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PROTECTION OF PROPERTY UNDER SUDANESE LAW

AKOLDA M. TIER*

Much contemporary legal literature has been devoted to the topic of sovereign states' power to regulate or expropriate private property within their territories for the purposes of social and economic development,¹ or the advancement of foreign policy objectives such as self-defense² and economic retaliation.³ Anticipating the potential detriment to property rights that may attend these measures, most states have incorporated guarantees for private property into their constitutions and laws.⁴ Although these guarantees are not intended to prevent a state from pursuing its social and economic objectives, they attempt to eliminate arbitrariness and create a sense of security among persons who commit their labor and capital to the economic life of a country. This article will examine these guarantees with reference to the Sudan. Two ancillary matters will also be discussed: Sudanese expropriation measures and settlements in the 1970's, and the tension between guarantees of private property and directive principles of state policy.

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1. See, e.g., S. FRIEDMAN, *EXPROPRIATION IN INTERNATIONAL LAW* (1953); Doman, *Compensation for Nationalized Property in Post-War Europe*, 3 INT'L L.Q. 323 (1950); Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125 (1948); Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L L. 243 (1941); Schwarzenberger, *The Province and Standards of International Economic Law*, 36 MINN. L. REV. 323 (1952).

2. See, e.g., Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1 (1972), reprinted in *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER* 13 (R. Lillich ed. 1976).

3. See, e.g., Muir, *The Boycott in International Law*, reprinted in *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER*, supra note 2, at 21.

4. See generally *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (A. Blaustein & G. Flanz eds. 1974).

I. CONSTITUTIONAL GUARANTEES

The earliest explicit reference to protection of private property under Sudanese law is article 6 of the 1953 Self-Government Statute.⁵ That article was subsequently incorporated into the Transitional Constitution of 1956⁶ and the Transitional Constitution as amended in 1964.⁷ It states: "No person may be arrested, detained, imprisoned or deprived of the use or ownership of his property except by due process of law."⁸ The expression "due process of law" was not defined in any of these statutory or constitutional documents, nor in the only case in which article 6 was considered by Sudanese courts. In *Building Authority of Khartoum v. Evangellos Evangelides*,⁹ Justice Awadalla, writing for a majority of the Court of Appeals, held that the protection of property rights under due process of law does not limit the subjects upon which the police power of the state may lawfully be exercised—under the police power all property is held subject to an implied obligation that the owner's use shall not injure the community.¹⁰ Moreover, the legislature may authorize, without hearing or notice, the summary seizure and destruction of property that constitutes a public nuisance.¹¹

Regardless of the historical perception of due process by Sudanese courts, the clause has seldom been relied upon because article 6 has been operative only for brief periods. The 1956 Transitional Constitution was suspended in 1958 when the military seized power.¹² Its successor, the Transitional Constitution (amended 1964), was suspended in 1969 at the dawn of the May 1969 revolution.¹³ Furthermore, the 1973 Constitution that is presently in force is devoid of a due process clause. Today, the only extant reference to due process is found in the bilateral treaty for the protection of property between the Sudan and Switzerland.¹⁴

5. For a brief but informative constitutional chronology by Zaki Mustafa, see *id.* at 1-11.

6. *Id.*

7. *Id.*

8. See SUDAN TRANSITIONAL CONST. (adopted 1956, amended 1964).

9. 1958 SUDANESE L.J. & REP. 16.

10. *Id.* at 20-24.

11. *Id.*

12. See CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 4, at 6-10 (preface to SUDAN CONST.). For a more comprehensive discussion of political and social developments in the Sudan, see P.M. HOLT, A MODERN HISTORY OF THE SUDAN, FROM THE FUNJ SULTANATE TO THE PRESENT DAY (1961).

13. See CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 4, at 9-10 (preface to SUDAN CONST.).

14. The Agreement Between the Democratic Republic of the Sudan and the Swiss

The 1973 Sudan Constitution retains the philosophy contained in the earlier constitutions that private property has an important social function. Article 33, for instance, recognizes the useful social role played by private ownership in the field of production and guarantees "the right of private ownership . . . for all citizens, unless it is against public interest."¹⁵ It also recognizes inheritance and donation as two modes of acquiring private property.¹⁶ Article 34 states that "no private property shall be confiscated except for a public interest, in accordance with the law, and on payment of a fair compensation."¹⁷ Though the Constitution fails to mention this, the public interest and fair compensation requirements also apply to other methods of expropriation, such as nationalization and requisition.¹⁸ In fact, payment of compensation is more applicable in cases of nationalization and requisition than in confiscation cases, as shall be seen in our discussion of investment laws and bilateral treaties. While the need to protect private property is generally recognized under Sudanese law, the "public interest" exception in the 1973 Constitution makes it clear that this protection is not absolute.

We shall now consider the applicability of constitutional guarantees of property rights to foreign-owned property. On closer examination, the constitutional guarantees of private property noted above apply to foreign as well as national owners. Nationality is relevant for purposes of article 33, which proclaims a citizen's right to own, inherit and donate private property,¹⁹ and article 35, which imposes a duty upon Sudanese nationals to preserve public property.²⁰ In the most important article, however, the nationality of the owner of private property is not mentioned.²¹ Reading these articles *pari materia* leads to the conclusion that the constitutional requirements of "public interest," "authority of law" and "fair compensation" apply to private property whether it is owned by a national or a foreigner.

Confederation Concerning the Encouragement and Reciprocal Protection of Investment (Ratification) Provisional Order, 1974, reprinted in Special Legislative Supplement to the Democratic Republic of the Sudan Gazette No. 1164, at 25 (1974).

15. SUDAN CONST. art. 33.

16. *Id.*

17. *Id.* art. 34.

18. See *infra* notes 37-39, 55-58, 104-07, 129 and accompanying text.

19. SUDAN CONST. art. 33.

20. *Id.* art. 35.

21. *Id.* art. 34.

II. INVESTMENT LAWS

These constitutional guarantees for foreign-owned property may be discussed in reference to specific investment laws. Initially, three investment laws were enacted to encourage investment in certain sectors of the economy. The first was the 1974 Development and Encouragement of Industrial Investment Act.²² This Act was intended to encourage investment in enterprises that were defense-oriented or strategically important; use or encourage the use of Sudanese raw materials; dispense wholly or partially with imports or contribute to exports; provide employment for Sudanese; increase national income; and achieve the aims of economic cooperation and integration with Arab and African states.²³

Once the investment had been accepted, the Act guaranteed non-discrimination by prohibiting all distinctions between national and foreign or public and private sector establishments in granting licenses, concessions and facilities.²⁴ Property could not be sequestered or confiscated except by order of a competent court and in accordance with existing laws.²⁵ The Act did not state whether the court should provide for compensation in cases of sequestration or confiscation since article 34 of the Constitution only provided for fair compensation in cases of expropriation.²⁶ Also, such capital was not to be nationalized except when the "high interests" of the country so required.²⁷ In such an event, the investor was to be paid just compensation based on an evaluation of his property according to the current price at the time of nationalization.²⁸ This evaluation had to take place within six months from the date of nationalization.²⁹ The compensation award was to be paid in annual payments not exceeding five years in the same currency or currencies originally used for the purpose of the investment.³⁰ In the event of a dispute over the assessment of compensation, the investor had the right to request that the dispute be submitted to a three-member arbitral committee—one member representing each party, and a third member, the chairperson, agreed upon by the two other mem-

22. The Development and Encouragement of Industrial Investment Act, 1974, *reprinted in* Special Legislative Supplement to the Democratic Republic of the Sudan Gazette No. 1162 (1974).

23. *Id.* art. 5.

24. *Id.* art. 15.

25. *Id.* art. 16.

