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G3 AGREEMENT: A COMPARISON OF ITS INVESTMENT CHAPTER WITH THE EMERGING INTERNATIONAL LAW OF FOREIGN INVESTMENT

*Omar E. García-Bolívar**

I. INTRODUCTION

AS Latin America and the Caribbean are involved in discussions for the Free Trade Area of the Americas, it is useful to highlight the merits of interregional agreements that are already in place within the Americas. This article looks at the components of the investment chapter of the free trade agreement between Colombia, Mexico and Venezuela, commonly known as the Group of Three Agreement or the G3 Agreement (G3 or G3 Agreement).

In 1994, Colombia, Mexico and Venezuela completed negotiations on a free trade area agreement. The conclusion of the negotiations was formalized in an agreement, which was then approved by each country as internal law.¹ While the agreement is largely focused on trade matters, other economic topics are also included. One such topic is investment.

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1. See *Tratado de Libre Comercio, Colom.-Mex.-Venez., June 13, 1994, available at <http://www.iadb.org/intal/tratados/g3.htm> (last visited July 14, 2004) [hereinafter *G3 Agreement*].*

Chapter seventeen of the G3 deals with investment matters, including its definitions, treatment, transfers, expropriations, performance requirements, safeguard mechanisms for payment balance troubles, and investment disputes.

This article highlights the main aspects of the emerging international law of foreign investment² in relation to these issues and describes the G3 approach. For analysis purposes, this approach is compared to the North America Free Trade Agreement (NAFTA).³

The interpretation of NAFTA and the decisions of tribunals applying it are particularly relevant, at least to investors from the two G3 parties investing in Mexico, for several reasons: NAFTA contains a chapter on investment, Mexico is party to both agreements, and the G3 Agreement has a specific provision related to most favored nation treatment.

Likewise, the Cartagena Agreement, which launched the Andean Community, to which Venezuela and Colombia are party, is reviewed. The Cartagena Agreement and particularly Decision 291 of the Commission, which relates to the framework for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements, and Royalties, might be extended to Mexican investments and Mexican investors in the other two G3 parties via the most favored nation treatment.⁴

The rationale for including an investment chapter in the G3 was to promote investments through investment protection. By granting legal certainty to investors and investments from one party into the territory of another party, it was thought that investments would be more likely to flow therein.

After almost ten years, this has been the balance of chapter seventeen of the G3 on pursuing that objective: outflow investments from Mexico in Colombia and Venezuela have totaled \$3,197.8 million. Of that amount 50.3 percent is attributable to investments made in Colombia, and 49.7 percent is attributable to investments made in Venezuela.⁵ Investments from Colombia and Venezuela to Mexico from January 1994 to June 2001 were registered for the amount of \$42.6 million. Colombian investors invested \$17.9 million, whereas Venezuelan investors invested \$24.7 mil-

2. Emerging international law of foreign investment is understood as those common principles arising out of bilateral and multilateral agreements on foreign investment and of non-binding international instruments.

3. *North American Free Trade Agreement, Dec. 17, 1992*, 32 I.L.M. 605 (1993) [hereinafter *NAFTA*].

4. See *Andean Subregional Integration Agreement* (Cartagena Agreement), May 2, 1969, available at http://www.comunidadandina.org/ingles/treaties/trea/ande_trie1.htm (last visited July 4, 2004). See also, Decision 291: *Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements, and Royalties, Mar. 21, 1991*, available at <http://www.comunidadandina.org/ingles/treaties/dec/d291e.htm> (last visited July 4, 2004).

5. Mexican companies such as CEMEX, HYLISA, TELMEX, TAMSA and Grupo Maseca, were the major investors.

lion, primarily in the area of services.⁶ Investment inflows to Venezuela from Colombia during the period 1998-2002 totaled \$204 million, whereas investments from Mexico during the same period totaled \$17 million.⁷ During the period from 1994-2002, Colombia received investments from Mexico in the amount of \$67.5 million. It also received \$393.9 million from Andean countries, including Venezuela.⁸

II. DEFINITION OF INVESTMENT

A. INVESTMENT ACCORDING TO THE EMERGING INTERNATIONAL LAW OF FOREIGN INVESTMENT

There are different kinds of Foreign Investment (FI). One of them is foreign direct investment (FDI),⁹ understood as the permanent establishment of a business in a foreign jurisdiction in order to reduce transactions costs.¹⁰ For that establishment, generally, a cross-borders transfer of capital is made in kind or through funds.¹¹ FDI differs from other kinds of business in that the investor assumes both the risk of the operation and its control. However, most international transfers of capital are not FDI.

The second type of FI is portfolio investments (PI),¹² which do not pur-

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6. See G3, *Informacion General del Tratado de Libre Comercio del Grupo de los Tres*, http://g3.minrelext.gov.co/g3/webdriver.exe?Mlval=librecomercio_generalidades.html (last visited July 12, 2004).
 7. See Venezuela Council for Investment Protection, *Nuevas inversiones extranjeras por pias de origen*, available at <http://www.conapri.org/framedetalle.asp?sec=1102&id=51&plantilla=9> (last visited July 4, 2004).
 8. See Banco de la Republica, *Flujo Neto de Inversion Extranjera Directa en Colombia Según la Balanza de Pago*, available at http://www.banrep.org/economia/flujo_siepais.pdf (last visited July 12, 2004).
 9. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT 1996, INVESTMENT, TRADE AND INTERNATIONAL POLICY ARRANGEMENTS* at 3, U.N. Doc. UNCTAD/DTCI/32, U.N. Sales No. E.96.II.A.14 (1996).
 10. See SANJAYA LALL & PAUL STREETEN, *FOREIGN INVESTMENT, TRANSNATIONALS AND DEVELOPING COUNTRIES 5* (1977) (explaining that although some other reasons are indicated for FDI, the most common is profit-seeking, but not the intent to function as instruments of imperialism. It is so because the investor entities are not political-purpose organizations, but rather means of business).
 11. See GASTON GAUDARD, *FOREIGN INVESTMENT AND TRANSNATIONAL CORPORATIONS*, in *FOREIGN INVESTMENT IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER* 33 (Detlev Dicke ed., 1987) (arguing that there could be foreign investments without real transfer of capital. This occurs either through service contracts, or reinvestment, or local financing or by deconcentration of any of the subsidiaries. Furthermore, when the subsidiaries invest themselves, they are engaging in foreign investment, economically speaking, without transferring any capital). See also EDWARD M. GRAHAM & PAUL R. KRUGMAN, *THE SURGE IN FOREIGN DIRECT INVESTMENT IN THE 80s*, in *FOREIGN DIRECT INVESTMENT 15* (Kenneth Froot ed., 1993) (explaining that Foreign Investment can be done without inflow of capital, such as borrowing money to buy shares or through share swapping).
 12. See CANADA PRIVY COUNCIL OFFICE, *FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY: REPORT OF THE TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY* JANUARY 1968 24 (1968). See also MILTIADES CHACHOLIADES, *INTERNATIONAL ECONOMICS* 268 (1990) (explaining that portfolio investment refers to purchases of foreign securities (bonds and stocks) that do not carry any claim on control or ownership of foreign enterprises).

sue the exchange of goods as in trade, but pursue profits on a speculative basis through buy and sell operations in the stock market. The investor in this kind of FI does not seek operational control of the business but holds stock in anticipation of its appreciation.¹³

UNCTAD differentiates between these first two types of foreign investment by looking at the investor's role in asserting management control over assets in the following passage:

In conceptual terms, FDI and foreign portfolio investment are distinct. Direct investment involves both a long-term interest in, and significant management influence over, a foreign affiliate. Portfolio investment may include a long-term interest, but it seldom involves managerial control. For statistical purposes, a threshold of 10% of share ownership has been established to differentiate equity holdings of direct and portfolio investors. But in practice, the line between different types of investment is sometimes difficult to draw. In some circumstances, foreign investors may use their assets as collateral to borrow from local capital markets and use the proceeds for hedging or speculation. Conversely, venture capitalists can take a significant management interest in a venture without a large shareholding—and their activity, conventionally defined as portfolio investment, is similar to direct investment¹⁴

There are also new forms of FI in which the investor enters a country and markets a product or service but does not own the asset. These new forms of FI are found in license agreements, management contracts, joint venture agreements, service agreements, and production sharing agreements in which there is a transfer of capital but no establishment of an entity, nor is the transaction executed through the stock exchange.¹⁵

In each kind of FI, the benefit for the receiving country is the same: incoming capital that can finance development and stimulate growth.¹⁶

13. CHACHOLIADES, *supra* note 12, at 268.

14. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT 2003, FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES* at 100, U.N. Doc. UNCTAD/NIR/2003, U.N. Sales No. E.03.II.08 (2003) [hereinafter UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT 2003*].

