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Impasse and Accommodation: The Protection of Private Direct Foreign Investment in the Developing States

by Lyman H. Heine*

I. INTRODUCTION

The ideological challenge of the Third World to many of the customary rules of international law has been a frequent theme in the literature of the last several decades. The developing states have been accused of relying upon the "forum," of using a conception of law based upon the political and economic principles of their New International Economic Order and of arguing for a "law equated with justice, and further, with justice defined in relation to themselves."¹

The developed states have maintained an ideological position of their own by insisting upon Third World adherence to the traditional rules of international law. As Morgenthau noted:

International law fulfills an . . . ideological function for politics of the status quo. Any legal order tends to be primarily a static social force. It defines a certain distribution of power and offers standards and processes to ascertain and maintain it in concrete situations . . . The invocation of international law, of "order with law," of "ordinary legal processes" in support of a particular foreign policy . . . always indicates the ideological disguise of a policy of the status quo.²

The ideological debate between the Third World's conceptions of the New International Economic Order, Permanent Sovereignty Over Natural

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¹ Friedheim, *The 'Satisfied' and 'Dissatisfied' States Negotiate International Law: A Case Study*, reprinted in *INTERNATIONAL LAW AND ORGANIZATION* 76 (R. Falk and W. Hanreider eds. 1968).

Reference to the Third World position towards international law has been so numerous that no listing is provided here. One of the earliest references, however, can be found in Q. Wright, *THE LEGAL BACKGROUND IN THE FAR EAST* 20 (1941).

² H. Morgenthau, *POLITICS AMONG NATIONS*, 4th ed. 87-88 (1967). Morgenthau uses Mannheims' concept of ideology ("particular ideology"), which reflects skepticism of other ideas and representations of one's opponents as they are perceived as concealing the opponent's real interest and purpose. *Id.* note 1, at 83.

Resources, and the Rights and Duties of States, and the developed states' insistence upon the minimum standard of justice, diplomatic protection, and adequate, prompt, and effective compensation is presently at an impasse. There is a limited political stand-off as well: the Third World states dominate the voting in the international forums while the developed states control bilateral development assistance and the votes of the international investment banks. In general the developing states demand change which the developed states can prevent. Nevertheless, both groups of states have shown a willingness to accommodate some of their conflicting economic and political interests. Outstanding differences over many substantive issues of foreign investment still remain, but the "gun boat" confrontations that once characterized the enforcement of State Responsibility for Injuries to Aliens have become historical examples of Western imperialism and "dollar diplomacy."³

The willingness of both groups of states to seek accommodation has been influenced by a number of factors: the changing nature of private international investment and public development assistance; the almost certain ideological and political repercussions against any Western state using force to protect the investments of its nationals; the increasing dependency of the developing states upon foreign corporations for capital, technology, services and marketing; and the expanding role assumed by all states within their economies. It would be incorrect to predict the obsolescence of the customary rules of law governing State Responsibility, but the protection once afforded private direct foreign investment property and contracts through the use of diplomatic protection and international claims is gradually being supplemented by other means by which foreign investment risks can be considerably reduced.

This article explores the nature of the present-day ideological challenge to State Responsibility for Injuries to Aliens by comparing the Latin American and Third World positions toward these laws. The extent to which the developing states have associated themselves with the Latin American efforts to restrict the application of these laws is examined. Finally, the mechanisms by which the developed states and a growing number of Third World states, as well as foreign investors and host governments, are using to resolve investment disputes are reviewed.

Almost twenty years ago, the late Wolfgang Friedmann stressed his belief that:

. . . the principles of contemporary international law dealing with the

³ Jessup, *The Responsibility of States for Damages to Individuals*, 46 COLUM. L. REV. 906 (1946). A comprehensive bibliography on State Responsibility for Injuries to Aliens can be readily found in the notes to M. McDougal, H. Lasswell and L. Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432-469 (1976).

security, protection, and compensation value of foreign property must be such that they are acceptable not solely to one group of contemporary nations but to a representative majority across the world, and across the divergent phases of development and economic philosophy. At least this must be the postulate, unless we are to accept the legal as well as the political division of the world not only into two blocs but into three or more rival groups of nations, each representing a particular congeries of interests and values.⁴

At that time Friedmann saw some "promising beginnings." Today, the question is whether the international legal system has moved beyond those "beginnings."

II. THE LATIN AMERICAN STATES

The political and economic conditions that gave rise to the body of rules governing State Responsibility for Injuries to Aliens did not fully develop until the latter part of the nineteenth century.⁵ Although Grotius in the seventeenth century and Vattel in the eighteenth laid a basis for the modern doctrine of diplomatic protection, their writings are more significant today for their illustration of the general obligations assumed to be imposed upon a Sovereign in the treatment of aliens. These obligations found their logical extension in the nineteenth century with the expansion of international trade and investment in the newly independent states of Latin America. Diplomatic protection was not limited to this geographical area, but the frequency of Great Power intervention⁶ and the thousands of claims which arose involving the Latin American states⁷ left an indelible mark upon this branch of international law and clearly established the opposition of the Latin American states toward these rules.

Various factors contributed to the role played by the doctrine of diplomatic protection in the Americas. For the most part, Africa and Asia were devoid of independent states or they increasingly fell under the ju-

⁴ Friedmann, *Social Conflict and the Protection of Foreign Investment*, in PROC. OF THE AM. SOC'Y INT'L L. 126, 126-27 (1963).

⁵ *Id.*

⁶ The more blatant interventions: France (Argentina and Mexico, 1838); France and England (Argentina, 1845); France, England and Spain (Mexico, 1862); England (Brazil, 1863); Italy (Columbia, 1885 and 1898); Germany (Haiti, 1897); England, Germany and Italy (Venezuela, 1902); and the United States (Dominican Republic, 1907; Nicaragua, 1911; Mexico, 1914; and Haiti, 1915).

⁷ Although the total number of claims vary according to whether types of claims were considered together or jointly, the American-Mexican Claims Commission of 1868, for example, had 2015 claims presented to it, of which 353 were allowed. The Commission of 1923 had 3617 claims filed before it. See 3 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 2068a-2068n (1943).

risdiction of the European colonial powers. Japan had essentially isolated herself from the West. In China and some areas of Africa, Asia and the Near East treaties often enabled citizens from the European Powers to remain under the jurisdiction of their own states. While Latin America avoided the full effects of nineteenth century colonialism and capitulations, foreigners were attracted to these "less civilized" states because of the commercial fortunes which could be made. The inconveniences that gave commercial advantage to the aliens were frequently the very conditions upon which aliens based their claims of "injustices."⁸

The claims by foreigners were based in large part upon concepts⁹ such as the sacredness of property and the sanctity of contracts, which had been unrealistically incorporated from European and North American political ideology and placed in the constitutions of the Latin American Republics.⁹ Considering the chaotic conditions that existed in these newly independent states, governments could not insure adequate protection to aliens no matter how seriously "(they) tried."¹⁰ There were instances where governments failed to meet their contractual obligations, which successor but bankrupt governments refused to honor. Nevertheless, the standard of justice claimed by aliens was more relative to the economic and social development, including political stability, of their native states.

In contrast to numerous present-day claims involving compensation and inconvertability, the diplomatic claims against the Latin American governments were generally based on the following conditions: failure to offer adequate police protection to aliens; failure to take appropriate punitive measures against those who mistreated aliens; failure to provide adequate procedural and substantive justice in situations where aliens were subject to criminal or civil action; and, failure to provide such safeguards to aliens in disputes concerning public or private contracts.¹¹

⁸ T. Esquivel Obregon, *MEXICO Y LOS ESTADOS UNIDOS ANTE EL DERECHO INTERNACIONAL* 154-155 (1926).

⁹ F. DUNN, *THE PROTECTION OF NATIONALS* 54 (1932).

¹⁰ C. RONNING, *LAW AND POLITICS IN INTER-AMERICAN DIPLOMACY* 35 (1963).

