International Lawyer

Volume 6 | Number 3 | Article 13

1972

Encouragement of Private Foreign Investment in the Developing Country: Provisions in the Laws of Kenya

Swadesh S. Kalsi

SWADESH S. KALSI*

Encouragement of Private Foreign Investment in the Developing Country: Provisions in the Laws of Kenya†

> Unlawful it certainly is
> to rule without regard to
> justice, for there may be
> might where there is no right.
>
> Aristotle, *Politics* (Bk. VII, Ch. II)

Section A: Some General Considerations

1. The Psychology of the Developing Country and Foreign Investment

Few will disagree that the widening gap in per capita incomes between the developed and the developing countries, is leading to progressively greater international tension. Relief in tension is dependent upon rapid economic growth, and the consequent rooting of prosperity in the now poorer members of the international community. Many developing nations see the cause of their poverty in the preceeding period of colonialism, and in economic domination since the attainment of political independence.

This domination is not only felt in direct exploitation of the natural resources by Western technology, but also in keeping the terms of trade unfair to developing countries. The situation is a reflection of the basic power structure of the international world, and it is unrealistic to expect

---

*B.Sc. (Hons.) (Lond.), of Lincoln's Inn, Barrister-at-Law; presently candidate for the LL.M. degree at the George Washington University; Member, Classical Association (Kenya), Royal Economic Society (U.K.), Economic History Society (U.K.), Convocation, University of London (U.K.), and Royal Philosophical Society of Glasgow (U.K.).

†The writer is greatly indebted to his guru Professor Stanley D. Metzger of Georgetown University for leading him from blind alleys to the light on the horizon, and to his father Mr. U.S. Kalsi, for promptly flying over the relevant legislation from Kenya, but for which the analysis would not have attained its present form.

the developed countries to give up these privileges appurtenant to the exercise of power. A penetrating insight is shed by Jenks,[1] who observes:

> (t)he problem is so dangerous less because the advanced countries are at fault than because the situation calls upon them to show a measure of disinterestedness, far sightedness and magnanimity rare in national and hitherto unprecedented in world politics.

How is the gap to be reduced? The major part of the development effort must come from mobilization of the domestic resources. However, domestic formation of savings and investment and the dissemination of technological skills are inadequate for the desired rapid economic growth. Investment is a crucial economic factor and economists hold that the difference between the developed and the developing countries does not lie entirely in the higher rates of growth prevailing in the former. It lies more in the fact that while developed countries can continue to grow steadily by an automatic self-generating process, the developing countries cannot.

Professor Rostow[2] characterizes this "take off" into self-sustaining growth by, inter alia, a high rate of savings and investment—not less than ten per cent. of the national income. Equally important are the possession of modern technology and access to markets. Unless other factors of economic production are combined with capital, primary products cannot be produced for export, and of this Professor Kindleberger[3] makes the compelling point that "oil in the ground in the Middle East was worthless without the technology, capital and markets possessed solely by foreigners."

There is no doubt that both public foreign aid and private foreign investment can help to supplement the meager savings in the developing countries. To step up the rate of development, Per Jacobsson[4] has proposed that the developed countries provide one percent of their national income to aid the developing countries of the world. Others are skeptical about the generosity of the developed countries and suggest that a greater participation of private foreign capital in the developing countries by creating the right investment climate can provide the additional needs.[5] It is intended to confine what follows to the concern that private foreign investment creates in the developing countries which are also capital importing countries.

---

[1] C. W. Jenks, *The World Beyond the Charter* (1969), p. 129.

[2] W. W. Rostow, *Stages of Economic Growth* (1960), p. 39. *See generally* pp. 36–58; *see also* W. A. Lewis, *The Theory of Economic Growth* (1955) e.g., pp. 225–226.

[3] C. P. Kindleberger, *Foreign Trade and the National Economy* (1962), p. 42.

[4] Per Jacobsson, *The Monetary Background of International Financing* in J. F. McDaniels, INTERNATIONAL FINANCING AND INVESTMENT (1964), p. 12.

[5] R. N. Gardner, *In Pursuit of World Order* (1964), pp. 128–131.

Although the developing countries recognize that private foreign capital can supplement the domestic economic resources and skills,[6] their recent colonial past and feelings of economic nationalism—which incidentally is not confined only to developing countries—have made them extremely suspicious of private investment.[7] Having attained political independence they desire the achievement of economic self-determination, which will prevent the old domination through economic power.[8] Part of this concern arises out of the nature of the migrating corporate structure.[9]

The day of the "pick and shovel" foreign pioneer is over, the typical investor of today is the large—often multinational—corporation. It has at its disposal the tremendous backing of financial resources, the sophisticated and technically advanced machinery for the relentless pursuit of profit maximization. Moreover, it is not unreasonable for the large corporation to pursue objectives of power in the society for securing the most favorable situation for the maximization of profits.[10] As a consequence, the freedom of action of the developing country in effecting change in the society is hindered.

To take one instance, there is in the ex-colonial countries of Africa, the problem of dominating European commercial banks which adopt unnecessarily rigid and conservative rules of credit worthiness, resulting in discrimination against indigenous borrowers in the export sector.[11] Even the larger indigenous enterprises in these countries find it difficult to satisfy the requirements. In this situation the benefit of banking facilities can only be

---

[6]*See, e.g.*, E. Boka, *The Sources of the Law of International Trade in the Developing Countries of Africa* in C. M. SCHMITTHOFF, THE SOURCES OF THE LAW OF INTERNATIONAL TRADE (1964), pp. 227-254, 252; U.N. Economic Commission for Africa, Standing Committee on Industry, Natural Resources and Transport, Second Session Addis Ababa, December, 1963 (E/CN 14/INR/28), p. 1.

[7]Professor W. A. Lewis in his THEORY OF ECONOMIC GROWTH (1955) at p. 412 observes, "At present most of the less developed countries are in a state of reaction against nineteenth century imperialism. They have acquired a distaste for foreign capital and foreign administration, and they are more anxious to protect themselves from further exploitation than to take advantage of current opportunities."

[8]*See, e.g.*, Professor M. S. McDougal in V. SHEPHERD, ROUNDTABLE CONFERENCE ON INTERNATIONAL LAW PROBLEMS IN ASIA (1967), p. 21; Tanzania African National Union, The Arusha Declaration and TANU's Policy of Socialism and Self-Reliance (1967) at p. 10 states Tanzania "cannot depend upon foreign governments and companies for development without sacrificing freedom."

[9]Similar views are expressed by Professor S. D. Metzger in his speech, *The Individual and International Law* at the Summer Conference on International Law at Cornell University, June 18-20, 1964, reprinted in S. D. METZGER, LAW OF INTERNATIONAL TRADE, Vol. I, pp. 102-104, 104.

[10]F. Machlup, *Theories of the Firm: Marginalist, Behavioral, Managerial*, A.E.R. (1967), pp. 1-33; *see also* R. M. Cyert and J. G. March, *Behavioral Theory of the Firm* (1963).

[11]P. T. Bauer, *West African Trade* (1954), pp. 186 - 188.

extended to the nationals through strict control of the banking system. Needless to say, the African countries have found it difficult to effect the necessary change in the face of opposition from the bankers. While such control is necessary to lay the ground-work for development it frightens away private foreign capital.

Part of the fear of economic domination comes from the fact that foreign aid and private investment, is motivated and used by Western developed countries to promote their political and economic aims[12] of securing the supply of raw materials, obtaining markets for large American corporations and inhibiting acceptance of communist aid. Again, the counsequences for the developing country which has foreign investments and receives aid are the limitation of the sphere of maneuvering for social and economic reforms it considers necessary for modernization as a result of political pressure from the investor or aid giving country. Besides it creates the master-servant relationship in the imposition of a code of conduct and such policies inevitably lead, in the present psychology of the developing world, to political estrangement.

The United States as the largest exporter of private capital, has given ample reason to support the contention that economic pressures may legitimately be used to support its policies of promoting economic growth in the context of the free enterprise system. Indeed, one of the provisions of section 620(2)(e) of the Foreign Assistance Act, 1963, directs the President to suspend assistance to any country that has "taken steps to repudiate or nullify existing contracts or agreements, with any United States citizen or any corporation, partnership or association not less than fifty per cent. beneficially owned by United States citizens." Section 620(1) states:

> no assistance shall be provided under this Act after December 31, 1965, to the government of any less developed country which has failed to enter into an agreement with the President to institute the investment guaranty program.[13]

Some writers on the subject believe that interference with the economy of a developing country accepting aid and foreign investment can be minimized and even eliminated through Development Planning.[14] The argument is that Development Planning allows effective control in economic

---

[12]*See, e.g.*, I M.D. Little and J. M. Clifford, *International Aid* (1965), p. 110; R. N. Gardner, *supra* note 5, pp. 112-115; H. Feis, *Foreign Aid and Foreign Policy* (1964), pp. 136-137; on the Hickenlooper Amendment see R. B. Lillich. *The Protection of Foreign Investment* (1965), pp. 117-146.

[13]Foreign Assistance Act, 1963, Publ. L. 205, 88 Cong., 1st Ses., Section 301(e) (3) Dec. 16, 1963.

[14]G. M. Meier, *The International Economics of Development* (1968), p. 137.

management and thus eliminates factors which are detrimental to the national interest. On the other hand, Professor Dumont[15] emphatically states that so long as real economic independence remains illusory, Development Plans will never be drawn on genuine national interest. An extreme view sees the danger for the freedom of the developing countries in the necessity of the capitalist system to find a sphere of overseas investment with a higher profit rate than is available at home. The export of capital from capitalist countries becomes a "dynamo of imperialism" to capture monopolist control of markets.[16]

The situation is further complicated by economic nationalism prevailing in the developing countries. One manifestation of this nationalism is the feeling that exclusion of nationals from management—even when none are available to perform the tasks—involves denigration of the position of the nationals.[17] It makes them feel that they are not managing their own affairs. Similar feelings are prevalent in some advanced countries like Canada and France as well and create electoral pressures against admittance of foreign capital.

2. *The Relevance of Investment Laws in the "Investment Climate"*

The term "investment climate" describes the attitude prevailing in the capital importing country towards private foreign investors.[18] It has been observed above that capital importing countries are concerned about allowing unrestricted private foreign investment. When a foreign investor contemplates investing in another country, he is influenced in making his decision mainly by its stability of political and social structure, which will ensure that radical changes do not jeopardize his investment, opportunity for earning high profits, transferability of earnings, and safeguards against expropriation of property.[19]

For most of the developing countries it is not possible to have this degree of stability. To facilitate rapid economic growth the countries are in various stages of engendering or continuing fundamental and all-embracing

[15]R. Dumont, *False Start in Africa* (1966), p. 101; *see generally* the chapter on economic planning, pp. 99-123.

[16]K. Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (1965), pp. 83, 239-254; *see also* Rosa Luxemburg, *The Accumulation of Capital* (1913), pp. 320, 368-385.

