DIPLOMATIC ASSISTANCE TO PRIVATE INVESTMENT

A STUDY OF THE THEORY AND PRACTICE OF THE UNITED STATES DURING THE TWENTIETH CENTURY†

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INTRODUCTION

THIS IS a study of the diplomatic assistance extended by the United States to American nationals investing in foreign countries. It is based on those official documents relating to American foreign relations in the twentieth century which have so far been published and thus principally encompasses the period 1900–1940. It is designed as an inquiry into aspects of international law which have not often been scrutinized in recent years; in fact, the scarcity of theoretical analyses of the law of diplomatic protection is as marked as is, at least in the United States, the abundance of primary source material awaiting the elaboration of theories and rules of law in the field.

Although much has been written on the protection that private investment enjoys or should enjoy under international law, the emphasis has been upon expositions or analyses of doctrines of international law, or upon plans for creating protection in the form of multilateral or bilateral investment conventions. No comprehensive survey would seem to have been made for some time of the protection actually given to investors in the form of diplomatic support extended by the home government. For this reason alone, an analysis of diplomatic practice in the field is important.

Evidently, a clarification of United States policy and practice in rendering assistance through diplomacy to American private enterprise is of considerable interest. The United States in most respects is the most powerful nation in the present world; it is difficult for other nations to ignore the attitude of its Government in any situation. The United States also supplies a very large share of the totality of international investment. Another reason which

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A comparative and more comprehensive analysis of the diplomatic protection of international concessions will be included in Mr. Schwebel's and the author's book, now in preparation, INTERNATIONAL INVESTMENT CONTRACTS.

has prompted selection of American documentation for this study is that more is known of United States practice than of the practice of any other capital exporting nation, due to liberal rules respecting publication of documents that are followed by the State Department.

Consideration will be given to several hundred cases in which the United States Government has given diplomatic assistance in one form or another to private enterprise investing abroad. It might be contended that these cases reflect only vanishing aspects of history and have limited relevance to modern conditions because of the very nature of "foreign policy," which in such large measure experiences constant transformation. This would be a misinterpretation of essential characteristics of the source material. A thorough examination of the cases does not reveal the application of flexible, oft-changing policies adapted, *ad hoc*, to the great variety of many-faceted factual situations that have arisen during a forty-year period, but rather leads to the discovery of a gradual evolution and theoretical elaboration of doctrines and rules by the State Department in a fashion more characteristic of the work of a judicial institution than of the methods commonly (and, in some cases, erroneously) believed to govern the activities of Ministries of Foreign Affairs. The State Department is found to have acted and to have believed itself to be acting on the basis of what it sees—in response to dispassionate legal advice—to be the governing international law. Many aspects of American foreign policy in this field are thus significantly firm and relatively unchanging. Indeed, in many respects little change seems to have occurred in the twenty-year period which has elapsed since the publication of the latest volume of *Foreign Relations*. Documents that are released from time to time in disputes which attract great public attention—such as the recent diplomatic correspondence with the revolutionary Government of Cuba—confirm this impression.

This inquiry is concerned primarily with those aspects of the material under review which are relevant to a legal theory of diplomatic assistance in the investment field. No attempt will be made to assess the statistical or economic importance of the case law examined. It is believed, however, both that the instances which have been recorded in *Foreign Relations* are representative and typical and that the accounts rendered of each case are substantially complete.

Because of the theoretical character of the inquiry, emphasis will be laid more upon the delimitation and fixation of opinions as to what is to be considered permissible, advisable, necessary, or vice versa, than upon the frequency of actions taken, or upon the intensity of any particular instance of diplomatic interposition.

The subject naturally falls into two parts. One concerns diplomatic assistance in the establishment of investments; Part I of the study examines these aspects of the subject. Part II will be devoted to analysis of diplomatic activities designed to protect already existing American economic interests abroad.

I. Diplomatic Assistance in the Establishment of Investments

The diplomatic assistance and aid given by the United States to Americans investing abroad is and has always been manifold. To the extent that it has not been directed merely to the dissemination of information and to similar administrative tasks, it may be said to have included, *inter alia*, the negotiation of commercial or other treaties with foreign States. It is not proposed to deal with such aspects of the activities of the United States State Department in this study, because to do so would considerably enlarge its scope without entailing corresponding benefit. Nor shall comments be made upon such matters as the foreign investment guarantee program which has been undertaken in recent years, even though this program by now has considerable practical importance. Attention will instead be focused on concrete diplomatic interpositions in a strict sense, as exercised, avowedly, in favor of particular companies or individuals vis-à-vis foreign governments.

A. *Survey of the Case Material*

American diplomatic assistance of this character has generally fallen within one of seven distinguishable categories, in most of which the State Department has sought to attain wider objectives by extending its good offices to American enterprise.

1. By far the most important group of cases is intimately connected with the so-called "Open Door policy." This doctrine—which claimed non-discrimination and commercial equality for American enterprise and finance—was originally advanced as official United States policy in relation to China toward the end of the nineteenth century. It is believed that acceptance of the doctrine resulted from the fear or realization on the part of sectors of the American business community that, unless the burgeoning domestic economy were eventually to contract, new markets must be found for the constantly increasing United States production of manufactured goods and agricultural products. It is often said that the policy first found expression in two instructions sent by Secretary of State Hay to the American Minister in China in 1899 and 1900; in fact, an earlier instance of diplomatic assistance to Americans desiring to invest in China is a dispatch from Secretary of State Olney in 1896.[2]

It must be realized that the Open Door policy was not merely a defensive action aimed at preventing an exclusive dominance, particularly of British and French—and, so far as China was concerned, Japanese—economic interests. In a recent illuminating book on American foreign policy in the

[2] For. Rel. 1897, 56. The American Minister in China was instructed to use his "personal and official influence and lend all proper countenance to secure to reputable representatives of such concerns the same facilities for submitting proposals, tendering bids, or obtaining contracts as are enjoyed by any other foreign commerical enterprise in the country.... Broadly speaking, you should employ all proper methods for the extension of American commercial interests in China, while refraining from advocating the projects of any one firm to the exclusion of others."

twentieth century, Professor W. A. Williams has aptly described the essential characteristics of the policy in these words:

> Discounted in recent years as a futile and naive gesture in a world of harsh reality, the Open Door Policy was in fact a brilliant strategic stroke which led to the gradual extension of American economic and political power throughout the world. If it ultimately failed, it was not because it was foolish or weak, but because it was so successful. The empire that was built according to the strategy and tactics of the Open Door Notes engendered the antagonisms created by all empires, and it is that opposition which has posed so many difficulties for American diplomacy in the middle of the twentieth century.[3]
>
> Latter-day experts who dismissed the policy as irrelevant, misguided, or unsuccessful erred in two respects. They missed its deep roots in the American past and its importance at the time, and they failed to realize that the policy expressed the basic strategy and tactics of America's secular and imperial expansion in the twentieth century. When combined with the ideology of an industrial Manifest Destiny, the history of the Open Door Notes became the history of American foreign relations from 1900 to 1958.[4]

While China seems to have remained its main sphere of application in regard to diplomatic support of American investors,[5] the policy of the Open Door eventually came to play an important role in United States diplomacy with respect to a large number of countries or territories such as Albania,[6] British India,[7] Kuwait,[8] Bahrein,[9] Netherlands East Indies,[10] Siam,[11]

[3] WILLIAMS, THE TRAGEDY OF AMERICAN DIPLOMACY 34–35 (1959).

[4] *Id.* at 39–40.

[5] See, *e.g.*, FOR. REL. 1902, 255–62, FOR. REL. 1909, 144–215, especially at 152, 178–79, 1910, 269–91; FOR. REL. 1909, 70–93, especially at 86, 1910, 353–60; FOR. REL. 1916, 150–210, 1917, 160–207, 1918, 199–209, 1920, I 679–727; FOR. REL. 1916, 128–50; FOR. REL. 1921, I, 404–56, especially at 411–12; FOR. REL. 1935, III, 767–89, 1936, IV, 600–28, 1937, IV, 658–61. *Cf.* UNITED STATES RELATIONS WITH CHINA, WITH SPECIAL REFERENCE TO THE PERIOD 1944–1949, 1–4, 10 (Washington 1949). *Cf.* Editorial Comment, *The Integrity of China and the 'Open Door,'* 1 AM. J. INT'L L. 954–63 (1907); Editorial Comment, *Railways in China*, 4 AM. J. INT'L L. 687–89 (1910); Ching-Chun Wang, *The Hankow-Szechuan Railway Loan*, 5 AM. J. INT'L L. 653–64 (1911); Editorial Comment, *The Chinese Railway and Currency Loans*, 5 AM. J. INT'L L., 705–07 (1911); Editorial Comment, *The Passing of Dollar Diplomacy*, 7 AM. J. INT'L L. 335–41 (1913); Finch, *American Diplomacy and the Financing of China*, 16 AM. J. INT'L L. 25–42 (1922).

[6] FOR. REL. 1923, II, 17–21, 1924, I, 753–55; FOR. REL. 1922, I, 604–09, 1923, I, 371–97, 1925, I, 493–511.

[7] FOR. REL. 1921, II, 71–80, 1922, II, 352–58, 1923, II, 264–71; FOR. REL. 1930, III, 161–66.

[8] FOR. REL. 1932, II, 1–29.

[9] FOR. REL. 1929, III, 80–82.

[10] FOR. REL. 1920, III, 260–91, 1921, II, 528–47, 1928, III, 375–407, 1929, III, 540–48. *Cf.* Reed, *Standard Oil in Indonesia 1898–1928*, 32 BUS. HISTORY REV. 311–37 (1958).

[11] FOR. REL. 1910, 846–48; FOR. REL. 1921, II, 880–89.

Persia,[12] the Sudan,[13] and Palestine as well as other Middle East mandate territories after World War I.[14] Indeed, the United States pressed for recognition of like principles even in the Americas; instances are found where the United States has relied on what amounts to an Open Door doctrine vis-à-vis Argentina,[15] Ecuador,[16] Guatemala[17] and other Latin American countries.

The Open Door policy was pursued with vigour for many decades. While originally the diplomatic measures taken were rather restricted, there later occurred a strengthening of the support in practice, and even in express declarations of policy. Thus, President Taft summarized the attitude of his administration in the following words:

> The diplomacy of the present administration has sought to respond to modern ideas of commercial intercourse. This policy has been characterized as substituting dollars for bullets .... It is an effort frankly directed to the increase of American trade upon the axiomatic principle that the Government of the United States shall extend all proper support to every legitimate and beneficial American enterprise abroad.[18]

2. A second broad type of instance of American diplomatic assistance in the establishment of investments are those where the United States Government has attached considerable importance to the development abroad of one or another kind of enterprise. Thus, the keen interest shown during certain periods for cable and radio communications led the State Department to go almost out of its way in supporting American companies in their efforts to secure cable or radio concessions in most of South America,[19] and at transatlantic landing points such as Liberia,[20] and Portugal (the Azores),[21] or at Pacific landing points in China.[22] Again, these activities often produced clashes with the efforts of British or French companies which were vigorously supported by their Governments.[23] Another distinct group of cases dates

[12] FOR. REL. 1921, II, 640–55.

[13] FOR. REL. 1933, II, 845–48.

