# NEW DEVELOPMENTS IN BILATERAL INVESTMENT PROTECTION

## (WITH SPECIAL REFERENCE TO BELGIAN PRACTICE)

by

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In a world observing with bewilderment the acceleration of its own history, custom, in view of its slow process of articulation, has ceased to be the primary formal source of international law. While it was apt to delimit the jurisdictions of coexisting states, imposing upon them little more than duties of abstention with regard to other states, only treaty law can define the modalities of active cooperation and participation — not to speak of integration — particularly when the treaty partners have different cultural backgrounds, represent opposing social systems or find themselves at unequal levels of economic development [1].

It is now increasingly recognised that economic relations between unequally developed states are or ought to be governed by a set of principles differing sometimes widely from those applicable to relations among the industrialised market-economy countries (Western Europe, North America, Japan). Even the two fundamental rules of international trade under the classical and neo-liberal economic theories — non-discrimination and reciprocity — are presently being subjected to close scrutiny by economists and lawyers and it appears that, while they continue to be valid in the developed world, they are in the process of turning into discrimination and non-reciprocity in negotiations with less developed countries [2].

The emerging international law of economic development governs the economic relations of developing countries with either the developed or other

[1] These developments have been admirably set out by Wolfgang FRIEDMANN in *The Changing Structure of International Law*, 1964.

[2] See PREISWERK, « La réciprocité dans les négociations entre pays à systèmes sociaux ou à niveaux économiques différents », 94 *Journal du droit international*, 1967.

developing countries, particularly in the fields of aid, trade and investments [3]. While little attention has so far been devoted to the relatively unexciting legal aspects of foreign aid, the discussions on a new international law of trade with developing countries were very lively both during and after the U.N. Conference on Trade and Development (1964). However, it is with respect to the promotion and protection of private investment in developing countries that international lawyers have sensed a particular challenge for intellectual mobility. There are serious reasons for pushing the analysis still further for much of the existing literature has an anti-private-enterprise flavour or, on the contrary, blindly defends any kind of right acquired in the past. In addition, some important developments of the post-colonial years are neglected.

Ever since the nationalization of the Suez Canal, the idea of a restatement, in a multilateral investment convention, of what are thought to be the customary rules governing private foreign property has been propounded by a surprisingly large number of institutions and scholars [4]. None of the existing drafts has a serious chance of adoption by the developing countries [5]. Agreement is even lacking within the Western community with respect to a text primarily designed for use among O.E.C.D. members.

[3] See Michel VIRALLY, « Vers un droit international du développement », XI *Annuaire français de droit international*, 1965, pp. 3-12. Other important questions are those of double taxation, protection of intellectual property and social security. Legal problems also arise from economic development on the domestic scene. A research project on this subject has been launched by UNESCO. See International Association of Legal Science, *Legal Aspects of Economic Development*, 1966.

[4] See for a list and discussion of these proposals : A.A. FATOUROS, *Government Guarantees to Private Foreign Investment*, 1962, pp. 69-92; and E.I. NWOGUGU, *The Legal Problems of Foreign Investment in Developing Countries*, 1965, pp. 135-165.

[5] We have stated the reasons for this unfortunate situation in *La protection des investissements privés dans les traités bilatéraux*, 1963, pp. 15-18. Criticism of the multilateral approach, though less outspoken, can also be found in M.J. VAN EMDE BOAS, « The O.E.C.D. Draft Convention on the Protection of Foreign Property », 1 *Common Market Law Review*, 1963, pp. 256-293, and FATOUROS, *op. cit.*, pp. 87-92. Many totally unrealistic arguments in favor of a multilateral treaty continue to be put forward despite such criticism. A recent meeting of the International Chamber of Commerce even suggested that a multilateral code, once adopted, could serve as a model for bilateral treaties (*Statements and Resolutions of the I.C.C.*, 1963-1965, pp. 22-24). This ignores the fact that agreement between unequally developed states on controversial issues of vital economic, political and social significance must evolve gradually and cannot begin with what is usually the last stage in the formation of universal international law.

One partial achievement in the multilateral field is the World Bank Convention of 1965 on the Settlement of Investment Disputes. This convention is revolutionary in the sense that it provides for an international dispute-solving procedure open to individuals and companies. But the jurisdiction of the World Bank Center exists, of course, only on a consensual basis. This explains why ratifications are so easily obtained from the respective Parliaments. The Convention entered into force on October 14, 1966. The World Bank is

It is not dogmatic hostility to private enterprise that explains the attitude of the developing countries. In fact, the « Third world » is becoming increasingly aware of the positive contribution that certain types of private foreign investments can make to its economic advancement [6]. Objections are made mainly to the terms under which investments are to be protected according to the multilateral drafts. On the other hand, the majority of investors feel that the domestic investment laws of the developing countries, although they may provide for reasonable or even exceptionnally favourable terms, offer no guarantee of long-term stability. The elaboration of internationally binding rules apt to induce new investments on terms compatible with the development aims of capital-importing countries is, therefore, undeniably the foremost task of the international lawyer concerned with economic development. It is still not sufficiently recognised that, at the present moment, bilateral contracts and treaties constitute the most valuable achievement in this direction.

## I THE FOUR FACETS OF THE BILATERAL APPROACH

Investors and governments of capital-exporting countries have devised four different methods when seeking legal protection for private investments in bilateral agreements. The most widespread and probably the most effective instruments are contracts concluded by the investor himself with the government of the capital-importing country. Governments are the sole parties to the other three types of agreements.

### 1. CONTRACTS BETWEEN STATES AND FOREIGN INVESTORS

At a time when most developing countries were still under colonial domination, *concession agreements* (or simply *concessions*) were widely used to provide a legal basis for the exploitation of natural resources or the operation of public

also working on a multilateral investment insurance which has serious advantages over the bilateral schemes. See I.B.R.D., *Multilateral Investment Insurance,* 1962.

The investment protection that stems from the establishment clauses in the Yaoundé Convention of 1963 on the Association of African States to the European Economic Community has been obtained by the six European partners, because it offers the associated countries a package deal : economic aid from the E.E.C. amounting to 730 million dollars over five years and an average annual export surplus to the E.E.C. of 200 million dollars are among the advantages that accrue to the associated countries in exchange for investment protection which, despite a reciprocity clause, is in fact an unilateral favour of the African partners. *Cf.* Communauté économique européenne, *Huitième rapport général sur l'activité de la Communauté,* June 1965, pp. 344-367.

[6] Most recently, the Third Committee of the U.N. Conference on Trade and Development has devoted considerable attention to the rôle of private capital. See *Proceedings of U.N.C.T.A.D.,* 1964, Vol. 5, pp. 33-34, and General Principle eleven, adopted by all developing countries, *ibidem,* Vol. 1, p. 21.

utilities with foreign capital [7]. Recently, such contracts have also become popular with respect to investments made in other sectors of a country's economy. The terminology has changed with the substance and one now refers more often to economic development agreements [8] or sometimes *conventions d'établissement* [9]. The multiple controversial issues raised in connection with these contracts by international lawyers cannot, of course, be discussed here [10].

