 2 of the statute requires that the judges shall be "persons of high moral character, who possess the qualification required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."

The Court's Decision

Proving a case at the international level is primarily a matter of finding and presenting suitable documentary evidence. This material, which is relevant to both fact and law, includes treaty texts, official records of international organizations and national parliaments, diplomatic correspondence, archive material, maps, films, photographs and affidavits. Although the facility is little used, documentary evidence may be augmented by the oral testimony of witnesses and experts.

The statute and Rules contain a number of provisions designed to enable the Court to supplement the parties' evidence with its own investigations.

The sources of law which the Court is to utilize are set out in Article 38 (1) of the statute. In the work of the Court, as in that of municipal courts, the essential problem is to reconcile continuity with innovation. Internationally, however, the problem is complicated by three factors: the lack of a single legal culture, the relatively underdeveloped state of international law and the advent of a period of unprecedented social change.

The decisions of international tribunals, it has been said, reflect “ the strong inducements to supplement and remedy the deficiencies of an imperfect system of law”, but also “the requirement of caution and restraint called, for by the sovereignty of States”.

The Court's obligation to apply the law has not in practice prevented it from broadening the basis of its decisions to take account of cultural diversity, from adapting the law to special cases and from taking account of social change.

The Effects of Judgments

Decisions in contentious cases, are legally binding. Does it follow that they are effective in settling disputes?

The first point to notice is that litigation can serve different functions. So when states refer a case to the Court they may not be seeking a definitive settlement but merely a decision which will narrow the differences between them, or in some other way move the dispute nearer to resolution. In the “Ambatielos case ”, for example, the sole question was whether the United Kingdom was under an obligation to refer a commercial dispute with Greece to arbitration. The Court decided that it was and arbitration was then attempted.

Of course in many cases states go to Court with the aim of securing a definitive settlement. Provided both parties are willing litigants - and this is an

important qualification - the resulting decision will usually be all that is required to end the dispute.

Suppose one of the states involved in the dispute is an unwilling party to the litigation? It has already been seen that unwillingness does not prevent the Court from deciding a case provided there is consent. Under Article 53 of the statute even the refusal of a party to appear is no obstacle, provided the Court has jurisdiction and is satisfied that the applicant's case is well-founded in fact and in law. Now a state may be a most unwilling litigant *and still carry on a decision*.

Recent- cases in which a decision against an unwilling state failed to settle the dispute include the "Diplomatic Staff in Tehran case" (1980). In this case an attempt by the United States to secure enforcement of the judgment through the Security Council, as provided in Article 94 (2) of the charter, could be blocked by a Soviet veto. In this case, the respondent refused to appear and the Court relied on Article 53.

The fact that willingness is often no less important than consent in achieving a judicial settlement does not, as is sometimes suggested, make recourse to the Court pointless. Apart from the obvious consideration that an unwilling respondent may have a change of heart, a state which is ready to litigate can use this fact to its advantage *in a number of ways*. When both sides have clearly accepted the Court's jurisdiction by treaty or in some other way the initiation of litigation indicates that the applicant takes such arrangements seriously, as well as demonstrating its support for the principle that disputes about legal rights ought to be settled by adjudication. Because litigation is a way of depoliticising a dispute, a state which goes to the Court is also signaling its desire to reduce tension and pursue a peaceful settlement. This can be extremely important if feelings are running high, or both sides are engaged in war-like preparations. Finally - and here "the Diplomatic Staff in Tehran case" is very much in point - a state which takes its case to the Court and wins, gains vindication for its position from an authoritative and disinterested source, which may be useful in securing the support of neutral opinion and consolidating that of allies.

The Significance of the Court

In the 45 years or so in which it has been in existence the International Court has decided an average of about one contentious case a year. Bearing in mind that a number of these judgments were given at different stages of a single case, while others were decisions to dismiss a case on jurisdictional grounds, it is evident that only a handful of disputes have actually been decided by the Court. Adding those advisory opinions which in substance concerned disputes between states does little to change the picture - of a situation in which litigation is a wholly exceptional act and the vast majority of disputes are handled by other means.

There are, to be sure, indications that the Court may be more significant than the record of its activity suggests. A large number of treaties provide for the reference of disputes to the Court and the number of states with declarations of some kind under the optional clause is approaching the half-century. Commitments of this kind tend to discourage disputes and so this "background" role of the Court should not be overlooked. It is nevertheless clear that even when this *is* taken into account, by comparison with domestic courts, international courts and tribunals occupy a relatively insignificant position.