15. CHARLES P. OMAN, *NEW FORMS OF INVESTMENT IN DEVELOPING COUNTRIES, INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL?* 131 (Theodore H. Moran ed., 1986) (explaining that “[t]he term ‘new forms of investment’ (NFI) covers a broad, heterogeneous range of international business operations that all have a common denominator: For an investment project in a host country, a foreign company supplies goods, either tangible or intangible, which constitute assets, but it does not own the project itself . . . the foreign partner’s equity share, if any, does not constitute ownership control . . . this does not mean that the foreign company cannot exercise partial or total control over the project by other means”).

16. The investment in the host country can activate production machinery, which probably would not otherwise have been activated. For example, the use of local financing would generate competition and the rising of new entities within the financial sector. One single entity would not suffice for the needs of the corporation. The outcome is that the development process of the country is accelerated. In this way, the host country can become an economic power that challenges the strength of the home country. See THOMAS J. BIERSTEKER, *DISTORTION OR DE-*

Thus, although FDI is seen as the most beneficial of FI for its positive externalities,¹⁷ other forms of FI can also bring the money that developing countries so desperately need without some of the disadvantages that are linked to FDI. For instance, the host country's fear of losing control over important sectors of its economy does not surface when investors lack managerial control as in PI.¹⁸

If protection is granted only to one kind of FI, it is not only the investor who would be in peril; countries would also lose a source of capital. For example, in economic reform cases, liberalization of only one kind of FI has made the country's economy vulnerable to the dangers associated with that particular kind of FI.¹⁹

Moreover, there are grey area cases in which it is not clear whether FI is direct or portfolio. Such cases occur when the FI concerns the acquisition of the shares of a corporation which are bought in the stock exchange market, that is, take over.²⁰ It may also occur when there is an acquisition of securities guaranteed with collateral in assets of the enterprise, which have been issued by a corporation, for purposes of financing

VELOPMENT? CONTENDING PERSPECTIVES ON THE MULTINATIONAL CORPORATION 9 (1978).

17. See ALAN GILPIN, *DICTIONARY OF ECONOMIC TERMS* 84 (4th ed. 1977). "[E]xternal effects or externalities" are "costs and benefits caused by the activities of an industry which are not reflected in the price at which the product is sold or influence the quantities purchased; costs not borne by those who occasion them, and benefits not paid for by the recipients." Accordingly, positive externalities are the beneficial side effects of an economic activity, such as those that activate the economy and do not harm anyone.
18. See IBRAHIM SHIHATA, *MIGA AND FOREIGN INVESTMENT: ORIGINS, OPERATIONS, POLICIES AND BASIC DOCUMENTS OF THE MULTINATIONAL INVESTMENT GUARANTEE AGENCY* 4 (1988).
19. The Mexican financial crisis of the 1990s was caused, to a large extent, by the extreme protection PI received as opposed to FDI. Accordingly, PI could move a huge amount of capital in a short time because they did not have any sunken costs. That is exactly what happened when the political crisis exploded. Had there been the same treatment for all FI, Mexico could possibly have been in better shape to assimilate the impact of fleeing capital. See Stephen Fidler, *That Sinking Feeling*, *FIN. TIMES*, Jan. 2, 1995, at 12.
20. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT* 7 (3d ed. 1996), available at <http://www.oecd.org/dataoecd/10/16/2090148.pdf>. "A foreign direct investor is an individual, an incorporated or unincorporated public or private enterprise, a government, a group related individuals, or a group of related incorporated and/or unincorporated enterprises which has a direct investment enterprise—that is, a subsidiary, associated or branch—operating in a country other than the country or countries of residence of the foreign direct investment investor or investors." *Id.* at ¶ 6. It is important to point out that the document does not use the term "corporation" but "enterprise," which seems not to be a legal term. Some definition of "enterprise" is provided by the same source as "an incorporated or unincorporated enterprise in which a foreign investor owns 10 per cent or more of the ordinary shares or voting power of an incorporated enterprise or the equivalent of an unincorporated enterprise. The numerical guideline of ownership of 10 per cent of ordinary shares or voting stock determines the existence of a direct investment relationship. An effective voice in the management, as evidenced by an ownership of at least 10 per cent, implies that the direct investor is able to influence or participate in the management of an enterprise; it does not require absolute control by the foreign investor." *Id.* at ¶¶ 7-8.

a particular operation. In the latter case, the buyer has control of the enterprise through the guarantee and would not be happy to hear that the investment would not be protected.

In the same sense, some existing non-comprehensive legal instruments on FI cover both FDI and PI. That is the case of the convention of the Multilateral Investment Guarantee Agency (MIGA),²¹ which includes as eligible investments, not only equity interests, but also medium and long-term loans made or guaranteed by holders of equity in the enterprise. The MIGA Convention also covers the reinvestment of profits and any transfer of foreign exchange related to the existing investment. Likewise, it extends eligibility to investments different from those listed there. However, in the case of loans different from those previously mentioned, they have to be related to a specific investment covered in order to be guaranteed by MIGA.²²

In addition, the convention of the International Center for Settlement of Investment Disputes (ICSID)²³ does not even define FI, thus it could be used to settle any kind of FI disputes, not only FDI disputes. Moreover, bilateral investment treaties (BITs)²⁴ have defined FI in very broad terms. They cover FDI, the establishment of a new corporation, the acquisition of a facility, and operations through a branch. But they also cover PI, such as acquisition of bonds or stocks in the public market, as well as the new forms of FI, e.g., management and service contracts, license agreements, etc.²⁵ When these treaties provide a list of investments protected, it is done only for illustrative purposes since special mention is made that the list is non-exhaustive. Some BITs even provide protection

21. *Convention Establishing the Multinational Investment Guarantee Agency*, Oct. 11, 1985, 24 I.L.M. 1605 [hereinafter *MIGA*].
22. *Id.* at art. 12. See also SHIHATA, *supra* note 18, at 112. Unlike most national investment guarantee programs, coverage will also extend to portfolio investment, including minority participation in joint ventures, preferred stock and shares resulting from the conversion of debt instruments. Among portfolio investments, preference will be given to those associated with foreign direct investments in the same enterprise.
23. *Convention on Settlement of Investment Disputes between States and Nationals of Other States*, Sept. 10, 1964, 1 U.S.T. 1270, 4 I.L.M. 524.
24. See UNITED NATIONS CENTER ON TRANSNATIONAL CORPORATIONS, *BILATERAL INVESTMENT TREATIES* at 16-29, U.N. Doc.ST/CTC/65, U.N. Sales No. E.88.II.A.1(1988). Accordingly, some treaties have a broad definition of investment comprising capital transfer, reinvestment and entities. New forms of co-operation such as management, marketing or turnkey contracts are covered. Portfolio investments are mentioned in some.
25. See KENNETH J. VANDEVELDE, *UNITED STATES INVESTMENT TREATIES, POLICY AND PRACTICE* 45 (1992) (explaining that the US BIT Model draft of 1983 defined investment as "every kind of investment . . . owned or controlled directly or indirectly by nationals . . . of the other party"). See also Adeoye Akinsanya, *International Protection of Direct Foreign Investments in the Third World*, 36 INT'L & COMP. L.Q. 58 (1987) (explaining that the Swiss agreement on the reciprocal promotion and protection of investments with other Less Developed Countries defines investment in broad terms. It covers FDI and PI, but also intellectual property rights and concessions).

to investment associated activities.²⁶

The bulk of evidence shows that it is necessary to balance the needs of investors and recipient countries in order to develop an appropriate legal framework for FI. Exclusion of PI in the definition of FI should be reconsidered, as any type of foreign capital inflow provides the host country with needed capital.²⁷

