THE NEW INTERNATIONAL ECONOMIC ORDER, INVESTMENT TREATIES AND FOREIGN INVESTMENT LAWS IN ASEAN

The states of ASEAN have adopted three distinct attitudes to foreign investment, each at a different level. At the international level, because of their membership of Third World groupings, they have associated themselves, somewhat reluctantly, with the package of norms on foreign investment contained in the claims to a New International Economic Order. At the bilateral level, they have deviated from these norms and accepted the more traditional norms of foreign investment protection advocated by the capital-exporting States. However, there are indications in the bilateral investment treaties that such protection will not be given to all foreign investment. In their domestic laws on foreign investment, the ASEAN states, which generally believe in a strategy of foreign investment led development, have adopted a pragmatic approach. While devising mechanisms for controlling such investments to ensure that they contribute to national economic goals, they also seek to attract foreign capital by maintaining certain traditional norms of foreign investment protection. This article is a study of these trends. The general conclusion is that the ASEAN states would adhere to the pragmatic approach of maintaining national control while adhering to internationally accepted standards of investment protection.

THE ASEAN states[1] have generally accepted the role that foreign investment has to play in economic development. Their attitude to foreign investment, however, has been expressed at three distinct levels. Firstly, as a result of the membership of the ASEAN states in multilateral groups to which Third World nations belong (like the Group of 77 at the United Nations[2] and the Non-Aligned Movement[3]), ASEAN states have subscribed to norms on international economic relations sponsored by these groups. Secondly, in bilateral investment treaties made with developed countries, they have reached accommodation with their treaty partners on the treatment to be accorded to investments made by their respective nationals. The third level is one of unilateral control of foreign investment where each of the ASEAN states has devised its own machinery for the control of foreign investment within its boundaries. When a state operates at these distinct levels, the possibility is great that there are divergences in the stances it takes at each different level. It can be accused of double standards in that, while maintaining the position that foreign investment

1 On the Association of South East Asian Nations and the aims of the regional grouping, generally see A. Broinowski (ed.), *Understanding ASEAN* (1982); R.P. Anand and P.V. Quisimbing (eds.) *ASEAN: Identity, Development and Culture* (1981); D.K. Mawgy (ed.) *Politics in the ASEAN states* (1985); R. Folsom, "ASEAN as a Regional Economic Group — A Comparative Lawyer's Perspective" (1983) 25 Mal. L.R. 203.

2 The formation of the group dates from the Joint Declaration of the Developing Countries made at the Eighteenth Session of the General Assembly. For documents associated with the group, see K.P. Saurant, *The Collected Documents of the Group of 77* (Vol. 1, 1981).

* On the non-aligned movement, see L. Mates, *Non-Alignment* (1978).

must be subject to national control in international fora, it could, at the domestic level, hold out lavish incentives and guarantees in order to attract foreign investors.[4]

This paper is an effort at studying the extent to which there is coincidence in the aims and policies of the ASEAN states at the three distinct levels outlined above. It explores the norms on foreign investment in the General Assembly resolutions on the New International Economic Order which received the support of the ASEAN states. It then examines the features of the bilateral investment treaties and analyses the extent to which the principles contained in these treaties are consistent with the norms of the New International Economic Order. Finally, a study is made of domestic legislation on foreign investment in the ASEAN states. Correspondence between the norms of the New International Economic Order and those espoused in domestic legislation will greatly strengthen the claims of the former to be regarded as part of international law.[5] Such correspondence may also eventuate in the possibility of a common approach to foreign investment by the ASEAN states. Such a common approach may be desirable as it would increase the bargaining strength of the ASEAN states by avoiding competition for foreign investment between the member states. It will also enable the ASEAN states to use their collective leverage against practices of transnational corporations, like transfer pricing, restrictions on the use of technology and other restrictive business practices harmful to economic development.

I. THE NEW INTERNATIONAL ECONOMIC ORDER

The Declaration on the New International Economic Order came after the demonstration of the effectiveness of collective economic action by the Organization of Petroleum Exporting Countries (OPEC). The Declaration was based on the premises that the existing economic order was weighted in favour of the developed states and that a change had to be brought about which redressed the balance of advantage in favour of the developing states. Claims to justice in international trade constitute the basis of the Declaration.[6] The justice-oriented argument is based on the notion that past inequities of the world order must be corrected in order to eradicate the poverty of the Third World. Such distributive justice implies the entitlement of poor nations, as a matter of right, to the payment of just prices for mineral and other resources, a system of preferences for imports originating from developing countries and the control of foreign investment by the host state. This paper is concerned with the norms in the New International Economic Order relating to foreign investment. Hence, it is necessary to state the "traditional" norms relating to the protection of foreign investment in international law and the extent to which the New International Economic Order seeks to change these norms.

The "traditional" norms of foreign investment protection which have been supported by capital-exporting nations are based on the

4 See below at notes 75-84.

5 At present, there is a difference of opinion as to the status of the norms of the New International Economic Order. Relying on the fact that they are contained in General Assembly resolutions, which usually have only recommendatory effect, some regard them as having no legal significance.

6 O. Schachter, *Sharing the World's Resources* (1977); K. Hossein (ed.) *Legal Aspects of the New International Economic Order* (1980).

insulation of the foreign investor from the domestic laws of the host country. They are based on the rules relating to the diplomatic protection of aliens and their property[7] and the responsibility of the host state if certain minimum standards of treatment had not been accorded the foreign investor.[8] Included in the minimum standards are the payment of prompt, adequate and effective compensation in the event of the nationalization of the foreign investment. The only role allowed the laws of the host country is that, in the event of a dispute, the foreign investor was required to exhaust the remedies provided him by the local law.[9] Such remedies need not be resorted to if they are illusory.[10] Nor are they relevant in a situation where the investment was made on the basis of a concession agreement or other contract with the host state. In the latter case, the contract or agreement was assimilated to a treaty between states and responsibility flowed immediately from the violation of the agreement.[11] Investment on the basis of concession agreements was common in the area of the exploitation of natural resources and, on the basis of the "traditional" theory, the economy of a country dependent on the export of such resources, could be locked up for a considerable period of time.[12] This legal framework of foreign investment protection acted as an impediment to the formulation of new economic policies by host states. They imposed onerous standards for a developing state seeking to alter its economic structure. The payment of prompt, adequate or effective compensation upon nationalization of foreign property was beyond the means of developing states. The imposition of state responsibility upon violation of concession agreements also acted as an impediment to change in economic policies.

The status of these "traditional" norms as rules of international law may be doubted. In the heyday of colonialism, foreign investment disputes were settled through gunboat diplomacy.[13] In the twentieth century, the use of force for the settlement of disputes came to be frowned upon as the rule against the use of force gathered strength.[14] Hence, rules had to be fashioned for the protection of foreign investment. The urgency for them in the first half of the twentieth century

7 On diplomatic protection of aliens, see E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915); R.B. Lillich, "Duties of States regarding the Civil Rights of Aliens" (1978) 161 *Hague Recueil* 329.