¹¹ *Id.* at 34. Whiteman has provided considerable insight not only into international practice regarding the measurement of damages for injuries to aliens but the *genre* of claims typical in the nineteenth and early twentieth centuries. In situations involving wrongful arrest, detention, and imprisonment "the amounts recovered . . . varied from approximately eight dollars for a day's imprisonment to \$2,000 for imprisonment for only one and a half hours." 1 M. WHITEMAN, *supra* note 7, at 383. It is a mistake to assume, however, that the exorbitant amounts were claimed only against the Latin American states. The standards of the day were applied, although certainly less frequently, even against the United States. One commission in 1874 granted Llewellyn Crowther, a British subject, \$100 for the claimant's allegation that "language abusively and indecently violent toward him and toward his country and Queen" were made during a warranted arrest. Crowther's initial claim was for \$10,000." *Id.* at 343-344.

While most claims were settled through normal diplomatic channels and domestic commissions rather than direct armed intervention, the frequency by which international arbitration commissions were used during the nineteenth and early twentieth centuries illustrates the extent to which the Latin American states were confronted with the laws of State Responsibility. Between 1794, when an arbitration commission was established by the United States and Great Britain under the Jay Treaty, and 1932, 101 international commissions arbitrated state claims, many of which were in consequence of World War I. For the historical record, the United States was involved as the claimant state in 48 commissions, Great Britain in 20, France in eight, and Italy in six. The Latin American states were respondents in 67 arbitration commissions, in which the United States was a claimant in 37 instances.¹²

Despite the frequent criticisms directed against the abuses associated with the laws of State Responsibility, Jessup noted that the history of this area of international law exemplifies "the way in which a body of customary international law develops in response to the needs for adjustment of clashing interests."¹³ Dunn argued that the practice of diplomatic protection was to some degree advantageous to the interests of the Latin American states. In other areas of the world, "territorial conquest was then taking place on much slighter provocation than was being offered in some Latin American countries."¹⁴ In the absence of the institution of diplomatic protection, "there is no reason at all to believe that . . . the stronger states would have been content to stand by and do nothing while their citizens in Latin American countries were receiving treatment which appeared unjust or improper."¹⁵ The rules of State Responsibility delayed and discouraged "the resort to forceful action by stronger states when their citizens sustained what was regarded as mistreatment in the territory of the weaker states."¹⁶ More recently, Lillich contended that "the belief that state responsibility is a product of 19th century economic imperialism has been accepted too easily."¹⁷ It is a mistake to believe that the development of this branch of international law "occurred solely because strong nations wished to have a legal basis for coercing weaker states."¹⁸ The method of enforcement, i.e., intervention, more than the

¹² These figures are based upon 3 M. WHITEMAN, *supra* note 6, at 2068a-2068n. Totals for the United States and Great Britain involve 8 bilateral commissions between the two countries.

¹³ P. JESSUP, *A MODERN LAW OF NATIONS* 95 (1968).

¹⁴ F. DUNN, *supra* note 9, at 57.

¹⁵ *Id.*

¹⁶ *Id.* at 58.

¹⁷ Lillich, *Toward the Formulation of an Acceptable Body of Law Concerning State Responsibility*, 16 SYRACUSE L. REV. 735 (1965).

¹⁸ *Id.*

nature of the rules of State Responsibility antagonized the Latin Americas.¹⁹

Whether antagonized by intervention or by legal coercion from the developed states, the response of the Latin American countries and their diplomats was to develop legal doctrines and practices which would narrowly confine the practice of diplomatic protection. The Inter-American Juridical Committee has claimed more forcefully that "the majority of the American states . . . have struggled constantly and tenaciously to reduce or abolish" the laws of State Responsibility for Injuries to Aliens.²⁰ In a 1962 report on the Contribution of the American Continent to the Principles of International Law that Govern the Responsibility of the State, the Inter-American Juridical Committee enumerated ten postulates which together formed a juridical basis for the American doctrine of the responsibility of the state.²¹ The first postulate stated that intervention by a state in the internal or external affairs of another state was "not admissible to enforce the responsibility" of the latter state.²² The second postulate reiterated the long-standing Latin American position on the equality of treatment for nationals and aliens. A state's responsibility arose only in those "cases and conditions, where, according to its own laws, it has such responsibility towards its own nationals."²³

With respect to contractual debts due to another state or its nationals, the third postulate precluded a state from using armed force to enforce payment of debts, even if "the debtor State fails to reply to a proposal for arbitration or fails to comply with an arbitral award."²⁴

The fourth postulate restated the Calvo Doctrine: if the alien renounces the diplomatic protection of his government or if domestic legislation subjects the alien to the jurisdiction of the local courts or places the alien in a similar status with nationals, the state is relieved of all international responsibility.²⁵ The fifth postulate declared that damages suffered by aliens as a consequence of political or social disturbances or by acts of private individuals did not create international responsibility "except in the case of the fault of duly constituted authorities."²⁶ The sixth postulate rejected the theory that the state was responsible for the

¹⁹ *Id.*

²⁰ INTER-AMERICAN JURIDICAL COMMITTEE, CONTRIBUTION OF THE AMERICAN CONTINENT TO THE PRINCIPLES OF INTERNATIONAL LAW THAT GOVERN THE RESPONSIBILITY OF THE STATE, reprinted in OAS OR Doc. CIJ-61, OEA/Ser.I/VI. 2 (1962).

²¹ *Id.* at 7-8.

²² *Id.* at 9-12.

²³ *Id.* at 13-18.

²⁴ *Id.* at 19-21.

²⁵ *Id.* at 22-27. Brazil has never stipulated the Calvo Clause in administrative contracts with foreigners.

²⁶ *Id.* at 28-31.

risk of injuries suffered by an alien since the latter's residence was a benefit to the state. The Latin American states held that "the state was liable only where fault, negligence or omission was proven."²⁷

According to the seventh postulate, damages arising from aggressive war were the responsibility of the state responsible for the war.²⁸ The eighth postulate stated that the obligation of a state to afford judicial protection was fulfilled "when it places at the disposal of foreigners the national courts and the legal remedies essential to implement" the rights of aliens.²⁹ Therefore, no denial of justice exists if aliens can "place their cases before competent domestic courts" of the state.³⁰ No further international obligation remains when "the judicial authority pronounces its decisions, even if it disallows the claim, action or appeal brought by the foreigner," or if the decision is unsatisfactory to the alien.³¹

The ninth postulate maintained that a state was responsible if it provided aid to others "who conspire or encourage hostile movements against a foreign state" or if the state fails to prevent by available means such situations from occurring.³² Finally, the American contribution to the laws of State Responsibility was found in the rights and duties of states as frequently expressed in the international declarations and treaties of the American states.³³

The Inter-American Juridical Committee admitted that these postulates were not unanimously accepted throughout the Western Hemisphere "because the position of the United States of America is contrary to or in disagreement with them."³⁴ Dr. James Oliver, the U.S. representative was critical of the Committee's omission of the practice and law that had developed between the Latin American states, the European states, and the United States. Particular issue was taken with three of the postulates which, he argued, had "not received acceptance in general international law" and which, as proposed, tended to favor *international irresponsibility*, i.e., the national standard of treatment, the waiver of diplomatic protection and denial of justice limited to refusal of access to national courts.³⁵

²⁷ *Id.* at 32.

²⁸ *Id.* at 35-36.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 37-41.

³² *Id.* at 44.

³³ *Id.* at 46.

³⁴ *Id.* at 6. In 1965, the Inter-American Juridical Committee summarized "Principles of International Law that Govern the Responsibility of the State in the Opinion of the United States of America." See OAS OR Doc. CIJ-78, OEA/Ser.I/VI.2, at 7-12 (1965).