26. SUDAN CONST. art. 34.

27. The Development and Encouragement of Industrial Investment Act, art. 16.

28. *Id.*

29. *Id.*

30. *Id.*

bers.³¹ The Act was silent on the appointment of a chairperson when the two members disagreed.³²

The Act also guaranteed repatriation of money.³³ After payment of taxes, duties and any other monies due to the Government, all profits resulting from the investment of foreign capital in the establishment could be transferred out of the Sudan.³⁴ Likewise, in the event of liquidation of any establishment, the Government was obliged to approve repatriation of the net capital originally imported and registered at the Bank of Sudan.³⁵ The transfer was to be in the currency in which it was imported and at the rate of exchange applicable at the time of transfer.³⁶ Thus, a devaluation of the Sudanese pound between the time of importation and transfer of foreign currency would result in a loss to the investor.

The Act did not treat expropriation of property singularly; it distinguished between sequestration and confiscation on the one hand and nationalization on the other.³⁷ No reference was made to other types of interference with property rights, such as requisition. The Act and the Constitution of 1973 had different provisions for confiscation. Compensation for confiscated property was included under article 34 of the Constitution,³⁸ but article 16 of the Act was silent on this point. Conversely, article 16 provided compensation for property nationalized for reasons of public interest,³⁹ yet the Constitution made no reference to nationalization.

Various guarantees of private property irrespective of the nationality of the owner were also incorporated in the Organization and Encouragement of Investment in Economic Services Act of 1973.⁴⁰ The purpose of this Act was to encourage "investments of foreign and national capital in economic services in the . . . Sudan, with a view to realising the State's economic growth in the country, by granting concessions, facilities and guarantees which would achieve these objectives."⁴¹

31. *Id.*

32. *Id.*

33. *Id.* art. 17.

34. *Id.*

35. *Id.* art. 18.

36. *Id.*

37. *Id.*

38. SUDAN CONST. art. 34.

39. The Development and Encouragement of Industrial Investment Act, art. 16.

40. The Organization and Encouragement of Investment in Economic Services Act, 1973, reprinted in Special Legislative Supplement to the Democratic Republic of the Sudan Gazette No. 1146 (1973) (amended Nov. 22, 1975).

41. *Id.* art. 4.

Two guarantees specifically were mentioned in the Act. The first concerned repatriation of money.⁴² All profits accruing from the investment of foreign capital in the enterprise were transferable abroad, once taxes, fees and other duties had been paid.⁴³ With the liquidation of an enterprise the Government was required to authorize the repatriation of the originally imported capital registered at the Bank of Sudan.⁴⁴ Transfer was to be in the same currency in which the capital was imported.⁴⁵ The Government would also authorize the transfer of any profits which had been reinvested and had become part of the original capital.⁴⁶

The second guarantee was non-discrimination.⁴⁷ The licenses, concessions, facilities and guarantees had to be granted without discrimination on the basis of national, foreign, public or private sector enterprise distinction.⁴⁸ Additional guarantees were incorporated by reference. In particular, all investment guarantees under the Development and Encouragement of Industrial Investment Act of 1974 relating to non-commercial overcomes were to apply to investment under the present Act.⁴⁹ As has been shown, the guarantees envisaged were those against sequestration, confiscation and nationalization.

The third early investment law was the Development and Promotion of Agricultural Investment Act of 1976.⁵⁰ This Act was intended to encourage "national and foreign capital to invest in the field of agriculture" with the view to achievement of self-sufficiency in agricultural commodities and products; to produce the greatest possible amount of agricultural commodities and products for export; to diversify agricultural production to ensure the economy of the Sudan against the dangers of relying on one cash crop; to distribute fairly agricultural development opportunities among the various parts of the Sudan to raise uniformly the standard of living and per capita income; and to integrate the agricultural and industrial sectors of the economy.⁵¹

Guarantees of private property similar to those under the 1973

42. *Id.* art. 10(1) & (2).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* art. 10(3).

48. *Id.*

49. *Id.* art. 10(4).

50. The Development and Promotion of Agricultural Investment Act, 1976, *reprinted* in Special Legislative Supplement to the Democratic Republic of the Sudan Gazette No. 1196, at 144 (1976).

51. *Id.* art. 4.

Act⁵² were embodied in the Act, but the guarantee against discrimination was omitted. On the question of repatriation of money the Act provided that after payment of taxes, dues and other obligations owed to the Government, profits from the investment of foreign capital could be transferred abroad in the currency in which the capital had been imported—or any other agreed currency—at the rate of exchange in force at the time of transfer.⁵³ Likewise, in the event of liquidation the net value of any capital imported and registered at the Bank of the Sudan could be transferred abroad in the currency in which it was imported or any other agreed currency.⁵⁴

The guarantees against sequestration, confiscation and nationalization were specifically enumerated in the 1976 Act,⁵⁵ not merely incorporated by reference as under the 1974 Act.⁵⁶ Capital invested in the Sudan was not to be sequestered or confiscated except by decision of a competent court and in accordance with the laws in force.⁵⁷ This capital also was not to be nationalized except when the “higher interests” of the state so required.⁵⁸ In this event, the investor was to be paid “just compensation” after evaluation of his property at the current price at the time of nationalization.⁵⁹ The property was to be evaluated within six months from the date of nationalization, and compensation was to be paid in annual payments not exceeding five years in the same currency in which it had been brought into the Sudan.⁶⁰ In a dispute concerning assessment of compensation, the investor had the right to apply to a three-member arbitral committee consisting of a member representing the investor, another representing the Sudan Government and a third as umpire agreed upon by the two members or appointed by the Supreme Court of the Sudan.⁶¹ This procedure was considerably more precise for settling investment disputes than the procedure common to the Acts of 1973 and 1974.

Operating within the above three Acts presented a minor inconvenience because in order to know the guarantees of property rights under one act, reference had to be made to the other two. The 1980 Encouragement of Investment Act⁶² remedied this defect by repealing

52. The Organization and Encouragement of Investment in Economic Services Act.

53. The Development and Promotion of Agricultural Investment Act, art. 20(b)(ii).

54. *Id.* art. 12.

55. *Id.* art. 20.

56. The Development and Encouragement of Industrial Investment Act, art. 10(4).

57. The Development and Promotion of Agricultural Investment Act, art. 20(a).

58. *Id.* art. 20(b).

59. *Id.* art. 20(b)(i).

60. *Id.* art. 20(b)(ii).

61. *Id.* art. 20(b)(iii).

62. The Encouragement of Investment Act, 1980, *reprinted in* Special Legislative

and amalgamating the 1973 Encouragement of Investment in Economic Services Act,⁶³ the 1974 Development and Encouragement of Industrial Investment Act⁶⁴ and the 1976 Development and Promotion of Agricultural Investment Act.⁶⁵ Licenses, privileges and securities granted under the original three acts, of course, continued to be valid.⁶⁶

The 1980 Act was intended to encourage investment in projects relating to the National Development Plan,⁶⁷ particularly projects widening the base of the national economy and strengthening its activities; remove bottlenecks obstructing development; provide services contributing to the consolidation of economic and social development; use or encourage the use of local materials; assist in the achievement of self-sufficiency and the creation of surplus for export; assist effectively in consolidating the balance of payments; provide employment for the Sudanese; have defensive or strategic importance; and contribute to the achievement of economic cooperation and integration with Arab and African countries.⁶⁸ As in the earlier investment laws from which they are derived, these objectives are broadly formulated.

