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The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law

*Bernard Kishoiyan**

I. INTRODUCTION

Bilateral investment treaties have today become an integral part of international relations and their existence undoubtedly has a great impact in influencing the formulation of international public policy.¹ Though most of these treaties have been made between developed and developing countries, some have been concluded among the developing countries themselves.²

A large number of commentators on bilateral investment treaties, or BITs, view them as vehicles that entrench customary principles of international law relating to the protection of foreign investment. The

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¹ See ICSID, *Investment and Protection Treaties* (1983); Ian Brownlie, *Legal Status of Natural Resources in International Law*, 162 RECUEIL DES COURS 255 (1979); Aron Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes*, in *THE ART OF ARBITRATION*, Liber Amicorum Pieter Sanders (J. Shulliz & A.J. Van den Berg 1982); Asken, *The Case for Bilateral Treaties*, in *PRIVATE INVESTORS ABROAD-PROBLEMS AND SOLUTIONS*, 357, 358 (M. Landwehr ed., 1981); Akinsanya Adeoye, *International Protection of Foreign Direct Investment in the Third World*, 36 INT'L & COMP. L.Q. 58 (1987); Peter Paul, *Investment Risk and Trust: The Role of International Law*, in INT'L L. & DEV. 131-62 (De Waart et al. eds., 1988); Krai Chitti, *International Treaties, Investment and Thailand*, THAIL. Y.B. INT'L & COMP. L. 76-83 (1986); Leich M. Nash, *International Economic Law: Bilateral Investment Treaties*, 80 AM. J. INT'L L. 948 (1986).

² See, e.g., Agreement: Promotion and Protection of Investments, May 9, 1980, Sing.-Sri Lanka, 1980, S.I.T.L. 32.

late F.A. Mann contended vigorously that "these treaties establish and accept and thus enlarge the force of traditional conceptions of the law of state responsibility for foreign investment." He noted in the first place the very large number of treaties, the scope of which is increased by the operation of the most favoured nation clause. Secondly, he noted the fact that many States which have purported to reject the traditional conceptions and standards included in these treaties have accepted them, when it came to the crunch.³ In an analysis delivered with his usual cogency, Dr Mann poses this question:

Is it possible for a State to reject the rule according to which alien property may be expropriated only on certain terms long believed to be required by customary international law, yet to accept it for the purpose of these treaties?

Mann believed that the paramount duty of States, as imposed by international law, is to observe the tenets of good faith and to act accordingly. Thus, where bilateral investment treaties "express a duty which customary law imposes or is widely believed to impose, they give very strong support to the existence of such a duty and preclude the contracting States from denying its existence."⁴

A former legal advisor to the U.S Department of State relied heavily on bilateral investment agreements (hereinafter BITs) to argue that the Hull formula of "prompt, adequate and effective" compensation continues to be accepted. He observed that

[s]tates have shown their real practice by establishing a network of international treaties. Provisions controlling compensation are contained in Bilateral Friendship, Commerce and Navigation (FCN) treaties. In the case of the United States, many of these are with developing countries as well as with developed nations. They contain provisions calling for compensation in terms equivalent to the traditional standard, although there are slight drafting variations. The history of these agreements indicates that the parties recognized that they were thereby making the customary

³ F.A. Mann, *British Treaties For the Promotion and Protection of Investment*, 52 BRR. Y.B. INT'L L. 241, 249 (1981). He suggested that the ICJ decision in the *North Sea Continental Shelf Case*, ICJ RPTS 4 (1969), to the effect that rules of international law cannot easily be deduced from bilateral treaties does not apply to the BITs because there existed a very large number of such treaties. Interestingly, Mann has elsewhere refuted this argument. Referring to taxation treaties, he has observed that:

"... although the international law of fiscal jurisdiction enjoys the unique and outstanding distinction of being regulated by a network of treaties, it is open to doubt whether they are expressive of, or exceptions to the rules of customary international law.

F.A. MANN, *STUDIES IN INTERNATIONAL LAW* 95 (1973).

⁴ Mann, *British Treaties*, *supra* note 3, at 249-51.

rule of international law explicit in the treaty language and reaffirming its effect.⁵

In this paper, I propose to investigate the utility of BITs in the formulation of customary international law in the area of state responsibility for the protection of alien property. It is my thesis that the frenetic conclusion of BITs is occasioned by the uncertainty that pervades international investment law since the advent of the developing countries on the international scene, and secondly, that international law has not kept pace with the developments that have taken place in the last thirty years in foreign direct investment. To the extent that this is so, I contend that each BIT is nothing but a *lex specialis* between parties designed to create a mutual regime of investment protection. In my view, such *lex specialis* is necessary simply because of the uncertainty in the law on investment protection but such uncertainty I humbly submit cannot be removed on a universal basis by these treaties as they do not consistently support definite legal principles. On the other hand, it is my contention that the proliferation of BITs will help to confirm the present and indicate the possible future trends in international foreign investment law.

II. THE GENESIS OF BILATERAL INVESTMENT TREATIES

Modern international economic relations regulated through bilateral or multilateral conventions were preceded by what then came to be known as gunboat diplomacy. In the pre-1914 era, Latin American countries protested violently against debt collection by European naval forces and marines. The joint naval intervention by Germany, Great Britain and Italy in Venezuela in 1902 had all the features of gun boat diplomacy.⁶ These and other European interventions sparked off characteristic exercises in *ad hoc* international law to suit debtors in default and gave birth to the Drago Doctrine and the Calvo Clause.⁷ In the Porter Convention of 1907, a sensible compromise was

⁵ Davis R. Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176, 177 (1984). For the view that property protection clauses in the FCN treaties were valueless, see ROBERT R. WILSON, *THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES* (1953). For the view that practice in the FCN Treaties on Compensation was not uniform, see STANLEY D. METZGER, *LAW OF INTERNATIONAL TRADE* 127 (1966).

⁶ EDWIN BORCHARD, *STATE INSOLVENCY AND FOREIGN BONDHOLDERS* 147 (1951); see *The Venezuela Preferential (Germany et al. v. Venez. et al.)*, 1916 HAGUE CT. REP. (Scott) 55 (Perm. Ct. Arb. Feb. 22, 1904).

⁷ See LUIS M. DRAGO, *LA REPUBLICA ARGENTINA Y EL CASO DE VENEZUELA* (1903); Drago, *State Loans in their Relation to International Policy*, 1 AM. J. INT'L L. 692 (1907). See also MARTENS, *PAR LA JUSTICE VERS LA PAIX* (1904). The Calvo Doctrine has its source in a number of statements made by the Argentine diplomat and international law writer Carlos

reached on the subject of forcible debt collection. In principle, willingness to submit to the peaceful settlement of investment disputes and to carry out awards was accepted as a substitute for unilateral and forcible debt collection by the home state of the creditors concerned.⁸

Throughout the modern era, especially in the 19th and 20th century, the rules of international law governing international commerce and foreign investment were reaffirmed with minor reformulations through bilateral treaties of Friendship, Commerce, and Navigation (FCN) between capital exporting countries and between them and capital importing countries.⁹ Further attempts to underpin the governing rules of international law by basing them on equivalent general principles of law recognized by "civilized" nations and alleged rules of natural law carried matters a little further.¹⁰ Yet they were symptomatic of a growing uneasiness in western countries about the willingness of the new states to comply with existing international law.¹¹ The

Calvo (1824-1906). M. CARLOS CALVO, *LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE* (Paris, 5th ed., 1896). See also CALVO, *MANUEL DE DROIT INTERNATIONAL PUBLIC ET PRIVÉ* Para 104, 134-37 (1884). The Calvo Clause binds foreign investors to waive appeal to diplomatic protection, and permits them to seek redress only in the local courts and under the law of the host state. The principles emanating from the Calvo Clause were embodied in the constitutions and statutes of Latin American countries and in treaties concluded among them. For examples of constitutional provisions, see BOL. CONST. art. 24; HOND. CONST. art. 33; VENEZ. CONST. art. 127. For texts of these, see CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1-20 (Albert P. Blaustein & Gisbert H. Flanz eds., 1971). See also FRANK G. DAWSON & IVAN L. HEAD, *INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS* 113-22 (1974). Such principles have been restated in inter-American instruments such as the famous Decision 24 issued by the Andean Pact Commission in 1970. ANDEAN FOREIGN INVESTMENT CODE, Dec. 31, 1970, 11 I.L.M. 126 (effective June 20, 1971). Article 51 of the decision provides that:

[I]n no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors.

Id. at 141. See also Abelardo L. Valdez, *The Andean Foreign Investment Code: An Analysis*, 7 J. INT'L L. & ECON. 1, 15 (1972); Opinion of the inter-American Juridical Committee on Transnational Enterprises, Dated February 13, 1976, Inter-Am. Jurid. Comm. 147 OEA/Ser.Q/iv.12 (May 1976).

⁸ Hague Convention II of 1907 (on the Limitation of the Employment of Force for the Recovery of Contract Debts), in J.B. SCOTT, *THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907* 89 (1915).

⁹ ROBERT R. WILSON, *UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW* 116-25 (1960). See also Martin Domke, *American Protection Against Foreign Expropriation in the Light of the Suez Canal Crisis*, 105 U. PA. L. REV. 1033 (1957); Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment. Present United States Practice*, 5 AM. J. COMP. L. 229 (1956); ROY PREISWERK, *LA PROTECTION DES INVESTISSEMENTS PRIVÉS DANS LES TRAITES BILATÉRAUX* 100-04 (1963).

¹⁰ WOLFGANG FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 78 (1964).

¹¹ See Ignaz Seidl-Hohenveldern, *Communist Theories on Confiscation and Expropriation. Critical Comments*, 7 AM. J. COMP. L. 541, 543-48 (1958); S. Prakash Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, 14 INT'L & COMP. L.Q.

1959 Abs-Shawcross Draft Convention on the protection of foreign direct investment was stillborn as it sought to re-assert the traditional norms of international law.¹² This was followed by the OECD Draft Convention which the OECD membership refused to adopt.¹³ The traditional norms of international law came under increasing attack from the developing countries. These traditional norms were based on a system of investment protection which relied on the existence of an international minimum standard of protection for foreign investment, the diplomatic protection by the home state in situations where such standards were not accorded the foreign investor. Responsibility was imposed upon the host state for failure to accord that standard of treatment.¹⁴ The alternative model long espoused by the Latin American countries and later adopted by the developing countries is that foreign investment is subject to national control and that disputes arising from it must be settled by domestic courts in accordance with domestic law.¹⁵ It is important to note that neither the Calvo Doctrine

121, 128, 130-31 (1965); R.P. Anand, *Attitude of Certain Asian-African States Towards Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55, 63 (1966); METZGER, *LAW OF INTERNATIONAL TRADE* 105 (1966); Rudolf Bystricky, *On the Principle of Obligatory Co-operation of States*, in *LEGAL PRINCIPLES GOVERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES* 99, 109-10 (M.K. Nawaz et al. eds., 1966).

¹² Abs-Shawcross Draft Convention, April 1959, 9 J.P.L. 116 (1960).

¹³ OECD Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, 7 I.L.M. 117 (1962). The bilateral investment agreements became popular after the failure of international efforts to secure a multilateral agreement. These efforts are described in GEORGE SCHWARZENBERGER, *FOREIGN INVESTMENT AND INTERNATIONAL LAW* 109-20 (1969).

¹⁴ For the customary law of investment protection, see generally EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1919). For the emergence of alternative views, see C.F. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1967). For the assertion of the traditional values, see Richard B. Lillich, *Duties of States Regarding the Civil Rights of Aliens*, 161 RECUEIL DES COURS 329 (1978). For the views propounded by the developing countries, see generally Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth*, 75 AM. J. INT'L L. 437 (1981); Charles N. Brower & John B. Tepe, *The Charter Of Economic Rights And Duties Of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 295; Robin C.A. White, *A New International Economic Order*, 24 INT'L COMP. L.Q. 542 (1975); STEPHEN NEFF, *FRIENDS BUT NO ALLIES: ECONOMIC LIBERALISM AND THE LAW OF NATIONS* (1990); Rozenal, *The Charter Of Economic Rights and Duties of States and the New International Economic Order*, VA. J. INT'L L. 309, 318-19 (1976); Eduardo Jimenez De Arechaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 302 (1978); Richard Falk, *The New States And International Legal Order*, 118 RECUEIL DES COURS 1, 29 (1966); JERZY MENKES, *THE NEW INTERNATIONAL ECONOMIC ORDER: INTERNATIONAL LEGAL OUTLINE* (1988). See also *THE CHALLENGE OF THE NEW INTERNATIONAL ECONOMIC ORDER* (Edwin P. Reubens Ed. 1981); THOMAS M. FRANCK & MARK M. MUNANSANGU, *THE NEW INTERNATIONAL ECONOMIC ORDER: INTERNATIONAL LAW IN THE MAKING?* 5 (1982).

¹⁵ CALVO, *supra* note 7, at 692. The Calvo Clause, which was the linchpin of Latin American policy to foreign investment, is binding on a foreign investor who accepts it (*but see infra* note 200 for the change in attitude towards foreign direct investment in the Latin American coun-

in its general application, nor any specific Calvo Clause, has inhibited states outside the Latin American region from the espousal of the claims of their nationals against other states, when they deemed such action necessary or appropriate.

The position championed by the developing countries reached its apogee in the promulgation of the 1974 U.N Charter of Economic Rights and Duties of States.¹⁶ The bone of contention in this charter was Article 2(2)(c) which provides that

[each state has the right t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.¹⁷

The apparent dichotomy in the norms that govern foreign investment militates against a conclusion that there exists an international consensus on what amounts to customary international law on foreign investments. A realistic assessment of the present situation of the law is that if a coherent body of customary principles on investment protection did exist, the emergence of contrary norms at the international level supported by the developing countries has considerably eroded the utility and juridical vitality of that body of law.¹⁸

It is this uncertainty relating to the law on state responsibility that has given an impetus to the negotiation of bilateral investment treaties. The argument that these treaties strengthen the now antiquated "customary law" on investment protection cannot be supported in the

tries). This position was stated in *North Am. Dredging Co. of Texas (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 26 (March 31, 1926). Commenting on the investors waiver of diplomatic protection, the commission held that the investor could not by so doing deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. *Id.* at 29. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 546 (3rd ed. 1979); L. OPPENHEIM, *INTERNATIONAL LAW* 345 (H. Lauterpacht ed., 1955). MAX SØGERESEN, *MANUAL OF PUBLIC INTERNATIONAL LAW* 592 (1968).

¹⁶ G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974). The Resolution was adopted by a large majority of 120 States, but the U.S. and five West European nations voted against it. Ten other states, including Japan and Canada abstained.

¹⁷ *Id.* at 52.

¹⁸ Views have even been expressed that the norms supported by the developing countries have displaced the traditional principles of foreign investment protection. See, e.g., White, *supra* note 14, at 547. Many others have taken the view that the resolutions are not binding but are only hortatory. See, e.g., Brower, *supra* note 14, at 302.

context in which such treaty making has taken place which usually involves the exchange of *quid pro quo* between the contracting parties. Each treaty is bound to be different from the other as each depends on the internal political order and the economic aspirations of each developing country. A country may concede far reaching rights to another on account of the quids it receives in return for such concessions. Each treaty then stands on its feet as formulating a particular legal order shared by only two countries and it reflects a compromise of the particular interests of the parties. As such, they do not give rise to any international consensus capable of creating a structure for the protection of foreign investment. Without prejudice to the foregoing, it is important to note that the BITs contain views and practice of states and for that reason they should engage the concern of the international lawyer on account of the incremental contribution they make, if any, to the formulation of an international consensus on the murky subject of state responsibility to foreign investors.

