

1981

# Contributions of Lesser Developed Nations to International Law: The Latin American Experience

Frank Griffith Dawson

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

---

## Recommended Citation

Frank Griffith Dawson, *Contributions of Lesser Developed Nations to International Law: The Latin American Experience*, 13 Case W. Res. J. Int'l L. 37 (1981)

Available at: <https://scholarlycommons.law.case.edu/jil/vol13/iss1/4>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# Contributions of Lesser Developed Nations to International Law: The Latin American Experience

by *Frank Griffith Dawson*\*

## I. INTRODUCTION

**A**LTHOUGH THE EXISTENCE of doctrines, practices and principles peculiar to Latin America has been acknowledged for some years by the international legal community, scholars generally have never considered Latin America a major participant in the formulation of wider international principles. Such an oversight is unfortunate and unjustified.

One need only consider briefly United Nations efforts proclaiming and purportedly regulating the New International Economic Order to realize that long-standing Latin American legal preferences on the equality of states, sovereignty, ownership of natural resources and compensation for nationalized foreign property are imbedded throughout the Declaration on the Establishment of a New International Economic Order<sup>1</sup> and the Charter of Economic Rights and Duties of States.<sup>2</sup> That these instruments do not constitute binding legal principles is immaterial. They crystallize the aspirations of a significant portion of the Third World, which increasingly looks to Latin America for leadership.

Some of the issues and problems raised by Latin American contributions to international law have already been discussed in print, but only as individual, isolated topics. Specific articles have expounded upon the exhaustion of local remedies rule, state responsibility, nationalization, sovereign immunity, diplomatic asylum, Decision 24 of the Andean Common Market, the law of the sea, the Calvo Clause and the New International Economic Order. Little attempt, however, has been made to demonstrate the inter-relationship between them and their common roots

---

\* Visiting Scholar, Wolfson College, Cambridge, for Academic Year 1981-82. B.A. Princeton University (1957); M.A. Harvard University (1959); LL.B. Yale University (1961). Member of the Bar of the State of New York. Also admitted to practice in U.S. District Court for the Southern District of New York. Member of the American Bar Association, Interamerican Bar Association, Association of the Bar of the City of New York, and New York Bar Association. Member, Advisory Board of the Procedural Aspects of International Law Institute. Honorary Member, Colegio de Abogados de Cordoba, Argentina. Member, Explorers Club of New York, Scientific Exploration Society of Great Britain, and the London and Middlesex Archaeologic Society.

<sup>1</sup> G.A. Res. 3201, 6th Spec. Sess. U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974).

<sup>2</sup> G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974).

in regional history and aspiration.

This article does not purport to provide a comprehensive analysis of Latin America's contributions to international law. Rather its aim is to survey the principle areas of impact and to suggest a framework for the future research necessary to remedy the gap in our appreciation of the roles regional international legal systems can play in forming and influencing a wider, more universal system of legal prescriptions.<sup>3</sup>

## II. SOVEREIGNTY, EQUALITY AND CONFRONTATION

Since independence two persistent themes, sovereignty and the equality of states, have supported and connected virtually all Latin American<sup>4</sup> legal positions on a variety of issues. The historical durability of these themes relates directly to Latin American attempts over 150 years to compensate for their politically and economically weak and unstable condition by asserting and codifying as international law, standards of behavior which they hoped would shield them from external political and economic aggression.

Whether the perceived threats derived from Spanish desires to recover lost colonies, English designs on their trade and resources, or U.S. intervention in Latin America, these themes have been consistently maintained and asserted by Latin American representatives on regional and international bodies and tribunals. To a surprising degree their efforts were successful. "The appeal to general rules and principles of law often served to shift attention away from the circumstances of the general case, and to give time for passions to cool. In the realm of legal dialectics the Latin American statesmen won many more victories than they ever could have on a trial of physical strength."<sup>5</sup>

Today, Article 38 of the Statute of the International Court of Justice includes among sources of international law: treaties, state practice, and the writings of the qualified publicists. Although Latin Americans have greatly enriched these sources, their contributions have all resulted from

---

<sup>3</sup> A more comprehensive, extensive study is being prepared by the author under the auspices of the Procedural Aspects of International Law Institute. That study, to be published in book form, will also explore Latin America's impact on private international law in such fields as the codification of international commercial and procedural State practice, not only in regional documents such as the Bustamante Code, but in broader international conferences and conventions on, for example, recognition and enforcement of foreign judgments and international legal assistance.

<sup>4</sup> "Latin America" as used herein refers only to those nations with an Iberian background, namely, Mexico, the Five Central American Republics, Panama, the Dominican Republic, Cuba and the ten South American States, but even with this limitation the phrase must still refer to nineteen nations which vary considerably in history, geography, population and resources.

<sup>5</sup> F. DUNN, *THE PROTECTION OF NATIONALS* 58 (1952).

confrontations with nations possessing value systems opposed to their own.<sup>6</sup>

The contours of Latin American economic and legal history since independence were largely shaped by such confrontations. Powerful, industrialized States seeking outlets for surplus people, goods, and capital were pitted against the weaker politically fragmented and economically disorganized Latin American nations which largely depended upon exports of mineral and agricultural resources. This was early recognized by the Latin American themselves. A Venezuelan commentator wrote in 1884:

The origin of the public and private law of the Hispanic American Republics must be sought in the source of the international differences with foreign powers, which has produced an inequality in the treatment of the nations of the hemisphere obliging us to establish a special one (law) which will respond to our aspirations and to the needs of our general interests.<sup>7</sup>

The intensity and nature of confrontation has varied with stages of Latin American political and economic evolution. Thus, the main perceived threat to sovereignty in Latin America today is no longer a naval blockade, but dependence upon foreign technology and the multinational

<sup>6</sup> While all Latin American Nations have contributed to their collective impact on international law, some played more obvious roles than others. Mexico, Venezuela and Argentina have provided particularly meaningful contributions through their diplomats and commentators, and through the international confrontations with which they have been involved. Undoubtedly this preeminence reflects their traditionally close involvement with foreign investors and their States. Other nations perhaps did not afford such great confrontation opportunities due to their relative lack of attraction to alien entrepreneurs.

In the case of Brazil a variety of factors minimized, in the Nineteenth Century at least, participation in the confrontation process, which made the transition from colony to independence possible without the chaos that beset the former Spanish colonies. In fact Brazil maintained roughly the same type of government well into the Nineteenth Century, because the Portuguese Royal family fleeing Napoleon, moved to Brazil and planted the roots of what was to become an independent nation ruled by an Emperor. Also its population, concentrated on the coast, gave it a demographic unity which belied its great size and contrasted sharply with the Spanish colonies where geographical barriers divided the new nations and encouraged a chaotic devisive regionalism. See text C. Atkins, *LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM* 279-280 (1932).

So in Brazil there was no abrupt break with the colonial past and no long struggle for control of the instruments of government. From the beginning of independence the country possessed trained administrators, and it was peculiarly happy in the character of its second emperor, Pedro II, who governed constitutionally and wisely, until 1889 the monarchy withered away and the republican era began.

See G. PENDLE, *A HISTORY OF LATIN AMERICA* 124 (1973). Consequently remarks later in this essay referring to post-independence turbulence apply more accurately to Spanish Latin America than to Brazil. There is good reason to consider a separate study of Brazil's impact on international law.

<sup>7</sup> R. SELJAS, *1 EL DERECHO INTERNACIONAL HISPANO AMERICANO* 509 (1884).

corporation.

This theme of confrontation still endures as the principle molding force behind Latin American attitudes towards international law. It is helpful, therefore, to approach an inquiry into Latin America's impact on international law through a chronological review of the different stages of the continent's historical, political, and economic development.<sup>8</sup>

### III. THE COLONIAL YEARS: 1492-1824

#### A. *Indians and Theologians*

During the colonial period any direct Latin American impact upon international law was minimal. Colonial policy required the different Vice-Royalties and Captain Generalcies to report exclusively to Spain. They were actively discouraged from trading with each other, let alone with foreign nations, and were closely interwoven into a complex administrative system centered in Europe.

The discovery of the New World with its exotic, numerous Indian population caused a reexamination in Spain of the underlying assumptions of prevailing international law. First, there was the question of the validity of Spain's title to the New World, which "exercised some of the best minds of the Sixteenth Century."<sup>9</sup> Second, the issue of political rights for the Indians forced great debate. To sixteenth century Europeans, the Indians with their complex, barbaric and often well-developed civilizations must have appeared strange and rare. In 1493, however, Pope Alexander VI instructed the Crown of Castile to convert the Indians to Christianity. This commission raised a new variety of issues: Could the Indians be converted by force? Could the duty of conversion justify armed conquest and the overthrow of their rulers? What legal and political rights should they have? Could they be forced to work or be enslaved?<sup>10</sup>

---

<sup>8</sup> Law does not develop in a vacuum, but in response to conflicting economic, social and political pressures. Unless an interdisciplinary approach involving politics, economics, sociology and history is applied to the study of Latin American legal development, the student will be misled by the apparent similarity of Latin American institutions to those of Civil Law European nations. This similarity is deceptive, and assumptions applicable to Europe are of limited validity in Latin America. The role of law in Latin America is different from its role in the United States or in Western Europe. While it might be possible to understand the workings of the French legal system by reading books, this would not be possible respecting Latin America, where the social structures are quite different from those of Europe. See Karst, *The Study of Latin American Law and Legal Institutions*, in *SOCIAL SCIENCE RESEARCH IN LATIN AMERICA* 291-92 (C. Wagley ed. 1964). See also Cooper and Furnish, *Latin America: A Challenge to the Common Lawyer*, 21 *J. LEGAL EDUC.* 435 (1969).

<sup>9</sup> J. PARRY, *THE SPANISH SEABORNE EMPIRE* 139 (1966).

<sup>10</sup> *Id.* The Portuguese settlers in Brazil had no such problem, because they encountered no numerous aboriginal population with well-developed cultures. Instead, the Portuguese

In seeking answers to these and related questions, two Spanish theologians, the Dominican jurist Francisco de Vitoria (1480-1546) and the Jesuit Francisco Suarez (1548-1617) revised traditional theories concerning the legitimacy of state conduct. They laid the basis for a new code of international practice posited upon a natural law determined by the exercise of right reason. "Suarez perceived of law as a moral system, grounded on eternal law. Eternal law is known to us through natural law, which in turn is known by the dictates of right reason. To be law, human law must accord with truths. In other words, to be a law a rule must be moral and just."<sup>11</sup> Thus it was implied that people exercising "right reason" could decide for themselves if a law was just or unjust. Suarez further maintained that people could justifiably overthrow a tyrannical government. After independence this proposition certainly provided further justification for political instability and disregard for law.<sup>12</sup>

Vitoria argued in favor of a natural law to govern international relations. He was among the first legal scholars to reject "all claim of Pope or Emperor to exercise temporal jurisdiction over other princes, Christian or infidel,"<sup>13</sup> which meant the Pope could not authorize war or conquest in the New World. Vitoria's concept of a natural law was binding not only on civilized nations, but also upon those still in a state of nature. But a just war could only be fought against the Indians "if they denied to other peoples those rights to which, by the Law of Nations, all peoples were entitled."<sup>14</sup> If the Indians merely rejected conversion, they would not merit conquest. But if they refused to hear the Gospel, refused to admit strangers, or attacked traders or missionaries without reason, the Spaniards could be entitled to wage war on them. In the end Suarez reluctantly justified Spain's presence in the Indies positing that since Europeans were the custodians of Natural Law they had a "duty to exercise a paternal and benevolent guardianship over peoples living in ignorance or open defiance of Natural Law," such as the Indians, who practiced human sacrifice, bestiality and other "offences" against Natural Law.<sup>15</sup>

---

found only extremely primitive nomadic forest-living tribes not sufficiently numerous to provide a sufficient work force. The result was the introduction of African Slavery to support the sugar economy, with 500,000 West Africans shipped to Brazil in the Seventeenth Century, see S. STEIN & B. STEIN, *THE COLONIAL HERITAGE OF LATIN AMERICA* 41-42 (1970).

<sup>11</sup> K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* 59 (1975).

<sup>12</sup> *Id.*

<sup>13</sup> J. PARRY, *supra* note 9, at 139-40.

<sup>14</sup> *Id.* at 140.

<sup>15</sup> *Id.* at 14, Vitoria's anxious conscious-searching and obvious liberality of mind (for those days) embarrassed the government and drew an official reprimand. *Id.* at 142. The Dominican Bartolome de las Casas excoriated Spaniards for their treatment of the Indians,

Vitoria and Suarez broke new legal ground by formulating this original Law of Nations based upon a Natural Law of rights and obligations applying to all men everywhere.<sup>16</sup> More importantly the concept of law flowing from justice and morality survived in Latin American juridical thought, if only as a faint strand, throughout decades of legal hair-splitting, political instability, and discarded constitutions. The idealistic heritage of Vitoria and Suarez still influences the thought processes of Latin American judges on the International Court of Justice who "attribute to it their unique awareness of keeping international law in stride with contemporary developments in international society."<sup>17</sup>

A 1954 survey of the philosophical bases of the writings of 36 Latin American legal scholars of the nineteenth and twentieth centuries found that the Vitoria-Suarez influence is still vigorous after several centuries.<sup>18</sup> The survey also found that while the scholars all combined both positivistic and naturalistic<sup>19</sup> elements in their philosophies, the emphasis on naturalism, while less pronounced today than in the nineteenth century, is still quite marked. The author concluded, "There seems to be less adherence in Latin America to rigid positivism than elsewhere. This is true in the sense that moral influences while relegated to lesser roles more often than not in Hispanic America are nevertheless rather consistently recognized as having at least some legal validity."<sup>20</sup>

The reaction of the Mexican Government in the 1930's to the U.S. demands for prompt, adequate, and effective compensation for the expropriation of oil and agrarian properties again suggests that a theory of law based upon values other than those related to capitalism and private property retains its appeal in Latin America. The Mexicans argued that "on the one hand there are weighed the claims of justice and the improvement of a whole people, and on the other hand, the purely pecuni-

and his efforts did lead to a few short-lived reforms, see L. HANKE, *THE SPANISH SEARCH FOR JUSTICE IN THE CONQUEST OF AMERICA* (1944). See also ARISTOTLE AND THE AMERICAN INDIAN (1959).

