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## A Historical Account of the Internationalization of Invest Disputes: What the Global South Should Know When Negotiating Bilateral Investment Treaties

Felix O. Okpe

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# A HISTORICAL ACCOUNT OF THE INTERNATIONALIZATION OF INVESTMENT DISPUTES: WHAT THE GLOBAL SOUTH SHOULD KNOW WHEN NEGOTIATING BILATERAL INVESTMENT TREATIES

*Felix O. Okpe\**

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## INTRODUCTION

The ICSID Convention<sup>1</sup> was negotiated primarily for the protection of foreign investments and considerations of economic development in the host state, particularly in the global south. The global south refers to developing countries in Africa, Latin America, and Asia. On the other hand, the global north is made of countries considered more developed, advanced and richer in terms of capital and economic development. The ICSID Convention established the International Center for Settlement of Investment Disputes (“ICSID”).<sup>2</sup>

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1. Convention on the Settlement of Investment Disputes Between States and National of other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter the ICSID Convention].

2. See Felix O. Okpe, *Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment and the Promise of Economic Development in*



ICSID provides facilities for conciliation and investment treaty arbitration between investors and state parties.<sup>3</sup>

Under international law, and perhaps in the context of the ICSID Convention, it is fair to state that; the potential for investment disputes is more likely with respect to foreign investments hosted in the global south. In most situations when investment disputes arise, foreign investors often allege that an act that includes regulatory initiatives of the host state or an omission attributable to the host state, has occasioned a violation of applicable investment agreement.<sup>4</sup> Sometimes the basis for the alleged breach results from underlying contractual claims by the foreign investor.<sup>5</sup> Thus, investment claims have created the intellectual foundation for a spirited debate over whether the insulation of contractual claims from treaty claims should be standardized under international investment law and arbitration. There are valid arguments on both sides of the divide. In spite of good attempts to articulate a more acceptable position on the issue, including the suggestion of an "integrationist approach" to reconcile the opposing propositions on this critical matter, the jury of scholars is still out on that question.<sup>6</sup> Arbitral jurisprudence has provided little or no guidance on the resolution of the debate either. The underlying current

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*Host States*, 13 RICH J. GLOBAL L. & BUS. 217, 218 (2014). See also *The ICSID Convention*, *supra* note 1, at art. 1(1-2).

3. See Note, *Mediation of Investor-State Conflict*, 127 HARV. L. REV. 2543, 2546 (2014).

4. See Lise Johnson & Oleksandr Volkov, *Investor-State Contract, Host state "Commitments" and the Myth of Stability in International Law*, 24 (3) AME. R. INT'L ARB. 361, 362 (2013) (stating that "[i]n the international law realm, tribunals have been taking a wide view of enforceable 'commitment' and have been imposing liability for a broad range of government measures (even measures of general applicability taken in the public interest) that interfere with those obligations").

5. See generally Kate Parlett, *Claims under Customary International Law in ICSID Arbitration*, 31 ICSID REV. - FOREIGN INV. L. J., 434 (2016).

6. See James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L. 351, 351-52 (2008). Crawford characterized the debate this way:

No issue in the field of investment arbitration is more fundamental, or more disputed, than the distinction between treaty and contract. There is a struggle between those who believe bilateral investment treaty (BIT) claims should be insulated from contractual claims and those who want to relate the two. That struggle has led to a divided jurisprudence and -to a tendency to caricature opposing positions. In these circumstances, both time and further reflection are necessary before any consensus can emerge, and the views of one proponent in the debate are no more likely to achieve immediate acceptance than the views of any other. . . [Crawford juxtaposed the underpinning of the struggle like this]. . . the proposition that a host state cannot rely on its own law as a justification for failing to comply with its international obligations, including those obligations arising under treaties for the protection of foreign investment; on the other, the proposition that an investment is, in the very first place and by definition, a transaction occurring in the host state and governed by its laws.



promoting the debate is the penchant of host states in the global south to rely on national laws as a justification for non-compliance with investment protection obligations contained in investment agreements.<sup>7</sup> This has become problematic in investment treaty arbitration. It has also led to inconsistent jurisprudence and a re-emerged “international minimum standard” for the interpretation and adjudication of investment disputes under the ICSID Convention.<sup>8</sup> The international minimum standard has resurrected in the form of standard umbrella clauses,<sup>9</sup> that are often relied on by arbitral tribunals to elevate contract claims to treaty claims, and the fair and equitable treatment (“FET”) standard on the treatment of foreign investments in the host state, regardless of the provisions of national law or the host state regulatory initiatives on foreign investment. The global south is still battling to appreciate this evolving phenomenon under international investment law and arbitration. More broadly, this development, more than anything else, has created significant confusion between considerations for the protection of investments and contribution to economic development of the host state through foreign investment.<sup>10</sup> The common response by host states in investment arbitration commenced under the ICSID Convention, have centered around the question of the

7. The term investment agreements or international investment agreements will be used interchangeably with Bilateral Investment Treaties (hereinafter BITs).

8. See *e.g.*, *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, *Objections to Jurisdiction*, Aug. 6, 2003, 8 ICSID Rep. 406 [hereinafter *SGS v. Pak.*]; *SGS Societe Generale de Surveillance SA v. Republic of Phil.*, ICSID Case No. ARB/02/6, *Objections to Jurisdiction*, Jan. 29, 2004, 8 ICSID Rep. 515 [hereinafter *SGS v. Phil.*].

9. An umbrella clause is a provision found in most investment agreements that imposes a requirement on the host state or the other contracting party to guarantee the observance of the obligations it entered into with investors from the other contracting party. A typical foreign investment agreement is usually bilateral. It is an agreement entered between two contracting states for the promotion and protection of foreign investments in their respective territories. A significant innovation found in these types of agreement is the resolution of investment disputes through the mechanism of investment arbitration under the ICSID Convention subject to the requirement of consent by the two contracting states. The investment agreement essentially protects the investment of investors from either of the contracting parties in the host state. For further reading on umbrella clauses. See Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developed and Developing Countries in Foreign Investment Disputes*, 14 *GEO. MASON L. REV.* 135 (2006).

10. *Id.* at 138 (noting that “[o]ne sees that the debate over interpretation of [umbrella clauses] is actually the latest incarnation of a long-standing and continuing conflict between the investment interests of developing countries and developed countries . . . [E]ven though such a BIT imposes reciprocal obligations on both Contracting States, its effects are asymmetrical . . . [T]he disagreement over umbrella clauses in this scenario is in effect an extension of the enduring tension between developing and developed countries on foreign investments”).



definition of investment and their unsuccessful attempts to challenge investment claims based on the provisions of national laws.<sup>11</sup> National laws in this respect are mostly represented by underlying contracts that were sometimes in conflict with umbrella clauses and FET standard<sup>12</sup> of foreign investments under most investment agreements.<sup>13</sup> A historical analysis is proper to guide the global south in negotiating effective investment agreements and reduce the over-reliance on national laws to regulate and interpret investment agreements. Granted that there is a lack of a consensus on the proper place of contractual and investment claims, the prevailing trend under international investment law and arbitration has been the subjugation of the national laws of the host state to an international minimum standard entrenched in BITs.<sup>14</sup> This article will attempt to show that, in the days of yore, the international minimum standard, as the term was understood under customary international law, was a controversial standard considered critical by proponents from the global north for the protection of foreign investments under international law.<sup>15</sup>

There is no question that in cases of inconsistency between national laws and international law, and by extension international investment law, international law prevails. This notion requires further analysis from the perspective of the global south. This article will focus on the nature of foreign investment disputes between host state

11. See, e.g., Alex Grabowski, Comment, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, 15 CHI. J. INT'L L. 287, 289-308 (2014). For the approach of one developing country to the definition of "investment" in the context of the ICSID Convention see Felix O. Okpe, *The Definition of Investment and the ICSID Convention: Matters Arising under the Nigerian Investment Promotion Act and International Investment Law*, 8 J. SUSTAINABLE DEV. LAW & POL'Y 133, 133-154 (2017).