8 On state responsibility, see C. Eagleston, *The Responsibility of States in International Law* (1928); Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" (1961) 55 A.J.I.L. 863; C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967); R.B. Lillich (ed.) *International Law of State Responsibility for Injuries to Aliens* (1983).

9 H.P. Law, *The Local Remedies Rule in International Law* (1961).

10 C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967) pp. 192-197.

11 There was some disagreement between the authorities on this point, one group holding that responsibility ensued immediately upon violation of the agreement and the other holding that responsibility arises only if remedies are denied by the host state. The conflict is discussed in Amerasinghe, *State Responsibilitv,* above, n. 10, pp. 168-170.

12 Some of these agreements, like the Ashanti Goldfields agreement, were to last for over 100 years.

13 A. Freeman, *The International Responsibility of States for Denial of Justice* (1938) p. 54.

14 H. Waldock, "The Control of the Use of Force by States in International Law" (1952) 81 *Hague Recueil* 455 at pp. 458-459; R.Y. Jennings, "State Contracts in International Law" (1956) B.Y.I.L. 256.

was still not great for this was a period of colonialism and most of the foreign investment proceeded from the metropolitan powers to the colonies. The protection of such investment was assured as a result of the dependent situation of the colonies. The battle for the contending systems of investment protection was really fought out in Latin America which, unlike Asia and Africa, was not under colonial domination.

While the United States, which was a principal investor in Latin America, asserted the "traditional" norms, the Latin American states asserted contrary propositions. They asserted two contrary doctrines which, though underplayed in Western text-books which assert that the "traditional" norms constitute international law, have equal claims to validity as norms supported by state practice. The two doctrines were the Drago doctrine that force should not be used in the collection of debts[15] and the Calvo doctrine that an investment dispute must be settled only in accordance with the domestic law of the host state. The latter doctrine was given effect to by the inclusion of a clause (now referred to as a Calvo clause) in state contracts making disputes arising from the contract subject to settlement by the domestic courts of the host state only and not by any supranational tribunal.[16] Some writers dismiss the Calvo and Drago doctrines as having only regional significance. If this be so, then, with equal justification one could characterize the norms supported by the United States and the European states as having only regional significance.[17]

The nations of Africa and Asia were under colonialism when these competing norms of investment protection emerged. There are two theories as to the binding force of international law existing at the time states emerge as independent entities. One is that they are "born into the world of law" and that existing rules are binding on new states.[18] On this theory, since there were two competing systems of foreign investment, there was no law binding on the new states. The "traditional" norms cannot satisfy the criteria for being regarded as international law. They do not constitute custom binding universally simply because there was a large number of states which objected consistently to their emergence as law.[19] On the theory that new states may choose the rules of international law which bind them,[20] the newly independent states can choose between the two competing systems of foreign investment protection.

There is overwhelming evidence to show that, upon the ending of colonialism, the Afro-Asian states favoured the position adopted by the Latin American states. The principle of self-determination which brought freedom to much of Asia and Africa grew contemporaneously

[15] The very assertion of the doctrine supports the view stated at notes 13-14

[16] D. Shea, *The Calvo Clause* (1955); F. Dawson and I. Head, *International Law, National Tribunals and the Rights of Aliens* (1971) at pp. 13-15.

[17] For the view that there is a European or Western regional system of investment protection, see Judge Gros in the *Barcelona Traction Case* 1970 I.C.J. Rpts. 3.

[18] D.P. O'Connell, "Independence and Problems of State Succession" in W.V. O'Brien, (ed.) *The New States in International Law and Diplomacy* (1965) 7 at p. 12.

[19] A custom does not bind persistent objectors: *North Sea Continental Shelf Case* [1969] I.C.J. Rpts. 1; but here, the basic question is whether the "traditional" norms have such acceptance as to constitute custom.

[20] See R.P. Anand, *New States and International Law* (1972); RA. Falk, "The New States and International Legal Order" (1966) 118 *Hague Recueil* 94.

with the idea of economic self-determination. The first General Assembly resolution on economic self-determination was in 1951.[21] The principle of permanent sovereignty over natural resources was asserted in 1962.[22] After the success of OPEC, the Third World grouped together to pass the Declaration on the New International Economic Order. The ASEAN states have voted for the Declaration and for the Charter of Economic Rights and Duties of States[23] which forms the basis of the New International Economic Order. The position taken on foreign investment is contained in Art. 2(2) of the Charter of Economic Rights and Duties of States, which, given the prior conflict in this area, proved to be the most controversial article in the Charter. It reads:

> Each State has the right:
>
> (a) to regulate and exercise authority over foreign investment within its own national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities, no State shall be compelled to grant preferential treatment to foreign investment;
>
> (b) to regulate and supervise the activities of transnational corporations within its national jurisdiction and to take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies; transnational corporations shall not intervene in the internal affairs of a host State; every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this sub-paragraph;
>
> (c) to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent, in any case, where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

There is little doubt that Art. 2(2)c emphasizes domestic control of foreign investment and seeks to diminish the role of international law in the protection of foreign investment.[24] As Lillich pointed out, the effect of the article would be "to substitute the national treatment doctrine and the Calvo doctrine for the substantive norms and procedural techniques previously applicable under traditional international

[21] S.M. Schwebel, "The Story of U.N.'s Declaration of Permanent Sovereignty over Natural Resources" (1963) 49 A.B.A.J. 463.

[22] G.A. Res. 1803 (1963); on it see, Gess, "Permanent Sovereignty over Natural Resources" (1964) 13 I.C.L.Q. 398. Res. 1803 is regarded as a compromise formula but Res. 3171 (1973) admits of no restriction upon the principle.

[23] G.A. Res. 3281 (1975).

[24] For an exhaustive treatment of Art. 2(2)c, see B.H. Weston, "The New International Economic Order and the Deprivation of Foreign Proprietary Wealth" in R.B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1983) p. 89.

law".[25] Though the effect of the article is to universalise the Calvo doctrine, it is important to remember that the notions of international justice and morality are at the very foundations of the New International Economic Order.[26] Through these notions, international law has a continuing role to play in assessing whether national treatment measures up to standards of international justice. The Article also effects a change in the standard of compensation upon nationalization of foreign-owned property. It rejects both the standard of prompt, adequate and effective compensation claimed by the developed States and the standard of just compensation contained in General Assembly resolution 1803 and favours the standard of appropriate compensation. The latter standard will accommodate even the extreme position taken by the Chilean government after the nationalization of the Kennecott copper mines that no compensation need be paid because of the excess profits made by the corporation in exploiting Chile's resources.[27] The scope for the inclusion of such radical attitudes accentuates the controversy that already exists on this question.[28]

Three developments have fleshed out the New International Economic Order's concern with foreign investment. Firstly, the studies of the United Nations Commission on Transnational Corporations[29] and the United Nations Centre for Transnational Corporations[30] and the efforts to draft a code of conduct for transnational corporations have sharpened the attitudes of developing countries to foreign investment which have moved away from the classical economic theory that foreign investment is uniformly beneficial to economic development. Efforts at drafting a code of conduct for transnational corporations, however, have not been successful.[31]

Secondly, as a result of a series of studies on restrictive business practices of transnational corporations conducted by United Nations agencies,[32] a voluntary code of conduct on the regulation of restrictive business practices has been adopted by the General Assembly of the United Nations.

