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ESSAY

BILATERAL TREATIES ON THE RECIPROCAL PROTECTION OF FOREIGN INVESTMENT

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I. NEW TRENDS IN FOREIGN INVESTMENT POLICY

A striking shift has occurred in the political-juridical approach to acceptance of foreign investment including transfer of technology. This has resulted from the growing interdependence in trade and the economic globalization generated by the worldwide effort to raise living standards and improve economic well-being in the less-developed countries. The defensive and distrustful attitude concerning foreign investment during the seventies has changed. Due to the inadequacy of domestic savings for improving productive infrastructure, capital and technologies to supplement internal resources have been sought abroad. Competition for capital is burgeoning. Indeed, the great majority of countries currently are striving to promote, stimulate, and protect foreign investment.

In this changed climate, various international organizations which have studied the regulations of the activities of transnational companies[1] for the establishment of an international code of conduct in the transfer of technology have come to an impasse.[2] The Secretary General of UNCTAD's report to the General Assembly of the United Nations Conference on Trade and Development at its 45th session makes this quite clear, indicating that:

> The economic and financial problems in many developing countries, the relative reduction in the technology flows to these countries and the importance attached to new technologies have led to much greater efforts by them to attract and promote technology transfer and foreign investment, which contrast with the greater regulation and control of such activities in the past. The range of new policy approaches adopted include more active search for and cooperation with potential investors and suppliers; more investment incentives and efforts to provide more advisory services to local enterprises in respect to selection of technologies and suppliers and negotiation of contracts. This promotional approach has also aimed at encouraging foreign investment and transfer of technology by removing those policy elements perceived as disincentives by foreign partners. There has been a similar extensive liberalization of policies towards foreign investment in the countries of Eastern Europe. The overall policy trend is

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1. The United Nations Center for Transnational Enterprises has existed since 1977. Its reports on general principles to guide governments with respect to foreign investment, as well as a code or set of rules of conduct for such enterprises relating to activities in the recipient country.

2. U.N. GAOR, 46th Sess., Agenda Item 77(a), U.N. Doc. A/46/564 (1991).

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toward less control and more promotion and cooperations.[3]

In this context, the developing countries have evaluated whether it is advisable to negotiate bilateral or multilateral agreements with countries at a higher level of industrialization, in order to gain promotion and reciprocal protection of investment. Further, those countries have amended their internal laws to encourage greater openness towards foreign capital and technology. Old treaties of friendship, trade, and navigation have been reconsidered to bring them into a bilateral framework more in tune with the new trends of openness and cooperation. As a consequence, the new bilateral treaties encouraging the promotion and reciprocal protection of investment have been gradually proliferating throughout the globe.[4]

There are a total of 253 bilateral treaties for the investment promotion listed in a study prepared by the World Bank, the International Finance Corporation, and the Multilateral Investment Guarantee Agency (MIGA) in the spring of 1992.[5] The study emerged in a Report and Guidelines proposed in the "Legal Framework for the Treatment of Foreign Investment" delivered to the same group in September, 1992.

The number 253 represents only those treaties covered in the survey made by the group.[6] However, the figure does provide an illustration of extent of the recent treaty proliferation. In looking at the main exporting and importing countries, several new treaties have emerged. The main capital exporting countries are: Belgium-Luxembourg Economic Union, Denmark, Finland, France, Germany, Italy, Norway, Netherlands, Sweden, Switzerland, United Kingdom, and the United States. Over 75 recipient countries exist throughout Africa, Asia, Europe, the Middle East, Latin America, and the Caribbean. This author has obtained through the good offices of the Legal Adviser of the International Center for Settlement of Disputes on Investments (ICSDI), an updated list of all the bilateral treaties entered into by 23 countries of the Organization of American States (OAS) through October 31, 1992.[7] The list indicates 90 such instruments had been signed by OAS governments. All of these countries except for Canada and the United States are investment-recipient countries. These investments come

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3. U.N. Doc. TD/CodeTod/56.

4. *See* Mohamed I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, *in* 1 LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT 13-58 (1992). This volume also contains an extensive bibliography on this subject on pages 185-190.

5. *See* note by the Secretary General, *supra* note 2. This work was supplemented by a second volume published by the Development Committee of the sponsoring organizations in September, 1992. It contains the Final Report and suggested guidelines for the promotion and flow of direct foreign investment.

6. Over 320 bilateral world-level investment treaties have been published. 7 THE INSTITUTE OF TRANSNATIONAL ARBITRATION 4 (Oct. 1992).

7. See annex to this article.

primarily from Western Europe[8] and, to a lesser degree, Eastern Europe, Hungary and Romania. The absence of Japan in these agreements is noteworthy.

All these agreements have a general similarity. Barring a more detailed examination of the texts, it could be said that in almost all the treaties it is evident which signatory countries are exporters of capital and technology and which are recipients. This is not universally true as some export agreements are between traditional recipient countries.[9]

However, it is important to note that none of the bilateral investment treaties specifies which of the contracting States is the source and which is the recipient. Further, all treaties provide for mutual promotion and reciprocal protection for each other's investments thus granting equal treatment, guarantees, and machinery for the settlement of investor's disputes.

