4-1-1984

The San Jose De Costa Rica Pact and the Calvo Doctrine

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This paper is based on an unpublished address given by Dr. César Augusto Bunge at the Second Annual Institute of International Finance, Southern Methodist University, Dallas, Texas, November 9-10, 1983: "The Calvo Doctrine and the Codes of Conduct for Transnational Enterprises." (c) Southern Methodist

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* After submitting this paper for publication, the Republic of Argentina ratified the Costa Rica Pact (Law 23.050). In addition, the Third Chamber of Criminal Justice of the city of Buenos Aires accepted for the first time the direct applicability of the Pact within the Republic of Argentina. *See* La Nación, Apr. 27, 1984, at 14 (Argentina).

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I. ARGENTINA'S FOREIGN DEBT: A GENERAL DESCRIPTION OF THE PROBLEM

Certain aspects of the Argentine renegotiation of its foreign debt may, in the long run, negatively affect the judidical and economic stability of the Americas. The Argentine situation is representative of the problems that other Latin American debtor-countries are facing.

There are certain common characteristics in the foreign debt of the developing world. For example:

> a) Between 1973 and 1981 the amount of international commercial banking loans increased at a rate of 20 percent per annum. Since 1979, however, the maturity date of said loans has tended to be shorter.
> b) During the same period, commercial banking loans represented 49 percent of foreign debt in the developing world. In 1981 this figure increased to 57 percent. The gravest problems can be found in the countries that have relatively high levels of development; i.e., those that were able to tap financial resources from private international banking institutions at very high and fluctuating interest rates. It has been determined that Brazil, Mexico, South Korea and Argentina account for more than half of the commercial loans given to developing countries.[1]
> c) Repayment of the loans appears to be an insurmountable task, especially in light of the dramatic rise in interest rates.[2]

This is the environment in which Argentina is trying to renegotiate the repayment of its foreign debt (public and private), which at the end of 1982, was approximately 38 billion dollars (of which 23.3 billion corresponded to obligations with the international commercial banking community).[3]

On December 9, 1982, the Minister of Economy of Argentina announced, to the local representatives of the international bank-

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1. *Deuda externa: Dificultades de los países deudores y posibles cursos de acción. El Caso Argentino*, CONSEJO ARGENTINO PARA LAS RELACIONES INTERNACIONALES (Argentina, 1983) [hereinafter cited as CARI Report].

2. *See* INTERNATIONAL MONETARY FUND BULLETIN (1982).

3. *See* CARI Report, *supra* note 1. Although the Argentine Central Bank is still conducting an inquiry to determine the exact amount and composition of the country's foreign debt, it is said that the total amount of Argentina's public and private foreign debt amounts to 45 billion dollars.

ing community, the main guidelines for the refinancing of Argentina's public foreign debt: a term of repayment of seven years with three years of grace for principal owed up to December 31, 1982. To this effect, very long and weary negotiations took place which resulted in the signing of the contract of guaranteed refinancing of Aerolineas Argentinas (debtor), the Argentine Central Bank (financial agent for the Argentine Republic) and the Republic of Argentina (as guarantor), on one side, and the Morgan Guaranty Trust Company of New York as agent for the creditor banks of Argentina, on the other. This contract was approved by a special decree of the President of the Republic.[4]

The debt renegotiation process was carried on in a relatively smooth manner by the then President of the Argentine Central Bank and by the Ministry of Economy. In fact, the Argentine delegation to the International Monetary Fund's (IMF) annual meeting, in September 1983, was trying to refinance the outstanding debts of the public sector in accordance with the model contract executed by Aerolineas Argentinas. The delegation was also about to receive the first 300 million dollars from the stand-by agreement with the IMF for a total of 1.5 billion dollars and another 500 million dollars from a medium term credit facility granted by international banks. Unpredictably, a federal judge of the Patagonian City of Rio Gallegos, Santa Cruz Province, notified the Argentine Central Bank of an injunction that he had granted on September 24, 1983 ordering the Argentine authorities to abstain from renegotiating the public sector debt until an inquiry conducted by *another* federal judge in Buenos Aires regarding the legality of the assumption of the foreign debt and the responsibility of governmental officials thereof be completed.[5] Furthermore, Judge Pinto Kramer ordered that the President of the Central Bank be imprisoned upon his return from the IMF annual meeting and be taken at his disposal to render testimony. The judicial decision was reversed by the Federal Chamber of Appeals of Comodoro Rivadavia and the President of the Central Bank was released after testifying. Needless to say, the tremendous commotion that the "Pinto Kramer injunction" caused was felt not only in the international financial com-

4. Decree 2410/83 of Sept. 15, 1983. This decree was published in the *Boletín Oficial* without a transcript of the text of the contract (File M.O. and S.P. 257/83). On the same date, Decree 2408/83 was issued requiring that the contract used in the Aerolineas Argentinas serve as a model to be followed by all other state owned companies and governmental agencies (File M.E. 618/83).

5. *See* Business Latin America, Oct. 5, 1983, at 313.

munity but also within Argentina itself.

The handling of the foreign debt has become one of the principal political issues and was extensively debated in the country during 1983, which is an election year for the new democratic administration. Immediately after inauguration day, December 10, 1983, a new economic team contacted the local representatives of the international banking institutions and stated that the Government could not immediately sign the refinancing contracts drafted in accordance to the Aerolineas Argentinas model. The economic committee requested a new extension until June 30, 1984, so that the Government could establish exactly which agreements Argentina could in fact honor, given the country's export capacity. Regarding the Aerolineas Argentinas' contract already signed, the extension requested would be utilized in order to study whether there had been any violation of Argentine legislation.[6]

The current situation of the refinancing process is quite unstable and, notwithstanding the repeatedly avowed intention of the Argentine government to respect the international commitments assumed by the past administrations, no one can guarantee the final outcome of the ongoing negotiations and judicial proceedings.

II. Objectionable Terms in the Agreements to Refinance Argentina's Foreign Debt

The main objection to the refinancing contract of Aerolineas Argentinas is the waiver of sovereign immunity by Argentina. This clause is precisely what triggered the injunction issued by Judge Pinto Kramer,[7] since it was believed that granting jurisdiction to a foreign forum might hinder the progress of the investigation of the foreign debt conducted by the federal judge in Buenos Aires.

In section 12.1(a) of the Aerolineas Argentinas contract, the main debtors, the Argentine Central Bank and the Argentine Government irrevocably consented to allow adjudication of the contract by any court of the State of New York. In section 12.4(a) and (b), respectively, Aerolineas Argentinas, the Central Bank and the Argentine Government-as guarantor-irrevocably waived the right to claim sovereign immunity, not only with regards to the possibility of utilizing this defense in legal proceedings wherever the case

6. El Cronista Comercial, Dec. 15, 1983, at 1 (Argentina).
7. Mercado, Oct. 5, 1983, at 15 (Argentina).

might be brought, but also in connection with Argentine assets within the United States. Thus, given a default in the contract (the provisions are very broad in that respect), any of the creditors might request and obtain, *ex parte*, a pre-judgment attachment on any assets of the Argentine Republic located without Argentina. This puts the country in a very disadvantageous position to challenge or negotiate the petition. The assets at risk include not only the airplanes which are the property of Aerolineas Argentinas, the ships belonging to the state-owned shipping company, the credits and assets of the U.S. branches of the Banco de la Nación Argentina and Banco de la Provincia de Buenos Aires, but also a substantial part of the gold reserves of the country deposited in the United States of America, as well as other assets of Argentine owned companies.

The Argentine Government has given its overall guarantee to both public and private foreign debts. It has also agreed to litigate only in foreign fora, New York, which has been the usual practice for international contracts, *and* to waive any sovereign immunity, including pre-judgment attachments. This creates a potentially explosive situation from a political standpoint. Under section 9 of the Aerolíneas Argentinas contract, any deviation by Argentina from *any* part of its foreign debt agreements (whether of public or private origin), gives the foreign banks the right to immediately start attachment proceedings against property of the Argentine Republic located in the United States (*e.g.*, the country's gold reserves) and only afterwards, to start the proper judicial collection proceedings or to conduct direct negotiations with the Government. The drafting of section 9 of the debt agreement demonstrates that the intention of the international banks is to restrict as much as possible the eventual claim by Argentina of sovereign immunity.[8]

From the international banking community's standpoint it seems quite reasonable to have as many legal weapons as possible

8. The Aerolíneas Argentinas refinancing contract would appear to cover quite reasonably the worries of the international banking community. Nonetheless, the New York Law firm of Davis, Polk & Wardwell (special legal counsel to Morgan Guaranty Trust Co.), when issuing their legal opinion annexed to the Aerolineas Argentinas contract, expressly stated that they were not rendering legal opinion as to the enforceability of section 12.4(b) of the contract (Argentina's waiver of sovereign immunity). *See generally* Brower, Bistline, Loomis, *The Foreign Sovereign Immunities Act in Practice*, 73 AM. J. INT'L L. 200 (1979); *see also*, Note, *An Alternative Justification for Judicial Abstention in Politically Sensitive Disputes Involving Acts of Foreign States*, 14 LAW. AM. 85 (1982); Note, *Act of State Doctrine: Determining its Viability in a Suit Involving an Expropriation by Cuba of Foreign-Owned Assets*, 14 LAW. AM. 337 (1982).

in case of potential repudiation of the foreign debt or in case of a clear-cut default, especially when some acts of a certain branch of the Argentine Government, the judiciary in this case, have been considered unpredictable and arbitrary. The foreign debt problem, however, is a very politically sensitive matter in any debtor-country. Consequently, the foreign creditors have to realize that judicial actions would immediately trigger retaliatory measures. At most, judicial action might help the particular creditor involved in getting its payment more quickly, but at the cost of generating further resentment against "imperialism," thus making the investment climate more risky and unstable. Agreements, such as the Aerolineas Argentina contract, are shortsighted and self-defeating for the very foreign creditors.