³⁵ *Id.* at 73. Dr. Hugo Gobbi, the Argentine representative, questioned the report on several grounds, including the report's failure to note the discrepancies of state practice

These ten postulates cited by the Inter-American Juridical Committee formed the ideological response of the Latin American states to the customary rules of State Responsibility. At the heart of this ideology as stated by former Secretary of State William Rodgers "is the body of doctrine inherited from Calvo. . . ." ³⁶ Although the developed states have tried to maintain the substantive norms of the 1962 General Assembly resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources, ³⁷ efforts "to endow the Calvo Doctrine . . . with limited international status" ³⁸ reflect the support of the Third World and Communist states for the Latin American position. ³⁹ These efforts have resulted in the adoption of the Resolution on Permanent Sovereignty Over Natural Resources by the UNCTAD Trade and Development Board in 1972, ⁴⁰ the 1973 General Assembly resolution on Permanent Sovereignty Over Natural Resources, ⁴¹ and, especially, the Charter of the Economic Rights and

among the American states and the report's formulation of the principles of equality of treatment, denial of justice, and the Calvo Clause. Moreover, he believed that there was no juridical standing to the Committee's conclusion "that the majority of the American states . . . have struggled constantly and tenaciously to reduce or *abolish*" (Gobbi's emphasis) the laws of State Responsibility. For Gobbi's dissenting opinion, see *id.* at 54-58.

³⁶ Rodgers, *Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AM. J. INT'L L. 2 (1978).

³⁷ GA. Res. 1803, 17 UN GAOR, Supp. 17, at 15, UN Doc. A5217 (1962). This resolution was adopted by a vote of 87-2 (France and South Africa)-1 (Soviet Union). The United States was able to support this resolution because, as U.S. United Nation's Ambassador John Scali later explained in 1973 during a Security Council debate on sovereignty over natural resources dealing with coercion against Latin American countries, the resolution "recognizes that sovereignty over natural resources is to be exercised in accordance with international law. [Resolution 1803] expressly provides that foreign investment agreements should be observed in good faith and that appropriate cooperation should be part in cases of nationalization in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law." DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 336 (1973).

³⁸ Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*. 69 AM. J. INT'L L. 360-61 (1975).

³⁹ *Id.*

⁴⁰ T.D. Res. 86 (XII), 12 U.N. TDOR Supp. (No.1) at 1, U.N. Doc. TD/B/423 (1973). Reprinted in 11 ILM 1474 (1972). This Resolution was adopted by a vote of 39-2 (Greece and the United States) - 23. The key portion of this resolution stated that "2 . . . such measures are the expression of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each state to fix the amount of compensation and the procedures for these measures, any dispute which may arise in that connexion falls within the sole jurisdiction of its courts, without prejudice to what is set forth in General Assembly resolution 1803 (XVII)"

⁴¹ G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 31) at 52, UN Doc A/9631 (1974). This Resolution stated that the General Assembly "3. Affirms that the application of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of

Duties of States adopted by the General Assembly in 1972.⁴²

A distinctive Latin American position towards the arbitration of investment disputes also seems to have emerged. The majority of the Latin American states "remain suspicious of the arbitration process," fearing that "arbitration is designed to evade the local laws" or that "the arbitration process may be used solely for the investor's benefits."⁴³ Uncertainty with arbitral institutions, procedures, and arbitrators reinforces this suspicion and has impeded the growth of arbitration among the Latin American states.⁴⁴ Many of them "simply do not believe that their interests will be safeguarded by the internationally recognized institutional arbitration centers."⁴⁵ Thus, the Latin American states refused to sign the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. As of January 1, 1981, only five Latin American countries (Chile, Columbia, Cuba, Ecuador and Mexico) have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Only six countries (Chile, Panama, Costa Rica, Mexico, Uruguay and Parguay) have ratified the 1975 Inter-American Convention on International Commercial Arbitration.⁴⁶ Even Secretary of State Kissinger's effort in 1974 to overcome the impasse by encouraging "the establishment of a working group to examine various procedures for factfinding, conciliation, or the settlement of disputes"⁴⁷ proved unacceptable.⁴⁸

Although there have been a few exceptions to this general nonarbitration principle, such exceptions "are out of the mainstream of Latin American practice" and "[t]here is no present likelihood, despite

each State carrying out such measures . . . "

⁴² G.A. Res. 3281, 29 U.N. GAOR Supp. (No.31) at 52, UN Doc. A/9631 (1974). *Reprinted in* 14 IML 251 (1975). This Resolution was adopted by a vote of 120-6 (including the United States)-10. The relevant article, which was proposed by Mexico, is 2(2)(c). "To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

⁴³ McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW. 216 (1979).

⁴⁴ D. Straus, *So Perfect in Theory-So Neglected in Practice*, (March 1978)(Paper presented at Sixth International Arbitration Congress, Mexico City), *reprinted in* McLaughlin, *Id.* at 216-217.

⁴⁵ McLaughlin, *supra* note 43, at 217.

⁴⁶ *Id.* at 216.

⁴⁷ Statement by H. Kissinger (released February 21, 1974), *reprinted in* 70 DEPT. OF STATE BULL. 257, 260 (1974).

⁴⁸ Rodgers, *supra* note 36, at 4.

whatever specific nations may do in special cases, that Latin American nations can be brought to agree upon a general investment dispute mechanism. In fact, the current probabilities are strongly in the opposite direction."⁴⁹ However, "while Latins have held fast to Calvoism in the abstract, they have, in practice, begun to show some willingness to dilute principle with a dash of self-interest in certain recent foreign investment cases."⁵⁰ The settlement of the Marcona dispute in Peru and the partial settlement of U.S. oil company claims against Venezuela for its 1975 nationalizations are instances where Peru and Venezuela as well as the United States were "prepared to temper principle with practicality."⁵¹

In any event, the Venezuelan transfer, together with the Marcona case and other recent experience, suggests that there may be something new in the air in the Western Hemisphere with respect to investment disputes. On both sides, there is movement away from earlier, rigid positions: in Latin America, tip-toeing away from Calvo and its strict insistence that nationalization is the exclusive concern of host countries; and, in the United States, movement away from the conviction that formal international machinery is the only remedy and that the justice of each final result is to be measured by rigid standards of compensation.⁵²

This "ideological detente" between the United States and a limited number of Latin American states will be tested if the Caribbean Based Initiative recently announced by the Reagan administration receives Congressional approval. Under this program, the United States will provide and support economic assistance to select countries of Central America and the Caribbean. However, continued adherence to the Calvo Doctrine by any country will likely preclude its receipt of this assistance.⁵³

III. THE THIRD WORLD STATES

Although the developing states have not had the same historical experience as the Latin American states with the laws of State Responsibility, some of their scholars in the early 1960s renewed the ideological attack upon these laws. Abi-Saab characterized this branch of international law as one which "most exemplifies the cleavage between the newly independent states and the older European ones."⁵⁴ Castañeda claimed that the developing states viewed the laws of State Responsibility as "merely

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 10.

⁵² *Id.* at 10-11.

⁵³ Discussions with State Department officials during a Scholar-Diplomat Seminar on Economic and Business Affairs, Washington, D.C., (February 8-12, 1982).

⁵⁴ Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, How. L.J. 95, 113 (1962).

the legal garb that served to cloak and protect the imperialistic interests of the international oligarchy during the nineteenth century and the first part of the twentieth."⁵⁵ These laws reflected the power of the investor countries; and, in practice, the doctrine of State Responsibility meant inequality of rights.⁵⁶

One of the most critical attacks upon State Responsibility came from Guha-Roy, who argued that the doctrine of State Responsibility "protects an unjustified *status quo*, or, to put it more bluntly, makes itself a handmaid of power in the preservation of its spoils" so long as the rules favor the rights and interests that the Western states acquired during the periods of colonial abuse.⁵⁷ He also called into question the universality of these laws because they were based upon custom which was "binding only among states where it grew up or came to be adopted."⁵⁸ Diplomatic protection could no longer be considered a part of universal international law because the responsibility for injury to an alien was "a responsibility not to the home state of the injured alien but to the injured alien himself."⁵⁹ Since this responsibility was based upon municipal law, the international standard of justice used in the past to impute responsibility could not be applied. Until the laws of State Responsibility could be revised, "the old rules will probably have to be applied," but he suggested that they be put in "cold storage," or invoked as little as possible. Guha-Roy hoped that appropriate treaties and conventions could be worked out among all states to reflect the law to control the administration of State Responsibility rather than to continue with the customary rules.⁶⁰

The work of the Asian-African Legal Consultative Committee represents one of the first attempts by the Third World states to establish a position on the traditional laws governing State Responsibility for Injuries to Aliens. The status of aliens, State Responsibility, and diplomatic protection were proposed for the Consultative Committee's consideration by the Japanese Government at the Committee's First Session in 1958.⁶¹ At its Third Session in 1960 the Committee postponed deliberation on diplomatic protection and state responsibility and began their study on the status of aliens.⁶² Since the International Law Commission had not

⁵⁵ Castañeda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORG. 38, 39 (1961).