III. BILATERAL TREATIES AND INTERNATIONAL CUSTOMARY LAW

A. Philosophical Underpinnings

The term “treaty” is used here in its two connotations viz. as an agreement (*ad negotium*) i.e. as an act of consent and as a document i.e. as an instrument of proof (*ad instrumentum*). The earliest distinction between different categories of agreements—an ordinary contract (*Vertrag*) and a lawmaking agreement (*Vereinbarung*)—was made by Professor Binding, the distinguished German jurist. He defined the *Vereinbarung* as the fusion of different wills which have the same content in which every party declares the intent and aims at the realization of an end that is of interest to all.¹⁹ Using different terminology, Professor Bergbohm applied this distinction to international agreements. He distinguished between treaties made to realize a particular juridical operation establishing or abrogating rights of signatories, where the intent of founding a rule of international law, is lacking and treaties composed of abstract legal rules which the parties explicitly agree to recognize as common “norms” for their future conduct.²⁰

Applying Binding’s terminology to Bergbohm’s concept, Trieppe tried to establish a theory to explain why some treaties are *Vertragen*

¹⁹ BINDING, *DIE GRUNDUNG DES NORDDEUTSCHEN BUNDES* [THE ESTABLISHMENT OF THE NORTH GERMAN FEDERATION] 69, 70 (1869).

²⁰ BERGBOHM, *STAATSVERTRÄGE UND GESETZE ALS QUELLEN DES VÖLKERRECHTS* [TREATIES AND ACTS AS SOURCES OF INTERNATIONAL LAW] 77 (1877).

while others were *Vereinbarungen*. To him this was the key to solving the serious problem of the origin or *fondement* of international law. In his view, the only conceivable basis for international law is a will superior to the common will of each state. This in his view could only be the common will of States (*Gemeinwille*) as a unified will (*Willenseinheit*) created by a union of the individual wills of all states party to an agreement (*willenseigmung*). Accordingly, he adopted the distinction between agreements designed to satisfy different and opposing ends which thus could not create a common will and agreements which are in fact a realization of the identical aims of parties, concluded by the "common will" and as a result capable of making rules of law. The first are *Vertragen*; the second, *Vereinbarungen*.²¹ Nothing in this distinction necessarily entails the consequence that the *Vertrag* be bilateral and the *Vereinbarung* multilateral.²² The *Vereinbarung* must, in Triepel's view, be open to accession by all States, since it can bind other States only by their accession.²³

The foregoing analysis demonstrates that the earliest distinction between "law-making" and other treaties was based mainly on whether the parties to a treaty wanted the same or different things. It was an attempt to classify treaties according to two principles of organization: organization by common aims and organization by reciprocity.²⁴ This distinction was very early on heavily contested and its credibility doubted. Professor Gihl contended that even in the case of contract, the parties want one and the same thing, namely the undertaking of the whole agreement which comprises the content of the contract.²⁵ On the other hand, reciprocity is a characteristic feature of all treaties, including those claimed to be law-making.²⁶

²¹ HEINRICH TRIEPEL, *DRIT INTERNATIONAL ET DRIT INTERNE* [INTERNATIONAL LAW AND MUNICIPAL LAW] 68-69 (1920).

²² See Ibrahim F.I. Shihata, *The Treaty as a Law-Declaring and Custom Making Instrument*, 22 *REVUE EGYPTIENNE DE DROIT INTERNATIONAL* 51 (1966). But Prof Triepel contends that: "[L]e <<Contract>> . . . ne tolere que deux parties et . . . la Vereinbarung au contraire est, par nature <<pluralistique>>." *Id.* at 83.

²³ Professor Shihata contends that this fact reiterates the point that the law-making process to be carried by the *Vereinbarung* is not a legislation of general rules for all subjects of international law and consequently, is not "law-making" in any proper sense. Rather, it is nothing more than the laying down of rules for the future conduct of parties. Shihata, *supra* note 22, at 82-83.

²⁴ See a clear distinction between the two as the basic form of social order in FULLER, *FORMS AND LIMITS OF ADJUDICATION* 4 (1962).

²⁵ TORSTEN GIDL, *INTERNATIONAL LEGISLATION* 50 (1957). See also Werner Levi, *Law-Making Treaties*, 28 *MINN. L. REV.* 247, 250-56 (1944).

²⁶ See also D.H.N. Johnson, *The Conclusion of International Conferences*, 35 *BRIT. Y.B. INT'L L.* 1, 10 (1959). Professor Shihata contends that "[w]hile States may join with each other in setting down rules to govern their future relationship, this by no means excludes a covert reci-

Professor Oppenheim, who introduced Binding and Triepel's dichotomous principle of organization into English legal literature, found fault with the basic underpinnings of the doctrine. In his view, a multilateral (universal) treaty is "concluded for the purpose of laying down general rules of conduct among a considerable number of States."²⁷ He contends that all treaties are law-making in as much as they lay down rules of conduct which the parties are bound to observe as law.²⁸

B. The Formation Of International Custom

The essential function of a treaty is to represent the consent of its parties,²⁹ but it may be used as well to demonstrate the existence of a rule of customary law. Use of the treaty to show that it contributes to the formation of a customary rule or to prove that such a rule was in existence before the conclusion of the treaty is one technique a court may use to determine the content of custom.³⁰ The acceptance by States of a certain practice whether by treaty or by any other form of consent is alleged by most publicists to be the basis of international custom.³¹ The phrasing of Article 38(b) of the ICJ Statute lends

procuity which may, and usually does, show itself in the course of negotiations. Shihata, *supra* note 22, at 56.

²⁷ OPPENHEIM, *INTERNATIONAL LAW* 878-79 (H.Lauterpacht ed., 1955). See also Hersch Lauterpacht, *Regles Generales du Droit de la Paix*, 62 *RECUEIL DES COURS* 94, 156 (1937); Arnold D. McNair, *The Functions and Different Legal Characters of Treaties*, 11 *BRIT. Y.B. INT'L L.* 100, 112 (1930).

²⁸ OPPENHEIM, *INTERNATIONAL LAW* 878. He also declares that:

[T]he term 'law-making' does not imply that there exists among States international legislation in the accepted meaning of the term, namely the enactment of laws overriding the will of the dissenting minority. In the light of Oppenheim's analysis, it appears that the distinction that was attempted by the progenitors of this legal theory becomes superfluous. However, it is important to note that whether a treaty is law-making or not is ultimately very important; especially the number of parties to a treaty is important in practice. This was brought out succinctly in the *Reparation for Injuries Suffered in the Service of the United Nations Case*, 1949 *I.C.J. Rep.* 171, 185.

²⁹ See P.E. Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 *BRIT. Y.B. INT'L L.* 20, 25 (1925).

³⁰ Anthony D'Amato, *Treaties as a Source of General Rules of International Law*, 3 *HARV. INT'L BULL.* 1, 32 (1962). See also *The Wimbledon Case*, 1923 *P.C.I.J. (ser. A) No. 1*, at 25-28 (Aug. 17); *Mavromatis Case*, 1924 *P.C.I.J. (ser. A) No. 2*, at 35 (Aug. 30); *Nottebohm Case (Liech. v. Guat.)*, 1955 *I.C.J. Rep.* 4, at 22-23 (Apr. 6). For a contrary opinion on the holding in the *Nottebohm Case*, see Josef Kunz, *The Nottebohm Judgment (Second Phase)*, 54 *AM. J. INT'L L.* 536, 557 (1960).

³¹ HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 311 (1952); Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 *BRIT. Y.B. INT'L L.* 127, 136 (1937); Gihl, *supra* note 25, at 73; I.C. McGibbon, *Customary International Law*, 33 *BRIT. Y.B. INT'L L.* 123-28 (1957).

credence to this proposition as it states that the court will apply "international custom as evidence of a general practice accepted as law."³²

Legal scholars from a considerable antiquity have wrestled with the issue regarding the basis of the binding force of customary law. The "common tacit consent" theory advanced since the days of Grotius has come under increasing criticism. Professor Gihl, for example, finds the origin of customary legal rules in "individual actions undertaken by the legal person and spontaneously repeated by other legal persons, until their repetition becomes so constant that they will also in similar circumstances be repeated in the future."³³ Adopting Gihl's view that it is juridical consciousness (*la conscience juridique*) that transforms usage into custom, Professor Politis asserts that

"... the rule of law is binding for all nations belonging to the social prelieu in which arose juridical consciousness from which it sprang, even though it is extremely manifested in the relations of some of them only."³⁴

Another test was suggested by Professor Kopelmanas, who wrote that the "formation and existence of a custom depends on its conformity with the social needs of a legal order. The custom results from acts of the same character because those who do them cannot do otherwise." From this he concluded that "whenever facts themselves impose a certain conduct on subjects of law, we have a customary rule."³⁵ This test of "social necessity" was criticized by Sorenson who stated that reciprocity is an element in both "social necessity" and in considerations behind international comity—that "cette notion parait mal appropriée a servir de critere entre la coutume juridique et les actes de courtoisie et de simples usages sans caractere obligatoire."³⁶ For the customary law to be valid, there must be *opinio juris*, i.e. the conviction of States that

³² ICJ STATUTE, ART. 38(B); Gerald Fitzmaurice, *The Law and Procedure of the ICJ*, (1951-54): *General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 33, 67-68 (1953); Charles De Visscher, *La Codification du Droit International*, 6 RECUEIL DES COURS 325 (1929).

³³ GIHL, *supra* note 25, at 25.

³⁴ NICOLA POLITIS, *THE NEW ASPECTS OF INTERNATIONAL LAW* 15 (1928). Professor Shihata has disputed this analysis as too grandiose and not in accord with international legal reality. He contends that:

This explanation seems to exceed the actual stage of development of international law. It assumes a sense of community so developed that it can be expressed by the acts of some members representing the "juridical conscience" of the whole community. Since this developed sense of community is lacking, the validity of the analysis based upon it is at best doubtful.

Shihata, *supra* note 22, at 71.

³⁵ Kopelmanas, *supra* note 31, at 148. See also FREDERICK POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* 54 (London, Macmillan 1882).

³⁶ MAX SØØERENSON, *LES SOURCES DE DROIT INTERNATIONAL* 107 (1946).

the practice has become legally binding.³⁷ Shihata contends that consent plays its role when custom is in the stage of formation, not after it is already made. When a rule, formulated by an impressive number of acts of consent emerges as a customary rule, he argues that it becomes as such, a rule of law applicable to all, regardless of whether a state accepts or rejects it thereafter. In his view, *opinio juris* cannot be reduced to consent since such reduction involves the equation of customary rules with conventional rules. If consent is all that is required, custom, he states, will be another name for unwritten treaties.³⁸ Customary laws develop and wither according to a system different from that of treaties. While both depend in their formation on the wilful acts of states, the former emerge as general rules of law, binding not because they are "consented to" but because they are felt "obligatory."³⁹ He further contends that:

While it is true that a State may acquire a right (in a territory or otherwise) by the mere consent of other States concerned, a general customary rule needs more than such consent. There should be signs that even States not participants in making the rule have come to observe it as part of the general law and have acted on this understanding. If consent is sufficient in the first case to validate the asserted right against States which accept it, it is also required-but not sufficient-in the other, where the principle should be accepted by all States concerned as a legal principle. This "legality" will be conferred only when there is a general conviction that States must respect the rights based on the customary principle as a matter of legal obligation, i.e. when the repetition of State practice is perfected by an *opinio juris*.⁴⁰

The existence of such a conviction, a necessary requirement for the formation of custom, could be demonstrated by various means. Some publicists have contended that it is a question of inference based on overt acts supposed to be evidence of a certain mental state.⁴¹ In this respect, treaties as an explicit expression of the will of States, play a fundamental evidential role. Professor Hall, in his treatise on international law, argues *inter-alia* that treaties differ from other evidences of national opinion in that their true character can generally be better appreciated. He asserts that:

³⁷ Kopelmanas, *supra* note 31, at 151. In the *S.S Lotus*, 1928 P.C.I.J. (Ser. A) No.10, at 28 et seq., the ICJ found *Opinio juris* lacking and concluded that the alleged customary rule did not exist.

³⁸ Shihata, *supra* note 22, at 72.

³⁹ Shihata, *supra* note 22, at 72-73. See also I. SMITH, *GREAT BRITAIN AND THE LAW OF NATIONS* 13 (1932).

⁴⁰ Shihata, *supra* note 22, at 73.

⁴¹ RONALD F. ROXBURGH, *INTERNATIONAL CONVENTIONS AND THIRD STATES* 57 (1917).

... they are strong, concrete facts, easily seized and easily understood. They are therefore, of the greatest use as marking points in the movement of thought. If treaties modifying an existing practice, or creating a new one, are found to grow in number, and to be made between States placed in circumstances of sufficient diversity; if they are found to become nearly universal for a while, and then to dwindle away, leaving a practice more or less confirmed, then it is known that a battle has taken place between new and old ideas, that the former called in the aid of special contracts till their victory was established, and that when they no longer needed external assistance, they no longer cared to express themselves in the form of so-called conventional law. While, therefore, treaties are usually allied with a charge of law, they have no power to turn controverted into authoritative doctrines, and they have but little independent effect in hastening the moment at which the alteration is accomplished. Treaties are permanently obeyed when they represent the continued wishes of the contracting parties.⁴²

C. World Court, State Practice and International Customary Law

The practice of the World court in determining the utility of bilateral agreements in the formulation of customary international law has been far from consistent. In the *Nottebohm Case*,⁴³ the ICJ found that State practice as reflected in the Bancroft Treaties,⁴⁴ as well as in two multilateral treaties, bore out the necessity of a "genuine link" between a State and its national if an international claim was to be presented on behalf of that individual.⁴⁵ In the *S.S. Wimbledon Case*,⁴⁶ the PCIJ was faced with the task of reconciling the provisions of two bilateral treaties establishing international regimes with the provisions of a multilateral treaty. The court first found a similarity between the provisions of the treaties relating to the Panama and Suez Canal which established the freedom of passage through these international waterways. On the basis of its finding here, it proceeded to use its finding to construe the analogous provisions of the Treaty of Versailles. The court, however, did not declare that the common rule running through the various treaties formed customary international law

⁴² WILLIAM F. HALL, *INTERNATIONAL LAW* 9, 11-12 (8th ed. 1924).

⁴³ *Nottebohm Case* (Liech. V. Guat.), 1955 I.C.J. Rep. 4, 22-23 (Apr. 6).

⁴⁴ E.g., *Naturalization Convention*, U.S.-Baden, 16 Stat. 731, Malloy T.S. No. 15, 1 1776-1909, at 53 (1910).

⁴⁵ The court, however, did not explain why a series of bilateral treaties concluded by the U.S. in the 19th century with a group of German States which had subsequently lost their separate identities (treaties which, moreover, had ceased to be in effect many decades before), much less a Pan-American Convention of regional application and a codification treaty not in force between the litigating States, should be persuasive evidence of a rule of customary law.