[14] FOR. REL. 1919, II, 250–62, 1920, II, 649–75, 1921, II, 80–94, 1921, II, 94–105, 1922, II, 333–52, 1923, II, 240–64, 1924, II, 222–41, 1925, II, 239–45, 1926, II, 362–70, 1927, II, 816–24, 1930, III, 309–11, 1931, II, 604–11.

[15] FOR. REL. 1936, V, 184–200.

[16] FOR. REL. 1912, 422–34, 1913, 505–21.

[17] FOR. REL. 1927, III, 44–47.

[18] 49 CONG. REC. 9 (1912). *Cf.* on subsequent policy, WILLIAMS, *op. cit. supra* note 3, at ch. 4.

[19] FOR. REL. 1910, 61–66, 1918, 35–44, 1918, 45–78, 1919, I, 172–83, 1919, I, 193–204, 1921, I, 263–65 (Brazil and Argentina); FOR. REL. 1920, I, 827–32 (Colombia); FOR. REL. 1920, II, 58–69, 1920, II, 686–99, 1921, I, 808–15, 1921, I, 815–27, 1922, I, 518–38 (Cuba); FOR. REL. 1921, II, 666–70 (Peru); FOR. REL. 1929, III, 850–60 (Venezuela).

[20] FOR. REL. 1928, III, 254–82.

[21] FOR. REL. 1922, II, 359–91, 1923, II, 271–306.

[22] FOR. REL. 1930, II, 627–30.

[23] See the material referred to above *passim* and *cf.* Section B *infra*.

from the early history of aviation, when, seemingly because of the national interest in securing efficient postal services, the State Department extended substantial aid to Pan American Airways in negotiations for concessions in Central and South America,[24] in China[25] and in Liberia.[26] Lastly, after World War I, it was the endeavor of the United States Government to secure adequate future sources of supply of oil[27]—and to some extent other vital raw materials, such as rubber[28]—which made it possible for companies like Standard Oil (N.J.) and Sinclair, or Firestone, to obtain the assistance of American diplomacy in their concession-seeking activities abroad.

3. A third main category of cases are those where a particularly close relationship existing between the United States and a foreign country has come to involve the State Department to a greater or lesser extent in concession negotiations and in other activities designed to promote American investments abroad. Among such countries are China until perhaps 1930,[29] Liberia,[30]

[24] FOR. REL. 1928, I, 775–830, 1929, I, 542–45, 1929, I, 546–652; *cf.* FOR. REL. 1927, III, 44–47.

[25] FOR. REL. 1933, III, 603–05.

[26] FOR. REL. 1940, III, 756–71.

[27] A circular letter from the Secretary of State to diplomatic and consular officers, dated August 16, 1919, stated, *inter alia*:

"The vital importance of securing adequate supplies of mineral oil both for present and future needs of the United States has been forcibly brought to the attention of the Department....

"You are accordingly instructed to obtain and forward promptly from time to time information regarding mineral oil concessions either proposed or granted, sale or transfer of such concessions, change of ownership of oil property or important changes in ownership or control of corporate companies concerned with oil production or distribution....

"You are also instructed to lend all legitimate aid to reliable and responsible United States citizens or interests which are seeking mineral oil concessions or rights...." FOR. REL. 1919, I, 167.

See on the initiation of this policy FOR. REL. 1919, I, 163–71, 1920, I, 350–70, and for case illustrations FOR. REL. 1920, III, 260–91, 1921, II, 528–47, 1928, III, 375–407, 1929, III, 540–48 (Netherlands East Indies); FOR. REL. 1921, II, 71–80, 1922, II, 352–58, 1923, II, 264–71 (British India); FOR. REL. 1921, II, 547–53 (The Philippines); FOR. REL. 1922, I, 604–09, 1923, I, 371–97, 1925, I, 493–511 (Albania); FOR. REL. 1936, V, 184–200 (Argentina); FOR. REL. 1929, III, 80–82 (Bahrein); FOR. REL. 1932, II, 1–29 (Kuwait); FOR. REL. 1919, I, 724–25, 1919, I, 726–63, 1919, I, 763–95, 1920, I, 823–27, 1921, I, 638–45, 1922, I, 974–79 (Colombia).

[28] FOR. REL. 1925, II, 367–495, 1926, II, 503–97, 1927, III, 136–59; *cf.* FOR. REL. 1933, II, 878–966.

[29] See, *e.g.*, FOR. REL. 1909, 144–215, 1910, 269–91; FOR. REL. 1909, 70–93, 1910, 353–60.

[30] *E.g.*, FOR. REL. 1914, 440–42, 1915, 635–42, 1916, 458–61, 1917, 888–901, 1918, 505–47, 1919, II, 464–504, 1921, II, 363–93, 1922, II, 606–38; FOR. REL. 1919, II, 504–27; FOR. REL. 1925, II, 367–495, 1926, II, 503–97, 1927, III, 136–59; FOR. REL. 1937, II, 829–57, 1938, II, 770–817, 1939, IV, 623–30; FOR. REL. 1940, III, 756–71.

An illustrative statement was made in connection with certain iron ore explorations by American steel companies in Liberia shortly before World War II. Secretary of State Hull, in a dispatch to the American Minister at Monrovia, dated December 13, 1939, wrote that "the Liberian Government undoubtedly realizes that we consider the development of Liberia's natural resources of much greater importance than the mere participation of American concerns in such an enterprise." FOR. REL. 1939, IV, 629.

Panama,[31] Cuba in the first quarter of this century,[32] as well as certain Central American or Caribbean republics, especially at times when the United States exercised control over their financial affairs.[33]

4. A primary motivating factor which might at times have prompted the State Department to lend its support diplomatically to American investors in their efforts to secure favorable conditions for investments abroad is the mere importance of the company concerned. This may often have been the case with the largest American corporations operating abroad, but one naturally meets with great difficulties in attempting to document this fact, which generally presents itself only in evanescent overtones.

5. A fifth category, somewhat less clearly perceptible, is the type of case where diplomatic assistance by the State Department has not seemingly been motivated by other factors than interest in supporting American enterprise generally. It would appear that some instances relating to Persia[34] and Afghanistan,[35] as well as a few other isolated cases are of this character.

6. At times, considerations of an entirely different nature have influenced the United States Government to become involved diplomatically in the promotion and support of private American investment abroad. While the cases in point are rather disparate, mention may be made, *inter alia*, of actions taken by the United States to prevent German enterprise from gaining a foothold in Panama[36] and Liberia[37] for military reasons, the interest of the United States in creating satisfactory sanitary conditions in Cuba[38] and Ecuador,[39] and a desire to prevent the Soviet Union from acquiring an undue interest in Iranian oil fields.[40]

7. Lastly, diplomatic activities exercised by the State Department in the promotion of American investments have often been dictated by extraneous reasons, such as for the purpose of alleviating famine,[41] or for other reasons of a humanitarian character.

[31] *E.g.*, FOR. REL. 1912, 1167-206, 1913, 1081-094, 1913, 1094-104; FOR. REL. 1917, 1179-204.

[32] *E.g.*, FOR. REL. 1912, 309-22, 1913, 365-69; FOR. REL. 1913, 381-405; FOR. REL. 1913, 369-81.

[33] Notably Nicaragua, *e.g.*, FOR. REL. 1912, 1071-105, 1913, 1034-67; and Haiti, *e.g.*, FOR. REL. 1920, II, 845-53, 1920, II, 837-44; FOR. REL. 1923, II, 418-23; FOR. REL. 1924, II, 293-99, 1925, II, 309-15, 1926, II, 429-34.

[34] FOR. REL. 1924, II, 552-65.

[35] FOR. REL. 1937, II, 597-604, 1937, II, 605-14, 1937, II, 734-61, 1938, II, 752-57.

[36] FOR. REL. 1912, 1167-206, 1913, 1081-94, 1913, 1094-104; FOR. REL. 1917, 1179-204.

[37] FOR. REL. 1919, II, 504-27; FOR. REL. 1937, II, 829-57, 1938, II, 770-817, 1939, IV, 623-30.

[38] FOR. REL. 1904, 247-53, 1905, 265-76, 1920, II, 83-108.

[39] FOR. REL. 1912, 422-34, 1913, 505-21.

[40] FOR. REL. 1921, II, 640-55; FOR. REL. 1937, II, 734-61.

[41] FOR. REL. 1914, 95-119, 1915, 212-16, 1916, 103-28, 1917, 207-31, 1919, I, 615-26 (China).

Virtually all of the recorded instances in which diplomatic support has been extended by the United States Government in the establishment of American investments abroad follow the general pattern which has been briefly outlined above. It is not always possible to classify the primary motivating considerations strictly into any of the seven categories enumerated, for evidently, in some instances, considerations have overlapped. Granted these deficiencies in the classification, the scheme nevertheless shows a few significant and relatively precise features of American diplomatic practice.

B. *General Features of Instances of Diplomatic Assistance*

A feature of interest is whether interpositions have been negative or positive in character, *i.e.*, whether the State Department has been primarily concerned with the elimination of existing impediments to American investments, or whether it has gone beyond this restrictive type of action and has called on foreign nations to take positive steps to facilitate local establishment of American enterprise.

In many situations, American diplomatic interpositions have had the character of protests against proposed or actually effected legislative or administrative measures which, while not in any way infringing upon existing American investments, have prevented or threatened to prevent American enterprise from competing on equal terms with local capital, or with the capital of other nations. The United States Government's primary purpose in these cases has been to secure for American firms future access to overseas markets.

It may suffice to refer here to some monopoly cases as illustrative of this attitude. The United States has objected to the establishment of oil,[42] wolfram,[43] and other [44] monopolies in China, and has protested against the institution of an air transportation monopoly in Guatemala,[45] as well as of various kinds of oil or petroleum derivatives manufacture or sales monopolies in Chile,[46] Greece,[47] Japan and Manchuria,[48] Portugal[49] and Siam.[50] It is notable that the State Department has viewed with disfavor even monopolistic rights granted to American interests.[51]

[42] FOR. REL. 1926, I, 1092–97.

[43] FOR. REL. 1933, III, 593–98.

[44] FOR. REL. 1935, III, 767–89, 1936, IV, 600–28, and 1937, IV, 658–61.

[45] FOR. REL. 1927, III, 44–47.

[46] FOR. REL. 1932, V, 505–11.

[47] FOR. REL. 1933, II, 547–52.

[48] FOR. REL. 1933, III, 732–45, 1934, III, 699–799, 1935, III, 877–939, 1936, IV, 786–806, and 1937, IV, 723–34.

[49] FOR. REL. 1930, III, 770–77.

[50] FOR. REL. 1937, IV, 890–94.

[51] FOR. REL. 1926, I, 1092–97 (China: Standard Oil Company); FOR. REL. 1920, III. 407–21, at 418 (Poland: American Express Company).

The cases where the purpose of diplomatic assistance has been to persuade the government of a foreign nation to take positive action vis-à-vis prospective American investors have nearly always concerned concessions or other contractual agreements. The State Department has then exercised its influence in support of efforts of American nationals to obtain, for example, nondiscriminatory treatment of tenders or bids, or the stipulation of favorable conditions in agreements or concessions with foreign governments.[52]

The most interesting feature of diplomatic interpositions of the kind surveyed thus far is the precise nature and characteristics of the diplomatic actions, and their actual or desired impact upon foreign governments in concrete situations, as well as the degree of involvement on the part of the United States Government.