## 2. ESTABLISHMENT TREATIES

Another traditional bilateral instrument is the inter-governmental establishment treaty. It has recently been used, with varying success, to provide for investment protection in developing countries. Tradition is, however, not necessarily an advantage and United States practice in this field is particularly illustrative of the fact that a model treaty which evolved from relations among Western states during the 19th and the first half of the 20th centuries and which has in recent years met with the approval of all six Common Market countries, is not necessarily an adequate basis for relations with new states. Since 1945, only one Latin-American (Nicaragua) and two African (Ethiopia, Togo) states have subscribed to the American treaty of Friendship, Commerce and Navigation [11]. Other countries, among which figure most eminently Japan

[7] See e.g. T. GULDBERG, « International Concessions, a Problem of Economic Law », 14 *Nordisk Tijdskrift for International Ret,* 1944, pp. 47-73; Kenneth CARLSTON, « Concession Agreements and Nationalization », 52 *A.J.I.L.,* 1958, pp. 260-279; Georges LE TALLEC, « La concession, instrument juridique d'investissements privés étrangers », 51 *Revue de science financière,* 1959, pp. 388-423.

[8] James N. HYDE, « Economic Development Agreements », 105 *Recueil des Cours* (Hague Academy), 1962-I, pp. 271-374.

[9] Philippe KAHN, « Problèmes juridiques de l'investissement dans les pays de l'ancienne Afrique française », 93 *Journal du droit international,* pp. 338-390.

[10] In addition to literature already cited, the most recent studies on the question are : J.F. LALIVE, « Contracts Between a State or a State Agency and a Foreign Company », 13 *International and Comparative Law Quarterly,* 1964, pp. 987-1021; Jacques LOGIE, « Les contrats pétroliers iraniens », 1 *Revue belge de droit international,* 1965-2, pp. 392-428; K.H.R. DARJA, *Toward Improving Legal Conditions of Viability of Economic Development Agreements, Harvard Law School Thesis,* 1965.

[11] The following statement was made in 1962 by a representative of the Department of State before the Senate Committee on Foreign Relations : « ... the failure to make greater headway with the program in Latin America results from deep-seated opposition by officials and the public in many of the countries to commitments of the type contained in our treaties. Such treaties are regarded as tending to infringe upon the sovereignty and independence of individual countries ». 1 *International Legal Materials,* August 1962, p. 92. In Asia the program has been somewhat more successful, but most contracting partners are countries heavily dependent on the United States : China, Iran, Korea, Pakistan, Vietnam, Thailand. Other F.C.N. treaties have been concluded with Greece, Israel and Mascate and Oman. A set of individual agreements amounting to more than F.C.N. standards have been signed with the Philippines. See 1 *International Legal Materials,* August 1962, pp. 92-94.

Some of the treaties with developing countries are called « Treaties of Amity and Economic

and Great-Britain, have also concluded individual treaties of the traditional FCN type with developing countries [12].

The only effort at bilateral establishment treaty relations with new states on the basis of a specially devised text was made by France. In 1960, six establishment conventions were signed with those of France's former African colonies which were prepared to join a revised version of the *Communauté* (Senegal, Malagasy Republic, Chad, Central African Republic, Gabon and Congo-Brazzaville). These treaties offer the most complete assimilation of nationals and companies for economic activities in the territories of the contracting parties that has yet been seen in international practice [13]. However, they must be viewed in the context of a whole set of treaties of cooperation which define the relations between France and each of her former colonies and cannot, therefore, be regarded as a possible model-treaty for investment protection in a different historical, political and economic setting [14].

When adding those of other capital-exporting countries, the total number of establishment treaties concluded since 1945 which bear some impact on investment protection in developing countries is approximately fifty.

### 3. INVESTMENT GUARANTEE TREATIES

Whereas the two bilateral instruments mentioned so far are solidly anchored in the history of international relations and are sometimes only slightly adapted to suit relations with new states, the remaining two types of treaties have been newly devised after World War II to take into account the particular political and economic background of financial transactions with less developed countries.

Investment guarantee treaties are designed to facilitate the implementation of unilateral measures taken by capital-exporting countries in the form of investment insurance schemes. The United States established such a scheme

Relations ». However, establishment provisions in these treaties are practically identical with those in the more frequently used F.C.N. model. The State Department has again confirmed this when announcing the signature of the 1966 treaty with Togo. *Cf. Department of State Bulletin,* March 7, 1966, p. 367. Text reproduced in 5 *International Legal Materials,* July 1966, pp. 737-746.

For a detailed analysis of F.C.N. treaties and a bibliography, see PREISWERK, *op. cit.*, 1963, pp. 100-177, 230-232; NWOGUGU, *op. cit.*, pp. 124-135. Much information can also be gained throughout the book of A.A. FATOUROS.

[12] Japan with India, Cuba, Malaysia, the Philippines, Pakistan, Peru, Indonesia and El Salvador. Great-Britain with Nepal, Mascate and Oman, Iran and Cameroon. The latest example in the practice of the two countries is the treaty concluded between themselves. *Cf.* Harry H. ALMOND, « The Anglo-Japanese Commercial Treaty of 1963 », 13 *International and Comparative Law Quarterly,* 1964, pp. 925-986.

[13] See PREISWERK, *op. cit.*, 1963, pp. 184-186.

[14] A descriptive survey of all these treaties is offered by Maurice LIGOT, *Les accords de coopération entre la France et les Etats africains et malgache d'expression française,* 1964.

as far back as 1948 and has since successfully negotiated investment guarantee agreements with 73 countries, i.e. practically every developing country in the world [15]. The ease with which the agreement has found general acceptance actually denotes its narrow scope and limited significance. The capital-importing states assume only conditional obligations through recognition of certain rights to the United States Government in cases where political risks, transfer risks or calamity risks are encountered by the insured investor and give rise to payments under the insurance. But the agreements neither positively bind them to take measures designed to increase the physical security of foreign establishments, to authorise transfers in foreign currency and to abstain from interference with foreign property, nor do they define the conditions under which expropriatory measures are allowed [16]. However, the international lawyer may discover some interesting features in the texts. Foremost among these is the recognition of the right of capital-importing countries to screen American investments, since no insurance is to be issued by the U.S. Government unless the investment has been approved by the host country. Furthermore,when allowing for the subrogation of the U.S. Government to all rights of an investor who has suffered a loss covered by the insurance, the agreements introduce a new type of diplomatic protection and thereby preclude the Government of the capital-importing country to set forth the argument embodied in the Calvo doctrine against such protection.

### 4. INVESTMENT PROTECTION TREATIES

Treaties which require positive steps on behalf of the capital-importing countries to create a suitable investment climate and which provide definitely for obligations irrespective of an insurance scheme, are the fourth type of bilateral instruments known in present-day interstate practice.