Part Two

The Minimum Standard of International Customary

Law Applicable to Foreign Property

Chapter 1

The Minimum Standard of Substantive Protection of Foreign Property

(1) The State's Right to take Foreign Property

(A) Property Rights of Aliens

It is an established principle of international law that every state has the right to regulate the conditions upon which property within its territory shall be based. Any question in relation to property right, then, should be found in the "lex situs", in the territorial legal system. Thus, the Permanent Court of International Justice in "the Panevezys-scudutiskis Railway case" , held:

"In principle, the property and the contractual rights of individuals depend in every state on the municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals. "

Aliens, once admitted lawfully to a state, are entitled to certain minimum rights necessary to the enjoyment of ordinary private life. International law does not allow any state to deprive aliens of rights of contract, of acquisition of personal property, or marriage and family rights. The Universal Declaration of Human Rights (1948) in Article XVII explicitly recognizes that " everyone has the right to own property" and that "no one shall be arbitrarily deprived of his property. (¹)

¹ (1) U.N., Human Rights : A compilation of International Instruments of the United Nations (A/CONF.32/4) (New York, 1967), P.2 .

Apart from these rights, a state may place aliens under certain disabilities or measures of restriction of varying severity, in order to preserve its national security or "ordre public". Some states prohibit aliens from holding or inheriting real property, or accords them these rights only *upon* reciprocity. Many states prohibit aliens from acquiring certain categories of moveable property, such as aircraft and ships. With the exception of those entitled to diplomatic immunity, aliens may not claim exemption from ordinary taxes or customs charges. A state has the right to tax real property within its jurisdiction owned by aliens, as well as bonds and other securities held by them.

PROTECTION OF ACQUIRED RIGHTS: This brings us to the doctrinal controversy as to whether international law requires a state to respect the validity of acquired rights of aliens. The concept of acquired or vested rights deals specifically with the sanctity of property rights obtained under a particular system of law which is threatened by a change of the "lex situs". Once property rights have been acquired under the existing law, they cannot be arbitrarily destroyed by a later change of that legal system without obligations to make adequate reparation.

The United Nations International Law Commission has dealt with this question and came to the conclusion that the respect for acquired rights:

“constitutes one of the principles of international law governing the treatment of aliens.”⁽¹⁾

This view is well supported by many authorities and is recognized and applied by international tribunals.

Lord Mc Nair considers the principle of respect for acquired rights:

¹ U.N. ,Yearbook of the International Commission 1959, Vol.II(ACN.41 SER.A/ADD.1) (New York) , 1960, p.3.

“Constitutes one of the general *principles* of law recognized by civilized nations. “⁽¹⁾

Wortley observed:

“ It is not the right which the *lex situs* gives that is compensated, but, it is submitted, the right which, being lawfully acquired.. was, until the nationalization, protected by the *lex situs*.”⁽²⁾

In case involving the question of state succession (German Settlers in Poland Case), the Permanent Cour of International Justice in an advisory opinion declared that:

“private rights acquired under existing laws do not cease on a change of sovereignty. “⁽³⁾

Recently, however, some writers have on occasions voiced their Objections against the principle of respect for acquired rights. One of the most critics is Friedman, in whose view the concept of acquired rights is not only:

“ obscure, ambiguous and indefinable, " but also " finds no support in judicial decisions ... and cannot, therefore, be raised to the dignity of a principle of international law.”⁽⁴⁾

Nevertheless, despite these various criticisms and objections, the principle of respect for acquired rights, as a principle of general character, is of value from the technical and practical *point of v*

¹ Lord Mc Nair, “The General Principles of Lay; *Recognized* by Civilized Nations”, The British year book of International Law, Vol.XXXIII (1957) ,p.16

² B.A. Wortley, Expropriation in Public International Law, Cambridge: The_University Press, 1959,p.125.

³ P.C.T.J., Series B, No.6, p.36.

⁴ S.Friedman, Expropriation in International Law, London, Stevens and Sons Limited, 1953, p.126 .

NATIONALIZATION UNDER INTERNATIONAL LAW ; Since the end of the Second World War many states have enacted nationalization measures, as many have espoused the claims of their nationals, for compensation for nationalization of their property abroad. Many writers have been concerned with the effect of such measures on both municipal and international levels.

The fundamental ideas of nationalization are, according to the Communist countries, fairly clearly defined. They compromise the utilization of all or part of the means of production in the interests of society and not of private individuals. To attain this aim it is necessary for the means of production, if in private hands, to become the property of the community.

Nationalization, in the Communist countries, is quite different from confiscation or requisition because it involves basic economic, political, and philosophic principles concerning the use of property.

Hence, it is usually authorized by constitutional provisions or organic laws formulated in broad terms rather than by mere executive decisions.

At the other extreme we find the limited or ad hoc nationalizations effected in France and Great Britain. They are distinguished by a respect for private enterprise and private property, and do not seek to limit them in a general way. They are not the results of a socialist economy but represent an effort to improve the liberal economy.

(B) The Legal Bases of the State's Right to Take Foreign Property

This right of a state to nationalize foreign property is an attribute of its sovereignty in the sense of the supreme power which it possesses in relation to all persons and things within its territorial jurisdiction.