Thirdly, efforts, so far unsuccessful, have been made to draft a code on the transfer of technology which would enable developing countries to have access to technology and prevent restrictions being placed on the use of technology. Having described the New Inter-

[25] Lillich, *ibid*., at p. 15.

[26] R.F. Meagher, *An International Redistribution of Wealth and Power* (1970) pp. 9-36; B. Gosovic and J. Ruggies, "On the Creation of a New International Economic Order" (1976) 30 Int'l. Org. 309.

[27] J. Rohwer, "Nationalization — Chilean Excess Profits Deduction" (1973) 14 Harv. J.I.L. 378; A.N. Heibein, "The Chilean Copper Nationalization: The Foundation of the Standard of Appropriate Compensation" (1974) 23 Buffalo L.R. 765.

[28] For a recent survey, see R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property" (1981) 75 A.J.I.L. 553.

[29] The reports of this Commission can be found in K. Simmonds, *Multinational Corporations Law* (4 Vols.).

[80] The Centre was set up in pursuance of the recommendation of the first report of the Commission. Its studies can also be found in K. Simmonds, *Multinational Corporations Law.*

[31] For the present position of the Code of Conduct, see U.N.C.T.C., *Report of the Secretariat on the Outstanding Issues in the Draft Code of Conduct on Transnational Corporations* E/C.10/1984/S/5 (1984).

[32] On them, see M. Sornarajah, "Towards an International Antitrust Law" (1982) 22 I.J.I.L.l.

national Economic Order, the views of the ASEAN states on its provisions on foreign investment may be looked at more closely.

ASEAN Views on Article 2(2)c

ASEAN comprises states with open economies, though their attitudes to foreign investment and their record of the treatment of foreign investment vary significantly. Singapore's emergence as a newly industrialised country has been based on foreign investment and its strategy of becoming a service centre will continue to depend on future flows of foreign investment. Hence, the representative of Singapore explained Singapore's position on Article 2(2)c by affirming Singapore's continuing commitment to honour in the future[33] all obligations she has undertaken. The representative for Thailand also made a similar statement and pointed out that Thailand had always honoured obligations undertaken in respect of foreign investment.[34]

Varying economic policies and attitudes to economic nationalism[35] make a uniform approach to Art. 2(2)c virtually impossible. Indonesia, Malaysia and Brunei are rich in resources and the idea of permanent sovereignty over natural resources and national control over them will have greater appeal to these states than to a state like Singapore which has virtually no natural resources. Political perceptions also differ. Indonesia, both as a country which won independence through the force of arms as well as an aspirant to the leadership of the Non-aligned Movement, may wish to take a more aggressive stance in support of Third World causes than may other members of ASEAN.[36] In assessing the impact of the New International Economic Order (which was supported by all the ASEAN states) on the bilateral relations of these states with developed states as well as on their domestic legislation, the constraints flowing from the economic and political policies of each state must be kept in mind. These constraints may act as impediments to the formulation of a common policy on foreign investment by the ASEAN states. On the other hand, cooperation in matters of economic development is a declared policy of the ASEAN states.[37] Such cooperation has been manifested in various international documents.[38] It is inevitable that, despite constraints, a common policy will emerge towards foreign investment and that ideas expressed in the New Inter-

[33] Mr. Wong, a Singapore delegate, speaking on the Charter at the General Assembly, said that his delegation supported the Charter despite difficulties with specific provisions. With respect to Art. 2(2)c he said that his country fully recognized the significant benefits that foreign investment had brought to its economy and would continue to welcome the role of such investment in its economic development. (1650th Meeting, 9 Dec. 1974).

[34] Explaining his vote on the Charter, the Thai delegate said that he voted for the Charter "even though some of its provisions do not reflect the customary attitude and policy of the Thai government". He pointed out that Art. 15 para. 2 of the Investment Promotion Act, 1972 of Thailand provides that the "State shall not nationalize" promoted foreign enterprises. Art. 2(2) c should be understood in the context of the fact that Thailand had never nationalized foreign property.

[35] On economic nationalism as an impediment to ASEAN cooperation, see H.H. Indorf, *Impediments to Regionalism in Southeast Asia* (1984) pp. 48-57.

[36] Robyn Lim, in Broinowski, *op. cit*., note 1 at p. 245.

[37] The ASEAN Concord signed in Bali (24th Feb. 1976) requires member states to cooperate in their national and regional development programmes: see A. Broinowski, *Understanding ASEAN* (1982) p. 245.

[38] *E.g*. Basic Agreement on ASEAN Industrial Joint Venture (7 November 1983); for text, see (1983) 25 M.L.R. 423.

national Economic Order will play a role in the shaping of that common policy. The survey of the extent to which the bilateral investment agreements of ASEAN states accords with the New International Economic Order is relevant because the opinion among commentators is that they support the traditional norms of investment protection.[39]

II. BILATERAL INVESTMENT TREATIES OF ASEAN STATES

Bilateral investment treaties came into prominence as a result of the confusion in international law created by the existence of the two competing systems of norms relating to investment protection. The treaty between Malaysia and the Federal Republic of Germany (1960) is regarded as the first of such treaties.[40] Since then, there have been over one hundred and fifty such treaties. A large number of commentators view these treaties as entrenching what they describe as customary principles of international law relating to foreign investment protection.[41] Mann, for example, has confidently asserted that "these treaties establish and accept and thus enlarge the force of traditional conception".[42] If this view is correct, then the ASEAN states, which have entered into a series of bilateral agreements on investment protection,[43] can be accused of double standards[44] in that at the multilateral level, they have supported the norms of the New International Economic Order but at the bilateral level, they accept norms of a competing and contrary system of investment protection.

This charge of double standards cannot be supported for several reasons. Firstly, the investment treaties must be seen as an effort to opt out of whatever the existing international law on investment protection is and to create a special regime of protection for investors from the treaty states. To this extent, the treaties must be considered *lex specialis* and are not to be regarded as creating or supporting any set of norms. They are akin to the lump-sum settlement agreements ending nationalization disputes which the International Court of Justice in the *Barcelona Traction Case*[45] regarded as *lex specialis* and as not contributing to the controversy concerning the standard of compensation for nationalization. Secondly, as will be shown, there is no uniformity in the treaty practice of states as regards standards of protection included in the treaties. Such standards diverge so considerably in the treaty practice of even a single ASEAN state that it is futile to talk in terms of such practice even giving rise to any customary international

[39] *E.g.* F.A. Mann, "British Treaties for the Promotion and Protection of Investments" (1981) 52 B.Y.I.L. 241.

