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NOTES

BRITISH TREATIES FOR THE PROMOTION AND PROTECTION OF INVESTMENTS*

By F. A. MANN[1]

Treaties for the promotion and protection of investments have for more than twenty years been a feature of international practice. Since 1959 the Federal Republic of Germany has concluded more than fifty such Agreements.[2] Switzerland started in 1961 and has concluded about thirty.[3] Between 1972 and 1978 France concluded sixteen such treaties.[4] In 1977 the International Chamber of Commerce counted altogether 124[5] and since then the number has increased.

Britain's first Agreement now in force was concluded in 1975 with Egypt,[6] the latest with Paraguay;[7] in addition there are Agreements with Singapore,[8] Korea,[9] Romania,[10] Indonesia,[11] Thailand,[12] Jordan,[13] Sri Lanka,[14] Senegal,[15] Bangladesh,[16] the Philippines,[17] Lesotho,[18] Papua New Guinea[19] and Malaysia.[20]

In essence all the treaties are very similar in nature, content and structure. This is not surprising, as they are derived from drafts prepared in 1959 by a private group and connected with the names of Abs/Shawcross[21] and in 1967 by the Organization for Economic Co-operation and Development.[22] Nevertheless, in the course of time a number of improvements and revisions have been introduced into the texts. Although these treaties do not seem to have given rise to much difficulty or contention in practice, it may be helpful, not to write a commentary upon or to embark upon an exhaustive analysis of the fifteen British treaties, but to discuss some specific points which have occurred to one reader.

In order to facilitate the understanding of what follows, the text of the latest Agreement which at the moment of writing is publicly available, i.e. the Agreement with the Philippines, will be found in the Annexe to this paper and taken as a basis for the following discussion.

It will be seen that these Agreements proceed from the principle of reciprocity: they apply to investments by the United Kingdom in the Philippines no less than to investments by the Philippines in the United Kingdom. In practice, of course, the latter type will be extremely rare and it is probably no exaggeration to suggest that reciprocity is to a large extent a matter of prestige rather than reality. What

* © Dr. F. A. Mann, 1982.

[1] C.B.E., F.B.A.; Honorary Professor of Law in the University of Bonn; Solicitor of the Supreme Court in London; Member of the Institut de Droit International.

[2] Alenfeld, *Die Investitionsförderungsverträge der Bundesrepublik Deutschland* (1971), lists thirty-eight, but since then many more have been concluded.

[3] Caflisch, *Annuaire Suisse de droit international*, 1980, p. 175 n. 55.

[4] Juillard, *Clunet*, 106 (1979), p. 274.

[5] See the leaflet *Bilateral Treaties for International Investment* (1977).

[6] Cmnd. 6141, 6638. See also Cmnd. 6140. An early Agreement of 1963 with Cameroon (Cmnd. 2133) entered into force on signature, but is no longer in force.

[7] Cmnd. 8329. [8] Cmnd. 6300, 7183. [9] Cmnd. 6510. [10] Cmnd. 6500, 6722.

[11] Cmnd. 6858. [12] Cmnd. 7732. [13] Cmnd. 7945. [14] Cmnd. 7984, 8186.

[15] Cmnd. 8079. The Agreement is not, however, in force. [16] Cmnd. 8013.

[17] Cmnd. 8148. [18] Cmnd. 8246. [19] Cmnd. 8307, 8506. [20] Cmnd. 8269.

[21] See on this, for instance, Schwarzenberger, *Foreign Investment and International Law* (1969), p. 109. [22] See Schwarzenberger, op. cit. (previous note), p. 153.

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imarily intended is the promotion and protection of British investments in the ppines. It should also be pointed out that the structure and even the wording ese Agreements is almost identical. The first two Articles are concerned with iitions. The following Articles III to VIII contain the substantive obliga- ;. Article IX provides for consultation, but this is hardly more than a nominal . Articles X and XI deal with the settlement of disputes between the investor the host country and between the Contracting Parties respectively. Finally, :le XII regulates the coming into force and the duration of the Agreement. noteworthy that the texts in both languages are equally authentic; in the imstances this may be described as a remarkable concession to the principle of rocity. In practice it is likely to be of minor importance, for if the English text ides the standard the language would seem to be simple and reasonably clear, at disputes about interpretation will probably be infrequent. On the other the Agreements include many terms which involve a measure of evaluation of judgment and may give rise to disputes about degree rather than termino- This applies, for instance, to the overriding obligation of 'fair and equitable ment' or to limitations in Article VII which entitle a Party 'equitably and in faith' to impose protective measures or to transfer 'large amounts' by way of onable instalments'. These are terms which by no means are withdrawn , or incapable of, judicial appreciation, but they undoubtedly leave to the : a considerable, albeit controlled, freedom of assessment.