⁴⁶ *S.S. Wimbledon*, 1923 P.C.I.J. (Ser.A) No.1, at 25-28 (August 17)(advisory opinion). The court here speaks of "consistent practice," gives examples and calls them precedents.

applicable to an instance in which there was not a treaty.⁴⁷ In the *Colombian-Peruvian Case*,⁴⁸ the court raised doubt on the utility of a series of treaties with conflicting provisions and evincing no single line of practice in the formation of customary international law. The court stated that:

The facts brought to the knowledge of the court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.⁴⁹

In the *Norwegian Fisheries Case*,⁵⁰ the variety of positions taken on the ten mile closing line for bays led the ICJ to conclude that customary international law did not employ that measurement.⁵¹ In the light of the foregoing, a question may be asked about the value of arbitral decisions in the formation of customary international law. Professor Baxter has argued that a decision of an international tribunal, which can *arguendo* be taken as legitimate evidence of international law, and a bilateral treaty converge at the point of the decision creating a conventional relation between the parties to the dispute. If the disputants have agreed to submit the matter to arbitration or adjudication, they have in effect delegated to the tribunal the function of establishing the specific rules by which they will be bound, and that decision may be looked upon as part of the treaty law binding the parties. As the tribunal declared in the *Martini Case*:⁵²

An international arbitral award constitutes a direct legal relationship between the two States. The arbitral award is rather of the nature of an international treaty than of a decision of a national court. However, while it may be technically correct to say that an arbitral award creates a sort of conventional relation between the parties, this conclusion does not really support the assertion that a bilateral treaty may be evidence of international law. The persuasiveness of an arbitral award derives from the fact that a third party has declared the law, and the treaty relation-

⁴⁷ SjøERENSON, *supra* note 36, at 96. See CAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 138 (1946); C. WILFRED JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 253-54 (1964).

⁴⁸ Asylum (Colom. v. Peru), 1950 I.C.J. Rep. 266, at 277 (Nov. 20).

⁴⁹ *Id.*

⁵⁰ Fisheries (Gr. Brit. v. Nor.), 1951 I.C.J. Rep. P. 116, at 131 (Dec.18).

⁵¹ *Id.* The court specifically alluded to the adoption of that rule by some States in "their treaties and conventions" but found that other States had used other limits."

⁵² Martini Case (Italy. v. Venez.), 25 AM. J. INT'L L. 554, 557 (1931).

ship neither diminishes nor enhances the force of the award as evidence of the law.⁵³

With regard to State practice, it has been contended that the recurrence of identical provisions in a series of bilateral treaties like the succession of bilateral air transport agreements modelled on the original agreement between the U.K and the U.S at Bermuda in 1946⁵⁴ may create what amounts to a "form contract" or a particular formula by which two States reconciled their differences; consequently, it may commend itself to other States as a reasonable compromise of conflicting demands.⁵⁵

A threshold issue that needs to be examined before delving into BITs is whether a succession of similar bilateral treaties may legitimately be employed of itself to establish the existence of a rule of customary international law binding on all States. This issue was clearly dealt with in the famous controversy between the U.K and the U.S in 1916 concerning the removal by the British authorities of Germans, some of whom were alleged to be naval reservists, from vessels under the flag of the U.S, then a neutral. In defence of its conduct, the British Government referred to the considerable number of treaties concluded between the two countries that permitted "military persons" to be taken off neutral vessels.⁵⁶ The U.S responded:

If these treaties can be regarded as representing a practice of nations, as the British government suggest, it was a practice recognized as permissible only under treaty agreement. The government of the U.S is not aware of any proof that these treaty provisions were declaratory of international law, or they were so considered at the time of their signature or subsequently. The more reasonable view to take of them is that they represent an exception to the general practice of nations, just as the rule of "free ships, free goods", provided for in many of the same treaties, was an exception to the practice of nations and was not generally adopted until about the middle of the last century. This view is borne out by the consistent practice of the U.S during the very period when these treaties were in force.⁵⁷

⁵³ Richard Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS, 27 (1970).

⁵⁴ Air Services Agreement, Feb. 11, 1946, U.S.-Gr. Brit., 3 U.N.T.S 253.

⁵⁵ There are, for example, bilateral treaties modeled on the compromise that was adopted at the Second Geneva Conference on the Law of the Sea. See, e.g., Exchange of Notes Modifying the Convention of 24 June 1901, Apr. 27, 1959, Den.-Gr.Brit., 337 U.N.T.S 416. See Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751, 773-782 (1960).

⁵⁶ Memorandum from British Secretary of State for Foreign Affairs (Grey) to American Ambassador in Britain (Page), (July 15, 1916), in FOREIGN RELATIONS OF THE UNITED STATES 653, 654 (Supp. 1916).

⁵⁷ Memorandum from Secretary of State to American Ambassador in Great Britain (Page), (Dec 1, 1916), in FOREIGN RELATIONS OF THE UNITED STATES 667, 669 (Supp. 1916); Wm. W.

It is contended that a bilateral treaty can be understood to be in derogation of the law if the state of customary international law is such that the activity dealt with lies exclusively within the sovereign domain of a State. For example, a State has no legal obligation to establish postal, telephone, radio or television relations with another State. States are also not obliged to resort to judicial settlement of international disputes unless they specifically agree.⁵⁸ There is also no general duty to extradite, and a State commits no violation of international law in refusing to hand a fugitive in the absence of a treaty.⁵⁹ Because of the sovereignty that a State enjoys in the airspace over its territory,⁶⁰ it is under no obligation, in the absence of a treaty, to allow the civil aircraft of other States to fly over its territory or to land on it. It is important to note that a large corpus of treaties often similar in form exist dealing with the various subjects itemized above. The multiplicity of treaties of extradition or air transport agreements does nothing to prove a rule of customary international law.⁶¹

In the light of the foregoing analysis of bilateral agreements as possible vehicles for the creation of customary international law, it now remains to be seen whether bilateral investment agreements have led to the creation of customary international law governing international investments. Instead of considering the entire landscape covered by BITs, specific aspects will be considered and carefully analyzed.

IV. DEFINITION OF PROPERTY

Article I of the U.K-Singapore Treaty⁶² can be taken as representative of the types of property listed as being protected by the treaty. The term investment in the treaty is defined as including: (i) movable and immovable property and property rights such as mortgages, liens and pledges, (ii) shares, stocks and debentures in companies and other interests in companies, (iii) claims to money or to any other performance under contracts having a financial value, (iv) intellectual property rights and goodwill, (v) business concessions including concessions relating to natural resources.

Bishop, *General Course of Public International Law*, 115 HAGUE ACADEMY, RECUEIL DES COURS 147, 229-30 (1965).

⁵⁸ Status of Eastern Carelia, 1923 P.C.I.J. (Ser. B) No. 5, at 27 (July 23)(advisory opinion).

⁵⁹ OPPENHEIM, INTERNATIONAL LAW 696 (1955) (Launterpacht ed., 8th ed. 1955).

⁶⁰ Convention on International Civil Aviation, Dec. 7, 1944, art. 1, 15 U.N.T.S 296.

⁶¹ See Baxter, *supra* note 53, at 99.

⁶² Agreement for the Promotion and Protection of Investments, July 22, 1975, Sing.-Gr. Brit., 15 I.L.M. 591 (1975).

The American model BIT contains a longer list which includes besides the five categories listed above, "licenses and permits issued pursuant to law, including those issued for manufacture and sale of products," and "any right conferred by law or contract, including rights to search for or utilize natural resources," and "to rights to manufacture and sell products."⁶³ The latter rights are protected by domestic law unlike intellectual property rights which are protected by international conventions⁶⁴ or concession rights which are regarded as internationalized in some arbitral awards.⁶⁵

The bilateral investment treaties have contributed to the expansion of a concept of property in international law to include intellectual property rights as well. Such a trend had already emerged and is strengthened by the treaties which contain evidence of what the participating states include within the notion of property. Prior to the foregoing developments, diplomatic protection of property concerned the tangible property of aliens. Works on state responsibility or diplomatic protection seldom referred to the protection of intangible property such as patents, copyright and know-how. For example, Professor Verdross, writing in 1931, excluded from his definition of property recognized by international law, "so-called literary[,] artistic and industrial property."⁶⁶ A sizable number of treaties, judicial decisions and arbitral awards have defined the concept of property in international law to include intangible property and intellectual property rights. The bilateral investment treaties confirm these trends and give a clear indication as to the extent of property that is protected. Incrementally, the BITs have elaborated and clarified the definition of what amounts to property. This is a particularly important develop-

⁶³ Treaty Between the United States of America and . . . Concerning the Reciprocal Encouragement and Protection of Investment (January 11, 1982) in U.S. Export Weekly (BNA) No. 400, at 734 (March 23, 1982), art. 1(c) V and VI of the Model Treaty.

⁶⁴ The Paris Convention For the Protection of Industrial Property, March 20, 1883, 25 Stat. 1372, 2 Malloy 1935.

⁶⁵ See, e.g., *Texaco v. Libya*, 53 I.L.R. 389 (1978); *Losinger & Cie*, 1936 P.C.I.J. (ser. C), No. 78, at 32; *Petroleum Development Ltd v. Sheikh of Abu Dhabi*, 1952 18 I.L.R. 149; *Sapphire Int'l Petroleum Ltd. v. National Iranian Oil Co.*, 18 I.L.R. 175-76 (1963); *Revere Copper Brass Inc. OPIC* 56 I.L.R. 271-72. For a contrary view, see M. Sonarajah, *The Myth of International Contract Law*, 15 J. WORLD TRADE L. 187 (1981).

⁶⁶ A. Verdross, *Les Règles Internationales Concernant le Traitement des Etrangères*, 37 RECUEIL DES COURS 327, 364 (1931). See GILLIAN WHITE, NATIONALIZATION OF FOREIGN PROPERTY 48-49, (1961). It is important to note however that the Intellectual Property was protected from as far back as 1883 with the signing of the Paris Convention on the Protection of Intellectual Property, 13 U.S.T. 1, T.I.A.S. No. 4931, 828 U.N.T.S. 107 (Revised at Lisbon on October 31, 1958). Protection of literary and artistic works dates to the Berne Copyright Convention of 1886.

ment given the fact that much value is attached to the transfer of technology in modern investment contracts such as joint venture agreements in which the protection of intellectual property is of paramount importance.

V. APPROVED INVESTMENTS

Protection under bilateral investment treaties is usually given to investments that are approved by the contracting parties. In effect, this creates two categories of alien property: one that is protected by the terms of the treaty and the other by the other ordinary principles of public international law on the protection of alien property. The creation of these two categories of alien property explicitly manifests the *lex specialis* nature of BITs. Distinctions between approved and unapproved investment comes about as a result of states seeking to control the entry of foreign investment on the basis of assessments of the effect of such investments on their economy or their national security.⁶⁷ Many of the legislative devices adopted would seek to impose certain requirements like the meeting of production quotas, the

⁶⁷ States have rejected the argument of classical economics to the effect that all foreign investment flows are beneficial to developing countries. For a contrary argument, see *White House Policy Statement on Economic Assistance and Investment Security In Developing Countries*, 11 I.L.M. 239 (1972). Some developed countries now also have restrictions on the investment that enters the country from abroad. For Canada, see Alan Rugman, *The Regulation of Foreign Investment in Canada*, 11 J.W. TR. L. 323 (1977); Andrews, *An Evaluation of Foreign Investment in Canada*, 8 VAND. J. TRANS. L. 164 (1978); For the U.S., see Jose Alvarez, *Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exxon-Florio*, VA. J. INT'L L. 3 (1989). The Exxon-Florio Amendment to the 1988 Trade Act. Pub. L. No. 100-418 art. 5021, 102 Stat. 1425 (codified at 50 U.S.C. App. Art. 2170 (Supp. 1989)). This Amendment grants the President discretionary authority to block, for national security reasons, mergers, acquisitions and takeovers which would result in "foreign control of persons engaged in interstate commerce." Opponents of Foreign Direct Investment in the U.S. regard it as a threat to "national security," because foreign ownership of a defence contractor may compromise confidential information; may threaten access to critical technology or equipment (particularly if production is moved off-shore); may seriously damage domestic producers of critical components thereby making the U.S. further dependent on foreign sources of supply; or may result in redirecting investment or research and development away from the U.S. defense needs. Foreign portfolio investment is also regarded as potentially threatening to the "national economic interest" because a withdrawal of foreign funds could seriously disrupt the economy." See Alvarez, *supra*, at 5. See also MARTIN TOLCHIN & SUSAN TOLCHIN, *BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION* 219, 261-64, (1988); Note, *The Rising Tide of Reverse Flow: Would a Legislative Breakwater Violate U.S. Treaty Commitment?*, 72 MICH. L. REV. 552 (1974); Mark L. Hanson, *The Regulation of Foreign Direct Investment in the U.S. Defense Industry*, 9 NW. J. INT'L L. & BUS. 658, 672-74 (1989); Cynthia Mitchell, WALL ST. J., April 28, 1988 at 1; Schwarz, *Foreign Ownership of U.S. Defense Companies: Where do we Draw the Line?* F.P.I. Policy Briefs: Foreign Ownership Of U.S. Defense Companies (1989); N. GLICKMAN & D. WOODWARD, *THE NEW COMPETITORS: HOW FOREIGN INVESTORS ARE CHANGING THE U.S. ECONOMY* (1989).

export of certain percentage of the product, compulsory employment of a percentage of local personnel and transfer of technology to local owners.⁶⁸ Such legislation also seek to ensure that foreign investors do not engage in restrictive business practices, transfer pricing and other conduct which may harm the development aim of the country. Where an investor is held to be in breach of such regulations by the host state, the investor loses the protection given by the BIT. On account of the foregoing, the role of BITs in the protection of foreign investment becomes very limited.⁶⁹

Singapore's BITs are indicative of the attitude of most developing countries on protection of only approved investments even though Singapore is generally a country that favors foreign investment. For example, Singapore refused to enter into a BIT with the U.S based on the model treaty, the clause requiring the prohibition of performance requirements being one of the reasons for the refusal.⁷⁰ Singapore's BITs with the U.K and France contains specific articles limiting protection to "investments made before or after the coming into force of this agreement which are specifically approved in writing."⁷¹ In Singapore's treaty with the Netherlands, the obligation is one sided, Singapore giving protection only to approved investments, whereas the

⁶⁸ B. ROCHMAT, CONTRACTUAL ARRANGEMENTS IN OIL AND GAS MINING ENTERPRISES IN INDONESIA (1981).

⁶⁹ The U.S model BIT seeks to avoid such screening devices in the interests of free flows of investment. See Lionel H. Olmer, *Barriers to U.S Foreign Investment*, in SOUTHWESTERN LEGAL FOUNDATION, PRIVATE INVESTORS ABROAD 63 (1983). The model U.S BIT is against performance requirements and sees them as inhibiting free flow of capital from the developed to the developing countries.