[40] In the I.C.S.I.D. collection of bilaterial investment treaties, it appears as the first treaty. See International Centre of Investment Disputes, *Investment Promotion and Protection Treaties* (1983).

[41] *E.g.* Mann, *op.cit.* at note 39; G. Gallins, "Bilateral Investment Protection Treaties" (1984) 2 *Journal of Energy and Natural Resources Law* 77; J. Vess, "The Protection and Promotion of European Private Investment in Developing Countries" (1981) 18 C.M.L.R. 363.

[42] See above, note 39 at p. 249.

[43] Singapore has investment treaties with Germany (1973), France (1975), Netherlands (1972), Switzerland (1978), the United Kingdom (1975), the Belgo-Luxembourg Union (1978) and Sri Lanka (1979). Malaysia has treaties with all these states (excluding Sri Lanka) and Sweden.

[44] Mann has accused developing countries of such double standards. F.A. Mann, "The Consequences of an International Wrong in International and National Law" (1976-77) 48 B.Y.I.L. 1 at p. 47 f.n. 5 where he accuses certain developing states of having "a habit of being double-tongued".

[45] [1970] I C.J. Rpts. 3.

law on investment protection or even a system of regional norms. Thirdly, there are significant investor nations in the ASEAN region which have not felt the need for such agreements, demonstrating the fact that investment risk is not tied to the making of such treaties. Japan (which, in 1980, had $7 billion in investments in the region[46]) has no investment treaty with any ASEAN state.

Another factor which indicates that the existing investment treaties of ASEAN states do not deviate from the norms of the New International Economic Order is that the United States has not been able to conclude an investment treaty with any of the ASEAN states on the basis of its model investment treaty.[47] The United States is a relative newcomer to the field of investment treaties. Its Friendship, Commerce and Navigation *(i.e.* FCN) treaties served different purposes.[48] Its model investment treaty, which unlike the FCN treaties confines itself to investment protection, is also a vehicle for the economic philosophy of the United States in international trade. The model treaty is based on absolute freedom in the flow of international investment and incorporates every feature of the "traditional" norms of the international law on foreign investment. The U.S. record in having the treaty accepted has been poor. So far, it has entered into treaty relations only with Egypt and Panama.[49]

The U.S. has made efforts to have the model treaty accepted by ASEAN states but has so far been unsuccessful.[50] Singapore, the most open of ASEAN economies, has refused to accept the model treaty. The reasons for the rejection are reported to be the unwillingness of Singapore to accept an obligation that would protect all investments by Americans (including those not approved officially) and an obligation not to impose performance requirements upon the investors.[51] Performance requirements relate to the employment of a percentage of local staff, the use of locally available resources and the export of a percentage of the finished product. Such requirements are to be found in the domestic laws of ASEAN states and, for that reason, it is unlikely that the model treaty will prove acceptable until its clauses based on the idea of promoting a free flow of investment are given up.

The view that the investment treaties support "traditional" norms is insupportable and formed without a closer examination of the pro-

[46] "T.N.C. Activities in ASEAN" (1984) No. 17 C.T.C. Reporter 32.

[47] For text and comments, see K. Kunzer, "Developing a Model Bilateral Investment Treaty" (1983) 15 Law and Policy in International Business 273; G. Asken, "The Case for Bilateral Investment Treaties" in South Western Foundation, *Private Investors Abroad* (1981); M.S. Bergman, "Bilateral Investment Protection Treaties: An Examination of the Evolution of the U.S. Prototype Treaty" (1983) N.Y.U.J. Int. L. & P.I.

[48] On these treaties, see H. Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice" (1956) 5 A.J.C.L 229.

[49] On these treaties, see D.A. Cody, "United States Bilateral Investment Treaties: Egypt and Panama" (1983) Ga. J.I.L. 491; J.E. Pattison, "The United States — Egypt Bilateral Investment Treaty: A Prototype for Future Negotiation" (1983) 16 Cornell I.L.J. 305.

[50] A recent effort was made by a U.S. trade official visiting Kuala Lumpur see *The Malaysian Straits Times,* February 9, 1985.

[51] For the reasons for Singapore's refusal, see Bergman, *op. cit.* 16 N.Y.U.J.I.L. & P. at p. 10. On the impact of performance requirements on international trade, see U.N.C.T.C., *Recent Developments relating to Transnational Corporations and International Economic Relations* E/C/10/1983.2 (1983) pp. 18-19.

visions of the treaties. To establish this point relating to the lack of uniformity in standards, a closer examination could be made of a few selected areas dealt with in the investment treaties of ASEAN states.

A. *Corporate nationality*

On the question of corporate nationality, there is no uniformity to be seen in the ASEAN investment treaties. In the *Barcelona Traction Case*,[52] the International Court of Justice stated that a corporation being the creature of the law of the country in which it was incorporated, must have the nationality of the state of incorporation. Hence, Belgium was held not to have *ius standi* to bring an action against Spain on behalf of Belgian shareholders of a company incorporated in Canada and doing business in Spain. The case attracted much criticism because it made the protection of shareholders who belonged to different nationalities difficult in situations where the state of incorporation was not prepared to espouse the claim of the corporation.[53] One of the aims behind the bilateral investment treaties has been to undo the effect of *Barcelona Traction* and to provide protection for shareholders. The treaties include shares within the definition of investments that are protected.

But, on the question of corporate nationality itself, the investment treaties have not adopted any consistent principle. The treaty between Singapore and Britain adopts a test based on the nationality of the shareholders. For the purpose of bringing arbitration proceedings before the International Centre for the Settlement of Investment Disputes (ICSID), the agreement treats a company incorporated in Singapore as a British company provided the majority of the shares are held by British nationals. But competing theories of corporate nationalities are used in other treaties to which Singapore is a party. Singapore's treaty with the Federal Republic of Germany is based on the *siege sociale* theory of corporate nationality favoured in the continental legal systems and defines a German company as one "having its seat in the Federal Republic of Germany". The formula leaves open the possibility that a company incorporated in the United States could claim the protection of the investment treaty between Singapore and Germany by locating its seat of control in Germany.[54] Whether such a result was intended by the parties is doubtful.

The practices of developed states are also inconsistent. The United Kingdom usually adopts an incorporation theory of corporate nationality in its investment treaties. But, it opted for the *siege sociale* theory in its treaty with the Philippines. In that treaty, a protected company is defined as one "actually doing business under the laws in force in any part of that Contracting Party wherein the place of effective management is situated". Thus, treaty practice is so divergent on the question of corporate nationality that no definite trend can be discerned in it.