I. Definitions

It may be stated at the outset that one of the principal changes that has taken : relates to the definitions. That the early Agreements defined 'returns' rather 'earnings', occurring in the Agreement with the Philippines, is probably of r significance. The definition of a United Kingdom company is much more rkable. Originally it meant a corporation, firm or association 'incorporated or tituted under the law in force in any part of the United Kingdom or in any tory to which this Agreement is extended'.[1] The Agreement with the Philip- s speaks of 'a corporation, partnership or other association, incorporated or tituted and actually doing business under the laws in force in any part of the tory of that Contracting Party wherein a place of effective management is ted'.[2] This means that the United Kingdom subsidiary of an American pany comes within the definition only if it actually does business in the United gdom and has there a place where it is effectively managed. The American nt should not find it too difficult to bring its British subsidiary within these itions before it makes an investment in the Philippines.

wo types of company are not in any case covered by the definition. A Philip- company cannot claim the protection of the Agreement even if all the shares wned by a British national. Nor can a holding company incorporated, say, in embourg do so. In both cases such treatment as Barcelona Traction suffered pain and as Belgium attempted to attack would prima facie remain immune. re the investment is made by an international consortium, it will have to be ully considered in which country the head company should be constituted.

The definition of the term 'investment' seems to have remained the same. cludes, in particular, property and property rights, shares, claims under

[1] Art. I of the Agreement with Egypt. [2] Art. I.

a contract, intellectual property and goodwill as well as concessions. Where it is intended to purchase a factory building in Manila, it may be preferable to do so in the name of a British rather than a Philippine company, for in the former case the company is probably protected against unfair taxation of property, while in the latter case it is by no means certain whether the reduced value of the shares would give rise to any remedy under the Agreement. On the other hand, the protection would seem to extend to activities which are not necessarily envisaged by the term 'investment'. If a British bank or a British firm of management consultants opens a branch in Manila this would perhaps not generally be described as an invest- ment, yet the branch and its assets clearly come within the definition.

More difficult questions arise in the case of lending. A loan of money is no less protected than a loan of cranes for the purpose of building a skyscraper. But can lending a picture for exhibition or lending an aeroplane for temporary use fairly be described as an 'investment'? It is submitted that in such cases it is necessary to look to the permanency of the purpose of the transaction; its temporary character would seem to require a negative answer.

Similar difficulties may arise in the event of the sale of goods. If the goods are destined for consumption, such as oil or wheat, no 'investment' occurs. But where a very expensive machine or ship is supplied, this may well constitute an 'investment'.

In many cases the problem will be solved by the fact that the treaty applies only to investments 'which are qualified for registration and are duly registered by the appropriate government agency of the receiving Contracting Party, if so required by its laws'. Where, however, there are no laws requiring registration, it may become necessary to find an answer to the problems referred to.

II. Substantive Law

3. The overriding obligation is that investments 'shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security'.[1] This is underlined by the further provision that investors shall not be subjected to 'unreasonable measures'.[2] Although these are very familiar terms, they have hardly ever been judicially considered. Thus, while it may be suggested that arbitrary, discriminatory or abusive treatment is contrary to customary inter- national law, unfair and inequitable treatment is a much wider conception which may readily include such administrative measures in the field of taxation, licences and so forth, as are not plainly illegal in the accepted sense of international law. In particular it is submitted that the right to fair and equitable treatment goes much further than the right to most-favoured-nation and to national treatment, even if in the latter case the foreigner's rights are greatly extended and underlined by the duty not to subject the foreigner to 'unreasonable measures'.[3] Thus if a British national erects a factory to produce cement in the Philippines and the government introduces a maximum price order, a tribunal may be able and com- pelled to investigate whether the prices so fixed are fair, equitable or reasonable. So general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that other provisions of the Agreements affording substantive protection are no more than examples or specific instances of this overriding duty.