In general, these treaties cover at least four significant subject matters :
— the standards of treatment of foreign investments;
— the transfer of profits and the repatriation of investments;
— the conditions of a taking of property;
— the settlement of investment disputes.

Despite its briefness, this description reveals beyond doubt that while investment protection treaties may in many cases resemble contracts between states

[15] A list is published in 5 *International Legal Materials,* March 1966, pp. 377-378. Norway and Japan, two other countries which offer their investors insurance guarantees, do not make the use of the insurance dependent on an agreement with the capital-importing country. But the German investment protection treaties usually contain a succint clause to this effect.

[16] A good recent discussion of the system is offered by L. COLLINS and A. ETRA, « Policy, Politics, International Law and the U.S. Investment Guarantee Program », 4 *Columbia Journal of Transnational Law,* 1966, pp. 127-151.

and foreign investors, they differ substantially, in purpose and substance, from investment guarantee treaties [17]. In fact, they have in many respects more in common with establishment treaties, mainly in that they create protection through legal obligations imposed upon the host government rather than through insurance. However, establishment treaties are generally founded on a philosophy of *laissez-faire,* while investment protection treaties tend to bring the inflow of foreign capital into accordance with the developing country's need, fulfilled through planning, for a strict allocation of complementary local resources (capital, energy, qualified labour, etc.). Thus, the FCN treaty seeks to secure free access of capital and free transfers of profits and amortization payments [18], whereas, according to the German model investment protection treaty, only investors to whom the Government of the capital-importing country has issued a « document of admission » are entitled to the allocation of foreign currency for transfers abroad. Furthermore, while establishment treaties devote much attention to the entry, sojourn and professional activities of nationals and to the acquisition and disposal of private property (with emphasis on problems of inheritance), the investment protection treaties are mainly concerned with the rights of corporate entities. It is significant that Germany, having successfully completed the negotiation of an establishment treaty with Greece in 1960, concluded an investment protection treaty with the same country in 1961 [19].

In mid-1966, the investment protection treaty has become a policy instrument of six continental European countries and has been accepted by no less than 32 countries in Africa (19), Asia (8), Southern Europe (3) and Latin America(2) [20]. The Federal Republic of *Germany* introduced this new type

[17] In this respect, comments made by A.A. FATOUROS on the German investment protection treaties are misleading, in particular the statement that « treaties of this type seem to be a cross between the United States investment guarantee agreements and its F.C.N. treaties ». *op. cit.*, p. 113. The same is true for G.A. VAN HECKE who goes as far as saying : « ... en fait on ne constate guère de différences importantes entre les divers traités bilatéraux conclus au cours des dernières années ». *Cf.* « Le projet de convention de l'O.C.D.E. sur la protection des biens étrangers », 68 *R.G.D.I.P.*, 1964, p. 649.

[18] It is true that exceptions to these rules are as far-reaching as the general principle. *Cf.* NWOGUGU, *op. cit.*, pp. 126-130.

[19] *Bundesgesetzblatt,* 1962 II 1505, 1963 II 217. See Alexander KARAKATSANIS, « Das deutsch-griechische Niederlassungs- und Schiffahrtsabkommen », 8 *Aussenwirtschaftsdienst des Betriebberaters,* 1962, pp. 75-76. Rolf BERGER, « Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Griechenland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen », *ibidem,* 1965, pp. 365-372. Other German investment treaties (e.g. those with Pakistan, Guinea, Cameroon) contain a *pactum de contrahendo* for the conclusion of an establishment convention.

[20] Among them Tunisia is bound by five treaties, while Senegal, Niger, Guinea, Congo-Brazzaville, Cameroon, Togo, Liberia, Morocco and the Malagasy Republic all have signed two treaties. Of the total number of 45 treaties signed before July 31, 1966, about half were already in force by that date.

of treaty in 1959 and ever since has negotiated it with relentless energy. Though the German model-treaty is by far the most elaborate, not to say meticulous, of all investment protection treaties, it has already met the approval of the following 27 countries :

| *Africa* | *Asia* | * in force |
|---|---|---|
| Liberia | Pakistan * | |
| Morocco | Malaysia * | |
| Togo * | Iran | |
| Cameroon * | Thailand * | |
| Guinea * | Korea | |
| Malagasy Republic * | Ceylon | |
| Sudan | Philippines | |
| Senegal * | India * | |
| Congo-Kinshasa * | | |
| Ethiopia | *Southern Europe* | |
| Niger * | Greece * | |
| Tanzania | Turkey * | |
| Kenya | | |
| Congo-Brazzaville | | |
| Tunisia * | *Latin America* | |
| Central African Republic | Chile | |

Since 1961, Switzerland has used a shorter form of investment protection treaty and sucessfully negotiated it with 14 countries [21] :

| *Africa* | *Southern Europe* |
|---|---|
| Tunisia * | Malta |
| Senegal * | |
| Niger * | *Latin America* |
| Ivory Coast * | Honduras |
| Guinea * | |
| Congo-Brazzaville * | |
| Cameroon * | |
| Liberia * | |
| Rwanda | |
| Togo | |
| Malagasy Republic | |
| Dahomey | |

[21] See, e.g. those with the Ivory Coast and Niger, *Recueil officiel des lois,* 1963, p. 45; Senegal, 2 *International Legal Materials,* January 1963, pp. 144-150; Tunisia, *ibidem,* May 1964, pp. 524-527.

While all the other texts of this series are named « Agreements on Trade, Investment Protection and Technical Cooperation », the one with Liberia is called « Treaty of Amity and Commerce ». It contains, however, the same investment provisions, except for those on arbitration which are embodied in a separate dispute-settlement convention.

Following more the Swiss than the German model, *France* [22] and *Holland* [23] signed investment treaties with Tunisia in 1963. Finally, the *Belgo-Luxemburg Economic Union* concluded treaties along the same lines with Tunisia in 1964 and Morocco in 1965 [24].

## II THE BELGO-LUXEMBURG TREATIES WITH TUNISIA AND MOROCCO

We have so far defined the place of Belgo-Luxemburg treaties in the general framework of the international law of economic development and particularly among the various types of bilateral agreements in the investment field, and can now turn to a closer examination of the two relevant texts. Wherever notable differences exist, reference will be made to treaties of the same category concluded by other capital-exporting countries.

### 1. MATERIAL SCOPE OF THE TREATIES

Although the term investment is not expressly defined, the material scope of the treaties can be extrapolated from Article 1. Quite significantly, reference is not made there merely to the treatment of investments, but to that of « assets, rights and interests » as well. In concrete terms, this can only mean that the treaty protection reaches far beyond investment of capital and covers all types of personal and corporate property, including e.g. currency, goods, mortgages, as well as intellectual and industrial property. Reinvestments are also covered [25].