The 1980 Act, like its predecessors, prohibits discrimination, providing that in "granting licences, privileges and facilities under this Act, no discrimination shall be allowed among projects by reason of being national or foreign."⁶⁹ Also, projects must be accorded equal privileges and facilities regarding exemptions from business profits taxes and duties; allotment of land necessary for the project; reduction of electricity and transport costs; and protection of products of the project.⁷⁰ Preferential facilities may, however, be given to projects for less developed regions as specified by the Minister of Finance and National Economy.⁷¹ By enabling the executive to discriminate in favor of less developed regions of the Sudan, this provision is evidently intended to distribute development programs fairly among the different regions.

The guarantee against expropriation is provided in section 19, entitled "Security Against Nationalization, Confiscation or Expropriation." Section 19 reads:

Supplement to the Democratic Republic of the Sudan Gazette No. 1272, at 84 (1980).

63. *Id.* art. 2(1)(a).

64. *Id.* art. 2(1)(b).

65. *Id.* art. 2(1)(c).

66. *Id.* art. 2(2).

67. *Id.* art. 6.

68. *Id.* art. 6(a)-(i).

69. *Id.* art. 7.

70. *Id.* arts. 8-16.

71. *Id.* art. 15.

Notwithstanding the provisions of any other law, any capital invested in the Sudan shall enjoy the following guarantees:

- (a) It shall not be nationalized except for the public good and by virtue of a law; and in such a case the following rules shall be followed:
 - (i) The investor shall be granted after evaluation of his property, just compensation at the price current at the time of nationalization.
 - (ii) The evaluation shall be completed within a maximum period of six months commencing from the date of order of nationalization; payment and transfer of compensation shall be in yearly instalments within a period not exceeding five years in the same currency of capital or any other currency agreed to.
- (b) It shall not be subjected to sequestration or confiscation save with the order of a competent court issued in accordance with the laws in force.⁷²

The 1980 Act tracks earlier investment laws by providing for the guarantees of public interest and compensation, which is expressly payable in cases of nationalization.⁷³ Where, however, property is sequestrated, confiscated or—and this is an extension under the 1980 Act—attached, there is no explicit guarantee of compensation.⁷⁴ It must be surmised, then, that whether compensation is payable in a given situation depends upon the law under which the interference is made. Significantly, the 1980 Act departs from earlier investment laws in not fixing a period for payment of compensation. Whereas the earlier investment laws provided for payment of compensation in the currency originally brought into the Sudan (suggesting that the guarantee was intended for foreign-owned property), section 19 of the 1980 Act merely provides for payment in “currency or currencies of capital.”⁷⁵

Although the heading of section 19 of the 1980 Act uses the word “expropriation,” nowhere in the text is the word to be found. Normally the expression “expropriation” embraces nationalization, confiscation and requisition, but the first two types of expropriation are governed by different rules under section 19.⁷⁶ It is uncertain, therefore, which rules apply to requisition.

In the case of foreign capital, repatriation of profits and interest is

72. *Id.* art. 19.

73. *Id.*

74. *Id.*

75. *Id.* art. 19.

76. *Id.*; *cf.* art. 19(a) & (b).

guaranteed on a loan from a bank or financial institution in the Sudan borrowed with the consent of the Minister of Finance and National Economy.⁷⁷ Similarly, in the event of liquidation, the capital resulting from a sale or transfer of ownership, wholly or partially, is transferable abroad.⁷⁸ The transfer may be in the currency in which the capital or loan was imported, or in any other agreed currency.⁷⁹ The use of the words "loan . . . was imported" suggests that the loan from a Sudanese bank or financial institution must be in foreign currency.⁸⁰ For purposes of the Act foreign capital includes foreign hard currency transferred to the Sudan at such rate of exchange as may be current at the time of transfer through a bank working in the Sudan; imported machinery, equipment and means of transport financed from abroad and necessary for the execution of one of the projects which are compatible with the technical development suitable for the Sudan according to such specifications as may be prescribed by the Minister of Finance and National Economy; the foreign hard currency utilized on preliminary studies and feasibility studies undertaken by the investor within the limits approved by the Minister of Finance and National Economy; the profits realized by the project if capitalized or invested in another project with the consent of the Minister of Finance and National Economy; and intangible assets registered by the foreign investor for utilization in the project such as patents, trademarks, technical expertise, securities, real property rights, investments and contracts.⁸¹ The foreign capital invested must be evaluated by the Minister of Finance and National Economy and registered with the Bank of Sudan.⁸²

Essentially, the guarantee of repatriation of money is similar to the corresponding guarantees under the earlier investment laws. Significant improvements can be discerned, however. Not only is foreign capital defined, but the termination of ownership by liquidation is also extended to the similar modes of sale and transfer of ownership.⁸³ Moreover, the section clarifies that this is a special guarantee for foreign property.⁸⁴

The dispute settlement provision is complex, which is understandable for a country that has ratified treaties on the subject. Section 32(1) of the 1980 Act provides that any legal dispute relating to invest-

77. *Id.* arts. 20(1), 21(1).

78. *Id.* art. 20(2).

79. *Id.*

80. *Id.* art. 20(1).

81. *Id.* art. 3 ("Foreign Capital," (a)-(e)).

82. *Id.* art. 22.

83. *Id.* art. 20(2).

84. *Id.*

ment must be settled by arbitration unless the law otherwise provides.⁸⁵ The arbitral proceedings, for which the Government provides the necessary facilities, are to be held in the Sudan.⁸⁶ The arbitral procedures are incorporated by reference as follows:

- S. 32(2). The provisions of Chapter IV of Part VI of the Civil Procedure Act 1974 relating to arbitration, shall apply to every legal dispute arising directly from investment of a national capital in any project.^[87]
- (3). The provisions of the Convention on the Settlement of Investment Disputes Between Host States for Arab Investment and Nationals of other Arab States 1974^[88] shall apply to every legal dispute arising directly out of the investment to which that Convention applies.
- (4). The provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States 1965^[89] shall apply to every legal dispute arising directly out of the investments to which the provisions of that Convention apply.

The term "national capital" is defined in section 3 as the capital owned by a Sudanese investor who is employed in the project at the commencement of the investment.⁹⁰ It may consist of movable or immovable assets plus any subsequent addition thereto either in the form of movable or immovable assets or cash or capitalization of the profits earned by the project, provided such additions are made with the consent of the Minister of Finance and National Economy.⁹¹

Earlier investment laws on the question of settling investment disputes have been slightly modified by the 1980 Act. In all the investment laws, there is reference to an arbitral tribunal as the proper forum for the settlement of disputes. Unlike the previous investment laws, however, the 1980 Act makes express reference to the 1965 Convention on the Settlement of Investment Disputes between States and

85. *Id.* art. 32(1).

86. *Id.*

87. Sudan Civil Procedure Act, 1974.

88. Convention on the Settlement of Investment Disputes Between Host States for Arab Investment and Nationals of Other Arab States, 1974.

89. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1272, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

90. The Encouragement of Investment Act, art. 3 ("National Capital").

91. *Id.*

Nationals of Other States⁹² and the 1974 Convention on the Settlement of Investment Disputes Between Host States for Arab Investment and Nationals of Other Arab States.⁹³ The Sudan is a party to both conventions.

To conclude this section, let us review the salient features of Sudanese investment legislation. First, the law is seen as an instrument for social and economic development by creating conditions conducive to both national and foreign investment. The legislative objectives concern both the solution of underlying social and economic problems, and the encouragement of investment. It is too early to say whether these objectives may be compatibly achieved. Second, the investment legislation provides various protections for property irrespective of the nationality of the owner. Third, the legislation addresses an investor's need to be assured against arbitrary governmental action. On the whole, the guarantees in the 1973 Sudanese Constitution and the investment laws are a significant advance over the nebulous due process guarantees previously embodied in article 6 of the Self-Government Statute of 1953, the Transitional Constitution of 1956 and the Transitional Constitution as amended in 1964.

