THE NEW INTERNATIONAL ECONOMIC ORDER AND THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES: CONTRADICTORY IMPLICATIONS ON THE PHILIPPINE POSITION

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I. INTRODUCTION

> The historical development of the international community of States has undergone two major qualitative changes, which are reflected in the emergence and transformation of the international legal order... the first is the breakdown of medieval society giving way to the establishment of national states... but this system yet bore the heavy imprint of the imperial order... Classical international law brought into its ambit the nations and peoples of Africa, Asia and Latin America, not as creative participants in its progressive development but as objects of colonial exploitation... the second... is the emergence of independent States from the break-up of the colonial system... the liquidation of colonialism marked their transformation from objects of international law into full subjects and active participants in the readjustment of the legal order to the new features of the international community.[1]

With their newly acquired political independence the new nation-states endeavored to build their nations in order to fulfill the growing needs and aspirations of their people, and to establish their position as sovereign equals in the international community. All these efforts however were futile. Colonialism had not really been abolished it merely put on a new mask. Political independence without genuine emancipation from alien domination of the economy meant nothing at all. An era of neo-colonialism had set in.

In the words of the UNCTAD:

> The fact that the developing countries did not share adequately in the prosperity of the developed countries when the latter were experiencing remarkably rapid expansion indicates the existence of basic weaknesses in the mechanisms which link the economies of two groups of countries... the weakness of this structure, the inadequacy of the mechanisms by which growth in the developed centres

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1 Magallona, *Towards the Consolidation and Progressive Development of the Principles and Norms of International Economic Law*, (1979, mimeo) at 1-3

> is transmitted to the third world are manifested in each of the major areas of economic relations between developed and developing countries...[2]

As the world has been transformed into a "global village", the increasing polarization of its constituent States into the developed and the developing (or underdeveloped) block with all the ghastly realities as a consequence thereof has come as a stigma, indicative of the failure of the existing world order. This, together with the growing assertiveness on the part of the developing States has caused the coming of a new international economic order.

On May 1, 1974 at its Sixth Special Session, the United Nations General Assembly adopted a monumental document called the Declaration on the Establishment of a New International Economic Order (NIEO declaration)[3] and a corresponding Program of Action.[4] These two documents, closely followed by the Charter of Economic Rights and Duties of States,[5] another General Assembly resolution, together constitute the frame of reference of the NIEO movement.

"What distinguishes these resolutions from their predecessors is their objective and the new environment in which they were formulated and advanced. The objective of these resolutions is no longer merely to improve the functioning of the existing international economic system, but rather to change its purposes, mechanisms and structures."[6] It must be emphasized however that the NIEO movement "is not a question of any destruction of the existing international law, but it is a matter of *gradual* substantive change and adjustment to new economic relations in the world . . . ." (underscoring added).

Fully cognizant of the volatility and injustice of a system oblivious of the needs and aspirations of the developing countries which comprise the vast majority of the world's nation-states, the NIEO seeks to mould a system responsive to these needs.

Thus, the Charter ordains that the economic as well as political and other relations of States be founded not only on established norms of international law, which have assumed a renewed significance in being invoked and asserted not only by the former colonial

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[2] Report by the Secretary of the UNCTAD to the Conference: TD 183 (1976) at 5-6.

[3] UN General Assembly resolution 3201 (S-VI), 1 May 1974.

[4] UN General Assembly resolution 3202 (S-VI), 1 May 1974.

[5] UN General Assembly resolution 3281 (XXIX), 12 Dec. 1974, (herein after referred to as the Charter).

[6] Sauvant, *Towards the New International Economic Order*, in SAUVANT & HASENPELUG (EDS.), THE NEW INTERNATIONAL ECONOMIC ORDER 6 (1977).

rulers but by those emerging States which not so long ago were under their tutelage, but more importantly, the Charter contains precepts geared towards the changing of the international *status quo*.

The principles of sovereignty and sovereign equality; non-aggression and non-intervention; peaceful coexistence and fulfillment in good faith of international obligation; all these are not new. At the same time however these precepts are no longer the exclusive domain of the former colonial rulers. The developing states too assert these very principles in an emerging system of mutual bargaining and struggle between the two classes of States. Cognizant of the inequality which pervades the international community of States, positive and active precepts, such as to remedy injustices brought about by forces which deprive a nation of the natural means necessary for its normal development; mutual and equitable benefits; and the promotion of international social justice which have never been proclaimed and considered as determinative of the rules of interaction among States, are integrated in the Charter. These precepts contemplate a system where the weak States will be able to share and participate more in the benefits and advances of modern day life. The aspiring States, it has been observed in this regard, would like the law to operate as it has done in certain constitutional systems which have adopted the principles of affirmative action and reverse discrimination to secure equal opportunity. This seems to be the only way by which the basic principles of sovereign equality of States may be given substance and would afford the weak and developing States an opportunity to progressively improve their position relative to the developed States.[8]