II. Analysis of Aspects of Investment Treaties

No standard text exists upon which to model these agreements. However, many countries have prepared a prototype agreement to show the State in which they intend to make investment. These proposed texts are always open to negotiation. Nonetheless, the bargaining power is conditioned by the imbalance of economic might between contracting parties. The power almost universally tilts in favor of the investor State. As a result, this party normally imposes conditions as initially set forth.

Further, many of the basic elements of this type of contract are customary international law and are not negotiable. These elements form the foundation of negotiation and eventual agreement. These include appropriate compensation for expropriation or similar measures, the free transfer of liquid assets to the country of origin, and the settlement of disputes between the recipient State and the investor through neutral mechanisms such as arbitration. Minor variances may occur, but these elements will always appear in the final text.

The title used to describe the bilateral instruments may vary. Possibilities include: "treaties," "conventions" and "agreements". However, aside from the title given the instrument, they fall within the meaning of the term "treaty" as applied in the Vienna Convention on the Law of Treaties.[10] The convention defines the word "treaty" to be an international agreement in writing between States, governed by international law.[11]

The descriptions of the bilateral instrument also vary. The purpose of

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8. Belgium-Luxembourg, France, Germany, Italy, Netherlands, Spain, Switzerland, United Kingdom, and the United States are the most important signatory nations (origin of investment).

9. Argentina-Chile, Uruguay-Hungary, Uruguay-Romania, and Peru-Thailand.

10. U.N. Doc. A/Conf. 39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 884 (1969) (signed in Vienna, Austria, May 23, 1969).

11. *Id.* at art. 2.

the contracting governments is twofold: to stimulate the reciprocal flow of investment between countries[12] and to afford both countries legal protection in either jurisdiction.

As to the contracting parties, one is usually represented by the government of one a country with a more developed economy and the other by the government of a less developed State needing the investment. However, agreements may be signed between states of similar development. Furthermore, it should be noted that economic growth is not static—a traditional importer can become an exporter of capital and technology.[13]

The document itself has several sections. First, most documents contain a preamble wherein the contracting parties state the objectives of the agreement. Second, the international regulations of their understanding is continued in a series of articles. Last, many documents following the signatures of the plenipotentiary officers have additional protocols or notes signed by the representatives of the States. The protocols explain the concepts expressed in certain articles of the text. Furthermore, specific exceptions are agreed upon or time frames are established for the enjoyment of certain rights. These protocols and notes are an integral part of the treaty.

It is important to remember that bilateral treaties for the promotion and reciprocal protection of investments should not be mistaken for other similar agreements, such as treaties of economic and trade cooperation[14] or treaties forming binational enterprises.[15] Further, these documents should not be confused with executory agreements for stimulating investment, which are instead characteristic of U.S. procedure to insure investors against possible losses due to noncommercial risks.[16]

III. THE PREAMBLE OF BILATERAL TREATIES

Before reaching an understanding on the terms of the agreement, the contracting parties make a preamble. Here, the contracting parties wishes on the record, in accordance with international law principles. This intensifies economic cooperation for the mutual benefit of the two countries, and maintains fair and equitable investment conditions by nationals or corporations of one State in the territory of the other. In general, the preamble recognizes that the promotion and protection of investments through a treaty can stimulate private initiative and increase the economic

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12. As will be indicated later, there are various types of "investment" and, in some cases, the name applied to "investors" may vary.

13. For instance, the People's Republic of China.

14. *See, e.g.*, Law No. 24,097 of the Senate and Chamber of Deputies of Argentina which ratifies the Economic Cooperation and Trade Agreement between Argentina and Indonesia, signed in Jakarta on October 9, 1990. Official Bulletin, July 10, 1992, at 2.

15. Agreement between the government of the Republic of Argentina and the government of the People's Republic of China to promote the formation of binational enterprises. Official Bulletin, Law No. 24,096, Aug. 4, 1992.

16. 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 665 (CCH International, 1990).

well-being of both peoples.

IV. Definition of Concepts

All bilateral treaties, without exception, preface their articles by defining certain basic terms. Important defined terms include: "investor," "nationals," "corporations," "investment," "profits," and "territory."[17]

The term[18] "investor," signifies the natural person or legal entity as the contracting party which has made or is making the investment in the territory of the other. It is interesting to note that although some instruments define both personal and corporate investors based on nationality, others do not attribute nationality to corporations. Where applicable, the nationality of a corporation may be determined by considering the place of incorporation or location of the main office or by partners, individuals or judicial persons of the other contracting party. In some agreements, corporations controlled by nationals of the other party are considered as investors of the latter. In others, the investor is still considered a state corporation even though its capital stock is in the hands of foreign persons.

"Investment" is defined in several ways. However, generally it is identified with assets or inputs in money or services, which is invested or reinvested in a sector of economic activity. Some bilateral treaties further require that assets or inputs must be acquired in accordance with the laws of the recipient country. The majority of the agreements list various types of investment. These typically include: stocks, credits, securities, real estate and personal property, *in rem* assets, intellectual property rights, prospecting, extraction or development of natural resources, including public law concessions, etc.