III. BILATERAL INVESTMENT TREATIES

Three bilateral treaties for the protection of foreign property have been enacted and provide further guarantees to foreign property. They are the Sudan-Federal Republic of Germany (Encouragement of Investment) Treaty of 1963, the Sudan-Kingdom of the Netherlands Economic and Technical Co-operation Agreement of 1969 and the Agreement Between the Democratic Republic of the Sudan and the Swiss Confederation Concerning the Encouragement and Reciprocal Protection of Investments of 1974. We shall discuss them *seriatim*.

A. *The Sudan-Federal Republic of Germany (Encouragement of Investment) Treaty of 1963*⁹⁴

The Sudan-Federal Republic of Germany (Encouragement of Investment) Treaty, ratified in 1963, is the earliest of the three bilateral treaties. The preamble states that "contractual protection" of invest-

92. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 89.

93. Convention on the Settlement of Investment Disputes Between Host States for Arab Investment and Nationals of Other Arab States, 1974.

94. The Sudan-Federal Republic of Germany (Encouragement of Investment) Treaty (Ratification) Act, 1963, *reprinted in* Special Legislative Supplement to the Democratic Republic of the Sudan Gazette No. 983 (1963).

ments by nationals or companies of either state in the territory of the other state is "apt to stimulate private business initiative and to increase the prosperity of both nations."⁹⁵ It requires each contracting state to allow within its territory investments "in accordance with its legislation, policies and administrative practices," by nationals or companies of the other contracting state, and to promote such investments as far as possible.⁹⁶ The word "investment" is defined as comprising every kind of asset. In particular, investment means movable and immovable property, as well as any other rights *in rem*, such as mortgages, liens, pledges, usufructs and similar rights; shares or other kinds of interests in companies; title to money or to any other performance having an economic value; copyrights, industrial property rights, technical processes, trade names and goodwill; and business concessions regarding the prospecting for or extraction or winning of natural resources that provide the holder with a legal position of some duration.⁹⁷ Since the term "company" is defined differently by Germany and the Sudan, the test for a "company" is based on the domestic company law of each state.⁹⁸ With reference to Germany, therefore, "company" means any juridical person, as well as any commercial or other company or association with or without legal personality, having its seat in Germany and lawfully existing consistent with legal provisions, regardless of whether the liability of its partners, associates or members is limited or unlimited, or whether its activities are directed to profit.⁹⁹ With respect to the Sudan, "company" means any company with limited liability incorporated in the Sudan, or any juridical person or any association of persons lawfully constituted in accordance with its legislation.¹⁰⁰

Different standards of treatment of property are employed. While article 1 requires investments to be treated "in a fair and equitable manner," article 2 requires treatment not less favorable than that accorded to nationals or companies of a contracting state or of a third state.¹⁰¹ Furthermore, each contracting state is precluded from subjecting nationals or companies of the other contracting state, as regards occupational or business matters in connection with investments made by them, to conditions less favorable than those imposed on its own

95. *Id.* preamble.

96. *Id.* art. 1.

97. *Id.* art. 8(1).

98. *Id.* art. 8(4).

99. *Id.* art. 8(4)(a).

100. *Id.* art. 8(4)(b).

101. *Id.* art. 2.

nationals or companies or members of a third state.¹⁰² This same standard applies to management, use and enjoyment of the investment.¹⁰³

Special attention has been paid to guarantees against non-commercial risks. Investments by nationals or companies of either contracting state shall not be expropriated except for "public benefit" and upon payment of compensation.¹⁰⁴ The amount of compensation shall represent the equivalent of the investment affected; it is to be actually realizable, transferable and made without undue delay.¹⁰⁵ Adequate provision shall have been made at or prior to the time of deprivation for the determination and payment of such compensation.¹⁰⁶ The courts have power to review the amount of compensation.¹⁰⁷ Moreover, nationals or companies of either contracting state whose investments suffer damage through war or other armed conflict, revolution or revolt in the territory of the other contracting state are to receive the same treatment a national would receive with respect to restitution, indemnification, compensation or other valuable consideration, and most favored nation treatment with respect to the transfer of such payments.¹⁰⁸ Apart from non-commercial risks, the treaty also guarantees repatriation of capital and, in the event of liquidation, the proceeds therefrom.¹⁰⁹

The treaty declares that disputes concerning the interpretation or application of the treaty should be settled by the governments of the contracting states.¹¹⁰ Failing a diplomatic solution, either state may submit the dispute to a three-member arbitral tribunal consisting of one member representing each state and a national of a third state agreed upon by both parties to act as chairman.¹¹¹ Appointment is to be made within two months (three for the chairman) from the date either contracting state declared its intention to arbitrate.¹¹² Failure to make the timely appointment entitles either contracting state to invite, in order of priority, the President, the Vice-President or the next senior member of the International Court of Justice who is not a national of either contracting state or is not otherwise prevented from discharg-

102. *Id.*

103. *Id.*

104. *Id.* art. 3.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* art. 4.

110. *Id.* art. 11.

111. *Id.*

112. *Id.*

ing his functions, to make the necessary appointments.¹¹³ Although the law to be applied by the tribunal is not stipulated, it is provided that decisions shall be final.¹¹⁴ In this connection, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States provides guidance.¹¹⁵ Article 42(1) states:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State (including its rules of the conflict of laws) and such rules of international law as may be applicable.¹¹⁶

*B. The Sudan-Kingdom of the Netherlands Economic and Technical Co-operation Agreement of 1969*¹¹⁷

The second bilateral treaty to which the Sudan is a party is the Sudan-Kingdom of the Netherlands Economic and Technical Co-operation Agreement, ratified and enacted in 1969. Through this treaty the two contracting states agreed to cooperate in facilitating the participation of their nationals in establishing productive and commercial activities and providing services in both countries.¹¹⁸ The term "national" is defined as legal persons recognized by the law of each contracting state in its territory.¹¹⁹

The treaty deals at length with the standards of treatment for various activities. In the area of international shipping, each contracting state is required to refrain from taking discriminatory measures against, and from restricting the free participation in international traffic of, vessels operated by enterprises of the other contracting state.¹²⁰ Each contracting state is to extend to the other contracting state the same treatment accorded its own vessels with respect to customs formalities, collection of taxes, port fees and charges, free entry into ports, assignment of berths, facilities for loading and unloading, and all other facilities in connection with the vessels and their crews,

113. *Id.*

114. *Id.*

115. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 89.

116. *Id.* art. 42(1).

117. The Sudan-Kingdom of the Netherlands Economic and Technical Co-operation Agreement (Ratification) Act, 1969, *reprinted in* Special Legislative Supplement to the Democratic Republic of the Sudan Gazette No. 1075, at 47 (1969).

118. *Id.* art. I(2).

119. *Id.* art. XV(1).

120. *Id.* art. V.

passengers and cargoes.¹²¹ The treaty further provides that nationals of each contracting state shall enjoy the benefits of national treatment in all matters relating to the payment of taxes, fees or charges, and to the enjoyment of fiscal deductions and exemptions for other economic activities.¹²² Regarding investments, article 9 provides that each state is to be accorded not only "fair and equitable" treatment, but, more specifically, the same security and protection accorded to investments by nationals.¹²³ Moreover, neither contracting state may, by means of unjustified or discriminatory measures, impair the management, maintenance, use, enjoyment or disposal of investments by nationals of the other contracting state.¹²⁴

Article 9 makes two important references which should be stressed. By reference, the guarantees of property rights contained in the 1973 Sudan Constitution and in the 1980 Encouragement of Investment Act expressly apply to Dutch-owned property.¹²⁵ Moreover, article 9 addresses intervention, that is, the impairment of business management characterized by some writers as "creeping nationalization."¹²⁶

The treaty also deals with repatriation of money.¹²⁷ It guarantees the transfer abroad of net profits, interests and royalties accruing from any economic activity; a portion of a foreign national's earnings; funds in repayment of loans which the contracting states recognize as investments; and, in the event of liquidation, the proceeds therefrom.¹²⁸

The guarantees on expropriation are not to be read subject to other laws, since the treaty merely provides that investments of nationals of either contracting state in the territory of the other shall not be expropriated except for the "public benefit" and upon payment of compensation.¹²⁹ Such compensation shall represent the equivalent of the depreciated value of the investment affected,¹³⁰ and shall be realizable, transferable and paid without undue delay.¹³¹

The treaty, by providing a neutral or impartial procedure for the settlement of disputes,¹³² attempts to protect private foreign property. A dispute, at first instance, is to be settled by negotiation between the

121. *Id.*

122. *Id.* art. VI.