⁵⁶ *Id.*

⁵⁷ Guha-Roy, *Is the Law of Responsibility for Injuries to Aliens a Part of Universal International Law?* 55 AM. J. INT'L L. 863, 866 (1961).

⁵⁸ *Id.* at 867-868.

⁵⁹ *Id.* at 889.

⁶⁰ *Id.* at 890.

⁶¹ ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE, REPORT OF THE FIRST SESSION (1958).

⁶² ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE, REPORT OF THE THIRD SESSION

yet finalized its report on State Responsibility, the Committee believed that its own study on these areas would be premature.⁶³ In 1965, at its Seventh Session, the Committee decided further to consider diplomatic protection in conjunction with State Responsibility at some future session.⁶⁴

Although the Committee's Secretariat originally advanced the minimum standard of treatment in the suggested draft articles on the status of aliens at the Third Session, it was evident that the Committee itself rejected the minimum standard and supported the equality of treatment between nationals and aliens.⁶⁵ The position of the Committee was that "in the context of the United Nations Charter and the Declaration of Human Rights every State was expected to accord fair treatment to its own nationals, which should be taken note of whilst formulating principles on the treatment of foreigners."⁶⁶ To accord the minimum standard of treatment to aliens "irrespective of the way a State treated its own subjects has become out of date. . . ." ⁶⁷ According to the Committee, foreigners should receive the same treatment as nationals because they reside in a country for their own ends and they should be satisfied if they receive the same treatment as the nationals of that country.⁶⁸

Following this direction the Secretariat argued in the commentary to the "Principles Concerning Admissions and Treatment of Aliens" adopted at the Fourth Session, that the nature and extent of modern state practice on an alien's essential rights was found in the Guerrero Report to The Hague Conference for the Codification of International Law in 1930. Accordingly, the maximum which a state could claim for its nationals was "civil equality" with the nationals of the receiving state, unless other obligations were embodied in a treaty.⁶⁹ The Secretariat maintained that the resident alien "does not derive his essential rights directly from international law but from the municipal law of the host State concerned. . . ." ⁷⁰

The Asian-African Legal Consultative Committee gave only preliminary consideration to diplomatic protection before assigning it as a future

(1960). [hereinafter cited as THIRD SESSION].

⁶³ The Committee also did not believe that these two areas were related "to the substantive rights of aliens regarding their status and treatment." *Id.* at 85.

⁶⁴ ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, REPORT OF THE SEVENTH SESSION, 57 (1965).

⁶⁵ THIRD SESSION, *supra* note 62, at 83-84.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, REPORT OF THE FOURTH SESSION, 81 (1961). [hereinafter cited as FOURTH SESSION].

⁷⁰ *Id.* at 81.

topic for the work of the Committee. However, in a draft article prepared by the Secretariat on the "Right of Protection by the Home State of the Alien" for the Committee's work on the status of aliens at the Third Session,⁷¹ the conditions described by the Secretariat, under which diplomatic protection was to be exercised, did not differ appreciably from those found in the 1961 Restatement of the American Law Institute or in the Harvard Draft.⁷² When discussed by the Committee, it again became evident that the Secretariat's position was not acceptable to a majority of the states.⁷³ Information obtained from the member governments indicated that while diplomatic protection was accepted by them, it was to be exercised "only in cases of necessity, such as denial of justice," rather than in instances following a delay of justice.⁷⁴ Ceylon argued that the Calvo Doctrine could "be accepted as a principle of international law among the Asian-African countries," but Burma and Iraq did not accept this argument.⁷⁵ Ceylon's position found support from Indonesia and the United Arab Republic because both considered the Calvo Clause as being a measure to safeguard "the newly won independence of the Asian-African States and to avoid intervention in the affairs of these countries"⁷⁶

At its Fourth Session, the Committee drafted several articles concerned with the right of states to nationalize the property of aliens and the extent to which compensation should be paid. Under Article II, the alien's right to acquire and hold property was accepted "subject to the local laws, regulations, and order . . . to the conditions imposed for his admission into the State"⁷⁷ Under Article 12, if nationalization of property occurred, compensation was to be "in accordance with local law, regulations and orders."⁷⁸ Japan appeared to be the only state to question this standard of compensation, arguing that "just compensation" should be paid instead.⁷⁹ The Secretariat's commentary noted that "the realities of the Modern World would make it impossible in many cases to

⁷¹ THIRD SESSION, *supra* note 62, at 130.

⁷² RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §202 (1965). *See also*, HARVARD LAW SCHOOL, CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS, Article 24 (1961).

⁷³ THIRD SESSION, *supra* note 62.

⁷⁴ *Id.* at 140.

⁷⁵ *Id.* at 143.

⁷⁶ *Id.* It was also evident from the responses of the member governments that there was varied interpretation of state responsibility arising from acts and omissions, including *ultra vires* acts, of officials and political subdivisions, and with respect to the due diligence rule regarding the acts of private individuals. *Id.* at 141-142.

⁷⁷ Article 11 of the Committee's final report on "Principles Concerning Admission and Treatment of Aliens." FOURTH SESSION, *supra* note 64, at 49.

⁷⁸ Article 12, *Id.*

⁷⁹ FOURTH SESSION, *supra* note 64, at 131.

adhere to the principle of full compensation. The principle of just compensation has to give way to considerations of the debtor's political and economic instability or its capacity to pay."⁸⁰ Moreover, the industrially advanced nations had begun to appreciate these political and economic conditions by their acceptance of the *en bloc* method of settlement where compensation was likely to be less than the full market value.⁸¹

The early deliberations of the Asian-African Legal Consultative Committee reveal the influence of the Latin American position among the member states of the Committee. The merging of interests of both the Latin American and Asian-African states would become more pronounced a decade later in other international forums and in the redirection of the International Law Commission's work on State Responsibility.⁸² Opposition to the codification of the laws of State Responsibility for Injuries to Aliens by the small and developing states was one of the principal factors leading to the failure of the previous effort to codify this branch of international law at The Hague Conference in 1930.

Guha-Roy's suggestion to put the rules of State Responsibility in "cold storage" seems to be gaining acceptance. The developed states appear increasingly reluctant to grant diplomatic protection to their citizens for non-economic injuries in foreign countries. The United States apparently rejects requests for diplomatic protection on a routine basis, primarily on grounds that this is insufficient evidence to substantiate the alleged non-economic injury. Such requests may be raised to the level of inter-governmental inquiry, but no American citizen within recent memory has been granted diplomatic protection on the basis of a non-economic in-

⁸⁰ *Id.*

⁸¹ *Id.* at 141-142.

⁸² The Responsibility of States has been a topic for codification by the International Law Commission since its first session in 1949. When, in 1953, the Cuban delegation introduced a draft resolution requesting the International Law Commission to undertake codification of the principles of international law governing State Responsibility, F.V. Garcia-Amador, the Cuban representative in the Sixth Committee and later to become the first Special Rapporteur on State Responsibility in the International Law Commission, argued that it "was undeniable that the question of State Responsibility was at present ripe for codification." 8 U.N. GAOR Sixth Committee (393d Mtg.) at 161. The frequent criticism in the International Law Commission and in the Sixth Committee of Garcia-Amador's six reports, including the failure of the Commission to give the topic much attention before his term of the Commission expired in 1961, led the Commission, in 1962, to give greater priority to the topic by appointing a subcommittee, under the chairmanship of Roberto Ago of Italy. The work of the subcommittee was to be "devoted primarily to the general aspects of State Responsibility." (See Ago's first report, A/CN. 4/152, YEARBOOK OF THE INTERNATIONAL LAW COMMISSIONS, VOL. II, at 227-259 (1963). In contrast to "State responsibility *stricto sensu* that characterized the work of Garcia-Amador, the work of Ago is viewed as "state responsibility *lato sensu*." For a discussion and comparison of state responsibility *stricto sensu* and *lato sensu* relative to expropriation, see: Goldie, *State Responsibility and the Expropriation of Property*, 12 INT'L L. 63-82 (1978).

jury.⁸³ Thus, without much notice, the international standard is giving way to the national standard of treatment.