Mere acceptance of the NIEO principle, however is not enough, "most developed states have done this."[9] The problem lies in their translation into changes in the mechanism governing interaction between the developed and the developing bloc of states.[10] Moreover, piecemeal and desultory efforts will not be enough. Genuine efforts would have to be taken directed towards the reduction of the economic dependence of developing countries on the developed states.[11]

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[7] Husain, *Legal Implications of a New International Economic Order*, in NAWAZ (ED.), LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, AN ASIAN PERSPECTIVE 2 (1980).

[8] Hossain, *Introductory Note*, in HOSSAIN (ED.), LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, STUDIES IN THE NIEO 5-6 (1980).

[9] Sauvant, *op. cit. supra*, note 6 at 10.

[10] *Ibid.*

[11] UNCTAD, *Elements of the New International Economic Order*, in SAUVANT & HASENPELUG (EDS.), *op. cit. supra*, note 6 at 48.

The changes desired will not however come in a silver platter. The developed states, though accepting the NIEO principles to a large extent, have expectedly been reluctant to translate the measures called for in more concrete terms. The implementation of general, non-discriminatory and non-reciprocal trade preferences; the transfer of technology; disarmament and the utilization of resources released by the same towards the economic and social development of the new states; and a host of other measures have hardly characterized their present positions nor will such be expected in the immediate future. The developing countries themselves have to take the initiative in improving their situation so as to reconcile the gap between them and the developed countries, a gap which if left unpatched would ultimately have grave consequences on security and peace in the international community.

Today we see symptoms of these efforts by the developing states. On the regional level, the lessons from OPEC prove the effectivity of producer associations in neutralizing, and finally overcoming, alien interference in a vital area of natural resources.

That the OPEC countries have been able to stand on an equal, or even superior, bargaining position against the powerful industrial states has been a source of inspiration to developing countries and an illustration of what unity and initiative can do.

The experience of the Andean group[12] shows the effectivity of uniform and concerted measures in controlling the onslaught of foreign investment. They call for a gradual transfer of ownership in any undertaking a foreign investor would wish to engage in, as a prerequisite to accommodation by any of its member states.

Measures undertaken by individual states, though not as effective as those on the regional level, are likewise underway.

Fully cognizant of the need for developing states to initiate measures for their own survival, the Charter ordains it to be not only a right of states but also their duty, "individually and collectively to eliminate colonialism, apartheid, racial discrimination, neocolonialism and all forms of foreign aggression, occupation and domination, and the economic social consequences thereof as a prerequisite for development."[13] How this injunction is to be fulfilled by the developing states will definitely be the question which is determinative of their survival in the few years ahead.

II. The Problem of Multinational Enterprises

If we see the wisdom in that old Chinese proverb that says a journey of a thousand miles begins with a single step, we need not

[12] Bolivia, Colombia, Chile, Ecuador, Peru, and Venezuela.
[13] *Op. cit. supra*, note 5, art. 16.

look far and wide to pursue our first step towards effective freedom. The problem of multinational enterprises (MNE's)[14] is a real and immediate one which has plagued not only our national economy but our political life as well. An analysis of the concomitants of this problem will bring us closer to the bone of our present inquiry.

The UN Economic and Social Council (ECOSOC) reports that:

> During the past quarter of a century the world has witnessed the dramatic development of the MNE into a major phenomenon in international economic relations. Its size and geographical spread, the multiplicity of its activities, its command and generation of resources around the world and use of such resources to further its own objectives, rivals in terms of scope and implications traditional economic exchanges among nations... The general conclusion that many MNC's are bigger than a large number of entire national economies remains valid***[15]

By now the power in the hands of multinational enterprises (MNE's) is known to all.

An inquiry however into the structure of MNE's will indicate that because of their profit-seeking objectives, their intricate system of centralized control geared towards the utilization of their relative size and geographical spread in amassing optimum advantages worldwide, their various intricate schemes from transfer pricing to monetary management, and even the extreme case of toppling governments, the over-all corporate strategy of the MNE would have a minimum genuine congruence with the development aspirations of the new states.