On December 5, 1983, the Argentine Government ordered all local banking institutions and local debtors with foreign loans to produce detailed information and documentation concerning their external debts,[9] so as to comply with an order of the federal judge investigating the foreign debt composition. This order was also intended to disallow payments of sham loans because local residents made use of the big differences between the official and extra-official market rates to place funds abroad and to pay back the loans contracted by utilizing the favorable exchange insurance implemented by the Government. This latter action might constitute an infringement of the Aerolineas Argentinas contract, thus providing a test for the application of the provisions established in said contract.

III. The Development of International Law

It is generally agreed that international relations between less developed countries and industrialized nations would improve substantially if a system could be developed to provide stable rules concerning the treatment to be given to multinational enterprises by host countries. These rules would serve as legal guarantees covering the fundamental rights to own property and to carry out business activities. The system envisaged is one in which multinational enterprises could operate with the same judicial protection they would receive within the boundaries of their own nation-state. To this end, host countries must effect profound changes in their laws and social attitudes.

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9. *Comunicación "A"*, Banco Central de la República Argentina 418 (Dec. 5, 1983).

Since, multinational enterprises, on the other hand, have used their power and influence to the detriment of host countries, the international community has been trying for many years to establish codes of conduct for them. Such codes would establish rules to govern the multinational enterprise's activities as well as rules to govern jurisdiction and compensation for expropriation and damages.

The complex network of forces affecting the multinational enterprise is explained by Professor Vernon as follows:

> It is an entity created under the laws of the country in which it operates, responsive to the sovereign that sanctions its existence. Yet, at the same time, as a unit in a multinational network, each affiliate must also be responsive to the needs and strategies of the network as a whole.
>
> The result is that each unit is enescapably the target of a set of influences that stem from many quarters: first and perhaps foremost, from the Government of the country in which it is located; second, from the Government of any other country that is in a position, by force or persuasion, to influence the behavior of the network; and third, from the managers of the multinational system, acting in accord with their own strategies and needs.[10]

Establishing the multinational enterprises within the host countries is a problem which has to take into account the following:

> 1. The centralized management which unites the network of enterprises in the different countries located (in most cases) outside the host country;
> 2. Regulations implemented by the host countries with respect to foreign enterprises;
> 3. Judicial protection of the enterprise's activities, property, transfer of profits and technology, reinvestment of capital, hiring of personnel and taxation; and
> 4. Problems arising in relation to expropriations and compensation for damages.

It is improbable that a proper set of rules applicable to multinational enterprises, which would establish the jurisdiction in

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10. Vernon, *Storm Over the Multinationals: Problems and Prospects*, 55 FOREIGN AFFAIRS 245 (1977).

case of a conflict with the host government, would solve the problems previously mentioned. The key to the problem can be found by integrating the Calvo Doctrine,[11] as well as the Calvo Clause, to modern international law. If this were done, the multinational enterprises would have no problems transacting business around the world. They would then be able to make the maximum contribution to less developed countries.

The conflict between the principle of a "minimum international standard"[12] and that of "equality with nationals" (Calvo Doctrine) cannot be resolved so long as the right to be protected by the state of nationality is considered as a right of the state and not of the individual. Under the present law of nations, the individual has a distinctive right and, therefore, he is also a subject of international law. When Carlos Calvo first stated his doctrine, individuals were not considered subject to the law of nations. Consequently, the state was the only entity vested with the right to make claims for reparation when one of its nationals was harmed abroad. The right would arise from an injury to a foreign state through the illicit action (or just plain risk allocation) of the host state (or of its nationals) against nationals of the foreign state.[13]

The international community has evolved sufficiently so that it directly recognizes individuals without the home state acting as intermediary. It is now questionable whether the state may intervene in its own right in favor of a national injured abroad. In 1947, Professor Jessup foresaw this evolution in the following terms:

> If all states accepted an international bill of rights and if a denial of such rights constituted a breach of international law, the subsequent differences between the new and the old system might be merely procedural. International law might still permit the state of which the injured individual was a national to interpose on his behalf, to *be his agent* for securing the vindication of his rights. In such instances the protecting state would no longer

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11. The Calvo Doctrine establishes that the responsibility of governments regarding foreigners cannot be greater than the responsibility they assume concerning their own citizens. *See* CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRACTIQUE 118-164 (A. Rousseau ed. 1896).

12. The principle of minimum international standard (relating to diplomatic protection), can be defined as "the right of a state to require from other States that they respect the person and property of foreigners *in the manner prescribed by international law*" (emphasis added), Garcia-Amador, *State Responsibility*, [1956] 2 Y.B. INT'L L. COMM'N 200, U.N. DOC. A/CN.4/96/1956.

13. *See* P. JESSUP, A MODERN LAW OF NATIONS 94-122 (1949).

> be seeking to vindicate the traditional right of the State, which was said to be injured by the injury to its national. International law might likewise empower some international agency such as the United Nations Commission on Human Rights to take steps on behalf on the individual, at his request or on its own initiative. Action by such an international body would under these circumstances take *no account of the nationality of the injured individual.* (emphasis added).[14]

The ideal organization for the protection of human rights already exists. The Council of Europe and the Organization of American states (OAS), which are outside the realm of the United Nations, have created commissions on human rights as well as international courts which grant access, through their respective commissions, to injured persons claiming protection of property, unjust expropriation, due process of law, etc. Therefore, if these conventions (European and inter-American) are in full force, the individual and not merely the state, is considered a subject of the law of nations.

Consequently, this evolution of international law eliminates the contradiction between the Calvo Doctrine and the so called established or customary international law. The result now is that international law coincides with the Calvo Doctrine. By vesting the right to protect aliens in the alien himself and not in the state, the modern law of nations determines that persons shall be treated according to the basic human rights recognized by the world community. As long as there exists a procedure to ensure worldwide enforcement of human rights, then it would no longer be possible to distinguish between an alien and a national with regard to this protection. The intervention of the state, as pointed out by Jessup, would only be acceptable if the state acted as an agent of the person, and not as the direct holder of a right against the host state.[15] Intervention by the state in such a limited way, might even be procedurally unnecessary. This rule has been clearly adopted by the existing conventions of human rights. For example, the American Convention on Human Rights (the Costa Rica Pact or the Pact) expresses equality before the law as follows: "*Article 24. Right to Equal Protection.* All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protec-

14. *Id.* at 102.
15. *Id.*

tion of the law."[16] If article 24 is the present rule of international law, then the Calvo Doctrine has already been adopted by world law.

The principle of equality, in order to be effective, must be made available through a choice of legal proceedings which would entail equal protection for nationals *and* foreigners. In other words, there should exist an alternate tribunal to ensure enforcement of human rights in case the local state institutions do not satisfy the minimum standards established by the international community. This opens the possibility for individuals to have access to world jurisdiction of international courts which, in cases of unjustified delay or denial of justice, would decide any infringment claim of said rights.

The principles of "minimum standards" and "equal national treatment" (Calvo Doctrine) appear to coincide under the present law of nations. Non-discrimination of foreigners, as provided by traditional international law, would also mean that non-discriminatory treatment has to be given to all individuals in the local or national fora. In such a case, many of the present domestic laws and practices, in both less developed countries and in industrialized nations, would have to be entirely revised. To accomplish this result, the application of the Calvo Doctrine in Argentina, where discrimination against aliens has been the rule in the past years, would have to be modified. The time is ripe for the countries of Latin America to consistently apply the principle for which they have so earnestly fought in the past. However, they also have to accept the full consequences of their proposals.

As pointed out previously, when the individual is made subject to international law with respect to human rights, the state can no longer claim diplomatic protection of its nationals as the basis of an action for restoration of infringed rights. Instead, the protection would be afforded by world institutions which already exist. In the case of Latin American countries, they have been established through the *Pacto de Costa Rica*. We will demonstrate that these institutions are also available for the protection of multinational enterprises. The Pact of Costa Rica creates an International Commission and Court.[17] The problems faced by multinational enter-

16. American Convention on Human Rights, Pact of San Jose, Costa Rica, Nov. 22, 1969, OEA/SER. A/16 (English).

17. *Id.* at chs. 6, 7.

prises can be resolved within this framework. Thus, diplomatic protection afforded by home countries would be adequately substituted by world law and institutions.