B. INVESTMENT ACCORDING TO THE G3

The G3 leans favorably to protect FDI, but it also provides protection for other forms of FI. It has done so by taking an enterprise-based approach to define investment. At first sight, the G3's method seems somewhat restrictive by only including FDI in the form of an enterprise, that is, a business organization that may or may not be incorporated. But the G3's definition also seems to include stock ownership (if the enterprise is incorporated) and investment in intellectual property rights, including franchise granting.²⁸

The G3 also incorporates different kinds of FI as accepted by the municipal laws of the parties. However, it expressly excludes credit or loan operations, such as State indebtedness. The G3 also excludes monetary rights that arise exclusively from commercial transactions for the sale of goods or services that do not entail a commercial presence of the investor in the other party. Likewise, it excludes trade-financing transactions.²⁹

The G3's use of an enterprise-based definition is a positive one. By defining investment in terms of enterprise, the G3 grants protection to non-incorporated forms of FI as well as incorporated forms. The term "enterprise" is more general than the term "corporation," but the former comprises the latter. The drafters of the G3 differentiated between constituting an enterprise and organizing an enterprise. The agreement states that an enterprise will be any entity constituted, organized or protected under domestic laws. Such a provision opens the door for protection of non-incorporated forms of business organizations.

Enterprise is an economic term, not a legal term, related to the organization and integration of the business rather than its legal form. In addition, an enterprise does not necessarily have legal personality. An enterprise may take different legal forms³⁰ such as a corporation, a facil-

26. *Id.* at app. A-4. The U.S. 1987 draft defines "associated activities" as including "the organization, control, operation, maintenance and dispositions of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports." *Id.*

27. See SHIHATA, *supra* note 18, at 4 (arguing that portfolio is a means of capital concentration without the risk of control of the entity, nor of the country's economy).

28. *G3 Agreement*, *supra* note 1, at art. 17-01.

29. *Id.*

30. See *North American Free Trade Agreement, U.S.-Can.-Mex.*, art. 201(1), Dec. 17, 1992, 32 I.L.M. 289 (1993). "[E]nterprise means any entity constituted or organ-

ity, or an arrangement arising out of a contract.

The term "enterprise" could be used to refer to the investment but not to the investor. The G3 also uses "enterprise," *inter alia*, to define "investor." However, an "enterprise" could never be held liable. Legally speaking, the liability of an enterprise's actions would fall on the investor.

Moreover, the G3 defines investment as the transfer of resources from one party to another party. The agreement does not make reference to transfer of capital. The term "resources" is left undefined but is more comprehensive than capital.

The agreement also incorporates within its definition of investment any other resource considered as investment under local laws. Such inclusion may provide clearer criteria for determining what FI is³¹ and may eventually expand the applicability of the agreement to other kinds of investment.

However, the G3 Agreement excludes all kinds of credit operations, particularly those involving the State or its enterprises. This approach seems to be intended to exclude PI, perhaps for its perceived danger with regards the balance of payments of countries. Thus, the incorporation of a local laws definition of FI cannot repeal the express provisions of the agreement, particularly those related to exclusion of specific types of investment.

Reading the G3 definition of investment, it can be concluded that only PI related to credit, such as bonds, are excluded. Portfolio investment in the equity of a locally incorporated entity will be protected.

"Article 17-01: Definitions

For purposes of this chapter, it will be understood that:

Enterprise is: any entity constituted, organized or protected in accordance with the law in force, either for profit or not and either of private property or governmental, including corporations, foundations, companies, branches, trusts, stocks, solely owned enterprises, shared investments or any other association;

Investment is: the resources transferred to the national territory of a Party or reinvested therein by investors of the other Party, including:

- any kind of good or right with the purpose of producing economic benefit;

ized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association." *Id.*

31. That is the case of the Venezuelan investment law which provides that rent-producing assets, either under incorporated or contractual forms, real estate, governmental concessions related to natural resources or public services and commercial instruments are considered investments. *See* Venezuelan Law for Promotion and Protection of Investments, Decreto No. 356, de octubre de 3 de 1999, GACETA OFICIAL EXTRAORDINARIA 5390 de 22.10.1999, at art 3. *See also* Colombian Statute of Foreign Investment, *Consejo Nacional de Planificacion Economica Social* (CONPES) Res. No. 51 of 1991, at art. 4 (defining FI as FDI and as PI).

- the participation of investors of a party, in any proportion, in the capital equity of the corporations constituted or organized in accordance with the law of the other Party;
- the enterprises owned by an investor of that Party or effectively controlled by him, that have been constituted or organized in the territory of the other Party; and
- any other resource considered as investment under the law of that Party.

Investment does not include credit of debt operations, among them:

- a payment obligation by the State or a State enterprise or the credit granting to the State or to a State enterprise;
- monetary rights derived exclusively out of:
 - commercial contracts for the sale of goods or services by a national or an enterprise in the territory of a Party to an enterprise in the territory of other Party; or
 - credit granting in relation with a commercial transaction, such as trade financing.”³²

The exclusion of credit operations certainly narrows the scope of applicability of chapter seventeen of the G3, particularly when it relates to State credit transactions. As the *FEDAX* case shows, investors might take the risk of acquiring credit bonds issued by States. The knowledge that such acquisitions will be protected by international law instruments might make those instruments more appealing to investors within the global market. At the end of the day, investors invest if they find an opportunity for a satisfactory return at an acceptable level of risk,³³ and having protection under international law for a given transaction diminishes risk.

In *FEDAX*, a company established in the Netherlands Antilles submitted to the Tribunal a dispute against Venezuela concerning debt instruments issued by Venezuela and assigned to the company by way of endorsement. The Tribunal held that non-direct FI could have international protection, that what mattered most was that the whole operation could be qualified as an investment (even if it was not FDI), and the dispute arose directly out of that operation through the particular transaction.³⁴

Had the G3 been the applicable law in the *FEDAX* case, the investor would not have been protected. Lack of legal coverage might have influenced the investor's initial decision to invest, and the State could have missed an important source of financing.

32. *G3 Agreement*, *supra* note 1 (translation by author).

33. Jeswald W. Salacuse, *Direct Foreign Investment and the Law in Developing Countries*, 15 ICSID REV. – FOREIGN INV. L.J. 386 (1998).

34. *FEDAX N.V. v. Venez.*, 37 I.L.M. 1378 at ¶ 24 (1998) (Decision on Objections to Jurisdiction).

III. TREATMENT

A. TREATMENT ACCORDING TO THE EMERGING INTERNATIONAL
LAW OF FOREIGN INVESTMENT

Once an investor is established in the host country, how should its operations be treated? In the past, it was thought that investors should be entitled to better treatment than local investors because the treatment granted to the latter might be below the internationally accepted minimum requirements.³⁵ The principle of sovereignty ensures the right of host countries to regulate economic activities in their territories, which meant that investors were treated in the same manner that national investors were treated, or possibly worse. Likewise, home countries were asked to accept the right of the host country to regulate economic activities operating within their territories, even if citizens of the former were performing those activities.³⁶

Probably the most illustrative example of this controversy is the Calvo doctrine and the Calvo clause,³⁷ under which investors were asked to exhaust the local legal remedies and surrender their right to request diplomatic protection to their home countries respectively. Under the Calvo doctrine, aliens were deprived of any protection. Aliens had to insist on treatment that met minimum standards.³⁸ However, there was no definition of what minimum standards meant.

The common standards of treatment that have been emerging in the international law of foreign investments are: national treatment, most favored nation (MFN) treatment, and fair and equitable treatment. National treatment subjects investors to domestic regulations in the same terms nationals are. If the national treatment standard is applied, a country has a right to regulate through national laws provided it does not introduce a distinction on the basis of nationality.

MFN treatment provides that foreign investors should receive the same treatment other foreigners receive if it is more favorable. This prohibits

35. See BURNS H. WESTON, *THE NEW INTERNATIONAL ECONOMIC ORDER AND THE DEPRIVATION OF FOREIGN PROPRIETARY WEALTH: SOME REFLECTIONS UPON THE CONTEMPORARY INTERNATIONAL LAW DEBATE*, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURY TO ALIENS, 89-125 (Richard. B. Lillich ed., 1983).