It must be remarked at the outset that the United States' diplomatic support to nationals in the establishment of investments abroad has tended to be comparatively restrictive; more power and vigor has doubtless been brought into play in those cases where the State Department has exercised diplomatic protection of already existing investments in foreign countries.

The restraint exercised by the State Department has been such that it would hardly ever be correct to speak of an actual identification between a private American investor and his Government. It is difficult to find instances where, in instructions to diplomatic agents stationed abroad, or in direct communications with American corporations, the Department has not endeavored to draw an exact and clear line of demarcation, indicating the strict limits of actions which it has been prepared to undertake. There is no doubt but that the State Department has nearly always desired to maintain a distance between the Government of the United States and private American corporations or financial interests, no matter who these have been. This attitude has found expression in a variety of policies and doctrines which have been implemented with remarkable consistency.

One may first cite a general reluctance displayed by the State Department to do more than provide information and introductions, and its view that, diplomatic representatives having done this much, investors should thereafter themselves work toward achievement of their objectives. This attitude was, to mention but one example, taken shortly before World War II vis-à-vis United States Steel, Bethlehem Steel, and Republic Steel which at that time were considering exploring iron ore deposits in Liberia. A memorandum

[52] See for illustration the general instructions by Secretary of State Knox respecting Turkey in FOR. REL. 1909, 595–96; and FOR. REL. 1909, 144–215, 1910, 269–91 (the Hukuang loan, China); FOR. REL. 1919, I, 505–55, especially at 525–28 (Continental and Commercial Trust and Savings Bank of Chicago), 1920, I, 605–74, especially at 650 (Pacific Development Corporation, China); FOR. REL. 1922, II, 966–83, 1923, II, 1198–252 (Ottoman-American Development Company, Turkey); FOR. REL. 1921, II, 932–41 (Sinclair Consolidated Oil Company, Venezuela); FOR. REL. 1929, III, 109–21 (radio and telephone concessions in Greece); FOR. REL. 1929, III, 850–60 (All-America Cables, Venezuela); FOR. REL. 1928, III, 31–41 (Struma Valley drainage project, Greece); FOR. REL. 1932, II, 508–20 (Roumania).

of a State Department aide of 1938 is indicative of the role assumed by the State Department:

> Our only concern in the matter from the beginning has been to make equally available to all possibly interested American companies information at the Department's disposal concerning the opportunity for the exploitation of the iron ore deposits in Liberia. Now that that purpose has been achieved we have no further direct interest in the question inasmuch as the matter is now one for negotiation direct between the companies concerned and the Liberian Government.[53]

While this instance possessed a few rather unique characteristics—such as the fact that it was the State Department which took the initiative of calling upon the steel companies to consider the possibility of investing in Liberia—the views expressed are representative of an attitude which has at times been vigorously insisted upon by the Department. It has more than once strongly maintained that the United States will in no circumstances become involved in commercial aspects of contractual negotiations between an American investor and a foreign government.

The main consideration underlying this policy is one which in large measure has shaped American diplomacy in the private investment field: the United States Government's unwillingness to lend extensive support to any single American company at the exclusion of other, competing interests. Secretary of State Hughes once summed up the doctrine with admirable clarity:

> In giving appropriate diplomatic support to American enterprise, our Government does not, of course, attempt to secure contracts for its nationals or to institute particular undertakings. I assume that no one could wish the Government to be so involved. Its object is to keep open the course of fair and equal opportunity. Hence, it is a vital principle that it must act with absolute impartiality with respect to American business interests which may happen to be in competition. It does not attempt to favor one at the expense of another, but to maintain such policies with respect to international intercourse as will give all a fair chance.[54]

Only a few years later, Mr. Hughes found occasion to restate this policy of restraint in connection with proposals by the Firestone interests to conclude concession and loan agreements with Liberia providing for the establishment of an important rubber industry in that country. In a letter to Mr. Harvey S. Firestone, Mr. Hughes explained the position of the State Department in these words:

> In reply, I wish to say that I fully appreciate the importance of developing independent sources of rubber supply under American control, and trust that your enterprise may contribute to that end. With reference to your

[53] FOR. REL. 1938, II, 770–817, at 814.

[54] Hughes, *Some Aspects of the Work of the Department of State*, 16 AM. J. INT'L L. 353, 357 (1922).

> inquiry whether the enterprise would receive the support of this Department, I may state that it is not the policy of the Department of State to obtain or negotiate concessions for American citizens, although the Department is always desirous to maintain free and equal opportunity for American enterprise throughout the world. There appears to be nothing in the contracts submitted by you which is opposed to the interests or policies of this Government or which would preclude this Department from giving appropriate moral support. It should be understood, of course, that the Government assumes no obligations and the investment must be made at the risk of those engaged in the enterprise.[55]

This case, relating to a country with which the United States has always felt a special affinity, may be classed in a somewhat special category. Yet the State Department—which at subsequent stages in the negotiations often looked at matters more from the point of view of the Republic than from that of Firestone—to some extent did comment upon the wording of proposed concession terms.

What has so far been said regarding the exercise of marked restraint by the State Department in supporting American enterprise diplomatically does not mean that the United States Government has always been a passive bystander, even in concrete negotiations between American corporations and foreign governments. When, for example, Standard Oil (N.J.) in 1921 obtained confirmation of the grant of a fifty-year oil concession in Persia, the American Chargé d'affaires in Teheran significantly cabled the State Department as follows: "May I again urge that the company send immediately one of its best men to represent it locally as the Legation has already gone as far as it properly can in pushing this matter through."[56]

Other exceptions are found in the diplomatic correspondence with China. While the vast material on this topic cannot be analyzed here, reference may

[55] FOR. REL. 1925, II, 367–495, at 403–04.

It is illustrative to compare this statement with the attitude of the State Department in the crisis which arose in 1933: see on the latter FOR. REL. 1933, II, 878–966, especially at 924–26.

[56] FOR. REL. 1921, II, 640–55, at 648. The United States later became even more deeply involved in this transaction on a high level after the British Foreign Secretary, Lord Curzon, had maintained vis-à-vis the Persian Government that he considered its grant of the concession "to be entirely indefensible and extremely unfriendly to His Majesty's Government." FOR. REL. 1921, II, 640–55, at 650–51.

An instance similar to the Persian one cited in the text arose in Venezuela in 1929, when the American Chargé d'affaires on May 13, advised the State Department, in a communication concerning negotiations for cable concessions, that "All-America Cables has lost much valuable time by dilatoriness if not incompetence of its local representatives until the recent arrival of Vice President Pirie. It may be necessary for the Department to remind the Venezuelan Government informally that it is interested in seeing an effective cable service established between the United States and Venezuela and that it believes All-America Cables in a position to render such service." Secretary of State Stimson replied that "if you believe such action necessary you may informally remind the Venezuelan Government as suggested." FOR. REL. 1929, III, 850–60. at 854.

be made, for example, to the actions of the State Department in connection with the Hukuang railway loan negotiations[57] which, in the apt words of G.A. Finch,

> went far beyond, and indeed contravened the foregoing expressions of previous policy. The official representations made by Secretary of State Knox and the personal appeal of President Taft made the Government of the United States virtually a party to the application for the Hukuang Railway Loan. The initiative of the State Department in the formation of the American group to participate in the loan made the Government practically sponsor for the actions of that group in China.[58]

Despite such exceptions, the dominant impression which emerges from a study of United States diplomatic practice is a policy of restraint. Perhaps this is best understood if the attitude of the United States Government, and the diplomacy practiced by it, are contrasted with the policies adopted by such other capital-exporting nations of major significance as Great Britain and France. There is a profound divergence among the three countries with respect to the extent of diplomatic support offered to their nationals in the establishment of investments abroad. In fact, American corporations have on many occasions been placed at a disadvantage as the State Department has felt bound to refrain from taking steps in support of their projects of a character which, as a matter of course, has been offered to British and French competitors by their Governments.

In an illuminating letter from Secretary of State Hughes to President Coolidge in 1923, this problem was presented in the clear and concise terms so often employed by that eminent Secretary of State, who has contributed more than perhaps anybody else to the creation of explicit theories and doctrines in this field:

> This general question raises a point which I feel to be of sufficient importance to bring to your attention; namely, the proper attitude of this Government toward American commercial enterprise abroad. From time to time there has been some dissatisfaction expressed in business circles because this Department's attitude towards American business interests in the foreign field differs somewhat from the attitude in similar matters of the British, French and other European governments. The latter are not loath to interfere politically in support of the business interests of their nationals to a degree which is not followed by this Department. Our position is that we are always ready to give appropriate support to our nationals in seeking opportunities for business enterprise abroad, but we do not undertake to make the government a party to the business negotiations or use political pressure for the benefit of private interests in order to obtain particular concessions, or intervene in favor of one American interest as against another. We are persistent in our efforts to maintain the open door policy, or equality

[57] FOR. REL. 1909, 144–215, 1910, 269–91.

[58] Finch, *supra* note 5, at 28.

of commercial opportunity, but we do not attempt to assume obligations for the government, expressed or implied, which under our system we could not undertake to discharge.

American companies which might prefer a policy of more direct interference on their behalf by the government are inclined, in my opinion, to overlook the fact that American prestige and reputation for fairness has been enhanced, and consequently business opportunities of our nationals have been increased, by the correct policy which this government has followed. I find that in many parts of the world American business is welcomed largely because foreign countries realize that they can deal with American interests on a business basis without fearing political complications.

It is hardly necessary to point out that the other course desired by some business men, intent on their own immediate interests, would not only be contrary to our traditions and policy, but if persistently followed would involve us in political intrigues and in difficulties which other governments with different exigencies and aims find it impossible to escape and from which we have happily been free.[59]

While the diplomatic correspondence of Great Britain and France is not published to an extent at all comparable to that of the United States, it is not difficult to find in the pages of *Foreign Relations* many cases where this cleavage of opinion among the three nations about the proper limits for diplomatic assistance of this character has engendered conflict in their mutual relations.

Mention has already been made earlier in this article of the clashes that often occurred between British and French cable companies, on the one hand, and their American competitors on the other hand.[60] Another field where disputes of this kind have not been lacking is that of oil exploration and exploitation.

In the beginning of the nineteen-twenties, an illustrative case arose in Albania where a British oil company—The Anglo-Persian Oil Company—and two American corporations—the Standard Oil Company (N.Y.) and the Sinclair Exploration Company—were competing for the grant of oil concessions by the Albanian Government. At one point, Secretary of State Hughes informed the Ambassador in Great Britain that:

The American Chargé in Albania has informed the Department that it has been reported that the British Minister has informed the Albanian Prime Minister that unless the Anglo-Persian Oil Company's contract is accepted and ratified in its present form during the present session of the Parliament, which will adjourn on October 13, he would withdraw immediately, by this action virtually severing diplomatic relations. A previous unconfirmed report has come to the Department that a threat had been made to the Albanian Government that if the Anglo-Persian's oil concession were

[59] FOR. REL. 1923, II, 711-36, at 717-18.

[60] *Cf., e.g.*, FOR. REL. 1920, II, 58-69 and 686-99, 1921, I, 808-27 and 1922, I, 618-38.