Calvo Clause legislation would then be unnecessary. Any existing Calvo Clause legislation would have to be revised, because exclusive local jurisdiction would be subject to review by a world organization. However, recourse to a world organization would only occur in exceptional cases of unjustified delay or denial of justice in the local or national tribunals.

Finally, we will use Argentina as an example of our position. Argentina has not yet signed the Costa Rica Pact. The new Administration, however, submitted for congressional approval the draft version of a law which would ratify the Pact and would recognize the competence of the Commission and the Court of Justice (subject to reciprocity).[18] The new Administration is committed to the reestablishment and protection of human rights in Argentina. The acceptance of the Pact, therefore, will change the position of the foreign enterprise in its relation with the state. The proposed new version of the Calvo Doctrine could really mean progress for the world at large.

IV. International Law on Human Rights

According to traditional international law, a state was not responsible for injuries, including breach of contract, to its own nationals within the boundaries of the state. Only the states were subject to international law. Citizens, living in their state of nationality, enjoyed no protection whatsoever by international law. On the other hand, citizens living in another country were considered an extension of the state to which they belonged as citizens. It has been pointed out that:

> Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.[19]

This widely-accepted principle identifies the interests of the

18. *See* La Nación, Dec. 19, 1983, at 10 (Argentina).

19. 3 E. de Vattel, Classics of International Law: The Law of Nations or the Principles of Natural Law 136 (C. Fenwick trans. 1916).

state with those of its nationals, and it has been the reason why state protection of citizens living abroad was introduced as a fundamental part of the law of nations. At the same time, it was recognized that states had the right to treat their own resident nationals as they pleased, without any accounting to the world community. Moreover, the state's right to protect its nationals abroad was recognized as a right vested in the state, not in the person. The decision of whether to protect its nationals living abroad, therefore, was within the sole discretion of the government. Professor Jessup adds to this point:

> There [have been] numerous grandiloquent statements about the 'duty' of a state to protect is nationals abroad, but actually no such a duty is imposed either by international law or, so far as appears, by national law. In the United States and in most states the extension of diplomatic protection and the prosecution of claims is a matter of discretion of the Secretary of State or the Foreign Secretary.[20]

International law conferred upon nation-states the right to protect their nationals abroad, however, such nationals had to comply with certain conditions in order for their state to be able to interpose a claim for damages. The conditions imposed were that: 1) nationals living abroad had to submit to local law; and 2) in case of injury to their rights they would first have to exhaust all domestic administrative and judicial remedies. Nonetheless, states have extended diplomatic protection without waiting to comply with the above mentioned conditions; any real or perceived delay or denial of justice would bring the "minimum international standards" principle into play. The case law has been erratic and inconsistent because the rules and standards have not been clearly established. This problem is apparent with regard to such important points as the right to expropriate, and the subsequent determination of just compensation. As Professor Garcia-Amador points out, in several cases resolved after the Second World War, the decisions made with respect to the lump sum settlement agreements were far from meeting the conditions required by international law. He concludes that "[i]n determining the amount of compensation to be paid, it is necessary to take into account equitable, practical, technical and political considerations, as well as juridical concerns. . . . 'Capacity to pay' is also important from the point of view of the time and

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20. C. JESSUP, *supra* note 13, at 98.

form of compensation."[21] If these considerations are part of the law of nations, then what is the status of the rule requiring prompt, effective and adequate compensation? This is an example of the loose interpretation given to the traditional rules governing the diplomatic protection of nationals abroad.

At the time Carlos Calvo developed his doctrine, the weak states suffered arbitrary intervention because the strong states aggressively protected their nationals involved in activities abroad. Calvo reacted by stating:

> The responsibility of governments towards foreigners cannot be greater than the responsibility they have towards their own citizens. It cannot be maintained that the rights of hospitality can restrict the right of a government to use all legal means in order to ensure the survival of the State, or that foreigners can hold a privileged position in such a society; exempting from the consequences of civil disorders the guarantee of indemnification from damages caused by *force majeure* (Act of God) or by imperious necessity to provide for the public welfare.[22]

The contradiction between the Calvo Doctrine and the principle of "minimum international standards" arose due to the existing state of the law of nations which was based on a notion of "self-help" in order to vindicate wrongs. The development of international law has left little room for subjective interpretation of the states' rights for protection of their nationals in another state. Any development, however, was always premised on the assumption that the state was the injured party and not the individual. In other words, the injured national had no rights himself; rather he depended on his state's decision to defend his personal claim. Moreover, there were gaps in the rule which left unsolved the problems of individuals with undefined or dual nationality. In ad-

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21. Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 49 (1980).

22. C. CALVO, *supra* note 11, at 138 (ed's. trans.) The use of leverage, or even direct armed intervention, to solve international claims continued well after the Calvo Doctrine was developed. In this respect, Dr. Luis Drago, Foreign Affairs Minister of Argentina, issued an instruction to the Argentine representative in Washington, D.C. on December 9, 1902. This instruction concerned the forcible steps taken by Great Britain and Germany against Venezuela in order to ensure the collection of Venezuela's public debt. Doctor Drago stated that "the public debt cannot occasion armed intervention or actual occupation of the territory of American Nations by a European power . . . ." This statement came to be known as the "Drago Doctrine.". *See* Drago, *State Loans in Their Relation to International Law*, 1 AM. J. INT'L L. 695 (1907).

dition, as exemplified in the *Barcelona Traction* case,[23] companies whose shareholders are of a different nationality than the corporate entity itself, present special problems with respect to diplomatic protection.

It was soon evident that the emerging concept of human rights protection and traditional law could easily be merged, with the result that all individuals, whether nationals or aliens, would enjoy the same rights. As a consequence of the uniform application of clear-cut rules of international law, the apparent contradiction between the Calvo Doctrine and the principle of minimum international standards disappeared. After referring to this contradiction, Professor Garcia-Amador stated in his 1956 Report to the International Law Commission:

> Although, therefore, both principles had the same basic purpose, *namely, the protection of the person and of his property*, they appeared both in traditional theory and in past practice as mutually conflicting and irreconciliable.
> Yet, if the question is examined in the light of international law *in its present stage of development*, one obtains a very different impression. What was formerly the object of these two principles-the protection of the person and of his property-is now intended to be accomplished by the international recognition of the essential rights of man. *Under this new legal doctrine, the distinction between nationals and aliens no longer has any 'raison d'être,' so that both in theory and in practice these two traditional principles . . . appear to have been outgrown by contemporary international law.* (emphasis added).[24]

Professor Garcia-Amador then emphasized that the evolution which had taken place called for "international responsibility" when fundamental human rights were affected. In other words, it was necessary to spell out those basic rights, and to establish supra-national institutions to accord the required protection in human rights infringement cases.[25] *Calvo's Doctrine would thus be fully vindicated almost a century after its proclamation.*

The Charter of the United Nations, after reaffirming its faith "in fundamental human rights, in the dignity and worth of the human person, in the equality of men and women and of nations,

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23. Barcelona Traction, Light and Power Co. Ltd. *Case* (Belgium v. Spain), 46 I.L.R. 2 (I.C.J. 1964).

24. Garcia-Amador, *supra* note 12, at 199.

25. *Id.* at 200-203.

large and small,"[26] establishes its purpose in article 1: "To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction of race, sex, language, or religion".[27] In 1948, the United Nations approved the Universal Declaration of Human Rights and later its Convention on Human Rights. Article 7 of the Declaration of Human Rights recognized the principle of equality before the Law for all people and their right to equal protection under the law.

The first real system developed for the protection of rights, however, was set forth in the European Convention of Human Rights. Thereafter, the Costa Rica Pact followed suit. The European Convention and the Pact allow an *individual* to bring a claim directly to the appropriate authorities provided there has been an infringement of human rights.

The Costa Rica Pact begins by stating that essential human rights, having as their basis the fundamental attributes of the human person, *justify their international protection.*[28] These rights include the following:

1. Recognition of juridical personality (article 3);
2. To be heard, with due guarantees and within a reasonable time, by a competent, independent, impartial judge or tribunal, established by previous law for, inter alia, criminal, civil, labor, fiscal, or cases of any other nature (article 8(1));
3. To freely associate for economic endeavors, which may only be restricted in exceptional cases of public interest or policy (article 16);
4. To own private property: *No one shall be deprived of his property, except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms established by law* (article 21(1),(2));
5. To enjoy equal treatment before the Law (article 24);
6. To enjoy rapid and simple judicial protection against violation of fundamental rights recognized by law, local Constitution and the very Costa Rica Pact, even when these violations are perpetrated by persons acting in performance of their official duties (article 25(1));
7. States undertake:

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26. U.N. CHARTER preamble.
27. U.N. CHARTER art. 1, para. 3.
28. American Convention on Human Rights, *supra* note 16, preamble.

a) to guarantee that a competent authority of the State shall decide upon the legal action filed by any person.

b) to develop the scope of legal remedies.

c) to guarantee compliance by competent authorities of all decisions in which legal remedies have been accepted and justified (article 25(2)).