The priority given by the Third World states to economic development has also significantly affected the current applicability of the Laws of State Responsibility to investment disputes. The validity of the old international economic order, under which this branch of international law developed, was first shattered by the Bolshevik Revolution and by the nationalization of agrarian lands under the 1917 Mexican Constitution.⁸⁴ Third World states now assume that their governments will play a major role in the economic development of their countries. Many of them, for political rather than economic reasons, consider the rejection of the Western capitalist model as a prerequisite for this role. Unwilling to be bound by the minimum standard, the Third World states claim as an attribute of their sovereignty, the right to settle investment disputes by their domestic tribunals and under their laws. The Calvo Doctrine has been endorsed by the Third World as an ideological and legal underpinning for this right.⁸⁵

The developed states, although still insisting upon many traditional norms, have established a number of bilateral and multilateral mechanisms under which investment protection and the settlement of investment disputes can be promoted without resort to diplomatic protection and international claims. The need for diplomatic protection has not been eliminated, however. Considering the Latin American and Third World attack on diplomatic protection, Lillich argues that "the modern doctrine of diplomatic protection of nationals abroad warrants the continued vigorous support of all enlightened internationalists."⁸⁶ The new mechanisms have neither resolved the differences over issues such as compensation and the applicable law nor reduced the intensity of the ideological debate, but they have provided means by which the developed and developing states can accommodate their more immediate and conflicting economic interests.

In the final analysis, the willingness of the Third World states to accept these mechanisms is still a reflection of their inherent economic and political weakness and their dependency upon development assistance from the capital exporting states. As this assistance becomes more limited in relation to need, or is increasingly allocated to the developing states according to specific political objectives, Third World acceptance of the

⁸³ See *supra* note 57.

⁸⁴ Eze, *Legal Structures for the Resolution of International Problems in the Domain of Private Foreign Investments: A Third World Perspective Now and in the Future*, 9 GA. J. INT'L AND COMP. L. 541 (1979).

⁸⁵ See generally *supra* note 20 et seq. and accompanying text.

⁸⁶ Lillich, *supra* note 38, at 364-365.

bilateral and multilateral schemes may become more pronounced. However, "the resolution of international problems is not a purely mechanical affair."⁸⁷ The structure of these mechanisms, as well as their law, is "determined by the control of economic and political power."⁸⁸ So long as a basic inequality exists between the developed and underdeveloped states, "the struggle to alter or maintain the rules of the game will persist."⁸⁹

The willingness of the developed states to support mechanisms to prevent or resolve investment disputes between their nationals and Third World governments has been encouraged by many factors. The developed states recognize the ideological risks they face from any dogmatic adherence to the status quo. Political considerations, including the perception of future economic benefits, may also require a normalization of relations with a Third World government despite that government's previous expropriation of alien property. Lump-sum settlements are frequently the result. Additionally, the political influence of a developed state accompanies, in varying degrees, its foreign private investment. Economically, some investments are encouraged because of their domestic economic benefits. Foreign investment in raw materials and energy not only enhances secured access to these resources but has strategic implications as well. Specifically, the United States investment guarantee program, the Overseas Private Investment Corporation (OPIC), is seen as reducing domestic political pressure for some responsive action against a foreign government if that government has expropriated American business.⁹⁰ Besides potential deterrence of expropriation, OPIC also enables the American government to influence multinational corporations in an investment dispute, including the reduction of inflated book values of lost assets and the requirement that the insured corporation, as a precondition for payment under OPIC, must attempt good faith negotiations.⁹¹ Without this leverage, investment disputes could remain unsettled "with potentially harmful results for U.S. foreign policy."⁹²

IV. INVESTMENT GUARANTEE PROGRAMS

In the attempt to encourage private investment in the Third World, the developed states have established a range of investment incentives for their nationals including investment guarantee programs. These programs

⁸⁷ Eze, *supra* note 84, at 537.

⁸⁸ *Id.*

⁸⁹ *Id.* at 546.

⁹⁰ CONGRESSIONAL RESEARCH SERVICE, THE OVERSEAS PRIVATE INVESTMENT CORPORATION: A CRITICAL ANALYSIS, prepared by the Library of Congress for the House Committee on Foreign Affairs, 93rd Cong., 1st Sess., 97 (1973).

⁹¹ *Id.* at 98.

⁹² *Id.*

provide insurance to cover political and non-commercial risks such as expropriation, inconvertibility, revolution, insurrection, and war. A few states (Japan and Switzerland) provide some protection even for commercial risks.⁹³ Under recent legislation, the Overseas Private Investment Corporation can now offer insurance coverage for civil strife resulting from civil disturbances or acts of terrorism.⁹⁴

Eighteen countries, including the United States, offer some form of insurance for private direct foreign investment.⁹⁵ The primary goal of nine of these programs (Australia, Austria, West Germany, the Netherlands, New Zealand, Spain, Switzerland, the United Kingdom, and the United States) is host country development.⁹⁶ Programs in seven countries (Belgium, Canada, France, India, Israel, Japan, and Korea) seek increased foreign exports, financial returns, and access to raw materials.⁹⁷

The programs also differ in terms of country coverage. Five programs (West Germany, Korea, the Netherlands, Norway, and Sweden) provide insurance only in non-Eastern bloc developing states.⁹⁸ Four programs (Switzerland, India, the United Kingdom, and the United States) include one or more Eastern bloc countries among the developing countries covered by the investment guarantees.⁹⁹ Nine programs (Australia, Austria, Canada, France, India, Israel, Japan, New Zealand, and Spain) cover investments in all countries. OPIC is unique among the programs in that priorities are established among the developing states.¹⁰⁰ In 1978, Congress revised OPIC's insurance authorization by requiring OPIC to give preference to projects in the poorer developing countries (per capita income under \$520 in 1975 dollars) and restricted activities to special projects, primarily mineral and energy, in countries where per capita income was over \$1,000.¹⁰¹ In 1981, these limits were raised to \$680 and \$2,950 in 1979 dollars.¹⁰²

Although current evaluative data is lacking, OPIC is by far the larg-

⁹³ *Overseas Private Investment Corporation: Hearings Before the Senate Committee on Foreign Relations*, 96th Cong., 2nd Session, 224 (1980). [Hereinafter cited as *Overseas Private Investment Corporation*].

⁹⁴ Overseas Private Investment Corporation Amendments Act of 1981, Pub. L. No. 97-65, 95 Stat. 1021, 1022 (1981). For a discussion of State Responsibility on terrorism in general, see Lillich and Paxman, *State Responsibility For Injuries Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217-313 (1977). [Hereinafter *Overseas Private Investment Corporation Act*].

⁹⁵ *Overseas Private Investment Corporation Senate Hearings*, *supra* note 93, at 224.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Overseas Private Investment Corporation Amendments Act, *supra* note 94, at 1021.

est of the existing programs. For example, as of the end of 1974, Japan's insurance coverage amounted to 36 percent of the almost three billion dollar coverage provided by OPIC.¹⁰³ The West Germany program, the third largest, provided only 14 percent of the total American coverage.¹⁰⁴ All other programs at that time provided only 1½ percent or less of OPIC's total dollar coverage.¹⁰⁵

The geographical distribution of the investment coverage also varies and tends to follow trade patterns. Japan's Ministry of International Trade and Industry provides 58 percent of its coverage to Asia and 26 percent to Latin America. West Germany's Treuarbeit provides 35 percent of its investment coverage to Africa, 26 percent to Latin America, and 15 percent to Asia. OPIC's recent coverage of investment projects has the following geographical distribution: Latin America (40 percent), Asia (35 percent), Middle East (12.8 percent), and Europe (0.7 percent).¹⁰⁶

Unfortunately, data which would indicate the total amount of private direct investment to the developing states covered by investment guarantee programs is unavailable, although various estimates have been made for OPIC's coverage of U.S. private direct investment. Franklin and West cite a 1977 market study of American businesses having overseas investment potential. The study indicated that OPIC is likely to insure between 35 percent and 50 percent of the LDC investment projects by these companies.¹⁰⁷ In terms of the total dollar amount of investment covered, they cite another study that indicates that this may vary from 17 to 94 percent in any one year.¹⁰⁸ Between fiscal years 1974-1980, OPIC provided insurance for investments in 60 developing countries covering projects totaling some \$6.8 billion.¹⁰⁹ Other data indicates that at the end of 1979, total United States direct investment in the LDC's amounted to \$48 billion, or about 25 percent of total U.S. private foreign investment.¹¹⁰

Unlike most other investment guarantee programs, OPIC requires a bilateral agreement between the host government and the United States as a pre-condition for OPIC insurance guarantees to U.S. private investors.¹¹¹ These agreements set forth the procedural understandings be-

¹⁰³ *Overseas Private Investment Corporation*, *supra* note 67, at 176.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ State Department data provided to the author (February 12, 1982).