36. C. Fred Bergsten & Edward M. Graham, *Needed: New International Rules for Foreign Investment*, 7 INT'L TRADE J. 15-41 (1992).

37. Named after the Argentine Minister of Foreign Affairs, Carlos Calvo. As per this doctrine, investors were subject to the same treatment domestic investors receive in the host country, not better. Only after exhausting local legal remedies could they claim diplomatic protection in few restricted cases. Likewise, host countries argued that they were not obliged to indemnify aliens for losses that were not the State's fault. Thus, foreign countries should restrain from making claims on those bases. See BLACK'S LAW DICTIONARY 205 (6th ed. 1991). See also Greta Gainer, *Nationalization: The Dichotomy between Western and Third World Perspectives in International Law*, 26 HOW. L.J. 1547 (1983); Tim Gebert, *The Principles of Just Compensation for International Takings*, 4 J. INT'L L. & PRAC. 389 (1995).

38. The most common minimum standards are the right of due process and the right to own property.

discrimination between foreign investors but does not grant a treatment equal to that given to the host country's entities or investors. Moreover, all foreigners could be treated below certain minimum standards, making the MFN treatment less useful.

Likewise, fair and equitable³⁹ treatment in the host country might not be of any help if it is not well-defined or if it is not provided along with other standards or with international minimum standards. For this reason, the emerging international law of foreign investment provides that foreign investors be granted a combination of all the preceding standards of treatment.

B. TREATMENT ACCORDING TO THE G3

The G3 provides for national treatment and MFN treatment. No specific provision of admission or pre-establishment treatment is included. An argument can be made in favor of extending the national and the MFN treatment for admission of investment. However, the G3 Agreement states that the standards are applicable to both investors and investments. Neither the investments nor investors exist before the capital has been transferred into the host State. Thus, the standards of treatment provided by the G3 are only applicable once the investment has been made, that is, post-establishment.

Hence, the parties retain the absolute right to control the admission and establishment of investors in their respective territories. Because the parties to the G3 have not agreed on any standard for treatment at the pre-establishment stage, international law does not have a say regarding a State's decision on whether to admit an investment or investor. That decision remains an act of sovereignty governed by municipal laws.

Article 17-06 of the G3 Agreement provides for the possibility of State parties making reservations to the agreement. However, those reservations are not intended to apply to sectors of the economy where FI will not be admitted but rather to sectors of the economy where certain provisions of treatment post-establishment will be applied differently.⁴⁰

After establishment, each party shall grant to the other parties' investors and investments treatment that is no less favorable than treatment to local investors and investments in similar circumstances.⁴¹ There is no definition of the term "similar circumstances." Thus, it remains an issue that needs to be determined case-by-case. The reference to "no-less-favorable" standards might ably protect foreign investors when treatment provided to domestic investors falls below certain international minimum standards. In those cases, the foreign investor may be treated more favorably.⁴²

39. See P.T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 504 (1995).

40. *G3 Agreement*, *supra* note 1.

41. *Id.* at art. 17-03 (1).

42. *WORLD INVESTMENT REPORT 2003, FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES*, *supra* note 14, at 108.

The G3 Agreement has no provision of fair and equitable treatment or minimum international standards. However, the local investment law of Venezuela so provides. This means that fair and equitable treatment along with the other standards of treatment provided by the G3 could be applicable to investors from the other parties when doing business in the territory of that party.⁴³

The agreement also provides for MFN treatment in circumstances similar to investments and investors of the other parties. However, the agreement expressly excludes MFN treatment from the definitions and from the double taxation treaties. Thus, the type of FI excluded in the definition could not be incorporated through application of the MFN standard of treatment.

MFN treatment in the G3 brings in provisions of the NAFTA, which are more favorable than the G3 provisions. They might apply to Colombian and Venezuelan investors and Colombian and Venezuelan investments in Mexico because the G3 provides MFN standard of treatment, and Mexico is party to the NAFTA.

The agreement also states that its benefits could be denied to investors of a party who are controlled by investors of a third party if such a third party investor does not conduct substantial business in the territory of the home State party. For that denial to occur, the G3 parties involved need to consult each other.⁴⁴

Thus, third country investors willing to benefit from the coverage of the G3 should be aware that the mere incorporation of an intermediary company in a G3 party State would not ensure coverage. In this sense, a tribunal deciding a case according to the G3 could face the issue of third State investor control. The tribunal could use the criterion established in the *AMCO* case and reach the immediate level of control of the parent company over a local company. If it determines that the control is held by a third State investor at that level, the tribunal could refuse to extend G3 protection.⁴⁵

The hypothetical tribunal could also use the criterion established in the *SOABI* case.⁴⁶ In that case, the Tribunal went beyond direct control. *SOABI* was a Senegalese incorporated company, controlled by a Panamanian company, which in turn was controlled by Belgian citizens. Panama was not a contracting State of the ICSID Convention when arbitration consent was given, but Belgium was. Senegal objected to jurisdiction, arguing that Panama was not part of the ICSID system. Thus, *SOABI* could be considered a local company under foreign control, but the foreigners who controlled *SOABI* were not nationals of a contracting

43. See Venezuelan Law for Protection and Promotion of Investment, *supra* note 31, at art. 6.

44. *G3 Agreement*, *supra* note 1, at 17-11.

45. *AMCO Asia Corp. v. Indon.*, ICSID (W. Bank) ARB/81/1 (1983), 23 I.L.M. 351 (1984).

46. *SOABI v. Sen.*, ICSID (W. Bank) ARB/82/1, 6 ICSIR REV. - FOREIGN INV. L.J. 120 (1991).

State of the Convention and thus could not use ICSID arbitration. The Tribunal found that the purpose of article 25(2)(b) of the Convention was to facilitate foreign investments through locally incorporated companies, in order to qualify before ICSID. As a consequence of this interpretation, the Tribunal went beyond direct control and found that the Belgian nationals in effect controlled SOABI. On this basis, the Tribunal rejected the objection to jurisdiction. If the Tribunal uses the *SOABI* criterion and finds that a third party investor controls an entity incorporated in a G3 Party, it could deny the extension of the benefits of the agreement.

IV. EXPROPRIATION

A. EXPROPRIATION ACCORDING TO THE EMERGING INTERNATIONAL LAW OF FOREIGN INVESTMENT

The right of property is understood as the right to freely use, dispose and profit from the asset owned.⁴⁷ There is not a consensus concerning the extent upon which the owner can use property vis-à-vis the State. Thus, the definition of what the right of property for the country and the limits each can impose over that right are central to the expectations of the investors.

In that sense, one concern of investors is the possibility of property deprivation. Although this issue seems to be a matter of the past,⁴⁸ the principle of sovereignty has not and will not disappear. It is precisely by virtue of this principle that countries are empowered to regulate their economies.

Today, the majority of damage to the property of investors, both local and foreign, is imposed through regulation.⁴⁹ The property is not expressly taken but rather is left useless by the burden of these regulatory provisions. In order to avoid this kind of hidden expropriation, most international investment agreements establish a limit at which the investor's right of property is maintained while fostering domestic social welfare. They also establish that the State, while pursuing its goals, may impose regulations that temporarily and partially affect the property.⁵⁰ Nevertheless, such authority is subject to certain requirements that make it both, stable and predictable.⁵¹

47. See generally S.R. MUNZER, *A THEORY OF PROPERTY* (1990).

48. See M. SORNARAJAH, *INTERNATIONAL LAW ON FOREIGN INVESTMENTS* 8-20 (1994) (explaining that if the political climate changes, the world could face a new wave of expropriations).

49. See Robert Shanks, *Insuring Investment and Loans Against Currency Inconvertibility, Expropriation, and Political Violence*, 9 *HASTINGS INT'L & COMP. L. REV.* 417 (1986).