<sup>16</sup> Professor Brierly wrote that "Vitoria's teaching marks an important expansion of international law into a world system," see J. BRIERLY, *THE LAW OF NATIONS* 32 (6th ed. 1963).

<sup>17</sup> Leonard, *Regional Particularism: The Views of the Latin American Judges on the International Court of Justice*, 22 U. MIAMI L. REV. 674 (1968).

<sup>18</sup> H. JACOBINI, *A STUDY OF THE PHILOSOPHY OF INTERNATIONAL LAW AS SEEN IN THE WORKS OF LATIN AMERICAN WRITERS* (1954).

<sup>19</sup> Positivistic writers were those showing a marked preference for treaties, customs and court decisions as sources of international law. Naturalistic writers viewed international law "as resting primarily on a sense of what is just and right and only to a small degree on positive sources. Many of these writers suggest . . . that the positive . . . order to be valid must mirror the natural law." *Id.* at 137-38.

<sup>20</sup> *Id.* at 141.

ary interests of some individuals'.<sup>21</sup> Remnants of the Vitoria-Suarez philosophy are also discernable in attempts of Latin American participants in regional and international organizations to alter established patterns of international political and economic conduct by invoking a higher morality. The Latin American campaign, together with the efforts of third world states to move North-South development issues into the General Assembly of the United Nations in order to reform the international monetary system is the most recent example<sup>22</sup> of the continuing Vitoria-Suarez influence.

### B. *The Heritage of Misrule*

The dead hand of colonial Hapsburg and Bourbon absolutism and misgovernment still affects Latin America. In post-independence years this legacy helped perpetuate a political and economic chaos which inevitably led at best to foreign diplomatic protest and at worst to armed intervention. The attitudes toward law and authority formed during the colonial years still condition Latin American legal perceptions and responses. Although the debilitating colonial heritage has received ample attention from historians and political scientists,<sup>23</sup> its legal implications are not always appreciated.<sup>24</sup> Those portions of the colonial heritage which helped precipitate post-independence confrontation may be viewed from both economic and political aspects.

Spain's colonial administrative system was authoritarian and highly stratified. The colonies belonged directly to the Crown. All lines of authority emanated from the King who governed his extensive New World realm through the Council of the Indies, a body of legally-trained professional administrators. It was the Council which not only recommended colonial officials for Royal appointment, but prepared all laws and decrees relating to the administration, taxation, governance, and supervision of the colonies. As a result, ". . . no important local scheme of government or of colonial expenditure might be put into operation by American offi-

---

<sup>21</sup> 1938 FOREIGN REL. U.S. 680.

<sup>22</sup> The developed nations are still opposed to allowing the General Assembly of the United Nations access to the levers of control of international monetary institutions. This was manifest at the latest IMF and World Bank meetings. But the real issue is how to recycle effectively oil funds to have-not Third World nations. The IMF as presently structured may not be the answer. And enabling the Third World to have a greater voice in IMF decision-making is contentious because the IMF "is, after all, a lending institution in the hands of the borrowers." See *The Observer* (London), Oct. 3, 1980, at 12, col. 5; *The Guardian* (London), Oct. 4, 1980, at 19, col. 6.

<sup>23</sup> J. PARRY, *supra* note 9, at 360-62; S. STEIN & B. STEIN, *supra* note 10.

<sup>24</sup> K. KARST & K. ROSENN, *supra* note 11, at 37-44, provide a good introduction to the student wishing a basic overview of possible current legal implications.



cial unless first submitted to it for consideration and approval."<sup>25</sup>

Moreover, unlike in the British North American possessions, no effective institutions of local government were allowed to evolve. The Crown remained the sole, centralized symbol of legitimate authority for three centuries. The fragility of such a system became manifest when independence was achieved. The colonial administrators who derived authority from the King suddenly could no longer assert any claim to legitimacy; the entire political structure collapsed, and the new nations slipped into anarchy and a prolonged series of civil wars and revolutions.<sup>26</sup>

The failure of constitutional authorities to maintain order led inevitably to constant streams of complaints from states whose citizens had suffered injury and loss. In a very real sense, the seeds of nineteenth century diplomatic and armed intervention were sown not after 1824, but centuries before.

Colonial economic policy, as administered through the Council of the Indies and the Seville Merchants' Guild, was constructed upon the premise that the colonies existed to supply Spain with precious metals and, to some extent, agricultural products. The eventual crippling and ruinous effect of this mercantilistic policy upon the Spanish economy is well-documented.<sup>27</sup> This policy discouraged the development of colonial manufacturing or trade with foreign nations and forced upon the New World an economic dependence upon Europe for manufactured goods, capital, and technology. Following independence the new nations sought to compensate for years of economic underprivilege by encouraging foreign immigration and investment. Unfortunately, local political and social institutions, also grievously underdeveloped, could not afford the protection and security expected by states whose citizens came to Latin America as investors, merchants, and engineers after 1824.

The enormous distances between the colonies and Spain, the length of time required for the voyage, and the clumsy, unwieldy apparatus by which the Crown sought to govern its New World possessions led to delays in decision-making and bureaucratic confusion. By a multiplicity of devices, the colonists sought to evade laws and regulations which they considered ill-suited to the realities of colonial life. For example, restrictive Spanish commercial policy forbade trade with other nations. This prohibition, when combined with limits on the number of Spanish ships

---

<sup>25</sup> *Id.* at 37.

<sup>26</sup> In some respects the post-independence years may be viewed as a futile search for a symbol of legitimate authority with which to replace the Spanish crown, See F. TANNENBAUM, *TEN KEYS TO LATIN AMERICA* (1962); Dawson, *International Law National Tribunals and the Rights of Aliens: The Latin American Experience*, 21 *VAND. L. REV.* 712, 712 n.2. (1968).

<sup>27</sup> J. PARRY, *supra* note 9, at 229-250.

permitted to sail to America, created an artificial scarcity of goods. Consequently, high prices for imports were charged by the merchant monopolies of Seville and Cadiz and their correspondents in Mexico City and Lima.<sup>28</sup> A contraband trade between the colonists and the English and Dutch was a natural result, involving and corrupting colonial officials on all levels. The difficulty the Crown experienced in enforcing laws against contraband was repeated in the fruitless legal attempts to protect the Indian population from colonial rapacity, as well as in countless other situations.<sup>29</sup> *Obedezco pero no cumpro* - "I obey the law but do not execute it" - were the watchwords of colonial administrators. The disrespect for the law fostered in colonial times persists today, as indicated by the half-serious remark still heard in Latin America - "For my friends anything . . . for my enemies the law."<sup>30</sup> Such prevalent attitudes made it inevitable that after independence conflicts would arise with foreign entrepreneurs and contractors.

#### IV. THE DEFENSIVE YEARS: 1824-1910

##### A. *Attracting Investment*

During the first 50 years after independence Latin American states were preoccupied with replacing the discredited colonial apparatus with new governmental and legal structures which could protect their political and territorial sovereignty from external aggression.

Shielding economic interests from foreign penetration was of secondary concern to the nation-builders. Indeed, foreign loans, investment, and immigration were eagerly sought by the new states. To encourage alien interest, the new constitutions promised foreigners equality of treat-

<sup>28</sup> S. STEIN & B. STEIN, *supra* note 10, at 47-50.

<sup>29</sup> Laws drafted in Spain to prevent Indian slavery, forced labor and related abuses, such as the New Laws of 1542, encountered great opposition from the colonists whose way of life depended upon the labor and tribute of the Indians, and who devised ingenious ways to circumvent protective legislation, see Dawson, *Labor Legislation and Social Integration in Guatemala, 1871-1944*: 14 AM. J. COMP. L. 124, 124 n.3 (1964). For a detailed discussion of the humanitarian legislation and the means the colonist used to avoid enforcing it, see Sherman, *Indian Slavery and the Cerrato Reforms*, 51 HISP. AM. HIST. REV. 25 (1971).

<sup>30</sup> K. KARST & K. ROSENN, *supra* note 11, at 60. Colonial Brazil until 1808, when the Portuguese royal family sailed to Brazil escorted by British warships, was governed through the Overseas Council, an organization every bit as inefficient as its Spanish counterpart. *Id.* at 38. The Brazilians devised their own method of avoiding unpalatable legal restrictions decreed by the irresponsible Council. Known as the *jeito* or "fix," it remains an integral part of Brazilian life today, see Rosenn, *The Jeito: Brazil's Institutional Bypass Of The Formal Legal System And Its Developmental Implications*, 19 AM. J. COMP. L. 514 (1971) But the colonial rule "had been relatively light and cohabitation with negroes in a tropical country had produced a people of easy-going disposition," so the colony avoided the bitter tensions and race conflicts which had beset the Spanish colonies, see G. PENDLE, *supra* note 6, at 120.

ment with nationals, which was quite progressive considering the hostility accorded aliens by the Spanish colonial administration.<sup>31</sup> This strategy of encouragement initially met with great success, especially in England. Between 1824-25, British investors placed over £17,000,000 in Latin American government bonds. In the same period at least 46 joint stock companies with a total capitalization of £35,000,000 were formed in England to carry out operations in Latin America.<sup>32</sup> Mining engineers from Birmingham and New York flocked to the newly liberated states and colonization companies began negotiations with various Latin American governments. Unfortunately, it was soon apparent that despite the good intentions of the new states, enthusiasm alone was insufficient to remedy the inability of their political, economic and social infrastructures to generate sufficient income or internal security to satisfy European expectations.

### *B. Diplomatic Intervention and State Responsibility.*

By 1833 every Latin American bond issue was in default and most of the foreign companies established to conduct business in the area had collapsed.<sup>33</sup> Ambitious early attempts to impose a new unity and identity upon the diverse governments, such as the 1826 Panama Conference, also failed. Bolivar's Gran Colombia dissolved into its component countries of Venezuela, Colombia, and Ecuador, while to the north, Mexico was rent by civil war following the overthrow of Iturbide's short-lived empire. The United Provinces of Central America, founded in 1823, were a disparate group of quarreling nations by 1838.<sup>34</sup>

In the succeeding years of confusion and peril, foreigners as well as nationals were exposed to injury and loss. Indeed, in 1824 when English Foreign Secretary George Canning recommended recognition of the new states, he foresaw the need to be in a position to provide diplomatic protection for British lives and property. He emphasized that ". . . more and more British capital was daily being sunk in mining and territorial enterprises in Mexico. This was money that would take time to mature, and during this time it was inevitable that troubles would arise which would require the diplomatic intervention of the British Government."<sup>35</sup>

---

<sup>31</sup> For accounts of early European colonization attempts in Central America, see W. GRIFFITH, *EMPIRES IN THE WILDERNESS* (1975); see H. BANCROFT, *2 HISTORY OF CENTRAL AMERICA* 588-94 (1887). English, Belgian, French and Germans were offered large grants, citizenship, exemption from military service, and protection of their lives and property as inducements to settle. H. BANCROFT, *Id.*

<sup>32</sup> J. RIPPY, *BRITISH INVESTMENTS IN LATIN AMERICA 1822-1949*, at 17 (1959).

<sup>33</sup> *Id.* at 18.

<sup>34</sup> For an overview of the turbulent history of the time, see H. BANCROFT, *supra* note 31; G. PENDLE, *supra* note 6, at 84-150; H. HARING, *A HISTORY OF LATIN AMERICA* (1955); J. RIPPY, *LATIN AMERICA* (1958).

<sup>35</sup> D. PLATT, *FINANCE, TRADE AND POLITICS IN BRITISH FOREIGN POLICY* 313 (1968).

As Canning had expected, complaints of injury and mistreatment coupled with requests for assistance soon began flowing in steady streams to the Foreign Office and to local British legations. The U.S. State Department had a similar experience.

Unfortunately for the Latin Americans the legal expectations of the foreign investor and entrepreneur had been based upon a relatively homogenous and politically stable European experience. Their concepts of justice and fair dealing "derived their content from the capitalistic individualism prevalent in Europe in the early part of the Nineteenth Century. They particularly embraced the notions of individual liberty, of the sacredness of private property even as against the actions of governments, and the sanctity of contracts."<sup>36</sup> Although Latin American nations in their newly-adopted constitutions and related legislation had embraced these theories and concepts as their own, the young paper institutions could not overcome the debilitating realities imposed by a harsh, divisive geography and the residue of colonial underdevelopment.

The inability of governmental and judicial institutions to protect life and property inevitably led to appeals by injured foreigners to their governments for either diplomatic interposition or the use of armed force to redress injuries. Diplomatic protection, which at first had been based upon comity, eventually became an institutionalized legal technique justified by appeals to treaties, state practice,<sup>37</sup> and to authors such as Vattel whose writings were interpreted to mean that a state which injured an alien also injured his state.<sup>38</sup>

Without doubt there were abuses of diplomatic intervention, as claims were exaggerated and utilized in some instances to justify armed intervention.<sup>39</sup> Nevertheless, recent scholarship strongly suggests that,

<sup>36</sup> F. DUNN, *supra* note 5, at 54.

<sup>37</sup> *Id.* at 55.

<sup>38</sup> *Id.* at 48-52. Conversely the Latin Americans have also found support in Vattel for the limitation of diplomatic protection, especially in a passage where he states ". . . a sovereign should not interfere in the suits of his subjects in foreign countries nor grant them his protection except in cases where justice has been denied or the decision is clearly and impalpably unjust, or the proper procedure has not been observed, or finally cases where his subjects, or foreigners in general have been discriminated against . . .", E. VATTEL, 7 THE LAW OF NATIONS, 139 (C. Fenwick trans. 1916). Professor Dunn observes that at the time Vattel was writing in the Eighteenth Century ". . . foreign property offered few problems in national or international affairs. He viewed the State primarily in terms of personal sovereignty rather than of territorial jurisdiction. His personification of the State as an organic unity made up of the sovereign and his subjects. . . undoubtedly served a useful purpose in the juristic evolution of the modern state, but it is not easy to apply to the modern world of extensive international trade and intercourse. . . ." F. DUNN, *supra* note 5, at 52. The relevance of theories based directly upon Vattel's writings to the wrenching changes being undergone by the world community today is extremely dubious.