123. *Id.* art. IX.

124. *Id.*

125. *Id.*

126. *Id.* art. VI.

127. *Id.* art. X(a)-(d).

128. *Id.* art. X(d).

129. *Id.* art. XI.

130. *Id.*

131. *Id.*

132. *Id.* art. XVII.

states.¹³³ Failing a settlement, the dispute may be submitted by either state to a three-member arbitral tribunal.¹³⁴ The composition and appointment procedures of the arbitral tribunal are the same as those under the treaty between the Sudan and West Germany, except that the umpire is to be appointed by the President, the Vice-President or the next senior member of the International Court of Justice if the two arbitrators are unable to agree on the choice of an umpire¹³⁵ within two months following their appointment. The decision of the tribunal is binding and shall be based on provisions of the treaty "in conformity with the principles of law."¹³⁶ At any stage of the proceedings before reaching a decision, the tribunal may propose an amicable settlement.¹³⁷ Additionally, the tribunal may decide the dispute *ex aequo et bono* if the parties so agree.¹³⁸ It is noteworthy that the tribunal under the treaty between the Sudan and West Germany is not given this power.

C. *Agreement Between the Democratic Republic of the Sudan and the Swiss Confederation Concerning the Encouragement and Reciprocal Protection of Investments of 1974*¹³⁹

The third treaty we shall discuss is the Agreement Between the Democratic Republic of the Sudan and the Swiss Confederation Concerning the Encouragement and Reciprocal Protection of Investments, which was ratified and enacted in 1974. According to the preamble, the encouragement and protection of investment by nationals of both countries is apt to stimulate the flow of capital to both countries.¹⁴⁰ Under the Agreement, the term "national" means "physical persons who, according to the respective legislation of each Contracting Party, are considered citizens of that country."¹⁴¹ The term "companies" means "companies, institutions or foundations with legal personality, as well as partnership firms or limited partnerships and other associa-

133. *Id.*

134. *Id.*

135. *Id.* art. XVII(2) & (3).

136. *Id.* art. XVII(5).

137. *Id.*

138. *Id.* The power to decide *ex aequo et bono* is conferred on the International Court of Justice by article 38 of its Statute. For a full discussion, see Sohn, *International Arbitration Today*, 108 RECUEIL DES COURS 1, 25-59 (1963).

139. The Agreement Between the Democratic Republic of the Sudan and the Swiss Confederation Concerning the Encouragement and Reciprocal Protection of Investment Provisional Order, 1974, reprinted in Special Legislative Supplement to the Democratic Republic of the Sudan Gazette No. 1164, at 25 (1974).

140. *Id.* preamble.

141. *Id.* art. 1(1).

tions without legal personality, in which nationals of either Contracting Party have a substantial interest, either directly or indirectly."¹⁴² Nationals of either contracting state are considered to have a substantial interest if they exercise substantial influence on a company either directly or through another company.¹⁴³

The treaty stipulates the standards of treatment of foreign property. Each contracting state must ensure "fair and equitable" treatment to investments.¹⁴⁴ Such treatment shall be at least equal to that granted by each contracting state to its own nationals or companies, or equal to the treatment granted to nationals or companies of the most favored nation, if the latter standard is more favorable.¹⁴⁵ The most favored nation clause, however, does not apply to privileges accorded by a contracting state to nationals and companies of a third state through membership in or association with a customs union, a common market or a free trade area.¹⁴⁶ Evidently, this guarantee of equality of treatment or nondiscrimination applies to all private property, foreign or national.

Neither contracting state shall impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or liquidation of investments.¹⁴⁷ In particular, each contracting state must facilitate investments in its territory when necessary, and grant permits such as those for the implementation of manufacturing agreements, or for technical, commercial or administrative assistance.¹⁴⁸ Entry or employment permits, however, may be refused for security reasons.¹⁴⁹

The treaty, by providing guarantees against exchange control restrictions and expropriation, follows earlier treaties.¹⁵⁰ Each contracting state undertakes to grant to nationals or companies of the other contracting state transfers of investment returns in the form of net profits, interest or royalties; instalments in the repayment of loans; expenditures in the management of the investment in the territory of the other contracting state or a third state; additional funds necessary for the maintenance and development of the investment; payments for technical, commercial or administrative assistance; and proceeds from

142. *Id.* art. 1(2).

143. *Id.*

144. *Id.* art. 3.

145. *Id.*

146. *Id.*

147. *Id.* art. 4.

148. *Id.*

149. *Id.*

150. *Id.* art. 6.

partial or total liquidation of the investment including possible increment values.¹⁵¹ The treaty further provides that neither contracting state shall take any measure of expropriation, nationalization or dispossession against investments except under due process of law and upon payment of effective and adequate compensation.¹⁵² The amount of compensation shall be fixed at the date of expropriation, nationalization or dispossession,¹⁵³ shall be settled in the currency of the country of the investment's origin, and shall be paid without undue delay.¹⁵⁴ This provision differs from the guarantees against expropriation already discussed.¹⁵⁵ First, it defines compensation in terms reminiscent of the views of traditional international law.¹⁵⁶ Second, it adopts the due process of law guarantee in a manner reminiscent of article 6 of the 1953 Self-Government Statute, the 1956 Transitional Constitution and the Transitional Constitution (amended 1964), instead of the public interest notions embodied in the 1973 Constitution.¹⁵⁷

A direct link between this treaty and those already noted is the procedure for settling disputes. The only difference is that under this treaty, the President, the Vice-President or the next senior member of the International Court of Justice may be invited to appoint arbitrators if either state has not selected its arbitrator within two months from the date of notification of the desire to arbitrate, or if the two arbitrators cannot agree upon a chairman within two months from the date of the second appointment.¹⁵⁸

Two general observations are in order before leaving the subject of bilateral agreements. First, this writer is unaware of any arbitrations that have taken place under these treaties. Second, it cannot be denied that these bilateral treaties are one-sided since the Sudan lacks the resources necessary to invest in Germany, the Netherlands or Switzerland.

151. *Id.* art. 5.

152. *Id.* art. 6.

153. *Id.*

154. *Id.*

155. *See supra* text accompanying notes 18, 26, 37, 52 and 72.

156. *See infra* notes 159-66 and accompanying text.

157. The Agreement Between the Democratic Republic of the Sudan and the Swiss Confederation Concerning the Encouragement and Reciprocal Protection of Investment (Ratification) Provisional Order, *supra* note 139, art. 6.

158. *Id.* art. 10.