> not granted the capitulations would be reimposed and British support in the matter of the delimitation of the boundaries of Albania would be withdrawn.[61]

An instance of vigorous action taken by the French Government may also be cited by way of comparison. In 1932, firms of varying nationality, among them French and American, were competing for contracts with Roumania respecting railway signal installations. In the correspondence relating to representations by the United States Government to the Roumanian Government concerning discrimination against the American firm, it was reported by the American Chargé d'affaires that Roumanian officials—including the Prime Minister—"freely admitted that the offer of the American company was the most advantageous one received and . . . neither of them made any attempt to deny that the contracts had been awarded to the French company because of political pressure from the French Government."[62]

It may be interesting, lastly, to illustrate the American policy of restraint by citing a few instances where United States diplomatic representatives abroad have exceeded the limits of what has been considered appropriate in rendering diplomatic support to American nationals.

The most explicit illustration which can be found is perhaps the unauthorized assistance extended by the American Ambassador at Madrid in 1924 to the International Telephone & Telegraph Company. While this instance primarily shows the negative attitude of the United States Government to the granting of monopolistic privileges to American enterprise—expounded upon below—it does, by implication, also illustrate the divergent attitudes of the major Western Foreign Offices to the role diplomacy should play in the private investment field.

The American Ambassador at Madrid, in August, 1924, reported that:

> Exclusive telephone rights in Spain have been given to American telephone interests who were assisted by Embassy in winning concession which involves about $8,000,000. Announcement must not be made in United States but will soon be made from Madrid.[63]

Secretary of State Hughes replied as follows:

> Department desires that appropriate aid be given to obtain a fair and equal opportunity for American interests, but our Government does not approve of monopolies. It is against the practice of the Department to aid American interests in securing monopolistic privileges or concessions which would

[61] FOR. REL. 1923, I, 371–97, at 394–95. *Cf.* on previous negotiations, FOR. REL. 1922 I, 604–09. It should be remarked that the allegations contained in the dispatch quoted in the text were later denied by the British Government, but there is doubt as to the sincerity of this denial. See on the diplomatic support given subsequently to the Standard Oil Company (N.Y.), whose negotiations ultimately resulted in the grant of a concession, FOR. REL. 1925, I, 493–511.

[62] FOR. REL. 1932, II, 508–20, at 514.

[63] FOR. REL. 1924, II, 692–94, at 692. The telegram has been paraphrased.

> exclude competing American firms, and the Department does not wish to have its representatives abroad give such assistance. The importance of this will be appreciated by you as our Government is constantly making protests to other governments against the giving to nationals of other countries exclusive concessions.
>
> The Department has made note of your statement that you have aided certain American telephone interests in winning monopolistic telephone rights in Spain. Department wishes immediate report on this phase of matter and complete information concerning the concession granted.[64]

Several other distinct features of American diplomatic assistance rendered in support of the establishment of American investments abroad explain and shed further light on the policy of restraint which has been described above as characteristic of the United States. They have crystallized into three specific policies which would seem to have been adhered to with constancy.

First, there is the perhaps self-evident rule that general foreign policy considerations have been held to override the interests of particular American investors. On this ground, it may be remarked, the State Department in at least two instances has persuaded American corporations to abandon concessions obtained by them from foreign governments.

The most drastic illustration is perhaps the correspondence that took place in 1935 with respect to the cancellation by the Standard Vacuum Oil Company of a concession in Ethiopia upon the advice of the Department of State. In this instance, "Stanvac" sought the Department's advice as to what it should do in view of the fact that a concession given by the Government of Ethiopia to their subsidiary company, the African Exploration and Development Company, had received world-wide publicity and had occasioned political agitation during the preceding three days. Secretary of State Hull stated in a dispatch to the American Ambassador to the Court of St. James's that "the Department officially advised that [the company] take immediate steps to cancel the contract and Department expressed a favorable opinion of a draft statement which [the company's] representatives had prepared giving the history of the concession and adding a declaration of their intention to cancel it."[65]

[64] FOR. REL. 1924, II, 692–94, at 693. The telegram has been paraphrased.

In subsequent dispatches, the American Ambassador, obviously hurt, explained that the choice on the part of the Spanish Government had been restricted to the American or the Swedish telephone system and that he "naturally thought that American system would be favored by the Department. My assistance consisted in informing Spaniards that Ameriican business interests always knew how to carry out big projects and that the American telephone system was not equaled anywhere. In the future I shall make no recommendations before receiving instructions from the Department." *Id.* at 693. Secretary of State Hughes replied that "of course Department wishes appropriate support to be given American interests. The point made was regarding efforts to obtain an exclusive concession. Department wishes complete information on this point so that nature and extent of monopolistic privileges may be understood." *Id.* at 694.

[65] FOR. REL. 1935, I, 778–84, at 781.

In this instance, the recommendation of the Department of State sprang from the international tension which surrounded Ethiopia at that time, and from the United States' desire not to do anything that might cast doubt on its removed position in the international conflict that had developed over Ethiopia.

Another case in point is the refusal of the State Department, in 1921 and 1922, to lend diplomatic support to the Sinclair Consolidated Corporation in its endeavors to secure a prospective oil concession in the northern portion of the island of Sakhalin for the reason that:

> the Government of the United States has not recognized the so-called Far Eastern Republic, from which it is understood that the concession in question would be received. Having regard to this fact, and to other uncertainties in the situation, the Department cannot at this time encourage you to proceed to the conclusion of definite engagements.[66]

Similarly, military considerations have influenced the United States Government to take a particularly restrictive attitude vis-à-vis American investors seeking its diplomatic support abroad.[67]

Lastly, mention may be made of the fact that it was for some time the policy of the United States to object to the granting of private American loans to foreign countries until these countries' debts to the United States Government had been settled.[68]

There are two further policies which in important respects have shaped and given clear direction to the American restraint in offering diplomatic assistance to prospective investors.

It has been noted that the United States has invariably insisted upon

[66] FOR. REL. 1923, II, 798–812, at 799. As the company nevertheless did proceed and eventually was granted a concession, Secretary of State Hughes later pointed out to the company that "you will readily understand that it is impossible for this Government to take official cognizanze of a contract which purports to have been concluded with a government which has not been recognized by the United States, and to make it the subject of diplomatic representations to another government." *Id.* at 805. *Cf.* on the subsequent cancellation of the oil concession in Northern Sakhalin and on the refusal then by the Department of State to intervene in behalf of Sinclair, FOR. REL. 1925, II, 697–701; *cf.* FOR. REL. 1924, II, 678–81.

[67] See, *e.g.*, on certain railway and road construction concessions in Panama, FOR. REL. 1917, 1179–204; *cf.* the previous instances recorded in FOR. REL. 1912, 1167–206, 1913, 1081–104. An instance of a somewhat unique character is referred to in FOR. REL. 1927, III, 499–518, where the United States actually objected to the granting by Panama of a proposed concession to a subsidiary of the United Fruit Company providing for the building of radio installations in that country. Here the United States in fact asserted its own rights under a concession granted to the Panama Railroad Company, owned by the United States Government.

[68] See, *e.g.*, FOR. REL. 1925, II, 358–63 (Italy); FOR. REL. 1925, II, 738–46 (Yugoslavia). A somewhat different consideration is referred to in FOR. REL. 1922, II, 1002–20, where the State Department displayed initial reluctance to acquiesce in a loan by American bankers to the Kingdom of the Serbs, Croats and Slovenes on account of the fact that the Yugoslav Government had not as yet settled a claim by the Standard Oil Company. See *id.*, at 1009 n.5.

the rule that it is unable to render diplomatic support to any one American company to the prejudice of competing American interests. This, of course, has been a consequence of respect for essential principles inherent in the American free enterprise system. With it has been joined another similar rule, which springs from official American policy towards monopolies. A doctrine has been evolved to the effect that American companies seeking monopolistic rights abroad are not entitled to support by American diplomacy. The instance cited above where the American diplomatic representative in Spain was rebuked for having assisted the International Telephone & Telegraph Company in obtaining an exclusive telephone concession in Spain illustrates this attitude.[69]

In a State Department report of a meeting held in 1938 in connection with negotiations then going on regarding iron ore concessions in Liberia, the competitive disadvantages resulting to American business from the anti-monopoly policy were discussed, and a number of instances were cited where the doctrine was said to have entailed detrimental consequences. The following quotations from the report are illuminating:

> [Mr. Murray described to representatives of United States Steel] what had occurred in Persia when two American companies had endeavored to obtain an oil concession from the Persian Government several years ago.
>
> Owing to the fact that the Department could not support one American concern to the exclusion of another, it had not been able to enter the lists and afford appropriate diplomatic support as it would have been in a position to do if there had been a single representative American interest at stake. One of the competing concerns, moreover, had effected a tieup with British interests which had brought with it British diplomatic assistance, whereas the Department was compelled to remain neutral and impartial throughout the negotiations. The result was that the Persians had played off one American concern against the other, the companies had fought each other to a standstill, and neither one obtained the concession.
>
> Mr. Murray next related what had taken place in Iraq when oil reserves had been opened up in that territory after the War. Under British mandate, there had been a disposition at first to restrict the exploitation of petroleum to those nations who had ratified the Treaty of Versailles or were members of the League of Nations, but we had insisted on the principle of the open door and had obtained equality of opportunity for American concerns. Instead of competing one against the other, six interested American companies had formed a group known as the Near East Development Corporation, the members of which had entered the fields successfully and worked in harmony together with everyone's satisfaction. More recently, Mr. Murray went on, two American companies had become attracted by

[69] Again, reference may be made to the general policy statement by Secretary of State Hughes quoted *supra* at note 54, and to the instances referred to *supra* note 51, where the State Department looked with disfavor upon exclusive rights obtained by the Standard Oil Company in China, and upon monopolistic features in an agreement concluded by the American Express Company with the Government of Poland.

> new oil reserves near Basrah and had been advised by the American Minister Resident in Baghdad to pool their interests and thus avoid the dangers and uncertainties of competitive negotiations.[70]

The remaining doctrine is of vastly greater importance than the foregoing. In general, it can be said to consist of a refusal to commit the United States in advance with respect to protection of an investment, once established. An examination of instances where this doctrine has been applied will explain much of what has been said above on the attitude of restraint and on the reasons which have been at the root of this policy.

As has been intimated, the reluctance of the State Department to lend active and vigorous assistance to American nationals, in contrast with the practice of some other governments, has stemmed from fear that this might imply a commitment on the part of the United States Government to later protect the investments in question against future actions by the government of the foreign country. American Secretaries of State have almost invariably stated that they lack power to bind their successors in office by giving assurances to such an effect. Among the many instances where this policy of the Department of State has been made clear to American investors, one may be cited which gives a concise summary of its purport.

In 1924, Mr. Harvey S. Firestone, then about to conclude a concession with the Liberian Government, submitted draft agreements to the Secretary of State "with the request that the State Department advise us if they contain anything that would prevent the United States Government from giving this development, if entered into, its moral support and approval, and also give me any opinion or advice you see fit as regards the protection afforded the rights of both parties from a contractual and international standpoint."[71] At a subsequent meeting in Washington, the Secretary of State is reported to have given Mr. Firestone the following reply:

> In examining the papers before him, the Secretary had found certain allusions to protection and support in the future. The Secretary would not and could not commit his successors in office in such a matter. He could, however, state that it was the historic policy of the Department to lend proper support of a diplomatic character to the just claims of its citizens. Each claim as presented was considered on its merits, and if found to be well founded in justice the Department took such action as was appropriate to the occasion. It should be clearly understood that there was no question of resort to force. It was a matter of appropriate diplomatic support. In this connection, the Secretary wished to emphasize the fact, which he hoped

[70] FOR. REL. 1938, II, 770–817, at 806. *Cf.* on another instance of implementation of the doctrine, 3 WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1564–65 (1943). The relation of such advice to subsequent antitrust action undertaken by the United States Government against the major American petroleum companies with international interests poses an interesting question.