<sup>39</sup> "There seems little doubt that the great powers in their ready resort to ultimatums

Latin American folklore notwithstanding, the British and American governments generally were reluctant to expose their nationals' claims, especially those arising from defaulted bond issues or relating to trade and finance.<sup>40</sup> An English commentator observed that of 40 examples of English coercion or armed intervention in Latin America between 1820 and 1914, 10 were concerned with insults to the flag, with insults to British consuls or with unsettled claims; 14 to enforce the claims of British subjects for "outrage and injury;" 12 to restore order and protect property; 3 to safeguard nations under British protection; and 1 to occupy an uninhabited Atlantic island for a telegraph station. These interventions were designed to rectify damage already done, and not to force British trade upon Latin America or to cause any change of government which might have been more favorable to British entrepreneurs.<sup>41</sup>

The degree of intervention after espousal was quite varied, ranging from formal protests and withdrawal of diplomatic representation to blockades, threats of naval bombardment and, eventually, warlike action. Most claims, however, probably never went beyond the stage of consular good offices. The existence of the varied techniques of diplomatic interposition not only encouraged conforming behavior but provided a structure, however imperfect, within which negotiators could seek reasonable solutions. Frederick Dunn observed that the Latin Americans were probably better off with the institution of diplomatic protection than without it. "There is no reason at all to believe that, in the absence of the institution, 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. . . . [I]n other parts of the world, territorial conquest was then taking place on much slighter provocation than was being offered in some Latin American countries."<sup>42</sup>

### C. *The Latin American Challenge to Diplomatic Protection.*

Not all Latin Americans agreed that diplomatic interposition and the developing law of state responsibility were beneficial. Although late nineteenth century leaders such as Mexico's Porfirio Diaz, Venezuela's Guzmán Blanco, Guatemala's Justo Rufino Barrios and Argentina's Domingo Sarmiento and Bartolomé Mitre encouraged foreign trade, investment

---

and threats of the use of force to exact the payment of pecuniary claims, particularly in Latin America, have often abused their rights and have inflicted gross injustice upon weak States." E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 447, (1915). See also, Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT'L L. 26, 44 (1907).

<sup>40</sup> D. PLATT, *supra* note 35, at 312; F. DAWSON & I. HEAD, *INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS* 11-12 (1971).

<sup>41</sup> D. PLATT, *supra* note 35, at 330.

<sup>42</sup> F. DUNN, *supra* note 5, at 57.

and participation in railways, mines, waterworks, ports and agriculture,<sup>43</sup> there was concern that foreigners were obtaining advantages through abuse of the concept of diplomatic protection.<sup>44</sup>

Leading the attack was the eminent Argentine diplomat and scholar, Carlos Calvo. Calvo reinterpreted the national or equal treatment doctrine which promised aliens equality with nationals, to mean that foreigners merited no better treatment than nationals. As formulated in his publications and correspondence between 1868 and 1896,<sup>45</sup> the Calvo Doctrine advocated that first, sovereign states, being internationally equal and independent, enjoy the right to absolute freedom from interference by other states, either through force or diplomacy; and second, while aliens should be accorded equal treatment with nationals, they are not entitled to rights and privileges not accorded to nationals and must seek redress exclusively in local courts. Therefore aliens could not appeal to their states for diplomatic intervention except in the event of a narrowly-defined denial of justice.<sup>46</sup>

Although claims by aliens were usually for compensation arising out of injuries to persons or property, Calvo viewed them as potential political menaces. He feared that diplomatic intervention could lead to physical occupation of Latin American territory. This concern of Calvo and his contemporaries of the possible danger to political independence proved not to be misplaced. In 1862 Napoleon III, ostensibly in response to defaults on bond issues which French citizens had purchased, invaded Mexico where he maintained a puppet emperor until 1867. From 1861 to 1865 Spain held Santo Domingo and fought a war with Peru in 1862-66. The

---

<sup>43</sup> G. PENDLE, *supra* note 6, at 128-49, 161-70; J. RIPPY, *supra* note 32, at 208.

<sup>44</sup> The benefits derived from foreign investments and immigration were not denied; but it was feared that the support given by foreign governments would raise aliens to privileged positions and lead to foreign domination. Meanwhile, the Nineteenth Century autocrats and dictators welcomed foreign investment "for personal or patriotic reasons or both. Foreign capital could mean the sinews of political power, the accumulation of private fortunes, or the means of accelerating the development of natural resources and public services and of acquiring more of the amenities and conveniences of civilized life." J. RIPPY, *supra* note 32, at 210.

<sup>45</sup> Although it first appeared in Spanish in 1868 the six volume *Le Droit Internationale Teorique et Pratique* was printed in French in final form in Paris in 1896. Still the best publication on Calvo is D. SHEA, *THE CALVO CLAUSE* (1955).

<sup>46</sup> Calvo thereby rejected the existence of an international minimum standard of justice. For discussion, see F. DAWSON & I. HEAD, *supra* note 40, at 20-22. Another American commentator writing in 1906 agreed with Calvo that it would be improper for an aggrieved alien to bypass the local legal system and request diplomatic intervention where the laws of the host State did not "conflict with the law of nations . . . But where . . . the courts are notoriously under the control of an unprincipled dictator, so that an appeal to them would be a mockery and a sham, it would indeed be a perversion of justice for an alien to be confined to his remedy in them even though the citizen of the country should have no other." See Boardwell, *Calvo and the "Calvo Doctrine,"* 18 GREEN BAG, 377, 380 (1906).

English seized the Falkland Islands and maintained a loose protectorate over the Mosquito Coast of Honduras and Nicaragua until 1860 and by 1853 the United States had taken over half of Mexico's territory, and had intervened in Central America where it bombarded one of Nicaragua's Caribbean ports.<sup>47</sup>

Calvo also argued further that European nations applied a double standard of international morality and responsibility. They only intervened in each other's affairs when there was at stake:

Some important principle of internal politics, such as the balance of power, or upon some great moral or religious interest favourable to the development of civilisation; while in the New World the interventions of European States have rested upon no legitimate principles, being based upon mere force and a failure to recognise the complete freedom and independence of American States.<sup>48</sup>

Calvo's rejection of this double standard found early and sympathetic support in the writings of Edwin M. Borchard, who in 1915 commented that "the principles they [Latin America] have adopted in their municipal legislation to forestall diplomatic interposition are such as the exploiting nations, for the larger part the countries of Europe, admit, by common international practice in their relations among themselves."<sup>49</sup>

Professor Borchard was less sanguine than later commentators when discussing the positive benefits of diplomatic interposition:

As the European nations . . . have the necessary warships to enforce demands, just and unjust, and have no intention, apparently, of changing their attitude, the weaker Latin-American countries, who alone have resorted to legislative limitations, have gained very little, if anything, by the enactment of legislative provisions limiting the diplomatic protection of foreigners.<sup>50</sup>

Other non-Latin American commentators were less supportive. Amos S. Hershey, for example, writing in 1907, thought the Calvo Doctrine was "essentially sound in principle and expedient as policy" but went "too far in condemning diplomatic interposition or the presentation of claims for indemnity in all cases" without exceptions such as denials of justice.<sup>51</sup> Other non-Latin American lawyers in the United States and Europe followed Hershey's view, and the prevailing opinion came to espouse arbitration rather than intervention as a means of settling disputes. Typical of

<sup>47</sup> See generally sources cited 34 *supra* note; E. SQUIER, APUNTAMIENTOS SOBRE CENTRO AMERICA (1856); HONDURAS, DESCRIPTIVE HISTORICAL AND STATISTICAL (1870).

<sup>48</sup> Hershey, *supra* note 39, at 27.

<sup>49</sup> E. BORCHARD, *supra* note 39, at 857-58.

<sup>50</sup> *Id.* at 859.

<sup>51</sup> Hershey, *supra* note 39, at 43.

the non-Latin American views was that "although the acceptance of the Calvo Doctrine would eliminate the abuses of diplomatic protection, it would also eliminate the institution itself without substituting an acceptable alternative."<sup>52</sup>

Calvo's reception in Latin America was much more enthusiastic. Although attempts to include the principles of his doctrine in treaties with European nations failed, such principles were incorporated into agreements among the Latin American states. As a result, Calvo's principles achieved at least regional international status. But the validity of Calvo provisions in constitutions and domestic legislation has been rejected by claimant nations on the theory that unilateral domestic legal prescriptions cannot have international effect. Furthermore, even where Calvo Doctrine incorporation into national law permits diplomatic interposition in cases of denial of justice, the intent to interpret the content of denial of justice solely by narrow municipal standards has led to protests by non-Latin American states adhering to the minimum standard of justice.<sup>53</sup>

The insertion of a "Calvo Clause" in contracts between a State and an alien has, at least since 1926, achieved partial international acceptance on the theory that the voluntary waiver of diplomatic protection is binding upon the individual, although it may be invalid vis-à-vis his state.<sup>54</sup> In this context the United States views such a waiver as a factor to be considered when espousing a claim and as a matter of policy has long refrained from diplomatic intervention in cases involving contractual disputes absent a gross denial of justice.<sup>55</sup>

Calvo's contribution to Latin American and international jurisprudence has been extraordinarily lasting. Today, the non-intervention concept is a cornerstone of hemispheric foreign policy which the United States and the Latin Americans generally observe. It is also a basic element in the Charter of the United Nations.<sup>56</sup> Calvo's insistence upon recourse by aliens to local tribunals also led to constitutional enactments and other legislation in Latin America as early as 1888. These enactments made municipal courts a compulsory first stop for aliens with claims against their host state, and thereby codified and strengthened the exhaustion of local remedies rule, a doctrine of customary international law<sup>57</sup> to which the United States has always adhered.<sup>58</sup> Finally, in 1961

---

<sup>52</sup> D. SHEA, *supra* note 45, at 20.

<sup>53</sup> *Id.* at 21-27.

<sup>54</sup> *Id.* at 194-257.

<sup>55</sup> F. DAWSON & I. HEAD, *supra* note 40, at 175. *See also*, Hershey, *supra* note 39, at 39-40.

<sup>56</sup> *See* discussion, *infra* at.

<sup>57</sup> *See* Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, 12 REV. BELGE DE DROIT INT'L. 499 (1976).



the Organization of American States (OAS) Inter-American Juridical Committee announced that all diplomatic claims were subject to the requirement of prior exhaustion of local remedies, a principle which "is not merely procedural but substantive"<sup>59</sup> in the Western Hemisphere.

Calvo was aided in the struggle against diplomatic protection and intervention by other prominent contemporaries including the Venezuelan commentator and jurist, Ricardo F. Seijas and his fellow Latin American, Argentine Luis M. Drago. In 1884 Seijas published his four volume *El Derecho Internacional Hispano Americano*, which collected and explored the basic legal principles binding the Latin American States. He asserted that "one of the most consistently suffered abuses by foreign powers in the Central and South American territory is, without doubt, the principle of diplomatic intervention in favor of their nationals for any motive or pretext . . ." and, therefore, appeal for diplomatic interposition by aliens should occur only after the exhaustion of local remedies and a serious denial of justice.<sup>60</sup> Moreover, foreigners should be permitted to seek indemnification from the host government for loss or injury in wartime only in those cases where nationals are given the same right.<sup>61</sup>

Drago's contribution to the attack on the perceived privileges enjoyed by aliens was more dramatic, springing from concern over the English, German and Italian attempt in 1902 to force Venezuela to agree to the repayment of its defaulted foreign debt. Professor Platt argues that English policy-makers consistently refused to espouse claims relating to unpaid bonds, and that the initial reason Great Britain agreed to a joint intervention in Venezuela was to obtain redress for injuries to English ships and subjects. The bond holders did not, he maintains, present their claims to the Government until after the decision to intervene had been taken.<sup>62</sup>

Drago, Argentine Minister of Foreign Affairs, wrote the Argentine Minister in Washington that he feared the use of force to collect loans would set a dangerous precedent. Drago reasoned that collection would require territorial occupation to be effective and that under the guise of such financial intervention European nations might seek to reestablish

<sup>58</sup> See F. DAWSON & I. HEAD, *supra* note 40, at 18-20, 50-56.

<sup>59</sup> Trindade, *supra* note 57, at 523.

<sup>60</sup> R. SEIJAS, *supra* note 7, at 77.

<sup>61</sup> *Id.*

<sup>62</sup> D. PLATT, *supra* note 35, at 312, 340-41. Amos Hershey, discussing the Venezuelan intervention and the use of force to collect contract debts implied that the British restraint in such matters was based on "motives of policy or expediency," while "[t]he United States appears to have been restrained, to a certain extent at last, by principle and by a regard for what it believed to be the law of nations." See Hershey, *supra* note 39, at 40. See also M. HOOD, *GUNBOAT DIPLOMACY 1895-1905: GREAT POWER PRESSURE IN VENEZUELA* (1975).

colonies in the New World.<sup>63</sup> Drago's concern was understandable since this was a period when Latin American nations were borrowing actively on the world's capital market, despite a bad history of defaults and credit renegotiations. Still fresh was the memory of the 1862 French overthrow of the Juárez government in Mexico which was based in great part on the flimsy excuse of the notorious Jecker loan.<sup>64</sup> Consequently, Drago suggested that the United States, perhaps as a corollary to the Monroe Doctrine, recognize "that the public debt (of an American state) cannot occasion armed intervention, nor even the actual occupation of the territory of American nations by a European power."<sup>65</sup> The Drago letter was circulated in Washington with varying effects. Despite Secretary of State Hays's indifference, in 1905 President Theodore Roosevelt called Congressional attention to the dangers of allowing foreign nations to collect debts by armed intervention in the Hemisphere.<sup>66</sup>

Eventually, thoughts inspired by Drago coupled with events in Venezuela led to the controversial Roosevelt Corollary to the Monroe Doctrine. The Corollary permitted the United States to begin preemptive landings and seizures of customs houses in defaulting Central American and Caribbean nations in order to forestall European debt collecting interventions.<sup>67</sup> This was surely not the type of corollary the Argentine diplomat had had in mind when he wrote his famous letter.

