

1987

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Recommended Citation

OCRAN, T. MODIBO (1987) "BILATERAL INVESTMENT PROTECTION TREATIES: A COMPARATIVE STUDY," *NYLS Journal of International and Comparative Law*. Vol. 8 : No. 3 , Article 3.

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BILATERAL INVESTMENT PROTECTION TREATIES: A COMPARATIVE STUDY

T. MODIBO OCRAN*

I. INTRODUCTION

The potential role of foreign investment in domestic economies is universally acknowledged in national and regional development plans and economic policy statements. Many states, particularly in the developing world, view foreign investment as a means of releasing and augmenting domestic resources. The objectives in seeking such investments include the search for investment capital for industrialization; establishment of productive capacity, especially in the key industries; generation of employment and impartation of technological skills to indigenous people; utilization of domestic resources; processing of raw materials for export-import substitution and export promotion; and the removal of regional imbalances through rural development.¹ Transnational corporations (TNCs) presently constitute the main vehicle through which direct foreign investment finds its way into other countries and, most importantly, into the developing nations. Thus, countries and regions in which foreign investment plays a potentially important role have come to focus on the issue of TNCs. Indeed, this subject has become increasingly important in the international community, causing the United Nations and other world bodies to hold a series of conferences and to sponsor a host of resolutions and draft con-

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1. G. MEIER, LEADING ISSUES IN DEVELOPMENT ECONOMICS 131-66 (1964). There is a great deal of literature dealing with the pros and cons of foreign investment as a tool of development. Thus we encounter a whole spectrum of arguments, from Rostow's dynamic theory of production to the exponents of the dependency theory. This article skirts the ideological argument and assumes the desire of many nations to receive investment. See generally Ahiakpor, *The Success and Failure of Dependence Theory: The Experience of Ghana*, 39 INT'L ORG. 535, 537 (1985); J. CARLSSON, THE LIMITS TO STRUCTURAL CHANGE: A COMPARATIVE STUDY OF FOREIGN DIRECT INVESTMENT IN LIBERIA AND GHANA 1950-1971 13 (1981); INTERNATIONAL INVESTMENT (J.H. Dunning ed. 1972); Dos Santos, *The Structure of Dependence*, AM. ECON. REV. 231-36 (1970); Bornschier, *Multinational Corporations and Economic Growth*, 7 J. DEV. ECON. 191-210 (1980); A.G. FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1969); Foster-Carter, *From Rostow to Gunder Frank: Conflicting Paradigms in the Analysis of Underdevelopment*, 4 WORLD DEV. 167-80 (1976).

ventions aimed at tackling the problems associated with the operations of these corporations.² While it is theoretically possible to discuss foreign investment without reference to TNCs, and while foreign investment can take place outside the framework of TNCs, there is an academic as well as a practical justification for focusing on TNCs in the study of organizational and regulatory aspects of foreign investment.

The preferred scale and pattern of foreign investment and transnational corporate activity differ from country to country and from one global region to another, depending on the prevailing socio-economic and political philosophy. Despite these differences, most states now have strategies for both promoting and protecting foreign investment. Those strategies include the use of incentives, guarantees and tax benefits, as well as the creation of a fairly protective legal regime for such investments.³ In the past, national and regional interests have been crucial in determining the specific types of arrangements to deal with foreign investment.

Some of these arrangements are unilateral in character;⁴ others are bilateral, and still others assume regional and interregional dimensions.⁵ This article will discuss one particular form of bilateral arrangement, namely, the investment protection treaty, which is the most extensively used bilateral format, although investment insurance agreements and double taxation treaties also feature prominently.

Traditional principles of customary international law affirm the standard of treatment most favored by the capital exporting countries, that is, the payment of prompt, adequate and effective compensation in the event of expropriation or nationalization. Capital exporting countries have never felt fully secure under this norm, because on some occasions when certain capital-importing states were called upon to make adequate reparation for their expropriatory measures, they have questioned or rejected the validity of the traditional principles.⁶ Thus, the use of treaties or other international agreements for the protection

2. Ocran, *Interregional Codes of Conduct for Transnational Corporations*, 2 CONN. J. INT'L L. 121, 126-28 (1986).

3. See generally INVESTMENT REGULATION AROUND THE WORLD (Hammer ed. 1983); THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS (V. Nanda ed. 1984).

4. Ocran, *The Legal Framework of Foreign Investment in Africa*, 12 U. ZAMBIA L.J. 1-37 (1980). Promotional or preventive measures involve the legislative or administrative machinery of only one state, the host or home state, or the investee or investor state. Examples of unilateral arrangements are the national investment codes found in host states, and the provisions on tax credit and tax deferral found in tax codes of home states. *Id.*

5. See generally Ocran, *supra* note 2.

6. See, e.g., 3 G. HACKWORTH, DIG. OF INT'L L. § 288, at 661 (1942 & photo. reprint 1973) (oil dispute between Mexico and the United States).

and insurance of private foreign investment has been given much impetus over the last sixty years.

The purpose of this article is to analyze the main trends in bilateral investment protection treaties by focusing on some of the issues such treaties typically cover. The author will place the issues in perspective⁷ before presenting a study of provisions found in treaties concluded between 1970 and 1986. The study analyzes selected treaties from various countries and regions of the world which illustrate the different approaches existing between countries with differing ideological or political orientations and economic systems. Treaties are also selected to reflect north-north, south-south, and north-south relationships. To illustrate the latter point, a bilateral treaty between the United States and Germany may differ in its provisions from a treaty on the same subject between Brazil and India, or between Britain and Botswana, thus reflecting these "polar" relationships. The study also examines treaties contracted between geographically and politically diverse capital-importing countries.⁸

II. MAIN TYPES OF INVESTMENT PROTECTION TREATIES

A. *Forms of Agreement*

The most popular method of bilateral investment protection is the conclusion of commercial treaties which include integral provisions on investment protection. In the Anglo-American world, these treaties are commonly known as "Friendship, Commerce and Navigation" (FCN) treaties. These treaties may be traced to earlier efforts by some of the major economic powers to liberalize international trade through the elimination of national restrictions and other forms of national discrimination which had previously hindered the flow of goods and capital across state frontiers.⁹

FCN treaties, as the name suggests, deal with three major subjects. First, they may formally establish friendly relations between two sovereign states, such as by providing for the exchange of diplomatic repre-

7. For such general perspectives, see generally, H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* (1986); L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *CASES AND MATERIALS ON INTERNATIONAL LAW* (1980); D. VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* (1986); C. FULDA & W. SCHWARTZ, *CASES AND MATERIALS ON REGULATION OF INTERNATIONAL TRADE AND INVESTMENT* (1970); H. JACKSON & DAVEY, *CASES AND MATERIALS ON LEGAL PROBLEMS OF ECONOMIC RELATIONS* (1986).

8. See Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 *MINN. L. REV.* 805, 807 (1958).

9. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 *N.Y.U. J. INT'L L. & POL'Y* 1, 2-6 (1983).

sentation. Second, they often deal with the security to be accorded to commercial and investment activities of nationals of one contracting state in the territory of the other contracting state. Finally, they may include provisions for freedom of navigation and free access to ports and internal waters of one state by the vessels of another state.

The FCN treaties, which are heavily utilized by the United States, have dramatically changed in both form and content over the years. They are now characteristically more specialized, tending to leave consular, tariff, and income taxation problems to separate agreements. Increasingly, emphasis is placed on the establishment and protection of investments, and occasionally the title "FCN" is even dropped in favor of a "Convention of Establishment."¹⁰ Since 1945, the United States has concluded more than twenty-five such treaties, in which the other contracting parties included all the EEC countries, other European countries, Japan, and a large number of countries in Asia, Africa and Latin America.¹¹ The United Kingdom has also concluded several FCNs which are generally referred to as "Agreement for the Promotion and Protection of Investments."¹² When Switzerland is a party, FCNs are generally entitled "Agreement for the Reciprocal Promotion and Protection of Investments."¹³

The Soviet Union sponsors agreements known as "Treaties of Friendship and Cooperation," but which, unlike the United States agreements, scarcely deal with foreign investment issues. These documents refer only briefly to the expansion of "trade and maritime shipping" under principles of mutual benefit and the most-favored nation treatment.¹⁴ Although titles of the U.S. and Soviet treaties are similar,

10. See, e.g., Convention of Establishment, Nov. 25, 1959, United States-France, art. 16, 11 U.S.T. 2398, T.I.A.S. No. 4625.