The concept of "profits" (called "earnings" in some treaties,) describes the amounts realized from an investment, such as shares in income, dividends, interest, license fees, royalties, copyrights, patents, and compensations. "Territory" designates the national territory and coastal waters of each of the parties, as well as the exclusive economic zone and continental shelf extending beyond the limits of the territorial waters over which the parties may have sovereignty under international law for purposes of prospecting, exploration, and conservation of natural resources.

A. Promotion and Admission

As already indicated, one of the distinctive features of these agreements is the promotion of investment. They are designed to foster, insofar as

17. Treaties referred to throughout the remainder of this essay are found in *International Center for Settlement of Investment Disputes*, 3-4 INVESTMENT TREATIES (Oceana Publications March 1994).

18. Although the definitions of the terms examined vary from one agreement to another, the basic ideas are preserved in all of them.

possible, conditions conducive to investment in their territory. Further, they assure that such investments will be accepted in accordance with the internal legislation.

Treaties apply to investments made following the effective date of the treaty. However, some agreements provide that investments made before that time will also be covered if, under the laws of the respective contracting party, they were considered foreign investment.[19] Nevertheless, they still will not apply in the case of disputes or claims antedating the treaty's effective date.

V. PROTECTION AND TREATMENT OF INVESTMENT

Practically all bilateral agreements provide that each contracting party shall guarantee fair and equitable treatment to investments belonging to nationals of the other contracting party. Likewise, agreements provide that no interference will occur with the investments through arbitrary or discriminatory measures in the operation, management, continuance, utilization, enjoyment, or disposal. However, some agreements provide that present and future investments shall enjoy ongoing security and protection.[20]

Further, a consensus of the bilateral agreements shows that recipient states should treat investments from the originating state equally to their own investors or investors from a third state.[21] Regardless, in no case may foreign investors be treated less favorably than permitted by international law.

Despite this principle of equal treatment under the law, various exceptions have been adopted by the majority of bilateral agreements. Three main exceptions exist. First, agreements or treaties which provide for the creation of a common market, free-trade zone, customs union, or any other type of multilateral, regional, or subregional economic organization grant privileges to nationals or corporations of a third State. Second, agreements extend privileges to nationals or corporations of a third State pertaining to tax deductions or exemptions by virtue of Agreements to Avoid Double Taxation or other international agreements in the tax field. These agreements apply to the privileges arising from internal tax law.[22] Third, privileges are accorded to nationals or corporations of a third State within the framework of franchises provided for in a bilateral treaty between one of the contracting parties and the country to which the investors belong.

The bilateral agreements examined are consistent in their protection and treatment. Only treaties entered into by the United States with Argentina,[23]

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19. Chile-Spain Agreement, art. 2, para. 2, Oct. 2, 1991.

20. Agreement between Chile and the Belgium-Luxembourg Economic Union of July 15, 1992, art. 3, paras. 1 & 2.

21. States which fall under the most favored nation clauses received more favorable treatment.

22. Agreement between Argentina and Sweden, Nov. 22, 1991, art. 3, para. 3.

23. Agreement on Investment Guarantees, Nov. 14, 1991, U.S.-Arg., Hein's No. KAV 3103.

Grenada,[24] Haiti,[25] and Panama[26] have broader provision. This inconsistency may be an outgrowth of the "model text" prepared by the State Department[27] which the United States has closely followed since 1984. The treaty signed with Argentina[28] follows this model. Article II, of this treaty which regulates the protection and treatment of the investments, contains nine extensive paragraphs practically identical to the U.S. model. Additional parallels to the model are provisions for treatment comparable to that accorded nationals and investors of a third country under the most-favored-nation clause and exceptions and clarifications set forth in the annexed protocol. The U.S./Argentina treaty covers other obligations including notification of all laws and regulations that may affect the agreement. Additionally mentioned are future amendments or exceptions that appear in domestic laws' fulfillment of contracts entered into. The document further stipulates that the investment shall not be subject to future obligations which require a certain volume of exports, purchase of local components, or similar requirements; the publication of laws, regulations, administrative judgments and practices that affect or could affect investment. Additionally, in negotiating this treaty, the Argentine government was able to include Article III which provided that the instrument shall not hinder any of the parties from passing new laws relating to additional investments as long as such legislation does not impair the essence of any of the rights set forth in the treaty.

VII. EXPROPRIATION, NATIONALIZATION, ANALOGOUS MEASURES

In all of the bilateral treaties studied, one uniform provision existed. Therein, each contracting party agrees not to take any measures, directly or indirectly, for expropriation or nationalization, or any other comparable investment measure made in its territory by nationals or corporations of the other contracting party.

The aforementioned measures may be adopted by the recipient state only if the following conditions are met:[29]

24. Agreement on Investment Guaranties, May 2, 1986, U.S.-Gren., Hein's No. KAV 735.

25. Agreement on Investment Guaranties, Dec. 13, 1983, U.S.-Haiti, Hein's No. KAV 788.

26. Agreement on Investment Guaranties, Oct. 27, 1982, U.S.-Pan., Hein's No. KAV 1545.

27. *See Model Bilateral Investment Treaty in* 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 656 (CCH International, 1990).

28. The text may be consulted in the *International Center for Settlement of Investment Disputes*, 4 INVESTMENT TREATIES (Oceana Publications March 1994).