In 1906, Drago's proposal came before the Third Pan American Con-

<sup>63</sup> Hershey, *supra* note 39, at 28-30; E. BORCHARD, *supra* note 39 at 309. Professor Borchard also observed ". . . that only a small part of the claims pressed arose out of contractual debts. The primary reason of the blockade was the stubborn reiteration by Venezuela of the exclusive jurisdiction of its national courts and the absolute refusal to arbitrate." See E. BORCHARD, *supra* note 39, at 313 n.1.

<sup>64</sup> In 1850 a Swiss banker named Jecker prevailed upon a pre-Juarez government to contract a usurious loan whereby in exchange for Government bonds totalling 15,000,000 Mexican dollars the Mexicans received but 750,000 after deduction of commissions and interest. When Juarez quite rightly refused to honor this obligation, Jecker approached the Duc de Mornay, Emperor Napoleon III's half-brother, and offered him 30 per cent of the Mexican bonds for his political support. Jecker then became a naturalized citizen which enabled the French government, at de Mornay's urging, to espouse his claim, see J. HASLIP IMPERIAL ADVENTURER: EMPEROR MAXIMILIAN OF MEXICO 145, 174 (1974).

<sup>65</sup> E. BORCHARD, *supra* note 39, at 317; Hershey, *supra* note 39, at 30.

<sup>66</sup> Hershey, *supra* note 39, at 30-31; E. BORCHARD, *supra* note 39, at 317.

<sup>67</sup> Miriam Hood, now of the Venezuelan Embassy in London, concluded in her perceptive study of the blockade, that ". . . the importance of the Anglo-German blockade lies in that it was not until after it took place that the Roosevelt corollary became an integral part of the American Government's policy on the Caribbean. The blockade was without doubt a great help in clarifying Roosevelt's ideas." M. HOOD, *supra* note 62, at 190. Professor Borchard wrote "international practice seems to have given a sanction to this form of (pre-emptive) intervention," but ". . . in the absence of an international forum, it is not apparent how grossly exaggerated claims against these states can be avoided . . ." E. BORCHARD, *supra* note 39, at 326.

ference in Rio de Janeiro which resolved to request the Second Peace Conference at the Hague "to examine the question of the compulsory collection of public debts, and, in general, the best means tending to diminish among nations conflicts of purely pecuniary origins."<sup>68</sup> The Hague conference, however, decided to treat the matter within the context of arbitration, which in the years preceding World War I had enjoyed an exceptional degree of international support as a means of resolving differences between nations. The resulting Convention, sometimes called the Porter Proposition after the U.S. representative, rejected resort to armed force to recover contract debts on the condition that the debtor state did not refuse to arbitrate, did not obstruct formulation of an agreement after arbitration was accepted, and did not after arbitration refuse to submit to the award.<sup>69</sup>

The reaction of the Latin American states at the Conference to the watered-down version of Calvo's original proposal was mixed. Venezuela refused to sign, maintaining that arbitration should only be allowed after exhaustion of local remedies and a denial of justice.<sup>70</sup> Other Latin American nations did sign with reservations similar to those voiced by Drago himself, that "public loans with bond issues constituting the national debt cannot in any case give way to military aggression nor to the occupation of the soil of the American states."<sup>71</sup> The rejection of armed force as a means of debt collection only upon the condition of arbitration is now of course nullified by the various United Nations resolutions eschewing the use of armed force and intervention. Thus the contributions of both Calvo and Drago are at last truly internationalized.

#### D. *The Emergence of a Regional International Law.*

It was evident soon after independence that legal institutions inherited from Spain would be of scant assistance in promoting peace, national unity, and prosperity. The conflicting, confusing mass of Spanish and Portuguese laws governing commerce, for example, could not be any more responsive to Latin American problems than could the political machin-

<sup>68</sup> Hershey, *supra* note 39, at 26.

<sup>69</sup> Scott, *Hague Convention Restricting the Use of Force to Recover On Contract Claims*, 2 AM. J. INT'L L. 78, 88 (1907).

<sup>70</sup> *Id.* at 89; E. BORCHARD, *supra* note 39, at 320.

<sup>71</sup> E. BORCHARD, *supra* note 39, at 320. Although Drago must have been disappointed at the outcome of the Conference " . . . it was largely due to his sympathy with the general proposition and to his influence upon several of the Latin American delegations in the Second Hague Conference that they did not abstain from voting for the Convention." Scott, *supra* note 69, at 89. Ironically, the Porter Proposition "acutally sanctions the use of armed force in a class of cases in which the United States and, on occasion, other powers, have declined as a matter of policy, to intervene diplomatically." E. BORCHARD, *supra* note 39, at 321.

ery of the rejected centralized monarchy respond to Latin American needs.

Establishing the new legal systems necessitated extensive legislative borrowing from more politically and legally sophisticated nations. The undertaking involved the adaptation of constitutions modelled on that of the United States, and of civil and commercial codes based upon post-Napoleonic European models, especially the French Civil Code and the 1829 Spanish Commercial Code. As one author commented, "the new European codifications, packaged in a readily exportable form, provided order to replace chaos and new procedural systems to replace old."<sup>72</sup> Only after post-independence turbulence abated would legislators and legal technicians be free to attempt codifications and constitutional amendments that might respond more accurately to the fundamental Latin American realities of political fragility, geographical barriers, illiteracy, poverty, and poor or non-existent internal communications.<sup>73</sup>

The first steps taken to establish new domestic legal institutions were paralleled by efforts to establish a wider hemispheric order to buttress defenses against Spanish attempts to recapture the now-independent colonies. Put another way, the new states required a new international legality in order to survive. From the earliest days of independence, Latin American states were involved with international law as they sought to regulate relations among themselves. At first the goals of such leaders as Simón Bolívar were expressed in attempts to establish political unity.

The 1826 Panama Conference, which was promoted by Bolívar, sought to create a regional political association united by a common resistance to the former colonial power. The resulting treaty of the Union League and Perpetual Confederation, although ratified only by Greater Colombia, was the forerunner of a succession of nineteenth century resolutions, treaties, and pacts, most of which were never ratified, but which

---

<sup>72</sup> Means, *Codification in Latin America: The Colombian Commercial Code of 1853*, 52 *TEX. L. REV.* 18, 22 (1973). See also Swartz, *Codification in Latin America: The Brazilian Commercial Code of 1850*, 10 *TEX. INT'L. L. J.* 347 (1975).

<sup>73</sup> One commentator suggests that while it is a "truism" that much of the borrowed constitutions and European Codes ill-suited Latin America, nonetheless "there has been a great deal of nonsense written about the inappropriateness and the supposed dysfunctionality of the legal-constitutional models adapted by the Latin American nations in the Nineteenth Century." The Latin American "founding fathers" did not seek to divorce themselves from 300 years of colonial history, but sought in their constitutions "to incorporate the republican forms and language of the day while retaining their non-democratic and non-revolutionary heritage almost intact." Wiarda, *Law and Political Development in Latin America: Toward a Framework for Analysis*, 19 *AM. J. COMP. L.* 434, 442-43 (1971). Pursuant to this theory, it was entirely logical to offset the elaborate "bills of rights" in these early constitutions with provisions for suspending these guaranteed rights, see F. DAWSON & I. HEAD, *supra* note 40, at 79-84.

expressed a surprising degree of solidarity on basic legal issues.<sup>74</sup> After the collapse of Greater Colombia into civil strife in 1830, Mexico made its bid for hemispheric leadership by attempting to organize five separate Latin American congresses between 1831 and 1842. All failed because, "despite the existence of a common cultural heritage, in political and economic matters, Spanish-Mexican unity was the most transparent of fictions."<sup>75</sup> In 1865, Peruvian effort produced a treaty codifying certain international principles including non-intervention. It was, however, never ratified by its signatories, Bolivia, Ecuador, Chile and Peru.<sup>76</sup>

After the 1865 meeting, the Latin American conference underwent a perceptible change of emphasis, probably due to the influence of Carlos Calvo's writings.<sup>77</sup> Ambitious earlier efforts at seeking protection from the outside world by a political union were replaced by a reliance upon international law to shield the states from external assaults upon their sovereignty. Conferences, such as the Congress of Jurists which met in Lima between 1877 and 1879 and the 1883 Bolivarian Conferences in Caracas,<sup>78</sup> sought to enshrine and codify principles of international public and private law. Latin American views on non-intervention, the rights and duties of states, territorial jurisdiction, diplomatic asylum, maritime jurisdiction, state responsibility, and arbitration<sup>79</sup> were all principles which the states

<sup>74</sup> C. ATKINS, *supra* note 6, at 278. See also J. LOCKEY, PAN AMERICANISM: ITS BEGINNINGS 312-354 (1920). "But the Panama Conference was not a total loss for it brought out the importance of some kind of Hispanic or Latin American Union, and was to be followed in the nineteenth century by a series of hemispheric conferences that were to result finally in the Organization of American States." H. DAVIS, J. FINN & F. PECK, LATIN AMERICAN DIPLOMATIC HISTORY 74 (1977). A Colombian commentator called the Panama Treaties: "One of the principle sources of American International Law." H. DAVIS, J. FINN & F. PECK, *Id.*

<sup>75</sup> C. ATKINS, *supra* note 6, at 278. A. WHITAKER, THE WESTERN HEMISPHERE IDEA 50 (1954).

<sup>76</sup> C. ATKINS, *supra* note 6, at 278-79; H. JACOBINI, *supra* note 18, at 122-23.

<sup>77</sup> Little is yet known of the exact extent of Calvo's influence. The general impact of his thinking is admitted, but further research might reveal the identity of his disciples, and, more importantly, perhaps of the jurists who had initially inspired him.

<sup>78</sup> C. ATKINS, *supra* note 6, at 280-81.

<sup>79</sup> Leonhard, *supra* note 17, at 676. One of the most significant of the pre-World War I meetings was the first Pan American Conference held in Washington, D.C. in 1889-90, where the basic divergence of interests between Latin American and the United States was first highlighted in an international setting. The Latin American States rejected U.S. proposals for a compulsory arbitration system which they suspected the U.S. might dominate. Similarly, they turned down the U.S. concept of a hemispheric customs union which would, they feared, harm relations with their European trading partners and tie them to the U.S. On the other hand, the U.S. delegation opposed Latin American views "that there existed an American international law that differed on a number of vital points from international law," especially with regard to the right of diplomatic intervention to protect nationals. The U.S. spokesman argued that "there can no more be an American international law than there can be an English, a German or a Prussian international law." Instead, international law was the

sought to codify.

Through these conferences the Latin American nations began to assume a distinct, collective identity. They created a special legal system or suborder, with legal institutions within, yet in some aspects apart from, the Europeanized international law propounded by legal theorists in capital-exporting nations. Supplementing the efforts of Latin American conferences to codify and propound a regional international law were attempts by Latin American jurists to persuade the outside world to recognize the existence of a so-called American international law, which in important respects differed from the "universal" international law concepts of the day. Their exhortations should not be dismissed solely as defensive attempts to assert models of conduct which could relieve Latin America from onerous, externally-imposed legal obligations.

In 1883 the Argentine jurist Amancio Alacorta in the "Nueva Revista de Buenos Aires" accused Calvo's treatise on international law of overlooking the existence of a special American international law that the Latin American nations observed among themselves. This American view included precepts such as non-intervention, equality of States and equal treatment for nationals and aliens. Calvo responded by denying the existence of an international law peculiar to Latin America since international law was by its nature universal. Unconvinced, Alacorta replied that America required legal solutions different from those developed in Europe.<sup>80</sup>

This conceptual battle of the books surfaced again at meetings of the American Congress of Scholars in Santiago in 1905-08. Chile's Alejandro O. Alvarez upheld the distinct nature of Latin American international law against the arguments of Brazil's Manuel A. de Souza S. Vianna, who in 1912 published his "De la Non-Existence d'un Droit Internationale American."<sup>81</sup> The esoteric, unreal nature of the debate, and the limited audience to which it was directed, is suggested by the publication by both authors of their views in French.

The Alvarez thesis is that a special type of international law developed in the Americas which combined the Anglo-Saxon legal system in the United States with the Spanish legal tradition as expressed in the

---

common law of the civilized world and could only be changed by the consent of all civilized nations. Under international law there was a universal standard of "substantial justice" to be observed in the treatment of aliens. By implication, if a State could not or would not provide such justice, intervention would be justified. See Fontaine, *Latin America's New Internationalism: An Historical Overview*, in *LATIN AMERICA'S NEW INTERNATIONALISM: THE END OF HEMISPHERIC ISOLATION* 1, 42-46 (R. Fontaine & J. Theberge eds. 1975).

<sup>80</sup> Butler, *Latin American Approaches to International Law*, 6 *INT'L J. POL.* 1, 130 (ed. 1976).

<sup>81</sup> *Id.* This was written to refute Alvarez's *Le Droit International Americain* (1910). The Alvarez viewpoint is explained in detail in H. JACOBINI, *supra* note 18, at 124-133.

resolutions and declarations of inter-American conferences. The "rules" derived by Alvarez from these sources and which purportedly comprise American international law included (a) recognition of the legal status of rebels, (b) recognition of political asylum, (c) acceptance of *ius soli* as opposed to *ius sanguineus*, (d) the equality of states, (e) the Drago Doctrine, (f) acceptance of codification of international law and (g) arrangements for hemispheric defense.<sup>83</sup> In summation, "[B]y American international law one ought to understand the aggregate of institutions, principles, rules, doctrines, conventions, customs, and practices which are characteristic of the American republics in the domain of international relations."<sup>83</sup>

Throughout his long career as a commentator and, later as a Judge on the Permanent Court of International Justice, Alvarez repeatedly expressed his belief in a body of jurisprudence sufficiently weighty and coherent to be called American international law. His challengers maintained that the principles or rules he cited were not necessarily of exclusively American origin, and that while American legal traditions had contributed to international legal development, it was inappropriate to refer to an American international law. The arguments pro and con prompted one recent commentator to remark "the controversy regarding the existence or non-existence of an American international law resolves itself largely into a terminological squabble."<sup>84</sup>

Although Alvarez and his supporters today are in the minority, they correctly and early identified a loose type of regional unity. This unity was expressed in bilateral and multinational agreements among the Latin American states themselves, and it later fostered a striking degree of legal unanimity as the states participated in the debates of international bodies, notably those considering the law of state responsibility, the law of the sea, and the jurisdictional exclusivity of municipal tribunals.