[52] [1970] I C.J. Rpts. 3.

[53] R.B. Lillich, "The Rigidity of *Barcelona Traction"* (1971) 65 A.J.I.L. 522; but see H.W. Briggs, *"Barcelona Traction:* The *Ius Standi* of Belgium" (1971) 65 A.J.I.L. 327.

[54] Mann has made this point regarding the U.K. — Philippines treaty: (1981) [52] B.Y.I.L. 241, 242.

B. *Compensation for nationalization*

The standard *of* "prompt, adequate and effective" compensation in the event of nationalization, known as the Hull standard,[55] receives a large measure of support in the ASEAN treaties. There are exceptions. Article 7 of the Dutch treaty with Indonesia (1968) speaks only of "just compensation" though it goes on to say that "such compensation shall represent the genuine value of the investments". Given that Indonesia and the Netherlands had a celebrated controversy relating to the nationalization of Dutch interests in Indonesia,[56] the alternative formula used may have some significance. But, Dutch practice, with ASEAN as well as non-ASEAN states, has been to use the phrase "just compensation", a formula derived from Resolution 1803 (on the permanent sovereignty over natural resources).[57]

Despite reference to the standard of prompt, adequate and effective compensation in many investment treaties, there is no reference in them to international review of the assessment made by the host country. The Norway-Indonesia treaty merely states that the "legality of such expropriation, nationalization and such measures... shall be subject to review by due process of law". Such a clause, in different forms, appears in the other ASEAN treaties.[58] The clause clearly refers only to domestic remedies provided by the host states. Two interpretations of the clause are possible. The first is that the clause merely asserts the exhaustion of local remedies and that an assessment made by domestic tribunals could be reviewed particularly by the international arbitral tribunal for which the treaties make provision. The second would be that once the domestic tribunal has provided due process and made the assessment, the assessment could not be reviewed. There could be review by an international tribunal of whether due process was given but not of the assessment itself. The latter view would bring the approach in the investment treaties closer to the position adopted in the New International Economic Order. This view, however, is unlikely to be accepted in view of the general provision in the investment treaties concerning the arbitration of investment disputes.[59] But support for the view may be drawn from the practice in other investment treaties which spell out the exclusively domestic nature of the remedy for nationalization.[60]

The above analysis indicates that the claim that the principles (if any) that could be drawn from the bilateral investment treaties support the "traditional" norms of investment protection is far from accurate. On the question of corporate nationality, no definite rule can be extracted from the treaties. On the question of compensation for nationalization, there is great support for the Hull standard. But, there

[55] After Secretary of State, Hull, who used the formula in negotiations following the Mexican expropriations.

[56] Lord McNair, "The Seizure of Property and Enterprises in Indonesia" (1959) 6 Netherlands I.L.R. 218.

[57] For text, see (1963) 2 I.L.M. 223.

[58] *E.g.* Art. 6(1)6 of the U.K. — Thailand treaty (1978); Art. 5 of the Singapore—Sri Lanka treaty (1981).

[59] An argument may still be possible that the clause is contained in a special provision and that the special provision survives despite the general provision: *generalia de specialibus non derogant.*

[60] See *e.g.* Art. 7 of the Korea — Sri Lanka treaty where the domestic nature of the remedy is made clear, or Art. 5 of the Papua-New Guinea — U.K. treaty (1981).

are still unresolved questions as to the finality of assessments made by a domestic tribunal.

In addition, there are new techniques adopted in the bilateral investment treaties which also deviate from the "traditional" norms. These are subrogation, and arbitration by the ICSID. The extent to which these techniques deviate from "traditional" norms also requires examination.

C. *Subrogation*

Developed countries have established public corporations which insure investments made in developing countries by their nationals. An altruistic purpose stated for such insurance is that it would promote the flow of foreign investment to developing countries. The United States has established the Overseas Private Investment Corporation for this purpose.[61] Most developed states have similar schemes.[62] Where an investor suffers damage as a result of a host state's policies, the home state's insurance corporation will pay the investor the insurance and take over his claim against the host state. The technique of subrogation contained in the investment treaties short-circuits the old rules on diplomatic protection by making the claim of the investor the claim of the home state. The jurisprudence that has been accumulated on subrogation seems to indicate that the investor should satisfy certain preliminaries such as exhausting local remedies, prior to claiming insurance.[63] To the extent that it dispenses with the theory of mediate injury suffered by the home state through its citizen and makes the injury one directly suffered by the home state, the technique of subrogation contained in the investment treaties must be considered a novelty.

D. *Arbitration*

In the older investment treaties of ASEAN states, there is a commitment to refer disputes arising from foreign investment to arbitration by *ad hoc* tribunals. Thailand continues to use *ad hoc* arbitration in its investment treaties because it did not become a party to the ICSID Convention. Features of *ad hoc* arbitration became unacceptable to developing countries. Initially, tribunals settled investment disputes in accordance with the domestic law of the host state.[64] But in a series of arbitrations involving petroleum concessions in the Middle East, the arbitrators applied "general principles of law" to the investment disputes before them on the ground that the law in the Middle Eastern countries was not sufficiently developed to deal with such disputes.[65] In later arbitral awards, the theory was developed that the mere fact that vast sums were brought into the host country and that the concession agree-

[61] On it, see T. Meron, *Investment Insurance in International Law* (1976).

[62] The French government will not insure investment which goes into a country which does not have an investment treaty with France, the insurance scheme thus being a lever to secure investment guarantees through treaties: see P. Juillard, "Les Conventions Bilaterals d'Investissement, Conclues par I a Francs" (1979) J. Dr. Int. 274.

[63] See note 60.

[64] *E.g. Societe Rialet* v. *Ethiopia* (1929) 8 Rec. de Decis. des Trib Arbit. Mixtes 742.

[65] *The Abu Dhabi Arbitration* (1951) 18 I.L.R. 144; *The Quatar Arbitration* (1953) 20 I.L.R. 534. A seminal paper which laid the foundations for the theory of internationalization of investment contracts was written by Lord McNair. See Lord McNair, "The General Principles of Law Recognized by Civilized Nations" (1957) 33 B.Y.I.L.I.

ment contained an arbitral clause and a stabilisation clause excluding the application to the agreement of future changes in the domestic laws had the effect of making the agreement akin to a treaty.[66] On this theory, a foreign investment dispute which arises must be settled in accordance with norms of "traditional" international law.[67] Developing countries, however, have felt that these norms were weighted in favour of foreign investors, fettered their legislative sovereignty over important areas of the economy and were, therefore, unacceptable.

The ICSID Convention (1965) sought to bring about a balance. Unlike earlier efforts at multilateral conventions on arbitration of foreign investment disputes, which were seen as "serving the sinister ends of Western neo-imperialism",[68] the Convention, in the making of which delegates from developing countries participated,[69] attempted a series of compromises. Consent of the parties is made the basis of the arbitral tribunal's jurisdiction (Art. 25). Complete autonomy of the parties as to choice of law is permitted but a contentious clause requiring that "such rules of international law as may be applicable" be also applied, is included (Art. 42). Diplomatic protection of the foreign investor is suspended during the period of arbitration.