¹⁰⁷ Franklin and West, *The Overseas Private Investment Corporation Amendments Act of 1978: A Reaffirmation of the Development Role of Investment Insurance*, 14 *TEX. INT'L L. J.* 15-16 (1979).

¹⁰⁸ *Id.*

¹⁰⁹ *Overseas Private Investment Corporation*, *supra* note 93, at 70.

¹¹⁰ *U.S. Prosperity and The Developing countries*, GIST (June, 1981).

¹¹¹ *DIGEST OF U.S. PRACTICE IN INT'L LAW*, 702 (1977).

tween the two governments regarding OPIC operations, including the host government's approval of all investment projects to be insured. Additionally, and in contrast to other investment guarantee programs, the host government recognizes the subrogation of the United States Government if OPIC makes a claim under the agreement.¹¹² (Apparently, the United States has not yet assumed subrogation in any claim). The agreements also establish inter-governmental mechanisms for the resolution of disputes, i.e., inter-governmental negotiations followed by arbitration rather than the exhaustion of local remedies.¹¹³ Under a model agreement, a dispute, if not resolved within three months, will be submitted at the initiative of either government to an arbitral tribunal.¹¹⁴ Either party may also submit "the question of whether such dispute presents a question of public international law" and the tribunal, in making a final and binding decision, "shall base its decision on the applicable principles and rules of public international law."¹¹⁵

OPIC's record of claims settlement is indicative of its success. Since its establishment in 1969, and including claims submitted under earlier programs administered by the Department of State's Agency for International Development formed in 1961, OPIC had settled 119 insurance claims, by the end of February 1981.¹¹⁶ Of these claims, 74 were for inconvertibility, 32 for expropriation, and 13 for war, revolution, or insurrection.¹¹⁷ Moreover, according to recent testimony in Congressional hearings, "there have been no repudiations or defaults on any OPIC-guarantee host government obligations, although certain obligations were rescheduled as part of Chile's general external debt rescheduling."¹¹⁸ These figures compare with the 136 old and new disputes involving U.S. private direct foreign investment in existence between March 1, 1977, and February 29, 1980, of which only 19 had been settled during that two year period.¹¹⁹ Most of the claims (approximately 82 percent) were for disputes involving nationalization or expropriation.¹²⁰

Since the 1960s various efforts have been made to structure a multi-

¹¹² *Id.* at 698.

¹¹³ DIGEST OF U.S. PRACTICE IN INT'L LAW, *supra* note 115, at 700.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Extension and Revision of Overseas Private Investment Corporation: Hearings on H.R. 3136 Before House Comm. on Foreign Affairs, 97th Congress, 1st Sess., 84 (1981).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 85.

¹¹⁹ BUREAU OF INTELLIGENCE AND RESEARCH, U.S. STATE DEPT., DISPUTES INVOLVING U.S. PRIVATE DIRECT FOREIGN INVESTMENT (March 1, 1977-February 29, 1980), 4 (1980). (Unclassified).

¹²⁰ *Id.*

lateral approach to investment guarantees.¹²¹ These efforts resulted from the limitations of national programs such as regulations restricting coverage. In extremely large and relatively high risk projects such as minerals and energy, there may be insufficient coverage. Moreover, some governments from the developed states believe that a coordination of their efforts would enable the capital exporting states to discourage LDC actions against the investors of any one country.¹²² These efforts have not been successful to date.¹²³

The potential of investment guarantee programs, national and multinational, is evident. If OPIC can serve as the model, then the need to resort to diplomatic protection, and its requirement that the foreign investor exhaust all local remedies, can be avoided. OPIC itself is not without its critics, however. A considerable number of uncertainties and weaknesses in the OPIC contracts¹²⁴ have been noted and doubts exist about their significance in reducing political risk.¹²⁵ In general, the lack of coverage provided by the programs makes it clear that foreign investors should look elsewhere for additional means for protecting investments.

V. THE ARBITRATION OF INVESTMENT DISPUTES

The resolution of international disputes through arbitration has a long history, but only in the last few decades has arbitration become a mechanism for the settlement of investment disputes between private for-

¹²¹ The following discussion on efforts to establish multilateral investment insurance guarantee programs is based upon the author's discussion with State Department Officials, *supra* note 53. See also G. SCHWARZENBERGER, *FOREIGN INVESTMENTS AND INTERNATIONAL LAW*, 170-181 (1969).

¹²² *Id.*

¹²³ Between 1962-1973, the World Bank held frequent discussions on the International Investment Insurance Agency (IIIA). Draft articles have been prepared at various times, but agreement was never reached because of the inability of the member governments to resolve a number of issues including: the IIIA's linkage to the World Bank; the allocation of voting rights between the capital-exporting and importing countries; the extent of financial participation; the subrogation rights for the IIIA; the arbitration requirements and procedures, and the relationship of the IIIA to the national investment guarantee programs.

Other programs have been suggested as well. In 1976, Secretary of State Kissinger proposed to UNCTAD an International Resource Bank (IRB), and the Berne Union considered an International Investment Reinsurance Association (IIRA). An Inter-American Development Bank Guarantee Fund for Minerals and Energy Development was discussed in the late 1970's. During 1981, OPEC considered an investment guarantee system to cover some form of political risk so as to encourage OPEC investment in the LDCs. Early in 1982, the International Monetary Fund and the World Bank sponsored discussions with the international banking community on their participation in a possible guarantee scheme. Further indications are that the Reagan Administration will renew previous U.S. efforts to gain support for establishing the IIIA.

¹²⁴ Koven, *Expropriation and the 'Jurisprudence' of OPIC*, 22 HARV. INT'L L. J.

¹²⁵ Heller, *Political Risk Insurance*, 12 J. INT'L L. AND ECON. 231 (1978).

foreign investors and host governments. Prior to the World Bank Convention on the Settlement of International Investment Disputes Between States and Nationals of Other States, which entered into force in 1966, private investors lacked jurisdictional capacity in international law. In the absence of an agreement to the contrary, local law governed the foreign investment. If a dispute arose, the foreign investor could appeal, after the exhaustion of local remedies, to his government for diplomatic protection in hope that the government would accept the claim for espousal before an international tribunal. Thus, the Convention represented a significant breakthrough since previous international efforts to give the foreign investor a status under international law had failed.¹²⁶

The Convention allows for binding arbitration and the enforcement of arbitral awards.¹²⁷ It also contains certain features which are attractive to private investors and host governments alike.¹²⁸ The Convention "affords private persons the only institutionalized international forum for litigating with states, and its jurisdictional requirements concerning nationality are less restrictive than those of the nationality of claims rules."¹²⁹ Having signed an agreement for arbitration, it is difficult for either party to avoid arbitration proceedings by refusing to participate in either the formation of the panels or in the proceedings.¹³⁰ Since awards are also to be considered binding by all contracting parties, the signatories are expected to enforce awards within their own territories.¹³¹ On the other hand, the government of the investor is precluded from granting diplomatic protection to its national or bringing an international claim until the other contracting party has failed to abide by the arbitral award.¹³² In the arbitration process, the applicable law is that of the host state unless mutual agreement determines otherwise.¹³³ The host state may also require the exhaustion of local remedies before beginning any arbitration proceedings.¹³⁴ Arbitration, as well as conciliation, is administered by the Centre for Settlement of Investment Disputes.¹³⁵

Consistent with its consensual character, the Convention does not define "investment," as does OPIC, but leaves it to the discretion of the

¹²⁶ Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, 28 INT'L & COMP. L.Q. 367, 370 (1979).