[71] FOR. REL. 1925, II, 367–495, at 384–85.

Mr. Firestone would appreciate, that the Secretary could give no different assurance in the case of Liberia than he could give in a similar case with respect to any other country.[72]

The instances are too numerous to cite in which this doctrine has been applied, directly or indirectly, before and after 1924. It should not be denied, however, that on special occasions the United States may have become involved in particular negotiations to a degree which in fact, if not in theory, has amounted to a virtual endorsement of particular contracts and an implied moral obligation vis-à-vis the American investor to object to possible future interference with or nonfulfilment of such contracts by the foreign government concerned. An explicit guarantee of this nature has, however, to the writer's knowledge, only been given once, and then in special circumstances and with an express proviso regarding the limited extent of future diplomatic assistance.[73]

The United States State Department thus having consistently refused to give any guarantees in express terms of future diplomatic protection of American investments, no question has ever arisen as between an American national and his Government as to the meaning and extent of an obligation of this character.[74] However, in the debate concerning the status under international law of concession agreements concluded between States and aliens, the question has recently been asked whether, because, *inter alia*, of the active support often given in diplomacy to corporations which eventually obtain such concessions, these contracts "arguably may be viewed as instruments of an international character whose violation does give rise to a violation of

[72] FOR. REL. 1925, II, 367–495, at 386.

[73] In 1914, John Basset Moore, in his capacity of Chairman of the International Relief Board of the American National Red Cross, wrote to President Wilson in connection with a river conservation project in China, where the Red Cross had undertaken to secure an American contractor to perform the work. Mr. Moore wrote as follows:

"I therefore trust that you will pardon me for referring to my letter of the 26th ultimo and particularly to the question therein propounded as to whether the Government of the United States will give assurance of good offices and diplomatic support in behalf of the American contractor should he be able to agree with the Chinese Government on fair and equitable terms," FOR. REL. 1914, 105.

President Wilson replied:

"I am sincerely glad to hear that the Chinese Government has consented to act through the International Relief Board of the American Red Cross in the matter of the conservation of the river waters of China, and I hasten to write not only to express my gratification but to say that, with the concurrence of the Secretary of State, I shall be very glad indeed to have it understood that the Government of the United States will give assurance of good offices and diplomatic support in behalf of the American contractor should he be able to agree with the Chinese Government on fair and equitable terms. Of course, it is no longer necessary to explain that these good offices would not go to the extent to which some Governments have gone in seeking to enforce the rights of their nationals in the matter of contracts." *Ibid.*

[74] *Cf.* DOEHRING, DIE PFLICHT DES STAATES ZUR GEWÄHRUNG DIPLOMATISCHEN SCHUTZES (1959).

international law."[75] Since the State Department's facilitation of the negotiation of concession agreements has been restricted, and its actual involvement in negotiations for the conclusion of concessions quite exceptional, it may be said that support for such a thesis in American practice is modest. Moreover, the State Department's refusal to commit itself to diplomatic protection in the future may be argued to detract from the impact in international law that its role in the negotiatory process may be said to generate. This latter argument, however, is weakened in turn by the consideration that a government is never legally bound to intervene diplomatically on behalf of its nationals; the question of diplomatic intervention always remains one of its political discretion and diplomatic appreciation. With respect to the thesis that the involvement of the government of the investor in the granting of a concession strengthens the case for applying the protection of international law to the transaction, the experience of Great Britain and France is of greater relevance, for, as noted, these countries have characteristically exerted diplomatic pressure on behalf of their nationals in this sphere. It will furthermore become apparent from Part II of this study that a large number of American diplomatic interpositions made in protection of concessions held by American nationals indicate that often in practice violations of concession agreements in certain circumstances have been considered to give rise to violation of international law.

II. Diplomatic Assistance in the Protection of Investments

There are significant contrasts between the diplomatic support extended by the United States in protection of established investments and the assistance rendered to prospective investors in the process of acquiring economic interests abroad. The first part of this paper has demonstrated that in situations of the latter kind the State Department has in large measure evidenced a generally restrictive attitude, flowing from such considerations as official antimonopoly policy, the principle of affording equal opportunity to competing American interests, and reluctance to involve the United States too directly in concrete business negotiations with foreign governments for fear of hampering the Government's freedom of action in the future.

The various motives which have thus imposed restraints on United States diplomacy in relation to support in the establishment of investments do not have the same relevance in situations where an existing investment needs protection against acts of a foreign government. Once an American citizen possesses vested rights abroad which are exposed to danger of politically motivated loss or unwarranted interference, the national interest will—absent strong reasons to the contrary—normally coincide with that of the investor. That is why it is not surprising, as we turn to this phase of the subject, that the records reveal a vigorous, flexible foreign policy which, although displaying

[75] Schwebel, *International Protection of Contractual Arrangements*, Proceedings of the American Society of International Law 266, 267 (1959).

some individual features which may be termed typically American, has close resemblance to the practice of the great European powers.

Evidence for this thesis is manifold. First, United States diplomatic theory has not clung to any narrow formula respecting the nature or form of investments deemed worthy of support: the United States Government has deemed itself justified in intervening in support of various economic interests of its citizens. Secondly, the nature of the actions taken by foreign governments has had limited importance so long as unwarranted interference has been established. Thus, it is not the form but the effect of measures instituted by foreign governments which has been judged to be important. Again, the United States has not regarded it as necessary to await the occurrence of actual damage or loss but has intervened even in the early stages of incidents where action by a foreign government has only been threatened or proposed.

This part of the study seeks particularly to examine those characteristics of United States diplomacy which give rise to these general conclusions. After an introduction to the nature of the interests protected, the main types of diplomatic interpositions will be analyzed. The following section is devoted to an exposition and critical appraisal of the formal grounds of interposition, particularly with respect to claims originating in disputes concerning investment contracts or concessions concluded between American nationals and foreign governments; some other significant legal issues, such as the time when interpositions may be made, will also be discussed in that context. Thereafter, the question of remedies will be examined. The study ends with a summary of the main conclusions which can be drawn from the foregoing presentation.

A. *Nature of Protected Interests*[76]

Most foreign holdings of American nationals reportedly are equity investments in the sense that the vested economic interests are represented by shares in foreign subsidiary corporations. This circumstance has often given rise to the difficult problem of ascertaining whether satisfactory formal grounds for interposition have existed in respect, for example, to claimant's nationality; that question, however, can not be discussed in this context.

A survey of the many hundreds of known instances in which interpositions have been made by the United States during the half-century under consideration to protect investments abroad justifies the conclusion that any American economic interest abroad is as such entitled to be protected by the United States Government. There is accordingly no need to describe the numerous types of business interests which have been the object of diplomatic interposition.

It would seem to be only in two areas that the nature and form of an investment has exerted any influence on the attitude of the United States Government towards the question whether diplomatic protection should be

[76] *Cf.* 2 WHITEMAN, *op. cit. supra* note 70.

given. First, and foremost, is the thesis that claims based upon concessions and similar contractual undertakings with a foreign government fall into a special category. This theory is of such importance that a large part of this study will be devoted to analysis and reappraisal of its validity. (See under C *infra.*) Secondly, and less importantly, it has once been questioned in a compensation claim for forced government appropriation of private property whether certain intangible business assets ought properly to be included in the demand for a financial settlement. In the *Spanish Petroleum Monopoly* case,[77] this problem was extensively considered in a series of diplomatic dispatches relating particularly to compensation demanded for the properties and assets of a Spanish subsidiary of Standard Oil (N.J.)—Industrias Babel y Nervoin[78]—which were expropriated by the Spanish Government. Thus, in 1927, the Ambassador at Madrid asked for instructions about whether he should press diplomatically for compensation "for value of going concern and business goodwill,"[79] and while Secretary of State Kellogg originally stated that this problem must be dealt with on an *in casu* basis,[80] the United States subsequently joined the French Government in interpositions aimed at securing compensation for goodwill and going concern value.[81] The French Government's firm stand on the principle of "fair" compensation for goodwill was later emphatically endorsed by Secretary of State Kellogg,[82] and eventually Standard Oil (N.J.) obtained what the company seems to have regarded as a satisfactory indemnity amounting to about 25 per cent for goodwill over and above the physical valuation of the property.[83]

The policy adhered to in the *Spanish Petroleum Monopoly* case illustrates the fact that—as may seem natural to an outside observer—the widest range

[77] FOR. REL. 1927, III, 655–714, 1928, III, 832–78 and 1929, III, 768–88.

[78] The correspondence concerned primarily this company. However, it is illustrative to note that the Vacuum Oil Company and the Atlantic Refining Company had "built up an excellent business as selling agents but with practically no physical assets to sell, their trademarks, good will and selling organization being their only assets," Ambassador Hammond to Department of State on October 24, 1927, FOR. REL. 1927, III, 677. This fact seemingly did play an important role in the early stages of the dispute.

[79] FOR. REL. 1927, III, 674. "Earning power" was later also included.

[80] "From what precedes you will perceive that the question of compensation for 'good will' is necessarily one upon which the Department can take no position except as each specific case of expropriation arises." FOR. REL. 1927, III, 681–82.

The intentionally vague wording of the first notes of protest, as prepared in Washington, accordingly spoke of "full and fair compensation to all American interests concerned by which is meant the fair value of the property taken over and such damages as may reasonably be considered to have resulted to other property by reason of the taking." Secretary of State Kellogg, FOR. REL. 1927, III, 683; text of note *id.* at 693.

[81] On facts and figures, see especially Ambassador Hammond's dispatch of May 23, 1928, FOR. REL. 1928, III, 861.

[82] See Secretary of State Kellogg's report on a conversation with the French Foreign Minister, FOR. REL. 1928, III, 875.

[83] See Ambassador Hammond's dispatch of May 9, 1929, FOR. REL. 1929, III, 781.

of economic interests of American citizens abroad enjoy diplomatic support. This is a liberal feature of the practice which has significance because it places in proper perspective the restraint and restrictiveness which, it is sometimes contended, characterizes American diplomacy in many areas besides that of assistance to prospective investors.

B. *Nature and Degree of Protection Extended: Scope and Principal Types of Interpositions*

The theory may be advanced, and in fact underlies this study as an implicit assumption, that diplomacy ends where judicial process begins. Thus, action taken by the State Department and by its staff abroad will be described as diplomatic only until the point where a dispute becomes formally crystallized into legal issues and submitted for judicial or quasi-judicial consideration or decision. At that stage, the representation of the United States is often entrusted to special officers—at times private law firms retained for a single occasion—and matters are handled in so different a manner from what is the usual custom that one can no longer regard the arguments advanced and the action taken as an expression of either the practice or the policy of the United States Government. It is mainly for this reason that the present study does not consider briefs and arguments prepared by agents of the United States in arbitrations between it and foreign countries, or presented to claims commissions established by treaty, and similar material.