IV. PROTECTION OF PRIVATE PROPERTY: CURRENT TRENDS IN INTERNATIONAL LAW

The earliest literature on the relationship of international law to property rights of aliens was dominated by the compensation theory,¹⁵⁹ including the related issue of valuation of property. While this question is still a live issue, recent studies have focused primarily on the circumstances under which the application of international law to private property is valid.¹⁶⁰ The principles most often invoked are those of acquired or vested rights, unjust enrichment, estoppel, abuse of rights and *pacta sunt servanda*.¹⁶¹ A contrary view, to which this writer is inclined, is that private property is protected under the domestic law of the *situs* of property, including its rules of the conflict of laws.¹⁶²

Comparing Sudanese guarantees of private property with current trends in international law discloses similarities in the protection of property under both systems. It is common ground, for instance, that expropriation should not discriminate between foreign and national property. In addition, under Sudanese law, and according to one school of international law, expropriation must be based on public interest and provide payment of compensation.¹⁶³ Under both, certain imprecise words are used to describe the terms of compensation, such as "partial," "appropriate," "just," and "adequate, prompt and effective."¹⁶⁴

In other respects, however, the Sudan departs markedly from current trends in international law, including the 1974 Charter of Economic Rights and Duties of States.¹⁶⁵ In fact, Sudanese law tends to provide even more protection. Under international legal principles, the

159. See A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 247-51, 325-33 (1962); E. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 21-22 (1965); G. SCHWARZENBERGER, FOREIGN INVESTMENT AND INTERNATIONAL LAW 4-11, 118 (1969).

160. See, e.g., Lipstein, *Proof of Foreign Law: Scrutiny of its Constitutionality and Validity*, 42 BRIT. Y.B. INT'L L. 265 (1967).

161. See A. FATOUROS, *supra* note 159, at 253-61, 296-301, 308-10; W. FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 206-10 (1964); E. NWOGUGU, *supra* note 159, at 177-79, 185-86; G. SCHWARZENBERGER, *supra* note 159, at 4-11, 110-18.

162. For a discussion of this approach, see *Luther v. Sagor*, [1921] 2 K.B.; *R. v. International Trustee for the Protection of Bondholders*, [1937] A.C.; *Anglo-Iranian Oil Co. v. Jaffrate*, [1953] 1 W.L.R.; *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki*, [1952] INT'L L. REP. 305.

163. See *supra* text accompanying note 159.

164. *Id.*

165. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9631 (1975).

nationality of the owner of property is important since a consequence of the rule relating to diplomatic protection is that the guarantees against discrimination and expropriation attract international law only if an alien is a national of a particular state willing and able to espouse his case.¹⁶⁶ While the positive declaration of the right to private property in article 34 of the 1973 Sudan Constitution guarantees the right only to citizens, the guarantee against confiscation operates in favor of "persons," i.e., citizens as well as non-citizens.¹⁶⁷ Moreover, the guarantee of convertibility of money and the guarantee against non-commercial risks other than expropriation found in the bilateral treaties go well beyond the uniform expectations created by customary international law.¹⁶⁸ This phenomenon may be explained, perhaps, by the Sudan's dire need to attract foreign capital for social and economic development.

A. *Expropriation Measures and Settlements in the 1970's*

Reference to specific expropriation measures and settlements made by the Sudan in the 1970's are useful, for they provide case examples of how the Sudanese guarantees of property rights work in practice. Two nationalization laws were passed in 1970 at the dawn of the May 1969 revolution: the Banks Nationalization Act¹⁶⁹ and the Companies Nationalization Act.¹⁷⁰ The former law nationalized Barclays Bank, DCO, National and Grindlays Bank, Commercial Bank of Ethiopia, Arab Bank, Bank Misr, El Nilein Bank and Sudan Commercial Bank. Of those banks, the first five were renamed respectively as The State Bank for Foreign Trade, The Omdurman National Bank, The Juba Commercial Bank, The Red Sea Commercial Bank and The People's Co-operative Bank. The latter law nationalized Gellantely Hankey & Co., Imperial Chemical Industries (Sudan) Ltd., Sudan Mercantile and Mitchell Cotts. The first two companies were renamed respectively The May Corporation for Workers and The National Chemicals Company, and the last two companies were merged into The State Corporation for Foreign Trade.

166. See generally *Nottebohm* (Guat. v. Liechtenstein), 1955 I.C.J. 4.

167. SUDAN CONST. art. 34.

168. See *supra* text accompanying note 104.

169. The Banks Nationalization Act, 1970, reprinted in Special Legislative Supplement to the Democratic Republic of the Sudan Gazette No. 1104, at 224 (1970) [hereinafter cited as Banks Act].

170. The Companies Nationalization Act, 1970, reprinted in Special Legislative Supplement to the Democratic Republic of the Sudan Gazette No. 1104, at 227 (1970) [hereinafter cited as Companies Act].

These nationalization laws provided for compensation,¹⁷¹ and for this purpose set up a three-member arbitration committee.¹⁷² The committee was appointed by the President of the Revolutionary Command Council in the case of the banks and by the Minister of Economics and Foreign Trade in the case of the companies.¹⁷³ Each committee fixed the net value due to the nationalized bank or company within a period of six months from the date of its appointment.¹⁷⁴ Once this decision was communicated to the interested party, this party could then exercise his right of appeal within one month of receiving the decision.¹⁷⁵ Appeal lay with an authority to be appointed, again, by the President of the Revolutionary Command Council of the Sudan in the case of the banks and by the Minister of Economics and Foreign Trade in the case of the companies.¹⁷⁶ The President or Minister, in turn, had to reach a decision on the appeal within three months from the appeal date, and their decision was final.¹⁷⁷

The net value due to the nationalized banks and companies was converted to state nominal bonds for fifteen years with four percent interest per annum.¹⁷⁸ Though the Act is not specific, it is reasonable to assume that four percent was the prevailing rate of interest at that time. After ten years, however, the state may redeem such bonds wholly or partially for their nominal value.¹⁷⁹ The Minister of the Treasury and the Minister of Economics and Foreign Trade were empowered to issue orders for dealing in bonds and the redemption thereof.¹⁸⁰ Under the Banks Act, the Minister has the discretion to authorize monetary facilities or the exchange of nominal bonds for shares in companies according to such conditions as he sees fit.¹⁸¹

Another aspect of the 1970 expropriation measures dealt with the Revolutionary Command Council Order of June 14, 1970. This Order authorized the confiscation of certain small businesses that were engaged in illegal business transactions, such as maintaining foreign bank accounts into which money could be illegally transferred.

The compensation settlements for the nationalized banks and companies were by and large accepted by the dispossessed owners. Sat-

171. Banks Act art. 4(1); Companies Act art. 3(1).

172. Banks Act art. 4(1); Companies Act art. 3(1).

173. Banks Act art. 4(1); Companies Act art. 3(1).

174. Banks Act art. 4(2); Companies Act art. 3(2).

175. Banks Act art. 4(3); Companies Act art. 3(3).

176. Banks Act art. 4(3); Companies Act art. 3(3).

177. Banks Act art. 4(3); Companies Act art. 3(3).

178. Banks Act art. 5(1); Companies Act art. 4(1).

179. Banks Act art. 5(1); Companies Act art. 4(1).

180. Banks Act art. 5(2); Companies Act art. 4(2).

181. Banks Act art. 5(2).

isfaction with compensation is not the only interesting feature of the 1970 Sudanese expropriation measures. Almost equally significant is the reversal of amateurish policies of erstwhile nationalizations and confiscations. Since 1975, for example, the nationalized banks vested in the state under the 1970 Banks Nationalization Act have been turned into private limited companies within the meaning of the 1925 Companies Act.

The position accorded to confiscated property also showed a reversal of the 1970's measures. The Government set up technical committees to review confiscations and to recommend the return of property or its value at the time of confiscation (June 14, 1970) to dispossessed owners against whom charges had not been established. As a result, many businesses were exonerated and awarded compensation based on the value of the property at the date of the confiscatory decree plus four percent interest per annum from the date of the compensation award. With other businesses the committee recommended the return to the owners of the businesses as they stood financially at the date of the confiscatory decree. For the few businesses with charges established against them, the committee upheld the confiscatory decrees without compensation or return of the property to the owners.