Latin American legal opinion still divides on the significance of this regional legal consensus, as indicated in a series of essays by Argentine, Chilean, Ecuatorian, Cuban and Mexican writers published in 1976. Although the editor of the collection took no position in the debate, he predicted that "in the 1970 - 80's . . . the Latin American heritage promises to have a broader analytical relevance for the purposes of comparison with regional approaches to international law elsewhere," including the European Economic Community (EEC) countries, Socialist nations, Africa and Asia.<sup>85</sup> But further inquiry is needed before deciding if a particu-

---

<sup>83</sup> See, Butler, *supra* note 80, at 129.

<sup>83</sup> A. ALVAREZ, *DESPUES DE LA GUERRA 182-83* (1943), *quoted in* Butler, *supra* note 80, at 127.

<sup>84</sup> Butler, *supra* note 80, at 133.

<sup>85</sup> Butler, *supra* note 80, at 5.

lar regional legal system can be classified as anything more than an aberration:

Among the issues to be contemplated are the various ways in which a regional international law consciousness emerges; the values or ideas which it cherishes; the perceived relationship of the regional legal order to general principles of international law and *jus cogens*; the extent to which regional principles of international law are the product of treaties or of a regional customary international law; the degree to which a regional international legal consciousness emerges from or identifies with the activities of regions' international institutions. . . .<sup>86</sup>

When confronting the outside world in conferences or in the corridors of the United Nations, it is evident that a definite Latin American solidarity based upon consistently expressed legal doctrines does indeed exist. The impact of this unity upon the legal order of the past is possible to assess. The effect upon the future is a matter of concern. The remarks of one commentator who rejects a separate Latin American international law are particularly thought-provoking. He suggests that doctrines and efforts directed towards regional problem-solving are but perhaps reflections of "the seeming impossibility of achieving a necessary measure of world-wide cooperation."<sup>87</sup> Many problems, though, are regional and local, and dealing with them on a world-wide level could magnify their significance and pose threats to world peace.<sup>88</sup> Given that assumption, perhaps a regional approach to reform highly controversial areas, such as human rights, might have better prospects for success than attempts to achieve universally acceptable and unenforceable declarations.

## V: THE TRANSITIONAL YEARS: 1910-1945

### A. *The Mexican Revolution as Catalyst in the Struggle for Economic Sovereignty.*

The 1910 Mexican Revolution marked a watershed for developing Latin American law and aspirations. Although physically the conflict was confined to Mexico, the challenges posed in the 1920's and 1930's to what was the then accepted law of state responsibility still reverberate throughout the continent. It was the first time that a Latin American nation had rejected traditional international views on the sanctity of private property. Mexico interposed an overriding obligation — the right of the

---

<sup>86</sup> *Id.* at 5. Other relevant considerations might indicate: (a) a common language, (b) a similar historical background, and (c) the length of time in which States have asserted the uniqueness of their groupings.

<sup>87</sup> Note, *International Law in Latin America*, 7 *LAW. AM.* 605, 608 (1975).

<sup>88</sup> A similar justification is given in support of the Exhaustion of Local Remedies Rule. See F. Dawson & I. Head, *supra* note 40, at 18-20.



state to control its own economic destiny for the ultimate benefit of its citizens.<sup>89</sup> This was not the classical palace coup which the international community had come to expect from Latin America. It was a movement aimed at promoting the well-being of an entire society,<sup>90</sup> and it "soon developed into a social movement of profound significance."<sup>91</sup>

The ideals of the Revolution were synthesised in the Constitution of 1917. The Constitution was the product of Latin America's first genuine social upheaval, so it differed from the many constitutions that had preceded it in Mexico and elsewhere in Latin America. It stressed economic nationalism, state ownership of natural resources, land reform, the state's right to regulate and take private property in the public interest, and it "is permeated with a paternalistic concern for the health, welfare and cultural advancement of the poor, the illiterate, and the dispossessed."<sup>92</sup>

The U.S. and European reaction to Mexico's expropriations was one of outrage, characterised by attempts to rebut the challenge by recourse to nineteenth century precedents in which the courts and tribunals had dealt with isolated property seizures. These orthodox preferences conditioned the legality of the taking of foreign wealth upon "public utility" and payment of "full" or "prompt adequate and effective compensation in lieu of restitution."<sup>93</sup> Obviously if such standards were to be applied, no wide-scale readjustment of social inequities could ever be achieved. Therefore, while Mexico admitted it was obliged to offer compensation under international law, it insisted that "the time, amount and manner of payment could be determined only pursuant to her own laws . . ."<sup>94</sup> This verbal struggle continued for 20 years, first with respect to lands expropriated in the 1920's, and then with renewed vigor when foreign oil properties were seized under President Cardenas in 1938. Ultimately the Mexican-American Agreement of 1941 settled the agrarian claims, while claims relating to the expropriation of American and British oil properties were satisfied respectively in 1942 and 1947.<sup>95</sup>

If there was a "winner" in such a wasteful, lengthy confrontation, it was surely Mexico, which never deviated from its initial stance. The compensation, when it was agreed, was certainly not "prompt" and was considerably below the value claimed. More importantly, Mexico's successful challenge to traditional compensation norms undoubtedly established sig-

---

<sup>89</sup> For a discussion of the Mexican expropriations and the legal postures of the protagonists, see Dawson & Weston, "*Prompt Adequate and Effective*": A Universal Standard of Compensation?, 30 *FORD L. REV.* 727, 740-42 (1962).

<sup>90</sup> Kunz, *The Mexican Expropriations*, 17 *N.Y.U.L.Q.* 327, 328 (1940).

<sup>91</sup> F. DUNN, *supra* note 5, at 43.

<sup>92</sup> K. KARST, & K. ROSENN, *supra* note 11, at 44.

<sup>93</sup> Dawson & Weston, *supra* note 89, at 729.

<sup>94</sup> *Id.* at 740.

<sup>95</sup> *Id.* at 741.

nificant precedents which were to be followed after 1945 by revolutions in Latin America, Eastern Europe, Africa and Asia. The international requirement of "prompt, adequate, and effective" compensation was irretrievably eroded by Mexico's steadfastness, precipitating a yet-unfinished search for new standards of greater relevance in a world of changing values and increased aspirations.<sup>96</sup> Mexico's attempts to alter traditional legal norms to accommodate a search for a more just society were rooted in the philosophies of Vitoria and Suarez. Their insistence in the 1920's upon arrogating exclusively to municipal courts the jurisdiction to determine the timing and amount of compensation foreshadowed Article 2(2) of the 1974 Charter of the Rights and Duties of States, which provides that "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."<sup>97</sup> The attitudes and philosophies of the Mexican advocates forged during the disputes generated by the Revolution therefore link Latin America's Iberian past with its present efforts to assume a leadership position in the Third World.

### *B. The First World War, Internationalism and the Quest for Legal Certainty*

Although Latin America was not involved directly in the conflagration that exploded in Europe in 1914, the war nevertheless had two profound effects upon the southern half of the hemisphere. The United States replaced Germany and eventually England as the prime investor and trading partner in the area, and the League of Nations provided Latin American States with novel opportunities to join older, more powerful nations in formulating a new basis for international order.

#### 1. Emergence of the United States as the Focal Point for Confrontation

Prior to World War I, U.S. investments in Latin America approximated one billion dollars, of which 82 percent was concentrated in Mexico and Cuba. British investments, on the other hand, were nearly five billion dollars following the investment booms of the 1880's and the period between 1902-1912. Of the total British investment, 77 percent was concentrated in South America, particularly in Argentina.<sup>98</sup>

---

<sup>96</sup> The compensatory standards the United States sought to apply were distilled from State practices relating to isolated takings of alien property. Precedents from these "limited" deprivations were inapplicable in a social revolution context necessitating "extensive" foreign wealth deprivations, *Id.* at 729-32.

<sup>97</sup> G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50 U.N. Doc. A/9631 (1974).

<sup>98</sup> Hicks, *The Federal Reserve Act of 1913: Fulcrum for United States Expansion in*

The pattern began to reverse after 1913 when Woodrow Wilson became President. Wilson feared that accumulation of industrial surpluses would create economic stagnation and recession unless exports were increased. Therefore, he and his colleagues began an unremitting campaign to interest manufacturers in export possibilities, promising governmental support.<sup>99</sup> Before World War I, the United States was third in Latin American trade and investment after Great Britain and Germany. Antiquated banking legislation prohibited American banks from branching abroad, with the result that any export trade to Latin America had to be financed through the network of English and German banks already established in the area. The Federal Reserve Act of 1913 reversed this posture and allowed foreign branch banking. It also permitted American banks to issue and accept bills of exchange, a service which they had been previously unable to provide.<sup>100</sup>

The outbreak of war caused European manufacturers and financiers to withdraw their attentions, at least temporarily, from Latin America. American businessmen, encouraged by their government, quickly began to fill the vacuum. By 1921, the dollar had replaced the pound sterling as the chief medium of financing Latin American trade, thereby establishing a dollar-related dependence which still exists. Consequently, 100 American banks were scattered throughout Latin America, and the United States outstripped Great Britain and Germany as the hemisphere's dominant economic influence.<sup>101</sup> The United States became the principle focus of Latin American resentments as U.S. hemispheric hegemony increased after 1945 and British investment waned dramatically. This pattern of economic dependence led to future confrontations and challenges to older value systems. These challenges, of which the 1959 Cuban Revolution was to be but one example, are echoed in the efforts of the Andean Common Market to limit technological dependence upon multinational corporations.<sup>102</sup>

## 2. Attempts to Protect Economic Sovereignty at Conference Tables and in Courtrooms

By 1921 Latin American alarm at the consequences of U.S. economic power had been compounded by the retention of the Platt Amendment, the landing of naval forces at Vera Cruz by President Wilson, and assorted physical interventions in Central America and the Caribbean.

---

*Latin America*, 21 WAYNE L. REV. 1373, 1374 (1975); J. RIPPY, *supra* note 32, at 7-12.

<sup>99</sup> Hicks, *supra* note 98, at 1377. Wilson appointed a new Secretary of Commerce who instigated much-needed changes. *Id.*

<sup>100</sup> *Id.* at 1395 *et. seq.*

<sup>101</sup> *Id.* at 1374, 1398.

<sup>102</sup> See discussion *infra*, at.

Stringent efforts were made at Pan American Conferences to present a united front against the United States in order to extract a pledge against future intervention. Partial success was achieved at the 1933 Seventh Pan American conference in Montevideo when the United States became party to the Convention on Rights and Duties of States which condemned intervention. In 1936, the United States withdrew its reservations to the 1933 treaty and non-intervention became the cornerstone of the inter-American system.<sup>103</sup>

Several Pan American conferences sought to obtain agreement on the codification of international law, and did achieve some unanimity on the peaceful settlement of disputes in treaties signed in 1923 and 1933. The Good Neighbor policy of Franklin D. Roosevelt and the abrogation of the Platt Amendment established an atmosphere of cooperation which led to further meetings before and during World War II to agree on collective security and closer economic and military cooperation. In 1945, the Chapultepec Conference provided for mutual, collective self-defense and an economic Charter of the Americas.<sup>104</sup> Perhaps the most important result of these conferences was the reinforcing of the sense of regional solidarity which had begun to form soon after independence. Thus, Latin America, controlling 40 percent of the votes, was able at the San Francisco conference to influence the drafting of the United Nations Charter, especially those provisions recognizing the right of individual or collective self-defense and the peaceful settlement of disputes.<sup>105</sup>

During the inter-war years, Latin American efforts at regional conferences to strengthen the Pan American system were paralleled by its contributions at the League of Nations. Membership in the League gave new

---

<sup>103</sup> Wilson, *Multilateral Policy and the Organization of American States: Latin American-United States Convergence and Divergence*, in *LATIN AMERICAN FOREIGN POLICY* 50 (H. Davis, L. Wilson eds. 1975). Unilateral diplomacy was also employed. Faced with United States policy of withholding recognition of new governments as a political weapon, Genaro Estrada, the Mexican Secretary for Foreign Affairs, in 1930 enunciated the so-called Estrada Doctrine. Basically it says that Mexico will not as a matter of policy take a formal position on the question of granting recognition to a new government because this would mean encroaching on the sovereignty of other nations, and subject their internal affairs to the approval or disapproval of other governments. Mexico therefore limits itself to maintaining or breaking off diplomatic relations without implying approval or disapproval of the new government. The Estrada Doctrine was to be somewhat modified in 1969 when the Mexican Secretary of State proclaimed the so-called "Thesis of continuity", that is, that the Latin American nations should keep open channels of communication in revolutionary situations and Mexico did not wish to break the continuity of its relations with other Latin American nations whatever the nature and orientation of their governments. Therefore, Mexico maintained diplomatic relations with Cuba despite United States efforts to internationalize its "hard line" approach towards Fidel Castro, see Vazquez, *The Subjects of International Law*, in Butler, *supra* note 80, at 133, 136-37.

<sup>104</sup> Wilson, *supra* note 103, at 52.

<sup>105</sup> *Id.*

status to the Latin American nations. This acceptance of the Latin American nations as significant members of the international community coincided with a profound alteration in international legal thinking.

The international arbitration concepts, which before the war had seemed to promise the best hope of settling international disputes peacefully, were discredited by 1918. As Frederick Dunn wrote in 1932, "The World War, in the minds of a great many people, represented the breakdown of international law as an effective instrument for regulating and controlling the relations between nations."<sup>106</sup> After 1918, scholarly attention turned to codification of existing international legal principles in order "to make rules clear and certain and thereby establish some order of priorities or guidelines for international conduct."<sup>107</sup>

Accordingly, in 1924, the General Assembly of the League resolved that an expert committee be appointed to study the possibility of codification of international law. The committee eventually submitted a report on several topics which it thought could profitably be discussed for codification purposes, including the question of the responsibility of states for injuries to aliens or their property. The report of J. Gustavo Guerrero, a Salvadorean, synthesized the Latin American policy preferences of the equal treatment doctrine, a restrictive view of denials of justice, the supremacy and finality of municipal court decisions, and a denial of diplomatic intervention.<sup>108</sup>

At the First Conference for the Codification of International Law in 1930, the Committee designated to prepare a draft convention on state responsibility was unable even to agree on bases for discussion. The issues had become polarized between the states primarily interested in preserving an environment conducive to trade and investment, and those Latin American states which were no longer willing to sacrifice political and economic sovereignty in return for economic participation. The Conference thus adjourned without adopting a convention on state responsibility.<sup>109</sup> The principles advocated by Guerrero had to wait another 40 years before attaining at least limited extrahemispheric recognition.