11. See Walker, *supra* note 8; H. STEINER & D. VAGTS, *supra* note 7 at 619-20; Bergman, *supra* note 9; Sachs, *The "New" U.S. Bilateral Investment Treaties*, 2 INT'L TAX & BUS. LAW. 192 (1984); Coughlin, *The U.S. Bilateral Investment Treaty: An Answer to Performance Requirements?*, in REGULATING THE MULTINATIONAL ENTERPRISE: NATIONAL AND INTERNATIONAL CHALLENGES (1983).

12. See, e.g., Agreement for the Promotion and Protection of Investments, June 1975, Egypt-United Kingdom, 14 I.L.M. 1470 [hereinafter Egypt-United Kingdom Agreement]; Agreement for the Promotion and Protection of Investments, July 1975, Singapore-United Kingdom, 15 I.L.M. 591 [hereinafter Singapore-United Kingdom Agreement]; Agreement for the Promotion and Protection of Investments, Feb. 1980, Sri Lanka-United Kingdom, 19 I.L.M. 886 [hereinafter Sri Lanka-United Kingdom Agreement]; Agreement for the Promotion and Protection of Investments, Dec. 1980, Philippines-United Kingdom, 20 I.L.M. 326 [hereinafter Philippines-United Kingdom Agreement].

13. See, e.g., Agreement for the Reciprocal Promotion and Protection of Investments, Sept. 23, 1981, Sri Lanka-Switzerland, 21 I.L.M. 399 [hereinafter Sri Lanka-Switzerland Agreement].

14. See, e.g., Agreement on Friendship and Cooperation, July 1, 1971, Union of So-

the Soviet treaties are generally more political than economic. The closest Soviet approximations to the United States's FCN treaties are the USSR "Trade Agreements."¹⁵ An agreement on investments initiated by the People's Republic of China is entitled "Agreement on the Mutual Protection of Investments."¹⁶

In some instances, the topics or issues normally covered under traditional investment protection treaties are instead covered by investment guarantee or insurance agreements, which generally focus on different issues than protection treaties. Thus, in treaty provisions dealing with substantive areas of investment promotion and protection, it is also appropriate to refer to such investment insurance agreements.

B. Scope of Application: Establishment Rules

The treaties typically define the kinds of investments protected by their provisions. They may apply to all lawful investments belonging to nationals of contracting states,¹⁷ or they may cover only investments made after the effective date of the agreement.¹⁸

The coverage of the Philippines-United Kingdom Agreement (1980) is limited to investments qualified for registration and duly registered by the appropriate agency of the host government.¹⁹ The Singapore-United Kingdom Agreement (1975)²⁰ includes a similar provision stating that the investment must have been specifically approved in writing by the investee state.²¹ The United States-Rumania Agreement (1975)²² provides that the establishment of investments in each other's territory shall be in accordance with the applicable laws and regulations of each state.²³ Similar provisions also exist in the USSR-United States Trade Agreement (1972)²⁴ and in the Egypt-United Kingdom

viet Socialist Republics-United Arab Republic, 10 I.L.M. 836 [hereinafter Union of Soviet Socialist Republics-United Arab Republic Agreement].

15. See, e.g., Agreement on Trade, Feb. 21, 1975, Guinea-Bissau-Union of Soviet Socialist Republics 14 I.L.M. 943 [hereinafter Guinea-Bissau-Union of Soviet Socialist Republics Agreement].

16. See, e.g., Agreement on the Mutual Protection of Investments, Mar. 29, 1982, People's Republic of China-Sweden, 21 I.L.M. 477 [hereinafter People's Republic of China-Sweden Agreement].

17. See, e.g., Sri Lanka-Switzerland Agreement, *supra* note 13, art. 2, para. 2.

18. Philippines-United Kingdom Agreement, *supra* note 12, art. 2.

19. *Id.*

20. Singapore-United Kingdom Agreement, *supra* note 12.

21. *Id.* art. 12.

22. Agreement on Trade Relations, May 1975, United States-Socialist Republic of Rumania, 14 I.L.M. 673 [hereinafter United States-Rumania Agreement].

23. *Id.* art. 4.

24. Agreement Regarding Trade, Oct. 18, 1972, Union of Soviet Socialist Republics-United States, 11 I.L.M. 1321, art. 6 [hereinafter USSR-United States Trade Agree-

Agreement (1975).²⁵

The Belgium-Indonesia Investment Guarantee Agreement of 1972 (Belgium-Indonesia Agreement)²⁶ contains a rather comprehensive list of both tangible and intangible investments which are considered investments for purposes of the agreement. These include movable and immovable property as well as any other rights *in rem*, such as mortgages, pledges, and similar rights.²⁷ Shares or other types of holdings are also considered investments, as are debts and rights to any performance having an economic value (copyrights, marks, patents, technical processes, tradenames, trademarks and goodwill), and concessions under public law (including concessions to search for, extract or exploit natural resources).²⁸

The France-Zaire Investment Guarantee Agreement of 1975 (France-Zaire Agreement)²⁹ also includes a non-exclusive list of categories of property which are considered investments. Items specifically mentioned are movable and immovable property, and all other proprietary rights, such as mortgages and liens, that are acquired or constituted in accordance with the legislation of the country in which the investment is situated.³⁰ Other items mentioned include equity interests in companies and other analogous interests; industrial property rights, patents, brands or trademarks and intangible business assets; concessions granted by public authorities, including concessions for the prospecting and mining of minerals; and finally, any debt claim regarding the aforementioned property.³¹ Like the Belgium-Indonesia Agreement, not all types of property are defined and/or listed. Despite this distinction, the language used in both agreements is intentionally broad and primarily serves to lend some assistance in determining eligible and ineligible types of investment. These provisions ensure that there is no guarantee of an "open door policy," as they define which types of investments are covered or protected with respect to either the type of investment activities in which an alien may participate, or the

ment]. Done pursuant to the Agreement on Basic Principles of Relations, May 29, 1972, Union of Soviet Socialist Republics-United States, 21 I.L.M. 756 [hereinafter USSR-United States Agreement on Basic Principles of Relations].

25. Egypt-United Kingdom Agreement, *supra* note 12, art. 2.

26. Agreement on the Encouragement and Reciprocal Protection of Investments (with protocol), Jan. 15, 1970, Belgium-Indonesia, 843 U.N.T.S. 19 [hereinafter Belgium-Indonesia Agreement].

27. *Id.* art. 3.

28. *Id.*

29. See Convention on the Protection of Investments, Mar. 1, 1975, France-Zaire, 986 U.N.T.S. 243 [hereinafter France-Zaire Agreement].

30. *Id.* art. 1.

31. *Id.*

nature of controls to be imposed on the admittance of investments. Most developing countries have enacted investment laws or regulations which exclude foreign participation in certain sectors or subsectors of the economy.³²

Finally, the treaties generally provide reciprocal treatment to nationals of contracting states. In treaties where one nation is in the north and the other is in the south, however, this reciprocity appears to be more theoretical than practical, since the flow of investment is decidedly unidirectional.

III. PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS

While the treaties contain general provisions aimed at both the protection and promotion of investments, the protective aspect tends to be given the greater emphasis in these instruments. Thus, the Egypt-United Kingdom Agreement imposes a duty on the parties to "encourage and create favorable conditions for investment by companies of the other"³³ The United States-Rumania Agreement³⁴ invites companies and economic organizations of each party to establish representation in the form of subsidiaries, business agencies of the state and other such organizations, in the territory of the other.³⁵ The USSR-United States Trade Agreement (1972),³⁶ which was executed pursuant to the more general USSR-United States Agreement on Basic Principles of Relations of 1972,³⁷ provides the same access to business organizations for each contracting state.³⁸

Three basic standards of treatment of foreign investment, which is viewed as an aspect of alien property, are found in investment protection treaties. These standards, which are also prominent in international economic law, are "national treatment," "most-favored-nation treatment," and the so-called "international treatment." Combinations of these standards, in particular the national and the most-favored-nation treatments, are also common.