On the other hand it is clear—and this fact indeed lends general scholarly as well as practical significance to the material under study—that interpositions made by the United States in concrete instances must be regarded as based on what the United States Government considers to be international law, since evidently the State Department would not advance or press claims diplomatically which it regards as legally unfounded. One might therefore contend that the distinction between diplomacy and law just referred to is invalid, or at least is less convenient to adopt because it excludes from analysis those instances which have resulted in judgments that sometimes constitute essential contributions to public international case law. Consideration must however be given to the fact that statements made in formal legal claims are merely contentions and arguments whose significance is diminished for the very reason that a judicial pronouncement of a higher order eventually supersedes them.

Furthermore, diplomatic claims, as defined above, have the peculiar dual quality both of being *based* on international law as understood by claimant government, and of being *generative* of customary international law, so that the interpositions, particularly if accepted by respondent government, also may constitute evidence of what the law actually is. This circumstance is particularly important to observe in relation to the practice of the Government of the United States; the submission that its actions must be accorded

substantial importance for determining the status of customary international law in the area of foreign investment needs no explanation.

If, in addition, it is recognized that, while at least the judicial pronouncements made in arbitrations, etc., to which the United States has been a party are well known, there exists a vast number of cases which have never gone beyond the diplomatic stage, and which are both relatively unknown and highly interesting, the reasons for a distinction between diplomatic claims and legal claims will be apparent.

1. *Armed Intervention.* Nineteenth century diplomatic records are replete with accounts of how the military power of capital-exporting nations—and among them the United States—has been brought to bear upon the attitudes of small capital-importing nations in disputes concerning private investments. In this century, however, the United States has been loath to resort to force and has indeed never done so exclusively to protect American foreign investment.

Other nations have not been similarly disposed. The bombardment and subsequent blockade by Great Britain, Italy and Germany—against the wishes of the United States—of certain Venezuelan cities beginning in 1902 may be recalled by way of contrast.[84]

In the arbitration that followed on the question whether the claims of the blockading powers against Venezuela should be accorded preferential treatment over those of other creditors, the British Attorney General, Sir Robert Finlay, made the following pronouncement on the justifications for the war—an advocate's masterful argument which, if it be viewed as an expression of official policy, well illustrates the divergent political philosophies of Great Britain and the United States in matters of this kind:

> All nations are equal. The obligations of international law are for the weak as well as for the strong, and no doctrine can be imagined more likely to imperil the peace of the world than that, on account of its weakness, any nation should be supposed to enjoy immunity from the discharge of those international obligations which are incumbent upon all countries, whether they are powerful or whether they are weak. It is always a thankless and an ungrateful task for a great power to have to impose respect for international law upon a weak power. That task on this occasion fell to the lot of Great Britain, in alliance with Germany and with Italy; in the assertion of their own rights they were compelled to have recourse to coercive measures.[85]

[84] *Cf.* Hershey, *The Venezuelan Affair in the Light of International Law*, 51 AM. L. REG. (1903); Basdevant, *L'action coercitive Angleo-Germano-Italienne contra la Vénézuela*, REV. GÉN. DE DROIT INT. PUBLIC (1904); GACHÉ, LE CONFLIT VENEZUELIEN ET L'ARBITRAGE DE LA HAYE (Thèse, 1905); MALLARMÉ, L'ARBITRAGE VENEZUELIEN DEVANT LA COUR DE LA HAYE (1903–1904).

[85] Quoted from the record of the Hearings on November 2, 1903, in PENFIELD, THE VENEZUELAN ARBITRATION BEFORE THE HAGUE TRIBUNAL 1903, 1199 (1905).

In the same year, England, France, Germany and Belgium, in order to bring about payment of bonds held by their citizens used collective coercive pressure against Guatemala. The American Chargé d'affaires then reported that

> it appears that they [the diplomatic representatives of claimant countries] as a body notified [the Government of Guatemala] that if arrangements were not made to satisfy their respective creditors on a specific date a man-of-war would take possession of each of the principal ports of the Republic of Guatemala.[86]

In this case as well, the United States, while acknowledging the right of the European nations to intervene—this was before the Hague Conference of 1907 inspired by Dr. Drago and the resulting Convention of the same year—declined to take part in the action.[87]

It may be remarked, lastly, that none of the military interventions which have in fact been made by the United States—and particularly in the first decades of this century where this might be suspected—have been undertaken exclusively as a measure of protection for private American investments.[88]

[86] FOR. REL. 1902, 579.

[87] *Ibid. Cf.* Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT'L L. 26, 37 (1907).
In 1913, Britain dispatched a warship into Guatemalan waters in order to exert pressure on the Government in a dispute concerning the payment of bonds held in Great Britain which were guaranteed by a coffee tax the proceeds of which the Guatemalan Government allegedly diverted to other uses. The United States in this instance was asked to lend its good offices, but the views of the United States and Great Britain differed as to how a solution should best be accomplished. The insistence of the British Government upon seeking United States' support for its claim that the bonds be converted was severely criticized by Secretary of State Knox who for reasons given characterized Great Britain's stand to be inconsistent "with even an ordinary regard for the broad interests and policies of the United States." FOR REL. 1913, 558–59. The British Government stated in reply that "whilst deeply regretting that the United States Government feel unable to join them in requesting the Guatemalan Government to refer the question to arbitration, [the British Government] have no option but to adopt such measures as may be best calculated to obtain satisfaction from the Guatemalan Government" (*id.* at 567), and it was subsequently reported that the British Minister stated to the President of Guatemala "that if the coffee revenues are not restored to the bondholders within two weeks he will telegraph to his Government for a warship, will then leave, breaking off diplomatic relations and his Government will adopt the necessary measures to collect the coffee revenues." *Id.* at 568.

Again, shortly after World War I, Great Britain became involved in a dispute with the Government of Costa Rica concerning claims which were eventually resolved in the well known arbitration on the *Aguilar-Amory and Royal Bank of Canada claims* (I UNRIAA 371 with appertaining references). In the process of securing the approval of the Government of Costa Rica to referring the dispute to arbitration, the British Government is reported to have acted as described by the United States Chargé at San José in a dispatch of November 15, 1921:

"British Minister delivered note dated November 8th to the Minister for Foreign Affairs respecting Amory petroleum and Royal Bank of Canada claims which is virtually an ultimatum. British war vessel due today at Puerto Limon probably for the purpose of lending weight to note." FOR. REL. 1921, I, 666.

[88] It is true that the interventions made in the Dominican Republic in 1907 and Haiti in 1915 resulted in the establishment of control over the financial affairs of those countries, aimed in large measure at satisfying foreign debts, and that this control included setting

2. *Severance of Diplomatic Relations.* In disputes concerning private foreign investments, the discontinuance of diplomatic relations must be regarded as a serious step ranking almost next to armed intervention. The United States has resorted to this measure at least once vis-à-vis Venezuela when serious disagreement had developed between the two nations regarding claims of American citizens against the Venezuelan Government. The principal reason given for the move was "the persistent refusal of the present Government of Venezuela to give redress for the governmental action by which substantially all American interests in that country have been destroyed or confiscated, or to submit the claims of American citizens for such redress to arbitration . . . ."[89]

3. *Economic and Political Sanctions and Other Coercive Actions.* It may be stated in general terms that, just as the United States has refused to make armed interventions to enforce claims relating to private American foreign investment, the Government has only rarely, and then reluctantly, resorted to economic or political sanctions of comparable weight in disputes of that character. Thus, the policy has consistently been applied of not taking en-

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up of receiverships over their customs houses, an arrangement which in the case of the Dominican Republic was maintained during 1907–1924. However, the interventions do not appear to have been primarily motivated by a desire to protect private American investments so much as to save the countries from ruin and from undue exploitation by European powers, the latter in pursuance of President Roosevelt's corollary to the Monroe doctrine enunciated in his message to Congress on February 15, 1905. The intervention in the Dominican Republic, furthermore, was made pursuant to a treaty signed between its Government and the United States on February 8, 1907. See with respect to the Dominican Republic, 2 WELLES, NABOTH'S VINEYARD: THE DOMINICAN REPUBLIC 1844–1924 645 (1928); the general study, THE UNITED STATES AND THE DOMINICAN REPUBLIC, published for the Catholic Association for International Peace; on Haiti, FOR. REL. 1915, 475–76, 479–480.

[89] FOR. REL. 1909, 610. *Cf.* FOR. REL. 1908, 774–830.

It may be recalled that in the dispute between France and Venezuela concerning the abrogation of a cable concession held by the Compagnie Française de Cables Télégraphiques, diplomatic relations were severed between the two countries for seven years (*i.e.* between 1906 and 1913). See on this case the Venezuelan Government's publications: VENEZUELA, FRANCE AND THE FRENCH CABLE CO., EDITORIAL ARTICLES OF "EL CONSTITUCIONAL," DIPLOMATIC CORRESPONDENCE, EXTRACTS FROM THE LEGAL PROCEEDINGS (1906); VENEZUELA Y LA COMPANIA FRANCESA DE CABLES TELEGRAFICOS, RUIDOSO PROCESO, DOCUMENTOS PUBLICADOS EN "EL CONSTITUCIONAL" (1905); SAUVAGE, THE FRENCH CABLE COMPANY (COMPAGNIE FRANCAISE DE CABLE TELEGRAPHIQUES) AND THE VENEZUELAN REVOLUTION OF 1902–1903; ROUVRAY, LA FRANCE & LE VENEZUELA MISE AU POINT (1906); *Cf.* also FOR. REL. 1929, III, 850. See on resumption of diplomatic relations the protocol of 1913, 1 LIBRO AMARILLO (VENEZUELA) 525–33 (1915) and EL PROTOCOLO VENEZOLANO-FRANCES DE 1913 (1915).

The differences between the Venezuelan Government and the Compagnie Française de Cables Télégraphiques were settled in 1909 in two agreements entitled "Convenio de 11 de mayo de 1909 celebrado entre el Procurador General de la Nación y la Compañía Francesa de Cables Telegráficos para poner término a los asuntos y reclamaciones pendientes entre los Estados Unidos de Venezuela y dicha Compañía" and "Contrato de 11 de mayo de 1909 celebrado entre el Ministro de Fomento y el Representante de la Compañía Francesa de Cables Telegráficos", No. 10.577 and 10.578, respectively. (Information graciously supplied to the writer by the Ministerio de Relaciones Exteriores de Venezuela).

forcement measures except upon extreme provocation. Here, as well, there is a distinct divergence between the attitudes of the United States and the great European powers.

Instances have not been lacking where the claims concerning government appropriation of or interference with American investments have seriously disrupted the relations between the United States and foreign nations. It is well known in this regard that relations with Mexico were strained for many years due to a disagreement on the proper limits of the Mexican Government's freedom of action in regard to American economic interests in that country.[90]

As a graphic illustration of the thesis, it may however be of greater interest to cite a less notorious dispute which originated in an attempt by the Government of Spain to annul an exclusive telephone concession held by The International Telephone and Telegraph Company and in subsequent other actions taken by the Spanish Government which seriously interfered with the affairs of that company.[91] When pressing for a satisfactory solution of outstanding questions after years of fruitless efforts to that end, Secretary of State Hull finally stated in a dispatch to Madrid that he intended to inform the Spanish Ambassador at Washington "that we consider that a satisfactory solution of the Telephone Company problem is of fundamental importance to all future relations between our two countries . . . ."[92] Thereafter, further pressure was brought to bear upon the Spanish Government "combined with an absolute refusal to discuss any needs of the Spanish Government particularly including gasoline until a satisfactory solution is reached;"[93] and at last the American Ambassador was able to report that:

> The growing conviction on the part of the Spanish authorities that we are in earnest in our refusal to permit the telephone company case to be used as a bargaining point coupled with our determination not to consider or discuss any Spanish needs until American rights and interests are recognized has had its expected result.[94]

A settlement was thus eventually reached.