[17]H. G. Johnson, *Economic Policies Toward Less Developed Countries* (1967), pp. 62, 128; C. P. Kindleberger, *supra*, note 3, pp. 42-43.

[18]On investment climate see A. A. Fatouros, *Legal Security for International Investment* in W. G. FRIEDMANN and R. C. PUGH, LEGAL ASPECTS OF FOREIGN INVESTMENT (1959), pp. 669-701; *see also* C. F. Amerasinghe in V. SHEPHERD, *supra*, note 8, p. 42.

[19]*See* B. Higgins, *Economic Development* (1968), p. 569; NATIONAL INDUSTRIAL CONFERENCE BOARD, OBSTACLES AND INCENTIVES TO PRIVATE FOREIGN INVESTMENT, 1967-1968, Vol. II (1969), pp. 1-6.

social and economic reforms. Widespread and dynamic change of this magnitude cannot be accommodated in a stable society. This instability and the resultant interference with foreign investment not only keeps out fresh investment but also prevents the existing foreign owned enterprises from making their full potential contributions to the growth of the country.[20] Infrequently a very high rate of profit or a strategic control over a scarce resource may overcome the barrier of instability, *e.g.*, investments in the Katanga Belt of the Congo.

The laws of investment of the capital importing country reflect the general attitude towards foreign investors. They will reveal whether foreign investment is given more favorable than similar national investment. They will also show if there are activities prohibited to foreigners. There may be restrictions or limitations, for instance, of local majority ownership or participation in foreign enterprises. The laws may require governmental screening of proposed foreign investment. The laws are, therefore, the primary indicia of the investment climate.

Laws unfavorable to the foreign investor are effective in halting the flow of capital. Its opposite is, of course, not true—simply changing laws in favor of the foreign investor is not enough by itself to induce investment.[21] Granted that laws are the primary indicia of the investment climate, other indicia—of profitability and stability—cannot be ignored. Policy-makers in the developing countries often mistakenly believe that enactment of legislation by itself is sufficient to promote a greater flow of investment.[22] It is only when a country has had a considerable continuity of laws favorable to the investor, and the laws reflect the requisite underlying stability, that the foreign investor can be attracted and induced to place his capital at risk.

It is in the light of these complex motivations and fears of the developing country, and the expectations of the foreign investor that the writer, a Kenyan lawyer, exaimines the inducements to foreign investment in the Laws of Kenya.

Section B: Encouragement Provisions

1. Government Policy

Straddling the African Equator with its eastern shores washed by the Indian Ocean, Kenya occupies a diminant position with respect to com-

---

[20]H. Myint, *The Economics of the Developing Countries* (1964), p. 68; H. G. Johnson, *supra* note 17, pp. 76–78.

[21]*See* the bitter experience of the Philippines as related by Professor V. Abad Santos in V. SHEPHERD, *supra*, note 8, p. 40.

[22]K. Ahooja, *Investment Legislation in Africa*, J.W.T.L. (1968), pp. 495–520, 499; *see also generally* United Nations Economic Commission for Africa, *supra*, note 6, pp. 1–39.

munication routes. The sun of British imperialism finally set in Kenya on December 12, 1963, when it emerged as a new nation to join the ranks of the developing countries. The nation comprises some eleven million people, of whom about three per cent are nonindigenous—being migrants from Arabia, Asia and Europe. It is an agricultural economy with thirty-five per cent[23] of the recorded gross domestic product in that sector. Its exports include coffee, tea, pyrethrum, maize, meat, sisal, soda ash, cement, cashew nuts and cotton. The fast expanding tourist industry has become a major foreign exchange earner, on the invisible spectrum of the balance of payments.

It has strong trade ties with Western Europe, particularly with Britain, although trade with Japan, the U.S., India, the U.S.S.R. and East European countries is not insignificant. In 1970, just over 30% of all imports in the terms of value came from Britian, 8% each from West Germany and Japan, and 7% from the U.S. On the export side of the trade, Britian again is the largest importer of Kenyan products, accounting for a little over 20% of the total value of exports. West Germany accounts of 11% and the U.S. 7% of the total value of exports. Nearly all private foreign investment in the country has been by Western Hemisphere nations, again led by Britain but with the notable exception of Japan.

Kenya is a member of the East African Community, a transnational organization composed of Kenya, Tanzania and Uganda and carrying on common enterprises and services for their mutual benefit. The self-financing component of the East African Community includes East Africa Railways Corporation, East African Harbors Corporation, East African Airways Corporation and East African Posts Telecommunications Corporation.

The nonself-financing component comprises the General Fund Services which runs common services like civil aviation, meteorology, medical, agricultural and industrial research, and the East African Court of Appeal. The General Fund Services also collects income taxes and customs and excise revenues on behalf of the member states. Since 1949, Kenya, Tanzania and Uganda have been united in a customs union where, apart from the Transfer Tax, there are virtually no trade barriers across their borders.

(a) Development Philosophy

The country is dedicated to the aim of rapid economic growth to better

[23]Kenya Ministry of Finance and Economic Planning, Economic Survey (1971), p. 9. The figure refers to the year 1969.

the lot of its people. The present per capita income is in the region of K£43.[24] Economic growth is to be achieved through Development Planning; the current Development Plan—Kenya's second—covers the years 1970-1974. It envisages an average overall growth rate target of 6.7% per annum, although the manufacturing sector is expected to grow at a much faster rate of 9% per annum.[25]

The present political system in Kenya is officially termed "African Socialism."[26] It adopts a pragmatic approach to modernizing the country, allowing private ownership of property and encourages private enterprise system as known in the West. It does not visualize any substantial government-owned sectors,[27] but government ownership is not excluded where private capital is not forthcoming to finance some essential activity needed by the people. This system can roughly be paralleled with the "mixed economy" systems of West European countries. Social justice in the society is to be achieved through fiscal policy and government control and direction of the economy. Marxist socialism or laissez faire capitalism are both rejected as irrelevant or at best ill-suited to solve the development problems.[28]

(b) Private Foreign Investment

Although the larger part of the savings have to be found domestically, the Government looks upon foreign assistance as a booster to domestic resources. In the words of the Minister for Finance and Economic Planning, "foreign assistance should supplement, not replace, our own effort."[29]

The Government is, however, fearful of subverting of its newly acquired freedom by the risk of foreign economic domination.[30] This has resulted in a rather elaborate screening of foreign investment to ensure that only those enterprises which will be of "benefit to Kenya" are to be allowed in. Once approval is given after screening, the right to repatriate capital and transfer earnings follows automatically. Screening effectively keeps out foreign

---

[24]Kenya Development Plan, 1970 - 1974 (1969), p. 1. The figure is for the year 1967.

[25]*Id.*, pp. 141, 143.

[26]Kenya Government Sessional Paper 10 on African Socialism and its Application to Planning in Kenya (1965), p. 2.

[27]Economic Survey, *supra* note 23, p. 167. The public sector's share in contribution to G.D.P. at current prices was 27% in 1970.

[28]Kenya Government Sessional Paper 10, *supra*, note 26, pp. 6-8, 13.

[29]Kenya Development Plan, *supra*, note 24, p. v; *see also* Kenya Government Sessional Paper 10, *supra* note 26, p. 14.

[30]Kenya Development Plan, *supra* note 24, p. 18; *see also* Kenya Government Sessional Paper 10, *supra*, note 26, pp. 12-14.

investment from areas of economic activity where potential conflict may arise due to greater control or take-over by the Government.

No foreign investment in the following industries will receive approval: broadcasting and other mass media, transportation, telecommunications, national park management, airports, irrigation and sewage facilities.[31] Energy industry already reflects heavy Government participation—both the East African Power and Lighting Company and the Oil Refinery have majority Government shareholding. Another benefit of screening is that it helps to reserve those types of intensive economic activities—usually non-capital and requiring little skill—which can easily be performed by the nationals. In this way the Government can provide "a fuller participation by Africans in an expanding economy"[32] and relieve unemployment at the same time.

It has been the policy of the Government to look with disfavor on foreign capital participation in (a) equity or portfolio investment, *i.e.*, purchases of shares in public corporations quoted on the Nairobi Stock Exchange; (b) mere changes in ownership of existing business or assets; and (c) merchanting organizations. In these cases approval upon screening will not normally be granted, but applications are nevertheless entertained on their merits.[33] Mention may be made of restriction on issue of shares and stocks of a local corporation to foreign non-residents.

A local corporation can only issue shares or stocks to non-residents, provided prior approval of the Exchange Control Authorities has been obtained.[34] Such approval is dependent, inter alia, on a deposit of the requisite amount of foreign exchange by the foreign investor for the equity purchase. Needless to say, the granting of approval carries the right to transfer profits, and the right to repatriate capital on disinvestment. In contrast to the portfolio investments, direct investments, especially in manufacturing, get priority and favorable treatment in the process of approval of the foreign enterprise.

Outside these policy restraints, foreign private enterprise is welcome and is allowed to function freely. Indeed, the current Development Plan visualizes a substantial portion of capital formation from foreign investors setting up new enterprises or expanding existing enterprises. The Government has, therefore, undertaken to follow policies creating the right investment climate which will induce foreign investment into the country.

---

[31] Kenya Government Sessional Paper 10, *supra*, note 26, p. 41.

[32] *Id.*, p. 6.

[33] Foreign Investments Protection Act, 1964, note to section 1 of Rules of Procedure.

[34] Exchange Control Act, 1965, Section 10(1).

(c) Nationalization

Having given private foreign investment a substantial role to play in the private sector of the economy, it is essential to safeguard foreign property against nationalization or expropriation. Foreign capital is known to be far too shy in venturing into countries where any threat of nationalization may exist. The Government is also aware that nationalization only changes the ownership of assets and does not lead to additional resources although it brings the property directly under state supervision.[35] For acquiring the benefit of direct Government supervision, the price paid in terms of foreign capital, is the discouragement of cessation of further investment, which in turn sacrifices growth targets set in the Development Plan.

Kenya assures the foreign investor prompt payment of full compensation on nationalization of property, in the Consitution and again in the ruling party's constitution—the KANU Manifesto. Property is to be taken only for public benefit or the national interest. Although public benefit for taking is not defined with any accuracy, the following circumstances have been officially enumerated as warranting nationalization:[36]

> (a) when the assets in private hands threaten the security or undermine the integrity of the nation; or
> (b) when productive resources are being wasted; or
> (c) when the operation of an industry by private concern has a serious detrimental effect on the public interest; and
> (d) when other less costly means of control are not available or are not effective.

(d) Kenyanization

The Government is currently following a policy known as Kenyanization[37] which is primarily aimed at replacing jobs now occupied by expatriates with African citizens. Beyond this, it wants to ensure that there is local participation "in all aspects of economic life in the country, not just as employees but as top management and entrepreneurs."[38] In this context, the obligation of the foreign investor is to retain a foreign managerial and technical staff for positions that cannot yet be filled by Kenyans. In addition, he must organize suitable facilities for the training and education of Kenyan citizens, who will eventually replace the foreigners.