Unfortunately, it is not clear whether rights accorded to investors in concessions and economic development agreements fall within this definition of investments. Only the German texts and some of the multilateral draft conventions are clear in this respect [26]. In the type of treaties employed by Belgium and Luxemburg, there is no reference made to state contracts with investors

[22] *Journal officiel (Lois et décrets)*, 22 September 1965. Also published in 93 *Journal du droit international,* 1966, pp. 218-222. For comments on French policy, see Jean CHARPENTIER, « Pratique française du droit international », XI *A.F.D.I.*, 1965, pp. 1039-1040.

[23] *Tractadenblad,* 1963, N° 106.

[24] Only the one with Tunisia is in force. *Moniteur belge,* 9 March 1966, p. 2491.

[25] The German treaties give a complete enumeration of the kinds of property falling within their scope. See Article 8, § 1, of the treaty with Pakistan, 457 *United Nations Treaty Series* 28 and Rolf BERGER, « Vermögensschutz im Ausland durch Investitionsförderungsverträge », 11 *Assenwirtschaftsdienst des Betriebsberaters,* 1965, p. 7; and « Vertrag zwischen der Bundesrepublik Deutschland und Pakistan zur Förderung und zum Schutz von Kapitalanlagen », *ibidem,* 1966, pp. 109-110.

[26] Article 2 of the O.E.C.D. draft reads as follows : « Each Party shall at all times ensure the observance of undertakings given by it in relation to foreign property of nationals of any other party ».

other than the one contained in the expropriation clauses, which requires that measures falling under these provisions should not be « contrary to a specific commitment » (Article 3). However, even in the absence of an explicit reference, the unilateral modification of a concession and the breach of an economic development agreement may, depending on the circumstances, be contrary to the equitable-treatment and non-discrimination standards of investment treaties. The absence of a clear definition is, therefore, not due to the negligence of negotiations but to the pursuit of flexibility, which contrast favourably with the categorical dictum of the O.E.C.D. draft. For indeed, as one of the eminent specialists of investment problems has said in connection with the Abs-Shawcross draft : « Words like *sanctity* or *at all times* impart a finality which belongs to the domain of religion » [27].

2. PERSONAL SCOPE OF THE TREATIES

As with the formulas used in the Swiss, French and Dutch texts, each contracting party undertakes to protect the property of « nationals, physical and juridical persons, of the other contracting party » (Article 1). Unfortunately this definition of the personal scope of the treaties is not as precise as one could wish. It could be argued that only foreign companies and their branches can claim treaty protection, whereas subsidiaries, incorporated locally, cannot seek protection against the government to whom they owe their nationality. This argument has led a California court to overrule the application of a U.S.-Japanese FCN treaty to a Japanese company's subsidiary incorporated in California [28]. If such reasoning were to prevail at a time when the bulk of private foreign investments give rise to the creation of new companies incorporated under the laws of the capital-importing state, the effectiveness of investment protection through treaties would be practically inexistant. Of course, shareholders in the subsidiary of a foreign company come under the definition of « nationals of the other contracting party ». But while this may be significant in the case of a taking of the subsidiary's property and encourage a government to accord diplomatic protection to shareholders of its nationality, it has no relevance to the status of the subsidiary itself. Now it is very doubtful whether a subsidiary could conduct business under satisfactory conditions, if shareholders

[27] Ignaz SEIDL-HOHENFELDERN in 10 *Journal of Public Law*, 1961, p. 104. It is for the same reasons that the 1965 World Bank Convention for the Settlement of Investment Disputes does not define the term investment, but leaves it to the future arbitrators and conciliators to examine claims brought before them in the light of the concrete situations. Discussions on this point before the U.S. Senate Foreign Relations Committee are reproduced in 5 *International Legal Materials*, July 1966, pp. 657-659. For a definition, see Philippe KAHN's Preliminary report submitted to the 1966 Conference of the International Law Association.

[28] *United States v. R.P. Oldham Co*, 152 *Federal Supplement* 818 (1957). For a more detailed criticism of this decision and examples of contrary rulings, see PREISWERK, *op. cit.*, 1963, pp. 63-68.

alone were entitled to, say, equitable treatment and transfer guarantees. Although this view, based on a teleological interpretation of treaties, may be sufficiently convincing in itself, it seems advisable to make the language of future treaties more specific on this point. Article 25, § 2b, of the 1965 World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States seems to confirm that more precision in this field would not be a luxury.

It reads as follows : ...

> « 2) ' National of another Contracting State ' means :
>
> a) any natural person...
>
> b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute... and any juridical person which had the *nationality of the Contracting State party to the dispute...* which *because of foreign control,* the treaty partners have agreed should be treated as a national of another Contracting State for the purposes of this Convention. »

Another interesting question is whether nationals and companies of a third state could benefit from the Belgian treaties after having established the *siège social réel* of a company in Belgium. The answer is definitely affirmative, since the treaties refer to « nationals of the other contracting party » without excluding third-party control [29]. However, this formula does not cover companies controlled by nationals of Belgium and Luxemburg but which have the nationality of a third state [30].

### 3. TEMPORAL SCOPE OF THE TREATIES

The two investment protection treaties under consideration come into force a fortnight after the exchange of the two instruments of ratification [31]. While the Swiss and Dutch treaties are provisionally applied as from the date of signature, the Belgo-Luxemburg texts limit such provisional application to the articles concerning the transfer of capital and earnings to the investor's country of origin. This presents no difficulties to the host country in view of the reference to municipal law in the transfer provisions. Such laws governing foreign investments and transfers are in force in both North African

[29] Reservations of that kind can be found in the Franco-American establishment convention of 1959 (Article XIII) and the Franco-Italian treaty of commerce of 1951 (Article 7).

[30] German investment treaties sometimes clarify these problems, but there is no uniformity in this respect. See Rolf BERGER, *op. cit.*, 11 *Aussenwirtschaftsdienst des Betriebsberaters*, 1965, pp. 3, 366, 369-370; 1966, pp. 105, 110.

[31] Tunisia (Article 7), Morocco (Article 8). The texts must be ratified by the respective Parliaments. In Switzerland Parliament has conferred the authority to conclude investment treaties upon the Federal Council. *Cf.* XXI *Annuaire suisse de droit international,* 1964, pp. 157-159.

countries and were applicable to nationals of Belgium and Luxemburg even in the absence of treaties [32].

All this may not be very significant to investors, who are much more interested in the duration of treaty protection. In this respect investment protection treaties contain guarantees unknown in other bilateral instruments. In view of the relatively short periods of validity (2 years in the case of Switzerland, 5-10 years in the other agreements) an effective investment protection can only be achieved if the status guaranteed to investors remains untouched for a certain period extending beyond the denouncement of the treaty by the capital-importing state. All except the Franco-Tunisian treaty provide for such periods of extension ranging from 5 to 20 years; it is 10 years in the Belgo-Luxemburg treaties. Total minimum duration of the protection is thus 20 years in the latter case as compared to 7 years in some Swiss treaties, 16 years in the O.E.C.D. draft and 30 years in some German texts.