¹²⁷ See generally, Amerasinghe, *The International Centre of Investment Disputes and Development through the Multinational Corporation*, VAND. J. OF TRANSNAT'L L. 793.

¹²⁸ *Id.*

¹²⁹ *Id.* at 802.

¹³⁰ Sutherland, *supra* note 127, at 392-393.

¹³¹ *Id.* at 396.

¹³² *Id.* at 397.

¹³³ *Id.* at 392.

¹³⁴ *Id.* at 373.

¹³⁵ *Id.* at 378.

parties since the consent of both parties is required before a dispute can be submitted to the Centre.¹³⁶ As noted, the Convention allows the parties to select the "rules of Law" to be applied, and, if they fail to agree, Article 42(1) states that the law shall be "the law of the contracting State to the dispute and such rules of international law as may be applicable."¹³⁷ This allows the parties to adopt among themselves, prior to the application of Article 42(1), one of a wide range of choice-of-law provisions which have been developed by the Centre, including *ex aequo et bono* for either a certain portion of the agreement or the dispute in its entirety.¹³⁸ Overall, the advantages to the host state make the Convention "particularly appealing to developing countries."¹³⁹

As of January 1, 1981, the Convention has been ratified by 66 states. However, the Latin American states voted *en bloc* against the original decision by the World Bank to develop the Convention and have not signed the Convention since it was open for signature.¹⁴⁰ Although the settlement of disputes under the Convention has been slight, the lack of cases according to OECD "need cause no surprise and is not considered by the Centre as an indication that the Convention is not serving a useful purpose."¹⁴¹ The inclusion of effective arbitration claims in agreements "may result in an actual reduction in the number of disputes."¹⁴²

The World Bank Convention, while receiving the greatest attention, is only one of a number of commercial arbitral systems that are presently in existence.¹⁴³ These include: the Rules of Conciliation and Arbitration of the International Chamber of Commerce (1975), the Commercial Arbitration Rules of the American Arbitration Association (1977), the United Nations Commission on International Trade Law Arbitration Rules (1976), the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, (1976), the European Convention on International Commercial Arbitration (1961), and the rules of arbitration established for the Eastern bloc countries under the Moscow Convention on the Settlement by Arbitration of Civil Law Disputes resulting from Economic and Scien-

¹³⁶ *Id.* at 386.

¹³⁷ *Id.* at 392.

¹³⁸ *Id.* at 393.

¹³⁹ McLaughlin, *supra* note 43, at 223.

¹⁴⁰ See Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131 (1976). As of 1 January 1981, the Convention has been ratified by 66 states.

¹⁴¹ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *INVESTING IN DEVELOPING COUNTRIES*, 107 (1975). See also Sutherland, *supra* note 127, at 399-400.

¹⁴² *Id.*

¹⁴³ See Domke, *Dispute Settlement by Multinational Companies*, 10 J. INT'L L. & ECON., 291-295 (1975); Holtzman, *Arbitration: An Indispensable Aid to Multinational Companies*, *Id.* at 337-345; McLaughlin, *supra* note 35, at 211-232.

tific Cooperation (1972). Optional rules have also been developed by the United Nations Economic Commissions for Europe, Asia, and the Far East and by the Council for Mutual Economic Assistance.

The existence of the Inter-American Convention on International Commercial Arbitration (1975) provides for the recognition and enforcement of arbitral agreements and awards, and represents a movement toward arbitration among the Latin American states.¹⁴⁴ The Convention also provides that, absent mutual agreement upon applicable rules of procedure, the Rules of Procedure of the Inter-American Commercial Arbitration Commission shall govern the arbitration.¹⁴⁵ Although five Latin American states have become parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, only eight Latin American states are presently parties to the Inter-American Convention.¹⁴⁶

The extent to which arbitration will find a willing response from the Third World is still in doubt. More evidence that arbitration is being used by foreign investors and Third World governments is required. Many of these states may still view arbitration as involving "mechanisms which primarily serve the interests of Western entities."¹⁴⁷ Unless the developing states "are reasonably persuaded that arbitration will fairly protect their interests, its potential will remain unrealized . . ."¹⁴⁸ A possible move toward realization of this potential would be the regionalization of the arbitration centers along with "full-scale attempts to create a genuine partnership between the national judiciary and the arbitration centers."¹⁴⁹ While the World Bank Convention has been seen as a breakthrough, the Convention has not really provided "a means around the impasse" over the applicability of international law to private foreign investments.¹⁵⁰ "What the Convention did do was to codify the *status quo* with all of its unresolved issues."¹⁵¹

VI. OTHER MEANS TO REDUCE INVESTMENT RISK

Besides investment guarantee programs and the arbitration of invest-

¹⁴⁴ Leich, *The Inter-American Convention on International Commercial Arbitration*, 75 AM. J. INT'L L.

¹⁴⁵ *Id.* at 983.

¹⁴⁶ *Id.* at 982-83.

¹⁴⁷ McLaughlin, *supra* note 47, at 231.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 232.

¹⁵⁰ Eze, *supra* note 84, at 231. For a review of some recent arbitral decisions, see von Mehren and Kourides, *International Arbitrations Between States and Foreign National Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476-552 (1981) and Belaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784-819 (1981).

¹⁵¹ *Id.*

ment disputes, a foreign investor has other means available to reduce investment risks. In some instances, private investors may rely upon the traditional bilateral commercial treaty between their state and another. As have other developed states, the United States has concluded Friendship, Commercial and Navigation (FCN) treaties with numerous countries. Such treaties indicate the receptiveness of a state toward American investment and require national or most-favored-nation treatment to American investment. The latter provisions are designed to prevent discretionary and discriminatory action against American investment. The treaties may recognize the right of the state to expropriate American investment for "public purposes" and may establish the standard of compensation to be paid the investor following expropriation. Unfortunately, these treaties do not precisely define legal obligations or cover all issues which may be of concern to a foreign investor, for example, taxation,¹⁵² and may be terminated on notice. Moreover, the number of FCN treaties with the developing states in Africa, Asia, and Latin American states is less than desirable.¹⁵³

An American investor may also be able to obtain insurance coverage through other guarantee programs provided by the U.S. government.¹⁵⁴ Frequently, the countries with which the United States has concluded FCN treaties are also the countries with which the U.S. has established such programs under the Mutual Security Act of 1954.¹⁵⁵ The protection offered (inconvertibility, expropriation, and war damage) requires that the investment be acceptable to both states.¹⁵⁶ The United States also provides, as do most major trading states, commercial and political risk

¹⁵² A. FATOUROS, LEGAL SECURITY FOR INTERNATIONAL INVESTMENT, reprinted in LEGAL ASPECTS OF FOREIGN INVESTMENT 707 (Freidman & Pugh eds. 1959). Fatouros and Snyder, *Protection of Foreign Investment: Examination and Appraisal*, 10 INT'L & COMP. L. Q. 469-494 (1961), provides a perspective on the protection of foreign investment as it was available over two decades ago.

¹⁵³ W. FRIEDMANN, O. LISSITZYN, AND R. PUGH, INTERNATIONAL LAW: CASES AND MATERIALS 857 (1969); L. HENKIN, R. PUGH, O. SCHACHTER, AND H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 783-789 (1980). Bilateral agreements to allow for the operation of the OPIC program are more numerous, although the investments must be approved by the host government and only new investments are covered. Lomé II, concluded in 1980 between the European Community and 58 African, Caribbean, and Pacific states provides for the most-favored-nation clause, "which in effect means that the protection of large portions of foreign investment in these areas comes fairly close to the Hull ['prompt, adequate and effective compensation'] standard." Dolzer notes further that "the highest total number of investment treaties so far has been concluded by the Federal Republic of Germany." Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 565 (1981).