Another instance of economic sanctions being applied occurred in the course of the prolonged diplomatic correspondence between the United States and Ecuador relating to the Guayaquil and Quito Railway Company, which, with various issues relevant from time to time, lasted for nearly thirty years.[95]

[90] Secretary of State Lansing, in a dispatch to the Minister at Bogotá on August 21, 1919, referring to the nationalization by Mexico of petroleum deposits in the preceding years, termed the diplomatic dispute with Mexico "one of the most serious international questions that ever confronted this Government . . . ." FOR. REL. 1919, I, 773.

[91] FOR. REL. 1932, II, 560–81, 1933, II, 698–703, 1939, II, 820–56, 1940, II, 855–97.

[92] FOR. REL. 1940, II, 872.

[93] *Id.* at 895.

[94] *Id.* at 896.

[95] FOR. REL. 1907, I, 385–91, 1908, 273–77, 1908, 277–79, 1912, 412–22, 1913, 473–504, 1914, 274–80, 1915, 340–73, 1916, 260–69, 1917, 730–47, 1918, 401–27, 1919, II, 171–200, 1920, II, 191–206, 1921, I, 881–95, 1923, I, 926–40, 1924, I, 692–701, and 1936, V, 536–57.

In 1918, diplomatic pressure was applied to the Ecuadorean Government in order to elicit payment of outstanding interest on bonds issued for the financing of the railway. In order to enforce this claim, the United States considered curtailing all imports from Ecuador of cacao. The Acting Secretary of State in a cable to the American Minister at Quito summarized the substance of the threatened sanction in no uncertain terms:

> The Secretary of State requested the Ecuadoran Minister to call on him this morning, and informed him, with reference to a note written by the Minister inquiring whether the importations of cacao into the United States from Ecuador were going to be restricted, that the War Trade Board proposes to restrict very considerably, and possibly entirely, the importations of cacao into the United States from Ecuador, in order to save tonnage for important war purposes. The Secretary of State further informed the Ecuadoran Minister that the State Department would be in a much stronger position to influence the War Trade Board to lessen the restrictions placed on the importation of cacao from Ecuador if the Ecuadoran Government would resume at once its daily payments of a 365th part of yearly payment of the interest of the Guayaquil & Quito Railroad bonds and would deposit 50 per cent of the export duty on all.cacao exported as part payment of the amount which Ecuador now owes as interest on these bonds, the American Consul in Guayaquil to be informed officially by the Government of Ecuador of the deposit made before issuance of license for each shipment of cacao.[96]

A recent illustration of sanctions is the still unresolved dispute between the United States and the Castro Government of Cuba, largely relating to confiscation of American investments. In 1960, after considerable diplomatic correspondence and much hesitation, the United States decided to place an embargo upon all exports to Cuba, excepting only non-subsidized foodstuffs, machines and medical supplies. The reasons cited were that:

> Accompanying its words with actions, the Government of Cuba has instituted a series of arbitrary, illegal and discriminatory economic measures, which have injured thousands of American citizens and have drastically altered the hitherto mutually beneficial pattern of trade between the United States and Cuba.[97]

[96] FOR. REL. 1918, 411. The action was successful, as reported *id.* at 427.

[97] Announcement by the State Department of October 20, 1960, quoted from N.Y. Times, Oct. 20, 1960, p. 2 (int'l ed.). The various measures on the part of the Cuban Government which lay at the basis of the complaint of the United States were summarized under five points. They were (1) the imposition of taxes and restrictions upon certain United States products; (2) surcharges and restrictions on foreign exchange; (3) requests that American exporters ship on a 90-day open account, refusal to grant rediscount facilities to American-owned financial institutions as well as threats of intervention against American firms unless they continue to ship in raw materials in a normal manner despite the fact that dollars had not been released to pay for earlier shipments of raw materials or for the remittance of normal earnings; (4) discrimination against the United States in the administration of Cuban trade regulations, etc.; and (5) seizure of private American investments and properties.

In retaliation against the export embargo, the Government of Cuba, on October 25,

A contradictory feature of United States policy is that sometimes a principle seems to have emerged to the effect that the United States does not desire to connect the discussion and solution of one outstanding question between the United States and a foreign country respecting, *e.g.*, loan negotiations and import quotas, with the settlement of a dispute concerning a government action infringing upon American private investment. Thus, the United States has at times refrained from linking issues of foreign policy which are inherently separable, and has been reluctant to use the possibilities of applying pressure which one matter has offered in order to obtain a satisfactory solution of another matter.

Although attempts on the part of the United States to join separable issues in diplomatic correspondence have occasionally been resisted, the Government's formal justification under international law for such action has rarely if ever been questioned. When differences of opinion have developed in regard to this issue, they have rather centered on the political feasibility of proposed actions than on their legality.[98]

4. *Protests, Representations and Good Offices.* The principal means of exercising diplomatic support in relation to private investment is the lodging of protests and representations. So far, attention has been focused on the force which might ultimately be put behind the words in diplomatic correspondence, the most extreme form being war; the other sanctions briefly referred to, while less drastic, may yet in certain circumstances be serious

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1960, nationalized 166 enterprises owned by United States companies or United States citizens, which action is said to have "virtually eliminated major investments of United States citizens in Cuba." N.Y. Times, Oct. 26, 1960 (int'l ed.).

[98] A reference may be made to an instance where the problem became of crucial significance, viz. in connection with the ratification by the United States Senate of a treaty entered into with Colombia in 1914 providing for the settlement of damages claimed by Colombia in connection with the secession of Panama. (Diplomatic correspondence on this question before 1914 is printed in FOR. REL. 1909, 223–33, 1910, 361–408, 1911, 88, 1913, 284–329, 1914, 146–69 and subsequent correspondence in FOR. REL. 1915, 259–63, 1916, 211–16, 1917, 293–300, 1919, I, 724–25, 1919, I, 763–95, 1920, I, 823–27, 1921, I, 638–45, and 1922, I, 974–79). The treaty was not ratified for many years, and when it was at last reported to the Senate for ratification, it was recommitted to the Committee on Foreign Relations upon the initiative of Senator Lodge with the request that the State Department seek to insert into the text additional provisions aimed at securing guarantees on the part of the Colombian Government for American investments that were threatened by new Colombian petroleum legislation. After this request had been made public in Colombia, the American Minister at Bogotá reported that:

"The surprise and disappointment occasioned by our action in merging the treaty question with that of the pending petroleum legislation is all too apparent among Colombians of all classes, my South American colleagues and American representatives of oil and other interests here. The press of Bogota is practically unanimous in condemning what is termed the imperialistic and coercive policy of the great northern Republic and I have had warning that violent demonstrations may result." FOR. REL. 1919, I, 740.

The issue was, however, never as such brought up to the level of an explicit diplomatic exchange of views, as eventually the Colombian Government made what was considered to be satisfactory amendments in her petroleum legislation.

enough economically or otherwise. These topics will to some remain the most essential aspect of the diplomatic activities of major powers.

In a legal study of diplomatic practice, however, the greatest interest does not necessarily attach to analyses of the degree of force or power which has actually been used or intimated. Indeed, it is submitted that the fact that the United States has never in this area resorted to war, and has only rarely backed up its words by sanctions, is of relatively minor interest. This is due not only to the importance as such of mere protests or representations—which if made by a nation like the United States often carry immense weight even in the absence of specific threats of coercive action or its implementation. It is also and especially because the primarily relevant problem is the delimitation and classification of cases where protests are or have been deemed legitimate and justified, and cases where this has not been so in the view of the United States and of the nations vis-à-vis whom interpositions have been directed, for a careful study of published documents in this respect serves to illumine what is international law on the subjects under review.

In this regard, it may sometimes be impossible to state more than that the United States has unilaterally and without success maintained that international law stipulates certain rules which allegedly have been infringed in the relevant case. In other instances, settlements effected, agreements reached, or the absence of legal exceptions taken by the foreign government concerned may indicate that at least the two governments involved have agreed upon a proposition of international law and/or its bearing upon the facts of a specific case. In form, the purport of such legal propositions will always be either the allowance or the denial of a government's plea that it possesses the right to present a claim and to obtain due satisfaction for its demands.

Clearly, then, the material lends itself readily to analysis, exposition and treatment using basically the same methods that have traditionally been applied to municipal or international case law, due consideration being given to the peculiar qualities inherent in the nature of diplomatic correspondence and to the fact that foreign policy-making in claims matters in some respects differs from the judicial process.

Against the background of these considerations, it will be appreciated that a detailed description and analysis of the individual qualities and intensity of protests and representations which have been made will be of little benefit. For it is hardly surprising to find that sometimes interpositions have been strong and forceful whereas at other times they have been mild in both tone and substance. This feature will naturally be of considerable practical importance in each case to those directly involved, but in a legal study such as the present, it will have only incidental relevance since, it must be repeated, the basic questions always remain whether or not the United States has been entitled to, or actually has lodged a protest or made representations in a given set of factual circumstances, how such interpositions have been construed and what results they have produced.

When the United States Government has not for legal or other reasons desired to protest or to make formal representations, or has been reluctant for political or other motives to become too directly engaged and committed, the State Department has resorted to what is termed "[informal] good offices." Moore quotes an early instruction from Secretary of State Fish, in 1876, where good offices were defined as meaning that the diplomatic agent shall "investigate the subject, and if [he] shall find the facts to be as represented, [he] will seek an interview with the minister for foreign affairs and request such explanations as it may be in [the minister's] power to afford."[99]

In the diplomatic correspondence under review, the concept of good offices abounds.[100] However, it appears to have been used rather loosely, as a surprising number of actions taken by the State Department and by diplomatic agents abroad have in reality been no different from those that would in ordinary circumstances be termed formal protests or representations.

The distinction has not merely a terminological interest; indeed, it is submitted that the concept has often been used, consciously or unconsciously, as a convenient lever to modify the consequences of a too narrow theoretical conception of the legal right of the United States to lodge protests in certain circumstances where sense and reason and the necessities of reality have been felt to demand a more direct and forceful involvement on the part of the United States. And a misunderstanding of the term "good offices" and its application in practice—sometimes coupled with a failure to appreciate the impact and effect of diplomacy in cases where actions have not obtained the form of legal claims or have not been labeled formal protests—is indeed one of the main reasons which underlies the largely incorrect contention that while the United States willingly lends diplomatic support to Americans whose investments suffer from interference by a foreign government, this will not be done when investments have been established on the basis of contracts with foreign governments and such contracts are breached or not fulfilled by the State. Thus, Hackworth states that:

> Generally speaking the Department of State does not intervene in cases involving breaches of contract between a foreign state and a national of the United States in the absence of a showing of a denial of justice. *However, it may use its informal good offices in appropriate cases in an effort to bring*

[99] 6 MOORE, A DIGEST OF INTERNATIONAL LAW 710–11 (1906). See also BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 288 (1915).