Foreign investors have to secure work permits for "non-citizens who are currently holding jobs, or are required to fill jobs for which there are no

---

[35] Kenya Government Sessional Paper 10, *supra*, note 26, pp. 26–27, 51.
[36] *Id.*, p. 27.
[37] Sometimes the policy is referred to as "Africanization." *See Id.*, pp. 27–30, 51; Kenya Development Plan, *supra*, note 24, pp. 9, 118–119.
[38] Kenya Development Plan, *supra*, note 24, p. 9.

suitably qualified and experienced citizens."[39] As more and more nationals qualify for these positions, the permits may be used to limit the number of key personnel allowed in. Up to now, foreign firms have been permitted to bring key personnel as a matter of course, although there are extremely tight restrictions on employment of non-citizens, however skilled they may be, but actually present in Kenya.

2. Legal Business Entities

Seventy years of British colonialism have left a rich heritage of English common law system in Kenya. The system provides a legal environment where the foreign investor can ascertain the extent of his rights and duties in a framework with which the Western technological societies are familiar. It is only possible here to indicate in an elementary outline the possible modes of doing business. The foreign investor may operate by establishing a sole proprietorship, a partnership, an unlimited company, a limited liability company or a branch office. Of these modes, a large corporate investor will find the device of incorporating a subsidiary limited company or establishing a branch company most suitable to conduct business.

Both foreign and domestic companies must comply with the requirements of the Companies Act, 1959,[40] which substantially enacts the English Companies Act of 1948. When a foreign investor is not thinking of establishing a subsidiary company, he will incorporate either as a private or a public limited liability company under the Companies Act depending on his specific needs.

More often the investor is a large corporation seeking to do business through a subsidiary company. This is accomplished by setting up a private limited liability company with the consequent restrictions on transfer of its shares owned by the holding company. If local participation is envisaged, shareholding interest to the extent of forty-nine percent of total shares may be issued to nationals on incorporation as a public company. Retention of fifty-one percent shareholding interest is not only necessary for control, but also has ramifications for eligibility for investment guaranty schemes.[41]

As an alternative to forming a Kenyan company, a company incorporated outside the country may register as a foreign company. In order to do this all requirements relating to registration in the Companies Act must be satisfied.[42] The requirements are the filing, within thirty days of

[39]Hon. D. T. Arap Moi, Statement on Application of the New Immigration Act in Relation to "Work Permits" and Kenyanization (1968), p. 3.

[40]Chapter 486 of the Laws of Kenya.

[41]*See infra* section on Security of Investment: (b) Investment Guaranty Agreements.

[42]Section 366; *see also generally* sections 365-375.

setting up business in Kenya, of a certified copy of the Memorandum of Association[43] and Articles of Association;[44] a list of directors and secretaries; a statement of all subsisting charges created by the company; the names and addresses of one or more persons resident in Kenya who are authorized to accept on behalf of the company service of process; and any notice required to be served on the company and the address of the registered or principal office of the company. In addition, the name, the limited liability status, and the country of incorporation must be conspicuously exhibited at each place of business in Kenya, stated in every prospectus and printed on all bill heads, letter paper, notices and other official publications of the company.[45]

3. Entry of Investment

(a) Movement of Capital

In order to control and guide the direction of foreign investment for the purpose of ensuring the achievements of the goals and priorities set forth in the Development Plan, all foreign investments are screened by the Ministry of Finance and Economic Planning. The decision on whether to let in the enterprise is on a case-by-case basis and then only when it has been decided that the enterprise will be complementary to aims of the Development Plan. Approval is given on successful application for the "Certificate of Approved Enterprise" under the Foreign Investments Protection Act, 1964.[46]

The "Certificate of Approved Enterprise" also gives the foreign investor the right to transfer earnings of investment and repatriation of proceeds of disinvestment.[47] A United States investor in possession of the Certificate of Approved Enterprise has, in addition, the benefit of eligibility for obtaining an investment guaranty with regard to his investment from AID.[48] The U.S. investment guaranty scheme only covers those enterprises which have the approval of the Kenyan Government, and the issuance of the Certificate is conclusive proof of such approval.

Although the Kenyan treaties of economic cooperation with Germany, and with the Netherlands, lay down standards of national[49] or most favored

[43]"Memorandum of Association" is equivalent to "Articles of Incorporation" in the U.S. practice.

[44]"Articles of Association" is equivalent to "By-Laws" in the U.S. practice.

[45]Companies Act, 1959, Section 371.

[46]Foreign Investments Protection Act, 1964, Sections 3(1) and (2).

[47]On which see *infra*, section on exchange controls.

[48]On which see *infra* section on Security of Investment: Investment Guaranty Agreements.

[49]Treaty between the Federal Republic of Germany and Kenya concerning the Encour-

nation[50] treatment, with respect to foreign investment in their respective countries, they are nevertheless subject to Kenyan laws for entry, and both these instruments specifically recognize this. The Kenya-Germany treaty admits screening through the right of the Kenyan Government, to 'admit such investment in accordance with its legislation.[51] The Kenya-Netherlands Agreement negotiates the same provision, by referring to investments approved 'under the relevant legislation of the Contracting Party concerned.'[52]

(b) Movement of Persons

The Immigration Act, 1967, sets down the basis of entry for aliens.[53] An alien has to apply for an entry permit in accordance with the requirements specified in the Schedule to the Act, which divides the permits into various groups or classes. The most inclusive of the entry permits, is the Class A permit which is granted to "a person who is offered specific employment by a specific employer, who is qualified to undertake that employment, and whose engagement in that employment will be of benefit to Kenya."

Apart from this general provision for employees, specific classes exist for permits applicable to investors in agriculture (Class F), prospecting for minerals or mining (Class G), specific trade, business or profession (Class H), and manufacture (Class I). The entry permit is issued for a maximum period of five years and is renewable for periods of up to five years on expiry of the permit.[54] In the classes of entry permits enumerated above, fees ranging from K£25 (U.S. $71.00) to K£50 (U.S. $141.00) is levied on issuance or renewal of the permit.[55]

In addition, a sum not exceeding K£250 (U.S. $710.00) has to be deposited as security with the immigration office for each permit.[56] Alternatively, it suffices to enter into a bond to provide security for an

agement and Reciprocal Protection of Investments, signed on December 4, 1964, but not yet ratified, Article 2. A copy of the treaty was kindly provided by Mrs. T. Besselaar-de Kok of the Legal Department, International Bank for Reconstruction and Development in Washington, D.C.

[50]Agreement on economic cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya, signed on September 11, 1970, but not yet ratified, Article V. A copy of the treaty was kindly provided by Mrs. T. Bessalaar-de Kok of the Legal Department, I.B.R.D., Washington D.C.

[51]Kenya-Germany treaty, *supra* note 49, Article 1.

[52]Kenya-Netherlands Agreement, *supra* note 50, Article XII in conjunction with Article XIV(c).

[53]Immigration Act, 1967, Section 5.

[54]Immigration Regulations (1967), L.N. 235, Section 11(2).

[55]Immigration (Amendment) Regulations (1970), L.N. 75, Second Schedule.

[56]*Supra* note 54, Section 32(1).

amount up to K£250 (U.S. $710.00) for each permit.[57] On leaving Kenya permanently this amount is refunded, or alternatively, the obligation under the bond is discharged if it has not been spent in connection with the detention, maintenance, medical treatment or deportation of the permit-holder or his family.[58]

4. *Security of Investment*

(a) Expropriation

(1) Polarity Between Capital Exporting and Capital Importing Countries

Expropriation is the taking of private property by a territorial sovereign for a public purpose or the national interest. The present analysis of expropriation limits itself to taking in time of peace.[59]

Provided there is no treaty obligation[60] to the contrary, customary international law recognizes a state's right to expropriate the property of foreign nationals for a public purpose. The state is simply exercising its right *dominium eminens,* eminent domain,[61] which is an attribute of its territorial sovereignty. Beyond this elementary exposition, there is today no consensus in customary international law as reflected in state practice—*placuit gentibus*—which is the very essence of international law.

The U.S. Supreme Court astutely observed, "there are few, if any, issues in international law today on which opinion seems to be so divided as the limitation on a state's power to expropriate the property of aliens."[62] Any further legal discourse on expropriation polarizes issues into two opposing camps—one representing the capital exporting countries and the other representing the capital importing countries.[63]

---

[57]*Id.*, Section 33(1).

[58]*Id.*, Section 32(3).

[59]For definitions of expropriation see G. Schwarzenberger, *Foreign Investments and International Law* (1969), p. 17; Bin Cheng, *The Rationale of Compensation for Expropriation in Transactions of the Grotius Society* 44 (1958-1959), pp. 267-310, 268-270.

[60]Here, too, unequal treaties and the doctrine of *clausula rebus sic stantibus* create problems.

[61]*See* Sir John Fisher Williams, *International Law and the Property of Aliens,* 9 BRIT. Y.B. INT'L L. (1928), pp. 1-30, 18-25; 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1942), pp. 653-654; *supra* note 59, Bin Cheng, pp. 286-287; A. A. Fatouros, *Government Guarantees to Foreign Investors* (1962), pp. 50-54.

[62]Banco National de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); *see also* H. Kelsen, *Principles of International Law* (1966), p. 367, *and* Lord Shawcross, *Problems of Foreign Investment in International Law,* 102 HAGUE RECUEIL (1961), pp. 335-363.

[63]Excluded from the present discussion are the views mentioned hereunder which do not have, and are not expected to have, any following in Kenya or for that matter Africa at large: (a) Marxist legal theory which denies any obligation of the territorial sovereign to compensate for expropriation of the property of foreigners; and (b) the Calvo doctrine, followed religiously

The traditional view[64] of the capital exporting countries which predominated till the post-war decolonialization, makes lawful taking of property conditional on the following principles:

(a) expropriation must be for some bona fide public purpose or national interest involving the use of the property taken;

(b) there must not be any discrimination against the property expropriated or its owners;

(c) expropriation must be accompanied by adequate, prompt and effective compensation.

There never has been much debate on the first two conditions. The more conservative schools[65] have stated that expropriation must be motivated by a *bona fide* public purpose or national interest for the property expropriated, to constitute legal taking. The better view[66] leaves the state to judge what constitutes the public purpose or the national interest for international law does not inquire into the internal administration of the state. In fact, public purpose in this context is not a limitation on the exercise of the right to expropriate, but a purported authorization by municipal law.

The second condition, i.e., non-discrimination, has not been a bone of significant contention in the expropriation debate either. In fact, if other conditions of legality are met, taking does not become illegal merely because it is discriminatory![67] Such a rule of international law is looked upon by the capital importing country as a substitute for imposing restrictions on the exercise of the right of eminent domain previously imposed by gunboat diplomacy.