It should be noted that this prolonged duration of treaty protection is not only intended to create a favourable investment climate. It may also have an influence on the investor's behaviour with regard to transfers of profits and interests. As is well known, investors are constantly torn between the lust for profits and the fear of impediments. Even where security standards are low, investors take a risk when profits promise to be exceptionally high. Where the risk is reduced and the chances of stable and durable protection more concrete, the investor is not so much in a hurry to transfer the maximum of profits in a minimum amount of time. The extended-duration clause is, therefore, not an unreasonable demand on behalf of investors, as some capital-importing countries argue, but clearly in the interest of those developing countries, which are in constant need of long-term capital and always short of foreign currency for the service of debts.

### 4. THE ADMISSION OF FOREIGN INVESTMENTS

Customary international law imposes, of course, no limitation on the right of states to screen foreign investments. Developing countries, more than others, are bound to select among proposed investments and to refuse the granting of protection to those which are not felt to have an impact on the productive capacity of the developing economy or do not contribute to the attainment of aims specified in development plans or investment laws. This principle of screening is expressed in two ways in the Belgo-Luxemburg treaties. Article 7 of the treaty with Morocco specifies that only investments made after the conclusion of the treaty are covered. There is no such provision in the Tunisian

[32] *Infra,* note 55. Note that the German treaties frequently provide for retroactive treaty protection. In the case of Pakistan, it extents to investments made after 1 September 1954 (Article 9). See BERGER, *op. cit.,* 1965, pp. 8-9, 1966, p. 111.

text, but both treaties stipulate that only agreed investments and reinvestments can give rise to a repatriation of capital, i.e. transfers from the country of investment of the product of total or partial liquidation (Article 2, § 2). Consequently, although this may not be a prerequisite to admission for all kinds of investments, new investors have the greatest interest in obtaining an *agrément* from the authorities of their country of choice. There are no indications in the treaties as to the criteria of selection or the procedures to be followed in this respect [33]. The question is, therefore, entirely left to the discretion of the capital-importing countries. In fact, the investment laws of Tunisia and Morocco both define the conditions for admission [34].

The difference between the Tunisian and Morrocan treaties lies in the fact that, in the former case, investments made prior to the conclusion of the treaty can be submitted for retroactive approval. This would have to be done in addition to the requirement instituted by Article 5 of the 1961 Tunisian decree, according to which all aliens must be holders of a *carte de commerçant.* Indeed, the authorization to exercice certain commercial activities does not in itself imply transfer guarantees.

## 5. THE STANDARDS OF TREATMENT OF INVESTMENTS

The first standard to be encountered in a growing number of bilateral treaties is that of *fair and equitable treatment.* There is much confusion as to the exact meaning of the term and some hesitation concerning its practical significance. It seems, therefore, necessary to define the notion with particular care.

Equitable treatment must be clearly distinguished from the well-known concept of equity, which empowers international judges and arbitrators, with the acquiescence of the parties involved, to depart from the existing law and to propose a political solution acceptable to both sides [35]. Whether equity is perceived as being outside of the law or as part of it, the fact remains that it bestows the judge with the power to mitigate the rigidities of the law [36].

[33] Screening being an important aspect of the German investment protection philosophy, the treaties of this country contain some details on such procedures. See e.g. the Exchange of Letters following the treaty with Pakistan, 457 *U.N.T.S.* 40-42, and BERGER, *op. cit.*, 1965, pp. 2-3, 370-371; 1966, pp. 110-111.

[34] Décret-loi N° 61-14 du 30 août 1961 relatif aux conditions d'exercice de certaines activités commerciales, *Journal officiel de la République tunisienne*, 1 September 1961, pp. 1152-1153.

Dahir N° 1-60-383 du 31 décembre 1960 instituant des mesures d'encouragement aux investissements privés, *Bulletin officiel du Royaume du Maroc*, 10 February 1961, pp. 184-186.

[35] We shall see in the section dealing with arbitration that the Belgo-Luxemburg investment protection treaties contain a similar reference to *ex aequo et bono* awards as the one in Article 38, § 2, of the Statute of the International Court of Justice.

[36] See G. SCHWARZENBERGER, *International Law*, Vol. 1 (3rd ed.), 1957, p. 52, and W. FRIEDMANN, *op. cit.*, pp. 197-199.

Along the same lines, equity could be viewed as the foundation of non-reciprocity in negotiations on economic matters between unequally developed states [37].

The equitable-treatment standard is in a way a transposition into treaties of the well-known municipal law principle of good faith [38]. This may sound vague, but the strength of the principle lies precisely in its indeterminate character. Just as municipal laws cannot regulate in advance all feasible contingencies in the life of a community, treaties must, through clauses of a general nature, remain instrumental in situations where the more precise standards of treatment are inoperative. The principle of good faith applied to private business operations by aliens is tantamount to the idea that, even in the absence of precise treaty or contract provisions, contracting parties must conform to an objectively justifiable line of conduct. They should not render business operations impracticable through excessive taxation, import restrictions on items indispensable to the operation of the enterprise, price controls or labor laws which harrass the employers beyond tolerable limits etc. Thus the standard here under consideration appears to be the major legal tool against such categories of impediments to foreign investments as creeping expropriation [39] and indirect discrimination [40]. It is in a more general way a functional minimum standard of treatment of private business, quite different however of the traditionally known legal minimum standard of the so-called civilized nations.

It must be remembered that the appreciation of what is fair, reasonable or equitable in the treatment of private enterprise is bound to vary in countries of different political and social systems and unequal levels of development. It seems that only an independent authority can determine in a particular situation, whether the behaviour of a government encumbers the conduct of private business or whether the ends pursued by a particular foreign investor are incompatible with the development needs of the host country. Yet, despite its relativity, the equitable-treatment standard is not designed to reduce the obligations of the capital-importing country in the sense that equity calls for indulgence. On the contrary, equitable treatment is tantamount to a strict adherence to the obligations contracted in an investment convention. It requires from the government of the capital-importing country a behaviour pursuant to the spirit of the treaty beyond its wording.

[37] See PREISWERK, *op. cit., Journal du droit international*, 1967.

[38] See Michael BRANDON, « Legal Aspects of Foreign Investments », *Federal Bar Journal*, 1958, p. 386.

[39] A very broad introduction to this phenomenon is offered by Saul LITVINOFF in 33 *Revista Juridica de la Universidad de Puerto Rico*, 1964, pp. 217-250.

[40] Indirect discrimination results, e.g., from regulations equally applicable to aliens and nationals, but in fact discriminatory because of a requirement which places the alien alone in a disadvantageous position. See Dietrich SCHINDLER, *Gleichberechtigung von Individuen als Problem des Völkerrechts*, 1957, pp. 142-149.

The question may arise where the investor's mutual obligation to respect a similar standard of behaviour is embodied. If an economic development agreement is signed, the principle of good faith constrains the investor just as much as the government of the host country not to adopt a behaviour contrary to the goals set out in the agreement. In the absence of such an agreement, it seems that the institution of screening embodied in investment treaties or in municipal laws is in itself a sufficient safeguard against investments which are incompatible with the development aims and the economic and social needs of the host country.