Suspensions of these rights and guarantees in cases of war, public danger or any other emergency menacing the independence or security of the state can only be done for limited periods of time and only as strictly required by the situation. Such measures must be justified, and cannot be taken when they would entail any discrimination on account of race, color, sex, language, religion, or social origin. In any event, the following rights may not be affected: recognition of juridical personality, the right to live, the right of personal integrity, the elimination of servitude and slavery, the principle of legality and nonretroactivity, freedom of conscience and religion, family rights, name, rights of the children, nationality, and political rights (these last rights only granted to citizens) (article 27).

The American Commission on Human Rights may receive and act upon claims (petitions) denouncing violations of human rights, presented by persons or groups of persons, or nongovernmental organizations legally recognized in one or more member states of the OAS (article 44). This article of the Costa Rica Pact establishes the direct protection of the individual. Article 44 creates an exception to the rule of exclusive local jurisdiction. Whenever there is a claim of infringement of any right guaranteed by the Costa Rica Pact, not duly taken care of by the domestic laws or domestic institutions, the claimant may go directly to the Institutions set up by the Pact to seek a remedy. However, because this is an exceptional proceeding, the following conditions (as stated in article 46 of the Pact) must be met:

a) To have filed the legal claim before local competent jurisdiction, having previously exhausted all other legal proceedings available to domestic jurisdiction.
b) To file the claim before the Commission within six months of having been duly notified of the domestic decision.
c) That the object of the claim is not being processed through other procedures of international settlement.

In cases of lack of appropriate local domestic law for the pro-

tection of the human rights conditions (a) and (b) above do not have to be met. For example, in cases where there are great difficulties in obtaining access to national courts or agencies or in cases of undue delays in rendering decisions, compliance with conditions (a) and (b) is not required.

The Commission begins summary proceedings to investigate human rights violations when it finds admissible any petition or communication of such alleged violation. If no amicable solution is found in a set period of time, the Commission's findings are then published in a report. This report is made available to the claimant and to all the states that are parties to the Costa Rica Pact. The Commission may then decide to start proceedings before the Court to resolve the problem (articles 49-51). Of course, the member states themselves can always take part in human rights proceedings on behalf of their nationals.

Only the Commission and the state involved have the right to appear before the Court. This rule is a last remnant of the traditional rule not allowing persons to directly participate as subjects of international law. The Commission acts on behalf on the individual person. Article 61 of the Pact states that only member states and the Commission may submit a case for the decision of the Court. Jurisdiction of the American Court of Human Rights is set out in Article 62 of the Costa Rica Pact as follows:

> 1. In general, a state may declare that in any case concerning the fundamental rights recognized in the Pact, the state recognizes as binding the jurisdiction of the Court, without need of further agreement. This statement may be made unconditionally or by way of reciprocity.
> 2. The member states may accept court jurisdiction only in specified cases.

The Court also renders advisory opinions to the Commission. Rules of procedure are issued by the Court. Its decisions are final and have to be executed by local courts, as if the local courts themselves had rendered the decision (Chapter VIII of the Costa Rica Pact).

As of now, sixteen American States have signed and ratified the Convention. The United States has signed it but has yet to ratify it. Argentina and Brazil have neither signed nor ratified it. No case has yet been accepted by the Court (a claim filed by Costa Rica was dismissed due to lack of jurisdiction). It should be noted, however, that the case law of the European Court may be of ad-

vantage to the American Court given their similar structures.

The question now is whether the activities of multinational enterprises could fall within the scope of applicability of the Costa Rica Pact. Under the Pact, the protection extended to aliens also includes cases likely to arise in connection with multinational enterprises. Basic rights are treated by the Pact the same way as in the constitutions of modern states. Nothing should preclude the use of the Pact institutions for the purpose of protecting foreign investments. If, however, some deficiency is found in the Pact, it could be amended to overcome it. Moreover, if adjustments have to be made in local regulations, said adjustments are mandatory and binding on the parties to the Pact (article 2).

As shown, there already exists a body of international law that secures the very rights which affect the operations of multinational enterprises. So long as these conventions remain effective, present international law has fully abrogated the previous traditional concept of diplomatic protection of aliens. The Calvo Doctrine should continue to serve as the basis of domestic law which in turn would be overseen by the law of nations. This forces the strict application of human rights which are then part of the "minimum international standard".

V. Domestic Treatment of Multinational Enterprises

According to Professor Garcia-Amador, the position assumed by the Latin American States concerning the strict application of the Calvo Doctrine and the Calvo Clause, is a hindrance to the adoption of a policy to encourage the development of foreign investments in the area. He states that the Calvo Clause in particular, by which parties to contracts between foreigners and governments specifically waive diplomatic protection, may deprive states of the needed financial and technical resources required for their development.[29]

There are several documents issued by Latin American Countries that adhere to this strict application of the Calvo Doctrine. For instance, the Guidelines (Pautas de Comportamiento) prepared by the Group of Latin American Countries (GRULA) for their representatives considering the draft of Codes of Conduct,

29. F.V. García-Amador, Soberaniá y Desarrollo: Una Nueva Posición Latino-Americana, Subsecretaría de Asuntos Jurídicos (Organization of American States).

state as an established principle that transnational corporations "shall submit themselves to the laws and regulations of the host country, and in case of conflict submit themselves to the *exclusive* jurisdiction of the tribunals in which they operate". (emphasis added).[30] The term "exclusive" is strongly criticized by Professor Garcia-Amador, who maintains that Calvo himself accepted the exercise of diplomatic protection in cases where there existed either denial or delay of justice. Professor Garcia-Amador, however, detects some changes of attitudes (e.g., the elimination of the term "exclusive" in some texts and acceptance of international arbitration in others) which may show a positive development.[31]

The insistence of Latin American countries to keep the "exclusivity of jurisdiction" concept goes against the paramount consideration that foreigners (multinational enterprises for the most part), shall receive the same treatment as nationals. It is hoped that the execution and enforcement of documents such as the Costa Rica Pact will eliminate the discrimination. Unfortunately, the norm of nondiscrimination has been changed by "taking a principle designed for the protection against inhumane treatment of the individual *alien* and transforming it into a formula designed to protect states from responsibility for arbitrary action." (emphasis added).[32]

If Latin American countries accept, as most of them already have, the jurisdiction of the Costa Rica Pact and at the same time continue to insist on the concept of exclusivity of jurisdiction, how can these apparently antagonistic principles be reconciled? On the one hand, the rules relating to submission to local jurisdiction and of exhaustion of domestic procedures are already accepted principles of international law. On the other hand, it is also agreed (and the Pact clearly establishes so) that the delay or denial of justice allows an appeal to international institutions for the restoration of basic rights. The result is that the provision of due process of law is a paramount condition for the exercise of exclusive jurisdiction. Waiver of diplomatic protection does not in any way imply renouncing recourse to international law for basic protection. The

30. *Anteproyecto de Código de Conducta para las empresas transnacionales*, SP/ GRULA, NY/ COD. ET/D.T. 3/1980.

31. *See supra* note 29.

32. McDougal, Lasswell, Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 444 (1976).

contradiction between the two principles disappears.

By adhering to the Calvo Doctrine, Latin American countries have been fighting against the use of force or pressure by other countries under the guise of diplomatic protection. To discourage this, Latin American countries have established procedures which would only be available to foreigners. Generally, any domestic company may, if no consideration of public policy is involved, submit its case to international arbitration. Latin American governments and state enterprises, may have their claims heard before international arbitration tribunals. It would then be against domestic public policy to admit that any such conciliation and arbitration procedures are available only for multinational enterprises operating within their own countries. There is no reason for this exception; it is just an implied acceptance of inadequate or arbitrary local laws and courts. It is very important that equal judicial protection be given to multinational enterprises as well as to domestic corporations to ensure adequate protection for all their basic rights, without any open or implied discrimination. This is part of the Pact; if domestic legislation has to be changed and improved, then the local amendment procedures should be used.

According to the Pact, if states participate in cases where their nationals have been injured abroad, they would do so on behalf of the person involved, and not on their own behalf, as was the accepted principle in traditional international law. Therefore, traditional diplomatic protection is no longer justified. The use of force or pressure would be illegal once the new international remedies are available. Moreover, the Charter of the United Nations forbids the use of force to solve international disputes of any kind (article 2, paragraph 3, 4). Besides, Article 33 of the Charter directs the states which are parties to a dispute, to resort, *inter alia*, to judicial settlements, regional agencies, or arrangements. The use of leverage to obtain a privileged settlement is thus rendered illegal. For example, the refinancing instruments of Argentina's foreign debt demonstrate the leverage problem. The terms establish that the Argentine Government grants indiscriminate guarantee to all public and private foreign debt. The government also waives sovereign inmunity. These terms grant the foreign creditor banks such powerful leverage tools that their eventual application could be very prejudicial to the development and integration of the Americas.

Once the superiority of international law is recognized (as it

has been by the Pact), then equal treatment of transnational enterprises and local persons is also recognized. Thus, domestic treatment of all persons using the guarantees established by the Pact is an essential part of the system regardless of the nationality of the person and the eventual extension of state diplomatic protection. Hence, the Calvo Doctrine would be fully in force in this respect, and would be compatible with the evolution of international law.