29. There is no uniformity in the conventional regulation of such a controversial and inherently complex subject. There are variants as the amount and promptness of payment of compensation, currency to be used, interest that accrues, etc. These variants (from the standpoint of the investment-exporting countries) may be examined in the tables in Mohamed I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties, in* 1 LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT (1992).

1) Considerations affected by a public purpose or of national interest must be involved. Some treaties with European countries utilize the concept of "common good."
2) The measures must be dictated in accordance with procedures previously established in international law.
3) The measures cannot be discriminatory nor contravene specific commitments agreed upon between the parties.
4) The agreements are subject to payment of adequate and effective compensation. Some agreements require "prompt" payment. Others merely stipulate that the payment be "fair" or "appropriate."
5) The amount of compensation must be consistent with the real value of the affected investments at the moment prior to when they were initiated or publicly announced.
6) Compensation must be paid in freely convertible currency. Some agreements require that payment be in the currency or foreign exchange used by the affected investor.
7) The instruments must bear interest at a regular commercial rate from the date of determination to the time of payment.
8) The agreement must be freely transferrable to the place of residence or main office of the holder of the right.

A supplementary provision exists in the bilateral treaties entered into by the United States and Canada with Argentina.[30] This provision permits the affected investor to appear before the judicial or other competent authorities to request a review of the procedures and to verify that they are in accordance with the terms of the treaty and with international law. This provision attempts to protect the investor. Apart from expropriation or nationalization, there is a possibility that the investor may suffer unforeseen damage as a consequence of extraordinary situations, such as damages due to civil war, armed conflict, revolution or uprisings in the territory of the recipient State. The provisions provides that if unforeseen circumstances arise, the affected investors will receive treatment at least on a par with that given investors of the State itself, or most-favored-nation with respect to refunds and compensation for the losses suffered.

VIII. TRANSFER OF FUNDS

Certain maladjustments in the economies of developing countries may bring on temporary or permanent measures of exchange control and affect the free transfer abroad of liquid assets. Hence, any restriction that the recipient State might place on remission of income, investments, and other related payments will be a continued source of concern to investors.

30. U.S.-Argentina Agreement, Nov. 14, 1991, art. IV, para. 2; Canada-Argentina Agreement, Nov. 5, 1991, art. VII, para. (2).

Consequently, all bilateral provisions unanimously provide for this eventuality. Each agreement expressly sets forth the obligation of each contracting party to guarantee the free transfer of liquid assets in freely convertible currency without delay. Specifically, the agreements require free transfer of the following.

1) Investment income, including earnings, interest, capital gains, dividends, and author's or inventor's rights and royalties.
2) The amounts necessary for repayment of regularly contracted loans.
3) Proceeds of loan repayment, total or partial liquidation of investment, which includes capital gains or increments of invested capital.
4) Compensation paid for expropriation or nationalization.
5) Royalties accruing from license fees and business, administrative, or technical assistance.
6) Wages, salaries, and other remuneration received by the national of one party for labor or services contracts related to the authorized investment.

Additionally, the recipient party shall make the necessary authorizations to assure that transfers to the source country are made without delay at the going rate of exchange at the time made. Transfers shall occur under conditions which must not be any less favorable than those accorded most-favored-nation investors. At the very least, the exchange rates must be fair and equitable.

Some agreements take into consideration that recipient states sometimes experience difficulty when they have exceptional balance-of-payments. In those cases, certain terms of transfer may be admitted which allow for staggering of remittances within maximum time limits. These agreements also provide for having reciprocal consultations on implementation deferral.[31]

IX. SUBROGATION

It is quite feasible that as a consequence of a guarantee to the investor through multilateral agreements such as MIGA or bilateral ones like OPIC, the multilateral organization or corporation that pays compensation could be subrogated with respect to the investor's rights vis-a-vis the State that caused the damage provided for in the international instrument.

As a result, to eliminate questions about the transfer of rights of the insurer or the contracting party that retained its services, bilateral agreements customarily include an article relating to the issue. These articles generally

31. Agreement between Argentina and Switzerland of April 12, 1991, art. 4, para. (3), subparas. a, b. c, d. Agreement between the Belgium-Luxembourg Economic Union and Argentina of June 28, 1990, art. 6, para. 4.

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refer to guarantees against non-commercial risks, although some do not make this distinction.

The rational behind these articles is that if a contracting party or one of its institutions, such as OPIC, has guaranteed against the investment risks of its nationals or corporations and paid the investor based on the guarantee, the rights of the contracting party is subrogated in regards to the rights of the investor for up to the compensated amount. Thus, the affected investor will have the right to bring suit to enforce the respective claims for damages not covered by the insurance. Additionally, the subrogation of rights applies as well, to the rights of free transfer and arbitration covered by the bilateral agreement itself. As such, the contracting party in the country where the insured damage occurred may demand that the insurer make good on the legal or contractual obligations incumbent on the compensated investor.

Application of Other More Favorable Standards

If special regulations exist between parties that which grant investors more favorable treatment than provided in the bilateral agreement, these more favorable regulations shall take precedence.

Further, each party shall comply with any other obligation entered into with respect to the investors of the other party regarding investments they make in its territory. In case the two contracting parties are also parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 1965)[32] such investments shall be governed by the provisions of one or the other instrument.