⁷⁰ The failure of the negotiations was attributed to five causes: Singapore's refusal to include a taxation provision in the BIT, disagreement over the inclusion of a custom's union exception, U.S opposition to a provision requiring the exhaustion of local remedies by investors prior to seeking diplomatic redress, Singapore's insistence on applying the BIT's protection only to approved investments, and Singapore's opposition to retroactive application of the BIT to investments made prior to, and existing at the time of, the effective date of the BIT. See American Society of International Law, Unofficial Report of the Corporate Consultation (July 10, 1980).

⁷¹ Agreement for the Promotion and Protection of Investments, July 22, 1975, Gr. Brit.-Sing., art. 12, 1018 U.N.T.S. 175; France-Singapore Treaty, September 8, 1975, art. 9, U.N.T.S. 1965; Swiss-Singapore BIT, March 6, 1978, art 1(2), U.N.T.S. 1979. Article 1(2) of the Singapore-Swiss BIT provides that:

The making of investments by nationals or companies of one contracting party in the territory of the other contracting party shall comply with such admission procedures as may be established by that other contracting party. Only an investment so admitted and, to the extent that a written approval is required, specifically approved in writing by that other contracting party as an admitted investment, shall enjoy the benefits and protection of this agreement.

It is important to note that the British BITs with Paraguay and Bangladesh do not contain an approval of investments clause. See Agreement for the Promotion and Protection of Investments, June 19, 1980, Gr. Brit.-Bangl., Brit. T.S. No. 73.

Netherlands promised protection to all investments made by Singapore's nationals.⁷² In Singapore's treaty with Germany, the term "investment" is defined to refer only to investments approved by Singapore.⁷³ The Sweden-PRC treaty contains no express "prior approval" clause. Under Article 8, the treaty applies to all investments made after July 1, 1979.⁷⁴ The definition of "investment" in the treaty contains a qualification not found in the British, French, Swiss, Dutch and German treaties. Article 1 provides that the term "investment" shall comprise "every kind of asset invested by the investors of one contracting state in the territory of the other contracting state in accordance with the laws and regulations of that state. . ."⁷⁵ The effect of this provision is to incorporate any legislation mandating approval of investments by the PRC prior to the entry of the investor. In a study of 335 BITs done by the International Centre for the Settlement of Investment Disputes (ICSID), it was found that 126 BITs (over 1/3 of which are German) provide that the contracting parties shall admit such investment in accordance with their legislation.⁷⁶ Fifty-four BITs contain the same provision with the addition of "regulations and/or administrative practices."⁷⁷ In 59 BITs, of which 42 are U.K, seven Dutch, and three Belgian BITs, the obligation to admit a foreign investment is subject to the contracting parties' right to exercise powers conferred on them by their national legislation. In nine BITs, the contracting parties merely require that each endeavour to admit such investments be subject to their laws and regulations.⁷⁸ Fifteen BITs, including two of the three Belgian BITs referred to above, expressly preserve the right of each party to decide its own economic policies notwithstanding the provisions of the BIT.⁷⁹ Fourteen BITs provide

⁷² Agreement on Economic Co-operation, May 16, 1972, Neth.-Sing., art. 12(a)-(b), 191 U.N.T.S. 87.

⁷³ Treaty Concerning the Promotion and Reciprocal Protection of Investments, Oct. 3, 1973, F.D.R.-Sing., art. 1, 1008 U.N.T.S. 221. Art. 1(ii) provides that in respect of investments in the territory of the Republic of Singapore, investments shall mean "all investments approved in writing by the Government of the Republic of Singapore irrespective of whether these investments were made before or after the coming into force of the present treaty."

⁷⁴ Agreement on the Mutual Protection of Investments, Mar. 29, 1982, P.R.C.-Swed., art. 8, 21 I.L.M. 477, 478.

⁷⁵ *Id.* art. 1, at 477.

⁷⁶ Mohamed Khalil, *Treatment of Foreign Investment in BITs*, 7 ICSID REV.-FILJ 350 (1992)[hereinafter ICSID study].

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

that the obligation to admit the investment shall be in accordance with the national or most favored nation treatment.⁸⁰

From the foregoing, one can clearly deduce the customary rule that foreign investments are subject to local laws and regulations which may require inter-alia, prior approval unless the BITs provide otherwise. The disparities in the parameters used to determine protected alien investments in different BITs militates against an argument to the effect that BITs are necessarily indicative of customary international law.

VI. CORPORATE NATIONALITY

Prior to 1970, the ICJ had not developed a consistent doctrine establishing when a State may intervene on behalf of one of its nationals whose shareholding in a foreign corporation had been damaged.⁸¹ When foreign investment was not concerned, it was settled law that when nationals had been directly injured by a foreign State's actions, and those nationals had sufficiently exhausted all local remedies, then their State could commence international proceedings on their behalf.⁸² The ability of shareholders to enforce their rights hinged on the municipal law applicable to the corporation.⁸³ Under the Municipal law of some States, only the corporate entity that had been harmed could assert a claim to vindicate its rights, not the shareholders of that corporate entity. In such circumstances, foreign sharehold-

⁸⁰ *Id.* See G. Gallins, *Bilateral Investment Treaties*, 2 J. NAT. RESOURCES L. 77 (1984); M. Sonarajah, *State Responsibility and Bilateral Investment Treaties*, 20 J. WORLD TRADE L. 79 (1986); Jürgen Voss, *The Promotion and Protection of European Private Investment in Developing Countries*, 18 C.M.L.R. 363 (1981).

⁸¹ Before 1970, the most cited precedent involving shareholder rights was the *Delagoa Bay Railway Case* in 2 J.B. MOORE, *INTERNATIONAL ARBITRATIONS* 1865 (1898). In this case, a British corporation held shares in a Portuguese corporation and American nationals were shareholders in the British corporation. The Portuguese Government had seized a railway owned by the Portuguese corporation. Consequently, the British Government brought suit against the Portuguese Government to compensate the injured interests of the British corporation. The British Government argued that since the Portuguese corporation was practically defunct, the British corporation had no shareholder remedy except through the intervention of its own government. Similarly, the United States contended that its nationals were also without remedy, and it should be permitted to intervene on behalf of both United States and British shareholders. The question of compensation was ultimately referred by the three Governments to arbitration. See Bagge, *Intervention on the Ground of Damage Caused to Nationals, With Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders*, BRIT. Y.B. INT'L L. 172-73 (1959) (citing J.B. MOORE, 2 *INTERNATIONAL ARBITRATIONS* 1865 (1898)).

⁸² Bagge, *supra* note 81, at 164-67. See also *Draft Articles on State Responsibility, Report of the International Law Commission on the Work of its Thirtieth Session*, U.N. GAOR, 33d Sess., Supp. No.10, at 187, U.N. Doc. A/33/10 (1979).

⁸³ Bagge, *supra* note 81, at 169.

ers might lose a substantial portion of their investment since municipal law prevented the investor from being able to pursue an effective remedy for damage inflicted by the State against the corporation. Thus, questions were raised whether customary international law required that foreign shareholders be afforded some legal protection notwithstanding a contrary determination under municipal law.⁸⁴ In *Barcelona Traction Case*⁸⁵ the ICJ decisively concluded that foreign shareholders had no right under customary international law to assert a damage claim on their own behalf against the State of incorporation. The company, Barcelona Traction Light & Power Co. Ltd was incorporated under Canadian law in 1911 and provided electric service in Spain through its Spanish subsidiaries. Eighty-eight per cent of the company was owned by Belgian nationals.⁸⁶ As a result of the Spanish civil war, servicing of the company's bonds was suspended, and although payment of interest on the company's peseta bonds was resumed in 1940, the Spanish government refused to authorize foreign currency transfers that would have enabled the company to meet its interest payments on its sterling bonds.⁸⁷ By February 1948, a Spanish court had declared the company bankrupt. The trustees then decided that new shares in the subsidiary companies would be issued and sold at public auction, while shares owned by foreigners would be cancelled. Consequently, Belgium brought suit against Spain before the court seeking compensation for the injuries suffered by Belgian nationals. Spain challenged Belgium's standing to bring the claim, arguing that municipal law permitted only the company itself to seek compensation. The majority of the court upheld the Spanish objection, stating that:

[T]he mere fact that damage is sustained by both the company and shareholder does not imply that both are entitled to claim compensation . . . Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate limits may have suffered from the same wrong, it is only one entity whose rights have been infringed . . .⁸⁸

⁸⁴ Bagge, *supra* note 81, at 169-70.

⁸⁵ Case Concerning Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 4, 7 (Feb. 5)(Second Phase).

⁸⁶ *Id.* at 12.

⁸⁷ *Id.* at 8.

⁸⁸ *Id.* at para. 36.

The court thus conditioned Belgium's standing upon the nationality of Barcelona Traction.⁸⁹ Since Barcelona Traction was not a Belgian company, the court concluded that diplomatic protection could only be invoked by Canada, the State of incorporation.⁹⁰

The *Barcelona Traction* decision rested on the court's fear that multiple claims and proceedings would result should the holder of one percent interest in a company and ninety percent holder equally enjoy the benefit of legal protection. The court specifically pointed out that a contrary holding "could create an atmosphere of confusion and insecurity in international economic relations."⁹¹ The court acknowledged, however, that foreign shareholders did have remedies at the international level in two exceptional cases. First, Barcelona Traction recognized a remedy for foreign shareholders under customary international law if they were deprived of their "direct rights" as opposed to their "interests" in the company.⁹² These rights, the court said, included the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder the court said, had an independent right of action.⁹³ The court emphasized, however, the distinction between a direct infringement of the shareholder's rights and difficulties or financial losses to which he may be exposed as the result of the situation of the company which are not justiciable except through the company.⁹⁴ Second, the court said that the Barcelona Traction rule

⁸⁹ See Comment, *Belgian Nationality of Shareholders in Canadian Corporation Held Insufficient to Give Belgium Standing to Sue on Behalf of the Shareholders in the International Court of Justice*, 3 N.Y.U.J. INT'L L. & POL. 391, 393 (1970).

⁹⁰ Two dominant theories have evolved to determine the nationality of a corporate entity. In the United States and the common law countries, a corporation is a national of the State in which it is incorporated. In the civil law countries, the "seat of control," e.g. the . . . location of the head office of the company, determines the nationality of the corporation. See *Société Constr. Ltd v. Brown*, 1897 JOURNAL DU PALAIS 84, 1897 JOURNAL DE TRIBUNAUX DE COMMERCE 552. Since Belgium failed to meet the criteria of either theory, it argued that an exception to the nationality test should be established, requiring the "corporate veil" to be pierced to reveal the nationality of the shareholders. See *Barcelona Traction*, 1970 I.C.J. at para. 39. Belgium pointed out that international law had disregarded the corporate entity in several situations, such as in Enemy Property Legislation. See Comment, *supra* note 89, at 394. However, the court rejected Belgium's contention, stating that these practices were "distinctive processes," arising out of circumstances peculiar to the respective situations "rather than evidence of customary international law." *Barcelona Traction*, 1970 I.C.J. at para. 39.

⁹¹ *Barcelona Traction*, 1970 I.C.J. at para. 49.

⁹² *Barcelona Traction*, 1970 I.C.J. at para. 36.

⁹³ *Id.* at para. 47.

⁹⁴ *Id.* at para. 47.

would not apply where a breach of a treaty provision is involved. The court pointed out that

[T]he Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty . . .⁹⁵

In the judgment, the court referred to the growth of MNCs within the international economy and expressed surprise that there had been little development towards securing greater protection for investments by MNCs.⁹⁶ The court indicated clearly that the best technique for protecting shareholders may be in bilateral and multilateral arrangements on investment protection. The court stated:

Thus, in the present state of the law, the protection of shareholders requires that recourse be made to treaty stipulation or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the means of wider economic arrangements. Indeed, whether in the form of bilateral or multilateral treaties between States, or in that of agreements between States and companies, there has since the second world war been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in the case of disputes concerning the treatment of investing companies by the States in which they invest their capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the parties to the present case.⁹⁷

The court thus recognized that, notwithstanding customary international law, nations could create treaties that amplify the rights of their nationals as shareholders in foreign corporations.⁹⁸ This decision contributed significantly to the impetus leading to the conclusion of BITs

⁹⁵ *Barcelona Traction*, 1970 I.C.J. at para. 46.

⁹⁶ The court's decision received tremendous criticism. See Rosalyn Higgins, *Aspects of the Case Concerning Barcelona Traction, Light & Power Company Ltd.*, 11 VA. J. INT'L L. 327 (1971); Richard B. Lillich, *The Rigidity of Barcelona*, 65 AM. J. INT'L L. 522 (1971).

⁹⁷ *Barcelona Traction*, *supra* note 85, at para. 90. On the protection of corporate interests before the *Barcelona* Decision, see generally BATTAGLINI, *LA PROTEZIONE DIPLOMATICA DELLE SOCIETAS* (1957); P. De Visscher, *La Protection Diplomatique des Personnes Morales*, 102 RECUEIL DES COURS 399 (1961); HOCHPIED, *LA PROTECTION DIPLOMATIQUE DES SOCIETES ACTIONNAIRES* (1965); CAFLISCH, *LA PROTECTION DIPLOMATIQUE DES SOCIETES ET DES INTERETS INDIRECTS EN DROIT INTERNATIONAL PUBLIC*, LA HAYE (1969); Ignaz Seidl-Hohenveldern, *The Impact of Public International Law on Conflicts of Law Rules on Corporations*, 123 RECUEIL DES COURS 1 (1968).

⁹⁸ See a similar argument that was made by the United Kingdom in the *Romano-Americana Case*, 5 G. HACKWORTH, DIG. OF INT'L L. 840, 841, 843 (1943).

as it created doubt as to whether and when diplomatic protection of the interests of shareholders is permissible in international law.⁹⁹ The BITs remove such doubts as far as the protection of shareholders is concerned. Whatever the position is in public international law, it is clear that because the definition of investments in the treaties includes shares, the diplomatic protection of shareholders who are nationals of States parties to these treaties is permissible. Here, the effect of the BITs has been to create a special regime of protection because the international law position on the protection of shareholders was and continues to remain unclear.¹⁰⁰

The I.C.J. got a chance to reconsider the juridical soundness of Barcelona Traction in the case of *Ellectronica Sicula S.P.A (ELSI) (U.S. Italy) Case*.¹⁰¹ The case came within the purview of the U.S.-Italy Treaty of Friendship, Commerce & Navigation (FCN).¹⁰² In this case, the ICJ vindicated its views in the Barcelona Traction case about the utility of BITs and FCNs in the light of its decision in Barcelona. Throughout its pleadings and oral arguments before the court, Italy contended that the rights of foreign investors in locally incorporated subsidiaries are not protected with respect to actions against those subsidiaries by the host government. In essence, Italy attempted to

⁹⁹ On the protection of shareholders and corporations in international law, see David Harris, *The Protection of Companies in International Law in the Light of the Nottebohm Case*, 18 INT'L & COMP. L.Q. 275 (1969); Mervyn Jones, *Claims on Behalf of Nationals Who are Nationals of Foreign Companies*, 26 BRIT. Y.B. INT'L L. 225 (1949).