The center of the stage in the legal debate is occupied by the com-

---

by most of the Latin American states, which asserts the principle that on expropriation of the property, foreign nationals are entitled only to national treatment, e.g., if citizens receive no compensation, none is due to the foreign nationals.

[64]*See* Sir John Fisher Williams, *supra* note 61, p. 28–29; G. Schwarzenberger, *A Manual of International Law* (1967), p. 106; Lord McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 NETH. INT'L L. REV. (1959), reprinted in SOUTHWESTERN LEGAL FOUNDATION, SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS (1964), pp. 573–628, 610–611; Bin Cheng, *supra* note 59, pp. 288–290; B. A. Wortley, *Expropriation in International Law* (1959), Chapter VII; G. M. Pollzien, *Law Rules to Encourage International Investment* in WORLD PEACE THROUGH LAW (1964), pp. 302–309, 304–305; G. VonGlahn, *Law Among Nations* (1970), p. 234.

[65]*See, e.g.*, Bin Cheng, *supra*, note 59, pp. 288–289 and Lord McNair, *supra* note 64, pp. 611–615.

[66]*See e.g.*, Sir John Fisher Williams, *supra* note 61, p. 26; H. W. Baade, *Permanent Sovereignty over Natural Wealth and Resources* in R. S. MILLER and R. J. STANGER (1967), pp. 3-40, 23; U.N. Gen. Ass. Off. Rec. 17th Sess. (A/RES 1803 (XVII)) (1962).

[67]*See, e.g.*, H. W. Baade, *supra* note 66, p. 24; D. W. Greig, *International Law* (1970), p. 443.

pensation issue—the third condition for legal expropriation.[68] Indeed, this issue is at the very heart of the matter and accounts for the polarity of positions between the capital exporting and capital importing countries. Mention may be made, *en passant,* of exceptional instances in which customary international law allows the taking of the property of aliens without any compensation. These include administrative and legislative measures as taxation and currency regulations, and punishment for crime.[69]

The above cases excepted, the rationale of compensation on taking has been based on a variety of legal principles, *e.g.*, acquired or vested rights,[70] inviolability of private property,[71] estoppel,[72] abuse of rights,[73] and social recompense for the individual who is deprived through no fault of his own.[74] Some writers have expressed the view that taking without compensation in certain circumstances constitutes unjust enrichment[75] for which reparation is due to the injured individual. Here we find that the key unresolved and disputed words in the expropriation debate are "adequate," "prompt" and "effective" compensation. The disputed words "adequate," "prompt" and "effective" are considered below, each in turn.

In the view of the capital exporting country, the right measure of compensation is the payment of adequate (or just) compensation which is defined as the value of the property at the time of taking.[76] Expropriation

---

[68]*See* the discussion of the debate by S. D. Metzger, *Property in International Law,* 50 VA. L. REV. (1964), reprinted in S. D. METZGER, LAW OF INTERNATIONAL TRADE, Vol. I (1965), pp. 105-143, 111-119.

[69]*See, e.g.,* Bin Cheng, *supra* note 59, pp. 286-287.

[70]B. A. Wortley, *supra,* note 64, pp. 125-128.

[71]Bin Cheng, *supra,* note 59, pp. 284-286.

[72]H. Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 168 - 172.

[73]H. Lauterpacht, *The Function of Law in International Community* (1933), pp. 286-306.

[74]Bin Cheng, *supra,* note 59, p. 297 where he says, "It is submitted that the rationale of compensation for expropriation consists in the fact that certain individuals in a community, or certain categories of individuals, without their being in any way at fault, are being asked to make a sacrifice of their private property for the general welfare of the community, when other members of the community are not making corresponding sacrifices. The compensation paid to the owners of the property taken represents precisely the corresponding contribution made by the rest of the community in order to equalise the financial incidence of this taking of individual property."

[75]*See, e.g.,* W. Friedman, *Social Conflict and the Protection of Foreign Investment,* PROCEEDINGS AM. SOC. INT'L. L. (1963), pp. 126-134, 131-132; W. Friedman, *Legal Theory* (1960), pp. 505-506; G. Schwarzenberger, *International Law,* Vol. I (1957), pp. 580-581; G. Schwarzenberger, *supra,* note 64, pp. 174 - 175; A. A. Fatouros, *International Law and the Third World,* 50 VA. L. REV. (1964), pp. 783 -823, 814.

[76]Chorzow Factory (Indemnity) Case, P.C.I.J. Series A. No. 17, (1928), pp. 46-48. *See also* A. A. Fatouros, *supra* note 61, pp. 325-331; in contrast, for an incisive account of the negotiating aspect of the settlement of claims arising out of expropriation see Professor Sir Francis Vallat's *International Law and the Practitioner* (1966), pp. 38-50.

which is legal *prima facie* becomes illegal *ab initio*[77] if adequate compensation is not made. A state which does not have the resources to provide adequate compensation cannot expropriate at all. Hence it is no excuse that expropriation is the result of basic social and economic reforms necessary in the national interest if the expropriating state is unable to provide adequate compensation.[78]

This traditional formulation of adequate compensation has never been accepted by the newly independent capital importing countries as the authoritative statement of international law on the subject. Their biggest problem is the measurement of compensation on expropriation of foreign investments made during the colonial period when the imperial powers dominated them. However, in order to preserve their freedom of action to fashion their societies in their own image, far too often the same arguments are indiscriminately applied to the investments made after independence.

A few of these countries contend that as new[79] states they have not consented to "traditional" international law, created in the image of the imperial powers which had a vested interest in maintaining the inviolability of private property rights. For lack of consent, international law is not binding upon them in this regard. Accordingly, expropriation does not involve any question of international law, and all questions arising therefrom must be settled with respect to the municipal law of the state. However, most of these newly independent capital importing countries accept the obligation to pay compensation on expropriation, but vehemently disagree on the adequate compensation formula. They suggest a much less onerous standard of compensation than the adequate formula.

Their view is based on several ideas—lack of basic equality of relationship,[80] economic self-determination,[81] freedom to choose and change the social and economic structure[82] that a state desires—which permit ex-

[77]*See*, Lord McNair, *supra* note 64, p. 620; *see also* C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945), p. 710.

[78]See the arguments of the U.S. and Mexico in their exchange of notes of 1938 concerning the Mexican expropriation in S. D. Metzger, *Private Foreign Investment and International Organization*, INTERNATIONAL ORGANIZATION, Vol. XXII (1968), pp. 290-291.

[79]R. S. Miller in R. S. MILLER and R. J. STANGER, ESSAYS ON EXPROPRIATIONS (1967), pp. vi-vii.

[80]D. R. Mummery, *The Protection of International Private Investment: Nigeria and the World Community* (1968), p. xxvi, where he states, "At the core of the problem, then is the issue of an adequate quid pro quo, of an adequate bargain, an adequate sense of reprocity. . . ."

[81]U. D. Umzurike, "*Nationalization of Foreign Owned Property and Economic Self-Determination*; EALJ, Vol. VI, No. 2 (1970), pp. 79-99, 96.

[82]E. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* (1970), p. 389.

propriation, even when it is clear that the expropriating state's resources will not permit the payment of anything like "adequate" compensation. According to this view, the obligation in international law on taking is for the payment of "appropriate" compensation which is not to be determined by market value, but on a basis which adjusts the "rights and wrongs" of the parties over a period of time.

The large number of newly independent states have been successful in having got the vague concept recognized or codified in the 1962 Resolution of the U.N. General Assembly which reads, "the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law."[83] W. Friedmann[84] sees in the Resolution a breakthrough in the deadlock of the debate on compensation and looks favorably on the Resolution in establishing agreement of all states. However, words cannot bridge the gap—the Resolution has only helped to confirm the weakening of the standing of the traditional "adequate" formula.

It is submitted that what is really needed is an accommodation of the interests of the capital exporting as well as capital importing countries, *i.e.*, a recognition of a new political and economic equilibrium.[85] No fair minded person who has gone into the history of the colonial investments can suggest that the "adequate" formula is just and equitable. On the other hand, there is the genuine need to respect private property which even the communist states recognize.[86] H. Lauterpacht[87] seems to shed a ray of light in the dark cavern. He suggests the payment of "partial compensation," when large scale or fundamental social and economic reforms[88] warrant interference with foreign private property. Perhaps the principle of

[83]U.N. Gen. Ass. Off. Rec. 17th Sess. (A/RES. 1803 (XVII)) (1962); *see also* I. Brownlie, *Principles of Public International Law* (1966), pp. 439-440.

[84]*Social Conflict and the Protection of Foreign Investment*, PRAC. AM. SOC. INT'L. L. (1963), pp. 126-134. p. 127-128.

[85]S. N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of* Universal International Law? AM. J. INT'L L. (1961), pp. 863-891, especially pp. 890-891; L. OPPENHEIM, THE FUTURE OF INTERNATIONAL LAW (1921), p. 67.

[86]*See, e.g.*, A. Drucker, *Compensation Treaties Between Communist States*, LAW TIMES, Vol. 229 (1960), pp. 279-280, 293-294; M. Akehurst, *A Modern Introduction to International Law* (1970), p. 117.

[87]H. Lauterpacht's 8th edition of OPPENHEIM, Vol. I, p. 352. On partial and adequate compensation *see also* A. A. Fatorous, *supra* note 3, pp. 325-331; F. G. Dawson and B. H. Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?* FORDHAM L. REV. (1962), pp. 727-758, 728-736.

[88]For a contrary view see G. Schwarzenberger, *supra*, note 59, p. 41. Professor Schwarzenberger states, "It is irrelevant whether the object of the [expropriation] measure is a structural change in the economy of the country concerned. If any of [the] conditions of a lawful expropriation is not fulfilled, the illegality of such acts is not healed by their connection with any alleged structural change in the economy of the country concerned . . ."

"fair return"[89] on invested capital could be employed to determine the measure of partial compensation. Lauterpacht's conception of the principal function of international law is especially instructive here:

> It is the principal function of international law to secure to states the measures of freedom of action necessary for the development of their institutions and their national life in accordance with the ideas which determine the political life of the state at any given time. The rules of state responsibility—no less than substantive international law in general—cannot be framed or developed by the method of choosing between one or another uncompromising claim. This is possible—or necessary—in an anarchical system of unreasoning sovereignties settling a controversy by force. The rational way of developing the law is by way of balancing and adjusting conflicting claims by reference not only to such law as is already generally accepted but also by reference to justice and to the needs of the international community.[90]

The capital exporting countries do not have a clear-cut view on the "promptness" of compensation. The more conservative writers state "prompt" to mean contemporaneous,[91] while other writers have pointed out that "prompt" does not necessarily mean such immediate compensation.[92] Prompt according to this latter view means payment after a reasonable period of discussion on all relevant aspects, including market value of the property concerned. The U.S. formula of promptness[93] is elastic indeed—it has accepted a lump sum settlement from Poland fifteen years after taking, with payments which extend over a twenty-year period from the date of the settlement.[94] Since the international standard of promptness can be tailored to fit the practical situation, the capital importing countries have no axe to grind. Indeed, the U.N. Resolution of 1962[95] is silent on the question of promptness.

