in their treaties. The exceptions then might be easily construed as the latest state of the art of the host country with regard to its own sovereignty. What was needed therefore was not too much of a divergency of approach amongst the bilateral treaties.

**REMARKS BY GERALD R. AKSEN***

The common theme, in addition to making money, of foreign investment abroad that almost every speaker touched on, deals with the fact that the investor needs, and I believe the host government needs, a mechanism to protect both of them. Too often I have been at seminars where a bright lawyer from a government ministry will get up and say: "You know, Mr. Aksen, we are very intrigued by all your remarks on dispute settlement, but candidly, is it not really for the benefit of the capitalist investor? What is really in it for the host government?" What I am going to try to show you today, although I have not been successful in the past with some developing countries' representatives, is that indeed there is a quid pro quo such that both parties, the host government and the investor, benefit from an effective dispute-settlement provision in a contract.

I want to set forth three things: experience of the past 15 years on dispute settlements has been encouraging; the impact of treaties in general on dispute settlement has been growing; and new rules and new law are currently being developed that continue this upbeat trend.

The decade of the 1970s gave us some experience with expropriation of foreign investments. One experience that I like to look to is the expropriation by Libya of assets in that country belonging to Texaco, British Petroleum, and LIAMCO, which involved a lengthy concessions agreement. This was a helpful, encouraging development because all three disputes went to arbitration, all three involved substantial sums of money, and, the bottom line, all three were paid. Now I know that you may interject many negative features of those three arbitrations: they took an extended period of time; there was continued doubt and uncertainty as to whether or not they would be paid; there were significant legal questions as to whether or not the awards that were rendered would ever be enforced. You remember that one of them particularly dealt with restitutio in integrum, which I think is the same as specific performance, and as lawyers we can debate and question today whether or not we can compel a government to perform specifically a long-term concession agreement, but nonetheless a French professor so ruled. His ruling helped to bring about payment in the case without ever testing the legality of restitutio in integrum, but nonetheless some lawyers thought that it was an effective device, and I agree.

Libya defaulted in all three arbitration cases. They never appealed, but nonetheless they paid the awards. I think there is a message there, and it is part of what I call my quid pro quo: I believe that every government needs a face-saving device, something to pay a foreign investor in situations of this kind. It might not be possible politically at home to honor one of these agreements when there is a change of governments, when there is an expropriation or some political problem of that kind. How convenient it is then to have an adjudication from a neutral source, not from the home country of the host government, not from the home country of the foreign investor, but from third neutral country adjudication site, which is what occurred in the three Libyan cases. I do not think, for example, that it is a coincidence that Iran agreed under the Algiers Accords to arbitrate all the disputes with the American contractors and

---

*Of the New York Bar; Chairman, Section of International Law and Practice, American Bar Association.
the American Government in a neutral country at The Hague. I think you will find that all civilized governments recognize the doctrine of fairness, recognize the doctrine that an adjudication must be made, recognize the fact that dispute settlement is watched by the whole world, and that one cannot evade it and hide from it. One cannot be irresponsible and say: “We are not going to pay this; we are not going to give prompt, adequate, and effective payment; we are going to violate international law.” No government wants to be in that position. It is fascinating that the United States-Iran Tribunal has existed for two years, and despite dire predictions from many people, it has issued some 30 to 35 awards, all of which have been paid. There has got to be a message there. I am not saying that these things are easy, I am not saying that these things happen very quickly, but thank goodness that the rules of law in dispute settlement, and particularly in the investment area, have some positive successes that should not be overlooked.

In 1973 the United States was negotiating a trade agreement with the Soviets, and one of the major stumbling blocks at that time was that we would not agree to settling contractual disputes in Moscow and the Soviets were not about to subject their trading companies to litigation in the United States. What was eventually agreed upon was a neutral, third-party arbitration site in Stockholm, Sweden, agreeable to both the U.S. Government and the Soviet Government. That procedure has been put in place. I also was fascinated by the fact that when we negotiated a trade agreement with China, even though China was not a signatory to any one of the major arbitration treaties, the Chinese put into the trade agreement that they would be bound by any impartial arbitral decision between American and Chinese companies. There is a message there too.