Because of these novel features and efforts at compromise, many developing states became parties to the Convention and readily accepted the jurisdiction of the ICSID in investment treaties.[70] But recent arbitrations, one of them involving Indonesia, indicate that, in practice, ICSID tribunals are moving away from the spirit of compromise that characterized the Convention to a position akin to the theory of internationalization of investment contracts which was built up by the *ad hoc* arbitral tribunals. Earlier published awards of the ICSID are equivocal on the point.[71] But the views stated by an ICSID tribunal in assuming jurisdiction in *Amoco (Asia) Ltd.* v. *The Republic of Indonesia,*[72] may create the impression, particularly in this region, that ICSID tribunals are moving towards the acceptance of a theory of internationalization. In that award on the question of jurisdiction, the tribunal asserted jurisdiction by relying on the domestic laws of Indonesia, the nature of the investment and the corporate nationality of the investor. On merits, the tribunal later decided in favour of the investor. Whether the award will create a suspicion of ICSID arbitration is a matter of conjecture.

[66] *The Sapphire Arbitration* (1963) 35 I.L.R. 136; *LIAMCO Award* (1978) 17 I.L.M.1; *Texaco Award* (1977) 53 I.L.R. 389; *B.P. Award* (1977) 53 I.L.R. 296.

6T For support of this theory, see R.B. von Mehren and P.N. Kourides, "International Arbitrations between States and Foreign Private Parties" (1981) 75 A.J.I.L. 476.

[68] G. Schwargenberger in P. Sanders (ed.) *International Arbitration* at p. 315.

[69] On the making of the Convention, see J. Cherian, *Investment Contracts and Arbitration* (1968) pp. 80-88; generally, see, A. Broches, "The Convention for the Settlement of Investment Disputes between States and Nationals of other States" (1972) 136 *Hague Recueil* 330; G. Gopal, "International Centre for the Settlement of Investment Disputes" (1982) 14 Case West. J.I.L. 591.

[70] On jurisdictional clauses in investment treaties, which may have different effects, see A. Broches, "Bilateral Investment Protection Treaties and Arbitration of Investment Disputes" in J.C. Schulsz and AJ. Van den Berg (eds.), *The An of Arbitration* (1982) p. 63.

[71] *A.G.I.P.* v. *The Republic of Congo* (1982) 21 I.L.M. 726; *Benvenuti and Bonfant* v. *The Republic of Congo* (1983) 22 I.L.M. 751.

[72] (1984) 24 I.L.M. 320.

Such trends may lead to attention being focused on regional centres of arbitration. The idea for such centres emerged at the Tokyo Session of the Afro-Asian Legal Consultative Committee in 1974.[73] In pursuance of a resolution at the session, a centre for arbitration was established in Kuala Lumpur, Malaysia in 1978. The Kuala Lumpur centre has an agreement for mutual cooperation with the ICSID. The use of this centre in investment treaties entered into by ASEAN states must be considered.[74]

The existence of investment treaties entered into by ASEAN states cannot be seen as amounting to the rejection of the norms of the New International Economic Order. As demonstrated, the claim that the investment treaties support "traditional" norms of investment protection is unacceptable. On the question of compensation for nationalization, there is general support in the ASEAN investment treaties for the Hull standard. But, this need not be construed as inconsistent with the New International Economic Order for Art. 2(2)c itself contemplates the settling of issues relating to compensation by mutual agreement. The acceptance of the Hull standard in the investment treaties must be regarded as mutual agreement given prior to an investment dispute. Generally, investment treaties are best regarded as efforts on the part of the states concerned to establish a mutual regime of protection for investment, in order to avoid depending on the chaos that exists (in the international law on investment) as a result of the conflict between the "traditional" norms and the norms of the New International Economic Order.

The importance of investment treaties in the investment process must not be overestimated. The United States, which is the single largest investor in the region, does not have modern investment treaties with any of the ASEAN states.[75] Japan, which is increasing its investments rapidly in the area, also has none. Investor confidence depends on risk analysis based on the past record, political stability and economic performance of the host state and not on the existence of investment treaties. Hence, too much significance should not be attached in law to these treaties, which are essentially designed to boost investor confidence.

III. THE INVESTMENT LAWS OF ASEAN STATES

The purpose of this section is to determine the extent to which the norms of the New International Economic Order have affected the domestic legislation of the ASEAN states. It would be far-fetched to claim that these norms have been implemented deliberately in national legislation but international norms do have a role in shaping national legislation.[76] Economic nationalism may have had a greater role in

[73] See also Secretary General's Report on *A.A.L.C.C's Scheme for Settlement of Disputes in Economic and Commercial Matters,* AALCC/XX1/IV(2); J.C. Wall, "The Asian-African Legal Consultative Committee and International Commercial Arbitration" (1979) 17 Can. Y.I.L. 324.

[74] For assessment of regional centres, see T. Oyekunle, "The Importance of Arbitration in Trade with the Developing World" in P. Sanders (ed.) *New Trends in the Development of Commercial Arbitration* (1982) p. 15. ,

[75] An exchange of letters with Singapore in 1966 is sometimes regarded as a treaty. There is an FCN treaty with Thailand.

[76] The General Assembly of the ASEAN Law Association at its Singapore session, 1984, passed a resolution recommending national legislation based on the U.N. draft code on restrictive business practices and other U.N. efforts relating to foreign investments.

the shaping of such legislation but the New International Economic Order may itself be seen as a collective expression of economic nationalism. Two facets of the New International Economic Order may be isolated as having influenced such legislation. They are the effort to assert national control over foreign investment and, in the field of investment in the exploitation of natural resources, to give effect to the principle of permanent sovereignty over natural resources.

National control is asserted in the ASEAN investment laws primarily through the screening of the entry of foreign investment and through the requirement that there should be majority ownership of the project by a local partner or a progressive divestment of shares to ensure such majority ownership.

A. *Screening of Entry*

ASEAN states take a pragmatic approach to foreign investment. While providing tax and other incentives to promote foreign investment, they have also established mechanisms which would ensure that foreign investment which may have deleterious effects on the economy are either kept out or admitted under such conditions that any potential harm is reduced. In Indonesia, the Investment Co-ordinating Board (BKPM) performs such a function.[77] In Thailand, although foreign investment is technically possible (except for certain small business preserved for nationals), the Board of Investment would only promote those investments it deems beneficial to the country.[78] The legislation states the criteria involved as the capacity of the investment to produce for export, its utilization of a high content of capital, labour or services and its use of local agricultural and natural products.[79] The Board also provides a list of activities which may be promoted.[80]

An indirect technique of attracting the desired type of investment is used in Singapore, Malaysia and the Philippines. These states offer tax and other incentives only to industries they characterize as pioneer industries.[81] The Malaysian legislation seeks to channel investment into industries given pioneer status and into industries sited in underdeveloped areas and those which are export-oriented.[82] Depending on the levels of industrialisation achieved, the type of investment that

[77] Set up by Presidential Decree No. 33/1981, it assists the President in deciding on investment policies. Under art. 3 of the decree, one of its tasks is "to screen and evaluate investment applications": art. 3(i).