12. The phrase requires that the host state accord foreign investments in its territory a non-discriminatory treatment that may be considered fair and equitable. Whether a particular conduct of the host state is unfair or inequitable with reference to covered investments has been the subject of varying interpretations in investment treaty arbitration. However, it has been a phrase that has been described more through the binoculars of international investment law where appropriate and applicable in investment treaty arbitration. See Felix O. Okpe, *Economic Development and the Utility of Local Content Legislation in the Oil and Gas Industry: Conflict and Effects of Nigeria's Local Content Act in the Context of International Investment Law*, 28 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 255, 270-71 (2015); see also JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 131-32 (Frank Berman ed., 2010).

13. See SALACUSE, *supra* note 12.

14. See generally MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (4th ed. 2017).

15. See *id.* at xiv (stating that, "[d]eveloping countries bear the brunt of the system still. The concepts that continue to be used, like the international minimum standard, denial of justice, expropriation law and the rules of state responsibility for injuries to aliens, were developed in the context of an asymmetry between capital-exporting and capital-importing states. The old concepts form the bedrock of newer treaties").



from the global south and investors from the global north within the framework of the ICSID Convention.<sup>16</sup> Statistically, investment arbitration under the ICSID Convention investment is significant.<sup>17</sup> The trend could be attributed to the advantages that may be associated with the use of that mechanism.<sup>18</sup> The settlement of investment disputes is dominated by access to ICSID arbitration that includes ICSID Additional Facility.<sup>19</sup> The system also accommodates a foreign investor whose country is not a signatory to the ICSID Convention.<sup>20</sup> At this juncture, a caveat is deserving of mention. This article does not seek to offer ideas on how to limit access to investment arbitration under the ICSID Convention. On the contrary, this article offers a fresh approach to understanding the nature and interpretation of foreign investment disputes from a historical perspective through the concept of a reincarnated international minimum standard that is now the cornerstone of internationalization of investment disputes.

This article proposes that, the internationalization of investment disputes through the theory of internationalization of state contracts is a reincarnated international minimum standard under international investment law and arbitration. Most countries in the global south do not sufficiently understand this new standard that is now critical when negotiating and interpreting BITs. This article is an insight into the metamorphosis of this standard with reference to the ICSID Convention and the global south from an historical perspective. It references Judge Lauterpacht's opinion in the *Norwegian Loans*

16. See Samuel K. B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L.Q. 588, 588 (1988) (suggesting that there are fundamental and international issues raised by the conduct of international investment law in the relationship between the host states and foreign investors that is a product of a clash of juristic opinion and more particularly described as a 'pervasive dispute associated with both East-West and North-South conflicts).

17. See Catherine M. Amirfar, *Dispute Settlement Clauses in Investor-State Arbitration: An Informed Approach to Empirical Studies About Law a Response to Professor Yackee*, 12 SANTA CLARA J. INT'L L. 303, 308 (2014).

18. See Judith Levine, *Navigating the Parallel Universe of Investor-State Arbitrations under the UNCITRAL Rules*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 369, 369-70 (Chester Brown & Kate Miles eds., 2011).

19. *Id.*

20. See David A. Gantz, *Investor-State Arbitration Under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules*, U.S.-VIETNAM TRADE COUNCIL EDUCATION FORUM, (Aug. 17 2004), [http://www.usvtc.org/trade/other/Gantz/Gantz\\_ICSID.pdf](http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf) (stating that "[i]nvestor-State Arbitration has become a common occurrence in the 40 years since the ICSID Convention was concluded, particularly during the last ten years . . . There have been decisions in more than a dozen cases under NAFTA Chapter 11 (the majority under ICSID Additional Facility Rules), and more than 30 notices of arbitration, about 60% of which are between the United States and Canada . . ."). Canada and Mexico are not parties to the ICSID Convention.



Case as a foundation to theorize that the nature and settlement of foreign investment disputes reflects the theory of internationalization of state contracts as the new international minimum standard. If the global south fails to appreciate and understand this development when negotiating foreign investment agreements, it can raise serious questions about the legitimacy of investment treaty arbitration. This can still the progressive development of international investment law and arbitration. Such an outcome will defeat the purpose of the ICSID Convention negotiated and ratified for the promotion and protection of foreign investment in the host state. It is not enough for developing countries' governments to run from one capital to the other signing investment agreements to attract foreign investments without a clear understanding of their historical context, expectations, implications, and the obligations they create for the host state. Even if the criticisms of Judge Lauterpatcht's opinion are valid, this article contends that the premise of the ruling in that case still resonate in most arbitral jurisprudence and scholarship.

To address the issues raised in this article, Part I examines the history and evolution of the concept of international minimum standard to lay the foundation for the main contention in this article through the analysis of the significance of the Calvo doctrine and the Hull formula. Part II analyzes the theory of internationalization of state contracts and its nexus to the internationalization of investment disputes. Setting out with the ruling of Judge Lauterpatcht in the *Norwegian Loans case*, this part advances the argument that the unsuccessful international minimum standard under customary international law has been reincarnated in the form of standard clauses such as the umbrella clause and the FET found in most international investment agreements. Part III is the conclusion.

#### I. INTERNATIONAL MINIMUM STANDARD UNDER CUSTOMARY INTERNATIONAL LAW

What became known as the main points of the Calvo doctrine, represented Latin America's fundamental objections to the international minimum standard as recognized under customary international law.<sup>21</sup> In the context of investment disputes, international minimum standard under customary international law stipulates that investment claims against the host state should not be

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21. Manuel R. Garcia-Mora, *The Clavo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205, 206 (1950), <http://scholarship.law.marquette.edu/mulr/vol33/iss4/1>.



subject to national jurisdiction or diplomatic intervention where the foreign investor alleges a violation of international law.<sup>22</sup> This principle has been described as one that is designed for the protection of investments in the host state.<sup>23</sup>

The origin of the international minimum standard as a principle of customary international law could be traced to the investment activities of foreign merchants in host states who experienced “denial of justice” from a foreign state for the acts of states and its citizens considered a violation of alien property rights. The experience of the merchants in ancient times, developed a system whereby aggrieved merchants doing business in foreign states appealed to their home countries to intervene on their behalf with foreign states to assist in the collection of debts from the citizens of the latter.<sup>24</sup> Under this system, the merchants were authorized to take reprisals if there is no response after the intervention of the merchant’s home state.<sup>25</sup> In support of this mechanism, Root, the former United States Secretary of State and a proponent of an international minimum standard in the settlement of investment disputes, suggested direct military intervention to settle investment claims where the system in place in the host state proves ineffective and discriminatory.<sup>26</sup> On his part, Paparinskis explained that the international minimum standard was elaborated through the phenomenon of the “variety of legal techniques through which [s]tates could protect the rights and interests of their nationals abroad.”<sup>27</sup> Root probably wrote against the traditional belief of the right to reprisals against the host state in the settlement of investment disputes. This right of reprisals against the host state as a means of settling disputes is linked to the concept of “denial of justice.”

According to Paparinskis, the concept of denial of justice against the alien trader in the host state may be traced to early times. A commentator has noted that the practice was premised on the notion that, “[e]arly European institutional writings on the treatment of

22. See Berk Demirkol, *Non-treaty Claims in Investment Treaty Arbitration*, 31 LEIDEN J. INT’L L. 59 (2018).

23. See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 11 (2008).

24. See Don Wallace Jr., *Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattin v. Mexico*, 2 TRANS. DISP. MGT. (2006), <http://www.transnational-dispute-management.com> (last visited June 4, 2015).