National treatment requires that the treatment accorded by the investee state to alien investors should be as favorable as that accorded to nationals of the home state in like situations. Ironically, the advocates of national treatment often object to what may be termed "re-

32. See generally Hammer, *supra* note 3; Ocran, *supra* note 4.

33. Egypt-United Kingdom Agreement, *supra* note 12, art. 2.

34. United States-Rumania Agreement, *supra* note 22, art. 4.

35. *Id.*

36. USSR-United States Trade Agreement, *supra* note 24, art. 1.

37. See USSR-United States Agreement on Basic Principles of Relations, *supra* note 24.

38. USSR-United States Agreement, *supra* note 24, art. 6.

verse national treatment." This situation arises where the treatment accorded by an investee state to its nationals is less favorable than that accorded to alien investors. Under reverse national treatment, the alien investors should accept the lower standard. This is an implication of the *Calvo* doctrine, which opposes any preferential treatment for alien investors and regards such special legal regime for aliens as creating a state within a state.³⁹

The capital exporting states, anxious to claim the higher of the two standards for their nationals, insist on the so-called "international law standard." This standard advocates the application of minimum standards of international justice, including fair treatment, free access to the courts, general respect for human rights, and adequate and effective compensation for expropriation or nationalization of foreign property. This approach seeks to evaluate the prevailing national standard of treatment in light of the "civilized" treatment of aliens under the minimum standards of international law and the principles of national justice. Beckett unabashedly stated the position of the capital-exporting nations in 1931 when he wrote "the minimum would be higher in a highly developed European country than in a sparsely inhabited and only partially developed territory in [say] Africa or Asia."⁴⁰

In contrast, the most-favored-nation treatment theoretically demands that treatment accorded by the contracting states to each other's nationals should not be less favorable than that accorded by them to *nationals of any third state*. In practice, this means that whenever one contracting state signs a more favorable agreement with a third state, the nationals of the other party to the first agreement will benefit from the new, more favorable terms, either automatically or subject to certain conditions. As noted above, the most-favored-nation standard is often used in conjunction with the national treatment standard.

Closely related to a discussion of the national and the most-favored-nation standards is the issue of discrimination. This issue poses several questions. First, does a commitment to national treatment bar a state from according any form of preferential treatment to its own national investor? Second, does the most-favored-nation clause impose on a state the duty to accord to the nationals of the other contracting

39. H. STEINER & D. VAGTS, *supra* note 7, at 332, 552. For recent affirmations of the *Calvo* Doctrine, see the Latin American resolution presented in Oct. 1972 at the 12th session of the UNCTAD Trade and Development Board in the course of a debate over the Chilean Kennecott Nationalization case. U.N. Doc. TD/B/SR.330; TD/B/421 Annex III (May 1973).

40. BECKETT, 17 GROTIVS SOCIETY TRANSACTIONS 175, 179 (1931).

state all the benefits that the former might wish to confer on its neighbors or members of its regional economic unions? Finally, can an investee state impose differential taxation based on the nationality of the payor? The lack of universal answers to these questions accounts for the exceptions to provisions on non-discrimination encountered in some bilateral treaties. The United States-Rumania Agreement, for example, provides for national as well as most-favored-nation treatment. Business representations in each other's country must be established in accordance with standards no less favorable than those accorded to companies of third parties.⁴¹

The France-Morocco Investment Guarantee Agreement of 1975 (France-Morocco Agreement)⁴² states that each contracting party shall allow and encourage investments in its territory by the other contracting party.⁴³ The agreement requires, however, that each contracting party accord just and equitable treatment for the investments.⁴⁴ As with agreements under eligible investments, productive investments must also receive prior approval of either contracting party, in accordance with its legislation, provided that they contribute to its economic and social development. This language seems to indicate that prior approval is required only in limited circumstances.⁴⁵

In the Egypt-United Kingdom Agreement, investments receive "fair and equitable treatment," and enjoy full protection and security in each other's territory.⁴⁶ The agreement states that the management, use, enjoyment and disposal of investments should not be impaired by unreasonable and discriminatory measures.⁴⁷ It contains both a most-favored-nation clause, and a national treatment clause.⁴⁸ Finally, the agreement does not oblige a party to extend to the nationals of the other the benefit of any treatment which it may have extended to its nationals or third parties by virtue of the formation or extension of a customs union, free trade area, common external tariff, monetary union, or of any international agreement on taxation, or of any domestic legislation.⁴⁹

The Singapore-United Kingdom Agreement is similar in its provi-

41. United States-Rumania Agreement, *supra* note 22, art. 1.

42. Agreement on the Reciprocal Protection, Encouragement and Guarantee of Investments, July 15, 1975, France-Morocco, 1036 U.N.T.S. 335 [hereinafter France-Morocco Agreement].

43. *Id.* art. 1.

44. *Id.* art. 2.

45. *Id.* art. 3.

46. Egypt-United Kingdom Agreement, *supra* note 12, art. 2.

47. *Id.*

48. *Id.* art. 3. The agreement also contains appropriate exceptions. See *id.* art. 7.

49. *Id.* art. 7.

sions to the Egypt-United Kingdom Agreement, except that it provides more explicitly for the preferential treatment of nationals of the contracting parties. Each state may accord its nationals preferential treatment so long as this is provided for by law and the differing treatment is made applicable to all non-nationals in similar situations.⁵⁰ The Philippines-United Kingdom Agreement (1980) provides for most-favored-nation treatment, but not for national treatment.⁵¹

The Sri Lanka-Switzerland Agreement (1981) imposes on the parties the duty to accord fair and equitable treatment to investments originating from each party, and to give full protection and security to such investments.⁵² In addition, it provides for national treatment as well as most-favored-nation treatment, and allows for preferential treatment arising from customs unions, bilateral agreements for the avoidance of double taxation, and similar international economic agreements.⁵³

The China-Sweden Agreement⁵⁴ provides for most-favored-nation treatment, but makes no similar allowance for national treatment.⁵⁵ In the United Kingdom-Zaire Agreement of 1970 (United Kingdom-Zaire Agreement),⁵⁶ each state undertakes to accept business establishments from the other in accordance with the principles of non-discrimination.⁵⁷

Under the Belgium-Indonesia Agreement (1972), protection for investments requires the execution of some admission procedure which commences on the date of the granting of admission.⁵⁸ At a minimum, the extent of protection guaranteed must equal that enjoyed by nationals of any third state (a most-favored-nation standard), and must not be less favorable than that recognized by law.⁵⁹

IV. NATIONALIZATION AND COMPENSATION

The national assertion of the principle of permanent sovereignty over natural resources often stands in sharp conflict with the reluctance of foreign investors to accept certain forms of control. The most

50. Singapore-United Kingdom Agreement, *supra* note 12, art. 7.

51. Philippines-United Kingdom Agreement, *supra* note 12, art. 4.

52. Sri Lanka-Switzerland Agreement, *supra* note 13, art. 3.

53. *Id.* art. 4.

54. See People's Republic of China-Sweden Agreement, *supra* note 16.

55. *Id.* art. 2, para. 2.

56. Agreement on Commercial and Economic Cooperation, Mar. 18, 1970, United Kingdom-Zaire, 804 U.N.T.S. 286.

57. *Id.* art. 7.

58. Belgium-Indonesia Agreement, *supra* note 26, art. 1, para. 2.

59. *Id.* art. 1, para. 3.

prominent form of control is arrangements for the progressive transfer of ownership to the host state or its nationals. If this conflict remains unresolved, the state usually turns to nationalization as a last resort. Indeed, developing countries often regard nationalization as a means of recovering their natural resources or securing ownership of foreign-owned property. Although international law generally recognizes the right of a state to expropriate foreign private property as an expression of its sovereignty, there nevertheless exists a wide divergence of opinion as to the implementation of this right. Bilateral treaties executed in various parts of the world reflect many of these differences.