In order to actually comply with the requirements of the Calvo Doctrine, the discrimination which is domestically imposed on the multinational corporations should be eliminated. Any discrimination should disappear in order to give the multinational enterprise the security it wants, which in turn would facilitate full participation in local development.

Taking Argentina as an example, the following discriminatory restrictions exist (the list is not purportedly complete):

1. Promotion Laws (only available for Argentine companies).
2. Banking Laws (preference to local companies as defined in the law).
3. Navigation Laws (exclusivity in some cases for local companies under flag protection).
4. Aviation (restricted to national companies if Argentine flag registration is demanded).
5. Public Works not financed by international organizations or not declared as international (only local companies are allowed).
6. Engineering consultations can only be given by local concerns in cases where the state contracts their services, unless there is an international call for bids, in which case the foreign local companies have to associate themselves with local consulting engineers.
7. Public Utilities (restricted to state enterprises).
8. Mining Law (several restrictive regulations concerning foreign companies).
9. Petroleum (for service contracts, only in association with local companies). In some cases, call for bids is fully restricted to local companies.

In addition, procedures are established by many laws which discriminate against foreigners. Of course, the Pact allows discrimination against foreigners in the name of the public interest, but in most cases there is no justifiable public interest, and therefore full and equal national treatment should be extended to foreign entities.

The Calvo Doctrine and Calvo Clause do not disallow international protection of aliens, provided the same protection can be given to nationals. It is important to note, however, that under cer-

tain exchange control situations only foreign residents may have the right to claim for transfers of dividends, royalty remittances, transfer of capital and other payments (for instance, compensation for expropriation). Does this mean that there is discrimination against local businesses in favor of an external parallel market? Not necessarily, but this is a very sensitive matter which should be handled on a case-by-case basis. However, if inequality of treatment is proven, recourse to international law would be available under the established principle of equality before the law provided for by the Costa Rica Pact.

Present Argentine regulations of foreign investments give the investor the right to receive as payment, when repayment problems arise, freely negotiable (exportable and importable), external bonds of the Argentine Republic (BONEX) quoted in U.S. dollars, as a substitute for currency, which have an ascertainable market value and have been widely accepted.

More than 3.5 billion dollars of said bonds have already been successfully issued and are being used as a substitute for foreign currency. These bonds are issued at par value only to the investor at the official rate, which is lower than the external market rate. Moreover, both nationals and foreigners may legally acquire them in the market (thus paying a bonus or a discount for "overcoming" the exchange control and having freely importable & exportable "currency"). Having foreign as well as Argentine bondholders may provide a touchstone for the principle of equal treatment under the laws and may eventually lead to a solution of the current discriminatory practices against foreigners.

It should be noted that current Argentine legislation is not as "anti-foreigner" as before. Many other Latin American countries (for instance, the Andean Pact members) have even more discriminatory statutes. If the Calvo Doctrine is to be fully applied, a substantial change of domestic laws and regulations as well as attitudes and practices would have to take place. Once these changes take place, the virtue of the Doctrine would then be clearly seen.

The concept of equal treatment of foreigners together with the concept of direct access to international remedies regardless of allegiance, overcome any objections to granting stateless individuals or foreign shareholders access to international jurisdiction. Recall that the International Court of Justice in the famous *Barcelona*

Traction case[33] denied the government of Belgium (whose nationals were the shareholders of a Canadian Company) the right to bring a claim before the Court because the allegedly injured company was not of Belgian nationality. This was done by ruling on a preliminary question raised by the Spanish Government, defendant in the case:

> The fact that the Barcelona Traction company does not possess Belgian nationality; and having regard also to the fact that no claim whatsoever can be recognized in the present case on the basis of the protection of Belgian nationals, being shareholders of Barcelona Traction, as the principal of those nationals lacks the legal status of a shareholder of Barcelona Traction, and as international law does not recognize, in respect of injury caused by a State to a foreign company, any *diplomatic* protection of shareholders exercised by a State other than the national State of the company. (emphasis added).[34]

The decision is clearly based on traditional international law. According to the Pact there would not be any legal obstacle to the intervention of the Human Rights Commission. Thus, this preliminary objection would have been rejected in proceedings before the Commission.

VI. Controlling the Multinational Enterprise: An Unsolvable Problem

An analysis of the last progress report of the U.N. Commission on Multinational Enterprises[35] demonstrates that the gap separating countries which adhere to the traditional rules of international law concerning the control and protection of multinational enterprises in host countries, from those following the Calvo Doctrine, has not been substantially bridged. This gap has hindered the issuance of a coherent set of rules. The U.N. Commission has been working on the subject together with several other U.N. and regional organizations for more than 11 years. There is no question as to the sovereignty of each state concerning its natural resources and other economic activities performed in its territory. Problems arise, however, with respect to the establishment of multinational

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33. 46 I.L.R. 2 (I.C.J. 1964).

34. *Id.* at 26.

35. Commission on Transnational Corporations, U.N. ESCOR Supp. (No. 7), U.N. Doc. E/1984/17/Rev. 1, E/C. 10/1983/S/5/Rev. 1.

enterprises. The Latin American countries, and the majority of the less developed ones, would only accept limitations on sovereignty which are not considered detrimental to their right to decide their future, regardless of whether they assume any obligations concerning aliens. On the other hand, to industrialized nations, the right to protect nationals abroad is imposed by customary international law.

The concept of sovereignty implied in the Calvo Doctrine does not by itself give a nation absolute discretion in its dealing with aliens. Moreover, its purpose is not to preclude the application of any rule of international law concerning aliens, provided that respect for the concept of equality between nationals and foreigners is maintained which means that aliens shall have the same access to judicial remedies that nationals enjoy. Unfortunately, there has been a return to the concept of full and absolute sovereignty by some Latin American countries when they exercise "exclusive" jurisdiction over aliens' claims. Consequently, disagreements are more readily apparent in that part of the draft Code of Conduct of the U.N. Commission on Multinational Enterprises concerning nationalization, compensation and jurisdiction.[36] There appears to be only one point in common, the right to nationalize or expropriate. There are wide divergencies on the remainder.

On the other hand, if one looks to the right to ownership of private property as set out in the Pact, one immediately sees the futility of the entire previous discussion.

> *Article 21. Right to Property*
> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
> 2. *No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to forms established by law.* (emphasis added).

The simple wording of Article 21 of the Costa Rica Pact regarding the guarantee of ownership could not be better expressed. If one takes into account the remedies provided for by the Pact, then it must be agreed that:

1. Guarantee of property rights is adequately provided for.

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36. 10 U.N. ESCOR. EC/10/1983/564 (spanish).

> 2. This guarantee is part of international law insomuch as the Pact
> has incorporated it as a fundamental human right. The world community has produced a superior law to which all nations will adhere.
> 3. This right to own private property *does not differentiate between nationals and foreigners.* All persons have the right to a just compensation once expropriation has occurred. If domestic laws do not conform to this, they have to be amended correspondingly.

One problem lies in the fact that there is not an accepted definition of what is considered "just compensation". The Pact could have been more specific on this point, nevertheless, a tremendous step forward has been taken if one compares the text of the Pact with what is being discussed on the U.N.'s Code of Conduct of multinational enterprises. For the time being, the Pact leaves the determination of what constitutes just compensation, to domestic institutions and rules. It is interesting to review the situation with regard to municipal statutes like those of Argentina. The Argentine position concerning expropriation and the payment of prompt, adequate, and just compensation shows quite an unstable history.

Article 17 of the Argentine Constitution of 1853 states:

> Property is inviolable, and no inhabitant of the Nation may be deprived thereof except by virtue of a sentence founded on law. Expropriation for reasons of public utility must be authorized by law and previously compensated. . . . The confiscation of property is stricken out forever from the Argentine Penal Code.[37]

Article 17 was not merely a copy of principles already adopted by the U.S. Constitution, but rather it reflects a supreme effort to implement stable well defined rules concerning the respect that the Argentine Republic would give to property rights of its inhabitants (nationals or foreigners).

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37. CONSTITUTION OF THE REPUBLIC OF ARGENTINA, art. 17 (1953). The reason behind the particular wording of article 17 can be traced to Argentina's history. During the dark decades that preceded the adoption of the Constitution of 1853 it was common practice (especially during the dictatorship of Juan Manuel de Rosas) to arbitrarily seize personal property. This was done to increase revenues or even to settle personal disputes. Just before the adoption of the Constitution, the Provisional Director of the Confederation (afterwards, first president of the republic), Justo José de Urquiza, decreed the abolition of all confiscations in order to strengthen property rights in Argentina.

Following the idea of implementing clear-cut fundamental principles consistent with a policy of encouraging immigration (article 25), the Argentine Constitution states in article 20:

> Foreigners enjoy in the territory of the Nation all the civil rights of a citizen; they may engage in their industry, commerce or profession; own real property, purchase it and alienate it; navigate the rivers and coasts; freely practice their religion; make wills and marry in accordance with the laws.

Hence, we can appreciate that one of the fundamentals in the organization of Argentina as an immigration country, as a land of opportunities, was to put nationals and foreigners on equal footing, so long as they were residents of Argentina.