The U.S.-Turkey Treaty defines "investment" as "every kind of investment in the territory of one party owned or controlled, directly or indirectly, by nationals or companies of the other party, including assets, equity, debt, claims, and service and investment contracts" as well as "intellectual and industrial property rights including rights with respect to copyrights, patents, trademark, trade names, industrial designs, trade secrets and knowhow, and goodwill." See U.S.-Turkey BIT, Dec. 3, 1985, art. 1(1)(c), 25 I.L.M. 87, 88. The France-China BIT defines "investment" in substantially similar terms. However, unlike the U.S.-Turkey BIT, it includes within the definition of investments "[r]ights granted under the law, particularly with respect to the cultivation, prospection, mining, or exploitation of natural resources, including those situated in the maritime zones of the contracting parties. See France-China BIT, May 30, 1984, art. 1(1)(e), 24 I.L.M. 550, 551. The Germany-Singapore BIT defines investments as including inter-alia shares or other kinds of interest in companies. Germany-Singapore BIT, Oct. 3, 1973, art. 1(b), 1008 U.N.T.S. 221, 229.

¹⁰⁰ If the view of the court in Barcelona Traction is accepted, they have no protection except through the company. But some judges, like Fitzmaurice (In his separate but concurring opinion, para. 86) contemplated such protection at least as *lex ferenda*. See Note, *The Case of Ellectronica Sicula SPA: Toward Greater Protection of Shareholders Rights in Foreign Investments*, 29 COLUM. J. TRANSNAT'L L. 215 (1991); F.A. Mann, *Foreign Investment in the ICJ: The Elsi Case*, 86 AM. J. INT'L L. 92 (1992); F.A. Mann, *Protection of Shareholder Interests in FURTHER STUDIES IN INTERNATIONAL LAW* 232 (1992).

¹⁰¹ *Ellectronica Sicula S.P.A [ELSI] Case (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20).

¹⁰² Treaty of Friendship, Commerce and Navigation, February 2, 1948, U.S.-Italy, 63 Stat. 2255.

view *Ellectronica Sicula* through the prism of customary international law.¹⁰³ The court however expertly chose not to limit the vital provisions of the FCN by the Barcelona Traction rule and thus ensured the treaty's effectiveness as a vehicle for the protecting foreign investment.¹⁰⁴ In essence, in the absence of a BIT or FCN, the rule enunciated in Barcelona still stands as the law-that shareholder interests constitute indirect interests which do not warrant international legal protection and a claimant State cannot espouse the claim of its national who have invested in foreign corporations absent treaties or agreements specifying otherwise. The ICJ refused adamantly to heed the protestations of Judge Oda whose separate but concurring opinion dwelt almost entirely on the Barcelona Traction decision.¹⁰⁵

The plethora of BITs do not shed much light on the issue of corporate nationality. Some BITs are expertly tailored to clearly avoid the operation of the Barcelona rule. In the U.K-Singapore treaty, for the purpose of bringing arbitration proceedings before the International Convention On the Settlement of Investment Disputes (hereinafter ICSID), the agreement treats a company incorporated in Singapore as a British company provided that the majority of the shares of the company are held by the British nationals. This position accords with Article 25(2)(b) of ICSID.¹⁰⁶ This provision is a feature

¹⁰³ See Statement of Ambassador Richard Gardner before the ICJ (U.S. v. Spain), 1989 I.C.J. Pleadings (Case Concerning *Ellectronica Sicula S.P.A.-Elsi*) 29 (Feb. 15).

¹⁰⁴ The outcome of this decision demonstrates clearly the importance of maintaining a wide network of BITs designed to promote and also protect foreign investment by giving investors rights which they would otherwise not have under customary international law.

¹⁰⁵ According to Judge Oda, the U.S-Italy FCN Treaty was not intended to alter the shareholder's status or augment their rights in any way. He said:

Can it be presumed that any of these rights guaranteed to United States corporations under the 1948 FCN Treaty are relevant to those of Raytheon and Matchlett as shareholders of *Elsi*? The treaty guarantees the right of the United States to hold as much as 100 per cent of the stock of an Italian company. Yet there is no reason to interpret the [U.S-Italy] FCN treaty as having granted to those nationals or corporations of one State party that hold shares in a corporation of the other State party further rights in addition to those to which the same shareholders would have been entitled under Italian law as well as under the general principles of [municipal] company law.

Elsi Case, 1989 I.C.J. at 88-89 (concurring opinion of Judge Oda). To Judge Oda, a bilateral treaty does not change the nature of rights acquired by shareholders. He advocated the continuance of the rigid rule laid down in Barcelona and as far as he was concerned, the FCN did not mitigate or oust the operation of the rule. This, the court refused to accede to and justifiably so, particularly for the foreign investor.

¹⁰⁶ Under Article 25(2) of ICSID, parties could treat any juridical person having the nationality of one party as the national of the other party because of foreign control. An investment treaty may amount to prior agreement that nationality should depend not on incorporation but on control.

of BITs to which the U.K and many other countries are parties to¹⁰⁷ and provides support for the view that as far as arbitration of investment is concerned, it is plausible to hold that the test of corporate nationality is the nationality of the majority of the shareholders of the company where actual control resides. On the other hand, there is no consistency in the theory of corporate nationality adopted in the BITs and they serve to show the competing theories on corporate nationality used in different treaties. For example, the Japanese-Sri Lanka Treaty of 1982 uses a test of "control or decisive influence" in determining corporate nationality but leaves the application of the test itself to the bona fide decision of the party in whose territory the investment is made.¹⁰⁸ The practice of single States varies between the theory of incorporation which is the prevailing view in common law jurisdictions and the "siège sociale" theory which is favored in the civil law jurisdictions.¹⁰⁹ It is not surprising that the Singapore-U.K BIT defines a British company as a company incorporated in Britain, whereas Singapore-Federal Republic of Germany BIT defines a German company as "one having its seat in Germany." Whereas the incorporation theory is preferred in the treaty with Singapore, the U.K-Philippines BIT opts for the siège sociale theory when it defines a protected company as one "actually doing business under the laws in force in any part of the territory of that contracting party wherein place of effective management is situated."

In sum, however, the treaties contribute to the clarification of the international law on corporate nationality to the extent that they bring to light the competing theories on this subject between the common law position and that one favored by the continental system. To this extent, the provisions in them on shareholder protection do not contribute to the creation of any customary rule on this question and their very presence could be evidence of an acknowledgement that in their absence, diplomatic protection of the shareholders is not possible. To the extent that this is so, the legal position propounded by the ICJ in the *Barcelona Traction* remains the general principle both on

¹⁰⁷ See Agreement for the Promotion and Protection of Investments, Apr. 27, 1976, U.K.-Indon., art. 7(2), 1074 U.N.T.S. 195, 198; Agreement for the Promotion and Protection of Investments, Dec. 3, 1980, U.K.-Phil., art. X(2), 1981 Gr. Brit. T.S. No. 7 (Cmnd. 8148), at 7; Agreement for the Promotion and Protection of Investments, May, 21, 1981, U.K.-Malay., art. 7(1), 1980 Gr. Brit. T.S. No. 16 (Cmnd. 707).

¹⁰⁸ Agreement Concerning the Promotion and Protection of Investment, Mar. 1, 1982, Japan-Sri Lanka, art.12(2), 21 I.L.M. 963, 968.

¹⁰⁹ See *supra* note 90 and accompanying text.

the protection of shareholders as well as on corporate nationality, for, on the latter point, the BITs do not show any consistent practice.

VII. REPATRIATION OF PROFITS

There is a 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. Many BITs however refer to the unimpaired right of the host 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. The Egypt-U.K agreement for example guarantees the transfer of the returns from the investments of the nationals of the other party.¹¹⁰ This guarantee is subject, however, to each party's right, in exceptional financial or economic circumstances, to exercise equitably and in good faith powers conferred by its laws.¹¹¹ The Singapore-U.K 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 contracting parties.¹¹² Under the Phil-

¹¹⁰ Agreement for the Promotion and Protection of Investments, June 11, 1975, U.K.-Egypt, art. 6(1), Gr. Brit. T.S. No. 97 (Cmd. 6638), at 5.

¹¹¹ *Id.* The BIT between China and France contains an elaborate provision safeguarding the transfer of funds by foreign investors. It provides that each contracting party in whose territory or maritime zones investment have been made by investors of the other party "shall accord such investors the free transfer of . . . interest, dividends, profits and other current yields . . . royalties derived from . . . intangible rights . . . payments made in reimbursement of regularly contracted loans . . . proceeds from the assignment or the partial or complete liquidation of the investment and compensation in the event of expropriation or nationalization." Agreement Concerning the Reciprocal Encouragement and Protection of Investments, May 30, 1984, Fr.-P.R.C., art. 5, 24 I.L.M. at 554 (1985). Such transfers shall be made "within a reasonable period of time at the prevailing official rate of exchange on the date of transfer." *Id.*

Unlike the France-P.R.C BIT, the U.S.-Turkey BIT expressly permits transfers related to an investment to be made into, as well as out of, the host state. It also provides that each party shall permit transfers "freely and without delay." Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Turkey, *supra* note 99, art. IV(1), at 93. The protocol to the U.S.-Turkey BIT permits Turkey "[i]n exceptional financial or economic circumstances relating to foreign exchange to temporarily delay transfers involving proceeds from the sale or liquidation of all or any part of an investment." *Id.* Protocol 1, para. 2(b), at 101. However, such delays must comply with Article II of the treaty i.e they must not be arbitrary or discriminatory. *Id.* art. II(3), at 90. However, such delays instituted by Turkey must not exceed three years from the date on which the transfer is requested and may only be maintained "for the time period necessary to restore its reserves of foreign exchange to a minimally acceptable level." *Id.* Protocol I 2(b), at 101.

¹¹² Treaty Concerning the Promotion and Reciprocal Protection of Investments, F.D.R.-Sing., *supra* note 73, art. 6.

ippine-U.K agreement, the right of investors in each state to the free transfer of capital is similarly preserved. Each party, however, can delay repatriation under more extensive conditions. The right of repatriation is made specifically subject to the right of the government "to impose equitably and in good faith such measures as may be necessary to safeguard the integrity and independence of its currency, its external financial position and balance of payments."¹¹³ The state's right to delay should be exercised consistently with its right 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.¹¹⁴ The agreement also states that the applicable exchange rate for transfers is the rate prevailing at the time of the remittance.¹¹⁵

Under the U.S.-Romania Agreement,¹¹⁶ the right to expropriation is unrestricted provided the initial importation of such capital or currencies was done in an authorized manner. Article 6 of the agreement applies a most favored nation standard to the repatriation of "funds or financial instruments" between the territories of the two states.¹¹⁷ The Sri Lanka-Switzerland agreement¹¹⁸ is more expansive regarding the right to repatriation of funds. 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.¹¹⁹ Secondly, the agreement provides for a more general right to repatriate capital and returns.¹²⁰ 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.¹²¹

¹¹³ Agreement for the Promotion and Protection of Investments, U.K.-Phil., *supra* note 107, art. VII(1), at 6.

¹¹⁴ Agreement for the Promotion and Protection of Investments, U.K.-Phil., *supra* note 107, art. VII(3), at 3.

¹¹⁵ *Id.* art. VII(2), at 6.

¹¹⁶ Agreement on Trade Relations, Apr. 2, 1975, U.S.-Rom., art. VI(2), 26 U.S.T. 2306, 2311-12.

¹¹⁷ *Id.* art. VI(1), at 2311.

¹¹⁸ Agreement for the Reciprocal Promotion and Protection of Investments, Sept. 23, 1981, Sri Lanka-Switz., 21 I.L.M. 399 (1982).

¹¹⁹ *Id.* art. 6, at 403.

¹²⁰ *Id.* art. 7(1), at 403.

¹²¹ Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 7(2), at 403.

The China-Sweden agreement provides for a right to the transfer of funds "without undue delay."¹²² The grounds for delay, however, are not as specific as, for example, the grounds stated in the Philippines-U.K. Agreement.¹²³ The France-Morocco Agreement¹²⁴ 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."¹²⁵ 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.¹²⁶ In the ICSID study, of the 335 BITs surveyed, all provide that such proceeds shall be transferred without delay. Nevertheless, more than 60 BITs provide for transfer of such sums in installments by taking into account the balance of payment of the host country; 22 BITs provide for the payment of interest in case of delay. 195 BITs provide for the rate of exchange in the event of delay. 131 of these treaties stipulate the official and/or the market rate of exchange and 64 refer to the IMF exchange regulations in this respect.¹²⁷

From the foregoing examination of the principles distilled in the various BITs, it is evident that the right to repatriate cannot bind a state in times of economic stringency. The doctrine of *clausula rebus sic stantibus*, under which the treaty rights exist only while the circumstances under which the treaty was entered into continue, can be invoked in support of this view.¹²⁸ In this regard, the BITs have served to reiterate the universally accepted international law position on repatriation of invested funds.

¹²² Agreement on the Mutual Protection of Investments, P.R.C.-Swed., *supra* note 74, art. 4, at 477.

¹²³ The agreement specifically states that "the compensation shall be made without undue delay, shall be effectively realizable and shall . . . be freely transferable." Agreement for the Promotion and Protection of Investments, U.K.-Phil., *supra* note 107, art. 5(1), at 5.

¹²⁴ Agreement on the Reciprocal Protection, Encouragement and Guarantee of Investments, July 15, 1975, Fr.-Morocco, art. 6, 1036 U.N.T.S. 348.

¹²⁵ *Id.* art. 6, at 349.

¹²⁶ *Id.*

¹²⁷ Khalil, *supra* note 76, at 353-58.

¹²⁸ See *Allied Bank Int'l v. Banco Credito Agrícola de Cartago*, 556 F. Supp. 1440 (S.D.N.Y. 1983).

VIII. EXPROPRIATION AND COMPENSATION

Compensation for nationalization of alien property has been a controversial area in international law.¹²⁹ The developing countries have collectively supported the position that the issue of compensation is one to be decided solely by their tribunals. Their collective position has been embodied in several United Nations General Assembly Resolutions.¹³⁰ The developed countries in their turn have insisted upon a standard for compensation which requires the payment of appropriate compensation that accords with international legal standards as exemplified in the Hull formula of "prompt, adequate and effective compensation." Whereas developing countries have a common stance in international fora, their bilateral agreements with most of the developed countries do not run in tandem with their avowed position in the U.N. General Assembly which situation manifests an amount of duplicity on their part.

In the Egypt-U.K. BIT, 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.¹³¹ If nationalization is carried out, the state must pay "prompt, adequate and effective" compensation. 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.¹³² The Singapore-U.K. BIT¹³³ 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 the law.¹³⁴ The Philippines-U.K. BIT extends the grounds for expropriation beyond the public purpose ideas, and covers "interests of the national defense." The agreement mentions "just" compensation rather than

¹²⁹ See Rudolph Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 533 (1981); M. Sornarajah, *Compensation for Expropriation: The Emergence of New Standards*, 13 J.W. TR. L. 108 (1979).

¹³⁰ See, e.g., G.A. Res. 3281 (S-VI) U.N. Doc A/9559; Declaration of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR 6th Special Sess., Supp. No. 1, U.N. Doc. A/9556 (1974).

¹³¹ Agreement for the Promotion of Investments, Egypt-Gr. Brit., *supra* note 110, art. 5.

¹³² Agreement for the Promotion and Protection of Investments, Singapore-Gr. Brit., *supra* note 71, art. 5.

¹³³ Agreement for the Promotion and Protection of Investments, Philippines-United Kingdom, *supra* note 107, art. 5.