The second standard of treatment is that of non-discrimination with respect to nationals or *national treatment* (Article 1, § 2). This article puts nationals and companies from Belgium and Luxemburg on an equal footing with those of Tunisia and Morocco and implies in the minds of the negotiators a renounciation of the minimum standard of international law.

The bone of contention with regard to the national-treatment standard is that the treatment is concretely defined by municipal laws governing the subject. These laws in turn often discriminate between aliens and nationals. Although courts in some countries have tried to impose the contrary view, one must admit that unless a treaty expressly reserves discriminatory rules of municipal laws, aliens are not merely subjected to such laws — which they would be even in the absence of a treaty — but to those provisions in municipal laws applicable to nationals at the exclusion of those restrictive of aliens' rights [41]. Neither of the two treaties presently examined bear any such reservation regarding internal laws [42].

As is usually the case in agreements on economic matters, a *most-favoured-nation clause* accompanies the other standards of treatment (Article 1, § 2) [43]. The writer has previously expressed serious concern about the use of this type of non-discrimination clauses in other than commercial agreements [44].

[41] The first Exchange of Letters annexed to the Tunisian treaty clearly substantiates this proposition. Among other clarifications of the meaning of the treaty, it stipulates that nationals of Belgium and Luxemburg may exercice certain professions which, under Article 8 of the Tunisian law on commercial activities, are reserved to Tunisian nationals. The same situation results from the Exchange of Letters N° 2 attached to the Franco-Tunisian treaty.

[42] A good example is that of the Franco-German establishment convention of 1956 which proclaims national treatment for professional activities unless such activities are reserved to nationals, granted only on condition of reciprocity or ruled by special regulations.

[43] Except in the French and Dutch treaties with Tunisia.

[44] *Op. cit.*, 1963, pp. 32-40. Even in the international law of trade the most-favoured-nation clause becomes increasingly bothersome. It is certainly not an adequate standard in trade agreements with communist countries (*Cf.* DOMKE and HAZARD, « State Trading and the Most-Favoured-Nation Clause », 52 *A.J.I.L.*, 1958, pp. 55-68). Relations with underdeveloped countries are going to necessitate new exceptions to the clause, first with respect to integrational efforts among developing countries falling short of common markets and free trade areas, then with respect to preferences accorded to developing countries by the developed countries.

It is relatively easy to define the exact scope of most-favoured-nation treatment with respect to tariffs, quotas and other trade barriers. In establishment and investment matters the situation is quite different. The two treaties require for Belgo-Luxemburg investments the same « security and protection » as that enjoyed by investments of nationals and companies of third states. The fact that « protection » is a vague term is confirmed by an Exchange of Letters which extends most-favoured-nation treatment to the transfer of salaries. It is furthermore unreasonable to expect that the host country should grant equal treatment to different types of investments because they originate from different countries. An important qualification to the standard is therefore that given by Protocol N° 6 of the German investment protection treaty with Greece which limits equal treatment to equal investments [45].

The simultaneous use of national- and most-favoured-nation-treatment clauses in an investment treaty is another disturbing factor. The latter clause could actually become operative in the sole hypothesis of nationals of the capital-importing country being treated less favourably than those of a third country. Not only is this hypothesis extremely rare, but on the few occasions where it does arrive, it is founded upon the close relationship with one particular capital-exporting country, which means that the treatment defined by the two countries for their mutual relations is not susceptible of being extended to any other country. It is refreshing to see that the Malagasy Republic has objected to most-favoured-nation treatment for Germany on these grounds [46]. As far as the Malagasy investment law is concerned, aliens are in fact treated better than nationals, but no discrimination is made between different aliens. As for treaties, the most far-reaching one concluded with a third state, i.e. France, comprises a special clause *(clause réservée)* to the effect that the privileges defined by the treaty are restricted to nationals of the two contracting parties in view of the specific nature of relations among them and cannot be automatically (i.e. through a most-favoured-nation clause) extended to nationals of other countries [47].

The fourth and last standard of treatment is that of *general non-discrimination* [48]. Whereas the preceding two contingent or indirect standards were directed against discrimination based on nationality, any other criterion of

[45] *Cf.* BERGER, *op. cit.*, 1965, pp. 365-366.

[46] *Cf.* « Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1964 », 26 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1966, p. 137.

[47] Establishment treaty of 1960, Article 14.

[48] Article 1, § 1, stipulates that « Each of the High Contracting Parties shall secure fair and equitable treatment to investments... and undertake not to impair the exercice of rights thus recognised by unjustified or *discriminatory measures* ». The French treaty with Tunisia says « to impair the exercise of rights thus recognised neither *de jure* nor *de facto* ».

discrimination is proscribed by this direct or non-contingent standard. As far as large-scale investments and corporate interests are concerned, the only obvious discrimination referred to is that between public and private enterprise. Considering that private enterprise in many underdeveloped countries may largely coincide with foreign enterprise, the national-treatment standard would not suffice to protect the conduct of business by aliens in cases where limited rights and advantages are granted to private as compared to public enterprise [49].

A general remark, covering contingent as well as non-contingent clauses, must be made on the scope of non-discrimination standards in the field of foreign investment. In fact, mere differentiation in the treatment applied to unequal subjects or situations is not only licit but necessary in order to create equality of opportunity. Unfortunately, there is no uniformity in the terminology used by writers or government officials which would permit us to speak of such an inevitable or even salutary differentiation in contradistinction to illicit discrimination [50]. Discrimination is used for both situations and the question, therefore, is where licit discrimination of investments stops and where illicit discrimination begins. In other words, we must determine the exact scope of what Dietrich Schindler rightly calls the permissibility of preferences, contrasted with the prohibition of prejudice [51]. As far as international law is concerned, states can e.g. offer preferential tax treatment to foreign as compared to local enterprises or even grant special advantages to a particular foreign enterprise if they feel that it is making an important contribution to economic development. This may not please the remaining investors. But the fact that such discrimination may be *detrimental* to the interests of others does not suffice to make it illicit. The decisive criterion is, as Jean Charpentier has pointed out, the pernicious intention *(intention dolosive)* of a state seeking to harm the interest of a particular enterprise or group because of foreign nationality (both as compared to nationals or other aliens), origin of capital or other criteria [52].

## 6. THE TRANSFER OF CAPITAL AND EARNINGS

While in the field of exchange control FCN treaties tend to create vague and broad obligations neutralized by equally broad exceptions, the investment protection treaties circumscribe the precise needs of foreign investors. Three types of funds are eligible for transfers [53] :

[49] The American F.C.N. treaties contain a series of clauses on the relations between the private and public sectors. *Cf.* PREISWERK, *op. cit.*, 1963, pp. 139-141.

[50] *Cf.* Heinrich KIPP, « Das Verbot der Diskriminierung im modernen Friedensvölkerrecht », 9 *Archiv des Völkerrechts,* 1961/62, p. 138.