Although the traditional formula has interpreted effective compensation to mean, transferable or convertible in the currency of the injured individual's state, there is in fact no such obligation on the expropriating state in customary international law. The obligation on taking is to compensate in local currency, and this constitutes effective compensation.[96]

---

[89]K.L. Karst, *Land Reform in International Law* in R. S. MILLER R. J. STANGER, ESSAYS ON EXPROPRIATION (1967), p. 61.

[90]E. Lauterpacht, *supra,* note 82, p. 389.

[91]Lord McNair, *supra,* note 64, pp. 574, 611.

[92]G. Schwarzenberger, *supra* note 59, p. 11; *see also* Professor Schwarzenberger's discussion of the views expounded in international arbitral practice in his INTERNATIONAL LAW, Vol. I (1957), pp. 679-681.

[93]E.g., the typical provision in a U.S. FCN treaty, like art. VI, para. 3 of the Treaty with Japan.

[94]S. D. Metzger; *supra,* note 68, p. 114.

[95]*Supra* note 83.

[96]S. D. Metzger, *supra* note 68, pp. 115-119; *also see* G. Schwarzenberger, *supra,* note 59, p. 11.

The experience of the European post-war nationalizations, the Articles of Agreement of the International Monetary Fund, and the U.S. practice in FCN treaties all support the contention that compensation in local currency can and does constitute effective compensation.

Article VI, Section 3 of the Fund gives almost absolute discretion to a state to control or restrict capital transfers[97] "as are necessary to regulate international capital movements." Hence a state in exercise of this discretion may refuse remittance in foreign exchange of the local currency receipts from expropriation. It is undesireable to hold the expropriating state to make immediate payment in foreign exchange where, *e.g.*, the state is obliged to conserve its foreign exchange or to increase its low foreign exchange earnings, to secure imports of goods and services for the health and welfare of its population.

In a typical FCN treaty of the U.S.[98] this situation is taken care of by a stay of transferability of compensation, while the expropriating state is in an exchange control stringency. The inequity of "effective" being interpreted to mean "transferable," is clearly brought out by Professor Metzger, in criticizing the negotiability of such a provision in the Abs-Shawcross Draft Convention on Investments Abroad:[99]

> . . . the quickest way to poison the atmosphere for private foreign investment is to attempt to secure a commitment from a country that it must be prepared to take food from the mouth of its people in order to pay compensation in foreign exchange for property taken in exercise of its eminent domain power, should it exercise such power. This proposition would be seen as either (a) a not-too-subtle-attempt to preclude exercise of the eminent domain power itself, which it is known that no country is in a position to forego, or (b) an effort to erect "property rights" over the "human rights" to eat the food necessary to have imported with scarce foreign exchange.[100]

A word about concession contracts. Some capital exporting countries contended that where a concession contract contains a provision not to expropriate the property of the foreigner, the expropriating state takes in breach of international law. However, most states, including the U.S., consider such a taking within the right of eminent domain, which "can neither be abdicated nor bargained away and is inalienable even by express grant, and . . . all contract and property rights are held subject to its fair

[97]Capital movements or transfers are not specifically defined in the Fund Articles of Agreement, but are indirectly defined as a residual category of movements after excluding "payments for current transactions" which are defined in Art. XIX(1).

[98]*Supra* note 93, Art. XII.

[99]The text of the Convention is reprinted in J.P.L. (1960) at pp. 116-118.

[100]S. D. Metzger, *Multilateral Conventions for the Protection of Private Foreign Investment*, J.P.L. (1960), pp. 142-143.

exercise."[101] Nationalization of the Suez Canal[102] by Egypt in 1956, in breach of a concession agreement between the Universal Suez Company and Egypt gives clear evidence of the settled law on this subject, England and France having suffered the greatest losses alleged a breach of international law by Egypt.

It is, however, worthy of observing that they sought to base the breach of international law on a stretched construction of the Constantinople Convention of 1888, to bring the concession agreement into the category of treaty exception. They never contended that the breach of the concession agreement between a foreign national (the Company) and a state (Egypt) constituted a violation of international law. Of course, a treaty between states specifically providing against such expropriation is a voluntary limitation of sovereignty and a breach thereof would result in a violation of international law.[103]

Even with regard to treaties the newly independent states are questioning the binding nature of treaties entered into during their colonial history. They argue that these treaties were imposed by gunboat diplomacy or entered into by coercion or through deceit. Since the element of consent is lacking in these unequal treaties, they are invalid *ab initio* and at best voidable. Implicit in this reasoning is the distinction between "old" and "new" foreign enterprises. With regard to the "old" enterprise, since the foreign company may have made profits out of all proportion to the investment, it has deprived the local people of the wealth that belongs to them. On expropriation of the "old" enterprise, the amount of compensation will be affected when the rights of the people are restored.[104]

A concession contract granted after independence is entered into with full knowledge and consent. Nationalization of such a new efficient enterprise on this understanding would constitute a breach of international law.[105] Equal treaties entered into after independence in contrast to unequal treaties, are to be respected under the principle of *pacta sunt servanda*.[106]

---

[101] Atlantic Coast Line R. R. v. Goldsboro, 232 U.S. 548, 558 (1914).

[102] G. Schwarzenberger, *supra* note 59, pp. 84-89; Slovenko, *Nationalization and Nasser*, 4 TUL. STUD. POL. SCI. (1957), pp. 88-89.

[103] *See* Chorzow Factory Case, P.C.I.J., Series A. No. 17 (1928); *see also* case concerning the Anglo-Iranian Oil Co. (1952) 1 CJ Rep. 111-112; case concerning the Barcelona Traction, Light and Power Co., Ltd. (Preliminary Objections) (1964) 1 CJ Rep. 56-64; M. Domke, *Nationalization of Foreign Owned Property and the Act of State Doctrine: The Present American Attitude Towards Nationalization of Foreign Owned Property*, 2 DUKE L. J. (1963), pp. 281-290.

[104] *See*, K. L. Karst, *supra*, note 89.

[105] *See*, H. W. Braade, *supra*, note 66, p. 14; *see also generally supra* notes 72 and 75.

[106] S. P. Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, INT'L & COMP. L.Q. (1965), pp. 121-131, 122-124.

From the foregoing it is clear that in the absence of a treaty agreement between the two states not to expropriate, a national of one state is virtually powerless against taking of property by the other. There expropriation does not constitute a violation of international law. Then, even if compensation is paid, the measure of compensation is uncertain so that the realized value may in fact not represent full and fair compensation from the foreign national's point of view.

In addition, time and resources must be spent to exhaust local remedies; if a cause at international still exists, the foreign national must persuade his state to take up diplomatic cudgels to settle the issue in a court where jurisdiction is granted only by consent of the parties.[107] When compensation is eventually paid in the light of international litigation, the expropriating state might be in an exchange control stringency (as in fact many capital importing countries are), and decide to exercise its lawful discretion to pay in local currency restricting transfer to the currency of the foreign national's state. It is in the light of the above not too happy state of customary international law that domestic legislation of Kenya governing expropriation and compensation is analyzed.

(2) Compensation Under the Constitution

At the outset it is worth observing that local laws can be changed by the legislature. In Kenya the Constitution may be altered by the National Assembly, only if the amendment bill is "supported on the second and third readings by the votes of not less than sixty-five per cent of all members of the Assembly (excluding the ex-offico members.)"[108] Whether the entrenched provision will provide a safeguard against radical change depends upon the continuation of present political ideology. Perhaps over and above that it might depend on the stability of the society. Many a time unstable societies have resorted to measures like nationalization as a solution to the problem of political unrest.

The main constitutional provisions on expropriation and compensation appear in section 75 of the Constitution, though there is an earlier mention under Chapter V: Protection of Fundamental Rights and Freedoms of the Individual. Section 70, in setting out fundamental rights and freedoms, states that an individual is entitled, *inter alia,* to "protection for the privacy of his home and other property and from deprivation of property without compensation." However, for circumstances of legitimate expropriation of

[107]*E.g.,* consent to arbitration by the parties. Also note that disputes may be brought before the International Court of Justice only with the consent of the parties, Art. 36(1) of the Statute of ICJ.

[108]Constitution of Kenya, Section 47(2).

property,[109] and for the measure of compensation and allied questions, the governing provisions are contained in section 75(1), which reads:

> No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—
>
> (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and
>
> (b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
>
> (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

This formulation comes very close to the traditional formula in international law. The first condition must show national interest for the property taken. Certain national interests are specifically enumerated, for instance, defense, public safety and so on; others are covered by the wideranging words "public benefit."[110]

The second condition of taking is closely linked with the first, and restricts it by demanding reasonable justification of the social benefit. Even where property is taken pursuant to a legitimate public benefit, there is the additional burden of showing that the consequent hardship to the injured individual was necessary. The condition of public benefit by itself is, therefore, not enough. This condition is designed as a safeguard against arbitrary measures of the Government. The courts would invalidate taking if the criterion of "reasonable justification for causing of any hardship" is not met.

The third condition provides for the legal authorization for taking and setting up of a machinery for "prompt payment of full compensation." Since there has not been any litigation in this connection, it is still an unsettled matter. It is, however, submitted—if the previous practice of Kenya is any guide—that full compensation stands for "adequate compensation" in the traditional formula. The Government has not indulged in any large scale nationalization, but there certainly have been cases of taking.

First, the Kenya Broadcasting Corporation, with a monopoly of radio

[109] Property is defined comprehensively in the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya) and includes "money, goods, choses in action, land and every description of property whether movable or immovable; and also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent arising out of or incident to property as herein defined."

[110] For the general ambit of "public benefit" see *supra*, section on Government Policy: Nationalization.

and television broadcast, was nationalized in 1964.[111] Compensation was paid not only for the assets of the former company, but also included indemnity for breach of contracts with overseas television corporations arising out of nationalization. Second, after independence it became necessary to acquire agricultural lands in the former "White Highlands" for the settlement of Africans. Farmlands of many European aliens were taken, and compensation paid at market value of the farms taken. Third, in April, 1970, the Government acquired control of the East African Power and Lighting Co., Ltd., a monopoly energy utility, by purchasing fifty-one per cent of the shares in the open market. Finally, the Government has acquired controlling interest in two enterprises through negotiated purchases of their existing shares.

In the absence of any disputes arising from the negotiated purchases, it may be assumed that the price paid to shareholders constituted compensation at market price. The first of the negotiated settlements was reached toward the end of 1970, when the Government acquired sixty per cent of the shares in one of the largest banks in Kenya, the National and Grindlays Bank. Later, early in 1971, a purchase of fifty per cent shareholding interest in the oil refinery at Mombasa was negotiated. In all the above cases the measure of compensation has been the market value of the property taken.