¹³⁴ Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 6.

“prompt, adequate and effective” compensation.¹³⁵ The BIT 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. No interest payment is mentioned in connection with the payment of compensation.¹³⁶

Under the Sri Lanka-Switzerland BIT, nationalization should be carried out only for a public purpose and should be accompanied by prompt, adequate and effective compensation. Compensation is measured by the value immediately before the expropriation became public knowledge, which 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.¹³⁷ The China-Sweden agreement¹³⁸ provides 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.¹³⁹ The agreement does not expressly require “prompt” payment but it does require that payment be made “without unreasonable delay.”¹⁴⁰ The amount paid however should be convertible and freely transferable. The France-Zaire BIT provides that investments made under the treaty can be expropriated only for a public purpose.¹⁴¹ The expropriation, nationalization and direct or indirect dispossession itself may not be discriminatory nor contrary to a specific undertaking.¹⁴² Fair compensation, which equals the value of the assets at the time of the expropriation must be paid.¹⁴³ Finally, prior to the transfer of ownership, the parties must agree to both the amount and manner of payment. The BITs manifest the inconsistency that obtains between the BITs that have been concluded between the different countries. The OECD countries have not maintained consistency in their practice, as each BIT was negotiated on its own merits dictated by the economic

¹³⁵ Agreement on the Mutual Protection of Investments, P.R.C.-Swed., *supra* note 74, art. 3.

¹³⁶ Convention on the Protection of Investments, October 5, 1972, Fr.-Zaire, art. 3, 986 U.N.T.S. 243.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Agreement on the Mutual Protection of Investments, P.R.C.-Swed., *supra* note 74, art. 3, para. 1.

¹⁴⁰ *Id.*

¹⁴¹ Convention on the Protection of Investments, October 5, 1972, Fr.-Zaire, art. 3, 986 U.N.T.S. 243.

¹⁴² *Id.* art. 3.

¹⁴³ *Id.*

and political interests of the capital importing and capital exporting state.¹⁴⁴ Of the 335 BITs surveyed in the ICSID study, 309 make the furtherance of public interest a condition precedent for embarking on any measures of expropriation.¹⁴⁵ 139 of these BITs require that the measure should be non-discriminatory and not in breach of any specific commitment not to expropriate.¹⁴⁶ 24 BITs fail to expressly stipulate the furtherance of public interest as a condition for expropriation, but merely provide that the measure should be non-discriminatory and not inconsistent with a specific commitment not to expropriate. 2 BITs make no express reference to any condition but simply require the payment of compensation for expropriation. With regard to compensation, 167 BITs adopt the Hull formula of "prompt, adequate and effective." Another 47 BITs provide for "just," "full," "reasonable" or "fair and equitable" compensation. The rest of the BITs refer to appropriate compensation.¹⁴⁷

In the final analysis, the issue is what is the international legal standard on compensation for expropriated property? The dearth of BITs and the disparity in the various legal positions they advance add to the confusion that already exists and their legal utility in my view is limited only to the contracting parties.

In the U.S., the Supreme Court in the *Banco Nacional de Cuba v. Sabbatino*¹⁴⁸ referred to the "disagreement" among states as to the relevant international law standards and applied the Act of State Doctrine to avoid ruling against Cuba. But the U.S Congress in the two Hickenlooper amendments asserted that international law requires "speedy compensation in convertible foreign exchange equivalent to

¹⁴⁴ Germany's BIT with Bangladesh, Papua New Guinea, Oman, and Syria requires "compensation equivalent to the investment expropriated." Sometimes the formula used is that "compensation shall be calculated in accordance with the value of the investment concerned immediately before the date on which the expropriation or nationalization was publicly announced." E.g. BIT with Israel, 8 W.G.B.T. 1161. There is no uniformity in French practice either. The Hull formula of full, adequate and effective compensation is used in the treaty with Liberia (1979). An alternative formula of just compensation is used in treaties with Paraguay (1981), El Salvador (1979), Sudan (1980), Jordan (1979), Syria (1980), Romania (1980) and Malta (1977).

¹⁴⁵ Khalil, *supra* note 76.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 351. See also Deidra A. Cody, Note, *United States Bilateral Investment Treaties: Egypt and Panama*, 13 GA. J. INT'L & COMP. L. 491 (1983); Joseph E. Pattison, *The U.S.-Egypt Bilateral Investment Treaty: A Prototype for Future Negotiation*, 16 CORNELL INT'L L.J. 305 (1983); Paul Dempsey, *Foreign Investment Incentives in the Developing World: The Legislation of Greece, Egypt, Pakistan, Thailand and the Republic of China*, 11 CASE W. RES. J. INT'L L. 575, 586-94 (1979); Ilona Cheyne, *Investment Promotion and Protection Agreements*, 36 INT'L & COMP. L.Q. 929 (1987).

¹⁴⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

the full value of the property taken.”¹⁴⁹ Other congressional enactments have also affirmed the “prompt, adequate and effective formula” as a requirement of international law. Whereas the legislature and the executive have maintained that position, the judiciary has trodden this path with a lot of trepidation and circumspection and has consistently refused to swallow hook, hide and sinker the universality of the Hull formula.¹⁵⁰ Several “traditional” decisions of international tribunals recognize the existence of an international obligation to pay compensation when alien property is taken by a state. However, contrary to what is usually asserted with gusto, these contain no reference to the “prompt, adequate and effective” standard. The *Chorzow Factory Case*,¹⁵¹ which is the most quoted decision in this regard, refers only to a duty to pay fair compensation. In the *Norwegian Ship Owners Claim*,¹⁵² the tribunal held that “just compensation” should be determined by “fair actual value at the time and place” in view of all surrounding circumstances.¹⁵³

The argument that the “prompt, adequate and effective formula” is traditional international law finds little support in state practice or authoritative treatises and monographs. For example, Judge Charles De Visscher, a past president of the ICJ, concluded that state practice in cases of nationalization hardly ever permits more than partial compensation calculated less by the extent of damage than by the capacity and good will of the nationalizing state.¹⁵⁴ Professor Hersch Lauter-

¹⁴⁹ 22 U.S.C.A. § 2370(e)(1)(C) (1988). The words quoted are in the first Hickenlooper Amendment and are referred to in the second amendment. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW, CASES AND MATERIALS* 790-91 (1st ed. 1980); Nancy Goodman, *U.S.-Poland Bilateral Investment Treaty*, 32 HARV. INT'L L.J. 255 (1991); Eileen Denza & Shelagh Brooks, *Investment Protection Treaties: United Kingdom Experience*, 36 INT'L & COMP. L.Q. 908 (1987); Andre W.B. Newburg, *U.S.-Soviet Trade Agreement and Investment Protection Treaties*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 117 (1990); Ocran T. Modibo, *Bilateral Investment Treaties: A Comparative Study*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 401 (1987).

¹⁵⁰ *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981).

¹⁵¹ *Factory at Chorzow (Merits)*, 1928 P.C.I.J. (ser. A) No. 17, at 46 (Sept. 13).

¹⁵² *Norwegian Shipowners' Claim (Nor. v. U.S.)*, 1 R.I.A.A. 307, 340 (October 12, 1922).

¹⁵³ For earlier cases, see JACKSON H. RALSTON, *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* (1926) (Supp. 1936). In all these decisions, one cannot find a single decision expressing the “prompt, adequate and effective compensation formula.” The tribunals in these cases examined the particular circumstances and announced their decision on whether the compensation was just, or fair or in accordance with the relevant agreements. Professor Wengler, a renowned German international law scholar, concluded after a thorough examination of the cases that there were no decisions of international tribunals to the effect that in the event of any and every non discriminating expropriation, full compensation was required. See generally, WILHELM WENGLER, *VÖLKERRECHT [INTERNATIONAL LAW]* (1964).

¹⁵⁴ CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW*, 203 (P.E. Corbett trans., 3d ed. 1968).

pacht states an important qualification to the duty to compensate "in cases in which fundamental changes in the political system and economic structure of the state or far-reaching reforms entail interference, on a large scale, with private property."¹⁵⁵ In such cases, Professor Lauterpacht concluded that a solution must be found in the grant of "partial compensation." Similar views were reflected in the resolution and discussions of the *Institut de droit international* in 1950 as well as in the detailed studies of Western European jurists.¹⁵⁶ A host of American international law jurists with time came to share the views of the rest of the world on the non-universality of the "full, adequate and prompt" compensation rule.¹⁵⁷ In his lucid assessment of the debate, the late Professor Wolfgang Friedman observed that:

It is nothing short of absurd to pretend that the protestation of the rule of full, prompt and adequate compensation . . . in all circumstances is representative of contemporary international law.¹⁵⁸

It has been contended that the Hull formula which has been rejected by a great many states in international fora has become largely political rhetoric perceived as being symbolic in the confrontation between the north and the south.¹⁵⁹

Attempts to entrench the Hull standard through BITs do not circumvent the fact that the BITs do not evidence customary interna-

¹⁵⁵ OPPENHEIM, *supra* note 27, at 352-54.

¹⁵⁶ See 43 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (1950); Bindschedler, *La Protection de la Propriété Privée en Droit International Public*, 90 RECUEIL DES COURS 173 (1956); ISI FOIGHEL, NATIONALIZATION: A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW 115-26 (1957); S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW (1953); F.V. Garcia Amador, *Fourth Report on International Responsibility to the International Law Commission*, [1959] reprinted in [1960] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/Ser.A/1959/Add.I.

¹⁵⁷ Hans W. Baade, *Indonesian Nationalization Measures Before Foreign Courts: A Reply*, 54 AM. J. INT'L L. 801 (1960); Frank G. Dawson & Burns H. Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 1125, 1128 (1948); RICHARD B. LILICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP-SUM AGREEMENTS 207-56 (1975); SEYMOUR J. RUBIN, PRIVATE FOREIGN INVESTMENT: LEGAL AND ECONOMIC REALITIES 11-23 (1966); BURNS H. WESTON, INTERNATIONAL CLAIMS: POST-WAR FRENCH PRACTICE (1971).

¹⁵⁸ Wolfgang Friedman, *National Courts and the International Legal Order: Projections on the Implications of the Sabbatino Case*, 34 GEO. WASH. L. REV. 443, 454 (1966).

¹⁵⁹ RUBIN, *supra* note 157, at 23-28. See also Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth*, 75 AM. J. INT'L L. 437, 455 (1981); Tom J. Farer, *The U.S. and the Third World: A Basis for Accommodation*, 54 FOREIGN AFF. 79, 84 (1975); Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 17-19 (1976); Maarten H. Muller, *Compensation for Nationalization: A North-South Dialogue*, 19 COLUM. J. TRANSNAT'L L. 35 (1981); David A. Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474 (1977); William D. Rogers, *Of Missionaries, Fanatics and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AM. J. INT'L L. 1 (1978).

tional law. To insist that they do, the proponents of such a theory would have to prove that apart from the treaty itself, the rules in the clauses are considered obligatory. It is interesting to note that extradition and air transit treaties are examples of BITs with standard clauses that are widely used yet nobody claims that those provisions are declaratory of or constitutive of customary law binding on third states.¹⁶⁰ Oscar Schachter contends that if any inference of *opinio juris* is to be made from the bilateral investment treaties, it would be limited to the highly general-though not insignificant-finding that such agreements are further evidence of the generally accepted rule that compensation should be paid when the property is expropriated.¹⁶¹

I contend that the acceptable standard is that of "appropriate compensation" as this did not only receive unanimous United Nations General Assembly support,¹⁶² but it has also been confirmed by landmark arbitral awards and municipal court decisions of our time. In *Texaco v. Libya*,¹⁶³ the arbitrator, Jean-René Dupuy declared that the requirement of "appropriate compensation" was the "*opinio juris communis*" that reflected "the state of customary law existing in the field." In support of this conclusion, Dupuy cited the acceptance of this standard in Resolution 1803 which received support from both the developed and the developing countries. He however did not mention that the U.S representative while voting for the resolution explained his vote for the resolution by stating that he was "confident that it would be interpreted as meaning prompt, adequate and effective compensation."¹⁶⁴ That very point was controversial in the UN committee debates and a U.S proposal to include its interpretation was withdrawn.¹⁶⁵ In the *Banco Nacional Case*,¹⁶⁶ the court of appeals reviewed much of the literature on the subject and concluded that

¹⁶⁰ Richard Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25, 83-84 (1970).

¹⁶¹ Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121 (1986).

¹⁶² G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

¹⁶³ International Arbitral Tribunal: Award on the Merits in the Dispute Between Texaco Overseas Petroleum/California Asiatic Oil Company and the Government of the Libyan Arab Republic, 17 I.L.M. 329 (1978), 53 I.L.R. 389 (1979).

¹⁶⁴ Stephen Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty Over Natural Resources*, 49 A.B.A.J. 463-66 (1963); F.A. MANN, *FURTHER STUDIES IN INTERNATIONAL LAW* (1990); RICHARD LILICH, *VALUATION OF NATIONALIZED PROPERTY UNDER U.S AND OTHER BITs* (1987). See generally PERROT & POGANY, *BILATERAL INVESTMENT TREATIES: CURRENT ISSUES IN INTERNATIONAL BUSINESS LAW* 155 (1988).

¹⁶⁵ The legislative history of Resolution 1803 shows that the compromise reached in the UN committee deliberately avoided endorsing either the U.S. interpretation or the contrary Latin American position in favor of "national treatment." See Orrego Vicuna, *Some International Law Problems Posed by Nationalization of the Copper Industry by Chile*, 67 AM. J. INT'L L. 711, 721-

It may well be the consensus of nations that full compensation need not be paid in all circumstances . . . and that requiring an expropriating state to pay appropriate compensation . . . even considering the lack of precise definition of that term . . . would come close to reflecting what international law requires.¹⁶⁷

The court went on to add that

. . . the adoption of an appropriate compensation requirement would not exclude the possibility that in some cases full compensation would be appropriate.¹⁶⁸

In the *Aminoil Award*,¹⁶⁹ the tribunal stated that the standard of "appropriate compensation" as set forth in resolution 1803 codifies positive principles.¹⁷⁰ The tribunal declared that the determination of the amount of an award of "appropriate compensation is better carried out by means of an enquiry into all the circumstances relevant to a particular concrete case, than through the abstract theoretical discussion."¹⁷¹ The one general notion that the tribunal emphasized was that of "legitimate expectations," a concept which was invoked by the parties. With regard to this concept, the tribunal stated that there must necessarily be economic calculations, and the weighing of rights and obligations, of chances and risks, constituting the contractual equilibrium."¹⁷² Judge Jimenez De Aréchaga, former President of the ICJ, has favored "appropriate" because in his view, it conveys better [than "just" or "adequate"] the complex circumstances which may be present in each case and further, it brings in the concept of unjust enrichment."¹⁷³

IX. APPLICABLE LAW AND THE SETTLEMENT OF INVESTMENT DISPUTES

Provisions in BITs relating to the resolution of investment disputes are critical in the overall process of trying to secure a bilateral

23 (1973); C. Greenwood, *State Contracts in International Law-The Libyan Oil Nationalizations*, 53 BRIT. Y.B. INT'L L. 27 (1982).

¹⁶⁶ *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d at 892, paras. 14-15.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *American Independent Oil Company(Aminoil) v. Kuwait*, 21 I.L.M. 976 (1982).