A succint enumeration of the undesirable practices of MNE's which are highly prejudicial to their host states can be found in points 12 to 21 of the Reports of the Commission on Transnational Corporations, which reads:

> ***12. Obstruction by transnational corporations of the efforts of the host country to assume its rightful responsibility and exercise effective control over the development and management of its resources in contravention of the accepted principles of permanent sovereignty of countries over their natural resources.
>
> 13. Tendency of TNC's not to conform to the national policies, objectives and priorities for development set forth by the governments of host countries.
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> 14. Withholding information of their activities of TNC's making host countries unable to carry out effective supervision and regulation of those activities.

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[14] Multinational Enterprises (MNE's) will be used synonymously with Transnational Corporations (TNC's) in this paper.

[15] Multinational Corporation in World Development, UN Doc. ST/ECA/190 (1973), at 1 and 13.

15. Excessive outflow of financial resources due to practices of TNC's and failure to generate expected foreign exchange earnings in the host country.

16. Acquisition and control by TNC's of national locally capitalized enterprises through controlled provision of technology among other means.

17. Superimposition of imported technology without any adaptation to local conditions, creating various types of distortions.

19. Obstruction or limitation by TNC's to access by host countries to countries.

20. Imposition of restrictive commercial practices, *inter alia*, on affiliates in developing countries as a price for technical know-how.

21. Lack of respect of the socio-cultural identity of host country.[16]

All these only point to no other conclusion.

Effective control and regulation of MNE's has become indispensable in the drive by developing states towards economic freedom, as the least of possible policy measures. Nationalization as a more positive measure has become a formidable challenge on the part of many host states considering the many counter-measures and repercussions that would surely ensue.

For countries like the Philippines with heavy cultural and trade ties with the United States, the above observations stand especially true. Legislative measures have been adopted in the United States geared towards discouraging emboldened moves on the part of developing countries against the former's interests. The Hickenlooper Amendment[17] to the Foreign Assistance Act, for one, requires the President of the United States to suspend foreign aid to a State that may have taken measures against property of its nationals abroad arising from a wide array of causes, which, for all intents and purposes, may coincide with purely legitimate measures within the NIEO context. Thus the nullification of contracts with US nationals which may be inequitous or disadvantageous on the part of the developing state, and the taking of measures which would have the effect of nationalizing or expropriating ownership of properties of US nationals, even if in pursuit of a desired public policy, may bring into operation the mechanics of the amendment. This provision of law however would not apply if appropriate steps, including arbitration, were to be taken by the expropriating state.

[16] Commission on Transnational Corporation Report on the First Session, UN Doc E/C10/6 Annexes I and II.

[17] 22 USC sec. 2370 (e) (1) 1964.

The World Bank-sponsored Convention on the Settlement of Investment Disputes Between States and Foreign Nationals[18] creating the International Center for the Settlement of Investment Disputes (ICSID), provides an expedient way by which developing states having relationship with the United States can avoid the implementation of the Hickenlooper Amendment.

A few more points however are in order before we see the full import of the World Bank Convention.

III. MULTINATIONAL ENTERPRISES AND TRANSNATIONAL CONTRACTS UNDER INTERNATIONAL LAW

Despite their size and geographical spread, "MNE's do not derive a legal personality from international law, as for example from a treaty or act of an international organization. They are organized under and governed by, each country's national law." As a consequence therefore MNE's cannot be regarded as international in the sense that contracting states have assumed specific obligations concerning their treatment and the privileges applicable to them.[19]

Indeed, if foreign nationals and foreign investments enter a territory with the principal objective of monetary gain and with the full realization of the risks naturally attendant thereto, including the legitimate acts of the State or of its organs in the pursuit of a desired public policy, how can it be said that the host state has assumed specific obligations towards them other than that ordinarily owed its own nationals. Would the giving of preferential treatment to foreign nationals and foreign investments not amount to an undue discrimination against the nationals of the said State? Following this, how can it be said that States have a right of diplomatic protection of its nationals in foreign countries in cases where those very nationals do not enjoy the right sought to be protected.

In this regard it has been observed that the law of responsibility of states for injuries to aliens, by which their home states can invoke the right of diplomatic protection over its nationals, is not part of universal international law. It has evolved as a part of the need felt by the powerful Western States to protect their interests which have penetrated deep into the new world. As such it is said to have binding effect only on States which have originated the practice and those which have subsequently adopted it.[20]

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[18] For Text, see 576 U.N.T.S. 160 (hereinafter referred to as the Convention).

[19] Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729, 755 (1973).

[20] Roy, *Is the Law of Responsibility of the State for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L. L. 963 (1961).