The Latin American struggle to alter prevailing international legal concepts to reflect their own preferences was manifest during 1910 to 1945 in numerous confrontations before arbitration tribunals. Many of the cases derived from injuries to persons and property in the years during and following the Mexican Revolution of 1910 and were heard before

---

<sup>106</sup> F. DUNN, *supra* note 5, at 61.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 62.

<sup>109</sup> *Id.* at 63. Guerrero's views of what might constitute a denial of justice sufficiently grave to justify diplomatic interposition were so narrow that they "restricted the exercise of diplomatic protection to occasions which seldom if ever arise in practice." *Id.* at 64.

the U.S.-Mexican General Claims Commission established in 1923 and the Special Mexican Claims Commission of 1934. The resulting jurisprudence concerning the measure of damages and due diligence on the part of the host state in prosecuting wrongdoers is extensive. Perhaps the most significant case decided by an arbitral commission in this area was *United States (Northern American Dredging Company of Texas) v. the United Mexican States*, which reversed prior case law and upheld the validity of a Calvo clause as a bar to a claim against Mexico for breach of contract.<sup>110</sup> The Commission decided that the Calvo Clause precluded the claimant from requesting diplomatic protection and required it to seek redress in local courts. The clause would not, however, bind a claimant's government from interceding on its own initiative in the event of a violation of international law, such as denial of justice. Although *North American Dredging Co.* was followed in five subsequent arbitration decisions,<sup>111</sup> Latin Americans either rejected the qualification that a waiver would not be effective in the event of a denial of justice, or interpreted the content of a denial of justice by more narrow, municipal standards.<sup>112</sup>

Between 1922 and 1939 four judges from Latin America sat on the Permanent Court of International Justice.<sup>113</sup> Unfortunately the issues which came before the Court were not of a type to enable these judges to employ any obviously Latin American preferences or doctrines. It is nevertheless interesting to examine the 1929 dissenting opinion of Judge Antonio Sanchez de Bustamante y Sirven in *Payment in Gold of Brazilian Federal Loans Issued in France*,<sup>114</sup> where the Cuban jurist disagreed with the majority opinion's willingness to consider French Court decisions as guiding precedent. He interpreted the Agreement between the parties to mean that the Court must look to municipal law to resolve the dispute. The court should not, however, allow "itself to be guided or influenced by the decisions of the national courts of the Parties. . . ."<sup>115</sup> This basic refusal to consider municipal court decisions as precedent clearly reflected

---

<sup>110</sup> See United States - Mexican Claims Commission of 1923, 1 OPINIONS OF COMMISSIONERS 21. For an extensive discussion, see D. SHEA, *supra* note 45, at 194-230.

<sup>111</sup> *Id.* at 231.

<sup>112</sup> In 1961 a majority of the Inter-American Juridical Committee adopted a Report relieving the State of all responsibility if "the alien has, by contract, renounced the diplomatic protection of his government, or if domestic legislation subjects the contracting alien to the jurisdiction of the local courts, or if it places him in a similar status with nationals for all purposes of the Contract." The United States delegate on the Committee filed a minority report in which he protested that Calvo Clause could not condone "a denial of justice or any other violation of international law by a State," see M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 931 (1967).

<sup>113</sup> Judge Bustamante of Cuba (1922-1939); Judge Pessoa of Brazil (1922-1930); Judge Guerrero of El Salvador (1931-1939); and Judge Urrutria of Colombia (1931-1939).

<sup>114</sup> See 2 *WORLD COURT REPORTS* 402 (M. Hudson ed. 1935).

<sup>115</sup> *Id.* at 435.

Bustament's Latin American legal training which accords *stare decisis* and judicial precedent little importance.<sup>116</sup>

## VI. THE YEARS OF ASSERTION: 1945-1980

### A. *The New International Arena*

During the last 35 years Latin American states have become more aggressive in attempts to alter accepted international norms by recourse to international fora. Their efforts were greatly assisted by the establishment of the United Nations where they now assumed elder statesmen roles, as new states in Africa and Asia emerged into the international arena. At the same time the rivalry between Soviet and the U.S. power blocs produced a precarious nuclear stalemate which neutralized any willingness of the super powers to engage in armed intervention in weaker non-client States.<sup>117</sup> Numerous international resolutions rejecting military and economic intervention in the affairs of other states further discouraged a recrudescence of past misdeeds and emboldened the Latin Americans to abandon their defensive posture and assert their preferences with renewed conviction.

The Latin American States played an active part at the United Nations and its related institutions from their earliest days, utilizing them as new arenas in which to obtain legal approval and recognition of their strongly held beliefs on sovereignty, equality of states, and a limited interpretation of the law of states responsibility. While they were not always successful, their efforts and impact was undeniable.

For example, Latin American nations participated fully in the International Law Commission established by the General Assembly in 1947 to promote development and codification of international law. Draft conventions were prepared on issues important to Latin America, such as fishing rights and the continental shelf. Indeed, Latin America's contribution on the Commission to the development of the maritime law of the sea at various United Nations conferences is well-documented.<sup>118</sup>

But United Nations efforts to agree on codifications of the law of

---

<sup>116</sup> Under Latin American legal theory a judge who rendered a decision which purported to constitute binding precedent for future decisions would be usurping legislative or executive functions, See F. DAWSON & I. HEAD, *supra* note 40, at 161-62.

<sup>117</sup> *Id.* at 43.

<sup>118</sup> See, e.g., García-Amador, *The Latin American Contribution to Law of the Sea*, 68 AM. J. INT'L L. 33 (1964); Pohl, *Latin America's Influence and Role in the Third Conference on the Law of the Sea*, 7 OCEAN DEVELOP. & INT'L L.J. 65 (1979). The African nations particularly have cooperated with the Latin American States in this area, demonstrating the ability of Latin America to remove certain issues from a regional to a hemispheric context, see Morris, *Influence and Innovation in the Law of the Sea: Latin America and Africa*, 7 OCEAN DEVELOP. & INT'L L.J. 1 (1979).

state responsibility, especially regarding alien property rights, achieved no greater success than prior attempts sponsored by the League of Nations. As in the 1920's, the Rapporteur was a Latin American, F.V. Garcia-Amador.<sup>119</sup> In 1961, he produced an impressive series of reports for the International Law Commission which bore the imprint of Latin American thought on compensation, exhaustion of local remedies and non-intervention. Although these drafts and revisions have yet to win the approval of all the diverse interest groups represented on the Commission, they constitute a primary source for Latin American views on international law.<sup>120</sup>

Other Latin American aspirations to alter or extend traditional international law have been even less successful. Motions by Uruguay in 1948 to incorporate into the Declaration of Human Rights recognition of diplomatic asylum were failures, despite hemispheric acceptance of this concept in a series of treaties dating from 1889.<sup>121</sup> The efforts to internationalize hemispheric diplomatic asylum via the International Court of Justice did not bear fruit in *Haya de la Torre Case (Colombia v. Peru)*.<sup>122</sup> The Court denied the validity of a grant of diplomatic asylum to Haya de la Torre, a Peruvian political dissident. In interpreting the 1928 Havana Convention on Political Asylum, the Court refused to "admit that the States signatory to the Havana Convention intended to substitute for the practice of the Latin American republics . . . a legal system which would guarantee to their own nationals accused of political offenses the privilege of evading national jurisdictions."<sup>123</sup> This, the majority opined, would amount to political intervention in the affairs of another state, a concept rejected at the same Havana Conference. Moreover, Colombia, which had granted the asylum at its embassy in Lima, had no right "to qualify the nature of the offence (of which Haya was accused) by a unilateral and definitive decision binding on Peru."<sup>124</sup>

Alejandro Alvarez, now a member of the Court, took the opportunity in his dissenting opinion to reaffirm his belief in the existence of a European, an American, a Soviet and an emerging Asian international law, all

---

<sup>119</sup> Director, Department of Legal Affairs, General Secretariat of the Organization of American States.

<sup>120</sup> See F. DAWSON & I. HEAD, *supra* note 40, at 41.

<sup>121</sup> See Nayar, *The Right of Asylum in International Law: Its Status and Prospects*, 17 ST. LOUIS L. REV. 17, 20, 41 (1972).

<sup>122</sup> Asylum case, [1950] I.C.J. 266.

<sup>123</sup> *Id.* at 285.

<sup>124</sup> *Id.* at 288. Four years later, the American Convention on Diplomatic Asylum signed at Caracas resolved any doubts by specifically providing that the State granting the asylum could determine "the nature of the offense or the motive for the prosecution", see Nayar, *supra* note 121, at 41.



of which "are not subordinated to universal law, but correlated to it."<sup>125</sup> The American international law, Alvarez explained, was derived from attempts by the Latin American nations to modify international law and "to bring it into harmony with the interests and aspirations of the continent."<sup>126</sup> Moreover, American international law influenced and shaped universal international law, and "many concepts or doctrines of American origin have achieved or tend to achieve universal acceptance. . . ."<sup>127</sup>

The creation of the Organization of American States (OAS) in 1948 reemphasized the belief of Latin American jurists in the existence of a regional international law, as well as reaffirmed the vitality of such long-standing hallmarks of Latin American international legal thought as non-intervention. The Inter-American Council of Jurist and its permanent committee, the Inter-American Juridical Committee, were created as organs of the OAS to promote the codification and evolution of a body of Latin American law on diplomatic asylum, the protection of human rights, arbitration, treaties, and the law of the sea. In 1958 their report, *Contribution of the American Continent to the Principles of International Law that Governs the Responsibility of the State*, listed six principles which the Committee majority considered to embody Latin American international law: (1) intervention in a state's internal or external affairs was rejected; (2) contractual debts could not be collected by force even where the debtor state refused to arbitrate or comply with an arbitral award; (3) states were not responsible for acts or omissions to aliens except where they owed their own nationals the same responsibility; (4) states were not responsible for crimes committed in their territory but only from inexcusable negligence or unwillingness to prevent or punish it; (5) states were not responsible for injuries to aliens caused by Acts of God, including insurrection and Civil war; and (6) state responsibility was discharged when it gave aliens access to courts, in which event a protect-

---

<sup>125</sup> *Id.* at 294.

<sup>126</sup> *Id.* at 293.

<sup>127</sup> *Id.* at 294. Unfortunately he is not specific on this point. Although it might be an overstatement to assert that Alvarez was an exponent of judge-made law, and therefore atypical by traditional Latin American legal standards, his dissent in *Adversory Opinion On Reservations To The Convention On Genocide* [1949] I.C.J. 50, perhaps illustrates his belief that the International Court can create new international law. "As a result of the great changes in international life that have taken place since the last social cataclysm it is necessary that the Court should determine the present state of the law in each case which is brought before it and, when needed, act constructively in this respect; it is at liberty to develop international law, and indeed create law . . . for it is impossible to define exactly where the development of this law ends and its creation begins." *Quoted in Leonhard, supra* note 17, at 678. Although as a former law professor of the author used to remark "we don't pay off on dissenting opinions," minority positions have a way over time of becoming the prevailing norm. For that reason dissents such as those of Alvarez are important.

ing state could not intervene diplomatically.<sup>128</sup>

The U.S. delegate on the Committee objected that the third principle should contain an exception where the alien's treatment contravened international law. The U.S. delegate also maintained that the fifth principle was too broad and the sixth principle was completely unacceptable.<sup>129</sup> A subsequent draft adopted by the committee at its 1961 meeting relieved a state of all responsibility if the alien had by contract renounced diplomatic protection, if domestic legislation subjected the contracting alien to the jurisdiction of the local courts, or if it placed him or her in a similar status with nationals for all purposes of the contract.<sup>130</sup> These reports and the objections they precipitated illustrate the intractability of present levels of discussion.

### *B. Wealth Deprivations as Challenges to Traditional International Law*

By 1943 the last of the lump sum settlement compensation arrangements arising out of the wealth deprivations of the 1910 Revolution had been resolved by the United States and Mexico. The Mexican takings, however, merely foreshadowed the spate of deprivations of alien property which occurred in Eastern Europe between 1945 and 1949 pursuant to legislation promising compensation far below the "prompt, adequate and effective" standard. The Western Nations eventually settled the claims of their deprived nationals through lump-sum compensation agreements administered by permanent administrative bodies such as the Foreign Claims Settlement Commission in the United States and the Foreign Compensation Commission of Great Britain. In no case did compensation satisfy the traditional tests of international legality.<sup>131</sup>

The example of the Eastern European seizures perhaps influenced Latin America, where in 1952 Bolivia nationalized its land and foreign-owned tin mines, and Guatemala expropriated alien-owned property.<sup>132</sup> The most extreme challenge to date, not only to traditional legal concepts but also to U.S. hemispheric hegemony, was the 1959 Cuban Revolution and its subsequent seizure of alien (principally American) property. The effect of the Cuban takings upon orthodox legal precepts was wide-ranging. Twenty years before, the U.S. Secretary of State Cordell Hull, had categorically declaimed "the right to expropriate property is coupled with

---

<sup>128</sup> See 2 Y. B. INTERNAT. L. COMM. 136.

<sup>129</sup> *Id.* at 136-37.

<sup>130</sup> See M. WHITEMAN, *supra* note 112.

<sup>131</sup> For the best authoritative work to date on lump sum compensation agreements, see R. LILICH & B. WESTON, 1 & 2 INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS (1975).

<sup>132</sup> Dawson & Weston, *supra* note 89, at 745 n.97; G. PENDLE, *supra* note 6, at 211-17.

and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of the requirement."<sup>133</sup> In 1960, although the United States demanded "prompt, adequate, and effective" compensation for its nationals deprived by the Cuban Agrarian Reform Law, it was admitted that this was a bargaining device used "to bring about negotiations on the question of compensation. . . ."<sup>134</sup> The change from the original U.S. position is impressive.