Western capital-exporting nations generally advance the traditional position which seeks to impose severe limitations on the right to nationalization. The traditional doctrine dictates that if a state deprives an alien of its property, claims arising therefrom are international in character and may appropriately be adjudicated upon by international tribunals. The rule that nationalization gives rise to international responsibility is part of the substantive rules of the international law standard already discussed under general standards of treatment. Furthermore, nationalization is proper only if it is done for a public purpose, non-discriminatory in respect of aliens, and accompanied by prompt, adequate and effective compensation.⁶⁰

An alternative view of nationalization, arising from the *Calvo* doctrine and advocated by the third world and the Eastern bloc, argues that national law should determine the conditions for the legality of nationalization, and the courts of the nationalizing state should have jurisdiction over any related claim.⁶¹

An equally controversial idea is that compensation, as it were, is part of the definition of lawful nationalization. Some states hold that the absence of compensation does not render expropriation illegal, and that such a measure remains lawful for all purposes, including transfer of title, since it is for the nationalizing state to determine the appropriateness of paying compensation.⁶²

60. Anglo-Iranian Oil Co. (United Kingdom v. Iran), 1952 I.C.J. 93; Marguerite De Joly De Sabla (United States v. Panama), United States and Panamanian General Claims Arbitration 216, 6 R. Int'l Arb. Awards 358, 366 (1933); Norwegian Shipowners Claims (United States v. Norway), 1 R. Int'l Arb. Awards 309 (1922); Oscar Chinn (United Kingdom v. Belgium), 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12). See generally THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (R. Lillich ed. 1972).

61. For an account of the progressive development in the new trends, see Adele, *International Law and the Property of Aliens: The Old Order Changeth*, 19 MALAY L. REV. 175 (1977); see also UNCTAD RES. 88 XIII.

62. See Seidl-Hohenveldern, *Communist Theories on Confiscation and Expropriation: Critical Comments*, 7 AM. J. COMP. L. 541 (1958). Compare Sri Lanka-United Kingdom Agreement, *supra* note 12, art. 5.

Even when the principle of payment is accepted, the manner of effecting it remains controversial. While the traditional view advocates that payment of compensation must be prompt, adequate and effective, some states merely advocate "appropriate," "just" or "equitable" compensation. In support of their view, these states argue that the nature and extent of the nationalization, coupled with the state of the economy of the expropriating state and the nationalized industry, are relevant in determining the rate at which compensation is payable. Under this view, however, the requirement of prompt and effective compensation would appear untenable in a host of situations.

Because of differing notions of fairness, several formulas have been adopted to determine the adequacy of compensation. Among the best known are the capitalized market value of the nationalized property, the replacement value, the depreciated book value, and the sales value of the real assets.⁶³

The various positions discussed above are reflected to a considerable extent in the bilateral treaties examined in this study. For example, in the Egypt-United Kingdom Agreement (1975),⁶⁴ the relevant provision stipulates that investments are not to be nationalized or expropriated except for a public purpose "related to the internal needs" of the host state.⁶⁵ If nationalization is carried out, the state must pay "prompt, adequate and effective" compensation.⁶⁶ Such compensation should be equivalent to the market value of the investment expropriated as it stood either immediately before the expropriatory measure, or before there was an official government announcement of the intention to expropriate, whichever occurs earlier.⁶⁷ The Singapore-United Kingdom Agreement (1975) provides for similar measures, with the addition of interest on the amount of compensation payable until the date of payment of the principal sum, and at such rate as may be prescribed by law.⁶⁸

The Philippines-United Kingdom Agreement (1980)⁶⁹ extends the grounds for expropriation beyond the public purpose ideas, and covers "interests of national defense."⁷⁰ The agreement mentions "just" com-

63. See Girvan, *The Question of Compensation: A Third World Perspective*, 5 VAND. J. TRANSNAT'L L. 340 (1972); Rubin, *Nationalization and Compensation: A Comparative Approach*, 17 U. CHI. L. REV. 458 (1950).

64. See Egypt-United Kingdom Agreement, *supra* note 12.

65. *Id.* art. 5.

66. *Id.*

67. *Id.*

68. Singapore-United Kingdom Agreement, *supra* note 12, art. 5.

69. See Philippines-United Kingdom Agreement, *supra* note 12.

70. *Id.* art. 5.

pensation rather than prompt, adequate, and effective compensation.⁷¹ The treaty equates just compensation to the market value, however, in the absence of a determinable market value, the measure of just compensation is the actual loss sustained on or immediately before the date of expropriation.⁷² No interest payment is mentioned in connection with the payment of compensation.⁷³

The Sri Lanka-Switzerland Agreement (1981)⁷⁴ closely resembles the Philippines-United Kingdom Agreement (1980).⁷⁵ Under the Sri Lanka-Switzerland Agreement, nationalization should be carried out only for a public purpose and should be accompanied by prompt, adequate and effective compensation.⁷⁶ Compensation is measured by the value immediately before the expropriation became public knowledge, which, of course, might be different from the actual date of expropriation. Under this agreement, there is no reference to market value, and payment is to include interest at a normal commercial rate until the date of payment.⁷⁷

The China-Sweden Agreement (1982)⁷⁸ dictates that the amount of compensation payable for expropriation is the sum which will place the investor in the same financial position as he would have been if the expropriation had not occurred.⁷⁹ The agreement does not expressly require "prompt" payment but it does require that payment be made "without unreasonable delay."⁸⁰ The amount paid, however, should be convertible and freely transferable. Thus, the notion of "effectiveness" in the traditional Western formula is maintained.

The France-Zaire Agreement (1975)⁸¹ also deals with the issues of expropriation and compensation. Investments made under the agreement can be expropriated only for a public purpose.⁸² The expropriation, nationalization, and direct or indirect dispossession itself may not be discriminatory nor contrary to a specific undertaking.⁸³ Fair compensation, which equals the value of the assets at the time of disposi-

71. *Id.*

72. *Id.*

73. *Id.*

74. See Sri Lanka-Switzerland Agreement, *supra* note 13.

75. See Philippines-United Kingdom Agreement, *supra* note 12.

76. Sri-Lanka-Switzerland Agreement, *supra* note 13, art. 6.

77. *Id.*

78. See People's Republic of China-Sweden Agreement, *supra* note 16.

79. *Id.* art. 3, para. 1.

80. *Id.*

81. See France-Zaire Agreement, *supra* note 29.

82. *Id.* art. 3.

83. *Id.*

tion, must be paid.⁸⁴ Lastly, prior to the transfer of ownership, the parties must agree to both the amount and manner of payment.⁸⁵

V. REPATRIATION OF FUNDS

There is general agreement that the timely transfer of income from investment capital, and the repatriation of capital in the event of disinvestment, whether forcible or voluntary, significantly contributes to a stable and equitable investment climate for foreign private direct investment. The host states' chronic balance of payment difficulties and their need for essential goods and services for their population, however, often undercut their ability or willingness to repatriate such amounts promptly. There is clearly a need to balance the interest of the investee states with the legitimate claims of the investor.

The investment protection treaties take these interests into consideration and attempt to provide an adequate compromise. Many of these treaties refer to the impaired right of the state, during periods of exchange stringency, to apply exchange restrictions to the extent necessary to assure the availability of foreign exchange for payment for goods and services essential to the health and welfare of its people.

Under the Egypt-United Kingdom Agreement,⁸⁶ each party guarantees the free transfer of the returns from the investments of nationals of the other party.⁸⁷ This guarantee, however, is subject to each party's right, in "exceptional financial or economic circumstances, to exercise equitably and in good faith powers conferred by its laws."⁸⁸ The transfer of capital is to be effected in accordance with the laws of the investee state.⁸⁹ The Singapore-United Kingdom Agreement has identical provisions, with the exception that the transfer of returns on capital is also to be effected in accordance with the law of the investee state.⁹⁰

Under the Philippines-United Kingdom Agreement,⁹¹ the right of investors in each state to the free transfer of capital and earnings is similarly preserved. Each party, however, can delay repatriation under more extensive conditions. Specifically, the right to repatriation is made subject to the right of the government "to impose equitably and in good faith such measures as may be necessary to safeguard the in-

84. *Id.*

85. *Id.*

86. See Egypt-United Kingdom Agreement, *supra* note 12.

87. *Id.* art. 6.