The decision of the International Court of Justice (ICJ) in the *Barcelona Traction case* sheds light on this matter when it distinguished between two kinds of obligations owed by a State to foreign nationals and foreign investors within its territory. One, *erga omnes,* an unconditional obligation it owes to the whole world such as the outlawing of genocide and the respect of human rights. Another, an obligation the performance of which is the subject of diplomatic protection. The latter presupposes the violation of a *right* (as distinguished from a mere interest) and a claim thereon can only be brought by the party whose right has been violated.[21]

The decision of the ICJ has had a far reaching consequence with regards to foreign investments. In answering an argument raised to the effect that an international claim can be made when investments by a State's nationals abroad are prejudicially affected because said investments are part of a State's national economic resources and, therefore, any prejudice to them directly involves the economic interest of the State, the court said:

> Governments have been known to interfere in such circumstances not only when their interests were affected, but also when they were threatened. However, it must be stressed that this type of action is quite different from and outside the field of diplomatic protection. When a State admits into its territory foreign investments or foreign nations it is*** bound to extend to them the protection of law. However, it does not thereby become an insurer of that part of another States wealth which these investments represent. Every investment of this kind carries certain risks***[22]

It was not surprising, therefore, that owing to the increased and large-scale activities between states and MNE's in practically all facets of economic life, transnational contracts (contractual relations between a subject of international law and a subject of a national legal order) have assumed a far reaching political connotation.

The political connotation on the part of the States, partly due to their feeling of helplessness *vis-a-vis* MNE's meant an assertion of their sovereign prerogatives, and on the part of MNE's (and their home State) a desire to remedy their lack of international personality and guarantee via devices, best exemplified by the World Bank Convention creating the ICSID, which would place the MNE's on the same level as the host State in an adversary proceeding before its tribunals.

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[21] Barcelona Traction, Light and Power Co. Ltd. Case [1970] I.C.J. Rep. 32 par. 33, 34, 35.

[22] *Id.*, at 46, par. 86, 87.

International courts consider these transnation contracts as subject to the host State's national laws. In the *Serbian Loans Case,* the Permanent Court of International Justice held that "any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country." In the *Anglo-Iranian Case,* the International Court of Justice held that contract entered into between a State and a foreign corporation was not an international treaty submitted to international law.[23]

It was in consideration of these principles that the developed States endeavored to have these transnational contracts depend on a legal order different from that of the host States. The governing rationale was that the principle of autonomy of will would always work in favor of the party with the strongest bargaining power. That this expedient would work to the advantage of foreign investors or MNE's at the expense of developing States is not hard to imagine. It was in view of this that the developing States refused to accept the proposals by industrial States of reading into the Charter the equal status of inter-state agreement and those concluded by the State and a foreign national.[24]

IV. NIEO AND THE MECHANICS OF CONTROL: JURISDICTION

It was the realization of the overall conflict that inhered in the relationship of home-host States and foreign investments that the NIEO documents contained specific provisions directed towards the control or regulation of foreign investments. These injunctions ought to be interpreted in the light of the experience of the vast majority of aspiring states, and in the light of their desire to overcome the present constraints posed by foreign investment or MNE's as prerequisites to true independence. It is not surprising that MNE's have been made specific objects of these measures.

Thus the NIEO declaration provides that the NIEO shall be founded on the principles of:

> 4(e) Full permanent sovereignty of every state over its natural resources and all economic activities... to exercise *effective control* over them and over their exploitation... including the right to *nationalization*.....
>
> (g) Regulation and supervision of the activity of transnational corporations by taking measures *in the interest of the national economies* of the countries where such transnational corporations operate . . . (underscoring added).

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[23] Ballecker-Stern, *The Legal Character of Emerging Norms Relating to the NIEO: Some Comments,* in HOSSAIN (ED.), *op. cit. supra,* note 8 at 75.
[24] *Ibid.*

The Program of Action enjoins member states to take all efforts to formulate, adopt and implement an International Code of Conduct for TNC's along the lines of the NIEO declaration.

The Charter, among others, provide that:

Each state has the right:

a) To regulate and exercise authority over foreign investment within its 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 corporation within its national jurisdiction and take measures to insure that such activities *comply with its laws, rules and regulations conform with its economic and social policies.* Transnational corporations shall not intervene in the internal affairs of a host State...

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 all circumstances that the State considers pertinent.* In case where the question of compensation gives rise to a 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 *sovereign equality* of States and in accordance with the principle of free choice of means. (Underscoring added).