Subsections 5(a) and 6 contain the usual exceptions for the taking of property of persons, including aliens, without payment of compensation. These include taking in satisfaction for civil debt pursuant to execution of judgment, for any unsatisfied tax liability, or as punishment for crimes.

Both the constitutional provisions and the few takings indicate the state of law equivalent to the adequate formula in international law. True, the principle of non-discrimination does not appear, but a taking with adequate and prompt compensation is not in violation of international law simply because it is discriminatory.[112]

(b) Investment Guaranty Agreements

While the legal debate on expropriation has been completely fruitless in allaying the fears of the investor, and in promoting greater flow of capital to the developing countries, some progress has been made at the non-ideological and practical level through the device of investment guaranty schemes. The device is an innovation of the United States, and was

[111] *See* the Kenya Broadcasting Corporation (Nationalization) Act, 1964.

[112] On non-discrimination and international law see *supra*, section on Expropriation: The Polarity Between Capital Exporting and Capital Importing Countries.

brought to life by the Economic Cooperation Act[113] aimed at providing greater protection to the American investor, in the desirable aim of post-war reconstruction in Europe. Since 1959 the investment guaranty scheme has been restricted to investments in developing countries, being no longer available for investments in economically advanced countries of Europe.[114]

In passing, it may be observed that the success of the United States scheme has led to the emulation of similar schemes by major capital exporting countries like Denmark, West Germany,[115] the Netherlands, Norway, Sweden, Switzerland, Japan, Canada and Australia. On payment of a small premium[116] the United States Government, through AID, provides the investor with insurance against risks of expropriation and inconvertibility of earnings or principal. Should an investment covered under the scheme be expropriated, the investor pursues his local remedies for a period of one year from the date of expropriation, and then submits his claim to AID. AID pays out the dollar amount of the prinicpal sum assured and steps into the shoes of the investor by the right of subrogation.[117]

Typically, the United States enters into a bilateral agreement—the umbrella agreement—with the developing country for the operation of the investment guaranty scheme. The umbrella agreement is usually established by an exchange of notes, like the agreement with Kenya pursuant to the exchange of notes between the then American Ambassador, Mr. William Atwood, and the President (then Prime Minister) of Kenya, Mzee Jomo Kenyatta, dated March 19, 1964, and April 20, 1964, respectively.[118] The major obligation on the part of the Kenyan Government is to recognize the subrogation rights of the U.S. after it has stepped into the investor's shoes, having paid out the sum insured under the scheme. The relevant clause runs:

> If an investor transfers to the Government of the United States of America

[113] Economic Cooperation Act (1948), 62 Stat. 137.

[114] Mutual Security Act (1959), Section 413(b), P.L. 108, 86th Cong.

[115] For a brief treatment of West German and Japanese investment guaranty schemes, see G. W. Ray, *Transnational Trade and Investments: Gurarantees of Foreign Investments*, WORLD PEACE THROUGH LAW (1967), pp. 266-281, 271-272.

[116] In the region of 1/8% on the sum insured. In the open market such insurance is either unobtainable, or else premiums are so high as to be effectively prohibitive.

[117] For a detailed description see L. A. Collins and A. Etra, *Policy, Politics, International Law and the U.S. Investment Guaranty Program*, COL. J. TRANSNAT'L L. (1966), pp. 240-296; R. B. Lillich, *The Protection of Foreign Investment* (1965), pp. 147-164; M. N. Whiteman, *The U.S. Investment Guaranty Program* (1959), pp. 20-59; W. S. Surrey and C. Shaw, *A Lawyer's Guide to International Business Transactions* (1963), pp. 336-346.

[118] T.I.A.S., 5573, pp. 423-426.

> pursuant to an investment guaranty, (a) lawful currency, including credits thereof, of Kenya, (b) any claims or rights which the investor has or may have arising from the business activities of the investor in Kenya or from the events entitling the investor to payment under the investment guaranty, or (c) all or part of the interest of the investor in any property (real or personal, tangible or intangible) within Kenya, the Government of Kenya shall recognize such transfer as valid and effective.[119]

This scheme is only available to new United States investments or new investments in existing enterprises made subsequent to April 20, 1964. For instance, the Firestone Tyre and Rubber Company, under construction at present, is eligible and in fact has an expropriation and inconvertibility risk cover from AID. In the exchange of notes, the United States specifically undertakes not to issue an insurance cover for any investment project unless the Kenyan Government "approves the activity to which the investment relates."[120] This consultation and approval keeps sensitive industries out of the reach of the U.S. investors, and thus tends to avoid the associated problems.

There is a similar investment guaranty scheme with the Netherlands under the Kenya-Netherlands Agreement.[121] The Netherlands Government undertakes to guarantee only approved enterprises, and the Kenya Government recognizes the right of subrogation by which the Netherlands Government steps into the shoes of the affected Dutch investor.[122]

For a developing country like Kenya, the scheme has several advantages:

1. It allows greater freedom of action. For instance, even in a foreign exchange stringency Kenya may expropriate a U.S. national's enterprise covered by the scheme and pay compensation in local currency without traumatic effect on the U.S. investors. The loss of the investor is made good by AID in dollars and though the U.S. Government acquires local Kenyan currency, it can utilize it effectively.[123]

2. As only enterprises approved by the Kenyan Government are covered by the scheme, it allows Kenya to select and expressly reserve those industrial activities which it needs to control stringently or limit to nationals.

---

[119] *Id.*, paragraph 3 of the United States note, p. 423, and paragraph 3 of the Kenya note, p. 425.

[120] *Id.*, paragraph 2 of the United States note, p. 423, and paragraph 2 of the Kenya note, p. 425.

[121] Kenya-Netherlands Agreement, *supra*, note 50.

[122] *Id.*, Article X.

[123] See *infra*, section on Exchange Controls: Transfer of Compensation.

3. The issue of expropriation is de-politicized.[124] Should a U.S. enterprise be expropriated, the investor having received payment from AID is no longer interested in high pressure lobbying at the Capitol Hill. Of course the claim is not extinguished, but the U.S. Government as the subrogee is less likely to pursue the claim as relentlessly, the political steam having been vented. In view of the fact that the U.S. Government gives millions of dollars in grants, a modest guaranty claim is not likely to be pressed hard and then a negotiated settlement is always a possibility.

4. The scheme also de-ideologizes the legal debate on expropriation.[125] While the bipolar debate can continue vociferously, an investor no longer need be apprehensive at the unsettled state of international law relating to the measure of compensation. Should he choose to invest in Kenya under the scheme, he is guaranteed conpensation to the extent of the sum insured and at the latest in a year's time for U.S. investors. If the unsettled state of international law was one of the impediments to investment, it no longer need be!

The arbitration clauses[126] of the schemes which call for settlement of claims or disputes in the light of "international law" may be a thorn in the investor's side, but then very few cases are ever likely to be litigated and new investments as contrasted with colonial investments are on a substantially different footing, so that the traditional formula may not be out of place here. Anyway the obligation on expropriation is to make good the losses to the extent of the sum insured which is already a substantial step away from the market value measure.

One major drawback of the U.S., or any other country's investment guaranty scheme, is that it is restricted to the nationals of the capital exporting countries.[127] The multinational corporation—not an infrequent investor—is simply not eligible unless it can meet the national requirements of eligibility. In the case of the U.S. scheme it is restricted to a citizen, a corporation, a partnership of other association created under the U.S. Laws, and owned fifty-one per cent by U.S. citizens or beneficially so owned.[128]

---

[124]S. D. Metzger, *Nations and the Rules of International Law—A Commentary*, HOWARD L. J. (1962), p. 126; for a contrary view see G. Schwarzenberger, *supra*, note 59, p. 192.

[125]*Id.*, S. D. Metzger, p. 127.

[126]*See infra* section on Judicial Settlement of Disputes.

[127]E. I. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* (1965), p. 79.

[128]*See* S. D. Metzger, *Nationality of Corporate Investment under Investment Guaranty Schemes-The Relevance of Barcelona Tractions*, AM. J. INT'L. L. (July, 1971), pp. 535-538, where the writer goes on to recommend local incorporation plus fifty-one per cent ownership as the genuine link of nationality of the corporation.

It is hoped that the IBRD Multilateral Investment Guaranty Scheme, in its final stages of negotiations at this time, will fill this chasm.[129] In view of the fact that one of the largest present and potential investors in the developing countries is the multinational corporation, the scheme may lead to greater flow of the needed capital.

(c) Judicial Settlement of Disputes

In order to ensure a viable investment climate it is essential to have adequate and effective machinery for settling issues arising from the application of local laws or for interpreting treaty rights and obligations of the parties.

Section 75(2) of the Constitution of Kenya helps to cut short the exhaustion of the local remedies rule, in any dispute connected with expropriation and the payment of compensation. The section gives the injured party

> direct access to the High Court for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right—and the amount of compensation to which he is entitled.

Another provision in the same section allows similar direct access for "the purpose of obtaining prompt payment" of compensation. This latter provision has utility in raising the question of adequate and effective machinery which must be set up on taking.[130] While there have been cases of nationalizations and government take-overs of majority equity assets of enterprises, no disputes have arisen which have necessitated the invoking of the direct-access clause.

Kenya is a signatory to several bilateral agreements which provide for arbitration of disputes and is a party to the Convention on Settlement of Investment Disputes between States and Nationals of Other States.[131] The agreement with the U.S. on guaranty of private investments provides that disputes arising out of the application or interpretation of the agreement or any claim to which the U.S. may be a subrogee shall be settled through negotiations between the two governments, failing which, at the initiative

[129]*See* Staff Report of IBRD, *Multilateral Investment Insurance* in J. F. DANIELS, INTERNATIONAL FINANCING AND INVESTMENT (1964), pp. 170–246. Professor Schwarzenberger, *supra*, note 59, at pp. 179–181 is, however, highly pessimistic of the success of the proposed IBRD scheme.

[130]Constitution of Kenya, section 75(1)(c). A proviso limits the direct access to the High Court, to a right of appeal if a tribunal has been set up by the Parliament to determine the issue.

[131]Signed on May 24, 1966, ratified on January 3, 1967, entered into force on February 2, 1967; adopted in legislation through the Investment Disputes Convention Act on November 22, 1966; appointees to Membership of Panels are B. M. Gecaga, J. F. H. Hamilton, B. H. Hobson, S. N. Waruhiu. For full text of the Convention see 575 U.N.T.S. 159.

of either government, the dispute can be referred to a mutually acceptable sole arbitrator. If the parties are unable to agree on the selection of the arbitrator, the President of the International Court of Justice may be requested again by either party to designate the arbitrator. The arbitrator is empowered to determine the issue "in light of the applicable principles of international law."[132]

The Kenya-Germany treaty[133] for the promotion of economic cooperation and "favorable conditions for investment by nationals and companies of either state in the territory of the other state" provides for similar arbitration machinery as contemplated in the U.S. investment guaranty agreement.[134] Disputes arising out of the interpretation and application of the treaty are to be settled through negotiations before resorting to arbitration. The arbitral tribunal is to consist of three arbitrators who render a decision by majority of votes. Kenya and Germany appoint one arbitrator each and both have to agree on the selection of the third who will act as their chairman.