88. *Id.*

89. *Id.*

90. Singapore-United Kingdom Agreement, *supra* note 12, art. 6.

91. See Philippines-United Kingdom Agreement, *supra* note 12.

tegrity and independence of its currency, its external financial position and balance of payments."⁹² The state's right to delay should be exercised consistently with its obligations and rights as a member of the International Monetary Fund. The agreement provides that where large amounts are involved, the contracting state may require that transfers be effected in reasonable installments.⁹³ The agreement also states that the applicable exchange rate for transfers is the rate prevailing at the time of the remittance.⁹⁴

Under the United States-Rumania Agreement,⁹⁵ the right to repatriation is unrestricted, provided the initial importation of such capital or currencies was done in an authorized manner.⁹⁶ A provision specifically applies the most-favored-nation standard to the repatriation of "funds or financial instruments" between the territories of the two states.⁹⁷

The Sri Lanka-Switzerland Agreement⁹⁸ is more expansive regarding the right to repatriation. First, a provision which applies specifically to repatriation of compensation funds stipulates that such amounts are freely transferable at the official rate of exchange prevailing on the date used for the determination of value.⁹⁹ Second, the agreement provides for a more general right to repatriate capital and returns.¹⁰⁰ Finally, amortization and contractual repayments such as loan servicing, amounts assigned to cover management fees and new capital required for the maintenance or development of investment are freely transferable.¹⁰¹

The China-Sweden Agreement¹⁰² provides for a right to the transfer of funds "without undue delay."¹⁰³ The grounds for delay, however, are not as specific as, for example, the grounds stated in the Philippines-United Kingdom Agreement.¹⁰⁴ Nevertheless, like all other agreements referred to under this topic, the general right to repatria-

92. *Id.* art. 7, para. 1.

93. *Id.* art. 7, para. 3.

94. *Id.* art. 7, para. 2.

95. See United States-Rumania Agreement, *supra* note 22.

96. *Id.* art. 6, para. 2.

97. *Id.* art. 6, para. 1.

98. See Sri-Lanka-Switzerland Agreement, *supra* note 13.

99. *Id.* art. 6.

100. *Id.* art. 7, para. 1.

101. *Id.* art. 7, para. 2.

102. See People's Republic of China-Sweden Agreement, *supra* note 16.

103. *Id.* art. 4.

104. Philippines-United Kingdom Agreement, *supra* note 12, art. 5, para. 1. Specifically, the agreement states: "[t]he compensation shall be made without undue delay, shall be effectively realisable and . . . shall be freely transferable." *Id.*

tion is clear and unmistakable. The France-Morocco Agreement¹⁰⁵ mandates that the contracting parties authorize certain transfers of investment properties, namely "net real profits, interest and dividends accruing to investors, . . . who are nationals of one of the two countries; royalties and loan repayments derived from validly concluded contracts; [and] proceeds of the complete or partial liquidation of investments."¹⁰⁶ The Agreement further stipulates that the rate of exchange of these transfers shall be that in force on the day of the transfer on the official exchange market of the country from which the transfers are effected.¹⁰⁷

VI. APPLICABLE LAW AND SETTLEMENT OF DISPUTES

Two aspects of dispute settlement exist under bilateral investment treaties. One aspect is the settlement of disputes between the contracting states arising from the interpretation, application, and implementation of the treaty. Such a dispute may be initiated by a contracting party either on its own behalf, or on behalf of its nationals under the doctrine of espousal of claims. No matter what form it takes, we are faced with an *inter-state* dispute.

The second aspect is the settlement of disputes directly between the foreign investor and a contracting state, based on an alleged breach of particular provisions of a bilateral investment treaty. Initially, these are not inter-state disputes, although they may end up as such if the state of the foreign investor eventually decides to espouse his claim.

A whole gamut of procedures exists for settlement of disputes involving at least one international legal person, ranging from the diplomatic methods of negotiations, good offices, mediation, and consultation (inquiry), to the adjudicative procedures of arbitration and judicial settlement.¹⁰⁸ Not all the procedures are available to each of

105. See France-Morocco Agreement, *supra* note 42.

106. *Id.* art. 6.

107. *Id.*

108. "Negotiations" describes the administrative process which provides the parties with the opportunity to discuss, adjust and settle their differences upon terms proposed by one of them, with or without the involvement of third parties. Negotiations are not so much a description of a specific procedure for dispute-settlement, as the provision of a forum for frank discussion of the conflicting issues.

"Good offices" deals with a mode of settlement in which a friendly third party assists in finding an amicable solution by bringing the parties together for negotiations and suggesting in general terms the framework for a settlement, without itself actually participating in the negotiations or conducting an exhaustive inquiry into various aspects of the dispute. With "mediation," the third party, as under the good offices procedure, assists in bringing about an amicable solution, but goes beyond good offices by actually participating in the negotiations and directing them with suggestions aimed at a solution.

the two basic types of disputes discussed in this section. Some of them are more appropriate to inter-state disputes than to disputes between the state and a national of another state. This point will become more evident through an examination of the actual provisions of the treaties.

While arbitration and judicial settlement procedures are most often employed, arbitration is particularly popular. Essentially, the advantages of arbitration over judicial settlement are that arbitration is speedier and less costly, represents the decision of persons informed in the techniques, usages, and problems of the particular trade or business, rather than that of generalist judges bound by laws and precedents, and generally affords a means of securing jurisdiction over the parties when consented to in advance, thus eliminating troublesome jurisdictional problems and permitting selection of the place or forum of the hearing in advance.

The composition of the international tribunal or body for the resolution of conflicts under the above procedures is generally determined by the investment treaty or other prior agreement of the parties, by agreement on the declaration of a dispute, or by the provisions of the statute or convention under whose procedures the parties had agreed to submit the dispute. In the case of arbitration, a procedure is often outlined in the treaty itself as to the appointment of arbitrators, including the umpire or third-party arbitrator, what happens if one party refuses to appoint the parties or their respective arbitrators, and if they both fail to make the appointment.

A. Disputes Between Host State and Foreign Investor

Although investment protection treaties are executed between states, it is quite common to find provisions conferring on foreign investors, as third-party objects, the right to seek redress against a contracting state for violation of rights recognized under particular treaties. The forum for such redress may be either domestic or

Under the procedure of "consultation," (or inquiry) there is a voluntary or compulsory submission of the dispute to a third-party forum with power to determine the law and facts in respect of the dispute, but without the power to issue decisions or judgments. Under "conciliation," there is either a voluntary or compulsory submission to a forum with power to issue decisions in respect of the dispute referred to it, accompanied by the freedom of the parties to reject or accept the decision. Under "arbitration procedures," there is a voluntary or compulsory submission of the dispute to a forum applying such rules of law and procedure as are agreed upon by the parties, with power to make binding decisions or awards against the parties. Finally, under "judicial settlement" we have a voluntary or compulsory recourse to a permanent and regularly-staffed machinery, applying generally established rules of law and procedure, with power to make binding decisions in respect of the dispute.

international tribunals. These private, third-party, procedural rights are found in both municipal and international law.¹⁰⁹ Historically, there have been a number of such provisions, even though these measures proved futile or at best were rather limited in scope. Examples include the International Prize Court, envisaged in a convention of 1907, which never came into force;¹¹⁰ the Central American Court of Justice, established in 1907 and dissolved in 1918;¹¹¹ the temporary Mixed Arbitral Tribunals, envisaged by the Peace Treaties of 1919-20,¹¹² and similar tribunals established after the Second World War.¹¹³ Moreover, the Convention on the Settlement of Investment Disputes¹¹⁴ enables private foreign investors to have access to international machinery for the settlement of their disputes with investee states.¹¹⁵ However, states are generally very reluctant to confer such procedural capacity on private persons. In the area of international *arbitral* tribunals, whose jurisdiction is largely consensual, this option is sometimes adopted. Moreover, some states habitually confine dispute-settlement to their domestic tribunals.

The settlement of disputes between states and investors, however,

109. See generally Geneva Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; The European Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 5 (1950).