As to the legal significance of these resolutions much controversy has ensued. Without going further into the merits of the discussion, however, and proceeding on the axiom that consent of States is still the basis of obligation in international law, it has been observed that:

> * * * no system of rules can even pretend to apply to an international community without the participation of the majority of the members of the community in the creation of those rules... there should be no hesitation in drawing the conclusion that the terms of 'international economic cooperation' set forth in Chapter IX of the UN Charter cannot be applied henceforth except through the medium of these three basic documents....the application of the law of the Charter cannot disregard such declaratory resolutions as those discussed above. They form part of the law and are binding in that sense on all member States of the UN.[25]

V. NATIONALIZATION: THE PROBLEM OF COMPENSATION

It may be observed that the Charter recognizes that an exception to the general rule of jurisdiction of the home State may exist

[25] Magallona, *Some Remarks on the Legal Character of United Nations General Assembly Resolution*, 5 PHIL. YRBK. INT'L. L. 84, 85 and 90 (1976).

in cases where the question of compensation arises from an exercise of its inalienable right of nationalization. The application of the laws of the nationalizing State and the interpretation thereof by its tribunals may be avoided by mutual agreement on the basis of sovereign equality and the free choice of means. But this exception is not without its share of controversy. Some salient points on nationalization should therefore be noted to appreciate the full import of the NIEO movement.

That States do have a right to nationalize foreign property is conceded by all. The question that arises, however, concerns the amount of compensation due the States against whose interests the right is exercised.[26]

The developed States insist on the "prompt, adequate and effective" compensation claiming that this is the rule recognized in international law. The new states, however, as may be gleaned from the Charter, have adopted the principle of unjust enrichment.

The rule of "prompt, adequate and effective" compensation was clearly articulated during the Mexican Nationalization of 1938 by the US Secretary of the State then, Cordell Hull, who said that a country that is not in a position to afford immediate, full and effective payment of the expropriated alien property ought to refrain from enacting measures of nationalization.[27]

Traditional international law on nationalization, founded on the theory of "acquired rights," considered any interference by a State with foreign owned property a violation of these acquired rights which, on account of being internationally protected, constituted an internationally "wrongful" act. As a consequence thereof, the duty to eliminate all damaging consequences of its unlawful act was imposed upon the nationalizing State. Classical international law doctrine, therefore claimed that indemnity in case of nationalization or expropriation should be determined on the basis of the full market value of an undertaking as a "going concern" plus the future earning prospects (*lucrum cessans*) and the goodwill it has developed as well as other intangible assets.[28]

Since its inception, capital-exporting countries have tried to preserve this principle by introducing it as an element in their treaty practice.[29]

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[26] *Impact of MNC's on Development and International Relations: Report of the Group of Eminent Persons*, UN Doc. E/5500/Rev. 1 ST/ESA/1 at 76-77.

[27] Francioni, *Compensation for Nationalization of Foreign Property: The Borderline Between Law and Equity*, 24 INT'L AND COMP. L. 255, 263 (1975).

[28] Arechaga, *Application of the Rules of State Responsibility to the Nationalization of Foreign Owned Property*, in HOSSAIN (ED.), *op. cit. supra* note 8 at 220-222.

[29] Francioni, *op. cit. supra*, at 264.

Today, however, any measure of nationalization or expropriation is recognized by all States as constitutive of the exercise of their sovereign right and therefore entirely valid. Given this, the general rules of State responsibility no longer apply and to assert that there is a need of restitution via "prompt, adequate and effective" compensation may in actual cases be a denial of the right to nationalize on the part of developing States deep in the thraldom of poverty.[30]

The principle of unjust enrichment postulates not the loss suffered by the expropriated owner but the beneficial gain of the nationalizing State as the criterion of measuring the amount of compensation. The merit of this principle is that it permits a legal formulation of the duty to indemnify without resorting to the idea of "damages" which presupposes a wrongful act.[31]

The reservations entered by the US, Federal Republic of Germany, France, UK and Japan to the NIEO declaration and Program Action was to the effect that the documents disregard international law by not integrating into the same the rule of "adequate, prompt and effective compensation".[32] But for all that is worth of this objection, it should at least be clear that the alleged customary rule invoked by these States lacked necessary generality and uniformity for the same to be considered still a tenable rule of customary international law.[33] Nothing, however, in the *travaux preparatoires* of the Charter show that it is based on the negative duty which denies absolutely an obligation to pay.[34]