[1] Art. III of the Agreement with the Philippines. [2] Art. IV (2). [3] Art. IV.

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:t has been suggested that the term 'fair and equitable' is expressive of, or
ɔpts what has for many years been known as, the minimum standard. Thus
1979 the Swiss Foreign Office stated:[1]

)n se réfère ainsi au principe classique du droit des gens selon lequel les États doivent
ttre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du 'standard
ıimum' international c'est-à-dire leur accorder un minimum de droits personnels,
céduraux et économiques.

s submitted that nothing is gained by introducing the conception of a minimum
ndard and, more than this, it is positively misleading to introduce it. The terms
r and equitable treatment' envisage conduct which goes far beyond the
nimum standard and afford protection to a greater extent and according to
ıuch more objective standard than any previously employed form of words. A
ɔunal would not be concerned with a minimum, maximum or average standard.
vill have to decide whether in all the circumstances the conduct in issue is fair
l equitable or unfair and inequitable. No standard defined by other words is
ɛly to be material. The terms are to be understood and applied independently
l autonomously.

n any event it seems clear that the provision of the Agreement would compel
ibunal to condemn such action as occurred in the *Barcelona Traction* case.[2]
ɔne adapts the facts of that case to the situation under the Agreement with the
ilippines, the position is as follows: a United Kingdom company owns all the
res of a Philippine company and deposits such shares with a London trustee as
urity for bonds issued by it. The Philippine company erects electricity works in
country. It is very prosperous, but does not obtain permission to remit
idends to its British parent company, so that the latter's bonds cannot be
viced. A Philippine financier, without proper or indeed any notice to the
ɔtor, obtains an order from an obscure court in the Philippines declaring the
glish parent company bankrupt. Trustees in bankruptcy are appointed and
e 'duplicate' share certificates of the Philippine subsidiary printed. They then
these duplicated certificates and thus the whole of the English company's
estment. Whether or no such treatment would be lawful under the law of the
ilippines, it should not be open to doubt that it is neither fair nor equitable nor
sonable and would, therefore, attract the liability of the Philippines.[3]

.. As has just been mentioned, the Agreements include a most-favoured-
ion as well as an extended national treatment clause. These are familiar clauses
ich in the present context do not need any comment, except that the former has
n so defined as not to include any existing or future customs union, common
rket, free-trade area or regional economic organization or anything relating to
ation. In view of the very wide terms considered in the preceding paragraphs

Annuaire Suisse de droit international, 1980, p. 178, with references to literature. It may be that it
the intention of the O.E.C.D. to adopt the so-called minimum standard. The express terms,
ever, must govern and go far beyond it.

I.C.J. Reports 1970, p. 3, on which see Mann, *American Journal of International Law*, 67
3), p. 259.

After more than ten years it appears even more remarkable than earlier that the facts summarized
ıe text were defended by eminent Spanish lawyers instructed by the Franco regime as lawful under
nish and international law, that no independent tribunal has ever pronounced upon them and that
-Franco Spain, which purports to adhere to democracy, participates in the Council of Europe
its human rights institutions and intends to join the E.E.C., has done nothing to undo a grave
stice.

it is unlikely that the two well-known standards thus guaranteed will add anything substantial. An example will perhaps help: there are certain countries in which the State accepts liability for wrongful acts of its servants only in cases in which the victim is a national of the State. There are also countries in which certain fundamental rights guaranteed by the constitution can be asserted only by nationals. If a foreigner is entitled to national treatment he must in both cases have the same rights as nationals. But suppose he were entitled merely to fair and equitable or reasonable treatment. Would the result not be the same? Would it not be unfair, inequitable or unreasonable to deny to him the rights which a national enjoys? Nobody will object to most-favoured-nation and national treatment rights being expressly assured. But the cases in which these rights will have independent significance are probably rare.

5. In the normal course of events an investor expects to be able to repatriate his capital and his profits, if any. The treaties invariably guarantee this right.[1] They usually speak of 'the free transfer' of capital and profits. This probably means: free from restrictions such as exchange control restrictions, taxes on transfer or charges for the grant of permissions. No doubt it is intended to emphasize this freedom by the further provision that the rate of exchange applicable to the transfer shall be that 'prevailing at the time of remittance'. This means that the investor, as he should do, incurs the risk of the host country's currency depreciating between the date of investment and the date of repatriation. Yet there remains a point of considerable obscurity in that in many countries multiple rates of exchange are in force. The differences of commercial value are frequently considerable. The treaties do not provide for the use of the 'official' or any other rate of exchange. The point may lead to difficulties and disputes and it is therefore desirable to regulate it, if possible, in the specific agreements which the investor concludes with the host country. But where the investor introduces money at the official rate it would seem fair and equitable that he should be able to retransfer at the same rate, and here again the duty which has been described as overriding may play a role.