The mutually agreeable chairman must not be a citizen of either country. Elaborate measures exist for requesting the International Court of Justice to make the necessary appointments of the missing arbitrators in case of disagreement. The treaty is silent on the law to be applied by the tribunal. In the absence of any governing provision, the application of customary international law, if applicable, cannot be presumed to be excluded.

The third bilateral instrument referring to disputes arising out of investments is the Kenya-Netherlands Agreement.[135] The Agreement provides for an almost identical form of tribunal as the one set up in the Kenya-Germany treaty.[136] The tribunal decides in "conformity with the principles of law," but if the parties agree it is empowered to decide the dispute *ex aequo et bono*.[137] In addition, the Agreement is unique in contemplating the use of the International Center for the Settlement of Investment Disputes for conciliation or arbitration.[138]

Kenya is a party to the IBRD Convention on the Settlement of Investment Disputes between States and Nationals of Other States which entered into force on October 13, 1966.[139] Since its ratification by the

[132] *Supra* note 118, paragraph 5 of the U.S. note, p. 424, and paragraph 5 of the Kenya note, p. 426.

[133] Kenya-German Treaty, *supra* note 49.

[134] *Id.*, Article 11.

[135] Kenya-Netherlands Agreement, *supra* note 50.

[136] *Id.*, Article XVI.

[137] *Id.*, Article XVI(5).

[138] *Id.*, Article XI.

[139] *See* A. Broches, *The Convention on the Settlement of Investment Disputes: Some*

Kenyan Legislature in 1967, several contracts between the Government and large corporations—United States and Dutch owned—have been concluded with the relevant arbitration clauses for submission of disputes to the International Centre for Settlement of Investment Disputes (ICSID).

Article 1 of the Convention sets up ICSID which is aimed at providing "facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with the provisions of this Convention." It does not deal with questions of substantive law governing the rights and obligations of investors; it only provides facilities for solving disputes. Only legal disputes as distinguished from disputes of a political nature "arising directly out of an investment" between a state and a private party may be submitted for conciliation or arbitration.[140] Consent is the basis of jurisdiction any may be given in advance or at the time of the submission of the dispute.[141] Once consent has been given, however, it may not be withdrawn unilaterally by either party.[142] After submission of the dispute, the parties are "required to carry out their agreement, to give due consideration to the recommendation of a conciliator and to comply with an arbitral award."[143]

The Convention is designed to fill a gap in the judicial settlement of investment disputes—a gap which some believe restricts adequate flow of investment—to where it is most needed in the developing countries. It has been seen that questions of international law to be applied are bitterly disputed between the capital exporting and capital importing countries. Even where there is consensus on law, the procedures for impartial determination of disputes are needed to reconstitute the confidence of capital importing countries. Precedents of colonial tribunals where the state of the investor acted both as the judge and executioner in its own cause, are still fresh in the history of the newly independent countries.

Observations on Jurisdiction, COL. J. TRANSNAT'L L. (1966) 263-280; J. G. Starke, *The Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States* in J. G. STARKE, THE ENCOURAGEMENT OF PRIVATE FOREIGN INVESTMENT (1966), pp. 1-22.

[140]Convention on the Settlement of Disputes between States and Nationals of Other States, Article 25(1).

[141]The number of arbitrators in the tribunal results in predictability of the decision and therefore, has important implications for consent by capital importing countries. On this see Professor Schwarzenberger, *supra* note 59, pp. 135-152, 191-192. For a speculation on the possible lack of support of the Convention, see Professor Sir Francis Vallat, *The Peaceful Settlement of Disputes* in CAMBRIDGE ESSAYS IN INT'L L. IN HONOUR OF LORD MCNAIR (1965), p. 173.

[142]*Supra*, note 140, Article 25(1).

[143]S. M. Schmitthoff, *Work Paper on Transnational Trade and Investments*, in WORLD PEACE THROUGH LAW (1969), pp. 261-276; *see also* A. Broches, *Settlement of Disputes between States and Nationals of Other States*, in WORLD PEACE THROUGH LAW (1969), pp. 258-261, 259-260.

The aim of the Convention is to get investment as far away from power politics as possible by providing recourse to an impartial tribunal for judicial settlement of disputes.[144] The investor has the benefit of *locus standi* against the foreign state, thus eliminating the need for his government to decide whether the issue will be litigated at all. To this extent, the investor will also give up the possibility of diplomatic intervention by the investor's government in return for an impartial tribunal, where he has the *locus standi* to litigate with the foreign state. In any case diplomatic intervention is deferred until the question of international law has been litigated, and this takes away the political basis of hostility. The Convention is an important innovation: It tends to encourage private foreign investment in developing countries like Kenya by measures which, *inter alia,* boost confidence in both the investor and the host state.

5. *Exchange Controls*[145]

(a) Transfer of Compensation

Transferability into the currency of the investor's country of compensation on expropriation is specifically permitted in the Constitution. Section 75(4) states:

> no person . . . shall be prevented from remitting within a reasonable time after he has received any payment of that compensation, the whole of that payment . . . to any country of his choice outside Kenya.

The provision is, however, to be read with the restriction imposed by subsection 5(b) of the same article which imposes "reasonable restrictions" on the manner of remittance. Hence transferability would seem to be denied in the case where Kenya happens to be in a foreign exchange stringency with the investor's state or indeed, in the situation where the International Monetary Fund—of which Kenya is a member—directs suspension or restriction in dealing of a scarce currency. Even in these situations the investor may choose to get his compensation in the currency of a third state acceptable to him under the provision of article 75(4).

The Kenya-Germany treaty requires compensation on expropriation to be paid in a form "realisable, transferable and . . . made without delay."[146] In addition, it requires a provision at or prior to taking for determination of compensation and subjects the legality of such action to review by the

---

[144]R. Y. Jennings, *International Investment* in WORLD PEACE THROUGH LAW (1964), pp. 280-284, 283.

[145]For an exposition of international law on the subject see S. D. Metzger, *Exchange Controls and International Law* in S. D. METZGER, INTERNATIONAL LAW TRADE AND FINANCE: REALITIES AND PROSPECTS (1962), pp. 109 - 126.

[146]Kenya-Germany treaty, *supra*, note 49, Article 3(2).

courts. "Transferable" must be interpreted with the restrictions which might be necessitated by the need to conserve the low level of foreign exchange and by obligations under the Fund Agreement, both mentioned above. A provision of the Protocol reserves the right of the investor to reinvest the proceeds of compensation, should they become untransferable.[147]

The investment guaranty agreement with the United States forsees the difficulty of transferability for a developing country like Kenya and solves the problem effectively with a more practical device. It provides for a treatment with respect to exchange, repatriation or use of the compensation paid to the United States as a subrogee, "not less favourable than that accorded to funds of nationals of the United States of America derived from activities similar to those in which the investor had been engaged."[148] Should this transferability be endangered by the low level of Kenya's dollar reserves and hence cause delay in the eventual repatriation, the right to use the compensation in local currency for the U.S. Government expenditures in Kenya. The relevant provision in the Kenya-Netherlands Agreement is worded in a similar vein. On expropriating Dutch property, Kenya is to pay "adequate compensation, transferable to the extent necessary to make it effective, within a reasonable time and in accordance with generally recognized rules of international law."[149]

(b) Transfer of Earnings

The Foreign Investments Protection Act allows approved foreign investments to transfer in the approved currency, profits derived from the enterprises subject to the payment of taxes.[150] Similarly, interest paid on a foreign loan financing an approved investment is transferable.[151] Where an enterprise is authorized by the exchange control authorities to borrow from abroad, the lender is entitled to transfer interest payments in the currency of the loan.

Although the Kenya-Germany treaty and the Kenya-Netherlands Agreement both require transferability of earnings,[152] the treaty rights do not add to existing rights under the Foreign Investments Protection Act. But if the Act is amended to restrict, suspend or stop current transferability on

[147] *Id.*, Protocol Article 3(b).

[148] *Supra* note 118, paragraph 4 of the U.S. note, p. 424, and paragraph 4 of the Kenya note, pp. 425–426.

[149] Kenya-Netherlands Agreement, *supra*, note 50, Article IX.

[150] Foreign Investments Protection Act, *supra* note 46, Section 7(a).

[151] *Id.*, Section 7(c).

[152] Kenya-Germany Treaty, *supra*, note 49, Article 4; Kenya-Netherlands Agreement, *supra* note 50, Article VIII(a) and (c).

earnings, the treaty rights will stand and be superior to national and most favored nation treatment outside these treaties.

(c) Disinvestment and Repatriation of Capital

On a liquidation of an approved foreign enterprise or its sale as a going concern to a national or another foreign investor, the proceeds can be repatriated in the currency in which the investment was made.[153] If the going concern is sold at a premium, *i.e.*, at a price higher than the investment value specified in the Certificate of Approved Enterprise, it is an open question whether this capital gain is transferable. No cases have reached the court to decide the issue, one way or the other. The principal of a foreign loan in respect of an approved enterprise can be repatriated in the currency it was borrowed in.[154]

Under present treaty obligations Kenya is obliged to maintain transferability of proceeds from liquidation—partial or total—of approved enterprises.[155] Since these privileges are at present granted by the Foreign Investments Protection Act, they do not add anything to the rights of the investors protected by the treaties. Should local legislation change adversely, the treaty provisions will become operative.

6. *Taxation*

(a) Corporation Tax

Corporation tax is levied under the East African Income Tax (Management) Act, 1958. The tax is assessed and collected by the East African Income Tax Department of the East African Community. All companies, whether local or foreign, pay the corporation tax at the same flat rate of forty per cent. Under section 12 of the Act, the Minister for Commerce and Industry has powers to exempt from tax any class of income or income from any person, but so far the exemption has never been given to business companies. However, Kenya has avoidance of double taxation agreements with most countries which are likely to invest foreign capital. The historic association with the U.K. has resulted in double taxation agreements with the U.K. as well as with other members of the Commonwealth. In addition, the following agreements have been concluded:

1. The Double Taxation Relief (Denmark) Arrangement[156] between

[153]*Supra*, note 150, Section 7(b).
[154]*Id.*, Section 7(c).
[155]Kenya-Germany Treaty, *supra* note 49, Article 4 in conjunction with Article 4 of the Protocol; and Kenya-Netherlands Agreement, *supra* note 50, Article VIII(b).
[156]L.N. 61/1959 and L.N. 68/1961.

Kenya, Tanganyika, Uganda and Zanzibar[157] of the one part and Denmark of the other part.