VI. The World Bank Convention

The World Bank Convention contains the grains for the negation of all the above stated NIEO principles. Although the mere adherence to the Convention does not *ipso facto* vest jurisdiction of any investment dispute in the Conciliatory Commissions or Arbitral Tribunals of the Center, and that such jurisdiction only vests upon written consent of the parties to the dispute, and on a case to case basis (see Annex for overview of Convention), still, some developing States objected to the Convention on grounds of *principle*. It was forwarded by the objecting States that the disputes were not between nations but related to property within the national boundaries of a host State, and since oftentimes the same act of nationalization may affect both foreign and domestic investments, they maintained that

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[30] Arechaga, *op. cit. supra*, at 221.
[31] Francioni, *op. cit. supra*, at 272.
[32] Reservation entered by the US, Federal Republic of Germany, France, UK and Japan to the NIEO declaration and Program of Action; 13 Int'l Leg. Materials 744, 755 and 764, (May 1974).
[33] Arechaga, *op. cit. supra*, at 223-224.
[34] *Ibid.*

only national courts could have jurisdiction over the same. These States invoked a prior resolution of the UNCTAD Trade and Development Board which asserted the sovereign power of each State to fix the amount of compensation and the procedures for nationalization measures, and recognized that any dispute attendant thereto fell under the *sole* jurisdiction of the courts of that State.[35]

Since then, the second General Assembly resolution on Permanent Sovereignty over National Resources[36] and the NIEO documents have been passed, basically reiterating the tenor of the UNCTAD resolution.

The Philippines has had a most active participation in the adoption of the NIEO documents and is an all-out supporter of the principles it espouses. It has been noted that the Philippines has been an active participant in the ministerial meetings of the "Group of 77" and UNCTAD conferences which provided an appropriate medium for concretizing the Third world position on a new international economic order. Together with 97 countries, the Philippines sponsored two proposals in the *Ad Hoc* Committee of the Sixth Special Session of the UN which subsequently adopted the NIEO declaration. Again, the Philippines was one of the sponsors of the draft Charter of Economic Rights and Duties of States in the Second Committee of the General Assembly, and in voting for the draft Charter, it voted in favor of each separate part. From these, the Philippines sees its predicament in the problems of the developing world and it recognizes that the solution to this problem is embodied in the NIEO movement.[37]

The Philippines' adherence,[38] however, to the World Bank Convention creating the ICSID, years after the NIEO documents have been passed constitutes a retrogression on our aim toward effective independence. Is the Philippines really committed to the NIEO movement?

Could it not be said that the mere adherence to the Convention constitutes an acceptance, in principle, of the machinery for the settlement of investment disputes provided thereunder? Could it not be said that the adherence to the Convention gives a reasonable

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[35] *The Impact of MNC's in Development and International Relations, op. cit. supra*, note 26, at 48.

[36] UN General Assembly Resolution 3171 (XXVIII), Dec. 17, 1973.

[37] Magallona, *National Interest and NIEO*, 2 PHIL. L. REV. 43, 45, 46 (1977).

[38] The Instrument of Ratification was signed by President Marcos and is dated 17 October 1978. The Convention came into force for the Philippines on December 17, 1978. See ICSID/8/Rev. 7, May 1, 1979.

The Instrument of Ratification was closely preceded by the Opinion (No. 149) of the Acting Secretary of Justice, dated 29 September 1975, indorsing the ICSID.

expectation on the part of foreign investors and their home State, that a contracting State would, if ever an investment dispute were to arise between them, submit the same under the machinery laid down by the Convention? It has been observed that the opposition of the Group of 77 to the proposals of the industrialized States on this subject was based on the fear that their incorporation in the Convention might give a character of general international law to the solution sponsored by the World Bank, whereby investment disputes, instead of being decided in litigation between the interested States on the basis of sovereign equality, would be determined by an arbitration which places the private company and the developing State on the same level of adversary proceeding.[39] This indeed is unprecedented. Prior to the ICSID, no treaties existed which required contracting States to recognize the jurisdiction of existing arbitral bodies over disputes between States and foreign nationals.[40]

With the World Bank (and its sister institution, the International Monetary Fund) as leading lending Institutions to a vast majority of developing States, and the accompanying controls attendant thereto, ratification of the Convention seems a necessary corollary to an expeditious enjoyment of its lending facilities.

Although submission of an investment dispute to the Conciliatory Commissions of Arbitral Tribunals of the ICSID is based on consent of the parties and on a case to case basis, to hold that the general rule of exclusive application of the laws of the host States and the final adjudication thereof by its courts would not be imperilled, would be naive as it is foolish. Added care should be taken in transposing the classical idea of contract as a private bargain struck by the parties of equal bargaining strength into the sphere of international relations. It has been observed that the barest acquaintance with the actual circumstance surrounding the conclusion of investment agreements or transnational contracts between TNC's and governments of developing countries show the same to be lop-sided contracts. These contracts are not arms-length transactions rooted in the free will of the parties of equal bargaining strength because of the superior negotiating skill, knowledge, resources, and more favorable bargaining position which the TNC's command at the inception of the relationship.[41] The data gathered from the United Nations Reports on TNC's fully and convincingly corroborate this point.