110. See Convention Relative to the Establishment of an International Prize Court, Oct. 18, 1907, 2 A.J.I.L. 174 (Supp. 1908), 205 Parry's T.S. 216; see also MANUAL OF PUBLIC INTERNATIONAL LAW 511 (M. Sorensen ed. 1968) [hereinafter Sorensen].

111. See Convention for the Establishment of a Central American Court of Justice, Dec. 20, 1907, 2 A.J.I.L. 231 (Supp. 1908), 206 Parry's T.S. 90. See also Sorensen, *supra* note 110.

112. Such tribunals were called "Reparation Commissions" and were established to hear and decide individual claims for damages arising out of the First World War. See Treaty of Versailles, June 28, 1919, 1919 I.L. Documents-Naval War College 3, 92, 225 Parry's T.S. 189, 287 (with Germany); Peace Treaty of St. Germain, Sept. 10, 1919, 1920 I.L. Documents-Naval War College 19, 73, 226 Parry's T.S. 8, 61 (with Austria); and Peace Treaty of Trianon, June 4, 1920, 1920 I.L. Documents-Naval War College 187, 215, 6 L.N.T.S. 187 (with Hungary).

113. See Convention on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411, 332 U.N.T.S. 219 (establishing the Supreme Restitution Court and the Arbitral Commission on Property Rights and Interests); Agreement on German External Debts, 4 U.S.T. 443, 333 U.N.T.S. 3 (establishing the Mixed Commission).

114. Convention on the Settlement of Investment Disputes between States and Nationals of other States, adopted Mar. 18, 1965, 60 A.J.I.L. 892 (1966), 575 U.N.T.S. 159.

115. *Id.* at 893, 575 U.N.T.S. 159 (established the International Centre for the Settlement of Investment Disputes).

is not to be viewed only, or even primarily, in terms of access to international tribunals. Indeed, even when the investment treaty provides for access to such a tribunal, most investment disputes will be submitted to a domestic tribunal. There are at least three reasons for this. First, a contracting state may have taken steps to incorporate into legislation the relevant provisions of a bilateral treaty whose violation is alleged by the foreign investor. In that case, if the investor is sufficiently confident that the domestic courts will be found impartial, there seems to be no problem with the investor, as a juridical person within the investee state, and perhaps on the strength of the "national treatment" standard, suing the state directly for infringement of domestic legislation. Second, where the treaty provisions have not been incorporated into domestic legislation and remain essentially as a ratified treaty, there could still be a basis for the investor to sue in a domestic court, basing his case on an alleged breach of an international rule of law recognized under the national constitution as one of the applicable sources of law. Third, even if the investor has little confidence in the impartiality of the domestic adjudicatory system, he may be compelled to commence his case in a domestic tribunal under the doctrine of exhaustion of local remedies.

It is well settled that remedies provided for in the legal system of the host state must be exhausted before international proceedings are instituted. This rule also finds expression in several bilateral treaties.¹¹⁶ Its function is to give the respondent state the opportunity to do justice by conducting its own investigation and adjudication. As a consequence of the local remedies rule, if the alien fails to institute proceedings or to appeal within the required time after the commission of the alleged wrong, he is precluded from having his case heard by the international tribunal.¹¹⁷

If the state espousing a national's claim under any applicable domestic law or investment protection treaty pays an indemnity to that national, the doctrine of subrogation generally confers on that state

116. See generally Amerasinghe, *The Exhaustion of Procedural Remedies in the Same Court*, 112 INT'L & COMP. L.Q. 1285 (1963); Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389 (1964); H. STEINER & D. VAGTS, *supra* note 7, at 283-88.

117. See Sorensen, *supra* note 110. The rule cannot be invoked if there are in fact no local remedies to exhaust, due, for example, to a provision of domestic law prohibiting suits against the government in the category of cases to which the alien's claim belong. Even when such remedies exist, the rule does not apply where they are obviously futile or manifestly ineffective, due, for example, to obstacles in domestic law or procedure, the existence of precedents which could have required the appellate courts to decide against the claimant, and adverse circumstances of fact such as interference by the government in the judicial process. *Id.* at 588-90.

any rights or claims which its indemnified national had against the investee state. Moreover, the latter state must recognize the validity of such an assignment.

In contrast to the choice of domestic or international forum is the choice of law. Surprisingly, little logical connection exists between the two, and therefore the parties to investment disputes must determine which legal standards will be used to judge the substance of their disputes. Generally, if bilateral investment treaties expressly stipulate the applicable law, they stipulate either the law of the host state, the law of the home state of the investor, the law of a third state, a model law, or public international law. Even if the parties select one of these options, however, there is nevertheless a presumption in favor of domestic law.

The capital exporting states tend to display an unwillingness to subject the investment of their nationals to the local laws of the developing capital-importing states, whose legal systems are often regarded as capricious and unstable. The host states, in contrast, resent the extra-territorial application of the laws of the home state, or of a third state, and regard it as undermining their legal systems and national sovereignty. Since the territory of the host state constitutes the place of establishment of the investment project, that state tends to regard its legal system as most closely connected with the transaction, and therefore the natural choice as the applicable law. International law is often irrelevant to the resolution of substantive issues involved in the disputes between foreign investors and the host state. In sum, this dilemma calls for a balance between the protection of the rights of alien investors and the exercise by the state of its sovereignty.

Also relevant to this discussion are treaty provisions on dispute settlement and applicable law as they relate to states and foreign investors. For example, in the USSR-United States Trade Agreement (1972),¹¹⁸ corporations of the contracting parties are encouraged to adopt arbitration as the appropriate method for settling disputes.¹¹⁹ Reference to "corporations" in the Soviet system necessarily drags the state into the dispute settlement process, for commercial corporations are generally designated as agencies of the state. The relevant provision of the Agreement further provides that such arbitration procedures should be held under the Arbitration Rules of the Economic Commission for Europe (1966).¹²⁰ Also, the arbitration procedures should normally designate an appointing authority and a forum in any

118. USSR-United States Trade Agreement, *supra* note 24.

119. *Id.* art. 7, para. 1.

120. *Id.* para. 1(a).

country other than in the United States or USSR. The corporations, however, could always agree to adopt any other form of arbitration. A corporation established in one state enjoys the right to appear before the courts of the other, and such right is to be the same as any other conferred on a corporation of a third state.¹²¹ Finally, this agreement does not contain an express provision on applicable law.

Provisions similar to the USSR-United States Trade Agreement can be found in the United States-Rumania Agreement (1975), except that the corporations or business organizations are encouraged to use the arbitration rules of the International Chamber of Commerce (ICC) rather than those of the EEC.¹²² Like the USSR-United States Trade Agreement, the United States-Rumania Agreement contains no express provision on the applicable law.

Under the Egypt-United Kingdom Agreement,¹²³ each party consents in advance to the submission of legal disputes to conciliation or arbitration under the International Centre for Settlement of Investment Disputes (ICSID) Convention, which gives direct access to individuals, whether natural or legal persons, in their claims against a state.¹²⁴ In the event of a dispute, the state and the company concerned may resolve the conflict through pursuit of local remedies. If no agreement is reached within three months, the complainant company may then consent in writing to submit itself to the jurisdiction of ICSID, after which either party may institute the appropriate proceedings in the manner provided for under the Convention.¹²⁵ If there is disagreement as to whether conciliation or arbitration is the more appropriate procedure, the affected company chooses the most desirable alternative. It should be noted that once a dispute has been referred to ICSID, either by the state in espousing the claim of its national, or by an aggrieved company, no state has the right to pursue the dispute through diplomatic channels unless either the Centre itself decides under its rules that the dispute in question is not within its jurisdiction, or the state-party to the dispute fails to abide by the award rendered by an arbitral tribunal.¹²⁶

The Egypt-United Kingdom Agreement includes a specific provision on disputes relating to payment of compensation in the event of nationalization.¹²⁷ That provision confirms the right of access of the

121. *Id.* para. 2.

122. United States-Rumania Agreement, *supra* note 22, art. 8, para. 2.

123. See Egypt-United Kingdom Agreement, *supra* note 12.

124. *Id.* art. 8, para. 1.