[78] Investment Promotion Act 1977; also see L. Nadaisan, "Some Aspects of Corporate and Taxation Laws affecting Foreign Investment in Indonesia" [1978] M.L.J. liv.; U.N. C.T.C., *National Legislation and Regulations relating to Transnational Corporations: A Technical Paper* S.T./C.T.C./35 (1983) pp. 69-86. In its *Guide to Foreign Investors,* BKPM lists criteria on which priority is given to investments. These criteria include (1) capacity to increase exports (2) capacity to save foreign exchange by reducing imports (3) utilization of local raw materials (4) processing of raw materials locally (5) transfer of new technology; etc.

[79] Art. 16 of the Investment Promotion Act 1977.

[80] K. Chantikul, "Investment and Incentive Laws: Thailand" Paper presented at 1984 ASEAN Law Association General Assembly 1984.

[81] For Malaysia, see the Investment Incentives Act 1968.

[82] Malaysia, *Investment in Malaysia: Policies and Procedures* (1982) pp. 17-18; Price Waterhouse, *Investment Regulation around the World* (1983) pp. 173-178.

would qualify for pioneer status could be continuously upgraded.[83] In the Philippines, the Board of Investments prepares an Investment Priorities Plan annually which lists the types of investments which would qualify for incentives.[84]

Screening of investments, as it operates in Australia[85] or Canada,[86] hardly exists in the open economies of the ASEAN states. The technique that is favoured is to provide incentives for investments made in designated sectors. Such incentives are provided also where the investor increases production and observes efficiency in operations. The investments that are preferred are export-oriented industries and those which utilize labour and natural resources. Performance requirements have generally been avoided so far. Insistence on such requirements may be unwise at a time when there is great competition among developing states for foreign investment. Instead, a carrot and stick method is preferred. But, a residual degree of control is still exercised over foreign investment as withdrawal of pioneer status and incentives will possibly have the effect of making an investor seek to regain it by toeing the line drawn by the administrative agency.

B. *Permanent sovereignty over natural resources*

The norm of permanent sovereignty over natural resources is reflected in the legal techniques employed in the area of the exploitation of petroleum resources of the region. The region is rich in such resources.[87] The technique that was developed in Indonesia is the production sharing agreement. The old concession agreement which were developed in the Middle Eastern context, amounted to a surrender of sovereignty over the oil fields, with the concessionaire paying the state a royalty on the amount of oil produced and the state not having any control at all over the operations until the end of the concession.[88] The production sharing agreement however, asserts the sovereignty of the state over the whole operation. That agreement is an effort to ensure that the state decides on the distribution of profits, marketing and other matters connected with the exploitation of the resources.[89]

[83] Singapore International Chamber of Commerce, *Investor's Guide* (1983) p. 40; Economic Expansion (Relief from Income Tax) Act 1967 and its Amendment Act 1970; N.S. Gandhi and K. Shanmugam, "Investment and Incentive Laws: Singapore" 1984 ASEAN Law Association Papers 37. For earlier legislation in Singapore, see Sok-Chun Tan, *International Investments in Singapore* (1972) pp. 119-141.

[84] Investment Incentive Policy Act 1983. The Act also contains a Declaration of Investment Policy.

[85] Department of the Treasury, *Australia's Foreign Investment Policy: A Guide for Investors* (1982).

[86] R.D. Donaldson and J.D.A. Jackson, "The Foreign Investment Review Act — An Analysis of the Legislation" (1975) 53 Can. Bar. Rev. 171.

[87] C. Siddayo, *The Off-shore Petroleum Resources of South-East Asia* (1978) and *The Supply of Petroleum Reserves in South-East Asia* (1980).

[88] K. Hossein, *Law and Policy in Petroleum Development* (1979). A useful survey of new forms of contractual agreements can be found in T.W. Waalde, "Transnational Investment in the Natural Resources Industry" (1979) 11 *Law and Policy in International Business* 691; also see Lawasia, *Energy Law in Asia and the Pacific* (1982).

[89] For fuller descriptions of the agreement, see R. Rochmat, *Contractual Arrangements in Oil and Gas Mining Enterprises in Indonesia* (1981); R. Fabrikant, *Oil Discovery and Technical Change in South East Asia* (1972); *ibid*., "Production Sharing Agreements in the Indonesian Petroleum Industry" (1976) 16 Hary. L.L.R. 303; M. Kusumatmasja, *Mining Law* (Survey of Indonesian Economic Law, 1984).

Such agreements are universal in the area of mining and are a response to the norm of permanent sovereignty over natural resources.[90]

In Indonesia and Malaysia, the production sharing agreement is well entrenched as the legal mechanism for petroleum exploration, in Indonesia, in colonial times, the concession agreement was the favoured form of investment in the area of mining.[91] But in post-colonial Indonesia, natural resources are owned by the Indonesian people. Hence, only an "authority to mine" can be transferred to an investor, but in the case of hydro-carbons, such authority is vested in state corporations — in the case of coal, the state corporation, Batubara, and in the case of oil, the state corporation, Pertamina.[92] Whereas previously the favoured concept — *kontrak kanya* — established a relationship which left much freedom in the contractor, the production sharing agreement provides for constant supervision of the process of exploitation by Pertamina.[93]

Malaysia, following the Indonesian example, has moved away from concession contracts, to production sharing agreements.[94] The Petroleum Development Act 1974 vested the entire petroleum resources of Malaysia in Petronas, a state corporation which was to directly participate in the exploitation of such resources. Petronas was to use oil companies as contractors to exploit the resources through production sharing arrangements.[95] The Philippines also use a service contract similar to the Indonesian model.[96] Brunei[97] and Thailand[98] still continue with the old type concession agreements.

It is not necessary to go into greater detail as to these arrangements to establish the point that they give effect to the norm of permanent sovereignty over natural resources. The contractual arrange-

[90] For a survey, see U.N.T.N.C., *Transnational Corporations in World Development* E/C 10/38 (1978).

[91] For colonial history and its impact on Indonesian investment laws, see C. Himawan, *The Foreign Investment Process in Indonesia: The Role of Law in the Economic Development of a Third World Country* (1980).

[92] For the colourful history of Pertamina, see A.G. Bartlett, *Pertamina: Indonesian National Oil* (1972) Pertamina was established in 1971 by Law No. 8 of 1971.