25. *Id.*

26. Elihu Root, *The Basis of Protection of Citizens Residing Abroad*, 4 AM. J. INT’L L. 517, 521-22 (1910).

27. See MARTINS PAPANISKIS, *THE INTERNATIONAL MINIMUM STANDARD AND THE FAIR AND EQUITABLE TREATMENT* 20-21 (2013).



aliens by their host [s]tates set the stage for later controversies in the area of foreign investment law."<sup>28</sup> The effect of this concept was that any breach of "the natural rights" of aliens in the host state without justification amounted to a "denial of justice." In turn, one consequence of the concept of the denial of justice is that it gave birth to two sister theories on the treatment of alien investments in the host state: (1) the theory of equality with the national of the host state; (2) the theory of the treatment of alien property by some external standard over and above the principle of equality. One commentator argued that the two alternate theories created two similar views. Firstly, the theory of equality "justified trade and investments as natural rights" in support of the notion of the equal treatment of aliens with nationals of the host state. Secondly, aliens should be "treated in accordance with some external standard, which was higher than the national standard" in the host state.<sup>29</sup>

This commentator concluded that the views associated with the theories were calculated to facilitate trade and investment into the global south by states with the capability to expand investments overseas that in turn developed their home economies.<sup>30</sup> Based on this conclusion, it is fair to summarize that the concept of the "denial of justice" and the right of reprisal against the host state is nothing but a system designed for the protection of foreign investment in the global south. Paulsson argued that "[s]tate responsibility for denial of justice is justified, indeed required, in order to satisfy the international requirement that states provide for the effective protection of the rights of foreigners . . . ."<sup>31</sup> It is this notion of international requirement for the protection of alien property that transformed into the concept of the international minimum standard on the protection and settlement of investment disputes.

Furthermore, it seems that the underlying principle of the international minimum standard stipulates a two-way dispute resolution system. On the one hand, it appears to give host states legal systems, the jurisdiction over investment claims applying the principle of equal protection based on local legislation. In other words, the underpinning of the international minimum standard in this respect espouses the jurisdiction of host states over foreign investment disputes. On the other hand, the standard gave foreign investors the option of diplo-

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28. MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 19 (2010).

29. *Id.*

30. *Id.*

31. JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 7 (2005).



matic intervention to settle investment disputes in so far as they can allege a violation of international law. This article will now examine how the Calvo doctrine responded to the two-way dispute resolution system on the settlement of investment dispute in the host state.

### A. *The Principles of the Calvo Doctrine*

Calvo's argument on the protection and settlement of investment claims in the host state opposed the international minimum standard under customary international law. Under the Calvo doctrine, a state is entitled to freedom from external interference in the exercise of its sovereignty.<sup>32</sup> Calvo advanced the concept of "national treatment."<sup>33</sup> He was opposed to the concept of the international minimum standard in the conduct of foreign investment and the protection of alien property in the host state in the manner canvassed under customary international law. By national treatment, Calvo argued that jurisdiction lies with the national courts of the host state over investment disputes.<sup>34</sup> Mourra explained that the substantive element of the Calvo doctrine, "emphasizes that host states shall not grant any rights or benefits to foreigners that exceed those accorded to their own nationals."<sup>35</sup> The procedural elements of the Calvo doctrine argued against any special remedies, privileges, or incentives for foreign investors except the same as available to nationals of the host state.<sup>36</sup>

In Shan's opinion, the Calvo doctrine consists of three fundamental elements: "anti-super-national-treatment . . . exclusive local jurisdiction, and the exclusion of diplomatic protection" in the conduct of foreign investment by the host state with foreign investors.<sup>37</sup> The Calvo doctrine was so widely received that a majority of Latin American countries enshrined its principles in their national constitutions and investment regimes.<sup>38</sup> The doctrine also found its way into the United Nation's new International Economic Order Charter at the

32. Garcia-Mora, *supra* note 21, at 206.

33. Wenshua Shan, *From "North-South Divide" to "Private Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L & BUS. 631, 632 (2006-2007).

34. *Id.*

35. Mary H. Mourra, *The Conflicts and Controversies in Latin American Treaty-Based Disputes*, in *LATIN AMERICAN INVESTMENT TREATY ARBITRATION* 5, 8 (Mary H. Mourra & Thomas E. Carbonneau, eds., 2008).

36. *Id.*

37. Shan, *supra* note 33, at 632.

38. DONALD SHEA, *THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY* 20-30 (1955).



time, with one source stating that Latin America's contributions to the emergence of the Charter were "no more than a thinly-disguised attempt to endow the Calvo doctrine."<sup>39</sup>

Opponents have criticized the principles of the Calvo doctrine as being too extreme.<sup>40</sup> Indeed, some critics of the Calvo doctrine have argued that a strict adherence to the doctrine would make it difficult for host states to be bound by the rules of international law on foreign investments.<sup>41</sup> Root rejected the underlying principles of the Calvo doctrine.<sup>42</sup> He argued that the international minimum standard, as understood under customary international law should be accepted as a fundamental standard of justice for the protection of foreign investments.<sup>43</sup>

Root's criticism is indicative of the following propositions: (1) international law provides a simple standard of justice for the resolution of foreign investment disputes; (2) domestic law of the host countries must conform to international standard; and (3) foreign investment disputes should not be subject to national treatment. There are legitimate questions that may be raised against the Calvo doctrine, but Root's position is problematic because the international standard of justice he relied on begs the question of how that same international order or standard of justice should be defined or applied. This is a weakness in Root's proposition. The inability of Root to address this weakness makes his objections significant, but unsustainable.

If Root's major concern was the need for an effective mechanism for the protection of foreign investment in the host state, the suggestion canvassed by Root is incomplete and not persuasive enough. The premise of Root's arguments does not reflect a balanced approach to the necessity for the protection of foreign investment in host states, at least from the perspective of developing countries in the global south. That necessity is consideration for the economic development of the host state. It is contended that an international order articulated by Root, can only be sustained through a framework and jurisprudence that supports adequate and equal consideration of the legitimate expectations of all the actors in the foreign direct investment ("FDI")

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39. R.B. Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AM. J. INT'L L. 359, 361 (1975); see also Shan, *supra* note 33, at 632-33.

40. See generally SURYA P. SUBEDI, *INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE* 13-18 (2nd ed., 2012).

41. See generally James C. Baker & Louis J. Yoder, *ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment*, 5 OHIO ST. J. DISP. RESOL. 75, 75-95 (1989).

42. Root, *supra* note 26, at 527-28.

43. *Id.*



paradigm. If the primary concern of host states in entering international investment agreements is to liberalize their investment climate through the protection of investments, the nature of investment disputes should also reflect the purpose for that protection.<sup>44</sup> That purpose is considerations for contribution to economic development of the host state. There is also an emerging school of thought that part of that purpose should include scrutinizing the impact of investments on human rights, public health, and the environment.<sup>45</sup>

Root made his arguments against the background of the need for the protection of foreign investments in the host state, while Shan made her observations based on the proliferation of international investment agreements to promote investment liberalization. Shan made a better argument. The inclination of most Latin American states to rethink foreign investment liberalization in their respective economies and consent to investment treaty arbitration, particularly under the ICSID Convention, supports Shan's thesis. One source observed that there is a worldwide trend to reject what is considered as "neo-liberalist investment instruments" in favor of a more "balanced regime for international investment."<sup>46</sup> Still, the most direct challenge to the Calvo doctrine came through what is referred to as the Hull formula that emerged because of the expropriation of the investments of American citizens in Mexico.<sup>47</sup>

### B. *The Origin and Demise of the Hull Formula*

The Hull formula was coined from the diplomatic exchanges between the United States Secretary of State, Cordell Hull, and the Mexican Ambassador to the United States over the Mexican government's alleged agrarian expropriation of properties of American citizens in Mexico.<sup>48</sup> The exchanges on the applicable law on the nature and resolution of the dispute reflect divergent views. The diplomatic exchanges made the Hull formula to be, arguably, the most

44. Omar E. Garcia-Bolivar, *Economic Development at the Core of the International Investment Law Regime*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 587 (Chester Brown & Kate Miles eds., 2011).