B. Guarantees of Property Rights and Economic Directive Principles

One of the innovations of the 1973 Sudan Constitution is the inclusion of provisions on social and economic directive principles, entitled "The Fundamentals of the Sudanese Society."¹⁸² This is the name given to economic, social and cultural rights, though these rights are not specifically formulated. Previously, these directive principles were contained in chapter III of the 1967 Report of the National Committee for the Constitution. This Report dealt with directive principles under four headings: economic, social, cultural and political. The 1973 Sudan Constitution consolidates these principles into two categories: general and social fundamentals (chapter I) and economic fundamentals (chapter II).¹⁸³ Although social and economic principles are closely linked, the former are not relevant to this article and, hence, the discussion will be confined to the latter. In this section we shall consider whether there is any conflict between express guarantees of property rights and economic directive principles, and how courts would handle such a conflict.

The Constitution of 1973 addresses the Sudan's fundamental eco-

182. SUDAN CONST. pt. II.

183. *Id.*

conomic principles in seven articles in chapter II. Article 31 provides that the socialist system is the foundation of the economy. It explains that the socialist system is adopted not only to prevent exploitation and injustice, but also to realize sufficiency in production and fairness in distribution, and to secure decent living standards for all citizens. To enable the state to play a dynamic role in social and economic development, article 31 empowers the state to own and manage the fundamental means of production.

Article 32 stipulates that the economic system consists of four sectors: the public sector (based on collective ownership), the cooperative sector (based on collective ownership by all members participating in cooperative societies), the private sector (based on private ownership), and the mixed sector (based on joint ownership between the state and the private sector). Article 33 recognizes the right of a citizen to own private property unless it is against the public interest. Article 34 prohibits confiscation of private property except for a public interest and in accordance with the provisions of the law and upon payment of compensation.

The inviolability of public property is equally recognized in article 35. Article 35 imposes a legal duty on citizens to preserve and protect public property and provides that public property should be employed for the welfare of the people.

Article 36 is an interesting and important provision:

Work is a right, a duty, and an honour. Every able citizen shall perform it with utmost honesty and the State shall endeavour to provide it. The State shall enact laws regulating working hours, holidays, compensation, and all other conditions of service in order to secure for those engaged in manual or intellectual activities the necessary guarantees during the service and in post-service benefits. No person shall, on grounds of need, be forced to perform work not suitable to his age, sex, or health.

The last sentence prescribes a specific right and, in so doing, departs from the Constitution's normal method of formulating economic and social rights merely as fundamental or directive principles of state policy.

Finally, article 37 deals with natural wealth and resources. It provides: "Natural wealth and resources under or above the ground or within territorial waters, shall be the property of the State and the State shall secure their appropriate exploitation." It appears from this provision that in the absence of express governmental authorization, private property rights cannot be asserted over natural wealth and resources.

The foregoing provisions of the Constitution demonstrate that with a few exceptions, notably a person's property rights in articles 33 and 34, the economic fundamentals in chapter II are essentially collective economic rights. The obligation for attaining these collective rights is placed primarily on the state, which will discharge it not only through the public sector, but also through encouragement and organization of the other sectors. A substantial part of socio-economic development is expected to come from communities' self-help activities, such as the building of health centers, schools and feeder roads.

The *Six-Year Plan of Economic and Social Development, 1977/78-1982/83* was formulated against this background.¹⁸⁴ Prepared by more than 400 experts of different views and nationalities, the plan is the first phase of a larger plan extending over eighteen years, to be implemented in three six-year phases.¹⁸⁵ Its objects are to:

- achieve a 7.5 percent growth rate in constant prices, with agriculture leading the economy
- conserve the country's natural resources
- develop and modernize the traditional agricultural sector
- increase productivity of all sectors of the national economy and improve the rate of implementation
- expand productive employment opportunities and limit unemployment as a first step towards its eradication
- develop industry as a complementary sector to agriculture, giving priority to agricultural industries and import substitution
- attain self-sufficiency in selected food and other agricultural commodities and imports
- consolidate and expand the infrastructure, particularly in the fields of transportation, communication, power resources, marketing and storage facilities
- improve the balance of payments position through expansion of exports and production of import substitution
- encourage the private sector to play a larger role in development
- develop the cooperative movement
- provide social services, particularly health and education
- develop rural and retarded areas
- increase and mobilize public and private savings
- develop administration and raise standards of organizational and administrative cadres

184. *Six-Year Plan of Economic and Social Development 1977/78-1982/83*, reprinted in Special Legislative Supplement to the Democratic Republic of the Sudan Gazette (1977/78) [hereinafter cited as *Six-Year Plan*].

185. *Id.*

—base central planning on a regional basis.¹⁸⁶

Fulfillment of these objectives depends upon fulfillment of certain preconditions. In order to meet these preconditions, the planners have proposed the adoption of certain policies or measures that closely follow various proposals of the International Labor Office. Furthermore, laws that give great incentives in the form of tax exemptions and guarantees of private property have been enacted.

It is not the purpose herein to discuss the basic economic issues, such as whether the specified growth rate can be achieved or whether the proposed policies are more likely to discourage rather than increase expansion. Admittedly, these issues are fundamental to the country and economists. Rather, the immediate issue in this article lies in whether the implementation of the objectives and policies set forth in the *Six-Year Plan* will conform to the Constitution. This issue has two aspects: the relation of the *Six-Year Plan* to the directive economic principles, and the relation of the *Six-Year Plan* and the directive economic principles to express guarantees of property rights.

The first aspect may be dealt with briefly. The *Six-Year Plan* faithfully reproduces the broad constitutional provisions on social and economic development.¹⁸⁷ It is reasonably clear that its authors had them in mind. The distribution of investment between the public and private sectors, for example, is justified as "enjoined by the Permanent Constitution of the country."¹⁸⁸

The obviously difficult question is the relation of express guarantees of property to the economic directive principles. Can a statute implementing economic principles be struck down as being in contravention of express guarantees of private property? Apart from the decision in *Building Authority of Khartoum v. Evangellos Evangelides*,¹⁸⁹ this matter has not been debated in the Sudan and it is unlikely to arise before the Sudanese courts at present, because under article 58 of the 1973 Constitution the Supreme Court is authorized to determine the constitutionality of a law only when the freedoms and rights in part III, articles 38-57 are infringed.¹⁹⁰ Since the right to property and the right to be paid compensation for property expropriated for a public purpose appear in articles 33 and 34, these articles, and the rest of part

186. *Id.*

187. See SUDAN CONST. pt. II.

188. See *Six-Year Plan*, *supra* note 184.

189. 1958 SUDANESE L.J. REP. 16.

190. SUDAN CONST. pt. II.

II (articles 14-37) are not justiciable.¹⁹¹ To put it in terms with which human rights lawyers are familiar, the "freedoms, rights and duties" dealt with in articles 38-57 are civil and political rights. "The Fundamentals of the Sudanese Society," treated in articles 14-37, are economic, social and cultural rights, though in general they are not formulated as rights but merely as fundamentals. In other countries, including India, these fundamentals are called directive principles of state policy.

One way in which courts may resolve conflict, such as the one in the Sudan between directive principles and the guarantees of property rights, can be seen in India, where courts have grappled with this problem.

Under article 31 of the Constitution of India, property rights are guaranteed in two ways. First, expropriation must be for a public purpose. Second, compensation must be paid for expropriated property (since 1971 the amount has been fixed by expropriation law).¹⁹² Both guarantees have raised the problem of the relationship of express guarantees of property rights to directive principles of state policy.