In many treaties the right to 'the free transfer' is expressed to be subject to the host country's power 'to impose equitably and in good faith such measures as may be necessary to safeguard the integrity and independence of its currency, its external financial position and balance of payments'. This is a provision in connection with which the obligation to act fairly, equitably and reasonably may become specially significant. It may lead to the right to free transfer being recognized notwithstanding the absence of bad faith. In other words, it is submitted that good faith is presumed here as elsewhere, and that bad faith need not be proved by the investor if he can establish a breach of the overriding objective duty of acting fairly, equitably and reasonably. If the authorities of the host country are found to be acting unfairly, inequitably or unreasonably they are in bad faith. The latter phrase at first sight carries a subjective connotation, and there may be occasions in the law when this is the correct interpretation. But on account of the primary duties imposed on the host country this, it is submitted, is not one of them.

6. The treaties usually contain a further provision guaranteeing the success of the investment: each party 'shall observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment'.[2]

[1] Art. VII of the Agreement with the Philippines.
[2] Art. III (3) of the Agreement with the Philippines.

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This is a provision of particular importance in that it protects the investor ;ainst any interference with his contractual rights, whether it results from a mere ·each of contract or a legislative or administrative act, and independently of the ıestion whether or no such interference amounts to expropriation. The variation the terms of a contract or licence by legislative measures, the termination of the ›ntract or the failure to perform any of its terms, for instance, by non-payment, e dissolution of the local company with which the investor may have contracted ıd the transfer of its assets (with or without the liabilities)—these and similar ts the treaties render wrongful.

The provision, it is submitted, does not amount to an unqualified guarantee, ıt only applies where a party fails to 'observe any obligation'. Where it is not ıch failure, but an extraneous event, in particular *force majeure*, that is put rward, the provision does not apply.

Furthermore (and this is a very serious limitation) the provision only covers an ›ligation arising from a particular commitment either of the Contracting Parties ay have entered into. If the investor contracts with a local company, the pro- sion does not apply to its obligations. What is assumed is that the State has ıtered into a particular commitment which imposes obligations. Such obliga- ›ns may arise from contract with the State or from the terms of the licence anted by it. It may be express or implied, it may be in writing or oral. But it must clearly ascertainable as an obligation of the State itself arising from its own mmitments. No difficulty occurs where the contract is made with the State elf—and the term may fairly be said to comprise its instrumentalities, even if ey are separate legal entities, as well as companies of which it is the sole share- ılder. But where the contract is made with a private person, then the provision ıly applies if and in so far as an obligation of the State arising from its own par- :ular commitment (as opposed to existing general legislation) may be discerned. hus if the law of the land provides that the State is liable for the torts of its rvants this is not an 'obligation arising from a particular commitment' the State ay have entered into and may be changed, though in certain circumstances this ay become subject to the provisions about expropriation.

7. These last-mentioned provisions are in all treaties contained in what may be lled a standard clause of a most comprehensive character.[1] Investments 'shall ›t be subject to expropriation or nationalization or any measure equivalent ereto, except for public use, in the public interest or in the interest of national fence and upon payment of just compensation'.

The first question is whether this provision invalidates expropriation altogether permits it on the terms defined by the treaty or at least invalidates it in the event the terms not being observed. It is submitted that the last-mentioned terpretation is the correct one. It accords with customary international law in neral, for the taking of property for private use without the payment of mpensation is illegal. Moreover, the breach of an express treaty obligation itself nstitutes an illegal act, i.e. an act without legal validity.[2]

It is noteworthy that the conception of expropriation comprises 'nationaliza- ›ns'. In the past it has often been suggested that far-reaching social changes such nationalizations usually intend to achieve are on a different level and should not ·e rise to any right to compensation at all or should lead to compensation on a

[1] Art. V of the Agreement with the Philippines.