45. See Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 *J. INT'L DISP. SETTLEMENT* 277, 277 (2015).

46. Wenhua Shan, *Calvo Doctrine, State Sovereignty and the Changing Landscape of International Investment Law*, in *REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW* 247, 298 (Wenhua Shan, et al. eds., 2008).

47. See discussion *infra*, § I.B.

48. Telegram from Cordell Hull, Sec'y of State, U.S., to Castillo Najera, Mex. Ambassador to the U.S. (July 21, 1938), <https://history.state.gov/historicaldocuments/frus1938v05/d662>.



notable approach to the unfair treatment of alien property in the territory of the host state. According to Hull:

The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future. If it were permissible for a government to take the private property of the citizens of other countries and to pay for it as when, in the judgment of that government, its economic circumstances and its local legislation may perhaps permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory . . . . We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires . . . . But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law, based on its reason, equity and justice.<sup>49</sup>

The Mexican Minister of Foreign Affairs embraced the Calvo doctrine and responded this way:

My Government maintains . . . that there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory payment of neither immediate compensation nor even deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land. The expropriation made, in the course of our agrarian reform, do, in fact, have this double character which ought to be taken very much into account in order to understand the position of Mexico and rightly appraise her apparent failure to meet her obligations. Without attempting to refute the point of view of the American Government, I wish to draw your attention very specially to the fact that the agrarian reform is not only one of the aspects of a program of social betterment . . . but also constitutes the fulfilling of the most important of the demands of the Mexican people . . . . Nevertheless Mexico admits, in obedience to her own laws, that she is indeed under obligations to indemnify in an adequate manner; but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treaties on international law, is that the time and manner of such payments must be determined by her own laws.<sup>50</sup>

49. *Telegram from Cordell Hull, supra* note 48; see also Leo T. Kissam & Edmond K. Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 *FORDHAM L. REV.* 177, 182-90 (1959).

50. Eduardo Hay, Mex. Minister for Foreign Affairs, to Josephus Daniels, Am. Ambas-



A synthesis of the Hull formula and the Calvo doctrine espouses two opposite principles on the settlement of foreign investment disputes. The Hull formula proposes that the taking of alien property by the host state is proper provided there is adequate and prompt compensation. In articulating the Hull formula, the proponent did not define nor explained what constitutes an adequate, effective, or prompt compensation as a remedy under customary international law. On the other hand, the Calvo doctrine, as presented by the Foreign Affairs Minister of Mexico, rejected the Hull formula on the treatment of alien property by insisting on a consideration of the public interest as the basis for the expropriation of alien property to mitigate the state's obligation through national treatment in accordance with national law.<sup>51</sup> The Mexican government's position espoused the principle of national treatment as opposed to the prompt, adequate, and effective compensation proposed and argued by the Hull formula. The two divergent positions reflected a conflict between an international minimum standard and national treatment. National treatment is premised on the national law of the host state.

The foundation of the Hull formula is rooted in the notion of an international minimum standard, while the position advanced by Mexico is grounded in the principles of the Calvo doctrine. The opposing views on the expropriation of foreign investment and the settlement of the resulting dispute in the host state, defined the nature of foreign investment with respect to the global south at the time.<sup>52</sup> So much so, that in 1962, the debate over the Calvo doctrine and Hull formula found its way to the General Assembly of the United Nations ("the UN").<sup>53</sup> The UN General Assembly Resolution 1803 rejected both doctrines by declaring in part that:

[R]equisitioning [of alien property] shall be based on grounds or reasons of public utility, security or the national interest . . . both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law . . . where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted.<sup>54</sup>

sador in Mex. (Aug. 3, 1938), <https://history.state.gov/historicaldocuments/frus1938v05/d663>.

51. Hay, *supra* note 50.

52. DOLZER & SCHREUER, *supra* note 23, at 14.

53. G.A. Res. 1803 (XVII), ¶ 4 (Dec. 14, 1962), <http://hrlibrary.umn.edu/instreet/c2psnr.htm>.

54. *Id.*



Based on Resolution 1803,<sup>55</sup> the opposition of developing countries to the Hull formula was largely successful. Guzman noted that the Hull formula "ceased to be a rule of customary international law" because of the challenge mounted by countries in the global south.<sup>56</sup> Guzman's observation was based on the premise that, "the majority of the developing world supported a less stringent compensation requirement for expropriations than the Hull Rule's 'prompt, adequate, and effective' standard."<sup>57</sup> The glee with which developing countries embraced the UN Resolutions raised valid concerns about the protection of foreign investments in the host state. It was after the unfortunate fate of the concept of the international minimum standard that the ICSID Convention was discussed, negotiated, and ratified.

Under the ICSID Convention, the theory of internationalization of state contracts has been consistently upheld through the interpretation of applicable investment agreements and treaties.<sup>58</sup> This theory elevates investments disputes from national jurisdiction in support of the application of an evolving international investment law.<sup>59</sup> The utility of this theory in investment arbitration after the failure of the Hull formula and the Calvo doctrine is a way to restore investors' confidence on the protection of foreign investments in the hope that the promotion of foreign investment for economic development may not be hampered. The remaining part of this article examines the significance of the theory of internationalization of state contracts in the context of the preceding analysis.

## II. THE THEORY OF INTERNATIONALIZATION OF STATE CONTRACTS

The legal relationship between the host state and foreign investors in international investment law and arbitration may be created by state contracts. A state contract is "a contract made between the state, or an entity of the state . . . created by statute within a State that is

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55. G.A. Res. 1803 (XVII), ¶ 4.

56. Andrew T. Guzman, *Why LCDs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRG. J. INT'L. L. 639, 641 (1998).

57. *Id.* at 647.

58. IVAR ALVIK, CONTRACTING WITH SOVEREIGNTY: STATE CONTRACTS AND INTERNATIONAL ARBITRATION 42 (2011).

59. *Id.* (observing that "the ICSID Convention is essentially a procedure for resolution of [investment] disputes between states and foreign investors, based on the model of international commercial arbitration, but providing an explicit basis of authority for the application of international law. By virtue of the habitual reference to ICSID in almost all bilateral and multilateral investment treaties, it is fair to say that this version of international commercial arbitration has become the standard procedural model of investment treaty arbitration").



given control over an economic activity, and a foreign national or a legal person of foreign nationality.”<sup>60</sup> State contracts create international obligations for the host state and the foreign investor in the conduct of foreign investment.<sup>61</sup> The theory of internationalization of state contracts posits that, regardless of any clear choice of law between the host state and the foreign investor on the law applicable to an investment claim, the principles of international law supersede national laws in the interpretation of the obligations and liabilities of the host state in the event of an investment dispute.<sup>62</sup> Maniruzzaman explained the theory this way:

The theory of internationalization of state contracts poses some of the hardest questions that relate to both public and private international law. The theory suggests that, no matter what law the parties to such a contract choose as the proper law of the contract, international law superimposes their choice and applies automatically as the overriding governing law. Thus where the law of the host state applies as the sole applicable law either by virtue of the parties’ express choice or by the conflict of laws rule closest connection in the absence of such choice, the theory of internationalization triggers off not only the theoretical controversies of monism versus dualism of public international law but also the issues of party autonomy and the doctrine of the proper law of the contract in private international law. Besides theoretical interest, the matter has great practical importance in the real world of foreign investment dispute settlement.<sup>63</sup>

Prior to Maniruzzaman’s thesis, there was a strong argument for the theory in the dissenting opinion of Judge Lauterpacht in the landmark decision in the *Case of Certain Norwegian Loans*.<sup>64</sup>

In this case, while conceding to the view of the Permanent Court of International Justice (PCIJ) that an international contract may be subject to national law, Judge Lauterpacht held that where national legislation is contrary to the international obligations of the host state, the notion that national legislation is exclusive and applicable in the settlement of an investment dispute is “subversive of international law.”<sup>65</sup> He stated that, “it is not enough for a state to

60. U.N. Conference on Trade and Dev., *State Contracts*, 3, UNCTAD/ITE/IIT/2004/11, U.N. Sales No. E.05.II.D.5 (2004).

61. See generally Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State “Commitment” and the Myth of Stability*, 14 AM. REV. INT’L ARB. 362-414 (2013).