¹⁷⁰ *Id.* at 1032.

¹⁷¹ *Id.* at 1033-37.

¹⁷² *American Independent Oil Company(Aminoil) v. Kuwait*, 21 I.L.M. at 1037.

¹⁷³ Jimenez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 302 (1978). See also Richard Falk, *The New States and International Legal Order*, 118 RECUEIL DES COURS 1, 29 (1966); F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 U.C. DAVIS L. REV. 577 (1988).

regime of law that guarantees investors access to domestic courts and/or international tribunals.¹⁷⁴

There is no uniformity on this point in the provisions of the various BITs. Under the Egypt-U.K. BIT,¹⁷⁵ each party consents in advance to the submission of legal disputes to conciliation or arbitration under the ICSID convention, which gives direct access to individuals, whether natural or legal persons, in their claims against a State.¹⁷⁶ 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.¹⁷⁷ If there is disagreement as to whether conciliation or arbitration is the more appropriate procedure, the affected company chooses the most desirable alternative. The agreement also contains a specific provision on disputes relating to payment of compensation in the event of nationalization. In particular, the agreement provides for the application of two systems of law: (i) domestic law (ii) international law (being typified by the BIT). The agreement also contains the principle 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.¹⁷⁸ The provisions of the Singapore-U.K. BIT¹⁷⁹ regarding the applicable law and the settlement of investment disputes are substantially the same as those in Egypt-U.K. BIT, save for three exceptions: (i) the U.K.-Singapore BIT stipulates that ICSID arbitration is the only acceptable dispute resolution mechanism; (ii) the 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

¹⁷⁴ Jeswald W. Salacuse, *BIT by BIT: The Growth of BITS and their Impact on Foreign Direct Investment in Developing Countries*, 24 INT'L LAW. 655 (1990); Salacuse, *Towards a New Treaty Framework for Direct Foreign Investment*, 50 J. AIR L. & COMM. 969 (1985).

¹⁷⁵ Agreement for the Promotion and Protection of Investments, U.K.-Egypt, *supra* note 110.

¹⁷⁶ Agreement for the Promotion and Protection of Investments, U.K.-Egypt, *supra* note 110, at art. 8, par 1.

¹⁷⁷ Agreement for the Promotion and Protection of Investments, U.K.-Egypt, *supra* note 110.

¹⁷⁸ Agreement for the Promotion and Protection of Investments, U.K.-Egypt, *supra* note 110, at art. 10.

¹⁷⁹ Agreement for the Promotion and Protection of Investments, U.K and N. Ir.-Sing., *supra* note 71, art. 8.

losses in pursuance of an investment insurance contract;¹⁸⁰ (iii) 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.¹⁸¹ Moreover, such amounts or credits are to be freely available to the indemnified State to meet its expenditures in the territory of the investee State.¹⁸² The total effect of the foregoing provisions is to make the position of the investor stronger under the Singapore-U.K. agreement than the Egypt-U.K. agreement. Under the Philippines-U.K. agreement, the parties to a dispute may select either arbitration or conciliation in accordance with ICSID rules.¹⁸³ Unlike the BIT with Egypt and Singapore, no prior submission by the State to ICSID is required in this case. However, if in the event of a dispute the aggrieved company submits to ICSID jurisdiction and then requests the State to do the same, the State then becomes obliged to accept ICSID jurisdiction.¹⁸⁴

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 to ICSID for settlement.¹⁸⁵ There has to be a mutual agreement to submit to ICSID since there is no compulsory jurisdiction. Thereafter, if there is disagreement as to whether conciliation or arbitration should be adopted, the agreement follows the Egypt-U.K. agreement and allows the affected party to make the decision.¹⁸⁶ The agreement also provides 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 parties.¹⁸⁷ Like the Singapore-U.K. 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. There is also a

¹⁸⁰ Agreement for the Promotion and Protection of Investments, Egypt-U.K., *supra* note 110, art. 8, para. 1.

¹⁸¹ *Id.* art. 10.

¹⁸² *Id.*

¹⁸³ Agreement for the Promotion and Protection of Investments, U.K.-Phil., art. X(2), *supra* note 107, art. X(1).

¹⁸⁴ *Id.* This in a veiled sense amounts to compulsory ICSID jurisdiction for Egypt, U.K. and Singapore that attaches at the behest of the foreign private investor.

¹⁸⁵ Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 9.

¹⁸⁶ Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 9, para 2.

¹⁸⁷ Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 9, para 2.

provision that precludes diplomatic intervention of the host State of the foreign private investor in the resolution of disputes that have been submitted to ICSID.¹⁸⁸ The indemnifying State also has a right of subrogation regarding any claims to which the company is entitled.¹⁸⁹ The repatriation of funds arising from subrogation is to be accorded most favored nation treatment.¹⁹⁰ On the applicable law, the agreement provides that the law of the host state is the law that is expected to govern all investments in its territory.¹⁹¹ This general rule is however 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 investments, to the rules laid down in that agreement.¹⁹²

Under the China-Sweden BIT,¹⁹³ dispute settlement procedures must be fair and equitable. It follows by implication that 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 international law.¹⁹⁴ The BIT thus implies that such companies have access to national courts and that national law is the applicable law in dispute settlement. The BIT however contains no direct reference to any international procedures to which investors have access. In contrast, the France-Tunisia BIT of 1972 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.¹⁹⁵ The France-Egypt Investment Guarantee Agreement¹⁹⁶ and the France and former Yugoslavia BIT also require the contracting parties to enter into a

¹⁸⁸ Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 9, para 3.

¹⁸⁹ Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 10.

¹⁹⁰ Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 10.

¹⁹¹ Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 4.

¹⁹² Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., *supra* note 118, art. 6.

¹⁹³ Agreement on the Mutual Protection of Investments, P.R.C.-Swed., *supra* note 74.

¹⁹⁴ Agreement on the Mutual Protection of Investments, P.R.C.-Swed., *supra* note 74, art. 7.

¹⁹⁵ Convention on the Protection of Investments, June 30, 1972, Fr.-Tunis., art. I, 848 U.N.T.S. 144.

¹⁹⁶ Convention Concerning the Mutual Promotion and Protection of Investments (with Exchanges of Letters), Dec. 22, 1974, Fr.-Egypt, art. 8, 996 U.N.T.S. 381, 384.

specific agreement providing recourse to ICSID.¹⁹⁷ Of the 335 BITs studied by ICSID, almost all make reference to an arbitration clause. Two hundred twelve BITs require arbitration under ICSID procedures, either as the only, or as an alternative, way for the settlement of investment disputes.¹⁹⁸

The recent BIT between Argentina and the United States is historic on account of its provisions on issues that have divided these two countries for centuries.¹⁹⁹ An accompanying report to the President on the treaty from Arnold Kanter, Acting Secretary of State, dated 13 January, 1993 stated that

The BIT with Argentina represents an important milestone in the BIT program . . . Argentina, like many Latin American countries, has long subscribed to the Calvo Doctrine, which requires that aliens submit disputes arising in a country to that country's local courts. The conclusion of this treaty, which contains an absolute right to international arbitration of investment disputes, removes U.S. investors from the restrictions of the Calvo Doctrine and should help pave the way for similar agreements with other Latin American countries.²⁰⁰

¹⁹⁷ Convention on the Protection of Investments, Mar. 28, 1974, Fr.-Yugo., art. 1, 974 U.N.T.S. 107, 108.

¹⁹⁸ Khalid, *supra* note 76. See also Van De Voorde, *Belgian BITS as a Means for Promoting and Protecting Foreign Investment*, 44 *STUDIA DIPLOMATICA* 87 (1991); PETER WOLFGANG, *ARBITRATION AND RENEGOTIATIONS OF INTERNATIONAL INVESTMENT AGREEMENTS* 218-25 (1986); Gudgeon Scott, *Arbitration Provisions in U.S. BITs*, in *INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE OR SETTLEMENT* 41 (Seymour Rubin & Richard Nelson eds., 1985).

¹⁹⁹ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S.-Arg., S. TREATY DOC. NO. 2, 102d Cong., 2d. Sess. 111 (1993); *reprinted in* 31 *I.L.M.* 124 (1992).

²⁰⁰ The legal environment in Latin America dealing with foreign direct investment has gone through a dramatic change in the recent past. Today Chile for example exerts no control over foreign investment. See Law No. 18, 447 November 30, 1985, amending decree Law No. 600, March 18, 1977. For Uruguay See Law No. 808/974, Oct. 10, 1974 [97 second semester 1] *REGISTRO NACIONAL DE LEYES Y DECRETOS* 988. For Paraguay, See Law No.550, Dec 1975 la Ley 126 (July-Sept. 1980). A flexible approach to foreign investment is also being taken in the Andean Common Market (ANCOM) region. ANCOM-consisting of Bolivia, Ecuador, Columbia, Peru and Venezuela-had promulgated Decision 24, which established minimum restrictions that its member states were required to impose upon foreign investments. See Decision 24, *reprinted in* Andean Commission: Codified Text of the Andean Foreign Investment Code, 16 *I.L.M.* 138 (1977). This decision prohibited contractual clauses recognizing subrogation of home governments to claims of foreign investors. In the mid 1980's, the ANCOM started chipping away at Decision 24 and countries like Bolivia virtually suspended the divestment requirements. See M. AGOSIN & V. RIBEIRO, *INVERSIONES EXTRAJERAS DIRECTAS EN AMERICA LATINA: TENDENCIAS RECIENTAS Y PERSPECTIVAS*, *INTEGRACION LATINO AMERICA* 21 (June 1987). Bolivia, Colombia and Ecuador concluded bilateral agreements with OPIC. On May 11, 1987, ANCOM approved Decision 220 of the Commission of the Cartagena Agreement on the Common Regime of Treatment of Foreign Capital and Trade Marks, Patents and Royalties to Replace Decision 24, May 11, 1987, *reprinted and translated in* 2 *ICSID REV. FILJ* 519 (1987). Decision 220 restores to member states control over profit remittances, decisions as to which sectors shall be reserved for national investors and determinations of which fora should be avail-

Under this BIT, exhaustion of local remedies is not required. The treaty identifies several different procedures for arbitration, at the investors option: The ICSID tribunal, upon Argentina's adherence to the ICSID convention; the ICSID Additional Facility, if ICSID is not available; or ad hoc arbitration under the arbitration rules of the UN Commission on International Trade Law (UNCITRAL).²⁰¹

From the foregoing, it is evident that most BITS refer to ICSID arbitration while others refer to the optional facility of the ICSID or to some ad hoc arbitration.²⁰² It is important however to note that the mere reference in the BIT that disputes arising from foreign investments protected by it should be submitted to ICSID arbitration does not necessarily create jurisdiction under ICSID tribunal.²⁰³ Under ICSID, only the consent of the parties creates jurisdiction in the tribunal. Whether an investment treaty can give prior consent to ICSID depends on the words used in the treaty. Aron Broches makes a distinction between four types of clauses in BITS relating to arbitration:

- (1) The dispute shall upon agreement by both parties, be submitted for arbitration by the Centre.²⁰⁴ Such a clause requires a further specific agreement referring any particular dispute to arbitration by the ICSID tribunal.
- (2) The second type, requiring "sympathetic consideration to a request to conciliation or arbitration by the Centre," does not amount to consent, but implies "an obligation not to withhold consent unreasonably."²⁰⁵
- (3) The third type requires the host state to "assent to any demand on the part of the national to submit for conciliation or arbitration "any dispute arising from the investment."²⁰⁶

The clause which is always found in U.K treaties reads

able for dispute resolution. Most of the Latin American countries have acceded to the U.N Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2417, 330 U.N.T.S. 3, and the Inter-American Convention on International Commercial Arbitration, Jan 30, 1975, OAS Treaty Ser. No. 42, *reprinted in* Inter-American Specialized Conference on Private International Law: Six Inter-American Conventions, 14 I.L.M. 325, 336 (1975).

²⁰¹ Text of the treaty and protocol attached thereto are reprinted in 31 I.L.M. 124 (1992).

²⁰² For ICSID history, see JOY CHERIAN, *INVESTMENT CONTRACTS AND ARBITRATION* (1975).

²⁰³ See Aron Broches, *BITS and Arbitration of Investment Disputes*, in *THE ART OF ARBITRATION, LIBER AMICORUM PIETER SANDERS* 63 (Jan Schultz & Albert Van Den Berg eds., 1982).

²⁰⁴ See, e.g., The Sweden-Malaysia Treaty, Mar. 3, 1979, U.N.T.S. 1980.

²⁰⁵ E.g. Netherlands-Kenya Treaty, Sept.11, 1970, U.N.T.S. 1978. The treaty does not resolve the issue of what amounts to reasonableness or otherwise of the withholding of consent.

²⁰⁶ Agreement for the Promotion and Protection of Foreign Investment, July 7, 1968, Neth.-Indon., 799 U.N.T.S. 1322 (1971).

Each contracting party hereby consents to submit to the Center any dispute arising between that contracting State and a national company of the other contracting party.²⁰⁷

Such a clause may create jurisdiction in ICSID, and Broches contends that

Provisions of this kind (e.g the British type), subject to the conditions stated therein and subject further to their compatibility with the convention, will enable the investor to institute proceedings against the host State before the Center and may entitle the host State to avail itself of the same remedy against the investor.

The foregoing examination of various BITs demonstrates that though the settlement of investment disputes through arbitration is accepted in BITs, the mere reference to it in the treaties should not be made the basis of an assessment that arbitration has come to be accepted as the method of settling investment disputes or that there is an obligation to refer such disputes to international arbitration so that they may be settled in accordance with a supranational body of legal principles or what is now commonly known as *lex mercatoria*.²⁰⁸ The diversity of the clauses does not admit the making of such claims. However, it is plausible to claim that on the basis of these treaties, the trend is towards the acceptance of international arbitration, particularly arbitration by ICSID of foreign investment disputes.²⁰⁹

An understanding of how ICSID works is relevant to the determination of applicable law in foreign investment disputes. ICSID was created by the Convention on the Settlement of Investment Disputes²¹⁰ to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all parties involved. It also attempts to depoliticize the settlement of investment disputes.²¹¹ The ICSID convention gives investors direct access to an

²⁰⁷ E.g. Gr. Brit.-Bangladesh Treaty, *supra* note 71.

²⁰⁸ F.A. Mann contends that the treaty clause will not protect an investor unless he includes a corresponding clause in his contract with the State. See F. A. MANN, *FURTHER STUDIES IN INTERNATIONAL LAW* 248 (1992).

²⁰⁹ Here, the BIT serves to open the door while the individual contract between the private investor and the host State gets the investor through the door to the most coveted world of international arbitration that was heretofore closed to individuals-not being subjects of international law.

²¹⁰ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], reprinted in 4 I.L.M. 524 (1965).

²¹¹ See Executive Directors Report, reprinted in 4 I.L.M. 524 (1965); Aron Broches, *The Experience of ICSID: Avoidance and Settlement*, in *INTERNATIONAL AND INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT* 75, 77 (S. Rubin & R. Nelson eds., 1985); David Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L L. 521 (1985). ICSID's Administrative Council which acts as its governing body reflects the balance of interests of

international forum and that assures them that the refusal or abstention of the state party to a dispute to participate in the proceedings after it has given its consent cannot frustrate the arbitral process. But the ICSID convention²¹² also provides that a contracting state may, as a condition of its consent to ICSID arbitration, require prior exhaustion of local remedies. This condition may be specified in various ways. It could, for instance, be stipulated in the investment agreement as was usually the case in agreements concluded with Latin American countries.