[2] This was submitted in this *Year Book*, 48 (1976–7), at p. 47.

lower scale defined as 'reasonable', 'sufficient' or in some similar fashion; the numerous treaties concluded after the Second World War with Eastern countries and providing for compensation at about 10 per cent have sometimes been put forward as models. The treaties now under discussion give the lie to any such theory: they require the payment of 'just compensation' for both expropriations and nationalizations and thus recognize a standard which is entirely in accordance with traditional thought. Moreover the rules applicable to expropriation and nationalization extend to 'any measure equivalent' thereto, i.e. any act depriving the investor of his property or proprietary rights and enriching the State, even if no property is transferred to it. Municipal law supplies innumerable examples of acts which may be said to be an expropriation or at least a measure equivalent to it, the latter expression being so comprehensive as to involve anything that prejudices the investor and benefits the State, whether directly or indirectly.[1]

In view of the difficulties which have arisen in the past, the treaties expressly define the 'just compensation' which they contemplate: it shall amount to the market value or, in its absence, the investor's actual loss, it shall be paid 'without undue delay', shall be effectively realizable and freely transferable in the manner indicated in paragraph 5 above and subject to prompt judicial or independent review. It is clear, therefore, that the mere insertion of recognition of a right to compensation in the expropriating legislation is insufficient to render the expropriation lawful. Such 'paper recognition' has occurred in practically all expropriations which have happened in the last thirty years or so but, as the French Cour de Cassation has so rightly said,[2]

> semblables dispositions de pur principe, qui, après dépossession immédiate, laissent le soin à l'Administration de fixer, dans un délai indéterminé et discrétionnairement, une indemnité en indiquant seulement le montant qu'elle ne pourra pas dépasser, sont contraires à l'ordre public français.

'Market value', it is true, will usually have to be assessed in terms of the host country's currency and this may impose upon the investor the risk of a deprecia- tion of that country's currency. But this is not necessarily so. Thus dollars are the currency of the international oil industry and in certain cases the market value will therefore have to be assessed in dollars, though in fact the market is situate in the host country.[3]

Another point which has caused much difficulty in practice is also expressly clarified: if the investment takes the form of shares in a local corporation, partner- ship or other body the assets of which are expropriated, the host State shall ensure the payment of the compensation to the foreign investors 'to the extent of their interest in the assets expropriated'. It would seem that in such a case the foreign shareholder will be entitled to obtain judicial review and is not limited by any action taken (or not taken) by the corporation itself; this conclusion is based on the wording ('shall apply the provisions of paragraph 1 of this Article so as to ensure

[1] The expression occurs several times in the Treaty of Rome creating the European Economic Community and has been given a very wide interpretation by the European Court of Justice. In certain circumstances the practice of that court may prove useful as a guide in construing the Agreements under discussion.

[2] 23 April 1969, *Clunet*, 96 (1969), p. 914.

[3] *B.P. Exploration Co. (Libya) Ltd.* v. *Hunt*, [1979] 1 W.L.R. 783, *per* Robert Goff J., affirmed by the Court of Appeal at [1981] 1 W.L.R. 233. In this case the courts were concerned with the assessment of a 'just sum' and on this aspect their observations may be helpful in construing and applying similar terms occurring in a treaty.

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. . .') and from the purpose of the clause, which could easily be defeated if the foreign investor were not given independent rights.

8. A final provision of a substantive character is due to the fact that practically all investments made by Western countries in pursuance of these treaties carry the benefit of an insurance or guarantee agreement,[1] in England by the Export Credits Guarantee Department of the Department of Industry. If the investor suffers any insured loss the Department becomes entitled to his rights by way of subrogation. The treaties expressly, though perhaps unnecessarily, provide for the recognition of the assignment. They also state that the assignee State does not acquire any greater rights than were vested in the assignor; although, strictly, this may again not be a necessary provision it is a useful one, for it makes it clear that the usual rule[2] according to which inter-State monetary obligations are not subject to exchange control regulations does not apply to private law debts assigned to the State. The assignee State or its instrumentality may therefore become the owner of blocked accounts which the assignor could not utilize; the treaties, therefore, helpfully provide that such accounts shall be 'freely available' to the assignee State for the purpose of meeting its official expenditure in the territory'.