62. A.F.M. Maniruzzaman, *State Contracts in Contemporary International Law: Monist versus Dualist Controversies*, 12 EUR. J. INT’L L. 309, 309 (2001).

63. *Id.*

64. *Certain Norwegian Loans (Fr. v. Nor.)*, Judgment, 1957 I.C.J. 9 [1957] (July 6).

65. *Id.* at 37 (Lauterpacht J., dissenting).



bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law."<sup>66</sup> According to Judge Lauterpacht, because an "international contract" may be subject to some national law, "does not mean that that [sic] national law is a matter which is wholly outside the orbit of international law."<sup>67</sup> The reasoning of Judge Lauterpacht's opinion was based on the notion that national law may not be applied to the interpretation of state contracts [investment agreements] where such application is a violation or conflicts with international law. Judge Lauterpacht explained that, "the question of conformity of national legislation with international law is a matter of international law."<sup>68</sup>

In the *Norwegian Loans case*, the French government instituted proceedings on behalf of French investors who held bond certificates issued by Norwegian financial institutions.<sup>69</sup> The dispute specifically pertains to certain loans floated through the Mortgage Bank of the Kingdom of Norway and by the Small Holding and Workers Housing Bank.<sup>70</sup> At the proceedings, the Norwegian government premised its preliminary objection to the admissibility of the French government's claim on the grounds that the subject matter of the dispute is within the domain of national law and not international law.<sup>71</sup> In other words, Norway claimed that the PCIJ lacks jurisdiction because the compulsory jurisdiction of the court in relation to the parties involved is restricted to disputes concerning international law, and therefore the claim put forward by France is not admissible by the Court. The foundation of Judge Lauterpacht's dissenting opinion is probably influenced by two instructive arguments by France in reply to the Norwegian preliminary objections on the admissibility of the claims. Firstly, the competence and jurisdiction of the PCIJ in all disputes concerning the interpretation of a treaty, any question of international law and the existence of any fact that constitutes a violation of an international obligation has been accepted by Norway and France through acceptance of the compulsory jurisdiction of the PCIJ.<sup>72</sup> Secondly, that the recovery of a debt due under an international loan claim from the government of the debtor state by the government which has adopted

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66. *Certain Norwegian Loans (Fr. v. Nor.)*, Judgment, 1957 I.C.J. 9 (July 6).

67. *Id.*

68. *Id.*

69. *Certain Norwegian Loans (Fr. v. Nor.)*, Judgment, 1957 I.C.J. 9 (July 6), at 39.

70. *Id.*

71. *Id.* at 40.

72. *Id.*



the cause of its nationals who are holders of bond certificates, raises an issue that falls within the competence of the PCIJ by virtue of the acceptance by both parties.<sup>73</sup>

There is no question that the transactions in issue are investments in the context of trans-border or foreign investment by French citizens in the territory of Norway. Judge Lauterpacht's opinion on the primacy of international law in the interpretation of state contracts involved in foreign investment dispute, underscores the theory of the internationalization of state contracts. This is also evident in Maniruzzaman's explanation above. Maniruzzaman's depiction of the theory sheds light on the trend by host states, mostly from the global south, "to provide expressly the law of the host state as the proper law or applicable law" in what he calls "economic development agreements."<sup>74</sup> In this context, economic development agreements mean international or foreign investment agreements between the host state and the foreign investor. Maniruzzaman's submission addressed the question of internationalization of state contracts through the prism of the Monist and Dualist schools of thought in international law.<sup>75</sup>

Monism and Dualism represent two opposing theories on the relationship between international law and national law.<sup>76</sup> Proponents of the Monist school of thought maintain that the application of national law to foreign investment disputes should be subject to the rules of international law.<sup>77</sup> The adherents of the dualism school of thought insist that, international law "is inherently distinct and requires states to undertake certain actions before international principles may be relied upon in national courts."<sup>78</sup> Except for the relevance of the Monist and Dualist school of thoughts to the theory of the internationalization of state contracts, the merits and demerits of the contentions of the two schools of thoughts are outside the scope of this article. However, analogously, Judge Lauterpacht's opinion makes the proposition that national law is inferior to international law in the adjudication of foreign investment disputes.<sup>79</sup> Judge Lauterpacht's views on the supremacy of international law have been criticized by many a scholar

73. Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. 9 (July 6), at 40.

74. Maniruzzaman, *supra* note 62, at 309.

75. *Id.*

76. See D. A. Jeremy Telman, *A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law* in BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM AND DUALISM (Marko Novakovic ed. 2013.)

77. *Id.*

78. *Id.*

79. Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. 9, 37 [1957] (July 6) (Lauterpacht J., dissenting).



of international law. For example, Brownlie opined that Judge Lauterpacht's doctrine of Monism is "antipathetic to the legal corollaries of the existence of sovereign states, and reduces municipal law to the status of pensioner of international law."<sup>80</sup>

In criticizing Judge Lauterpacht, Brownlie observed that the former's view on the theory of Monism "takes the form of an assertion of the supremacy of international law even within the municipal sphere, coupled with well-developed views on the individual as a subject of international law."<sup>81</sup> On his part, instead of offering a criticism, Judge Fitzmaurice advocated a cautious approach when relying on the opinion of Judge Lauterpacht in the case above.<sup>82</sup> Judge Fitzmaurice observed as follows:

However, in view of his finding on the jurisdictional aspects of the *Norwegian Loans Case*, Lauterpacht was not called upon to go into the substantive question of whether the alleged breach of contract would in fact have involved a violation of international law. Therefore, it would be wrong to attribute to him the view that if there is in fact a breach by a [s]tate of a contract between itself and a foreign national or corporate entity, a breach of international law is thereby ipso facto constituted, even in the absence of any denial of justice such as would result, if, for instance, a right of action was not afforded to the foreigner in the local courts . . . .<sup>83</sup>

The "shortcomings" of Judge Lauterpacht's opinion in articulating the primacy of international law in the *Norwegian Loans Case* was highlighted mainly through the criticisms levied by Brownlie and by Fitzmaurice's caveat. Maniruzzaman concluded that Judge Lauterpacht's opinion in the case under reference cannot be an authority for the theory of internationalization of state contracts.<sup>84</sup> Maniruzzaman hinged his conclusion on the premise that a state contract "on its own does not create an international obligation even though international law is designated by the contracting parties to be the governing law of the contract."<sup>85</sup> Maniruzzaman's conclusion is credible and persuasive in the context of international commercial arbitration. According to Maniruzzaman, international commercial arbitration is "particularly of private international character."<sup>86</sup> However, Maniruzzaman's con-

80. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32 (7th ed. 2008).