The model clauses prepared by the ICSID secretariat to assist investors and states in drafting ICSID arbitration clauses, acknowledge this option by suggesting the following language for possible insertion in an ICSID clause:

Before [name of investor] institutes an arbitration proceeding in accordance with the provisions of this agreement, [name of investor] must exhaust [all local remedies] [the (following) (administrative) judicial remedies] [, unless (name of host state) waives that requirement in writing].²¹³

Another way of accomplishing the same objective can result from the declaration made by a contracting State at the time of signature or ratification of the ICSID convention that it intends to avail itself of the provisions of Article 26 and will require, as a condition of its consent to ICSID arbitration, the exhaustion of its local remedies. Of the 91 signatory States, only Israel has made such a declaration.

Under Article 42 of the ICSID convention, an arbitral tribunal must decide a dispute in accordance with the rules of law agreed by the parties. Most ICSID clauses in BITs communicated to ICSID secretariat provide for host state's law.²¹⁴ In the absence of a specific agreement on this matter, the ICSID convention Article 42(1) explic-

the developed and developing countries. The Council consists of one representative of each contracting State, the total number of which is at present eighty eight. Each representative casts one vote. The ICSID convention therefore ensures equal representation to all contracting states. The Administrative Council approves the regulations and rules governing the proceedings relating to investment disputes and elects the Secretary General of the ICSID. Over and above its duty as a dispute resolution forum, ICSID's paramount responsibility is to promote a climate of mutual confidence between investors and States favorable to increasing the flow of resources to developing countries under reasonable conditions. It is essentially an instrument of international policy for the promotion of investments and of economic development.

²¹² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 210, art. 26.

²¹³ For ICSID model clauses, see Article 47 of ICSID Convention and Rule 39(5) of the Arbitration Rules.

²¹⁴ GEORGES R. DELAUME, *TRANSNATIONAL CONTRACTS* ch. XV, para. 15.24 (1982).

itly stipulates that the law of the host state would apply, along with such rules of international law as may be applicable.

The balance of interests that ICSID has advocated has held ascendancy in a number of leading arbitral awards in which the issue of applicable law to the dispute has been contested. In *Kuwait v. Aminoil*,²¹⁵ the parties had agreed in an arbitration agreement to the following applicable law clause:

The law governing the substantive issues between the parties shall be determined by the tribunal, having regard to the quality of the parties, the transactional character of their relations and the principles of law and practice prevailing in the modern world.²¹⁶

As to the law applicable to the substantive issues in the dispute, the arbitrators declared that "the law of Kuwait applies to any matters over which it is the law most directly involved." They went on to note however that "established public international law is necessarily a part of the law of Kuwait . . . In their turn, the general principles of law are part of public international law . . ." The arbitrators thus applied both Kuwait and public international law, Kuwait law being the law most directly involved and public international law being a part of Kuwait law.

In *Texaco v. Libya*,²¹⁷ the sole arbitrator had to decide to which legal system to refer to determine whether and to what extent the concession agreement was binding on the parties. Although the underlying concession agreement contained an express choice of law clause providing that the concession was to be "governed by and interpreted in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals . . ." ²¹⁸ there had been no agreement on the law to be applied in determining the issue of the concession agreement's validity. In deciding this question, the sole arbitrator chose international law over the municipal law of Libya.²¹⁹ There had likewise been no explicit agreement on what law should govern procedural matters. In deciding this question, the arbitrator considered whether municipal law or international law should govern and decided in favor of international law.²²⁰ On the question of applicable substantive law, the arbitrator

²¹⁵ *Kuwait v. Aminoil*, 21 I.L.M. 976, 980 (1982).

²¹⁶ *Kuwait v. Aminoil*, 21 I.L.M. at 1000.

²¹⁷ *Texaco v. Libya*, 17 I.L.M. 3 (1978).

²¹⁸ *Id.* at 14.

²¹⁹ *Id.* at 11-12.

²²⁰ *Texaco v. Libya*, 17 I.L.M. at 8.

also referred to international law as empowering the parties to choose the two-tier system.²²¹ The arbitrator held that

[t]his tribunal. . . holds that it is established that the deeds of concession in dispute are within the domain of public international law and that this law empowered the parties to choose the law which was to govern their contractual relations.²²²

In *Libyan American Oil v. Libya*,²²³ the sole arbitrator found international law applicable to the question of validity of the governing law and arbitration clauses.²²⁴ With regard to the procedural law, the arbitrator rejected the law of the seat in favor of the rules set forth in the U.N Convention on Arbitral Procedure.²²⁵ On the applicable substantive law question, the arbitrator looked to “both municipal and international law, as prescribed by the proper law of the contract.”²²⁶

In the *S.P.P (Middle East), Ltd. and Southern Pacific Properties, Ltd. v. Egypt & Egyptian General Co. for Tourism and Hotels* arbitration,²²⁷ which involved a claim for a breach of contracts with Egypt for the development of a tourism facility on the plateau adjacent to the pyramids at Giza, the parties had not agreed to an applicable law clause. The tribunal held that in the absence of an agreement of the parties, general principles of international law were a part of the law of Egypt and “that the national laws of Egypt can be relied upon only in as much as they do not contravene the said principles.”²²⁸ The tribunal thus applied the law of Egypt as well as applicable rules of international law to the substantive issue of Egypt’s liability referring to Article 42(1) of the ICSID convention as “illustrative of a principle of wider application.”²²⁹ Under Egyptian and international law, the tri-

²²¹ *Id.* at 14.

²²² *Id.*

²²³ Arbitral Tribunal: Award in Dispute Between Libyan American Oil Company (Liamco) and the Government of the Libyan Arab Republic Relating to Petroleum Concessions, 20 I.L.M. 12 (1981).

²²⁴ *Id.* at 32-34.

²²⁵ *Id.* at 42.

²²⁶ *Id.* at 85. In *BP Exploration Co. (Libya) Ltd v. Libya*, 53 I.L.R. 297 (1979)(award on the merits, Aug. 1, 1974), the law of the seat of the arbitration was held applicable. On the applicable substantive law question, the arbitrator looked to the general principles of law. *Id.* at 329.

²²⁷ International Chamber of Commerce Arbitration: Award in the Arbitration between S.P.P. (Middle East) Limited Southern Pacific Properties Limited and the Arab Republic of Egypt, the Egyptian General Company for Tourism and Hotels, 22 I.L.M. 752 (1983) (award on merits, March 11, 1983) (Bernini, Elghatit, Lattman, arb., Elghatit dissenting and refusing to sign the award).

²²⁸ *Id.* at 771.

²²⁹ *Id.* at 769.

bunal found that the principles of *pacta sunt servanda* and just compensation for expropriatory measures applied.²³⁰

X. CONCLUSION

Whereas a lot of ink has been poured by scholars of different persuasions arguing with passion that the proliferation of BITs has had the effect of entrenching the traditional principles of public international law in the area of state responsibility for property belonging to aliens, a close analysis of the various BITs in this paper has revealed that there is not sufficient consistency in the terms of the investment treaties to find in them support for any definite principle of customary international law. To borrow the logic of the words of the ICJ in the *Asylum Case*,²³¹ the foregoing analysis of BITs has manifested "so much uncertainty and contradiction, so much fluctuation and discrepancy in the rapid conclusion of BITs, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not easy to discern in all the treaties any constant and uniform usage, accepted as law regulating foreign investment."

The BITs, then, merely amount to devices to boost investor confidence. Their legal significance is that by providing for arbitration and for subrogation, they ensure that the investors have certain remedies which but for the BIT would have been unavailable to them. The OECD countries have sought to protect their investors through bilateral agreements on account of the morass of confusion that presently obtains in international multilateral forums which was occasioned by the espousal of new norms by the developing countries, norms that are diametrically opposed to the traditional rules of state responsibility for foreign investment. The main objective of the treaties is to create a separate legal regime of investment protection quite apart from the "customary" international law on foreign investment protection which though not fully agreed upon, it is also not sufficiently developed to afford protection to the new forms of foreign investment. Faced with the need for certitude in the legal regime of foreign investment protection more suited to modern conditions, states have seen in

²³⁰ International Chamber of Commerce Arbitration: Award in the Arbitration between S.P.P. (Middle East) Limited Southern Pacific Properties Limited and the Arab Republic of Egypt, the Egyptian General Company for Tourism and Hotels, *supra* note 227, at 770. The award was annulled in French courts but only because of the absence of consent by Egypt to the arbitration clause. See Arab Republic of Egypt vs. Southern Pacific Properties (Middle East), 232 I.L.M. 1048 (1984)(Cour d'appel, Paris, July 12, 1984).

²³¹ *Asylum (Colom. v. Peru)*, 1950 I.C.J. Rep. 266, at 277.

the making of BITs an acceptable way of achieving this objective.²³² This view is supported by an analysis of modern trends in foreign investment protection made by the ICJ in the *Barcelona Traction Case*,²³³ where the court observed that

[c]onsidering the important developments of the last half century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.

No definite universally accepted and consistently applied rules have crystallized in the intervening period since the *Barcelona Case*. Efforts at formulating codes on regulation of foreign investment and multinational corporations have not met with great success either.²³⁴ In effect, each BIT reflects the promotion and protection of each country's interest and the principles of law that are distilled into each treaty are essentially a by-product of an exchange of quid pro quo between the negotiating parties. This scenario accounts for the variance in the treaty practice of each state. The BIT creates legal obligations between the parties and confers greater protection to investors than is provided by the confused norms of international investment law. Effectively, the BITs have contributed not to the creation of universal customary international law as such, but to the creation of spe-

²³² Attempts at creating a multilateral system at Havana failed miserably at a time when developing countries were a minority in the international arena. See Art. 11 of the Havana Charter (not in force) March 24, 1948.

²³³ *Barcelona Traction Case*, 1970 I.C.J. Rep. 3.

²³⁴ OECD, *INTERNATIONAL INVESTMENT AND TRANSNATIONAL CORPORATIONS* (1976); OECD, *INTERNATIONAL INVESTMENT AND TRANSNATIONAL CORPORATIONS. REVIEW OF THE 1976 DECLARATION AND DECISIONS* (1979). The Guidelines are nonbinding and absolutely voluntary in nature. By virtue of the code, the OECD members agreed to progressively abolish among one another restrictions on the movement of capital to the extent necessary for effective economic co-operation. Another example of a regional multilateral treaty is the agreement on the investment and movement of capital among Arab States, a multilateral convention concluded in 1970 among members of the league. It has however been subject to the political vicissitudes of the Arab world and never took off the ground. See Jeswald Salacuse, *Arab Capital and Trilateral Ventures in the Middle East: Is Three a Crowd?*, in *RICH AND POOR STATES IN THE MIDDLE EAST* 129, 146-47 (Malcolm E. Kerr & Elsayal Yassine eds., 1982). The United Nations under the auspices of the United Nations Center For Transnational Corporations (UNCTC) has continued to make efforts that are intended to lead to the adoption of a code of conduct for MNCs in such areas as competition, taxation, transfer of technology, employment relations, information disclosure etc. Draft text reprinted in 23 I.L.M. 602 (1984). See Seymour Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Co-operation and Economic Development*, 30 AM. U.L. REV. 903 (1981). Thus far, the effort to secure a binding code of conduct has been no more successful than has the effort to secure a multilateral treaty to facilitate the free movement of capital.

cial custom between contracting parties.²³⁵ In the *Right of Passage Case* between India and Portugal, the ICJ noted that

it is contended on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.²³⁶

This case may contain the most decisive recognition of particular customary rules as opposed to general customary rules.²³⁷ The court noted that the situation was "a concrete case having special features; that the practice between the two States was clearly established and that therefore such a particular practice must prevail over any general rules."²³⁸ To the extent that States in their various BITS agree to conform to particular standards of treatment of the investment of nationals of each other, that *ipso de jure* becomes the law between the two sovereign nations. It is immaterial that a State may have BITS that provide for different treatment with any of its other contracting parties. The regime of law established between two sovereign nations in each BIT suffices to establish the special custom if they faithfully follow the dictates of their BIT to the letter.

It is important to note that there are some principles that are common to almost all the BITS and thus by and large evince the practice of States. Effectively, there is utility to the BITS in this regard in formulating legal principles that may become customary international law. Whereas there may not be agreement on some of these principles at the international level, the BITS contribute incrementally to the crystallization of customary international law which ultimately may be distilled into treaty law.

In conclusion, I contend that bilateral negotiations that lead to the conclusion of bilateral investment treaties will not settle dispositively the issues of public international law regarding investment law

²³⁵ The distinction between general custom and special custom is very simple. General customary law applies to all States, while special custom concerns relations between a smaller set of States. As Professor Myres McDougal has put it:

Some prescriptions are inclusive of the globe; other prescriptions recognize self direction by smaller units.

MYRES MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER* 15 (1960). See also OLIVER J. LISSITZYN, *INTERNATIONAL LAW TODAY AND TOMORROW* 7 (1965); Salt, *The Local Ambit of Custom*, in *CAMBRIDGE LEGAL ESSAYS* 279, 283 (1926).

²³⁶ *Right of Passage Case (India v. Port.)*, 1960 I.C.J. Rep. 4, 39.

²³⁷ KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 89 (2nd rev. ed. 1993).

²³⁸ *Right of Passage Case*, 1960 I.C.J. Rep. at 44.

that is necessary to ensure unfettered mobility of capital across frontiers. There is a need for an international multilateral conference to negotiate an international regime of investment law.²³⁹ This duty to produce a multilateral legal blueprint should not be abdicated at the expense of the easier path of bilateral negotiations where the exchange of quids between the developed and some vulnerable third world countries holds sway. The time has come and now is when such a conference is absolutely feasible. The world must rise to the occasion and seize the opportunity or forever miss the boat.

²³⁹ The World Bank-IMF Joint Development Committee attempted to deliver a legal framework for the treatment of foreign direct investment. *See* ICSID Rev.-FILJ Vol. 7 No. 2, Fall 1992. The guidelines cover each of the four main areas usually dealt with in investment treaties, namely the admission, treatment and expropriations of foreign investments and the settlement of disputes between governments and foreign investors. In the communique issued by the development committee after discussing the guidelines, it noted that the guidelines constituted a further step in the evolutionary process where several international efforts aim to establish a favorable investment environment free from non-commercial risks in all countries, and thereby foster the confidence of international investors. Accordingly, the committee called the attention of member countries to the guidelines as useful parameters in the admission and treatment of private foreign investment in their territories, without prejudice to the binding rules of international law at this stage of its development.

It is important to note that the guidelines are not legally binding even though they may represent the *opinio juris* on the issues at hand. The guidelines are also not exhaustive as they only deal with the obligations of the host state and do not mention the obligations of the foreign investor to the host state which is by all means a fatal omission that casts great doubt on the juridical utility of the guidelines. The fear of reproducing the work of the UNCTC is understandable. This omission underscores the need for a multilateral conference to settle the regime of international law governing foreign direct investment hopefully once and for all.