50. See Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 *ICSID REV. - FOREIGN INV. L.J.* 41 (1986).

51. This could be referred as "rule of law." See *BLACK'S LAW DICTIONARY* 925 (6th ed. 1991) (providing that decisions should be made by the application of known principles or laws without the intervention of discretion of their application; also "... sometimes called 'the supremacy of law'"). See also Maximo Bomchil, *The Rule of Law in Argentina: A Pending Issue?*, 23 *INT'L BUS. LAW* 369 (1995) (ex-

The international law of foreign investment provides that regulations should not be arbitrary. Instead, they should be for public purpose and based on existing law, not on the will of the ruler.⁵² Nor should regulation be discriminatory among individuals or entities in equal circumstances.⁵³ If the property is seized by the State, the owner should be compensated, according to a formula of adequate, prompt and effective⁵⁴ payment. In the application of this formula of compensation for damages inflicted, however, it should not be forgotten that legitimate expectations of the parties as well as all surrounding circumstances of the case should be taken into account.⁵⁵

B. EXPROPRIATIONS ACCORDING TO THE G3

The G3's stance on expropriation parallels those outlined above.⁵⁶ Accordingly, parties are not entitled to expropriate or nationalize directly or indirectly nor are they permitted to adopt measures equivalent to expropriation or nationalization unless it is required by public purpose, on non-discriminatory bases, in accordance with the principle of legality, and the owner is compensated.⁵⁷

No definition is provided for expropriation or nationalization. Thus, as in other international investment agreements, a key issue is to determine whether or not specific State actions constitute expropriation or nationalization that would require compensation. This issue is particularly important in the context of regulatory takings and less with direct expropriations, which are easily recognizable: a State takes over a business or nationalizes an industry depriving the investor of ownership, control and possession. Regulatory takings are less obvious.

plaining that the concept of "rule of law" comprises two concepts: the constitutional order that separates branches of government and ensures the independence of the judiciary, and legal security as the stability, certainty, and predictability of laws and court judgments).

52. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). See also MUCHLINSKI, *supra* note 39, at 504 (arguing that the State has discretion to determine the public purpose. The limit is set, however, in the sense that such taking cannot be for personal gain nor performed in the absence of legal recognition. Neither can the taking be in the course of crimes against the humanity). See also *Protection of Foreign Direct Investment in a New World Order: Vietnam-A Case Study*, 107 HARV. L. REV. 1995 (1994).
53. See *Libyan Am. Oil Co. (LIAMCO) v. Libya*, 20 I.L.M. 1 (1981).
54. This is the Hull formula, named for the U.S. Secretary of State Cordell Hull, who exchanged notes on this with the Mexican government during the Mexican expropriations that followed the Revolution. See Francesco Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 INT'L & COMP. L.Q. 225, 263 (1975).
55. See Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121 (1984).
56. Colombia made reservations to the Expropriation and Compensation article. It also committed to not apply more restrictive measures in nationalization, expropriation, or compensation issues. Mexico and Venezuela stated that only when Colombia had withdrawn the reservation would they apply the article.
57. *G3 Agreement*, *supra* note 1, at art. 17-08.

Measures equivalent to property seizure include a variety of regulatory actions that may interfere with an investor's right of property. Creeping expropriations could also be included therein. Creeping expropriations, the taking of property by successive and cumulative measures imposed on a property that eventually lead to the effective negation of the owner's interest in the property, is another form of property seizure.⁵⁸ The fact that neither expropriation nor equivalent measures are defined leaves the determination of indirect takings to be resolved.

One issue worth noting in the context of the G3 relates to regulations and regulatory takings. States are entitled to exercise governmental regulatory power that might eventually impact the economic value of the investment but not to the extent that ownership is deprived. Tax and environmental measures are examples of regulatory measures that might impact the individual's right of property.

Property rights cannot be conceived as separate from the interests of society at large. For that reason the legality and legitimacy of a State's interference with an individual's rights of property to protect social interests is not at question. The debate is centered on how to differentiate legitimate measures to protect social interests from illegitimate regulatory takings of property that require compensation. The consensus seems to be that "[w]here interference with private property rights violates the legitimate rights or expectations of owners, the State may need to provide compensation."⁵⁹

The G3 does not provide any hints to determine when a regulatory measure is a taking, nor does NAFTA. However, several Tribunals, some of which are NAFTA-related, have enlightened the issue. In the *Metalclad* case, the Tribunal held that article 1110 of NAFTA also includes "... covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of the property even if not necessarily to the obvious benefit of the host State."⁶⁰

Similarly, during the *Santa Elena* case, the ICSID arbitration Tribunal dealt with the issue of the date of the taking to determine the compensation payable. The Tribunal noted that a measure taken for the purpose of environmental protection that gradually deprived owners of the value of their property was no different from a taking for which full compensation must be paid.⁶¹

Other awards have pointed to an analysis that balances the investor's property rights and the public good. In *S.D. Myers, Inc. v. Canada*, the Tribunal held that regulatory takings of property might include denying

58. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2003, *supra* note 14, at 110.

59. *Id.* at 112.

60. <http://www.state.gov/s/l/c3752.htm> Mex., ICSID (W. Bank) ARB(AF)/97/1 (2000), 16 ICSID REV. – FOREIGN INV. L.J. 168, 195 ¶ 103 (2001).

61. *Santa Elena v. Costa Rica*, ICSID (W. Bank) ARB/96/1 (2000), 15 ICSID REV. – FOREIGN INV. L.J. 169 (2000).

the right to export with intent to transfer ownership.⁶² However, that was not the case in *S.D. Myers*.⁶³

In the *Feldman* case, the Tribunal held that some business problems of a foreign investor are not expropriations under NAFTA, and such was the situation in *Feldman*.⁶⁴ Similarly, in the *Azinian* case, the Tribunal stated that not all governmental interference with a foreign investment constitutes an expropriation.⁶⁵

The Tribunal also found no expropriation in the *Pope* case.⁶⁶ However, it stated that to determine “. . . whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property had been ‘taken’ from the owner.”⁶⁷ Likewise, in the *Sporrong* case, heard in the European Court of Human Rights,⁶⁸ the court stated that when the substance of the right of property has been affected, there is a property taking of property for which the State must pay compensation.⁶⁹

In *Tecmed v. Mexico*,⁷⁰ the ICSID Tribunal stressed the difference between direct, creeping, and *de facto* expropriation. It mentioned that, although creeping and *de facto* were kinds of indirect expropriation, the latter referred to conduct or actions that do not state an intent to deprive rights or assets but in fact have that effect,⁷¹ either by “[transferring] assets to third parties different from the expropriating State or . . . without allocating such assets to third parties or to the Government.”⁷² The Tribunal supported its award with case law and found that there was *de facto* expropriation when the deprivation was irreversible and the action or decision destroyed the ability to use, enjoy or dispose of the assets or rights.⁷³ This is the case even where legal ownership over the assets in question is not affected, provided the deprivation is not permanent.⁷⁴ It then concluded that regulatory actions and measures would not be excluded from the definition of expropriation if they are excessive in proportion to the public interest being protected.⁷⁵ Accordingly, “there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized

62. *Id.*

63. *S.D. Myers, Inc. v. Can.*, 40 I.L.M. 625 ¶ 288 (2000).

64. *Feldman v. Mex.*, 42 I.L.M. 625 ¶ 112 (2002).

65. *Azinian v. Mex.*, 39 I.L.M. 537 ¶ 83 (1999).

66. *Id.*

67. *Pope & Talbot, Inc. v. Can.*, Interim Award ¶ 102 (Jun. 26, 2000), available at <http://naftaclaims.com/Disputes/Canada/Pope/PopeInterimMeritsAward.pdf>.

68. *Sporrong & Lonnroth v. Swed.*, 52 Eur. Ct. H.R. (Ser. A) at 35 (1982).

69. Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259, 330-331 (1982).

70. *Tecmed v. Mex.*, 43 I.L.M. 133 (2004).

71. *Id.* ¶ 114.

72. *Id.* ¶ 113.

73. *Id.* ¶ 116.