A. Interpretation or Application

Any dispute between contracting parties with respect to interpretation or application of the language of the bilateral treaty, shall be settled by friendly negotiations or through diplomatic channels. These include the establishment of bilateral commissions.

However, if the dispute is not settled within a reasonable length of time through the above indicated means, it may be brought to *ad hoc* arbitration at the request of either party. The arbitral tribunal is comprised as follows. First, each party shall name one arbitrator. Then those two arbitrators shall, by mutual agreement, appoint a presiding arbitrator, a national of a third state. Customarily, the first two must be named within three months of being brought to arbitration. Two additional months are provided to approve the third. If arbitrators are not provided within the time allowed, the bilateral agreement provides means for designating the arbitrator or arbitrators lacking.

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32. 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 948 ff (CCH International, 1990).

There are three alternatives to parties picking their own arbitrators. The first, present in a majority of the agreements studied, is to petition the President of the International Court of Justice to make the appointments. Second, the parties could petition the Secretary General of the United Nations for the same purpose. Last, the procedural rules of the United Nations Commission on International Trade Law (UNCITRAL) regarding arbitration indicate the Secretary General of the Permanent Court of Arbitration could be called upon to make the appointments.

Once the tribunal has been established, it sets up its own rules of procedure or follows those of the UNCITRAL. Substantively the tribunal applies the standards set forth in the bilateral treaty and the universally accepted principles of international law. The decision reached by majority vote is final and binding on both parties.[33]

B. Disputes Between a State Party and Investors of the Other Party

Various schemes exist to settle these disputes. However, almost all of these schemes have identical mechanisms and sequencing for settling disputes.

If a dispute arises between an investor of a contracting party and the other contracting party regarding the former's investment, it will be settled by friendly negotiation. If the dispute is not settled within three (or sometimes six) months from the time it appeared, it will be submitted, upon the investor's request, to either the national jurisdiction of the party in whose territory the investment was made or international arbitration.

But if the dispute should have been submitted to the jurisdiction of the competent legal or administrative authorities of the recipient investment country, the investor may not resort to the arbitration unless eighteen months have elapsed since the suit was instituted and no decision has been reached on its merits or, if a decision was reached but the dispute persists. In other words, the investor considers that the decision contravenes the bilateral treaty.[34] This alternative, apparently abusive, should be eliminated in future agreements. Instead, as provided in article 10, paragraph 2 of the Chile-

33. In the bilateral treaties examined for purposes of this study, the author noticed that a provision was erroneously included in three of these treaties. It stipulates that if both parties are also contracting parties of the ICSID Convention signed in Washington on March 18, 1965, it is not permissible to have recourse to the court of arbitration stipulated in articles 25 and 27 of the Convention. However, this reference is mistaken, since the ICSID is concerned solely with settling disputes over investments between States and nationals of other States, and the referred articles assume that the dispute is between sovereign states regarding the interpretation and application of a treaty. This mistake occurs in the treaties between Argentina and Germany of April 9, 1991, art. 9, para. 5; between Argentina and Chile of August 2, 1991, art. 9, para. 6; and between Chile and Germany of October 21, 1991, art. 9, para. 6.

34. It appears that the bilateral treaties containing this condition are inconsistent or have given rise to an intolerable situation for the competent authorities who were requested by the investor to hear the claim. Not only must they determine the merits of the case by a strict deadline but satisfy the plaintiff as well. Otherwise, "the dispute subsists" and the investor can ignore the judicial decision and resort to international arbitration.

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Spain agreement, signed on October 2, 1991, that once the investor has placed the dispute under the jurisdiction of the implicated contracting party or international arbitration, that choice should be considered final.

If the case is brought to international arbitration, the dispute could come before various courts of arbitration to which each contracting party grants its prior and irrevocable approval. Once having taken this route, the investor has the following three options. First, if both parties have acceded to the convention, they must resort to the International Center for the Settlement of Investment Disputes (ICSID).[35] However, if one of them is not yet a party to the ICSID agreement, each contracting party must consent to the dispute being submitted to arbitration in accordance with the regulations provided in the additional facility of the Center. Second, the parties can agree to an *ad hoc* arbitral tribunal established in accordance with UNCITRAL arbitration rules. Last, if the parties can agree to another arbitral institution, such as the International Chamber of Commerce, the dispute may be taken there.

In some bilateral agreements which provide for the dispute settling arbitration, it is provided that none of the parties involved shall object to arbitration. This is because the investor has received payment on an insurance policy or other guarantee stipulated prior to the dispute.

The arbitral tribunal shall be established according to the guidelines set forth in ICSID regulations, the UNCITRAL, or those adopted by the parties. The regulations determine the site of arbitration.[36] Additionally, they specify which authority shall appoint the arbitrators in the event that the parties have not appointed them within the prescribed time or no presiding arbitrator has been chosen.

The dispute is settled by applying the national law of the contracting party where the investment was made, including conflicts of law rules. The tribunal shall take into consideration the bilateral treaty, itself, the terms of other agreements concerning the investment, as well as applicable principles of international law.

The arbitral awards are final and binding for the litigating parties. Each contracting party agrees to enforce the decisions in accordance with the laws of its nation.