¹⁵⁴ See Editorial Board, *Foreign Seizure of Investment: Remedies and Protection*, 12 STANFORD LAW R. 625 (1960).

¹⁵⁵ Mutual Security Act of 1954, 22 U.S.C. 1933, repealed Pub. L. No. 87-195, pt. III, § 642(a)(2), 75 Stat. 460 (1961).

¹⁵⁶ See note 155, *supra*.

coverage through the Export-Import Bank for export credit and financial transactions.¹⁵⁷ Additionally, limited insurance protection from private carriers is available.¹⁵⁸

Protection may also be offered by the host state. Governmental policy statements to encourage foreign investment, while not legally binding upon the government, can set out the intentions of the government toward foreign investment. These intentions, if incorporated into legislation or investment contracts, are of greater value to the investor than a policy statement.¹⁵⁹ Although investment code intentions need to be incorporated into a contract, "there is no investment code in any of the developing countries which provide a remedy where the government responsible for creating the statute fails to live up to its provisions."¹⁶⁰ Even if statutory remedy is provided, problems such as action against the state being limited by sovereign immunity, access to courts being restricted, or the statute being repealed can occur.¹⁶¹ Constitutional provisions, containing property protection clauses and the international law standard, may provide considerably more protection than investment codes, but constitutional provisions are not a contract, and revisions may occur at any time.¹⁶²

Without coverage under an investment guarantee program and because of limited assurance of protection under statutory or constitutional provisions, protection for foreign investment becomes essentially a contractual arrangement. The "four crucial issues" that should be resolved by the contract are—(1) the law applicable to the contract, for which Article 42 of the World Bank Convention may provide guidance; (2) the sanctions which are to occur upon the breach of the contract; (3) detailed provisions for the effect of changing circumstances; and (4) the careful specification of the rights and obligations of the parties under the contract.¹⁶³ A clause regulating the conditions under which expropriation may occur, if it is possible to agree on such a formulation, is a further condition that should be specified in an investment contract to ensure that "creeping nationalization" is covered.¹⁶⁴ With longterm extractive investments "the investor should attempt to obtain host state agreement that the principle of *pacta sunt servanda* applies to the concessional

¹⁵⁷ W. FRIEDMANN, *supra* note 153, at 868-870; L. HENKEN, *supra* note 153, at 787.

¹⁵⁸ Koven, *supra* note 125, at 269.

¹⁵⁹ E. NWOGUGU, *THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES*, 55 (1965).

¹⁶⁰ *Id.* at 61.

¹⁶¹ *Id.* at 61-62.

¹⁶² *Id.* at 58-61.

¹⁶³ Ryan, *Investment Contracts and the Developing Countries*, AUSTRALIAN Y.B. OF INT'L L. 1970/1973, at 94 (1975).

¹⁶⁴ *Id.* at 101-102.

agreement."¹⁶⁵

Investors themselves may be able to reduce investment risks, particularly expropriation, through a joint venture with the host government.¹⁶⁶ Manufacturing industries are less likely to be nationalized than extractive or service industries, especially if components for the industry must be imported from abroad.¹⁶⁷ A foreign investor can lessen exposure to nationalization by moving away from direct investments to management-service contracts.¹⁶⁸ Indirect investments, through patent, trademark, or know-how licensing, are also possible but may pose somewhat greater risks.¹⁶⁹ In the later instance, the investor can undertake long and multiple litigation to prevent marketing elsewhere of the goods.¹⁷⁰ Joint-venture projects, especially in minerals involving companies from several countries, as well as an inter-governmental lending agency, may provide "a large measure of invulnerability against nationalization."¹⁷¹

Under some circumstances, a foreign investor's last resort may lie in the request for diplomatic protection.¹⁷² For the American investor, a few additional options remain. If the political pressure is sufficient, the American President may apply the Hickenlooper and Gonzales amendments as political and economic threats against the offending state so as to persuade settlement.¹⁷³ However, the effectiveness of such action by the United States is very much in doubt and the amendments have been applied rarely. If all else fails, the American investor can avail himself of federal tax benefits by deducting the loss.¹⁷⁴

VII. CONCLUDING REMARKS

When Friedmann, in 1963, spoke of the "promising beginnings" taking place in detaching the debate over the proper legal treatment of foreign investment "from the sterility that has characterized it for a good many years,"¹⁷⁵ he called attention to the 1962 UN Resolution on the

¹⁶⁵ Pedersen, *Expropriation in International Law—Strategies of Avoidance and Redress*, 10 TOLEDO LAW R. 122 (1978). For a discussion of recent mineral agreements with developing countries, see Smith and Wells, Jr., *Mineral Agreements in Developing Countries: Structure and Substance*, 69 AM. J. INT'L L. 560-590.

¹⁶⁶ *Id.* at 118.

¹⁶⁷ *Id.* at 120.

¹⁶⁸ *Id.* at 121.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Rood, *Compensation for Takeovers in Africa*, 11 J. INT'L L. AND ECON. 535 (1977).

¹⁷² See Adede, *A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies*, 18 HARV. INT'L L. J. 1, 17 (1977).

¹⁷³ Pedersen, *supra* note 166, at 109.

¹⁷⁴ *Id.* at 111.

¹⁷⁵ Friedmann, *supra* note 4, at 127.

Permanent Control [sic] over Natural Resources, the 1962 OECD Draft Convention on the Protection of Foreign Property, and the 1963 Report by the Committee on International Trade and Investment of the American Bar Association. As he saw it, the importance of the UN Resolution was in the principles it endorsed, that is, "good faith" observance of foreign investment agreements, and following nationalization, expropriation, or requisitioning on grounds of public purpose, "*appropriate* compensation, in accordance with the rules in force in the state . . . and in accordance with international law."¹⁷⁶ The importance of the OECD Draft Convention was that it expressed "the reasoned consensus of the Western Nations" for "just compensation," a standard which mediated "between uncompensated taking—or compensation only for the depreciated value of installations—on the one side, and for damages as measured by municipal contract or tort standards on the other side . . ." ¹⁷⁷ The importance of the A.B.A. Report lay in "its recognition that there is an ideological and social conflict, that the aspirations of the developing nations, decolonized or otherwise, are not simply to be dismissed as the aberrations of lawless brigands, but express a genuine conflict of interests and approaches, a new phase in the evolution of international law, a challenge that demands a response."¹⁷⁸

The "promising beginnings" cited by Friedmann for the necessary legal protection of private direct investment did not materialize. As we have seen, the 1962 UN Resolution was followed by succeeding resolutions which, ideologically at least, moved further to the Third World position.¹⁷⁹ The OECD Draft Resolution, later adopted with minor revisions in 1967, has not found support among the developing states. Although no longer seen as "lawless brigands," the developing states would argue that their aspirations are still being dismissed.

The principle issues which divided the developed and the developing states at the time Friedmann wrote are present today and still debated with an ideological intensity no less than before. The Third World states, because they control the forum, will persist in their quest for the New International Economic Order; the developed states, forced now to vote against or abstain in the forums, will maintain their own ideological insistence upon the traditional norms and will control the purse strings of developmental assistance. Ideologically, there is an impasse, but as always is the case, with a tilt in favor of the political and economic power of the developed states.

Nevertheless, an accommodation *is* taking place, but the accommoda-

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 127-128.

¹⁷⁹ See notes 37-42 *supra*.

tion is based largely upon the continuing and increasing power disparities of the developed and developing states. The developed states, through their investment guarantee programs, have provided a mechanism for protection which the Third World states can accept or reject. That most of them have accepted the operation of these programs within their countries is significant. The World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States represents a further attempt to find accommodation on a process and not necessarily upon the legal norms to be applied. The development of multilateral investment insurance programs and the greater use of arbitration will be required before private foreign investors may ignore carefully drawn investment contracts. Until then, diplomatic protection and international claims, while dispensed with under insurance programs like OPIC and in the World Bank Convention, will also continue to serve as a traditional means for protecting private direct foreign investment. The ideological impasse will remain for the near future, but the accommodation that does exist appears to be a promising beginning.