It is noteworthy that these agreements, while labeled “trade,” can conceivably be carried over into the investment area. I have not yet seen a case or a decision which holds that merely because it dealt with trade in the first instance, such an agreement would be precluded from being extended to an investment situation. For example, in the third Libya case, the LIAMCO case, which was argued here in the United States, there was no impediment to the enforcement of the award even though it was being enforced under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. That is, the court was not concerned as to whether it was an investment award or a commercial award; it was an award which was enforceable under the 1958 Convention.

The reason I am impressed by Mr. Golsong’s comments is that here is a multilateral treaty, the 1958 Convention, that is now subscribed to by 63 major countries. (The United States finally ratified this Convention in the 1970s.) The U.S. case law, which is now rather abundant on the recognition and enforcement of foreign arbitral awards, puts us for the first time in a very novel position: The U.S. courts have been more willing to grant recognition and enforcement of foreign arbitral awards than any other country. Therefore, if our negotiators are negotiating an investment treaty with a foreign country, they now will be able to point to the fact that we will respect awards rendered in favor of foreign parties from developing countries. I have in mind the award from Egypt in which the American parties lost and which the U.S. courts enforced under some very interesting legal doctrine, doctrine the correctness of which American lawyers are not quite sure, but nevertheless we had a good faith obligation to honor that treaty, and we did. You can point to that in all of your negotiations.

You have a host of treaties now, all of which have a common theme on dispute settlement. I do not care if it is an FCN treaty, or if it is a treaty on bilateral investment, which we have only signed, not yet ratified, or if it is under the 1958 New York
Convention or the ICSID Convention, which has probably more signatories than any other multilateral treaty, or under the 1975 Inter-American Convention on International Commercial Arbitration, which one or two Calvo countries have signed or ratified. The point is that there is a common theme, a common message, on dispute settlement that every civilized government, and not-so-civilized government, recognizes, of which we should continue to take advantage. The U.S. agency has been of great help to us because the U.N. Commission on International Trade Law (UNCITRAL) has completed two helpful projects and is in the process of doing a third: They published the UNCITRAL Arbitration Rules, the rules that are being used at the Hague Tribunal. Overnight, we are going to have hundreds of decisions coming out of the Hague Tribunal, making these rules of worldwide scope and application. I would not be surprised if some of these rules found their way into future bilateral investment treaties because they are being viewed around the world. Interestingly, these investment treaties call for all kinds of methods of dispute settlement, negotiations, consultation, conciliation, and the like, because UNCITRAL has also come out with a set of uniform conciliation rules, which you insert into your investment agreements or your investment treaties. So you now have two standards of rules put out by UNCITRAL that have another advantage in addition to the fact that they have been negotiated by many countries through U.N. auspices: they are translated into six languages. That is helpful if you go to Latin America, where Spanish is the language, and say, “Here are the rules in Spanish.” It cuts down considerable negotiating time and considerable aggravation because it is in their language. These rules are published in Spanish, German, English, French, Russian, and Chinese. You do not find too many other documents that you can use in a contract or a treaty already translated for you, and I urge you to consider these in any of your investment arrangements.

Finally, UNCITRAL is now engaged in a major undertaking: they are preparing a model law. Now that they have a model set of rules on conciliation, and a model set of rules on arbitral procedures, the final clincher is a model law on international arbitration. The purpose of this new model law, which is not really for developed countries, is to have a basic model of international arbitral law to be picked up by the developing countries, most of which have no law on arbitration. This would be a most encouraging development for the future protection of investments and for the enforcement of dispute settlement provisions.

In closing, I do believe that the record has been good and is continuing to get better. If you went back 25 years, countries like Mexico would never have considered dispute settlement provisions with the United States. At the time we thought of Mexico as a developing country; suddenly, they had some natural resources and now they are perhaps more of a developed country. It is fascinating that when this happens, whether it is Mexico or Kuwait, one of the first things they do is ratify a dispute-settlement treaty. Mexico is a signatory of both the 1958 New York Convention and the 1975 Inter-American Convention, and you will find some of the other international oil countries like Kuwait also pushing for investment treaties. This is a positive development because it is hard to tell in the future which countries will be developing and which countries will be developed. And I do not think Mr. Golsong’s suggestion for moving into multilateral insurance will in any way deter this course; I think it will tie in very nicely, particularly with the New York Convention and the ICSID Convention. I think again there is a message here as to investment and dispute settlement that should hearten all of us to continue our efforts and not give up on what these fine negotiators are doing.