Additionally, none of the contracting parties may ask their government to provide diplomatic protection for disputes concerning investments of its nationals. However, the sole exception is when, upon conclusion of the arbitral procedure, the contracting party does not enforce or accept the

35. ICSID was established by the Convention opened for signature in Washington on March 18, 1965, and has 106 ratifications and accessions. 7 INSTITUTE FOR TRANSNATIONAL ARBITRATION (Oct. 1992).

36. In the agreement of June 5, 1990 between Venezuela and Italy, it is provided that the site of arbitration will be Stockholm, unless the parties decide to the contrary.

court's decision.[37]

Last, the arbitration is limited to determining if nonfulfillment of its obligations by the contracting party has occurred. If so, the tribunal then asks if that nonfulfillment has resulted in damages to the affected national and the amount of compensation.

C. Time Frame of Application

Bilateral agreements often contain a provision in regards to effective date. Customarily, the agreements provide that they will also apply to investments made in the recipient state prior to the instrument's entry into force, as long as the investments were properly recorded. In any case, the agreements will no apply to investment disputes already initiated or settled prior to its entry into force, nor to claims pending or initiated prior to that date.

D. Entry into Force, Duration, and Denunciation

Once bilateral treaties have been signed by the plenipotentiary representatives, they must comply with the provisions of the respective country's constitution. This usually requires approval by the competent legislative body. In order to ratify, the contracting parties must exchange the corresponding instruments of ratification. The treaties will become ratified either on the date of the last scheduled notification or a month later. This event occurs independently of announcement and publication for internal purposes.

These agreements generally last ten years. Once the term has expired, the agreement may continue indefinitely unless one of the parties denounces it. Extension of a definite term may also be impliedly renewed for a set number years without prejudice to the right of denunciation.

Several treaties stipulate that investments made prior to the expiration date shall be subject to and receive the benefits of the treaty's provisions for an additional period of ten, fifteen, or twenty years from that date. Others stipulate that the force of the agreement exists independently of whether or not diplomatic or consular relations coexist between the parties.[38]

The authorized representatives of each government sign the originals of the instrument written in their official languages. The documents are normally signed in the capital city of one of the parties. Both copies of the agreement are equally authentic.

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37. In case of disputes that have been submitted to the ICSID, it should be noted that Article 52 of the Convention that established it, provides that one of the parties may apply for the setting aside of the award under any of the five grounds that the same instrument stipulates. *See supra* note 35.

38. Vienna Convention, *supra* note 10, at art. 63.

E. The Protocol Annex or Exchange of Notes

At the time the governments of the contracting parties sign the bilateral treaty, the accredited representatives of both customarily conclude agreement. Two ways exist to conclude the agreement. First, in the same day they sign an annexed protocol. Second, the parties exchange notes transmitted to each other through their Ministers of Foreign Affairs. These comprise a series of supplementary provisions that constitute an integral part of the treaty.

Such provisions supplement, interpret or restrict certain articles of the instrument. The following is a list of the most common supplementary provisions.

1) Individuals who have resided for a certain number of years in the recipient country shall not be considered "nationals" of the contracting party from were the investment was made, except where it is proven that the investment was subsequent.
2) In order to determine if foreign investors predominate or control a corporation set up in the recipient country, certain evidence such as, voting percentage, majority of administrators, will be required.
3) Both parties agree to consider in good faith the application for admission and for authorization of residence, work, and travel presented by the nationals of one party.
4) The legal residence of an investor shall be determined according to the laws of the country in which the investment is made.
5) Most-favored-nation treatment accorded under the treaty is not applicable to certain privileges reserved for foreign investors who benefit from concessionary financing.
6) One of the contracting parties may reserve certain privileges to national treatment in certain sectors.[39]
7) Repatriation of invested capital may be restricted until a time limit has elapsed; or the transfer of earnings may be held to a certain annual percentage during periods of reorganization of external debt.
8) The availability of arbitration may be conditioned by dual nationality or clear proof of actual control in the case of corporations.
9) The concept of "common good," in the case of expropriation shall be interpreted in accordance with the law in force in the country

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39. In the Argentina-United States Treaty, signed November 14, 1991, the latter government reserved the right not to accord treatment as a national to investors of the contracting party in the following sectors: air transportation; ocean and coastal shipping; banking; insurance; energy; customs (clearance); public service radio and television; real estate; public service telephone and telegraph; underwater cable; natural resource development. Certain programs involving government credit and insurance guarantees are also included. U.S.-Arg. Agreement, *supra* note 23, at Protocols 2-4.

Correspondingly, Argentina reserved application of treatment of investments as national to such sectors as: real property in border zones; air transport; naval industry; atomic plants; uranium mining; insurance; mining and fishing. *Id.* at Protocol 5.

considering adoption of the measure.

As the above list indicates, the bilateral treaties allow the parties certain bargaining power even after having signed the agreement.