125. *Id.*

126. *Id.* para. 2.

127. *Id.* art. 4.

affected company to the domestic tribunals of the expropriating state. In effect, the affected company can request a prompt determination as to whether the expropriation is in conformity with the domestic law of the expropriating state, and whether the valuation of its investments was done in accordance with the principles set out in the agreement.¹²⁸ Thus, at least with respect to nationalization, the agreement provides for the application of two systems of law: domestic law and international law (*i.e.*, the treaty on investment protection). The agreement also contains the principles of subrogation which enables the indemnifying state to assert any right or claim which the indemnified company as its predecessor in title could have so asserted against the other contracting state.¹²⁹

The provisions of the Singapore-United Kingdom Agreement regarding applicable law and settlement of disputes are substantially the same as those in the Egypt-United Kingdom Agreement, with three exceptions. First, the agreement with Singapore stipulates arbitration as the *only acceptable ICSID procedure*.¹³⁰ Second, that agreement contains an additional clause barring a party to a dispute from raising as an objection the fact that the national or company concerned has received an indemnity for some or all of its losses in pursuance of an investment insurance contract.¹³¹ Finally, the agreement also provides that a state's right to subrogation is expanded to include the right to be accorded treatment not less favorable than that accorded to the funds of nationals of the other contracting state or of third states.¹³² This presumably includes the right of transfer. Moreover, such amounts or credits are to be freely available to the indemnifying state to meet its expenditures in the territory of the investee state.¹³³ The total effect of the above provisions is to make the position of the investor stronger under the Singapore-United Kingdom Agreement than under the Egypt-United Kingdom Agreement.

Under the Philippines-United Kingdom Agreement, the parties to a dispute may select either arbitration or conciliation in accordance with ICSID Rules.¹³⁴ Also, unlike the agreements with Egypt and Singapore, no prior submission by the state to ICSID jurisdiction is required in this case. If, in the event of a dispute, the complainant company submits to the jurisdiction and then requests the state to do the

128. *Id.*

129. *See id.* art. 10.

130. Singapore-United Kingdom Agreement, *supra* note 12, art. 8, para. 1.

131. *Id.*

132. *Id.* art. 10.

133. *Id.*

134. Philippines-United Kingdom Agreement, *supra* note 12, art. 10, para. 1.

same, the state then becomes obliged to accept ICSID jurisdiction.¹³⁵

Under the Sri Lanka-Switzerland Agreement, the starting point of dispute-settlement is the exhaustion of local remedies. If the conflict cannot be resolved within twelve months, either party can transfer it for settlement to ICSID.¹³⁶ There should be a mutual agreement to submit to the jurisdiction of ICSID, since there is no compulsory submission. Thereafter, if there is disagreement as to whether conciliation or arbitration should be adopted, the agreement with Sri Lanka follows the Egypt-United Kingdom Agreement and allows the affected party to make the decision.¹³⁷

The Sri Lanka-Switzerland Agreement stipulates that, a company incorporated in the host state maintains its access to ICSID procedures, provided that it is controlled by nationals or companies of the other contracting state.¹³⁸ Two points are clear here: first, the fact of local incorporation does not deny the company the status of a foreign company as far as access to ICSID procedures is concerned. Second, if the company is no longer controlled from the other contracting state, it loses its right of access to such procedures. Like the Singapore-United Kingdom Agreement, the Sri Lanka-Switzerland Agreement renders inadmissible any objection to enforcement of an award on the grounds that indemnity has already been paid to the company,¹³⁹ and there is a similar provision on the limits to diplomatic resolution of disputes once they have been submitted to ICSID.¹⁴⁰ The indemnifying state also has a right of subrogation regarding any claims to which the company is entitled.¹⁴¹ The repatriation of the funds arising from subrogation is to be accorded most-favored-nation treatment.¹⁴²

The Sri Lanka-Switzerland Agreement also contains a specific provision on the applicable law. In general terms, the agreement provides that the law of the host state is the law that is expected to govern all investments in its territory.¹⁴³ This general rule, however, is made subject to other provisions of the agreement and to rules of international law. For example, the provision on expropriation subjects the determination of the amount of compensation payable, and the valuation of

135. *Id.*

136. Sri Lanka-Switzerland Agreement, *supra* note 13, art. 9.

137. *Id.* art. 9, para. 2.

138. *Id.*

139. *Id.*

140. *Id.* art. 9, para. 3.

141. *Id.* art. 11.

142. *Id.*

143. *Id.* art. 4.

investments, to the rules laid down in that agreement.¹⁴⁴ Similarly, there is a separate article on free transfer of funds.¹⁴⁵ These provisions are thus similar to the relevant provisions of the Egypt-United Kingdom Agreement.

Under the China-Sweden Agreement, dispute settlement procedures must be fair and equitable. By implication, parties to a dispute are to be accorded the same facilities as those given to investors from third states. It is expressly provided that the agreement is not intended to take away or diminish any rights or benefits accruing to companies under the national law of the host state or under international law.¹⁴⁶ Thus, the agreement implies that such companies have access to national courts and that national law is the applicable law in dispute settlement.

The China-Sweden Agreement, however, contains no direct reference to any international procedures to which investors have access. In contrast, the France-Tunisia Agreement (1972) (France-Tunisia Agreement) requires that the parties enter into a specific undertaking and that such undertaking shall cover, *inter alia*, recourse to ICSID, in the event that an amicable settlement has not been reached within three months.¹⁴⁷ The France-Egypt Investment Guarantee Agreement (France-Egypt Agreement) and the France-Yugoslavia Investment Guarantee Agreement (France-Yugoslavia Agreement) also require the contracting parties to enter into a specific agreement providing recourse to ICSID.¹⁴⁸

B. Inter-State Disputes

As already indicated, disputes between contracting states may arise from the interpretation, application, or implementation of the bilateral treaty. Such a dispute may be initiated by a state either on its own behalf or in the exercise of the right of espousal on behalf of its nationals. Thus, investment treaties also deal with the various methods available for the settlement of interstate or international disputes. Interstate disputes are generally resolved in international forums, such as international arbitration or international courts, since the disputants are international legal persons. It is conceivable, however, that a na-

144. *Id.* art. 6.

145. *Id.* art. 7.

146. People's Republic of China-Sweden Agreement, *supra* note 16, art. 7.

147. Convention on the Protection of Investments, June, 1972, France-Tunisia, art. 1, 848 U.N.T.S. 144.

148. See Agreement on the Mutual Promotion and Protection of Investments, Dec. 1974, France-Egypt, art. 8, 996 U.N.T.S. 381; Convention on the Protection of Investments, Mar. 1974, France-Yugoslavia, art. 1, 974 U.N.T.S. 107.

tional forum, such as a forum of one of the disputant states, or of a third state may become seized of a dispute either because of express waiver of diplomatic immunity, or because of the application of the restrictive theory of diplomatic immunity.

The doctrine of sovereign immunity holds that a foreign state cannot be subjected to the jurisdiction of the courts of another state. The restrictive version of the doctrine, however, holds that while the "public acts" of a state done *jure imperii*, or in the exercise of its sovereignty, enjoy immunity in a foreign court, the *jure gestionis*, or private acts of the state, do not qualify for immunity.¹⁴⁹ Trading or commercial activities are considered private acts of the state.¹⁵⁰ The restrictive theory is of particular relevance to the investment activities of the states with socialized economies, where the commercial corporations involved in international business transactions are generally designated as agencies of the state. Thus, it is not unusual to find provisions in investment treaties insisting on a disclaimer of immunity in such circumstances.

It is unusual to find investment treaties expressly stipulating the applicable law in the event of interstate disputes. A legal presumption exists, however, that international law, including the provisions of the particular investment treaty, is the applicable law. It must be noted that in rare circumstances, the treaty itself may expressly stipulate the application of a domestic or model law to all or certain defined matters in the agreement.