[93] Other features of the agreement are that the foreign investor bears the risks. Recovery of costs is limited annually to 40% of the oil produced. The remaining 60% is divided between Pertamina and the investor, the investor's share decreasing progressively to 15%. The equipment used in the project becomes the property of Pertamina. There is an obligation to sell a percentage of the oil in domestic markets at a set price. A specimen contract is attached to the paper by K. Muljadi, "Foreign Investments in Indonesia" presented at the International Conference on Energy Law and Policy in Asia and the Western Pacific (Singapore, 6 November, 1984). A feature of the agreement is that it is approved by Parliament and incorporated in a Presidential decree.

[94] For an account of developments in Malaysia, see V.K. Moorthy, *Petronas — Its Corporate and Legal Status* (1983).

[95] In broad terms, the Indonesian and Malaysian agreements are similar, though there are variations *e.g.* the Indonesian contract is for 30 years whereas the Malaysia contract is for 20 years. The structure of control is also different.

[96] The framework for oil exploration is Presidential Decree No. 87 of 1972 (The Oil Exploration and Development Act 1972). The Ministry of Energy set up in 1978 controls exploitation. Land ownership is confined by the constitution to citizens. But the National Development Authority may enter into joint ventures with foreign corporations to exploit natural resources.

[97] C. Siddayo, *The Supply of Petroleum Reserves in South-East Asia* (1980) pp. 81-82. Chapter 4 of the work contains a survey of contractual arrangements in the region.

[98] Siddayo, *ibid*., at pp. 97-99.

ments devised in Indonesia, Malaysia and the Philippines ensure constant state control over the exploitation and the marketing of the resources. This is a feature that is now common to the whole of the petroleum industry. Though the arbitral tribunal in Kuwait was not prepared to regard the principle of permanent sovereignty over natural resources as a part of the *ius cogens* of international law, domestic laws and contractual arrangements more than establish the proposition that natural resources and their exploitation are subject exclusively to domestic control.

C. *Joint Ventures*

In Indonesia, the only method of entry for foreign investment is through the establishment of a corporation limited by shares (a *perseroan terbatas).* Since 1974, no such corporation wholly owned by foreigners may be established. At establishment, the Indonesian partners should have at least 20% of the shares but within ten years, Indonesian ownership should rise to 51% of the shares so that control over the corporation passes into Indonesian hands. A certificate of incorporation is to be obtained from the Department of Justice.[99] The local incorporation of the company and Indonesian control over it led Professor Sunaryati Hartono to the conclusion that:

> any foreign investment in Indonesia is legally an Indonesian company, and therefore governed by Indonesian law, except for certain specific features and regulations. This makes it a "special" Indonesian company, as rules of Private and Public International Law are directly or indirectly applicable to such Indonesian companies, and a slightly different procedure is to be followed for its incorporation, management and settlement of disputes.[1]

This is a logical view for a *perseroan terbalas* is a creature of Indonesian law but for which it cannot exist. Hence, it must be subject, at every turn, to Indonesian law. But this was not the view taken by an arbitral tribunal in *Amoco (Asia) Ltd.* v. *The Republic of Indonesia*[2] where the tribunal characterized a *perseroan terbatas* formed with American capital as a foreign corporation. But, since the view of the tribunal was based on s. 25(2)b of the ICSID Convention and the tribunal itself was operating under that Convention, the view stated by the tribunal could be disregarded for other purposes. On this basis, the conclusion is justified that acceptance of foreign investment on the basis of a joint venture company to be incorporated in the state subjects such investment to domestic control.

In Malaysia, the joint venture is a preferred form of entry for foreign investment. Since an objective of the New Economic Policy announced by the Malaysian government is a better distribution of wealth among Malaysians, a progressive divestment of shares in corporations is always envisaged.[3] *Bumiputra* equity is given preferential treatment. Foreign majority control is permitted in certain sectors

[99] The procedure for incorporation is in the Commercial Code, articles 36-56.

[1] S. Hartono, "Investment and Incentive Laws: Indonesia" 1984 ASEAN Law Association Papers 3 at p. 10.

[2] (1984) I.L.M. 351.

[3] Malaysian Government, Guidelines for the Regulation of Assets, Mergers and Takeovers (1974) Part One para. 4 refers to the "marked imbalance in ownership between Malaysians and foreigners". For a cost-benefit analysis of foreign investment in Malaysia, see L. Hoffmann and Siew Ee Tan, *Industrial Growth, Employment and Foreign Investment in Peninsular Malaysia* (1980).

where technology, expertise and capital are needed. The Fourth Malaysia Plan contemplates that by 1990, 70% of the ownership of shares in limited companies will be in Malaysian hands.[4] Unlike in Indonesia, what are stated in Malaysia are policy preferences intended to guide foreign investors. In the Philippines, Thailand and Singapore, wholly owned corporations may be set up.

The joint venture is a technique of ensuring national control. But studies show that the mere existence of majority control of shares in nationals may amount to nothing as management control may still be with foreigners. Yet, the poularity of the device within ASEAN will increase particularly because it is an instrument of ASEAN cooperation.

Though there is no uniformity in the machinery established to control foreign investment within the ASEAN states, the idea of national control over such investment is clearly reflected in many instruments. It has taken hold firmly in the area of primary and natural resources where the bargaining power of the states is greatest. But in the manufacturing sector, the method used is one of persuasion through tax incentives. Indonesia, having a greater degree of natural resources, has instituted measures involving national control to a greater extent and yet receives the largest share of foreign investment in the region.

CONCLUSION

This paper surveyed the attitude taken by ASEAN states, at three distinct levels, to foreign private investment. There are gaps between the posture adopted at the international level and those adopted at bilateral and domestic levels. However, many features of the stances taken at the bilateral and domestic levels reflect a trend towards the norms of the New International Economic Order. Whether these norms will provide a unifying basis for the formulation of a common policy on foreign investment within ASEAN is yet to be seen. Such a common policy may be more feasible in the area of natural resources where the bargaining strength of the states *vis-a-vis* the foreign investor is greater and where common contractual techniques have already come to be employed. In the manufacturing sector, there may be competition among these states to attract foreign investment. Yet, the formulation of a common policy may increase the collective strength of the grouping of states. Particularly in the area of restrictive business practices and technology transfer, such a common policy could ensure that the harmful effects of foreign investment are avoided. It is unlikely that ASEAN would approach the question of foreign investments with the degree of stridency which has characterized the approach of other regional associations of developing countries.[5] Instead, they would, if they decide on a common policy, adopt the same pragmatic approach that has been taken by each individual member in its dealings with foreign investment.

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[4] Para. 146.

[5] Decision 24 of the Andean States had disruptive consequences. For a negative view of existing regional arrangements on foreign investments, see U.N C.T.C., *Measures Strengthening the Negotiating Capacity of Governments in Their Relations with Transnational Corporations: Regional Integration Versus Corporate Integration* ST/CTC/10(1982).

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