Indian courts have decided that public purpose is a justiciable issue and that the particular purpose for which expropriation is made must be specified. In *State of West Bengal v. Bella Banerjee*,¹⁹³ a West Bengal statute provided for compulsory acquisition of land "for the settlement of immigrants who had migrated into West Bengal." One issue in the case was the constitutional validity of a provision in the statute making the Government's declaration conclusive as to the public nature of the acquisition's purpose. The Supreme Court held and the Attorney General conceded that the existence of a public purpose must be established as a matter of fact because article 31 of the Constitution makes the existence of public purpose a necessary condition of acquisition.¹⁹⁴

In *Lachhman Dass v. Jalalabad Municipality*,¹⁹⁵ an Indian statute provided that Pakistani assets remaining in India after the establishment of the State of Pakistan were to be used as a compensation pool for displaced persons in India who had left assets in Pakistan. It further provided that property wrongly placed in the compensation pool was to be restored to the owner except where in the opinion of the

191. *Id.*

192. See INDIA CONST., reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 4.

193. 1954 A.I.R. 170 (S.C.).

194. *Id.* at 173.

195. 1969 A.I.R. 1126 (S.C.).

Government it was not expedient or practicable to do so.¹⁹⁶ In this event the rightful owner was entitled to either the restoration of immovable property or an amount in cash from the compensation pool, as the Government may deem proper. Certain rented shops of the municipality had been wrongly transferred to a displaced person, and the municipality petitioned to have the shops restored to them. Part of their argument was that the statute violated the public purpose guarantee. Accepting this argument, the Indian Supreme Court reasoned that the statute's public purpose was not sufficiently specified.¹⁹⁷ The discretion not to restore property could be exercised for purposes convenient to the Government, lessee or licensee, rather than for the convenience of the displaced person. Only in the last mentioned case would public purpose be served, e.g., when it is stipulated that a displaced person should not be ousted if his business would be ruined or if he would be thrown into the street. Although the words "public purpose" are imprecise, the courts' interpretation of them has not attracted serious criticism in India.

The most perplexing question which has occupied the legislature and courts in India is whether a statute implementing the directive principles can be invalidated because it violates the guarantee of compensation. The Court's position on this issue is unclear and only a bare outline will be noted. Before 1971 the original article 31 required the law to provide for compensation or specify the principles and manner in which compensation was to be determined. The Constitution, however, did not define compensation. In *Bella Banerjee* the statute limited the amount of compensation to the market value of the land at the time the statute came into force even though the land could have been acquired many years later and could have had a higher value at the time of acquisition.¹⁹⁸ The Supreme Court held this provision unconstitutional because it infringed upon the article 31 guarantee of compensation. It reasoned that fixing the amount of compensation at a date before acquisition (which might have no relation to the value of the land at the time of acquisition) was not just equivalent of that which the owner had been deprived, namely, its market value. Similarly, in *Lachhman Dass*, the Court determined that the failure to fix any compensation rate violated article 31, invalidating the statute.¹⁹⁹ The statute neither prescribed when the value of the property was to be ascer-

196. *Id.* at 1128-29.

197. *Id.* at 1129.

198. 1954 A.I.R. 170, 171-72 (S.C.).

199. 1969 A.I.R. 1126, 1128 (S.C.).

tained nor whether the cash was to be equivalent to the value of the property sought to be restored.

Responding to these decisions, the Indian Parliament amended article 31 in 1955 by adding a provision removing the courts' power to question the validity of any law on the ground of inadequacy of compensation. This ban simply opened a second phase in the relationship between the guarantee of compensation and directive principles, as exemplified by *State of Gujarat v. Shantilal*.²⁰⁰ In that case the statute empowered a local authority to expropriate whole plots or parcels of land under a town planning scheme and to award compensation. The amount of compensation was based upon the market value of the land on the date of the declaration of the intention to undertake the scheme and not on the date the scheme came into force (the date the owner's interest was extinguished). A dispute over compensation of land expropriated some thirty years after a declaration to develop such a scheme reached the Supreme Court. It held that, although the inadequacy of compensation was not justiciable under article 31 as amended in 1955, the Court would not uphold the validity of legislation in which compensation is "illusory or can in no sense be regarded as compensation . . . for, to do so, would be to grant a charter of arbitrariness, and permit a devise to defeat the constitutional guarantee."²⁰¹ Thus, in the Court's view a distinction was drawn between illusory compensation and inadequate compensation, with review for the former but not the latter. This distinction, however, can be difficult to draw in practice.

The legislature again changed the law in 1971. Article 31 was amended to provide, *inter alia*, that the expropriation law should provide for an "amount" to be fixed by such law or to be determined in accordance with such law. In short, the amendment substitutes the word "amount" for the word "compensation."

From the foregoing brief survey, we see the fundamental tension between guarantees of property rights and economic directive principles. The attainment of the former may infringe upon the latter. A country with limited resources needed for other essential services, for instance, may not have sufficient cash to compensate the owner for the full value of property indispensable to the public use. Further, judicial resolution of this tension causes great difficulties, as the example of India amply shows. The policy issues involved in social and economic legislation are complex. The concepts of "public interest" and "compensation" are imprecise, and can lead to great uncertainty in the law.

200. 1969 A.I.R. 634 (S.C.).

201. *Id.* at 650.

CONCLUSIONS

An analysis of the Sudan's Constitution, investment laws and bilateral treaties for the protection of foreign property reveals three main areas of concern: protecting property, minimizing the risk of loss due to expropriation and providing impartial machinery for the settlement of disputes. It might be expected that these identical aims would produce uniformity of results, but unfortunately, this has not occurred. As we have seen, the bilateral treaties deal exhaustively with the three areas of concern, while the Constitution of 1973 and the Investment Act of 1980 are more vague and limited in their protection.

Generally, state interference with property is limited to the demands of "public interest," "public benefit" or the "high interests of the state." Apart from the question of confiscation under the 1980 Act, compensation must be paid for property expropriated on any of the above grounds. Further, under the 1980 Act and the bilateral treaties, but not under the Constitution, this compensation is directly linked to the guarantee of repatriation of money. Finally, the word "compensation" is variously described as "fair," "just," "equivalent of the investment," and "effective and adequate." While the 1980 Act permits payment by instalments, the bilateral treaties require payment without undue delay. Both the guarantee of public interest—or its equivalent—and the guarantee of compensation apply to all private property, national and foreign.

The guarantees incorporated in the 1980 Act and the bilateral treaties are comparable to one another. Thus, with the exception of the treaty between the Sudan and West Germany which provides for judicial review of legislation, disputes (including disputes about compensation) are to be referred to a three-member arbitral tribunal. The composition of the tribunal is intended to guarantee, as shown by the example of similar tribunals, that the chairman cannot take a position opposable by both sides. The related principles of nondiscrimination and equality of treatment between national and foreign-owned property also serve as proof of the guarantee of property rights irrespective of the nationality of the owner. Finally, in a country with strict exchange control regulations, repatriation of foreign capital can be expected to be guaranteed.

Another point to be noted is the exclusion of judicial review of legislation which had existed under the Self-Government Statute of 1953 and the Transitional Constitution, both in its original form in 1956 and as amended in 1964. This exclusion is similar to the situation in India, where the constitutional amendments of 1955 and 1971 deprived the courts of the power to protect the right to property by means of judicial review. The disappearance of judicial review of cer-

tain legislation in the Sudan and India is due in large measure to a recent awareness of the extreme relativity of the concepts of public interest, due process of law and just compensation. Given the tension between individual personal rights to property and collective economic and social rights, the legislatures determined that the resolution of this conflict should not be left to the courts.