Turning to the provisions of the specific treaties examined in this study, the Sri Lanka-Switzerland Agreement provides for the initial settlement of disputes through diplomatic channels.¹⁵¹ If this procedure fails, one state may request the submission of the case to arbitration, in which case the other state must comply.¹⁵²

The procedure for constituting the arbitral tribunal under the Sri Lanka-Switzerland Agreement must be examined. When the parties receive the request for arbitration, each party appoints an arbitrator, and the two appointees will in turn appoint a national of a third state as chairperson of the tribunal.¹⁵³ If the states fail to appoint their arbitrators, or if the two appointees fail to appoint the chairman, then, in the absence of any other agreement between the parties, either state may invite the President of the International Court of Justice (ICJ) to

149. See H. STEINER & D. VAGTS, *supra* note 7, at 637-41.

150. *Id.*

151. Sri Lanka-Switzerland Agreement, *supra* note 13, art. 10, para. 1.

152. *Id.* art. 10, para. 2.

153. *Id.* para. 3.

make all the necessary appointments.¹⁵⁴ If the ICJ President is a national of one of the disputant states, or is otherwise disqualified, the said appointments are to be made by the Vice-President, and where the latter is also disqualified on similar grounds, the appointments are to be made by the judge next in seniority who is not a national of either contracting state.¹⁵⁵ The provisions on interstate disputes embodied in the Sri Lanka-Switzerland Agreement appear to be typical of bilateral treaties on investments.

The provisions on dispute settlement in the China-Sweden Agreement are almost identical to those in the Sri Lanka-Switzerland Agreement, except for a slight modification in the composition of the arbitral tribunal where the parties or their arbitrators fail to make the necessary appointments. In such a situation, the appointments are to be made, not by the President or other judges of the ICJ, but by the Secretary-General of the United Nations.¹⁵⁶ If he happens to be a national of the other state, or is disqualified on similar grounds, then the appointments are to be made by the U.N. Under Secretary-General for Legal Affairs.¹⁵⁷

VII. CONCLUSION

This article has examined the provisions of bilateral investment promotion treaties in terms of the main forms assumed by them, their scope of application, their arrangement of the general promotion, protection and treatment of investments, their nationalization and compensation, their facilities for the repatriation of funds, and applicable law and the settlement of disputes both between states, and between states and nationals of other states.

The discussion shows some noteworthy differences in treaty provisions executed between the same capital-exporting country and different capital-importing countries. For example, the treaties between the United Kingdom and Singapore, the Philippines and Egypt confer a much stronger position on the investee state than do other agreements signed between the United Kingdom and other developing countries.

When initiating treaty discussions, officials of some capital-exporting countries give officials of the other states the impression that the draft submitted by the capital-exporting country is the *standard form*, as unalterable as the "boiler-plate" contracts one encounters in dealings with department stores and dry-cleaning proprietors. This study

154. *Id.* para. 4.

155. *Id.*

156. See People's Republic of China-Sweden Agreement, *supra* note 16, art. 6.

157. *Id.* para. 4.

not only belies the accuracy of this posture, but it also encourages capital-importing nations to insist on their sovereign right to negotiate such draft treaties to arrive at mutually satisfactory provisions.

Particular mention must be made of provisions demanding parity of treatment with nationals of a contracting state under the "national treatment" standard or "non-discrimination" clauses. There must surely be situations in which the government of a capital-importing developing nation wishes to encourage local entrepreneurship by providing local companies or investments with special fiscal or industrial incentives which are not accessible to foreign investors. Similarly, a national investment code or national policy might require, on the basis of reciprocity, the extension of such preferential treatment to nationals of a regional political grouping of which the country concerned is a member.¹⁵⁸ Such a provision basically flows from regional charter obligations on free movement of persons and harmonization of industrial policy, as well as common bonds of history, ethnicity, migrations and settlement; it is not to be presumed that the national treatment which is grounded on such reasoning is "expandable" to cover foreign investors in general. At any rate, it seems morally wrong for foreign investors to first run for national treatment whenever it suits them, and then to insist on the minimum standards of international justice in all other respects.

A closely related subject concerns the non-discrimination provisions in relation to dispossession or expropriation and compensation. Nationalization, or threats of nationalization, is misplaced as a general policy and it is also the surest way of polluting the investment climate. At the same time, nationalization cannot be ruled out forever from the national economic scene, and this explains why the investment codes of admittedly conservative governments make provision for it as a last resort or as an exceptional measure. The public interest and national policy might require the preservation of a given economic sector within the hands of national investors, or investors from member-states of a customs union, common market or free trade area. The same policy could also necessitate the takeover of foreign investment in the same economic sector. Such measures of nationalization, viewed as a mechanism for transferring ownership into indigenous hands and recovering natural resources from foreign economic domination, cannot be considered discriminatory in any relevant sense, since they could only be directed at those who stand in the way of the desired level of "indigenisation" of the economy. Essentially, such acts cannot be deemed

158. See, e.g., The Investment Code, No. 437 (Ghana 1981) (discussing the treatment of nationals of member-states of the Organization of African Unity).

discriminatory solely on the grounds that they do not apply to nationals or companies of the country taking the action, or of a third state sharing membership in or association with a customs union, common market, or a free trade area. The essence of discrimination is differentiation which is not justified by legitimate considerations, and not the existence of differentiation as such.

Finally, there is the need for consistency between the provisions of the investment protection treaties and national investment codes, where the latter exist in the contracting states. In a zealous effort to accept the so-called "standard form" of the treaties as laid down by the capital-exporting country, officials of the other contracting party may overlook provisions which actually go beyond the ambit of their investment codes, such as the circumstances justifying expropriation, or the formula for the calculation or payment of compensation due on expropriation.

The problem here is that a code is typically a direct act of the legislature, such as a statute, and it often purports to be all embracing or admits of no deviation from its norms with respect to the investments covered under it. In such a case, the existence of inconsistent treaty provisions might raise questions of validity or of conflict of laws, and it might become necessary to lay before the legislature the entire draft treaty for adoption as a separate statute, whose terms would expressly override the relevant provisions of the code. Such an agreement would hardly assume the status of a self-executing treaty.¹⁵⁹

Indeed, in the case of a country with a comprehensive investment code, the subsequent conclusion of bilateral investment treaties could pose thorny judicial and policy questions. If the relevant provisions of such treaties are inconsistent with the code in areas such as nationalization, compensation, dispute settlement, or the nature of approved projects, the only way to ensure the validity of the treaty provisions appears to be the enactment of a ratification statute resolving any inconsistencies in favor of the treaty, with language to the effect that in the event of any inconsistencies, the treaty provisions shall prevail. Alternatively, the lawmakers could take the position that all such treaties should be made consistent with the relevant provisions of the national investment code. This position, however, would lead to rigidity in the negotiations of bilateral treaties, and it raises a fundamental question whether such treaties are even necessary.

In contrast, the investment code could be drafted in such a way as to exclude provisions ordinarily covered by investment protection treat-

159. On self-executing treaties, see generally H. STEINER & D. VAGTS, *supra* note 7, at 586-88.

ties, so as to avoid the potential inconsistencies referred to or to utilize language resolving any such inconsistencies in favor of investment protection treaties. In the former situation, investment agreements with particular foreign corporations would then consist of the investment code as supplemented by the provisions of the particular investment protection treaty concluded between the host country and that corporation's home government. The requisite investment code, however, could be rendered so "skimpy" and restrictive in scope that one could raise the question of whether such codes are useful. The country concerned could just as well adopt the *ad hoc*, case by case approach to investment agreements long practiced by many countries before they switched to the concept of investment codes.

Bilateral investment protection treaties, if freely and seriously negotiated between the contracting parties with the aim of achieving mutually satisfactory arrangements, could serve as useful instruments of investment promotion and protection. From a formalistic standpoint, they put potential foreign investors at greater ease with respect to the protection of their investments through the invocation of diplomatic intervention of their home state. Yet, as a promotional tool, their effectiveness could be undermined by the fact that such treaties have traditionally been perceived more in terms of *protection* than the positive *promotion* of foreign investments. For affirmative promotional work, one would have to reckon with potentially more effective alternatives or complements such as national, regional and multilateral regulatory arrangements, especially the projected United Nations Code of Conduct on Transnational Corporations.¹⁶⁰

160. See generally Ocran, *supra* note 2.