81. *Id.*

82. See Gerald Fitzmaurice, *Hersch Lauterpacht-The Scholar as a Judge: Part 1*, 64-5, 37 BRIT. YR. BK. INT'L L. (1961).

83. *Id.*

84. Maniruzzaman, *supra* note 62, at 313.

85. *Id.*

86. *Id.*



clusion, after his analysis of Judge Lauterpacht's dissenting opinion in the *Norwegian Loans Case*, is not consistent with the nature of foreign investment disputes with respect to investment treaty arbitration. On the one hand, with reference to investment treaty arbitration, state contracts with foreign investors are by their nature internationalized. Once concluded, state contracts create international obligations on host states under applicable international investment agreements to guarantee the full faith and purpose of the clauses contained in applicable investment agreements or investment dispute resolution mechanisms such as under the ICSID Convention. The reality of the international investment law regime makes the operation of state contracts subject to considerations of the obligations of the host state on the protection of foreign investment. These considerations are now grounded in arbitral practice and international investment law.<sup>87</sup> On the other hand, the advent of investment treaty arbitration is the evidence that foreign investors may now commence arbitration directly for claims arising from state contracts in the host state.

Brownlie's criticisms and Judge Fitzmaurice's caveat against the opinion of Judge Lauterpacht in the *Norwegian Loans Case* has been diminished by the progressive development of international investment law and arbitration. Brownlie wrote at a time when only sovereign states were subjects of international law. The ICSID Convention and other international investment agreements that provide mechanisms for the resolution of foreign investment disputes, have trashed the premise of Brownlie's criticisms. Foreign investors are now subjects of international law in the context of investment treaty arbitration for the settlement of foreign investment disputes.<sup>88</sup> Judge Fitzmaurice's caveat was an attempt to limit Judge Lauterpacht's opinion to the jurisdictional aspect of the *Norwegian Loans Case*.

87. See e.g., Francisco O. Vicuna, *Of Contracts and Treaties in the Global Market*, 8 MAX PLANCK Y.B. UNITED NATIONS L. 341, 346 (2004).

88. See Jose E. Alvarez, *Are Corporations "Subjects" of International of International Law*, 9 SANTA CLARA J. INT'L L. 1, 23 (2011) (stating that, "[i]f foreign businesses are, within the context of BITs and FTAs, really subjects of international law because they are given the ability to make claims directly against host states, arguably the investment regime is not just a particularized application of traditional espousal practice. If, as some scholars and arbitral decisions are beginning to suggest, investor-state arbitration is wholly new mechanism designed to permit a new subject of international law to have equal standing alongside and old (state) subject of international law, a number of legal consequences could emerge. If the right of this new subject of international law is in no sense derivative of the right of its home state . . . it could follow that home states no longer retain the right to waive the right of their investors to file a claim."); see also Tillman R. Braun, *Globalization: The Driving Force in International Investment Law*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 491-506 (Michael Waibel et al. eds., 2010).



Judge Fitzmaurice attempted to make this distinction by creating the impression that Judge Lauterpacht's opinion might have been different if the latter was called upon to consider the substantive question of whether a breach of state contract in that case involved a violation of international law.<sup>89</sup> With due respect, Judge Fitzmaurice's caveat is speculative. There appears to be no indication that Judge Lauterpacht might have viewed the issues raised in the preliminary objections to the jurisdiction of the PCIJ differently in a substantive hearing. Judge Lauterpacht himself noted in the same opinion that:

It seems a sound principle of judicial procedure that, unless the provisions of its statute or other cogent legal considerations make that impossible, the Judgment of the Court should attach to the submissions of the Parties a purpose, though not necessarily an effect, which the Parties attach to them. Applied to objections to the jurisdiction of the Court, that principle means that, when a party has advanced objections to the jurisdiction of the Court, the decision on the question of jurisdiction must be reached by reference to objections which, in the intention of the Party advancing them, are principal rather than subsidiary and which are substantial rather than formal.<sup>90</sup>

The credibility of Judge Fitzmaurice's caveat, if at all, is inconsistent with the reality of international investment law and arbitration regime, particularly under the ICSID Convention. This is so, because, it is now fairly established in investment arbitral practice that more often than not, where there is a breach of state contract against the interests of the foreign investor in the host state, a breach of an international obligation is implicated in the investment agreement applicable to the investment dispute.<sup>91</sup> Guzman advanced this by arguing that:

[W]hen a BIT [an investment agreement] is in force between a host and a home state, an agreement made between the home state investor and the host is binding on both. A breach of the agreement by the host is a violation of the BIT and, therefore, a violation of international law.<sup>92</sup>

89. Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. 9 (July 6), at 35 (Lauterpacht J., dissenting).

90. *Id.*

91. See generally Jose E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17 (2009); Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27. (2004); Andreas F. Lowenfield, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003).

92. Guzman, *supra* note 56, at 642. This may also result through the full effect of what is now referred to as an 'Umbrella Clause.' An umbrella clause is a clause in BITs or other international investment agreements that mandate the host state to guarantee or meet its contractual obligations to foreign investors. Generally, the meaning and effect of an um-



This recognition and practice in most investment arbitration case law resonates more with the opinion of Judge Lauterpacht in the *Norwegian Loans Case*. Foreign investors have often alleged a violation of international law or obligation against the host state resulting from the act or omission to guarantee non-interference with the contractual rights of the foreign investors in state contracts or any other investment agreement regulating the transaction.<sup>93</sup> Judge Lauterpacht's dissenting opinion is predicated on his acceptance of the complaint of the French government; that the subsequent currency legislation enacted by Norway, suspending the operation of the gold clause attached to the loans bonds, was an act that interfered with the state contract with the French bond holders.<sup>94</sup> The act by the Norwegian government was contrary and in conflict with its obligations under international law and thereby made Norwegian law inapplicable.<sup>95</sup> According to Judge Lauterpacht, "it is that very legislation, in so far as it affects French bondholders, which may be the cause of violation of international law of which France complains."<sup>96</sup>

It is important for the global south to understand that, since the ruling of Judge Lauterpacht in the *Norwegian Loans Case*, there have been deliberate attempts by investors from the global north countries to facilitate the process of internationalization of investment disputes for the protection of investments.<sup>97</sup> Notable examples of the process of internationalization include the birth of the ICSID Convention and the 1959 Abs-Shawcross Draft Convention of Investment Abroad.<sup>98</sup> The

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rella clause in a BIT or international investment agreement is that the host state undertakes to abide by its contractual agreement with the foreign investor. See Kenneth J. Vandeveld, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 256-60 (2010) (noting that the observance of obligations clause is referred to as an umbrella clause "because it brings contractual commitments within the coverage, or umbrella, of the BIT").

93. See Johnson & Volkov, *supra* note 4.

94. *Certain Norwegian Loans (Fr. v. Nor.)*, Judgment, 1957 I.C.J. 9 (July 6), at 34-66 (Lauterpacht J., dissenting).

95. *Id.* at 35.

96. *Id.* at 37.

97. See generally Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International*, 98 AM. SOC'Y INT'L L. 27 (2004).

98. The history of the Abs-Shawcross Draft Convention of Investments Abroad [hereinafter the Abs-Shawcross Draft] may be credited with the origin of umbrella clauses as the term is understood under international investment law and arbitration today. See Wong, *supra* note 9, at 146 (citing the Organization for Economic Cooperation and Development [hereinafter the OECD Draft] Draft Convention on the Protection of Foreign Property. Wong stated that the Abs-Shawcross Draft influenced certain draft conventions of the OECD Draft, particularly Art. 2 of the OECD Draft which provides that, "[e]ach party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other party."); see also, Anthony C. Sinclair, *The Origins of Umbrella*



Abs-Shawcross Draft was a private effort that was aggressively pushed by "European lawyers" for the protection of foreign investments in the global south.<sup>99</sup> The intention of the Abs-Shawcross Draft was to secure the protection of foreign investments under international law.<sup>100</sup> This effort was successful to the extent that its semblance found its way to the OECD Draft. The OECD Draft, which embodied the core recommendation of the Abs-Shawcross Draft on the protection of foreign investments in the host state, failed to pass the OECD Council that considered its propriety at the time.<sup>101</sup> However, the OECD was able to recommend Article 2 of the draft convention to member states to utilize in their BITs.<sup>102</sup> This would allow member states to affirm the application of international rules as the international minimum standard for the regulation and protection of foreign investments in the host state. The recommendation has been widely accepted.<sup>103</sup> It is now referred to as umbrella clauses found in the model investment agreements or treaties of member states of the OECD used as templates to negotiate BITs with countries mostly from the global south.<sup>104</sup> To understand the underpinnings of the development of the umbrella clause in the context of this article, it is instructive to summarize the dispute that led to the aggressive effort of the European lawyers.