III. Remedies

9. Among the remedies available to an investor there is in the first place any local remedy which the law of the host country may provide. In the event of expropriation, as has been pointed out in paragraph 7 above, there exists the specifically guaranteed right to have both the legality of the expropriation and the valuation of the investments reviewed by a judicial or other independent body, though this is without prejudice to the additional remedies presently to be mentioned.

10. Among these there is in the first place the investor's (though not the host country's) right[3] to have any dispute decided by a tribunal set up under the World Bank's Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965.[4] This affords the best legal protection which, probably, in present circumstances is available, though the Convention of 1965 and, in particular, the panel of arbitrators set up by the World Bank cannot by any means be viewed with unqualified enthusiasm.

The right of access to the Convention and the tribunal contemplated by it is considerably strengthened by the express provision according to which a company incorporated in the host country may itself be a claimant if the foreign investor owns the majority of the shares in it; this probably includes an investor who owned the shares prior to expropriation.

On the other hand, the protection afforded to the investor is considerably prejudiced if he fails to obtain a direct undertaking to him to apply the Convention and submit to the jurisdiction of the tribunal. The Investment Protection Agreement is a treaty between the High Contracting Parties, from which the private investor is unlikely to be able to derive any benefit unless he ensures the inclusion of a corresponding clause in the document to which he is a party. In the absence of such a clause, he would depend upon the readiness of his government to apply

[1] See Meron, *Investment Insurance in International Law* (1976).
[2] Mann, *The Legal Aspect of Money* (4th edn., 1982), p. 559.
[3] Art. X of the Agreement with the Philippines.
[4] On which see, e.g., Schwarzenberger, op. cit. above (p. 241 n. 21), p. 135.

under Article XI, for according to Article 25 of the Convention on the Settlement of Investment Disputes it is a condition of the Centre's jurisdiction that 'the parties to the dispute consent in writing to submit to the Centre'.[1]

11. Independently of the remedies available to the investor, any 'dispute between the Contracting Parties as to the interpretation or application of the present Agreement' may be submitted to arbitration 'in accordance with the provisions of this Agreement and the applicable principles of international law'.[2]

This, it is submitted, is not a case of a State affording diplomatic protection to one of its nationals: any legitimate interest of the State in the dispute which concerns the interpretation and application of the Agreement is sufficient to give it *jus standi*. This may be important, for instance, if the disputes involve a company incorporated in the host country if all or most of the shares in its capital are owned by the protecting State's nationals. This particular result, however, is probably in line with the general rules relating to diplomatic protection; the point is one on which, it will be remembered, important dicta are to be found in the International Court of Justice's judgment in the *Barcelona Traction* case,[3] but which has never been finally decided and is not dealt with in the treaties under discussion. It is, however, possible that even in this procedural connection the overriding entitlement to fair and equitable treatment may have a significant function.

IV. Appraisal

12. The importance of the British treaties as well as the numerous foreign treaties for the promotion and protection of investments and, incidentally, the twenty-one Friendship, Navigation and Commerce Treaties concluded, principally, by the United States of America since the end of the Second World War lies in the contribution they make to the development of customary international law, in their being a source of law. In general, as the decision of the International Court of Justice in the *North Sea Continental Shelf* cases has proved,[4] it is very difficult to deduce a rule of public international law from a single treaty. But this decision should not be overrated. It dealt with a very specific case in which specific arguments militated against finding the existence of a customary rule. In the case of the treaties, the subject-matter of this discussion, many other elements combine to facilitate such a finding. There is, in the first place, the very large number of treaties the scope of which is increased by the operation of the most-favoured-nation clause. There is, secondly, the fact that many States which have purported to reject the traditional conceptions and standards included in these treaties have accepted them, when (if the colloquial phrase be permitted) it came to the crunch. There is, thirdly, the most important fact that these treaties establish and accept and thus enlarge the force of traditional conceptions. Is it possible for a State to reject the rule according to which alien property may be expropriated only on certain terms long believed to be required by customary international law, yet to accept it for the purpose of these treaties? The paramount duty of States imposed by international law is to observe and act in accordance with the requirements of good faith. From this point of view it follows that, where these treaties express a duty which customary international law

[1] For other pitfalls see Lalive, this *Year Book*, 51 (1980), p. 123.
[2] Art. XI.
[3] See p. 244 n. 2 above.
[4] *I.C.J. Reports*, 1969, p. 4.

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mposes or is widely believed to impose, they give very strong support to the existence of such a duty and preclude the Contracting States from denying its existence.