Actually, these provisions are not precisely "reservations" as defined by the Vienna Convention on the Law of Treaties.[40] The Convention defines reservations as a unilateral declaration, however expressed or named, by a State which signed, ratified, or approved a treaty or acceded to it, for the purpose of excluding or modifying the legal effects of certain provisions of the treaty regarding its application to that State. Instead, its provisions are diplomatic document annexes to the treaty itself. They may also be viewed as an exchange of instruments that the ministers of foreign affairs of the contracting parties transmit to reciprocally record their understanding or interpretation of certain provisions agreed upon in the text of the treaty.

Often, the negotiators approve a "model" text that requires adaptation to special conditions of the bilateral relationship. It also may require exceptions which by reason of their specification it would be inappropriate to include in the body of the main agreement. Such additions or interpretations, as integral part of the treaty, are submitted together with it to the process of legislative ratification.

X. CLOSING REMARKS

As a result of growing trade interdependence at the regional and worldwide levels which anticipates a globalization of the economy, a greater flow of investment and technology between countries called for. As centrally planned economies have failed, market economies, free access, development of the private sector, and open competition must be fostered for the social good and for raising living standards.

This changing trend has engendered new foreign-investment policy. A climate of greater openness towards attracting funds from abroad to supplement internal savings now exists through direct or indirect investments. Most of the developing countries try to encourage and promote the flow of capital. Ideally this should take place without regard to nationality or politics. However, fierce competitiveness has arisen among recipient countries. Generally, agreements which offer investors a structure of legal security obtain greater flows.

This structure of legal certainty breaks down into three components: (1) domestic regulation; (2) adherence to multilateral agreements,[41] and (3) negotiation of bilateral treaties for the promotion and mutual protection of investments.

It is evident that none of these components, in themselves or taken as a

40. Vienna Convention, *supra* note 10, at art. 1, ¶ (d).

41. ICSID, MIGA and others.

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group, will be a panacea for investment. Other metalegal factors exist which help to determine the choice of investor[42] However, remaining socioeconomic factors tactics must be placed in the proper legal framework and under the rule of law.

Of the three components, within the legal framework it could be asserted that acceptance of the last—bilateral treaties—is the one that has encountered the greatest reluctance on the part of the countries of the Western hemisphere. The list of accessions and ratifications which appears as an annex to this article, shows that within the Latin American countries, Brazil, Cuba, Guatemala, Mexico, and Nicaragua, have not entered into any bilateral agreement in this field. In the Caribbean group, are not party to these agreements: Bahamas, Barbados, Belice, Saint Christopher-Nevis, Suriname, and Trinidad Tobago. However, it is noteworthy that two of the aforementioned Latin American countries, Brazil and Mexico, are the biggest recipients of direct foreign investment in Latin America.

Regardless, it is also strange that the only two countries in the hemisphere who are capital "exporters", U.S. and Canada, and are members of the OECD. These two have only entered into five treaties, of these, Canada, only two, with countries of the hemisphere. The vast majority of countries who make investments with South American and Latin American countries are European countries.

A possible explanation may have a historical and geopolitical basis. In the case of Mexico, for example, 66% of direct foreign investment comes from the United States. The remaining 34% origination the United Kingdom, Germany, Spain, Japan, France, and the Netherlands. The legal framework regarding agreements involving the United States and Canada has been regulated on a broad basis in the recently negotiated North American Free Trade Agreement (NAFTA).[43]

However, this agreement would not deter Mexico from studying the advisability of entering into bilateral investment agreements with other European countries, adapting the NAFTA text to its socioeconomic circumstances.

It may be concluded from this analysis that, except for discrepancies of detail, all the bilateral treaties studied show an overall resemblance. Their main accomplishment is that they do not specify which contracting party is the source of the investment or which is the recipient. Therefore, the

42. However, these lie outside the scope of this report. *See* Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of Multilateral Guarantee Schemes*, 21 THE INT'L LAW. 671 (1987).

43. North American Free Trade Agreement, 1992, U.S.-Can. (Chapter 11 of this Agreements covers investment. It contains 39 articles and 4 annexes. Also, Annexes 1-7 of the NAFTA provides a very extensive list of the reservations of each of the three parties with respect to measures of nonconformity that revoke obligations in Chapters 11 (investments), 12 (transborder services trade), and 13 (State monopolies and enterprises) in such matters as national treatment, most-favored-nation treatment, local presence, conduct requirements, nationality requirements, etc.). *Id.*

promotion and protection of the investment is reciprocal although the equality of treatment may still be somewhat theoretical.[44] Consequently, the sovereign right of each country to regulate the input of capital and technology from abroad or moving from the territory of the other party on a parity basis is respected.

Considering that the degree of development in the recipient countries is disparate and that each has its special characteristics, it is not practical to suggest that a model text for these instruments be adopted. It might be recommended that the countries which have not yet entered into bilateral treaties think about contracting within a framework of mutual respect for domestic laws. When the latter do not agree with already established principles of customary international law, a State's legislature should make them conform, and give them a regulatory character in keeping with such principles. Thus, without prejudice to the foregoing, when a bilateral agreement is entered into, the local congress would be required to implement it subsequently in the internal sphere. Therefore, the regulation of foreign investment could be made current.