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[39] Arechaga, *op. cit. supra*, note 25 at 229.

[40] Moore, *International Arbitration Between States and Foreign Investors—The World Bank Convention*, 18 STAN. L. REV. 1359, 1363-1368, (1966).

[41] Asante, *Stability of Contractual Relations*, in HOSSAIN (ED.), *op. cit. supra*, note 8 at 237-240.

What then would prevent any foreign investor, specifically a TNC, to impose as an indispensable condition to every contract entered into with a contracting State, a standard clause that would refer any dispute arising thereunder to the jurisdiction of the Center? The adverse effect of this stipulation is evident. Our courts will not have jurisdiction over those cases. An irony, considering the fact that our judges would be in the best position to appreciate and apply our laws with nothing but the country's interest in mind.

If the TNC can impose the above contractual stipulation, what will prevent it from imposing as a further requirement that, in view of the free choice of laws applicable at the option of the parties, its national law (which would be more favorable to it), is to govern the contractual relations between the parties? What good is political independence if our courts and our laws would be denied jurisdiction and application in these instances. We need not go further to say that this would, for all intents and purposes, be an abdication of our country's sovereign rights which the NIEO movement seeks to promote.

As to the rule on compensation in cases of expropriation or nationalization, it is not hard to imagine that the traditional rule, insisted upon by the industrialized States of "prompt, adequate and immediate" compensation would be adopted. With this alone assured, the ICSID would have served its purpose.

Here lies the contradiction of the ICSID and the NIEO.

Lastly, even the mechanics of the Convention itself bespeak of ambiguity and thus reveal promising areas of conflict.

Since no effort was made to define the term "investment" in the Convention, a wide range of discretion has been lodged in the Conciliation Commissions and Arbitral Tribunals. It is entirely possible that the conciliators and arbitrators would adopt a liberal definition of investment so as to open the Center's doors to a wide range of important international agreements. "Nearly all international transactions, except for cash sales of goods, involve the commitment or investment of cash or capital assets in the foreign State for some period of time."[42]

The Report on the Executive Directors of the World Bank states that under Art. 25 of the Convention the expression "legal dispute" has been used "to make clear that while conflicts of rights are within the jurisdiction of the center, mere conflicts of interests are not," and that "the dispute must concern the existence or scope of a

[42] Moore, *op. cit. supra*, note 40 at 1362.

legal right or obligation or the nature or extent of reparation to be made for breach of a legal obligation."[43] Yet, this definition is wanting. The explanation above hardly clarifies the meaning of the term "legal dispute". "Where there is no conflict of interest with respect to a cause of conduct or interpretation there will be no conflict of rights. It is the conflict of interest which prompts the taking of positions giving rise to a conflict of rights . . . No doubt special problems relating to the often changing economic and political policies of the contracting states prompted this language".[44]

It could, therefore, be seen that the jurisdiction of the ICSID is all encompassing. This phenomenon coupled by the fact that the Conciliatory Commissions or Arbitral Tribunals of the ICSID shall be the judge of their own competence foretells of serious consequences for a state endeavoring to exercise a modicum of control or regulation over a foreign investor or MNE. To a large extent, the ICSID would stifle any genuine drive of developing states to exercise their inalienable sovereign rights of controlling and regulating all economic activities within their respective territories, including control and regulation of foreign investors therein. Assuming, and the possibility is great, that a State has bound itself to the jurisdiction of the tribunals of the ICSID, the possibility of a suit therein would always stand as a Damocles sword, an active bar, practically ensuring the immunity of foreign investors from the reach of the host State. Furthermore, when the Arbitral Tribunals of the ICSID have assumed jurisdiction, no party to the dispute may unilaterally withdraw therefrom[46] and any decision had thereunder is binding upon the State.[47] The decision of the arbitral tribunals is not to be taken lightly for the ICSID has full International legal personality including the capacity to institute legal proceeding against an erring or delinquent party.[48] Beside all these considerations, any State which has adhered to the Convention is enjoined to take legislative measures to make it effective within its territory.[49]

From these could be gathered the overall picture that the ICSID is the internationalization of a system for the frustration of the efforts of host States at controlling and regulating foreign investors

[43] *IBRD: Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Report of the Executive Director*, 4 INT'L. LEG. MATERIALS 524, 527 (1965).