These remarks apply, in particular, to the overriding effect of the standard of fair and equitable treatment, to the duty not to expropriate except on certain terms and to the duty to 'observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment'. The cold print of these treaties is a more reliable source of law than rhetorics in the United Nations.

Annexe

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE REPUBLIC OF THE PHILIPPINES FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of the Philippines, hereinafter referred to as the Contracting Parties;

Taking note of their existing friendly relations;

Desiring to create favourable conditions for greater investment by nationals and companies of one Contracting Party in the territory of the other Contracting Party, and to increase prosperity in their respective territories;

Recognising that agreement on the promotion and protection of such investment will contribute to the furtherance of such purposes;

Have agreed as follows:

Article I

For the purposes of this Agreement:

1. (*a*) The term 'Republic of the Philippines' shall refer to the entity as constituted at present, whose territory is that defined in this Article.
   (*b*) The term 'United Kingdom of Great Britain and Northern Ireland' shall refer to the entity as constituted at present, whose territory is that defined in this Article.
2. The term 'territory' means:
   (*a*) In respect of the Republic of the Philippines, the territory defined in Article I of its Constitution.
   (*b*) In respect of the United Kingdom of Great Britain and Northern Ireland, the territory of Great Britain and Northern Ireland, and those territories for whose international relations the Government of the United Kingdom are responsible and with respect to which the Contracting Parties agree to extend the provisions of this Agreement by an exchange of notes.
3. The term 'nationals' shall mean:
   (*a*) In respect of the Republic of the Philippines, its citizens within the meaning of Article III of its Constitution.
   (*b*) In respect of the United Kingdom of Great Britain and Northern Ireland, any citizen of the United Kingdom and Colonies, and any British subject not possessing that citizenship or the citizenship of any other Commonwealth country or territory, provided that in every case he has the right of abode in the United Kingdom.
4. The term 'company' of a Contracting Party shall mean a corporation, partnership or other association, incorporated or constituted and actually doing business under the

laws in force in any part of the territory of that Contracting Party wherein a place of effective management is situated.

Provided that any particular company may be excluded from the foregoing definition by mutual agreement between the Contracting Parties on the grounds of the need to maintain public order, to protect essential security interests or to fulfil commitments relating to international peace and security.

5. The term 'investment' shall mean every kind of asset and in particular, though not exclusively, includes:
   (i) movable and immovable property and any other property rights such as mortgages, liens and pledges;
   (ii) shares, stocks and debentures of companies or interests in the property of such companies;
   (iii) claims to money or to any performance under contract having a financial value;
   (iv) intellectual property rights and goodwill;
   (v) business concessions conferred by law or under contract.
6. The term 'earnings' shall mean amounts yielded by an investment, particularly, though not exclusively, profits, interest, capital gains, dividends, royalties or fees.

Article II

1. This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of one Contracting Party by nationals or companies of the other Contracting Party which are qualified for registration and are duly registered by the appropriate government agency of the receiving Contracting Party, if so required by its laws.

2. This Agreement shall not affect the rights and obligations of the Contracting Parties with respect to investments which under the provisions of paragraph 1 are not within the scope of the Agreement.

Article III

1. Each Contracting Party shall encourage and create favourable conditions for investments, consistent with its national objectives, by companies or nationals of the other Contracting Party, subject to the laws and regulations of the Party in whose territory the investment is made, including rules on registration and valuation of such investments, if any.

2. Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

3. Each Contracting Party shall observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment of nationals or companies of the other Contracting Party.

Article IV

1. Each Contracting Party shall extend to investments in its territory of companies or nationals of the other Contracting Party treatment no less favourable than that granted to nationals and companies of any third state.

2. Each Contracting Party shall not subject nationals or companies of the other Contracting Party in its territory, as regards their management, use, enjoyment, or disposal of their investments, to unreasonable measures or treatment less favourable than that which it accords to nationals or companies of any third state.