44. It would be unrealistic to consider investments by Haiti in Germany.

ANNEX

Parties	Signature	Entry into force
ANTIGUA AND BARBADOS (1)		
United Kingdom	12 June 1987	12 June 1987
ARGENTINA (12)		
Belgium-Luxembourg	28 June 1990	
Canada	5 Nov. 1991	
Chile	2 Aug. 1991	
Germany	9 Apr. 1991	
Italy	22 May 1990	
Poland	31 July 1991	
Spain	2 Oct. 1991	
Sweden	22 Nov. 1991	28 Sept. 1992
Switzerland	12 Apr. 1991	
Turkey	8 May 1992	
United Kingdom	11 Dec.1990	
United States	14 Nov. 1991	
BOLIVIA (7)		
Belgium-Luxembourg	25 Apr. 1990	
Germany	23 Mar. 1987	9 Nov. 1990
Italy	30 May 1990	
Spain	24 Apr. 1990	12 May 1992
Sweden	20 Sept. 1990	3 July 1992
Switzerland	6 Nov. 1987	17 May 1991
United Kingdom	24 May 1988	16 Feb. 1990
CANADA (6)		
Argentina	5 Nov. 1991	
Czechoslovakia	15 Nov. 1990	9 Mar. 1992
Hungary	3 Oct. 1991	
Poland	6 Apr. 1990	22 Nov. 1990
Soviet Union	20 Nov. 1987	27 Jun. 1991
Uruguay	16 May 1991	
CHILE (6)		
Argentina	2 Aug. 1991	
Belgium-Luxembourg	15 July 1992	

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France	14 July 1992	
Germany	21 Oct. 1991	
Spain	2 Oct. 1991	
Switzerland	11 Nov. 1991	
COLOMBIA (1)		
Germany	11 June 1965	
COSTA RICA (3)		
France	8 Mar. 1984	
Switzerland	1 Sept.1965	18 Aug. 1966
United Kingdom	7 Sept. 1982	
DOMINICA (2)		
Germany	1 Oct. 1984	11 May 1986
United Kingdom	23 Jan. 1987	23 Jan. 1987
DOMINICAN REPUBLIC (1)		
Germany	16 Dec.1959	3 June 1960
ECUADOR (2)		
Germany	28 June 1965	30 Nov. 1966
Switzerland.	2 May 1968	11 Sept. 1969
EL SALVADOR (1)		
France	20 Sept. 1978	
GRENADA (2)		
United Kingdom	25 Feb. 1988	25 Feb. 1988
United States	2 May 1986	3 Mar. 1989
HAITI (4)		
France	23 May 1984	25 Mar. 1985
Germany	14 Aug. 1973	1 Dec. 1975
United Kingdom	18 Mar. 1985	
United States	13 Dec.1983	
HONDURAS (1)		

Switzerland	20 July 1966	
JAMAICA (3)		
Netherlands	18 Apr. 1991	
Switzerland	11 Dec. 1990	21 Nov. 1991
United Kingdom	20 Jan. 1987	14 May 1987
PANAMA (5)		
France	5 Nov. 1982	9 Oct. 1985
Germany	2 Nov. 1983	10 Mar. 1989
Switzerland	19 Oct. 1983	22 Aug. 1985
United Kingdom	7 Oct. 1983	7 Nov. 1983
United States	27 Oct. 1982	30 May 1991
PARAGUAY (3)		
France	30 Nov. 1978	11 Dec. 1980
Switzerland	31 Jan. 1992	
United Kingdom	4 June 1981	23 Apr. 1992
PERU (2)		
Switzerland	22 Nov. 1991	
Thailand	15 Nov. 1991	
SANTA LUCIA (2)		
Germany	16 Mar. 1985	22 July 1987
United Kingdom	18 Jan. 1983	18 Jan. 1983
SAINT VINCENT AND THE GRENADINES (1)		
Germany	25 Mar. 1986	8 Jan. 1989
UNITED STATES (21)		
Argentina	14 Nov. 1991	
Armenia	23 Sept. 1992	
Bangladesh	12 Mar. 1986	25 July 1989
Bulgaria	23 Sept. 1992	
Cameroon	26 Feb. 1986	6 Apr. 1989
Congo	12 Feb. 1990	
Czechoslovakia	22 Oct. 1991	
Egypt	29 Sept. 1982	27 June 1992

Grenada	2 May 1986	
Haiti	13 Dec. 1983	
Kazakhstan	19 May 1992	
Morocco	22 July 1985	29 May 1991
Panama	27 Oct. 1982	30 May 1991
Poland	21 Mar. 1990	
Romania	28 May 1992	
Russia	17 June 1992	
Senegal	6 Dec. 1983	25 Oct 1990
Sri Lanka	20 Sept. 1991	
Tunis	15 May 1990	
Turkey	3 Dec. 1985	18 May 1990
Zaire	3 Aug. 1984	28 July 1989

URUGUAY (10)

Belgium-Luxembourg	4 Nov. 1991	
Canada	16 May 1991	
Germany	4 May 1987	29 July 1990
Hungary	25 Aug. 1989	
Italy	21 Feb. 1990	
Netherlands	22 Sept. 1988	1 Aug. 1991
Romania	28 May 1990	
Spain	7 Apr. 1992	
Switzerland	7 Oct. 1988	
United Kingdom	21 Oct. 1991	

VENEZUELA (2)

Italy	5 June 1990
Netherlands	22 Oct. 1991