2. The Double Taxation Relief (Sweden) Arrangement Notice[158] between Kenya, Tanganyika, Uganda and Zanzibar of the one part and Sweden on the other part.

3. The Double Taxation Relief (Switzerland) Arrangement Notice[159] between Kenya and Zanzibar of the one part and Switzerland of the other part.

4. The Double Taxation Relief (Norway) Notice[160] between Kenya and Zanzibar of the one part and Norway of the other part.

5. The Double Taxation Relief (Zambia) Notice[161] between Kenya and Tanzania of the one part and Zambia of the other part.

The United States taxation laws allow credit for taxes paid in foreign countries by U.S. corporations carrying on business in those countries.

(b) Accelerated Depreciation and
Initial Allowance

The East African Income Tax Act, 1958, permits all approved enterprises to depreciate capital assets at an accelerated rate, with the net effect of reducing the tax burden until expenditures or invested capital have been recovered. For instance, the accelerated rates for the following classes are:

1. Industrial buildings can be depreciated annually at the rate of four per cent to six percent.

2. Plant and machinery annual write-offs vary between 12.5 per cent for ships to 37.5 per cent for heavy self-propelling vehicles like tractors.

3. Mining equipment can be depreciated forty per cent in the first year and thereafter at an annual rate of ten per cent.

4. Farm equipment expenditures may be written off at the rate of twenty per cent each year to give nil book value of five years.

In addition to the above accelerated rates of depreciation, initial allowances provide further encouragement to certain investments, *e.g.*, construction of ships (at the rate of forty per cent) and new industrial buildings, including new machinery installed therein (at the rate of twenty per cent). The initial allowance does not affect the written-down values for depreciating an asset. This makes it possible to depreciate more than one hundred

[157]After their merger into one state Tanganyika and Zanzibar form the state of Tanzania.
[158]L.N. 61/1959.
[159]L.N. 60/1964.
[160]L.N. 61/1964.
[161]L.N. 10/1970.

per cent of the value of the new equipment or construction. The initial allowance is given only once over the lifetime of the new equipment or construction. The device further reduces the tax burden on present profits and in addition the unabsorbed balance can be carried forward indefinitely against future tax liability. If the enterprise is making losses, these losses are aggregated with the initial allowances and carried forward indefinitely as set off against future tax liability.

(c) Customs Duties—Exemptions and Refunds

Customs duties, imposed on almost all items imported into the country, provide a major source of revenue for the Government besides protecting the domestic industry. The principal act governing customs tariffs and excise duties is the East African Customs Management Act, 1952. The Act gives the Minister of Finance and Economic Planning, *inter alia,* wide discretionary powers in prohibiting importation of goods whether listed in the East African Tariff Schedule or not. Alternatively, he may permit importation of goods but subject to conditions deemed necessary, *e.g.*, require import licenses for goods. In the interest of rapid industrialization of the economy, the following items are specifically exempt from import duties: agricultural machinery, certain industrial machinery, electrical machinery, locomotives, certain minerals and metals and chemicals.

On application, the Minister may permit drawbacks or refunds on duties to manufacturing enterprises, by issuing regulations under the Act. An enterprise using imported goods in the manufacture of its articles is entitled to a one hundred per cent drawback on the imported component of industrial inputs, should the manufactured article be exported from Kenya. Other drawbacks of varying percentages—the percentage depending on the type of industry—are given for imported goods used for local production. The drawbacks act as an incentive for the investor to locate in those industries where local production is insufficient, and where the Government is trying to encourage expansion planned for the future.

(d) National Social Security Tax

The National Social Security Tax is imposed on all resident employees except for those who are exempted. The employee and the employer contribute in equal shares and when the benefit matures for an employee, *e.g.*, on his retirement, he is entitled to a lump sum payment based on total contribution plus interest earned standing to his credit as at that date. The tax provides a provident fund scheme at the moment but is designed in the near future to cover a general pension and unemployment relief scheme for

its employee contributors. Foreigners taking employment for less than three years are exempt. Those who continue working beyond the three-year period are taxed but entitled to the lump sum benefit on permanently leaving Kenya.

7. *Miscellaneous Provisions*

(a) Protection from Foreign Competition

The Minister for Commerce and Industry has wide discretionary powers to protect Kenyan infant industry from foreign competition. The Minister may restrict competition in any way most suitable for protection of the particular industry. The methods that have currently been used to thwart foreign competition are the raising of tariff levels, and the allocation of quotas through import licenses for the competing imported goods. The Minister decides, on a case-by-case method, on applications, submitted by investors, and should an industry be in need of protection, he directs the measures to be taken. For instance, in the case of the new Firestone Tyre and Rubber Company, he has deemed fit to impose phased quotas on the types and sizes of tires that will be produced by the enterprise.

(b) Trade Disputes Act

In order to minimize the threat of major strikes and lockouts and reduce the number of man-days lost through work stoppage, Kenya passed the Trade Disputes Act in 1965 to curb the power of the trade unions. The Act outlaws strikes in many services and industries, and in yet others if the trade unions fail to exhaust all the necessary machinery for the settlement of disputes, the Government has powers to declare the strike unlawful.

(c) Patents, Trademarks and Copyrights

Kenya does not have independent patent laws which provide for an original registration of a patent. However, patents can be "registered" by virtue of the Registration of U.K. Patents Act, which enables registration of patents that have already been obtained in the U.K. The foreign investor must first obtain registration of his patent in the U.K. to protect it in Kenya by further registration under the Act. The rights and privileges of the patent continue for the term of the original U.K. patent. The U.K. investor is therefore in a favorable situation as regards the protection of patents.

In contrast to patents, Kenya has a statute governing trademarks. Each successful application for registration of a trademark is valid for an initial period of seven years from the date of the application. After the expiry of

the seven-year period, renewals for successive periods of fourteen years each are granted on application.

Kenya acceded to the Universal Copyright Convention on June 7, 1966. Under the provisions of the Convention, it is ensured that a member national receives automatic copyright protection in Kenya, on fulfillment of the necessary conditions.

Section C: Appraisal

1. Rate of Foreign Investment

Statistics of private foreign investment in Kenya are far from being perfect. It is impossible to find an unadulterated statistic that will reveal the rate of investment from year to year. The balance of payments statistics distinguish "Long Term Capital Movements: Private Enterprises" from other long term capital movements. The concept of "Long Term Capital Movements: Private Enterprises" represents the flow of foreign investment into the private sector and includes both direct and portfolio investment. However, it contains an element of retained and reinvested profits of approved enterprises.[162]

In other words, profits which are legally transferable by virtue of Foreign Investment Protection Act, 1964, are recorded as having left the country and then coming in again as foreign investment should these profits be reinvested. How much of "Long Term Capital Moverments: Private Enterprises" is accounted by these reinvested profits is anybody's guess. It is assumed this component is relatively unimportant. In fact, the larger this component, the stronger the basis for the present conclusion as it tends to reduce the total amount of genuine foreign investment in any year. The current Development Plan, drawn in awareness of all the relevant aspects, projects private foreign investment at K£ 140 million for the five years 1970 - 1974.

No breakdowns over the five years are given, but it is instructive to keep in mind that the figure represents an average rate of K£28 million per year over the period. In 1970 actual or realized foreign investment stood at K£ 11.3 million and, as compared to the annual average rate of K£ 28 million, leaves a difference of K£ 16.7 million. In the very first completed year of the Development Plan, less than half the projected investment materialized! The table below sets out the statistics.

[162]On which see *supra*, section on Entry of Investment.

Private Foreign Investment: Planned & Realized K£ Million

	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974
Planned[163] Investment	Data Not Available					Average 28 Per Year (= 140 over 5 Years)				
Realized[164] Investment	1.5	1.0	7.9	10.5	12.6	11.3				

Realized Investment = Long-Term Capital Movements: Private Enterprises

2. Assessment of Investment Climate

The growth of the economy has not been spectacular, but a steady growth in the region of four per cent per annum has been achieved without inflation. There is no reason to believe that profitable openings do not exist. The economy has a large private sector and encourages participation by private foreign investment. The Foreign Investment Protection Act, 1964, was passed specifically to induce a greater flow of investment.

The legal environment and protection accorded to foreign investment is excellent. There is, of course, the screening of investment, but once the investment is allowed in transfer of profits; repatriation of capital are permitted automatically. The analysis of security of investment has revealed that the security accorded to the investor leaves little to be desired from the investor's point of view.

The statistical analysis above shows that the expected or planned rate of investment is unlikely to materialize. The primary indicia of investment climate—the investment laws—totally fails to account for the underlying political and social factors that antagonize the investor. Although political stability has been ensured under President Jomo Kenyatta, the foreign investor is apprehensive of the tribal context of politics and the failure of the Government to alleviate the problem of ever-increasing unemployment.[165] Combined with other factors mentioned below, the country is potentially unstable.

The exodus of Asians[166] from Kenya, especially after the Trade Licensing Act, 1968,[167] has tended to create problems for the investor. The Asians are the largest pool of technical, professional and entrepreneurial-minded people in Kenya. While the investor is not concerned with the

[163]Kenya Development Plan, *supra*, note 24, p. 161.

[164]Data derived as follows: (a) 1965-1968 from Kenya Development Plan, *supra*, note 24, p. 43; (b) 1969-1970 from Economic Survey, *supra* note 23, p. 20.

[165]National Industrial Conference Board, *supra*, note 19, Vol. I, p. 84.

[166]For the U.K. point of view see R. Plender, *The Exodus of Asians from East and Central Africa—Some Comparative and International Law Aspects*, AM. J. COMP. L. (1971), pp. 287-324.

[167]Chapter 497 of the Laws of Kenya.

inhumanity of the situation, their departure creates an adverse investment climate for three reasons. First, the distributive chain—importation, wholesaling and retailing of goods—now dominated by the Asians may break down, especially considering the lack of entrepreneurial skills in indigenous Africans.

At the same time, Asians in technical fields and professions are migrating with the resultant accentuation of the bottleneck in badly needed skills. Second, even assuming there is no adverse effect of the migration on the aggregate level of demand in the economy, the pattern of demand will change and the potential foreign investor is faced with a kaleidoscopic market, the full consequences of which cannot be foreseen accurately. Third, the transfer of savings and capital of migrants to places outside Kenya might lead to balance of payments difficulties—the Emigration Allowance has twice been slashed to lower figures. With this in mind, the foreign investor may not like to risk nontransferability of his profits in the future not too far distant.

Kenya, Tanzania and Uganda, as members of the East African Community, offer one market to the investor—the only customs barrier to interstate trade being the Transfer Tax. With the rocking of the boat of the East African Community by the Tanzanian Government's policy of non-recognition of the present Uganda Government since the ouster of ex-President Milton Obote, there is a threat to the survival of the common market. The possibility of a shrunken market is certainly not attractive to a potential foreign investor.