3. The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of any third state shall not be construed as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:

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(*a*) any existing or future customs union, common market, free trade area, or regional economic organisation of which either Contracting Party is or may become a member, or

(*b*) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Article V

1. Investments of nationals or companies of either Contracting Party shall not be subject to expropriation or nationalisation or any measure equivalent thereto (in this article referred to as 'expropriation'), except for public use, in the public interest, or in the interest of national defence and upon payment of just compensation. Such compensation shall amount to the market value of the investments expropriated, or, in the absence of a determinable market value, the actual loss sustained, on or immediately before the date of expropriation. The compensation shall be made without undue delay, shall be effectively realisable and, subject to the provisions of paragraph 3 of Article VII, shall be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review by a judicial body, or, if such exists, by other independent authority of that Party of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

2. Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its territory, and in which nationals or companies of the other Contracting Party own shares, it shall apply the provisions of paragraph 1 of this Article so as to ensure the compensation provided for in that paragraph to such nationals or companies to the extent of their interest in the assets expropriated.

Article VI

If a Contracting Party makes restitution, indemnification, compensation or other settlement for losses suffered owing to war or other armed conflicts, revolution, a state of national emergency, revolt, insurrection or riot in the territory of such Contracting Party, it shall accord to the nationals or companies of the other Contracting Party whose investments in the territory of the Contracting Party have suffered such losses, treatment no less favourable than that which the Contracting Party shall accord to companies or to nationals of any third state.

Article VII

1. Each Contracting Party shall in respect of investments permit nationals or companies of the other Contracting Party the free transfer of their capital and of the earnings from it, subject to the right of the former Contracting Party to impose equitably and in good faith such measures as may be necessary to safeguard the integrity and independence of its currency, its external financial position and balance of payments, consistent with its rights and obligations as a member of the International Monetary Fund.

2. The exchange rate applicable to such transfer shall be the rate of exchange prevailing at the time of remittance.

3. In cases where large amounts of compensation have been paid in pursuance of Article [illegible] the Contracting Party concerned may require the transfer thereof to be effected in reasonable instalments.

Article VIII

1. If either Contracting Party makes payment under an insurance or guarantee agreement with its own nationals or companies in respect of an investment or any part thereof in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim arising from the indemnity paid, by the party indemnified to the former Contracting Party, and that the former Contracting Party is entitled by virtue of subrogation to exercise the rights and assert the claims of such nationals or companies. This does not necessarily imply, however, a recognition on the part of the latter Contracting Party of the merits of any case or the amount of any claim arising therefrom.

2. If the former Contracting Party acquires amounts in the lawful currency of the other Contracting Party or credits thereof by assignment under the terms of an indemnity, the former Contracting Party shall be accorded in respect thereof treatment not less favourable than that accorded to the funds of a private investor deriving from activities and transactions similar to those in which the party indemnified was engaged but subject to those limitations or conditions, if any, that are applicable to the party indemnified. Such amounts and credits shall be freely available to the former Contracting Party concerned for the purpose of meeting its official expenditure in the territory of the other Contracting Party.

Article IX

The Contracting Parties agree to consult each other at the request of either Party on any matter relating to investments between the two countries, or otherwise affecting the implementation of this Agreement.

Article X

1. The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any dispute that may arise in connection with the investment.

2. A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25 (2) (*b*) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

Article XI

1. Any dispute between the Contracting Parties as to the interpretation or application of the present Agreement, not satisfactorily resolved through diplomatic channels or other amicable means, shall be submitted, at the request of either Party to a panel of arbitrators for decision in accordance with the provisions of this Agreement and the applicable principles in international law.

2. The panel shall be composed of three members, one selected by each Party within one month of receipt of the request for arbitration, and the third to be chosen by the members thus selected by the Parties within two months from the designation of the second member.

3. If within the periods specified in paragraph 2 of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the Secretary-General of the United Nations to make any necessary appointments. If the Secretary-General is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the President of the International Court of Justice shall be invited to make the necessary appointments. If the President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Vice-President or the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

4. The panel of arbitrators shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. The panel shall determine its own procedure.

5. Each Contracting Party shall bear the cost of its own member of the panel and of its

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representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties.

ARTICLE XII

1. This Agreement shall enter into force on the 30th day following its signature.

2. This Agreement shall remain in force for a period of ten years from its entry into force and shall thereafter continue in force unless terminated by either Contracting Party by not less than six months' written notice through diplomatic channels; provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ten years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

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

Done at London this 3rd day of December 1980 in two original copies, each in the English and Philipino languages, each text being equally authentic.

For the Government of the United Kingdom of Great Britain and Northern Ireland:

P. A. R. BLAKER

For the Government of the Republic of the Philippines:

CESAR VIRATA

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