[51] *Op. cit.*, p. 77.

[52] See his excellent analysis : « De la non-discrimination dans les investissements », IX *A.F.D.I.*, 1963, pp. 35-63.

[53] Tunisia, Article 2; Morocco, Articles 2 and 3.

— real net profits, interests, dividends and royalties;
— proceeds of total or partial liquidation of agreed investments;
— an adequate share of the proceeds of the work of nationals who are authorized to carry on a professional activity.

It must be noted that there is no mention of restrictions concerning the amounts of available foreign currency and no exceptions of the « balance-of-payments-difficulties » type [54]. The only direct limitation is that concerning the liquidation of non-agreed investments. It is true that reference is made to the municipal regulations of the capital-importing state governing transfers. This should, however, not be viewed as a restrictive reservation, since such regulations equal the standards defined by the treaties [55]. As for future changes in the municipal laws, the treaties expressly specify that protection accorded could only be more favourable than that of the present legislation. This is a far-reaching obligation, since it should be interpreted to mean that not only do more favourable provisions of a subsequent law prevail on those of the anterior law, but more favourable provisions of the anterior law prevail on the subsequent law. The need for stability of investment protection explains this particularity of the treaties. Again, it should be remembered that such long-term commitments must not be regarded as an undue restriction on the sovereignty of the capital-importing state, but as a means of influencing the behaviour of creditors with respect to transfers.

## 7. EXPROPRIATION AND NATIONALIZATION

Again a comparison with FCN provisions is useful at the outset of a chapter dealing with another vital aspect of investment protection. A perfected property-protection clause in a FCN treaty enumerates the following conditions of the « taking of property » [56] :

— no taking except for public purposes;
— just compensation representing the full equivalent of the property taken;
— determination of compensation at or prior to the time of taking;

[54] While German treaties go much further in defining the obligations of the capital-importing country, they are also subject to several limitations which are not found here. *Cf.* BERGER, *op. cit.*, 1965, pp. 4-6, 367-368; 1966, pp. 107-109.

[55] Décret du 4 juin 1957 relatif à l'investissement de capitaux en Tunisie, *Journal officiel de la République tunisienne*, 4 June 1957, pp. 657-658.

Avis de l'Office des changes N° 1012 relatif au régime des investissement étrangers, *Bulletin officiel du Royaume du Maroc*, 23 June 1961, pp. 893-895.

Note however that the Tunisian decree limits transfers of earnings on investments made in other than « productive enterprises » to 8 %, beginning two years after the date of investment (Article 4, § 2).

[56] *Cf.* Robert WILSON, « Property-protection Provisions in United States Commercial Treaties », 45 *A.J.I.L.*, 1951, pp. 83-107; NWOGUGU, *op. cit.*, p. 131.

— prompt payment of compensation;
— payment made in an effectively realizable form.

The difference from the Belgo-Luxemburg and other investment protection treaties may not seem very significant at first sight [57]. Compensation must also be prompt and effective, i.e. determined at the time of the taking [58], paid without delay and transferable to the investor's new place of residence. Furthermore, as mentioned earlier, the taking of property under these treaties should be neither discriminatory nor contrary to a specific commitment.

Yet the difference is considerable. With respect to the amount of the compensation, the *full* equivalent required according to the FCN treaties goes beyond existing rules of international law [59]. All six European countries which have concluded investment protection treaties clearly recognize that, in conformity with international law, compensation must be *adequate*. This factor is probably one of the major reasons for the limited interest shown by developing countries in the FCN treaties, as well as in the multilateral drafts [60]. It is indeed unreasonable, in a general treaty text, to require full compensation irrespective of the type of investment involved, its economic and social utility for the host country, the motivation and circumstances of the taking, the amounts of earnings already transferred abroad etc. The adequate-compensation standard in treaties among unequally developed states is far more realistic, mainly because of its flexibility. Indeed, adequate compensation can represent either the full or a partial value of the property taken, depending on the circumstances. It is not identical with a substitution of equity to law, which would authorize an arbitrator to take into account such factors as the financial resources, the standard of living or the balance-of-payments situation in the debtor state. Only when the parties agree to the application of equity can compensation be determined on such grounds.

With respect to the extent of the compensation, the treaties make no distinction

[57] Tunisia, Article 3; Morocco, Article 4.

[58] Taking, in the case of all five Tunisian treaties, extends not only to expropriation or nationalization for public purposes, but to any direct or indirect measure of « dispossession ». This covers creeping expropriation.

[59] The 1928 decision of the Permanent Court of International Justice in the *Chorzov Factory* case (Series A, N° 17) is often cited in support of the idea of full compensation. Yet, the Court clearly states that Poland acted in violation of special conventions which prohibited the taking of property even against payment of compensation. Her illicit action calls for *full reparation* (p. 47), while expropriation, a lawful act, must be accompanied by *fair compensation* (*indemnité équitable*, p. 46).

[60] Under the O.E.C.D. draft « such (just) compensation shall represent the genuine value (*valeur réelle*) of the property affected... » (Article 3 iii) and any breach of the convention furthermore entails « the obligation of the Party responsible therefor to make full reparation » (Article 5 a). In his commentary, G.A. VAN HECKE argues that *full compensation* continues to be a rule under customary international law. *Op. cit.*, pp. 654-655.

between expropriation, nationalization or other kinds of dispossession. This seems to be contrary to the theory that nationalization requires less complete compensation than expropriation [61]. But again, the adequate-compensation standard is flexible enough to allow for an accomodation to circumstances.

## 8. ARBITRATION

The last pillar which sustains investment protection is the dispute-solving procedure. In this respect, FCN treaties contain a somewhat vague reference to the International Court of Justice. The solution adopted for disputes between the contracting parties concerning the interpretation and enforcement of investment protection treaties is compulsory *ad hoc arbitration*. For an injured investor, this may take as much time as any other international dispute-solving procedure. According to general international law, the investor must first exhaust local remedies [62]. In a second phase, the government of the investor may wish to negotiate the case with the government of the host country. Actually a claim can only be brought up for arbitration when it has not been satisfactorily dealt with through diplomatic channels within a period of six months following the decision of the highest domestic court [63].

The procedure for the designation of the arbitrators presents no particular originality. Each contracting party designates one arbitrator; the two arbitrators will then nominate a national of a third country as their umpire. The President of the International Court of Justice, at the request of one of the contracting parties, is entitled to designate an arbitrator if the other party fails to do so within two months following the initiation of proceedings. Under the same conditions and respectful of the same time-limit, he also nominates the umpire. If the President is hindered or happens to be a national of one of the contracting parties, the Vice-President or after him the oldest member of the Court are entitled to assume this function [64].