The dominant view among scholars was that the concept of an umbrella clause originated over the expropriation of the interests of the Anglo-Iranian Oil Company ("AIOC") under its oil concessionary contract with the Republic of Iran.<sup>105</sup> A change in the government in Iran had led to the enactment of Iranian Oil Nationalization Law that effectively expropriated the investments of the American company.<sup>106</sup> The law nationalized all oil operations in Iran and placed it in the

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*Clause in the International Law of Investment Protection*, 20 *ARB. INT'L* 411, 413-18 (2004).

For a full text of the Abs-Shawcross Draft, see *The Proposed Convention to Protect Private Foreign Investment: A Roundtable*, 9 *J. PUB. L.* 115, 116-18 (1960).

99. Wong, *supra* note 9, at 147.

100. Sinclair, *supra* note 98, at 413-18.

101. *Id.*

102. *Id.*

103. *Id.*

104. See Agreement between the Swiss Confederation and the Republic of the Philippines, Concerning the Promotion and Reciprocal Protection of Investments, Switz.-Phil., Mar. 31, 1997, at art. X (entered into force on Apr. 29, 1997), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2174>, (providing that, "[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party").

105. Wong, *supra* note 9, at 147.

106. Sinclair, *supra* note 98, at 414.



hands of the Iranian government.<sup>107</sup> The AIOC unsuccessfully pursued legal options, including arbitration, before the International Court of Justice ("ICJ"). The failure of its legal attempts at resolving the dispute under international law was linked to a defective provision in the concessionary agreement.<sup>108</sup>

The dispute was later settled under a subsequent government regime that was more open to foreign investments in Iran and on terms that deviated from the original advice of counsel.<sup>109</sup> It is noteworthy that the AIOC originally intended to resolve the dispute based on the legal advice provided by counsel for the AIOC.<sup>110</sup> The said legal advice recommended a consortium agreement and an "umbrella treaty" between Iran and the United Kingdom that incorporates the consortium agreement.<sup>111</sup> The combined effect of the agreements, as recommended, would have been to make a breach of the consortium agreement *ipso facto* amount to a breach of the umbrella treaty. The umbrella treaty was not part of the terms with which the dispute was eventually resolved.<sup>112</sup> Still, the umbrella treaty clause that was formulated by the counsel to the AIOC was the basis of the umbrella clause found in the Abs-Shawcross Draft that developed into the clause transplanted in the model BITs of countries mostly from the global north.<sup>113</sup>

The arbitral tribunals conflicting decisions in *SGS v. Pakistan*<sup>114</sup> and *SGS v. Philippines*<sup>115</sup> will go down in the history of the evolution of international investment law and investment arbitration as one of the most controversial interpretation of the umbrella clause, including their roles in the internationalization of investment disputes. The decisions are by far the most dominant example of the entrench-

107. Sinclair, *supra* note 98, at 414.

108. Wong, *supra* note 9, at 144 ("AIOC prevailed on the British Government, a major Shareholder of AIOC, to initiate claims against Iran with the ICJ, which declined to exercise jurisdiction over the dispute. Specifically, the Court found that it lacked jurisdiction over the dispute, because the terms of Iran's acceptance of the Court's compulsory jurisdiction did not extend to allegations of breach of customary international law, as opposed to treaties.")

109. *Id.* at 146.

110. The legal advice was provided to AIOC by Elihu Lauterpacht. See Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEGAL STUD. 259, 271-72 (1997); see also Sinclair, *supra* note 98, at 415-17.

111. Lauterpacht, *supra* note 110, at 271.

112. Wong, *supra* note 9, at 144; see also Sinclair, *supra* note 98, at 414.

113. *Id.*

114. Societe Generale de Surveillance S.A. v. Islamic Republic of Pak., ICSID Case No. ARB/01/13, Objections to Jurisdiction (Aug. 6, 2003), 8 ICSID Rep. 406.

115. Societe Generale de Surveillance SA v. Republic of Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction (Jan. 29, 2004), 8 ICSID Rep. 515 (2005).



ment of the Abs-Shawcross Draft. The intention of the Draft was to elevate contractual investment claims to treaty claims.<sup>116</sup> An elevation in this respect internationalizes investment disputes. The *SGS* decisions have been widely criticized mainly because the rulings confused the issue of jurisdiction over contractual and treaty claims in the arbitration of investment claims.<sup>117</sup> The underlying investment contracts in issue in those cases contained an exclusive forum selection clause that designated a different forum for the settlement of investment disputes contrary to international arbitration under the applicable BITs.<sup>118</sup> The two main issues in the *SGS* cases was whether an arbitral tribunal may exercise jurisdiction over breach of contract claims based on the application of an umbrella clause, and if so, whether the same arbitral tribunal may not be restricted where the underlying contract contains an exclusive forum selection clause contrary to the BIT under review.<sup>119</sup> The *SGS v. Pakistan* arbitral tribunal held that an arbitral tribunal lacks jurisdiction on the ground that an umbrella clause do not extend to contractual claims.<sup>120</sup> In the *SGS v. Philippines case*, which was on all fours with *SGS v. Pakistan*, the former held that it has jurisdiction over contractual claims, but went further to state that an arbitral tribunal should not exercise jurisdiction where the investment contract contains an exclusive forum selection clause for the settlement of investment dispute.<sup>121</sup> In his analysis, Wong answered both questions raised in the *SGS* cases in the affirmative.<sup>122</sup> On his part, Crawford was reluctant to take a definite stand, noting:

[L]egal theorists have debated this issue for ages, and it must be added to the lengthening lists of points which in the confines of a lecture (if not a lifetime) I am not going to be able to settle. But . . . I must say that I find the current level of dissensus on core questions disturbing . . . .<sup>123</sup>

The real effect of the issues raised in the *SGS* cases was an attempt to determine a pattern of jurisdiction that internationalizes investment disputes through the umbrella clause, and FET standard in most BITs. Restricting the analysis and criticisms of the *SGS* cases to the confusion over jurisdictional issues is a major shortcoming and a disservice

116. Sinclair, *supra* note 98, at 412.

117. See Wong, *supra* note 9.

118. *Islamic Republic of Pak.*, 8 ICSID Rep. 406, at ¶ 88; *Republic of Phil.*, 8 ICSID Rep. 515, at ¶ 67.

119. See Wong, *supra* note 9, at 137.

120. *Islamic Republic of Pak.*, ICSID Case No. ARB/01/13 at ¶ 162.

121. *Republic of Phil.*, 8 ICSID Rep. 515, at ¶ 155.

122. Wong, *supra* note 9, at 137.

123. Crawford, *supra* note 6, at 353.



to its wider implications pertaining to the internationalization of investment disputes.

Except that the *SGS v. Pakistan* tribunal resisted the attempt to elevate contractual breaches to BIT violations,<sup>124</sup> there has been a consistent pattern by arbitral tribunals to internationalize investment disputes through the broad application of umbrella clauses since the decisions in the *SGS* cases.<sup>125</sup> For example, in the annulment proceedings of *Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, the claim was a review of the \$300 million damages investment arbitration commenced by the claimants, a French company organized under the laws of the Respondent through their Argentine affiliate.<sup>126</sup> In this case, the Respondent did not directly or affirmatively interfere in the investment by Tucumán, but claimants alleged that the failure of the Respondent to prevent the Province of Tucumán from refraining to take certain actions against the concession contract infringed their rights under the France-Argentina BIT.<sup>127</sup> The contentious concession contract did not make any reference to the France-Argentina BIT or the ICSID Convention, except that the BIT contained some remedial provisions.<sup>128</sup> The *ad hoc Committee* characterized the remedial measures in the BIT as "an international law standard, expressly or by clear implication," applying to "investments made by investors."<sup>129</sup> However, the concession contract, which is one of the most common forms of state contracts, provided for a forum selection clause.<sup>130</sup> This was to the effect that the resolution of any dispute arising from the concession contract, concerning its interpretation and application, was to be submitted to the exclusive jurisdiction of the contentious administrative courts of

124. *Islamic Republic of Pak.*, 8 ICSID Rep. 406, at ¶ 163.