74. *Id.*

75. *Id.* ¶ 122.

by any expropriatory measure."⁷⁶

In sum, the principles set by those decisions can be useful for the interpretation of the G3 and in determining the extent to which the regulatory authority of the States can be exercised without giving grounds to compensation. In that context, the authority of the States to regulate their economies remains intact, but if the regulation interferes with the right of property in a way that leaves it useless for the owner, then a regulatory taking has occurred and compensation should be paid. Such judgments should be made on a case-by-case basis. Thus, the key is that if the substance of the right is affected so that the owner of an asset no longer has the right to dispose, use, control, or profit from it, deprivation of property may have occurred through creeping expropriation, *de facto expropriation* or constructive taking.⁷⁷

Additionally, as a matter of sovereignty, the G3 States are entitled to take punitive measures on behalf of the public interest. In such cases, property is taken as part of a sanction imposed on the owner due to a violation of regulations. Typically punitive measures are applied only if criminal regulations are broken.⁷⁸ In such cases, no compensation is required and property is confiscated as part of a sanction imposed on the owner following a regulatory violation.⁷⁹

For a property taking to be considered legal, according to the G3 Agreement, certain conditions need to be met. First, the taking should be based on grounds of public utility,⁸⁰ presumably public use.⁸¹ Though no definition of the public utility concept is provided, it could be likened to the concept of public interest, which is widely known in international law.⁸² Public interest is generally understood as something less than national interest⁸³ but different from the personal interest of governmental officers.⁸⁴

The determination of what is and what is not public interest is something over which States have discretion.⁸⁵ Though during any taking of property a portion of the public will always benefit directly, the principle of government seizure for public use requires that something more significant be provided to the public.⁸⁶ Furthermore, the G3 requires that a taking be non-discriminatory, which is to say that the taking of property in one set of circumstances should be applied to all parties in analogous

76. *Id.*

77. *Id.*

78. *See Higgins, supra* note 69.

79. *See id.*

80. *G3 Agreement, supra* note 1, at art 17-08

81. *See Higgins, supra* note 69, at 288, 331.

82. *Id.*

83. It is much more related to strategic political-military purposes of a country vis-à-vis foreign countries.

84. *Protection of Foreign Direct Investment in a New World Order: Vietnam-A Case Study, supra* note 52.

85. *Id.*

86. *See Higgins, supra* note 69.

circumstances.⁸⁷

The G3 also requires that property takings be applied in accordance with the principle of legality, meaning that takings should not be arbitrary or based on caprice.⁸⁸ Likewise, legal actions to challenge them should also be provided.⁸⁹

Lastly, compensation should be paid. The G3 uses the Hull formula of adequate, prompt and effective payment, though it goes deeper in some regards.⁹⁰ Accordingly, payment should be equivalent to the fair market value at the moment of the expropriation.⁹¹ Moreover, the agreement provides that compensation should not reflect any change in economic value due to knowledge of the intention to expropriate obtained before the date thereof.⁹² In order to comply with that part of the provision, a tribunal analyzing this issue would probably need to look at the facts and determine the date of expropriation not as per the official date but rather on the date when the intention to expropriate became known.

Valuation shall include the value of tangible assets as expressed in the tax returns as well as other appropriate criteria useful in determining the fair market value.⁹³ Compensation should be paid in cash or by other fully-liquid means, as payment in bonds or any other conditional instrument will not be accepted.⁹⁴ Compensation should also be made in a freely convertible currency and transferred in accordance with the provisions of the agreement.⁹⁵

The agreement also states that payment should be made in a timely manner to protect the investor against currency fluctuations.⁹⁶ Accordingly, if a period of time lapses between the moment the amount of compensation is fixed and the actual payment, the investor is entitled to receive a sum equal to the fixed amount as denominated in the hard currency most used by the property-taking State. Likewise, the payment should include interest at the market rate of the currency of reference.⁹⁷

Parties should also allow money transfers related to investments of another G3 Party to be made feely and without delay in convertible currency at the market exchange rate.⁹⁸ The provision includes, *inter alia*, transfers of profits, dividends, interests, capital gains, royalties, payments from sales, payments of expropriation compensation, and payments made as a consequence of dispute settlements.⁹⁹

87. M. SORNARAJAH, *THE PURSUIT OF NATIONALIZED PROPERTY* 175 (1986).

88. *Id.*

89. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. ITALY)*, 1989 I.C.J. 15, 109 (July 20).

90. *G3 Agreement*, *supra* note 1, at art. 17-08.

91. *Id.*

92. *Id.* at art. 17-08(2).

93. *Id.*

94. *Id.*

95. *Id.* at art. 17-08(3).

96. *Id.*

97. *Id.* at art. 17-08(4).

98. *Id.*

99. *Id.* at art. 17-07.

However, the parties to the G3 can suspend unilateral money transfers for a period of time, provided that the suspension is based on expressly stated reasons, such as a serious difficulty with the balance of payments.¹⁰⁰ The G3 Agreement makes no indication of a limit on the time extension during which a party can suspend money transfers.

V. INVESTMENT DISPUTE SETTLEMENTS

A. INVESTMENT DISPUTE SETTLEMENTS ACCORDING TO THE EMERGING INTERNATIONAL LAW OF FOREIGN INVESTMENT

When investment disputes arise, the directly interested parties are the investor and the host country, though the home country might also have an interest. However, it is the investor, rather than the home country who would absorb the loss if any were to occur. Thus, the investor seeks to have control of the dispute, as the home government might include arguments that are contrary to the investor's interest. For example, the weight of other claims in negotiations between States could diminish the importance of a single investor's claim. Likewise, political factors could interfere with a conflict that otherwise would be purely economic.¹⁰¹ On the other hand, the home country's political strength might be a decisive factor in pressing the host State to settle the investment dispute on terms more favorable to the investor.

In this context, it is important to determine who would have the standing¹⁰² to claim satisfaction to the host country for the damages inflicted on the investing corporation. If one takes for granted the narrow view of the law, according to which a transnational corporate investor is a group of legal entities created all around the world,¹⁰³ then, at the moment a conflict arises, the local corporation whose shares are owned by a foreign

100. *Id.* at art. 17-07(3), (6).

101. See Bruce Kogut, *Foreign Direct Investment as a Sequential Process*, in 2 INTERNATIONAL POLITICAL ECONOMY OF DIRECT FOREIGN INVESTMENT 273 (Benjamin Gomes-Casseres & David Yoffie eds., 1993).

102. "'Standing to sue' means that party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy The requirement of 'standing' is satisfied if it can be said that the plaintiff has a legally protectible and tangible interest at stake in the litigation." BLACK'S LAW DICTIONARY, *supra* note 37, at 978.

103. *Id.* See also Peter Hansen & Victoria Aranda, *An Emerging International Framework for Transnational Corporations*, 14 FORDHAM INT'L L.J. 881 (1990). "[T]ransnational corporation[s] as a group of enterprises with a unified structure and with common control and strategy has yet to find a legal regime that matches those characteristics. From the legal perspective, a transnational corporation is only recognized as a group of separate national companies established under the laws of different countries. . . . [i]t is difficult or impossible to hold the entire enterprise accountable for its actions." *Id.* at 882. See also Raymond Vernon, *Codes on Transnationals: Ingredients for an Effective International Regime*, in TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK 227 (A.A. Fatouros ed., 1994) (arguing that if TNCs are composed of a number of separate enterprises, each unit would respond to the obligations imposed by the sovereign State, but if they are affiliates linked by strong bonds and responding to common strategies, governments would have to figure out how to extract benefits from such a system, thereby causing conflict. In some cases governments do not accept that

legal entity would not have grounds for an international legal claim against the host country.

The International Court of Justice used this principle in the *Barcelona Traction* case, when it stated that international law recognizes the existence of the corporate entity as a matter of domestic law brought about by economic realities.¹⁰⁴ Accordingly, in that case, a company incorporated in Canada, whose shares were owned by Belgians, could not be protected by Belgium before the court.¹⁰⁵ The court's rationale was that, under customary international law, a corporation can only claim the protection of the country where it was incorporated but not the protection of the shareholder's country.¹⁰⁶

Using this interpretation of the facts, shareholders and corporations are different entities with different personalities and rights. Accordingly, the corporation has a property right over assets it owns and the right to diplomatic protection by the country of its incorporation.¹⁰⁷ The shareholders, on the other hand, have a property right to the shares and the right to diplomatic protection by the country of their nationality.¹⁰⁸

Certainly, the difference of legal personalities has been overcome through most BITs by providing that local corporations in which foreigners have a substantial interest, this being substantial share of ownership and ability to exercise decisive influence,¹⁰⁹ could have standing to claim international protection. But where there is no treaty providing so, the subsidiary of a foreign corporation is still considered a local entity. Therefore, in absence of any treaty, the host countries could state that a legal entity created under their laws is a national investor regardless of who owns the shares and consequently entitled only to have access to domestic investment dispute settlement mechanisms.¹¹⁰

Thus, if the term investor is defined in a way that includes more than just the subsidiary, the investor might consider itself protected. In the absence of treaty protection, the investor would only have standing for a

the parent corporation has to assume the subsidiary's foreign liability, but they ask subsidiaries to comply with the parent's country law provisions).

104. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 47 (Feb. 5).

105. *Id.*

106. *Id.*

107. *Id.*

108. See RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 3442 (1995) (discussing how BITs have solved this issue); See also E.R. HARDY IVAMY, *DICTIONARY OF COMPANY LAW* 42 (2d. ed., 1985) (arguing that the corporate personality does not have anything to do with the personality of its members, thus, the corporation and its liabilities are distinct from the shareholder and its shares) (on file with author).

109. See UNITED NATIONS CENTER ON TRANSNATIONAL CORPORATIONS *BILATERAL INVESTMENT TREATIES*, *supra* note 24. See also VANDELDELDE, *supra* note 25. See also Paul Bryan Christy III, *Negotiating Investment in the GATT: A Call for Functionalism*, 12 MICH. J. INT'L L. 743 (1991) (explaining US BIT model is broad in regards to investment definition and the US Department of State defines control on 10% shares ownership).

110. See *Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3. See also, IGNAZ SEIDL-HOHENVELDERN, *CORPORATION IN AND UNDER INTERNATIONAL LAW* 4 (1987).

claim against the country when it operates therein through a branch, because, according to local laws, the branch does not, in itself, have a legal personality separate from its parent. Thus, any liability arising from its activities would make the latter liable with no need to pierce the corporate veil.¹¹¹

Besides investors' interests, it is important that this issue be defined for the well-being of the State. If the investors can take actions against host countries for wrongdoing, the States should be allowed to take similar actions against the investors. However, if the country's view is that each subsidiary is a different legal entity, it would be difficult to claim satisfaction to the parent company or other members of the group. For example, if the host country seeks payment of damages from the investor and the investor's assets are worth less than the amount claimed, the country would be at risk of not obtaining satisfaction for that claim. The lift-of-corporate-veil doctrine that has been accepted by some countries may not be helpful, as applicability of the doctrine generally requires intention of fraud to bona fide parties plus acceptance of enforcement by the country where the parent company is located.¹¹²

In sum, host countries might also be interested in the term investor being defined in broad terms, so as to include not only the local legal entity, but also the parent company, and even the whole economic group.¹¹³ In so doing, the legal reality would be closer to the economic reality. The transnational corporation investor would not be viewed as a group of separate legal entities but as one centrally-controlled economic entity of organization of production factors with units scattered in different countries,¹¹⁴ for which all and each unit is responsible for the others' activities.

111. See Vernon, *supra* note 103.

112. See SEIDL-HOHENVELDERN, *supra* note 110, at 5. "[T]he very essence of the notion of corporation is respect for the existence of the corporate veil, separating the corporation from its members and endowing it with rights and duties to its own. Yet even the general principles of domestic law admit that this veil may be lifted under certain exceptional circumstances This follows from the elementary principle of justice that requires reference to the substance and not merely to the legal form." *Id.*

113. UNCTAD DIVISION ON TRANSNATIONAL CORPORATIONS AND INVESTMENT, WORLD INVESTMENT REPORT 1993: TRANSNATIONAL CORPORATIONS AND INTEGRATED INTERNATIONAL PRODUCTION at 190, U.N.Doc ST/CTC/156, U.N. Sales No. E.93.II.A.14 (1993) (explaining that the nationality of corporations is relevant in order to determine the law that is to be applicable and the State that would exert diplomatic protection on their behalf. However, this approach is becoming less meaningful. The concept of a separate legal corporate personality does not accurately reflect the reality of functional ties between affiliates as a business group and can hinder the attribution of responsibility among them. With the integration of production activities the affiliate may lose autonomy in management and operational aspects. Thus the concept of parent responsibility vs. group responsibility should be studied).

114. *Id.* See also Hansen and Aranda, *supra* note 103.

B. INVESTMENT DISPUTE SETTLEMENTS ACCORDING TO THE G3

The G3 provides dispute settlement mechanisms for investors and States. Disputes between investors can be of different natures. If disputes are investment-related they fall under chapter seventeen. However, because the G3 is a comprehensive trade agreement, it is presumed that disputes arising out of an agreement-related matter other than investment could be submitted to arbitration. If that is the case, the dispute could not be submitted to ICSID, and chapter seventeen would not govern.¹¹⁵

Some disputes are excluded from the G3, even if they are investment-related. For example, disputes that arise out of national security measures, public order or criminal law provisions, or when a party prohibits or restricts the acquisition of an investment in its territory by an investor or any other party are not included in the G3 agreements.¹¹⁶

If the dispute falls under the G3, an investor from the other party or on behalf of an enterprise of its property or under its effective control can submit a dispute to arbitration. However, local enterprises in which a foreign investor from the other G3 party has made an investment cannot submit a dispute to arbitration under the terms of the agreement. In other words, locally incorporated corporations cannot initiate arbitration; the foreign controlling investor from a G3 party will have the standing.¹¹⁷

The G3 Agreement requires that a dispute be based on a violation of the obligations established therein and that the investor had been damaged or had suffered a loss as a consequence of that violation.¹¹⁸ Thus, the mere violation of the G3 Agreement is not sufficient to submit a dispute. The G3 does not provide for any reference as to the nature of the damage or loss. However, awards issued in the context of G3 investment disputes can only provide compensation for damages or losses plus interests if applicable. From that provision, it can be concluded that damages or losses that give rise to a G3 investment claim need to be of economic nature.

In this sense, property takings under the G3 are unlikely to be compensated as per the standard *restitutio in integrum*. The investor whose property is taken would not be restored to the position he was before the expropriation. The agreement provides that the award could contemplate restitution of the property, but the same provision states that the Party could pay in equivalent.¹¹⁹ Thus, a State party can choose between paying in equivalent or restitution of property, if the latter has been imposed in the award. A State is most likely to pay in equivalent.

In general, *restitutio in integrum* is considered interference with a State's sovereignty that might cancel the effects of an expropriation, al-

115. *ICSID Convention*, *supra* note 23, at art. 25.

116. *G3 Agreement*, *supra* note 1, at art. 17-24.

117. *Id.* at art. 17-17 (2).

118. *Id.* at art. 17-17(1).

119. *Id.* at art. 17-21(1).

though it was recognized as a possible remedy in the *AMCO* case.¹²⁰ However, that does not mean that the owner should not be compensated.

This has led some authors to suggest that in those circumstances measures of reprisal by the home State would not be illegal if the home State's investor did not succeed in obtaining restitution.¹²¹ Likewise, the Permanent Court of International Justice had accepted the principle *restitutio in integrum* for illicit acts.¹²²

If the State decides to pay in equivalent, it should compensate for the *damnus emergens*, that is, the loss sustained.¹²³ A different matter is the inclusion of *lucrum cessans*, that is, the lost profits. In some cases, it has been granted as an equitable remedy, as in the *Sapphire* arbitration where the Tribunal held that there was a premature termination of a concession agreement.¹²⁴

The G3 is silent with respect to *lucrum cessans*. It only states that the award should provide coverage for pecuniary damages and interests. An argument can be made to consider lost profits as a pecuniary damage. Thus, the determination and inclusion of lost profits is not excluded and could be considered by tribunals.

There is a statute of limitation of three years to submit the investment dispute to arbitration, beginning on the date when the investor had knowledge or should have had knowledge of the presumed violation of the agreement and the damages. The G3 Agreement does not provide any hint as to how to determine the knowledge of violation of the agreement and of damages. This key issue should be determined on a factual basis.

The G3 agreement contains a "fork in the road" provision according to which the violation of the agreement can only be submitted to either a local court or an arbitration tribunal. If it has been submitted to a local court, the same dispute could not be submitted to arbitration and vice versa. The rationale of a recent ICSID case could be extended to G3 cases where the "fork in the road" provision arises. In *CMS*,¹²⁵ Argentina objected to ICSID jurisdiction because TGN, the company where CMS was a minority shareholder, appealed a judicial decision and sought other administrative remedies, for which, it was argued, CMS could not submit the same dispute to arbitration.