[44] Sirefman, *The World Bank Plan for Investment Disputes Arbitration*, 20 ARB. J. 168, 172-173, (1965).

[45] See Annex, note 12.

[46] See Annex, note 15.

[47] See Annex, note 13.

[48] *Op. cit. supra*, note 18 art. 18.

[49] *Op. cit. supra*, note 18 art. 69. To date no such legislative measure has been enacted by the Philippine government.

and MNC's, and thus rendering its sovereign prerogatives meaningless in a fast changing world where the quest by these States for genuine independence is at its deafening heights.

ANNEX

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND FOREIGN NATIONALS

The convention provides for the creation of the International Center for the Settlement of Investment Disputes (ICSID or Center) upon ratification by twenty member states of the World Bank.[1]

ORGANIZATION

The organization of the Center is made up of the administrative Council, the Secretariat and Conciliation and Arbitration Panels.[2]

THE ADMINISTRATIVE COUNCIL

The Administrative Council is the policy-making organ of the Center. Its chief functions are the adoption of regulations governing the conciliation and arbitration proceeding for the Center and likewise its administrative and financial regulations.[3] It is composed of one representative from each of the contracting States.[4] The President of the World Bank is the ex-officio Chairman of the Administrative Council but has no vote.[5] Each member of the Administrative Council has one vote and, except in special instances, all matters before the Council shall be decided by a majority of the vote cast.[6]

THE SECRETARIAT

The Secretariat is headed by the Secretary-General who shall act as the Center's legal representative and responsible for its administration.[7] The Secretary-General has the power to refuse registration of a request for conciliation or arbitration proceedings, and thereby prevent the institution of such proceedings, if on the

[1] Art. 68(2)
[2] Art. 3
[3] Art. 4
[4] Art. 4
[5] Art. 6
[6] Art. 7
[7] Art. 11

basis of the information furnished by the applicant he finds that the dispute is *manifestly* outside the jurisdiction of the Center.[8]

CONCILIATION AND ARBITRATION PANELS

The Center does not itself engage in conciliation and arbitration activities, this task is undertaken by the Conciliation Commissions or Arbitral Tribunals constituted under the provisions of the Convention.[9]

An Arbitral Tribunal must, unlike a Conciliation Commission, render a decision on the merits of the dispute and under the convention the decision is binding upon the parties (art. 48.3 and 53). Both Conciliation Commission and Arbitral Tribunal may consist of one or an uneven number of conciliators or arbitrators from a panel (the constitution of which is provided for in articles 12 to 16), or even outside as the parties agree. Where there is disagreement, the Commission or Tribunal shall consist of 3 members, one appointed by each and the third by agreement of the parties.[10] If the Commission or Tribunal shall not have been constituted pursuant to said procedure the Chairman shall appoint from within the Panels, arbitrators or conciliators not yet appointed on request of either party to the dispute.[11]

Both Conciliation Commission and Arbitral Tribunal are to be the *judge of their own competence* and therefore any objection by a party to the dispute that the same is not within its competence, shall be considered by either as a preliminary question or join the same with the merits of the dispute.[12] Judgment by the Arbitral Tribunal shall be considered as if it were a final judgment by a court in the Host State and enforced according to its law on execution without prejudice to the Host State's invocation of its laws relating to sovereign immunity.[13]

The Arbitral Tribunal shall decide a dispute in accordance with such rules of law *as may be agreed by* the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable.[14]

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[8] IBRD: Convention on the Settlement of Dispute Between State and Nationals of other States; Report of the Executive Director, 4 INT'L LEG. MATERIAL 524 (1965) at 527.

[9] *Id.*, at 526.

[10] Art. 29, 37

[11] Art. 30, 38

[12] Art. 32, 41

[13] Art. 54, 55

[14] Art. 42

JURISDICTION OF THE CENTER

The jurisdiction of the Center shall extend to *any legal dispute* arising directly out of an *investment* between a contracting State and a national of another contracting state, which the parties to the dispute consent in writing to be submitted to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally. The term "national of another contracting state" include both natural and juridical persons.[15]

The consent of the parties to arbitration under the Convention, unless otherwise stated, is deemed consent to such arbitration to the exclusion of any other remedy.[16] No contracting State is to give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another contracting State shall have consented to submit and have submitted for arbitration under the Convention unless the other State has failed to abide by the award.[17]

[15] Art. 25
[16] Art. 26
[17] Art. 27