Referring back to article 17, the phrase stating that confiscation "is stricken out forever from the Argentine Penal Code"[38] is in fact, not completely accurate. At the time article 17 was drafted, a penal code did not exist. The phrase was included to emphasize the illegality of taking property without respecting the supreme requirements set forth in article 17 of the Constitution.[39]

However, the constitutional guarantee of private property rights set forth in article 17 of the Constitution did not prevent, however, the implementation of clearly discriminatory and arbitrary measures against foreign owners. This turned out to be especially true during the twentieth century. So called "new and progressive" ideas relating to the roles that capital and property rights play in society were gradually accepted by the ruling administrations in Argentina. This occurred in spite of what the Constitution prescribed in Article 17. Thus, a subtle and corrupt method of gaining control over key sectors of the economy was utilized. Professor Rosenn explains this method in the following manner:

> An important part of the expropriation picture, *especially for the foreign investor lies outside the constitutional and statutory provisions regulating expropriation.* A number of expropriate or confiscations of the property of foreigners, as well as nationals, has been effected through special legislation or decree, *or has been disguised as a bona fide regulatory measure.* Generally, when this has happened, the courts and the regular formal legal system have not been irrelevant, but neither have they been of controlling importance. Such investment disputes have

38. *Id.*

39. J. González Calderón, Derecho Constitucional Argentino, 221 (1931).

> been highly politicized, and their ultimate resolutions have turned more on political and economic variables than upon juridical issues. *In a few cases court decisions have been critical, but in most cases satisfactory settlements have been negotiated outside the courts.* (emphasis added).[40]

The various Argentine expropriation cases cited in Professor Rosenn's article, comprising a period of almost forty years, undoubtedly show a trend of increasing expropriations without respecting the formalities of due process. It is therefore true that many of the expropriation decisions were made ". . . outside the constitutional or statutory . . ." framework.[41] Thus, inevitably, these expropriations turned out to be political in nature, as opposed to judicial. Professor Rosenn stresses the importance of court decisions in this respect, which have been very few when compared with the number of out-of-court settlements. We can only partially agree. The expropriation cases listed in Professor Rosenn's article demonstrate that respect for the law and constitutional guarantees has not been strictly followed. A clear and well defined constitutional statute dealing with expropriations, however, would help towards reaching satisfactory out-of-court settlements. In situations where an agreement was not reached, the statute would provide for clear cut rules of general applicability in a judicial proceeding.

The increasing expropriations in Argentina, aimed against the more visible multinational enterprises and national groups, was caused in part by new ideas with regard to the concept of property rights and their role in society. Article 17 of the Argentine Constitution established the principle of inviolability of private property, imposing several safeguards to protect the individual against illegal removal by the state. In essence, private property was seen as a fundamental right of man prior to the organization of the Republic. Those that advocated the new concept of property rights (and their role in society) argued that the concept expressed in article 17 of the Constitution was in fact anachronistic and contrary to the solidarity principles that should prevail in "modern" societies. Thus, during the Peron dictatorship (1945-1955) a new Constitution was voted, abrogating the 1853 Constitution. The basic conceptual foundations of the 1949 Constitution (i.e., the social func-

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40. Rosenn, *Expropriation in Argentina and Brazil: Theory and Practice*, 15 VA. J. INT'L L. 298 (1975).

41. *Id.*

tion of capital) were taken from the fascist counterparts of the Italian and German constitutions prior to the termination of the Second World War. Articles 38-40 of the 1949 Constitution state:

> *Article 38.* Private property has a *social function* and, consequently, it will be subject to the obligations imposed by law for the purpose of the common good. . . . Expropriations for the public good or general interest must be pursuant to law and subject to prior compensation. . . . Confiscation of assets is forever abrogated from Argentine legislation.
>
> *Article 39.* Capital must be at the service of the national economy and have as its principal purpose the social welfare. The diverse methods of exploitation of capital cannot go against the goal of the general benefit of the Argentine people.
>
> *Article 40.* The organization and exploitation of wealth have as a goal the welfare of the people, within an economic order in conformance with the principles of social justice . . . Public utilities originally belong to the State, and in no way will they be alienated or given in concession for their exploitation. The ones already in the hands of private persons will be transferred to the State by means of purchase or expropriation with prior compensation, *when a national law so determines.*[42]

The price for the expropriation of public utility-concession will be that of historical cost of the assets affected by expropriation less the amount of amortization during the time elapsed from date the concession was granted, and the excess over a reasonable profit which will also be considered as a return on the invested capital. (emphasis added).

The 1949 Constitution adopted the concept of the social function of property, social justice and adjustment of capital and wealth utilization to social welfare principles. Notably, however, the 1949 Constitution repeated the safeguards against illegal expropriation and confiscation established in the Constitution of 1853 and also mentioned prior compensation ". . . when a national law so determines. . . ."[43] Finally, the paragraph specifically addressed to public utilities was aimed at constitutionally justifying the measures already taken against some foreign holdings (i.e., telephone companies subsidiaries of ITT, railroads, etc.). It also

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42. CONSTITUCIÓN NACIONAL arts. 38-40 (Argentina 1949) (ed.'s trans.)
43. *Id.*

served as the basis for calculating the compensation for future expropriations, since the huge amounts of foreign reserves in Argentina had been dramatically reduced by the end of World War II due to Peron's spending policies.[44] In line with the real purpose of Article 40 of the 1949 Constitution, the expropriation law 13.264[45] provided for quick procedures that authorized the expropriating agency to take possession of the desired property. The agency could comply with the "prior compensation" requirement by merely depositing at the owner's disposal thirty percent of the tax valuation of the property involved. In a country traditionally hit by high inflation,[46] these reduced payments and the delayed judicial proceedings[47] rendered the expropriation law unconstitutional[48] because the recipient did not receive the just compensation he was entitled to.

The history of the application of the expropriation statute by Argentine courts[49], especially concerning the seizing of real estate, shows that its effect has been to partially legalize expropriations without proper compensation. Law No. 13.264 continued in effect even after the 1949 Constitution was repealed in 1957. The Argentine Supreme Court therefore had to find a way to provide condemnees with full compensation of their seized property, since the expropriation statute in force permitted the taking of the property by merely depositing thirty percent of the tax assessment. This amount was in no way representative of the fair market value of the asset involved. The solution was to establish the principle of "replacement," by which the money to be paid to the condemnee would allow him/her to be in a position to buy an equivalent piece of property, as of the moment the decision was rendered.[50] This principle, even though well intentioned in practice, did not completely accomplish its avowed purpose, due to problems with the very judicial expropriation proceedings (i.e., technical assessments

44. C. DÍAZ ALEJANDRO, ESSAYS ON THE ECONOMIC HISTORY OF THE ARGENTINE REPUBLIC, 537 (1970).

45. Law 13.264 [1948] Amario de Legislacion (Argentina).

46. *See* Rosenn, *The Effects of Inflation on the Law of Obligations in Argentina, Brazil, Chile and Uruguay*, 2 B.C. INT'L & COMP. L. J. 269 (1979).

47. *See* Rosenn, *Expropriation, Inflation and Development*, 1972 WIS. L. REV. 845 (1972).

48. *See* A. GORDILLO, EXPROPRIATION IN THE AMERICAS 21 (A. Lowenfeld ed. 1971); Bedart-Campos, *Régimen constitucional de la expropriación*, 144 LA LEY 953 (1971).

49. *See* Rosenn, *supra* note 40, at 300 *et seq.* for a detailed listing and analysis of the Argentine cases on the subject.

50. *See* Provincia de Santa Fe v. Nicchi, 127 LA LEY 164 (1967).

of the value of property took a considerable amount of time and, once obtained, there was another big time lag between the valuation by experts and the final judicial decree) as well as the erosion in purchasing power caused by double and triple-digit inflation rates.

There are always possibilities of new (open or creeping) expropriations in Latin America, especially in politically unstable countries such as Argentina, which are executed by the executive, the legislative or the judicial branches. These expropriations are usually carried out without considering the ineffective results of the expropriatory measure per se; and without considering the negative effects such decisions have on the investment decision of multinational enterprises. Thus, the expropriations end up being counterproductive. As Professor Lowenfeld describes it, the attitude of Latin American governments regarding the subject of expropriations may be counterproductive, however ". . . we [the United States] cannot change the receptivity of the hemisphere to private investment by cost-benefit analysis. . ."[51]

The Argentine cases dealing with the unilateral cancellation of oil contracts in 1963,[52] the Swift-Deltec bankruptcy proceedings,[53] the discriminatory nationalization of certain banking subsidiaries of Chase Manhattan Bank, Citibank and other foreign finance institution by the Peronist administration,[54] as well as the nationalizations of the telephone, electricity and railroad industries during the forties and fifties demonstrate that (except in those cases where the final settlement of judicially fixed compensation was obtained during the duration of the administration that decreed the expropriation) either there was no further interest on the part of the foreign condemnee to recover the seized property on the one hand; or to increase the amount of compensation on the other. Moreover, it could well be that the multinational enterprise involved had to negotiate with a new administration interested in attracting foreign investment and, consequently, it negotiated out-of-court in relatively satisfactory terms. Unfortunately for Argen-

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51. Lowenfeld, *Reflections on Expropriation and the Future of Investment in the Americas*, 7 INT'L LAW. 121 (1923); *see also* Comment, *Public Policy and Negating Discriminatory Expropriations in the Municipal Courts* 7 CORNELL INT'L L.J. 171 (1973).