The Tribunal pointed out that contractual claims are different from treaty claims. Treaty claims can be submitted to arbitration while contractual claims are submitted to local courts. If a claimant renounces the right to arbitrate a treaty dispute by submitting that dispute to local courts, then the "fork in the road" rule would have been triggered so long

120. *AMCO*, 23 I.L.M. 351.

121. B.A. WORTLEY, *EXPROPRIATION IN PUBLIC INTERNATIONAL LAW* (1959).

122. *Chorzow Factory Case (F.G.R. v. Pol.)*, 1928 P.C.I.J. (Ser A) No. 17, at 28 (Sept. 13).

123. *LIAMCO*, 20 I.L.M. 1.

124. *Sapphire Int'l Petroleum Ltd. v. Nat'l Iranian Oil Co.*, 35 I.L.R. 136 (1963).

125. *CMS Gas Transmission Co. v. Arg.*, 42 I.L.M. 788 (2003).

as it was provided by in the relevant treaty. In that event, the selection would have been binding. The Tribunal found that none of those were the circumstances of CMS because it had not filed a treaty claim in local courts.

Regarding the specific procedural steps, the G3 requires that the investor submit a communication to the State expressing the intention to submit the investment dispute to arbitration. If ninety days have passed since the communication has been submitted and six months since the challenged measures were taken, the investor can submit the dispute to ICSID arbitration, arbitration as per the additional facility of ICSID, if either the State party to the dispute or the State of nationality of the investor are not party to the ICSID Convention, and arbitration according to the rules of UNCITRAL.¹²⁶

The parties to the G3 Agreement expressly consented to arbitration. But that in and of itself would not be sufficient for arbitration tribunals to have jurisdiction. The investor party to the dispute needs to grant consent as well. Consent can be granted explicitly by the investor or implicitly by filing a claim. Several ICSID cases have dealt with the issue of consent by the investor.

In *SPP v. Egypt*¹²⁷ the Tribunal held that acceptance of the State's offer to arbitrate the dispute before ICSID made by a local law could be accepted expressly by the investor in a letter where he indicated his acceptance or by filing the claim with ICSID. The same rationale can be extended to offers to arbitrate made in multilateral agreements, as is the case with the G3.

In *AMT v. Zaire*,¹²⁸ the Tribunal dealt with the acceptance of an offer to arbitrate at ICSID, but the offer had been made by a State in a BIT. The Tribunal stated "AMT has expressed its choice without any equivocation; this willingness together with that of Zaire expressed in the Treaty, creates that consent necessary to validate the assumption of jurisdiction by the Centre."¹²⁹

The investment dispute settlement mechanism provisions of the G3 provide for the possibility of claims consolidation. However, in that case all disputes should be handled in accordance with UNCITRAL.¹³⁰

Parties to the dispute can submit any sort of legal defenses and arguments based on the facts and the law, including jurisdiction objections to the arbitral tribunals. However, a State party cannot allege as defense that the investor was insured against the damage for which the claim has been submitted.¹³¹

126. *G3 Agreement, supra* note 1, at art. 17-18 (2).

127. *SPP v. Egypt*, 3 ICSID REP. 102, 119 (1985).

128. *Am. Mfg. & Trading, Inc. v. Zaire*, 36 I.L.M. 1531, 1546 (1997).

129. *Id.*

130. *G3 Agreement, supra* note 1, at art. 17-19 (1).

131. *Id.* at art. 17-22.

As for legal arguments, they should be related to the G3 and applicable rules of international law, as those will be the applicable law for deciding the merits of the dispute.¹³² However, if the issue is jurisdiction and the dispute falls under ICSID, the ICSID Convention could be the applicable law.

In *CMS*,¹³³ Argentina argued that the jurisdiction of ICSID should be decided according to its own law. The Tribunal said that the provisions of article forty-two of the Convention are applicable to the resolution of the disputes on the merits. It pointed out that the issues of jurisdiction are governed by article twenty-five of the Convention and other provisions of the consent instrument that might be applicable.

The awards are final and subject to enforcement. If a State fails to comply with the arbitral award the investor can ask for diplomatic protection from the State of its nationality who could submit the dispute to arbitration under the State-State dispute settlement mechanism.¹³⁴ If a G3 party considers that an award has not been followed, it also can submit a dispute to the State-State dispute settlement mechanism, regardless of whether the investor has claimed diplomatic protection.¹³⁵

However, resorting to diplomatic protection is only possible once the arbitral award has been issued. In other words, arbitration and diplomatic protection could not be asked for at the same time. In that regard, it is worthwhile stressing what an ICSID arbitral Tribunal held: “. . . once ICSID arbitration is available for settling a dispute related to a foreign private investment, diplomatic protection is excluded: the investor no longer has the right to seek diplomatic protection, and the investor’s home State no longer has the right to grant the investor diplomatic protection.”¹³⁶

One recent ICSID case could have given the opportunity to an ICSID additional facility Tribunal to bring a case under the G3.¹³⁷ In the *AUCOVEN* case, a Mexican company owned the majority of the shares of a Venezuelan company incorporated in order to operate a highway concession granted by the Government of Venezuela. The local company filed a claim alleging breach of the concession agreement. The Mexican shareholding company sold its shares to an American company. The concession agreement had specific provisions related to investment dispute. One of those related to foreign control whereby the local company was considered a national of another country and consequently entitled to initiate international arbitration as it was controlled by a foreigner. The

132. *Id.* at art. 17-20.

133. *CMS*, 42 I.L.M. 788.

134. *G3 Agreement*, *supra* note 1, at ch. 19.

135. *Id.* at art. 17-23.

136. *Banro Am. Res., Inc. v. Dem. Rep. Congo*, ICSID (W. Bank) ARB/98/7 (2000), 17 ICSID REV.—FOREIGN INV. L.J. 382, at 387 (2002).

137. Mexico is not a party to the ICSID Convention, thus the additional facility rules would have applied.

dispute was heard by an ICSID arbitration Tribunal and considered the investor to be an American investor.

VI. CONCLUSION

The G3 has improved the investment climate of the three member countries. In times when investments do not only flow from developed countries, but also between developing countries, a modern reliable international legal framework for foreign investment between developing countries can help increase the flow of foreign investment from south to south. The G3 has done that.

The G3 Agreement covers the most important issues of FI in line with the emerging international law of foreign investment. It extends protection to different sorts of FI, not only FDI. It protects investors from member countries, even when they do business through a locally incorporated entity. It also guarantees national treatment and MFN treatment to investors and investments. Likewise, the agreement prohibits direct and indirect takings of property and equivalent measures. Due to the social function of the right of property, property takings by the State, including regulatory takings of property, are allowed so long as customary international law conditions provided by the G3 are followed.

The G3 Agreement provides for investor-State investment dispute mechanisms in the same way that most BITs and NAFTA do. It also contains the consent of the States for submitting a dispute to a tribunal chosen as per those provisions.

However, the G3 lacks a provision for admission. States maintain their sovereignty regarding the entry of the investment. If economies are not liberalized to allow entry of foreign entities, the legal protection granted to investments and investors of other parties proves futile.

One mechanism that could have been used to guarantee liberalization of the economies was the requirement to meet minimum standards of economic liberalization, along with the possibility of a list of closed areas or sectors exempted at the investment entry stage. For example, the G3 could have compelled States to deregulate areas of the economy, privatize State-owned corporations and reduce public expenditure as a prerequisite to enter into the agreement.

Regardless of the G3 imposing those obligations, parties might voluntarily liberalize their economies. That would increase the investment opportunities for foreign and local investors. Local investors would benefit from the interaction and competition with foreign investors. This could help local investors take the quantum leap of exploring foreign markets.

The framework provided by the G3 has granted investors from each of the parties the same standards they would find in developed countries' economies. However this has not been sufficient to increase the flow of FI between the parties. Countries need to open more space in their economies to allow investors to capitalize on the advantages provided by the G3 agreement; only then can a final judgment of the G3 be issued.

Comment and Casenote