125. See generally, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2004).

126. *Compañía de Aguas del Aconquija S.A. v. Arg. Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 11 (July 3, 2002), 6 ICSID Rep. 340 (2004) [hereinafter *Vivendi*].

127. *Vivendi*, 6 ICSID Rep. 340, at ¶ 9. See generally, Agreement between the Government of the French Republic and the Government of the Argentine Republic on the Reciprocal Promotion and Protection of Investments (Translation), Fr.-Arg., July 3, 1991, 1728 U.N.T.S. 298 [hereinafter France-Argentina BIT].

128. *Vivendi*, 6 ICSID Rep. 340, at ¶ 11 (explaining that Articles 3 and 5 of the France-Argentina BIT provides, *inter alia*, that "the Contracting Parties shall grant fair and equitable treatment according to the principles of international law to investments made by investors of the other Party [and] that investments shall enjoy protection and full security in accordance with the principle of fair and equitable treatment . . .") (internal quotations omitted).

129. *Id.* at 117, ¶ 59.

130. *Id.*



Tucuman.<sup>131</sup> On the core issue of whether the forum selection clause in the concession contract should be accepted and applied by the tribunal to set aside the remedial provisions in the France-Argentine BIT, the *ad hoc Committee* upheld the submissions of the Claimants finding "that the fact that the investments concerns a Concession Contract made with Tucuman . . . does not mean that the dispute falls outside the scope of the BIT."<sup>132</sup> This *ad hoc Committee* advertently or perhaps inadvertently, embraced the theory of the internationalization of state contracts as applicable under international investment law and arbitration.<sup>133</sup> The *ad hoc Committee* was unequivocal when it found:

[W]here the "fundamental basis of the claim" is a treaty [an investment treaty] laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.<sup>134</sup>

In reaching its conclusion on this issue, the *ad hoc Committee* reasoned that the determination whether the act of a state is internationally wrongful is a question of international law that is not impacted by a consideration of whether or not the same act could be lawful under national law.<sup>135</sup>

Similarly, the *ad hoc* arbitration case *Eureko B.V. v. Republic of Poland*,<sup>136</sup> also involved a concession contract between the parties. The facts and issues raised in this investment treaty arbitration were similar to those of *Vivendi*. One of the main issues for determination in this investment treaty arbitration was whether alleged breaches of contract-based claims governed by national law could be separated from alleged BIT violation without recourse to the interpretation and application of the contract under review in the investment dispute.<sup>137</sup> Following *Vivendi* as a persuasive authority, the *ad hoc Committee* held as follows:

There is an amplitude of authority for the proposition that when a state deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation of the type of provision contained in Article 5 of the Treaty.

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131. *Vivendi*, 6 ICSID Rep. 340 at ¶ 11.

132. *Id.* at ¶ 75.

133. *Id.*

134. *Id.* at ¶ 101.

135. *Vivendi*, 6 ICSID Rep. 340 at ¶ 102-03.

136. See *Eureko B.V. v. Republic of Poland*, Partial Award, IIC 98 Ad Hoc Tribunal (2005).

137. *Id.* ¶ 102, at 41.



The deprivation of contractual rights may be expropriatory in substance and in effect.<sup>138</sup>

The scholarship and jurisprudence on the extensive, and sometimes extreme, analysis of the effect of umbrella clauses and FET and their contributions to the internationalization of investment disputes, misses a vital consideration. Granted that the overwhelming support for the protection of foreign investments in the host state is valid for obvious reasons. Often when investment disputes arising from underlying investments are elevated to treaty claims under applicable BITs, the economic and sovereign regulatory power of the host state is restrained. When this occurs, host states are left with no plank to stand on to articulate and assert their expectations in the context of international investment law and arbitration. There is little or no analysis of the effect of this on the economy and international investment regimes of host states, particularly from the global south. The international investment law regime and arbitration should not simply be a mechanism for the protection of investments. There is a need to recognize and analyze the component of the promotion of investment for contribution to the economic development inherent in the host state's regulatory authority for economic development considerations. Some host states in the global south are agitated.<sup>139</sup> Some have responded to what might be considered as a one-sided approach to international investment law and arbitration in ways that can undermine its progress.<sup>140</sup> Admittedly, the lacuna created as a result of the insufficient consideration of the full implications of the internationalization

138. *Id.* at ¶ 241.

139. See generally, Thomas Schultz & Cedric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147 (2014); see also MICHAEL WAIBEL, *THE BACKLASH AGAINST INVESTMENT ARBITRATION* (Michael Waibel ed., 2010).

140. See Suzanne A. Spears, *Making Way for the Public Interest in International Investment Agreements*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 271, 273 (Chester Brown & Kate Miles eds., 2011) (noting that "[s]tates have responded to concerns about the potential for investment law to place undue constraints on sovereign regulatory power in a variety of ways in recent years. At one extreme, a number of countries in Latin America have responded by denouncing or insisting on the renegotiation of some of their IIAs (*international investment agreements*), and by withdrawing from the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) or seeking to limit the jurisdiction of the Centre established by the Convention (ICSID.); see also Peter Muchlinski, *Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate: The Issue of National Security*, in *YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009* 35 (Karl P. Sauvant ed., 2009). See generally Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in *APPEALS MECHANISM IN INTERNATIONAL DISPUTES* 39 (Karl P. Sauvant ed., 2008).



of investment disputes on the host state cannot be placed on the doorsteps of arbitral tribunals or foreign investors alone. Host states have a responsibility to properly define and clarify their legal and regulatory regime on foreign investments.

#### CONCLUSION

The opposing views of Calvo and Hull, mostly addressed the issue of expropriation under international law at the time. It is fair to state, with some plausibility, that the act of expropriation is at the root of most international investment disputes. At the height of the conflict between the Calvo doctrine and the Hull formula, expropriation meant the actual taking of the alien property by the host state. The notion of expropriation has broadened over time. Under international investment law and arbitration, the act or omission of the host state that directly or indirectly infringes on the proprietary rights of the foreign investor is expropriation. This expanded notion is hinged on the obligation on the host state to guarantee the observance of contractual obligations entered with foreign investors under BITs and independent foreign investment related contracts. Despite the failure of the international minimum standard to satisfy the test of customary international law, the concept has been reincarnated through standard provisions in BITs such as umbrella clauses and the FET standard.

Considering the evolution of investment law and arbitration, it is not a good approach by the global south to rely on national laws, or contracts founded on same, to regulate and interpret international investment law obligations and dispute resolution mechanisms. In cases where national laws have been clearly applied to settlements of investment disputes, umbrella clauses have been upheld and applied broadly to internationalize the disputes by subjecting it to the provisions of the BIT. This is a lesson the global south should draw from the historical development and evolution of international investment law and arbitration. These countries should take steps to re-negotiate and insert clauses in their BITs that reflect their expectations, particularly as it pertains to covered investments, investment dispute resolution mechanisms, and considerations of contribution to economic development by the covered investments. Doing nothing will create more confusion and frustration with the investment treaty arbitration regime. The situation can instigate a massive withdrawal from the ICSID Convention over a matter that could be addressed with a smarter and a more balanced approach by the global south to international investment law and arbitration.