52. EDWARDS, *The Frondizi Contracts and Petroleum Self-Sufficiency in Argentina*, in FOREIGN INVESTMENT IN THE PETROLEUM AND MINERAL INDUSTRIES-CASE STUDIES OF INVESTOR-HOST COUNTRY RELATIONS 157 (R. Mikesell ed. 1971).

53. *See* Rosenn, *supra* note ___, at 311.

54. Law 20.522 [1973] C Anales de legislación argentina.

tina, the net result of such compensatory measures (either by out of court settlements or legislative fiat) is overpayment and an increasing distrust of Argentina's investment attractions.

The grave defects of the Argentine statute on expropriation were so acute that it was generally accepted that the worst thing that could happen to *any* resident of the country, whether a national or a foreigner, was when the state decided to expropriate any of his assets. The menace of expropriation was an inevitable risk which Argentines had to abide with, knowing that it meant a big economic loss to wait for several years of judicial proceedings in order to collect the depreciated balance of compensation owed. Such state of affairs had to be changed. It was well settled that law No. 13.264 had to be modified and replaced by another expropriatory statute more in accordance with the present needs of Argentina. The new statute would also have to be compatible with the letter and spirit of Article 17 of the Argentine Constitution of 1853.[55]

Thus, in 1977, law 21.499 was enacted.[56] Its implementation permitted the speedy and effective expropriations of vast sectors of Buenos Aires in order to build the controversial elevated motorways that now criss-cross the city. Article 10 of said law introduced a dramatic change into the concept of compensation for expropriation. Adopting in full the "replacement" principle established by the Supreme Court ten years before, article 10 states:

> Compensation *will only comprise the objective value of the property and the damages that are an immediate or direct consequence of the expropriation.* Personal circumstances, affective valuations, hypothetical gains or the increase in value that the public work (or purpose) might yield to the property will not be taken into account for determining the compensation. Loss of gains will not be paid. Included in compensation will be depreciation of money and interest. (authors' translation)[57]

The confiscatory provision of the previous expropriation statute was eliminated. Under the present law, if no agreement is reached between the state and the condemnee, the expropriating agency will have to pay *in full* the amount assessed by the technical experts appointed in order for it to take possession of the piece of

55. *See supra* note 37 and accompanying text.
56. Law 21.499 [1977] A Anales de legislación argentina.
57. *Id.* art. 10.

property (articles 23 and 25). The damages will be fixed by the intervening court as of the moment of the final judicial sentence (article 20).

The new expropriation statute makes the entire expropriation procedure a regulation pursuant to the constitutional guarantee protecting private property. This "regulation" can only be exercised by the state if it follows certain indispensable procedures:

> a) that establish boundaries beyond which the expropriatory power cannot be utilized;
> b) for the judicial proceedings for the respect of due process of law (Title V of the law);
> c) regarding the method of compensation which envisage a wider protection of the property rights of individuals (Title IV of the law).[58]

The principle of "replacement" or of "integral reparation" was adopted by this statute. This means that the *compensation has to be just, which implies that it has to be prompt, in constant real values, integral and paid prior to the taking of possession.* It is clear that the objective value of the property taken can be ascertained relatively easily when the particular asset is not unique, meaning that it has a market value, such as real estate for example. However, a special problem is posed by the provision of article 10 providing that "loss of gains will not be paid . . ."[59], especially with regard to the amount of compensation to be paid by the government in cases where the stock of a company is expropriated. It is clear that profits form an integral part of the amount to be paid. Article 10 of the statute mentions that: "damages that are an immediate or direct consequence of the expropriation . . ." are to be indemnified. In turn, Article 519 of the Argentine Civil Code established that: "Damages (*daños e intereses*) include the value of the loss suffered and that of the profit which the creditor has been prevented from collecting due to the default incurred." (authors' translation).[60] Hence, despite an apparent contradiction between the two above cited provisions the inclusion of the lost profits item as part of the indemnification amount is appropriate. In this respect, we believe that the Civil Code is secondarily applicable to

58. Casagne, *Expropriación: Causa, Sijeto y Objeto-Law Olvas o Planes de Ejecución Diferida*, 41 Asociación Argentina de Derecho Administrativo (1977).

59. *See supra* note 57 and accompanying text.

60. CÓDIGO CIVIL DE LA REPÚBLICA DE ARGENTINA art. 519 (1871).

this type of case.[61]

In summary, law 21.499 lays out fairly equitable and just rules which are applicable equally to nationals and foreigners. It is also fully compatible with the letter and spirit of Article 17 of the Argentine Constitution[62] as well as being fully compatible with article 21 the Costa Rica Pact.[63] The right of expropriation of property (whether owned by a national or a foreigner) is an inherent right of the State for the satisfaction of public purposes. Thus, said measure would constitute a legal act of the expropriating state. In the case of Argentina, case law has also evolved in this respect. The judiciary considers that it has no power to scrutinize the legality of an executive or legislative act. However, if the executive or legislative act encroaches on the constitutionally protected private property rights, then just compensation has to be paid.[64] If we accept that a judicial decision is an act of government, i.e., a political act,[65] then creeping expropriations performed through illegal or unconstitutional judicial interpretations should be treated as tantamount to a seizing of property. Consequently, if just compensation is not paid to the totally/partially expropriated party, then this judicial decision constitutes a confiscation which is illegal under Article 17 of the Argentine Constitution.

It would be more desirable to have "prompt, adequate and effective" compensation. This Anglo-Saxon concept is similar to that included in the expropriation statute of Argentina. When the national laws approximate the Anglo-Saxon concept, then the property belonging to multinational enterprises would be adequately protected against confiscations. However, the problems raised by the crisis in the world economy have affected the less developed countries to a greater extent than industrialized countries. This has prevented some less developed countries from meeting the "prompt, adequate and effective" requirements of compensation.

If the Costa Rica Pact is ratified by the majority of the American nations, it can be asserted that inter-American law limits the

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61. This is more fully explained by the Commission which drafted Law 21.499. *See* Linares, *El valor objectivo de la expropriación. Determinacion. Criterios de Valuación*, 65 Asociación Argentina de Derecho Administrativo (1975).

62. *See supra* note 37 and accompanying text.

63. *See supra* note 28 and accompanying text.

64. See Canton v. Gobierno Nacional, 1979-C LA LEY 217.

65. *See* Vanossi, *El marco constitucional de la sentencia*, 1981-D LA LEY 1267 (1981); Chichizola, *Requisitos constitucionales para una sentencia válida*, 1981-D LA LEY 1138 (1981).

exercise of national sovereignty by requiring the individual states to enact laws dealing with expropriations based on well-determined social or public interests, and providing for just, prompt, adequate and effective compensation. All members of the international community would have to accept this as a consequence of a legally binding limitation of their national sovereignty. In other words, the existence of a valid and enforceable international treaty really means both an accepted limitation of national sovereignty, and the abrogation of previous customary rules regarding state diplomatic protection for alleged injuries to its nationals abroad. The use of force as a sanction (direct or indirect) in such cases has been banned by the U.N. Charter, as we pointed out before. However, if a state intercedes not in its own right but on behalf of a person (multinational enterprises included), it would not be against established international law, provided the state waits for its national to exhaust the domestic remedies.

Recent cases concerning Argentina may illustrate this important point. One of them was the application of the Hickenlooper Amendment[66] upon the annulment of some petroleum contracts originally executed by the Frondizi administration in the 1960's and later deemed illegal by a succeeding Argentine Government.[67] The United States suspended aid to Argentina as a sanction, because Argentina allegedly did not pay "speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof"[68] within a term of six months. This unilateral action by the United States was clearly against international law. It should also be noted that the annulment challenged by the United States was not based on claims of expropriation, but rather on breach of contract.

Another example of leverage concerns the applied against Argentina concerns the amendment of Article 4 of the Bankruptcy Law.[69] In proceedings started by a local company, Celulosa Argen-

66. 22 U.S.C. § 2370 (1982); The Hickenlooper Amendment places the President under a duty to interrupt aid to any country which expropriates American-owned assets without paying "speedy compensation for such property in convertible foreign exchange equivalent to the full value thereof (§ 2370(e)). The main goal of the amendment is to protect the property of United States citizens who have invested abroad.

67. *See* Rosenn, *supra* note 40, at 306.

68. *See supra* note 66.

69. Law 19.551 [1972] B Anales de Legislación Argentina, art. 4 states:

Creditors meetings decreed abroad: The declaration of a creditors meeting by a foreign court is motive for the opening of a like proceeding in the Republic, at the request of debtor or of a creditor who has to be paid in the Republic. With-

tina S.A., a provincial court unjustly held (in an unreported opinion) that Article 4 of the Bankruptcy Law provided for the postponement of creditor's claims arising from external loans, which were to be repaid only abroad (actually, article 4 does postpone said credits in cases of simultaneous bankruptcy proceedings abroad and locally, and only when claims accepted in foreign countries are presented for recognition in the local proceedings). Since there are major international banks involved in the *Celulosa* case, the government was pressured into amending Article 4 to suit the banks, as a pre-condition to the actual disbursement of an agreed refinancing loan to the Argentine Government. Apparently, the amendment was enacted because otherwise Argentina would be considered in default of its foreign debt.