The arbitral tribunal renders its sentence on the basis of the existing law. However, at its own initiative, it can submit an amicable settlement to the

[61] Most authors make such a distinction. See e.g. Gérard FOUILLOUX, *La nationalisation et le droit international public*, 1962, p. 444; S. FRIEDMANN, *Expropriation in International Law*, 1953, p. 211; Rudolf BINDSCHEDLER, « La protection de la propriété privée en droit international public », 90 *Recueil des cours*, 1962-II, p. 248.

[62] In the case of the 1965 World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States, a contracting state « *may require* the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration... » (Article 26).

[63] Tunisia, Article 4; Morocco, Article 5.

[64] Article 8, § 4, of the Franco-Tunisian treaty envisages furthermore the possibility of designating the third arbitrator in advance for a period of five years.

parties at any point during the procedure. Thus, a conciliatory type of dispute settlement is introduced in the treaties, which has the particularity that the tribunal can immediately switch back to arbitration if the parties disagree on the terms of the proposal submitted to them.

With the consent of the parties, the tribunal can furthermore render an award on the basis of equity. This procedure is not equivalent to conciliation, for such awards, made by a majority of at least two arbitrators, are compulsory for the parties as are the awards based on law [65].

## 9. COLLISION OF THE TREATIES WITH OTHER AGREEMENTS

Two situations arise with respect to conflicts between the treaties and other agreements. One of them is clearly pointed out in the Belgo-Luxemburg texts which leave it free for nationals of the two countries to invoke other more favourable international agreements conflicting with the investment treaty [66]. This is not a most-favoured-nation clause, for it also extends to other agreements between the two contracting parties. The situation could notably arise when both states have ratified the World Bank Convention on the Settlement of Investment Disputes. In this case, the bilateral treaty offers the advantage of compulsory arbitration, whereas the multilateral convention may seem preferable because it gives the investor access to an international dispute-solving procedure irrespective of diplomatic protection.

The second situation, that of a conflict between the inter-governmental treaties and agreements made by investors with the government of the capital-importing country is not envisaged. In this respect, only the Franco-Tunisian treaty is irreproachably precise (Article 5) :

> « Investments ruled by a particular commitment of one of the parties either towards the other party or towards nationals, physical or juridical persons, of the latter shall be governed *exclusively* by the terms of this commitment. »

As far as the *treatment* of investments is concerned, this solution would seem to apply even in the absence of collision norms in both the intergovernmental and the particular agreement. However, this is not to say that a *violation* of the « particular commitment » could not also, under certain circumstances, be contrary to the investment protection treaty [67].

[65] « *Décisions obligatoires.* » The French treaty with Tunisia is more precise : « décision... définitive et exécutoire de plein droit » (Article 8, § 4).

[66] Tunisia, Article 5; Morocco, Article 6.

[67] *Supra,* pp. 11-12.

## CONCLUSION

The new developments in bilateral investment protection are of two kinds. In the first place, there is a quantitative growth resulting both form a sustained effort of Germany and Switzerland at negotiating their type of treaty with developing countries and from the recent adherence to the bilateral approach of France, Holland and the Belgo-Luxemburg Economic Union.

But the spread of the bilateral investment protection treaty as a policy instrument of a growing number of states has also brought in its train substantial qualitative developments. Not only has this type of treaty few points in common with the investment guarantee treaty used by the United States after 1948, but it differs considerably from the traditional treaties of friendship, commerce and establishment. The latter have not been sufficiently transformed to suit the specific context of relations between developed and developing countries and they are in many ways too broadly worded to provide effective investment protection. On the contrary, the new model treaty used by the six European countries since 1959 provides the prospective investor with a tailor-made status comprehensive of all essential guarantees without forcing the developing country into unacceptable commitments.

The new states as well as the older developing countries display a certain reticence in accepting customary international rules governing foreign property. It would certainly be exaggerated to pretend that the minimum standard of civilized nations or the obligation to respect acquired rights are non-existent. Without the recognition of certain minimum rights to aliens or of the validity of certain acts beyond the territorial and temporal limits of the legal order under which they came into existence, there could be no international economic transactions. But international lawyers and government officials have shown a tendency to interpret such principles and concepts very extensively. The doctrine of acquired rights, which may be uncontested in private international and private intertemporal law, has gradually infiltrated the law of nations to arrogate to itself the privilege of providing for the sanctity of private property at all times [68]. If rights must be legally acquired to be protected under international law, what exactly does legal acquisition mean in the context of colonial expansion ? Is *occupatio* a valid title to property ? These questions show why the categorical affirmation of such imprecise concepts as acquired rights stirs up unnecessary hostile reactions. Though these reactions may often be justified, we call them unnecessary, because there is actually more agreement on the rôle of private enterprise than one would suspect when studying doctrinal disputes. Similarly, the inflation of the minimum standard in the field of property

[68] This evolution is clearly pointed out by Pierre LALIVE, « The Doctrine of Acquired Rights », in Southwestern Legal Foundation, *Rights and Duties of Private Investors Abroad*, 1965, pp. 145-200.

protection has aroused the hostility of all developing countries to the principle as such, although the need of a minimum of personal security and protection of aliens could hardly be debated [69].

A striking feature of the investment protection treaties is that they certainly go beyond the minimum which can be regarded as being an undisputed part of customary law. A definition of investments which embraces the « interests » of foreign investors is more comprehensive than that of acquired « rights » [70]. Transfer guarantees or compulsory arbitration of investment disputes are certainly not a part of the minimum standard. This demonstrates quite clearly that while developing countries are hostile to ill-defined principles originating from the Western community, they are prepared to grant precise and substantial privileges on a selective basis to members of that community. The only indeterminate standard in the treaties, that of equitable treatment, is designed to guarantee strict observation of treaty commitments and not to introduce additional obligations.

The sceptic will raise the question whether bilateral treaties can actually create effective security for private investments. The answer is yes when one considers that the disrespect of material treaty clauses and the non-execution of arbitral awards would seriously endanger the creditworthiness of countries desirous to attract new foreign capital. But the answer is obviously no in the case of a capital-importing country which undergoes a complete social and economic revolution. As the case of Cuba demonstrates, neither does general international law offer remedies in such extreme situations, nor did the economic dependence of Cuba on the United States, the proximity of marines and the nuclear arsenal of the powerful neighbour prevent the island's revolutionary government from resorting to outright confiscation. It is useless to accuse the law of its vulnerability, particularly since we have recently been reminded by an investment lawyer that St. Paul had already qualified the law as being there because of the transgression [71]. Bilateral treaties are just one contribution to an early phase of the formative stage of an international law of private porterty abroad. The fact that the substance of this law is still embryonic and its enforceability often precarious merely reflects the primitive stage in which the international society as such continues to vegetate in the second half of the 20th century.

[69] See the account of debates that took place in the International Law Commission in 1956/57 in PREISWERK, *op. cit.*, 1963, pp. 26-30.

[70] See Pierre LALIVE, *op. cit.*, pp. 183 ff., particularly at p. 192.

[71] Ignaz SEIDL-HOHENFELDERN, *Investitionen in Entwicklungsländern und das Völkerrecht*, 1963, p. 53.