The legality of the Cuban deprivations was challenged in United States Federal District court in New York in *Banco Nacional de Cuba v. Sabbatino*. The Cuban legislation was deemed to violate international law because it was retaliatory, discriminatory, and provided inadequate compensation.<sup>135</sup> The interest generated by the subsequent series of cases led ultimately to a long-overdue reconsideration of the sovereign immunity and act of state doctrines in the United States and in England.<sup>136</sup>

Another interesting by-product of the Cuban-United States confrontation was the creation in 1964 of a procedure whereby the U.S. Foreign Claims Commission was empowered to preadjudicate claims against Cuba even in the absence of an overall lump-sum monetary settlement.<sup>137</sup> Previously the Commission, like its English counterpart, had been entrusted with establishing the validity of claims which were to be satisfied out of the lump-sum monetary settlements already agreed upon by the depriving and protecting states. The preadjudication technique was a significant departure from past international practice.

Cuba's nationalizations were followed by wealth deprivations in Peru and Chile which, by similarly rejecting traditional compensatory preferences, added to the international literature and experience calling for a modification of the law of state responsibility. Neither country offered "prompt, adequate, and effective" compensation in the traditional sense, although it could be argued that Peru's seizure of the International Petroleum Company (IPC) oil properties in 1969 was a "limited deprivation"

---

<sup>133</sup> M. WHITEMAN, *supra* note 112, at 1020.

<sup>134</sup> Dawson & Weston, *supra* note 89, at 757 n.141.

<sup>135</sup> 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*. 307 F. 2d 845 (2d cir.), *aff'd*. 372 U.S. 905 (1963). The case law and commentaries are voluminous. See, e.g., Dawson & Weston, *Banco Nacional de Cuba v. Sabbatino: New Wine in Old Bottles*, 1 U. CHI. L. REV. 63 (1963); Rabinowitz, *Viva Sabbatino* 17 VA. J. INT'L L. 697 (1977), and articles cited therein.

<sup>136</sup> See The Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891, 28 U.S. §1330 *et. seq.* (1976). Bird, *The State Immunity Act of 1978: An English Update*, 13 INT. LAW 619 (1979). Unfortunately, in the United States legislation Congress in withdrawing immunity where international law was violated, defined such a violation to include nationalization which had not afforded "prompt, adequate and effective" compensation. Goldie, *State Responsibility and the Expropriation of Property*, 12 INT. LAW. 63, 75 (1978).

<sup>137</sup> See Lillich, *The Cuban Claims Act of 1964*. 51, A.B.A.J. 445 (1965).

to which traditional compensatory norms were applicable. Also the Peruvian takings were not in aid of a widespread social reform such as that which inspired Mexican and Chilean nationalizations, but were directed at a single alien company with which there had been a running dispute for some years. The compensation formula was illusory, being related to IPC's payment of back taxes from which it had previously been partially exempted and which would exceed the amount of compensation offered, as well as the company's asset value.<sup>138</sup> The most significant impact on international law of the Chilean<sup>139</sup> and Peruvian deprivations was in the impulse which they gave to those international scholarly efforts seeking to divert attention away from reiteration of ambiguous general "standards" towards the more meaningful quest for means of valuing alien property taken in the wealth deprivation process.<sup>140</sup>

### C. Foreign Aid and Economic Integration as Sources of Confrontation

Although technical and military aid had been supplied to Latin America since 1948, economic assistance had been so deemphasised that in 1957 President Eisenhower told Congress that while Latin American military and technical assistance should be maintained, "(e)conomic assistance can be reduced."<sup>141</sup>

This view changed dramatically after the Cuban Revolution caused that basic reassessment of U.S. Latin American relations which culminated in the 1961 Charter of Punta del Este. The Alliance for Progress envisioned at Punta del Este proposed a ten year economic and social development investment program, a substantial portion of which was to be supplied by Latin American public and private capital. This initiative generated an initial enthusiasm in Latin America and in the United States, where eager young law school graduates hurried to Washington to

---

<sup>138</sup> For discussion of the Peruvian takings, see Rodley, *The Nationalization by Peru of the Holdings of the International Petroleum Company*, in *INTERNATIONAL LAW IN THE WESTERN HEMISPHERE* 112 (N. Rodley & C. Ronning eds. 1974).

<sup>139</sup> For a general survey of the Allende period, see Noguee & Sloan, *Allende's Chile and the Soviet Union: A Political Lesson for Latin American Nations Seeking Autonomy*, 21 *J. INT'L STUDIES* 339 (1979). For discussion of the legal questions raised by the deprivations, see Vicuna, *Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile*, 67 *AM. J. INT'L L.* 711 (1973).

<sup>140</sup> "The disagreement in this area is not with respect to the requirement of compensation. It is centered on the manner in which the value of the property is determined", see Sweeney, *The Restatement of the Foreign Relations Law of The United States and the Responsibility of States of Injuries to Aliens*, 16 *SYR. L. REV.* 762, 764 (1965). Professor Lillich addressed himself specifically to the valuation debate precipitated by the Chilean deprivation, see Lillich, *International Law and the Chilean Nationalizations - The Valuation of the Copper Companies*, 7 *INT'L LAW.* 124 (1973).

<sup>141</sup> Wilson, *supra* note 103, at 57.

join in bringing economic and social justice to the hemisphere.<sup>142</sup> One wonders, however, if even the best-intentioned Latin American representatives at Punta del Este were not a trifle skeptical at the prospect of reshaping economic and social structures which had persisted for centuries and which many of their countrymen had little interest in seeing changed.

Money and aid were usefully employed under the Alliance. Nonetheless one hears, especially in the United States, that the Alliance "failed." Although branding the Alliance a "failure" may partly derive from national propensities to expect instantaneous gratification and results even in highly complex situations, the Alliance did raise higher expectations than it was able to satisfy. It thereby increased a basic lack of confidence in the capacity of free enterprise systems to redress social and economic imbalances between developed and underdeveloped states.<sup>143</sup>

Economic integration was considered in conjunction with the Alliance as a method for increasing regional prosperity through the Latin American Free Trade Association (LAFTA) and the Central American Common Market (CACM). The Latin American regional economic integration movement owes its origin to the Economic Commission for Latin America (ECLA) founded in 1948 as a suborganization of the United Nations Economic and Social Council. From its headquarters in Santiago, Chile, ECLA directed the studies, conferences, and negotiations that led to the formation of the CACM in 1959 and LAFTA in 1960. But by 1965 it was apparent that the economic programs were not operating as originally conceived, and that renewed efforts were required.

The Andean Pact signed by Bolivia, Colombia, Ecuador and Peru in 1969 (and later by Venezuela in 1973) sought to create an Andean Common Market (ACM) with virtually no trade barriers among its members.<sup>144</sup> Like LAFTA and CACM, ACM aspirations are related to similar attempts by Third World countries elsewhere to reform the international economic system to obtain a better distribution of wealth. Through integration the Latin American Nations sought a self-generating and perpetuating development which would free them from foreign dependence.<sup>145</sup>

---

<sup>142</sup> Arthur Schlesinger Jr., who had joined in the early formulation of Alliance policy, recaptures the faith and optimism of the participants in the early days of the Alliance, see Schlesinger Jr., *The Alliance for Progress: A Retrospective*, in *LATIN AMERICA: THE SEARCH FOR A NEW INTERNATIONAL ROLE* 57 (R. Hellman & H. Rosenbaum eds. 1975). [hereinafter cited as *LATIN AMERICA*].

<sup>143</sup> "Was the Alliance for Progress a failure? . . . Who knows? The Alliance was never really tried. It lasted about a thousand days, not a sufficient test, and thereafter only the name remained. Even that disappeared finally in the Nixon years." *Id.* at 83.

<sup>144</sup> For history of ACM, see Murphy, *Decision 24, Mexicanisation, and the New Economic Order: The Anatomy of Disincentive*, 13 *TEX. INT'L L. J.* 289 (1978).

<sup>145</sup> See Vargas Hidalgo, *Economic Integration Development Planning and Sovereignty: A Latin American View*, 9 *LAW AM.* 318, 319 (1977).

The adoption of the Andean Pact Statute on Foreign Capital in 1971, known generally as Decision 24, more than any other document reflects the increasing Latin American apprehensions that economic sovereignty is at the mercy of the efficiency and technology of large multinational corporations.<sup>146</sup> Foreign capital investment is not considered good or evil *per se*. The new emphasis is not upon taking over foreign investment, but upon limiting and regulating its admission to, and activities within, the host state. The aim is to channel foreign investment so that it can fulfill a supporting rather than negative function in the process of integration and economic development. In this sense the importance of Decision 24 and its amendments cannot be ignored because it "may represent the most concrete resolution of the foreign investment problem possible in Latin America today, and perhaps the truest consensus in the entire Third World."<sup>147</sup> It is noteworthy that one of the chief architects of the Code was Miguel Wiozcek of Mexico, "a country that has had a restrictive policy towards foreign investment for almost a generation."<sup>148</sup>

Decision 24 is particularly important because it represents the region's only multinational attempt to control investment. It derives from an international treaty ratified by all signatories, and must be considered part of the corpus of law applicable within Latin America. This regional legal system strengthens Latin America's claim to be a regional legal sub-order. Because it establishes a regime to regulate the admission and continuance of foreign investment, it also provides a new arena for international confrontation, with the possibility that this in turn will produce an impact on extra-hemispheric perceptions of international law.<sup>149</sup>

Provisions of special interest in ACM legislation include the "fade-out" concept whereby foreign investors wishing to take advantage of the ACM's duty-free internal trade must divest themselves of corporate control (down to 49 percent) over a 15 year, or in the case of Bolivia and Ecuador, 20 year period. Any enterprise, however, may be 70 percent foreign-owned if the other 30 percent is held by the host state. These provisions, especially in light of the limited function of stock markets in Latin America, could be difficult to enforce without arousing fears of "creeping

---

<sup>146</sup> See Rodley, *supra* note 138, at 121-22. For a perceptive study of the issues raised by multinational corporations, see Solomon, *Multinational Corporations and the Emerging World Order*, 8 CASE W. RES. INT'L L. 329 (1976).

<sup>147</sup> Furnish, *The Andean Common Market's Common Regime for Foreign Investment*, 5 VAND. J. TRANSNAT'L L. 313, 314 (1972).

<sup>148</sup> *Id.* at 315.

<sup>149</sup> Latin Americans have developed a cautious attitude towards foreign investment in recent years, ". . . which they often see through the lens of the dependency theory as valuable only if carefully harnessed to specific needs and only if the investor agrees to relinquish control to national capital at an early date." See Furnish, *Establishment of Mechanisms for the Settlement of Economic Disputes*, 5 GA. J. INT'L & COMP. L. 145, 146 (1975).

confiscation." Another potential point of conflict is Article 50 which distorts the equal treatment standard because instead of guaranteeing aliens equal treatment with nationals, it provides that foreign investors may not receive treatment more favorable than that given national investors. This wording "seems inferentially to negate the notion of a substantive international minimum standard."<sup>150</sup> The spirit of Carlos Calvo dominates Article 51, which prohibits any clauses in investment or technology transfer agreements purporting to oust local jurisdiction in the case of "possible conflicts," thereby perhaps even forbidding subrogation of insurance claims.<sup>151</sup>

The extent to which LAFTA, the CACM and the ACM may develop and the success they achieve could be limited, according to Rafael Vargas-Hidalgo, a former professor at the Institute for International Affairs at the University of Chile, because economic integration implies a renouncing of a certain degree of sovereignty.<sup>152</sup> Indeed the closer the integration sought, the more sovereignty must be surrendered. To work properly, Vargas-Hidalgo maintains that "an integration system in Latin America would require at least some harmonisation of national politics, and in a more perfect scheme, coordination of national plans and joint planning."<sup>153</sup> Unfortunately, this does not appear any more likely in the near future than it was in the past when ". . . considerations based on national sovereignty prevented the Latin American countries from reaching higher levels of integration or from having established a system of joint planning."<sup>154</sup> Thus the sovereignty concept in which Latin America has sought a defense against foreign aggression may prove to be a two-edged sword.<sup>155</sup>

---

<sup>150</sup> Oliver, *The Andean Foreign Investment Code; A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763, 769 (1972).

<sup>151</sup> The article states in full: "In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors." *Quoted in id.* at 773. Also, "Article 51 seems to hit hard . . . at investment guarantees, insurance, arbitration, and international adjudication of foreign investors claims—a matter significant as to appraisals of climate for new investments." *Id.*

<sup>152</sup> See Vargas Hidalgo, *supra* note 145, at 322.

<sup>153</sup> *Id.* at 328.

<sup>154</sup> *Id.* at 318.

<sup>155</sup> Chile resigned from the ACM in 1976 alleging a threat to its sovereignty. Bolivia now threatens to leave the group, alleging intervention by the other Latin American States which criticized the excesses of its latest revolution, and the Peruvians have reservations concerning the ACM's political and economic objectives, see Latin American Regional Report, Oct. 3, 1980, at 1 (London). The recent brief war between Ecuador and Peru over a disputed border also called into question the ACM's future, see Latin American Weekly Report, Feb. 6, 1981, at 1-21 (London).

This same stubborn adherence to an outmoded concept of sovereignty has impaired the growth of international mechanisms to resolve disputes between alien investors and their host states.<sup>156</sup> In the absence of treaties settling past disputes and providing for claims commissions, Latin American states have persistently refused to concede that investment disputes could be removed from municipal tribunals and submitted to international adjudication. This Calvo Doctrine legacy accounts for Latin America's rejection of the World Bank Convention for the Arbitration of Investment Disputes<sup>157</sup> and for the shape which they have sought to give the legal expression of the New International Economic Order.<sup>158</sup>

#### D. *The New International Legal Order*

In 1974 the Calvo Doctrine and other Latin American legal norms received their greatest apotheosis to date with the enactment of the United Nations Declaration on the Establishment of a New International Economic Order<sup>159</sup> and the Charter of Economic Rights and Duties of States.<sup>160</sup>

From the beginning, the Latin American nations played a leading role in the formulation of the Declaration and the Charter. At an address in 1972 at the Third Session of the United Nations Conference on Trade and Development (UNCTAD), President Luis Echeverría of Mexico proposed to obtain the developed states' consent to a legally binding set of economic rights and duties which would favor Third World economies.