These are clear cases of the undue use of power by the foreign state. The terms contained in the instruments of the refinancing of Argentina's current foreign debt show us that there are real risks that the same methods will be utilized again. If Argentina had been a member of the Costa Rica Pact it would be liable to claims filed either by the affected parties themselves, or by states acting on behalf of the multinational enterprises involved, requesting that their property rights be respected on account of undue denial of justice in the local courts.

It should be pointed out that both the Commission and the Court are empowered to take preventive measures in grave and urgent cases (articles 48(2) and 63(2) of the Pact). The conflict raised by the interpretation of Article 4 of the Argentine Bankruptcy Law would call for legislative action in order to prevent discrimination (e.g., to prevent the violation of the constitutional principle of equality before the law). Those proceedings could have been started to request the application of article 2 of the Pact, which requires a member state to adopt, through the appropriate legal channels, "legislative measures or other measures as may be necessary to give effect to those rights or freedoms."

The Pact contains, as we have already shown, a rule regarding

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out prejudice to what has been established in the international treaties, the foreign proceedings cannot be invoked as against creditors to be paid in the Republic, or to dispute the rights they might possess over assets existing in the territory of the Republic; or to annul the acts executed by the debtor.

Credits payable abroad: Once the proceedings are started in this country, the creditors who must be paid within the country have priority over those creditors who must be paid abroad; the latter can only exercise their rights, a balance remains, once all prior debts are totally paid. (author's trans.)

the exhaustion of remedies in the local jurisdiction and the application, under the jurisdiction of its organs, of the new world law which provides for the protection of basic human rights. If the rule to be applied would make no exception at all for national treatment, the entire draft of the U.N. Code of Conduct for Multinational Enterprises should be overhauled accordingly.

VII. Conclusion

The international agreements dealing with human rights have already provided for the basic guarantees which constitute the so-called "minimum international standards" for protection of multinational enterprises. Moreover, the international community, working with rules like those contained in the Costa Rica Pact, now extends such protection to nationals and foreigners alike without any discrimination. As pointed out, the Pact also provides for an adequate machinery, to which affected private parties have access to bring individual claims of human rights violations. Finally, those rights concerning property, jurisdiction and due process of law have been adequately defined by the Pact, so that there is no longer any need to find a formula for their proper definition. It is now very easy to bring to the forefront, as being compatible with international law, the Calvo Doctrine. The Calvo Doctrine espouses what the Costa Rica Pact has accepted. That is, that foreigners and aliens in any country shall have their basic human rights guaranteed equally and without any discrimination.

Individuals now have access to international institutions created to protect them from infringements of human rights. It is important at this stage to emphasize the futility of the current dispute between the different groups of countries holding divergent views on this subject. This struggle is going on in the discussion of different drafts in several international fora (OAS, ILO, SELA, GRULA, Inter-American Juridical Committee, etc.). Just putting together what is being elaborated on at the U.N. and the other organizations with the principles and rules of the Pact, would constitute a gigantic step forward. An international code of conduct for the multinational enterprises, based on the rights covered by the Pact, could then easily be executed.

From the point of view of the Calvo Doctrine, present international law can be summarized as follows:

1. Foreigners and nationals shall be treated alike with respect to

the protection of their rights (equality before the law).
2. It is up to the domestic laws and regulations to assure that basic human rights will be respected.
3. In case of violations of these rights, remedy shall lie in the domestic jurisdiction, in accordance with local laws and regulations.
4. The Calvo clause would no longer be required to safeguard the principle of equality in contracts with the states. Any violation of existing contracts is always subject to recourse according to the rules of the Pact in spite of any provisions to the contrary in the contracts because of the superiority of international law.
5. If there is any delay or denial of justice, concerning basic rights covered by the Pact, the Commission is open to individuals' claims. There will no longer be any problems concerning dual nationality, stateless persons or nationals of third countries injured indirectly (*i.e.*, the *Barcelona Traction* case). Only in cases of grave and urgent situations the Commission (and the Court) may act through special provisional measures. Under the Pact, member states are entitled to appear before both the Commission and the Court, but not in their own rights (as in customary international law) but in behalf of their nationals.

The evolution of international law has brought the Calvo Doctrine into a position where it can play a vital role with respect to the treatment of multinational enterprises, based on equal protection as declared by the international community through the Pact. Formerly, individuals were not subject to classic international law, but they had to be provided for and protected. Therefore, there was only one practical way to protect the rights of aliens and that was by subscribing to the fiction that it was the state, rather than one of its nationals, that had sustained the injury. Now it is feasible to protect equally all individuals, whether foreign or national, by making them part of an international community concerned with their basic rights.

Once the superiority of international law is accepted, it is up to the individual states to spell out the implementing laws and regulations. In reference to the relation between international and national law, Hans Kelsen writes:

> If we conceive of international law as a legal order to which all the states (and that means all the national legal orders) are subordinated, then the basic norm of a national legal order is not a mere presupposition of juristic thinking, but a positive legal norm, a norm of international law applied to the legal order of a concrete state. Thus the international legal order, by means of

> the principle of effectiveness, determines not only the spheres of validity, but also the reason of validity of the national legal orders. Since the basic norms of the national legal orders are determined by a norm of international law, they are basic norms only in a relative sense. It is the basic norm of the international legal order which is the ultimate reason of validity of the national legal orders, too.[70]

Promotion of just laws to guarantee the right to be protected in all domestic jurisdictions is also part of the scheme approved by the Pact. In this respect, once a supra-natural law has been enacted, its implementation in the member states is assured by Article 2 of the Pact. Kelsen states that:

> A higher norm may determine not only the organs and the procedure by which lower norms are to be created but also, to a certain extent, the contents of these norms. But a higher norm may restrict itself to empower an authority to create lower norms at its own discretion. It is in the latter manner that international law forms the basis of the national legal order.[71]

The practical application of the foregoing can be easily demonstrated. For example, assuming that Argentina is interested in promoting a steady and increasing flow of foreign investments, then the following strategy should be adopted:

> 1. Sign and ratify the Costa Rica Pact, expressly accepting the jurisdiction of its Court of Justice.
> 2. Enact a new Foreign Investment Law giving foreign investors the same judicial and political treatment as that given to nationals. The law could consist of only two articles: one granting equality of treatment and the other abrogating the many laws establishing discriminatory rules against foreigners.
> 3. Promote the adoption of an international code of conduct for multinational enterprises.

In summary, this analysis of the interaction of the several American states demonstrates that although there are still many problems, positive steps are being taken for the integration and development of the Americas:

> 1. The current level of foreign indebtedness faced by several Latin American countries is so great, that it goes beyond the debtor-countries' capacities to pay the principal and interest

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70. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 415 (1952).
71. *Id.*

owed.

2. The whole process of renegotiation of the region's foreign debt (which is handled on a country-by-country basis) is being conducted amidst an extremely sensitive political environment.

3. The precautionary measures taken by the international banking community, establishing stiff contractual terms with some countries (as in the case of Argentina, requiring the guarantee of the Argentine Government for all public and private debts, waiver of sovereign immunity in case of prejudgment attachments, and the establishment of jurisdiction in New York); or the use of political leverage to have certain domestic legislation modified (in Argentina's case: modification of Article 4 of the Bankruptcy law) can only increase the political and economic instability in the area. Moreover, Latin American countries often resort to extra-legal retaliatory measures, creating additional obstacles to the process of development and integration in the Americas.

4. The measures described in 3 above are more a reflection of the principles of traditional international law as opposed to modern international human rights law (which has, in fact, evolved from the classic concepts of international law). In this respect the Calvo Doctrine regains importance since all debt, investment, expropriation, and other international disputes can be solved in the host countries' tribunals, with the guarantee of equal protection extended to multinational enterprises and with recourse to the Costa Rica Pact's Commission or Court of Justice in case of delay or denial of justice.

5. The Costa Rica Pact grants equal protection of human rights to both nationals and foreigners. Such protection is available to multinational enterprises. It is strongly recommended that the member states of the Organization of American States that have not yet adhered to the Costa Rica Pact do so, expressly accepting the jurisdiction of its Court of Justice.

6. Wider acceptance of the Costa Rica Pact's basic rights and remedies in the Americas, coupled with a vigorous case law from the Court of Justice will undoubtedly stimulate the process of development and integration in the Americas.

7. The full application of the Costa Rica Pact would render useless the current discussions being held at the various international fora concerning the adoption of codes of conduct for multinational enterprises, as well as any specific, regulatory foreign investment statutes. It is also recommended that those OAS member states that have adhered to the San José de Costa Rica Pact take positive legislative steps to modify their domestic legal systems to eliminate incompatible discriminations against aliens.

The above listed conclusions demonstrate that some positive elements can be drawn from the foreign debt crisis but only if the proper steps are taken by the individual OAS member states to contribute to the development and integration of the Americas.