Since 1960 the world economy had turned against the lesser developed countries. Traditional economic institutions such as the World Bank, the International Monetary Fund and the General Agreement on

<sup>156</sup> See Rogers, *Of Missionaries Fanatics and Lawyers: Some Thoughts on Investment in the Americas*, 72 AM. J. INT'L L. 1, 2 (1978).

<sup>157</sup> See Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L. J. 131 (1976); Summers, *Private Versus State Arbitration in Latin America*, 4 CAL. W. INT'L L. J. 121 (1973).

<sup>158</sup> *Id.* at 4-5. The durability of the Calvo Doctrine combined with the overriding desire to control foreign investment was manifest in 1973 when Mexico enacted new technology and investment legislation to restrict foreign enterprise. Although "Mexicanization" had been in operation for some years, the 1973 legislation sought to codify, clarify and extend prior enactments. Like the ACM Code, the Mexican legislation requires prior registration and approval for all foreign investment and licensing agreements, and enshrines the Calvo Clause. While the ACM Code is more gradual and flexible in approach, perhaps because it was produced by a group of loosely aligned nations with differing views on foreign investment, the Mexican legislation reflects the "nationalist sentiment of a unified nation resolved to dominate foreign capital within its borders, and is less apprehensive of discouraging new foreign investors" than is the ACM Code, see Murphy, *supra* note 144, at 296.

<sup>159</sup> G.A. Res. 3201, 6th Special Sess. U.N. GAOR, Supp. (No. ) U.N. Doc. A/9559 (1974).

<sup>160</sup> G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974). [Hereinafter cited as Charter].



Tariffs and Trades (GATT), which were controlled by the wealthier nations, seemed unable or unwilling to assist the impoverished nations in the southern half of the globe. The economic gap between richer and poorer countries widened steadily as did the imbalance in the terms of trade.<sup>161</sup> Not surprisingly, President Echeverría struck a sympathetic chord when he urged a New International Economic Order which would “. . . reinforce the precarious legal foundations of international economy . . . removing economic cooperation from the realm of goodwill and rooting it in the field of law by transferring consecrated principles of solidarity among men to the sphere of relations among nations.”<sup>162</sup> Such a doctrine would concede to States the right to adopt whatever economic structure they deemed most suitable, to treat private property as the public interest required, and to be freed from outside economic pressures.<sup>163</sup>

A working group to prepare a draft outline of the Charter's contents was designated with Mexican Ambassador Jorge Castañeda as Chairman.<sup>164</sup> The initial intent was to set out those rights and duties of states which should become part of the corpus of international law; merely codifying existing precepts would not be enough.<sup>165</sup> It soon became apparent, however, that opinion was so diverse on certain issues that a charter embodying legally binding prescriptions would be impossible to achieve. The resulting General Assembly resolution, while technically not binding under international law, reflected the expectations of a large portion of the international community.

The Charter sought to globalize the Calvo Doctrine at the expense of traditional international legal doctrines. Nowhere is this better illustrated than in the attack on the law of state responsibility contained in Article 2 of the Charter. Article 2 rejects all diplomatic protection, enables a taking state to decide unilaterally upon the compensation it will offer deprived aliens, and provides that any disputes over compensation can only be settled in the municipal courts of the taking state unless the latter “has freely agreed otherwise.”<sup>166</sup> Professor Lillich described Latin American ef-

---

<sup>161</sup> See Rozental *The Charter of Economic Rights and Duties of States and the New International Economic Order*, 16 VA. J. INT'L L. 309, 310 (1976). See also W. BRANDT, NORTH-SOUTH: A PROGRAMME FOR SURVIVAL 30 (1980).

<sup>162</sup> U.N. Doc A/PV.2315, at 67 (1972).

<sup>163</sup> Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection of International Law?* 9 INT'L LAW. 294, 297 (1975).

<sup>164</sup> See Rozental, *supra* note 161, at 313.

<sup>165</sup> “Developing countries . . . argue that innovation and new rules of law are necessary because the traditional rules of economic law are no longer valid and binding on States who reached political and legal independence long after their formulation and on the basis of situations totally different from the one existing over the past three decades.” *Id.* at 315-16.

<sup>166</sup> Rogers, *supra* note 156, at 4-5.

forts on the Declaration and Charter as “. . . no more than thinly disguised attempts to endow the Calvo Doctrine . . . with limited international status. This development which would immunise States from potential international responsibility by denying alien claimants the right to seek the diplomatic protection of their States, is as unnecessary as it is unfortunate.”<sup>167</sup> In rejecting traditional international norms respecting wealth deprivations the Charter seems to place the concept of state responsibility outside the realm of international law.

Even though not legally binding, certain features of the Charter have created great misgivings in the international legal and investment communities. Significantly, F. García-Amador, now a law professor and formerly Rapporteur of the International Law Commission's efforts to codify the law of state responsibility, seems to fear that the Charter has gone too far. In a recent article he maintains that the Latin American countries are not as eager as other Third World nations to repudiate entirely the doctrine of state responsibility.<sup>168</sup> He admits that the Charter demonstrates the non-Latin American Third World Nations' "approach to the law governing nationalization projects the image of a kind of emotional renaissance of the classic concept of absolute State Sovereignty — a concept that was thought to be gone forever, if not in the Soviet Union, in the rest of the world.”<sup>169</sup>

One is tempted to speculate if in their eagerness to become leaders in promoting a new international economic order the Latin Americans have not gone too far. They have indicated and internationalized their firm intent to abolish diplomatic protection without suggesting an alternative international problem solving mechanism to take its place.<sup>170</sup> Their efforts cannot fail to rebound on them at some future date, either through a failure to attract the foreign investment they may require,<sup>171</sup> or because at some stage in their future development they may discover themselves on the wrong end of a wealth deprivation.<sup>172</sup>

<sup>167</sup> Lillich, *The Diplomatic Protection of Aliens Abroad: An Elementary Principle of International Law Under Attack* 69 AM.J. INT'L L. 359, 361 (1975).

<sup>168</sup> See García-Amador, *The Proposed New International Legal Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1 (1980). See also *Latin America and the Creation of a New International Order*, UNECLA/B (No. 19), ½ at 1-9 (1975).

<sup>169</sup> García-Amador, *supra* note 168, at 52.

<sup>170</sup> The failure to present a suitable alternative in place of diplomatic interposition was considered one of the reasons behind the rejection of the Calvo Doctrine by late Nineteenth Century European and American lawyers, see D. SHEA, *supra* note 45, at 20.

<sup>171</sup> See Dawson, *The Role of the Private Banker in the New International Economic Order* 16 VA. J. INT'L L. 297, 306 (1976).

<sup>172</sup> Professor Lillich has written that “in recommending normative guidelines and procedural sanctions . . . the ‘mirror image’ principle must be kept in mind: namely, that the claims one projects against others inevitably will be reflected in similar claims against one-

## VII. FUTURE PERSPECTIVES

The foregoing chronological examination of selected past confrontations between the Latin American legal sub-order and the value systems of other states demonstrates a three-fold impact upon international law.

First, the development and content of international state practices of non-Latin American origin, such as the law of state responsibility and related rules governing the minimum international standard of justice, diplomatic protection of nationals, and exhaustion of local remedies, have been reshaped and refined by Latin American publicists, negotiators, and litigators before national and international courts and claims commissions.

Second, new legal concepts have been introduced to the non-Latin American international community, some of which have been accorded international convention or treaty status. The Drago Doctrine proscribing the use of armed force to collect debts, and the concepts of non-intervention and extended coastal jurisdiction over maritime resources are examples. Other doctrines, such as diplomatic asylum, have not as yet obtained wide acceptance.

Third, persistent invocation of policy preferences relating to sovereignty over natural resources, exclusive jurisdiction of municipal tribunals, the supremacy of local law in wealth deprivation situations, and insistence upon waiver by aliens of rights to diplomatic protection, has eroded the traditional problem-solving techniques and formulae available to the foreign offices of claimant or protecting states. It would, for example, be counter-productive today to challenge the validity of a nationalization by citing pre-1945 precedents or by insisting upon "prompt, adequate, and effective" compensation.

The legal experience of the past is surely but a prelude to that of the future. In view of the economic disparities dividing the world community, confrontation will not only continue, but will accelerate. Latin American states will increasingly assume extrahemispheric leadership roles, through alliances with other parts of the under-developed world, will seek to alter patterns of international economic life which formerly led them to view themselves as "members of weak, externally penetrated societies in which great powers, multinational corporations, and international economic relationships play important roles."<sup>173</sup>

The resentment felt by the Latin American nations and other lesser-developed nations at what they perceive to be past injustices and the ap-

---

self," see Lillich, *Economic Coercion and the International Legal Order*, 51 INT'L AFF. 358, 365 (1975).

<sup>173</sup> Milenky, *Problems, Perspectives and Modes of Analysis: Understanding Latin American Approaches to World Affairs*, LATIN AMERICA, *supra* note 142, at 93, 107.

parent reluctance of the industrialized nations voluntarily to alter the economic patterns of centuries must be of concern to internationalists throughout the world community. Instead of focusing primarily on such matters as establishing dispute resolving mechanisms, the real issue to which attention should be directed is deciding what kind of order is desirable for both developed and developing nations and how to achieve it. Otherwise the ominous recent warnings of the Brandt Commission Report may prove disturbingly prophetic.<sup>174</sup>

Assessing the effect of future confrontations upon international law can only be made as they occur, but past experience in Latin America suggests there is a discernable process of confrontation which can be useful in assessing international legal impact. In retrospect one is struck by the wide number and identities of participants who carry out the confrontation and determine its force and direction. Similarly diverse are the arenas in which the confrontation may be aired, ranging from courts to the pages of a law review. The claims which precipitate the confrontation may vary over a period of time. Thus, claims relating to political and territorial integrity in the century after independence were later replaced by claims to assert economic independence and control over natural resources. A claim relating to a refusal to meet traditional compensatory standards which would have been rejected in 1930 might be allowed today. Finally, the immediate effects and eventual outcomes may also change with time and geography.

It is perhaps useful, therefore, to attempt imposition of some analytical order on this process of confrontation that has in the past, and will surely in the future, affect Latin America's impact on international law. The following outline is offered to aid understanding and analysis of a complicated, constantly evolving aspect of international legal development. It is applicable not only to Latin America but, with modification, to Asia and Africa as well.

### *THE PROCESS OF CONFRONTATION*

#### A. Participants

1. Foreign offices or other government agencies
2. Judges and arbitrators
3. Commentators
4. Officials in regional bodies, e.g. OAS

---

<sup>174</sup> There were two Latin Americans on the Brandt Commission, which concluded: "Whatever their differences and however profound, there is a mutuality of interest between North and South. The fate of both is intimately connected. The search for solutions is not an act of benevolence but a condition of mutual survival." See W. BRANDT, *supra* note 161, at 281-82.

5. Officials in international bodies, e.g. U.N.
- B. Arenas**
1. International Court of Justice
  2. Regional Courts
  3. Claims and Arbitration Tribunals
  4. Municipal courts
  5. Regional bodies
  6. International bodies
  7. International conferences
  8. Publications.
- C. Claims Leading to Confrontation**
1. Claims relating to Political Sovereignty
    - (a) Claims relating to non-intervention
      - (i) political/diplomatic intervention
      - (ii) economic intervention
      - (iii) armed intervention
      - (iv) ideological intervention
    - (b) Claims relating to self-defense
      - (i) arising from extrahemispheric action
      - (ii) arising from interhemispheric action
  2. Claims relating to Economic Sovereignty
    - (a) over natural resources
      - (i) sub-soil resources
      - (ii) marine resources
    - (b) over economic activities relating to national security e.g. national control of airlines, railways, communications, insurance, banking.
    - (c) over economic activities relating to control of local labor and markets.
  3. Claims relating to social and judicial integrity
    - (a) over exclusive jurisdiction of municipal courts and exhaustion of local remedies
    - (b) over rejection of diplomatic interposition
      - (i) absolute
      - (ii) modified in event of denial of justice
    - (c) over rejection of international arbitration in disputes between aliens and States.
- D. Immediate Effects**
- (a) Regional level
  - (b) International level
- E. Eventual Outcome**
- (a) Regional level
  - (b) International level

## VIII. CONCLUSION

The lack of date of an interrelated overview of the development of Latin American legal attitudes and their impact upon the international world order is disturbing. It hinders our ability to perceive, if not influence, the shape and direction of future events.<sup>176</sup> Latin America has been, is, and will continue to be a legal "confrontation area"<sup>176</sup> between norms of purported universal application, and newer legal concepts moulded by the faith that the human condition need not forever be blighted by mass poverty, disease, hunger and unresponsive political, social and economic structures.

---

<sup>176</sup> It is not generally appreciated that other areas, such as the East Indies, also may have had special impacts upon international legal development. Professor Alexandrowicz in a thought-provoking and perceptive work deplores the willingness of European, and even Asian, commentators to refuse to recognize that the Indian subcontinent (including Burma, Ceylon, Siam and Indonesia) was an active participant in the development of the law of the family of nations in the 16th, 17th and 18th centuries. He argues that "it seems questionable to uphold the traditional view that the law of nations grew up exclusively in the confines of Christian Europe." Rather, the treaty and diplomatic relations between European States and Indian Sovereigns affected the development of international legal concepts, including the "law" of war and the law of diplomacy. Hugo Grotius, who had been employed by one of the large Dutch trading companies, was influenced by the maritime traditions of the Indian Ocean when he came to evolve his theories concerning freedom of the seas, see C. ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES 1, 229 (1967).

<sup>176</sup> In future, United States' preeminence as the principal focus of Latin American discontent may be diminishing as other nations, especially Japan and West Germany, become increasingly involved economically in the region. The division of opinion between the United States and West Germany's Social Democratic government over the best policy to pursue when dealing with social revolutions in Central America is already apparent, and signals European readiness to challenge United States leadership in the area. "There seems little doubt that a fundamental difference in outlook on Central America now exists between Bonn and Washington. As far as the Germans are concerned, the United States is wrong to continue supporting military regimes in Central America and the Caribbean that have no future. The German view is that short-term instability is the necessary price to pay to ensure stability in the long run." See Latin America Weekly Report, 22 Aug. 1980, at 3-4 (London).