[100] A statement by the American Minister at Caracas in 1921 is indicative of what good offices has meant in practice to some diplomatic representatives of the United States:

"During the six years that have intervened [since receipt of an instruction dated September 10, 1915 in which the State Department, considering a recently enacted law concerning the rights of foreigners, reserved the right of the United States to exercise diplomatic protection even before exhaustion of local remedies] it has proved to be the rule rather than the exception for American citizens and the representatives of American development, financial and commercial companies and religious organizations to adjust their differences with the Government of Venezuela through the good offices of the Legation," FOR. REL. 1921, II, 941.

> *about an adjustment of differences.* The practice of declining to intervene formally prior to a showing of denial of justice is based on the proposition that the Government of the United States is not a collection agency and cannot assume the role of endeavoring to enforce contractual undertakings freely entered into by its nationals with foreign states.[101]

This doctrine will shortly be discussed extensively. It will suffice to add here only a few brief notes which support the submission that good offices may indeed mean something substantially more than mere investigation and requests for clarification of facts.

In 1937, the Bolivian Government, by executive resolution, cancelled a concession held by the Standard Oil Company of Bolivia, a subsidiary of the Standard Oil Company (N.J.), and confiscated its properties. The concession contained a Calvo clause, and also a clause to the effect that the Government might declare its abrogation or administrative annulment if the concessionaire were to defraud government interests, which was alleged to have been the case. These facts as well as subsequent developments complicated the legal situation, particularly because the requirement of exhaustion of local remedies was not fulfilled. It is perhaps for this reason that the rubrics in the *Foreign Relations* as well as official references speak of "informal assistance" given to the Standard Oil Company (N.J.).

The diplomatic support extended by the State Department started with a personal message from Secretary of State Hull to the Bolivian Foreign Minister which only upon request was to be delivered in written form and which was said:

> not to be construed as an official communication from one government to another, but solely as an expression of my personal concern by reason of the existence of a situation which may prejudice the steady growth of that confidence on the part of all the peoples of the American republics one towards the other, to the value of which I know Dr. Finot [the Bolivian Foreign Minister], like myself, attaches the greatest importance.

The request submitted left no doubt of the wishes of the Secretary of State:

> I expressly refrain from dealing at this time with any questions of fact or law, but I do very earnesly desire to urge upon Dr. Finot the expression of my sincere hope that steps may be taken by the Bolivian Government at an early opportunity to make it clear that that Government has every intention of offering just and equitable compensation for the properties owned by nationals of the United States which may have been seized by the Bolivian authorities, or, failing an agreement between these nationals of the United States and the Government of Bolivia upon the form and amount of such compensation, that it will agree upon some method of adjudication of the rights and equities inherent.[102]

[101] 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 611 (1943). (Emphasis added.) See further citations in 2 HYDE, INTERNATIONAL LAW § 303, n.1 (1945).

[102] FOR. REL. 1937, V, 285. The American Minister at La Paz reported "that the message made a definite impression on Dr. Finot was obvious from the fact that at the

A new phase began when the Bolivian Government, on October 22, 1937, issued a decree prescribing that litigation arising from government resolutions or administrative acts affecting contracts or concessions with the State must be submitted to the Supreme Court within ninety days of administrative acts. On receiving news of the decree, Secretary of State Hull cabled that "the Department is of the opinion that there is no action it can appropriately take with respect to the decree of October 22,"[103] and that subsequent action would depend upon the outcome of the litigation. It is significant to note, however, that the Department's attitude was quickly reversed after a meeting with representatives of the Standard Oil Company (N.J.).[104] A fortnight later, Mr. Hull instructed the American Minister to see the Bolivian Minister for Foreign Affairs in order to "express to him the continuing interest of your Government in the Standard Oil Company case and repeat the hope of your Government that a solution satisfactory both to the Bolivian Government and to the Company may be reached through direct negotiations between the two parties conducted in a friendly spirit";[105] furthermore, the Minister was urged to seek to obtain an extension of the time limit for submission of the case to the Supreme Court "to such reasonable period as may be deemed necessary by the company's counsel."[106]

While the case was still pending before the Court, in the beginning of 1939, Secretary of State Hull again instructed the Minister at La Paz that:

> It would, of course, be desirable if a friendly compromise settlement of all questions now at issue could be reached without awaiting a decision by the Court. It is not clear from your telegrams whether the Government is disposed to bring about such a settlement. If in your judgment it is so disposed, you may in an appropriate manner indicate to the Government that the Department would be glad to see such a settlement made.[107]

In 1939, the Department of State also assisted in preparing draft arbitration agreements, but the accounts of the matter given in *Foreign Relations* are inconclusive, and material documenting the ultimate outcome of the case has not yet beeen published.[108]

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beginning of his conversation his comments were much more guarded and temperate than heretofore." *Id.* at 286.

[103] *Id.* at 303.

[104] See on this meeting the letter from Under Secretary of State Welles to Mr. Armstrong. *Id.* at 304.

[105] *Id.* at 303.

[106] *Ibid.*

[107] FOR. REL. 1939, V, 325.

[108] Documents on the case appear in FOR. REL. 1937, V, 275–311, 1938, V, 321–29 and 1939, V, 322–47.

The facts of the Bolivian expropriation through the decision of the Bolivian Supreme Court have been dealt with in a booklet entitled CONFISCATION: A HISTORY OF THE OIL INDUSTRY IN BOLIVIA, published privately in 1939. The writer is informed that as a result

Another illustration of the realities often found behind diplomatic interpositions ostensibly restricted to the extension of good offices may be drawn from the correspondence with Paraguay. In 1918, a concession granted by the Government of Paraguay to the Construction and Engineering Finance Company of New York was terminated by the Government for the reason that works had not begun as stipulated in the agreement; the Company maintained that by reason of force majeure, as defined in the contract, it had not been in a position to fully comply with its obligations. In a note presented by the Acting Secretary of State to the Minister of Paraguay it was stated that:

> the Government of the United States has examined the law and other documents presented in the case, and desires to present for your kind consideration its feeling in respect to the matter.... Considering further the friendly relations existing between the two Governments which we represent, I venture to suggest for Your Government's consideration, whether it should not in equity and justice, and in the interest of all parties concerned, interpret Article III of the law so as to allow an extension of the period within which the works contemplated by it were to be completed.[109]

A few lines later, the Acting Secretary of State summed up by saying that "I desire, therefore, to propose, *informally by way of good offices*, on behalf of the company, that the President...."[110] A study of the further documents in this matter reveals that the American Minister at Ascunsión was instructed to "present the matter" to the Paraguayan Government,[111] that upon further examination, circumstances "confirmed [the] earlier conclusion [of the United States Government] as to the innate justice of [its] request...."[112] and in the same communication from the Secretary of State to the Paraguayan Minister, the latter was asked to advise promptly "whether the President of Paraguay cannot possibly, upon further consideration, find some means of complying with the request contained in [the original note referred to initially

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of subsequent negotiations, a settlement was eventually agreed upon which purported to constitute full compensation for the seizure but which was in fact quite inadequate, its function primarily being to preserve the principle of compensation. It appears that the Standard Oil Company (N.J.) has consistently taken the view that in cases where its properties have been subject to confiscatory measures abroad, the United States should seek to preserve diplomatically and in settlement agreements the principle of compensation. See on the attitude of the Standard Oil Company (N.J.) the statements by Mr. Farish made to the chief of the Division of the American Republics, Mr. Duggan, in the memorandum of conversation of May 31, 1938. FOR. REL. 1938, V, 752. Mr. Farish said in relation to the issue under discussion, *viz.*, the question of compensation for oil properties in Mexico that:

"If the company accepts some arrangement which in effect is based upon some compromise of the principles of international law, the company then considers that it is lost since a precedent will have been established. Other countries will follow suit and the company will not be able in these cases to stand on the ground that if its properties are expropriated they should be paid for at the time of taking in cash." *Id.* at 754.

[109] FOR. REL. 1920, III, 329.

[110] *Id.* at 329-30. (Emphasis added.)

[111] *Id.* at 331.

[112] *Id.* at 337.

above] . . . ."[113] A few days later, a formal note was sent by the Minister at Ascunsión in which the request was made even more precise.[114] Eventually, the United States demanded that, if no agreement could be reached between the Government of Paraguay and the Company, "the entire case should be submitted to arbitration under the arbitration clause of the concession."[115] The ultimate outcome of the case appears to have been a compromise agreement reached between the two parties to the concession.[116]

Numerous other instances could be cited for the proposition that the extension of "good offices" in disputes concerning private American foreign investment has often constituted what—at least at the receiving end—must have been understood as relatively forceful exercise of diplomatic protection.[117] A government which is requested by the Government of the United States in the clearest of terms to adopt or refrain from adopting measures concerning private investments will rarely fail to view such a matter seriously, irrespective of whether the American diplomatic communication is said to constitute merely the exercise of good offices. It would be unrealistic, to say the least, to consider, for this purely formal reason, the extensive case law which has been created by the State Department in the course of this century as of minor interest. It would be more appropriate to recognize this same case law as the policy and practice of the United States Government and, consequently, to perceive how vigorous, how flexible, and how responsive to practical needs and to equity and justice the State Department has been, and thus to see the wide permissive limits of international law as it is handled

[113] *Id.* at 338.

[114] "Because of all the foregoing I am further instructed to bring this whole matter to the attention of His Excellency the President of Paraguay, through the intermediary of Your Excellency, with a view to securing an annulment of the forfeiture of this concession, if any such forfeiture has been decreed, that the franchise be revivified, and that the concessionaire be now allowed a reasonably sufficient length of time to build the port." *Id.* at 340.

[115] *Id.* at 342.

[116] The documentation on the case is found in FOR. REL. 1920, III, 323–43, 1921, II, 623–27; *cf.* 1927, III, 521–22.

[117] See, *e.g.*, the diplomatic correspondence relating to the Guayaquil and Quito Railway Company, to which references have been given note 95 *supra*, *passim* and particularly that exchanged in the years 1917, 1918 and 1919; the correspondence with Cuba relating to the controversy between Compañia de los Puertos de Cuba and the Government of Cuba, FOR. REL. 1917, 431–56; the protracted dispute with China pertaining to a concession held by The Federal Telegraph Company set out in FOR. REL. 1921, I, 404–56, 1922, I, 844–60, 1923, I, 783–826, 1924, I, 570–80, 1925, I, 890–935, 1926, I, 1040–92, 1927, II, 472–82, 1928, II, 555–69, 1929, II, 829–33 and 1930, II, 626–27; the support given by the United States to American holders of Portuguese Tobacco Monopoly bonds referred to in FOR. REL. 1926, II, 880–97, particularly 885–87; the good offices extended by the Department of State for securing suspension of lighterage charges on lighters owned by Grace & Company in a Colombian port, FOR. REL. 1930, II, 641–48; the good offices of the Department of State in resolving certain differences between the Colombian Government and American bankers, FOR. REL. 1931, II, 28–40; and various instances cited in the section below which is devoted to diplomatic support in disputes concerning contracts and concessions granted by foreign governments to American nationals.

from day to day in actual practice. For this diplomacy is shown often to have been one step ahead of the international law enunciated in the judicial process, and will likely as such eventually transform that law for the very reason that customary international law is indeed, in the ultimate analysis, but an abstract of the practice of States.

C. *Formal Grounds of Interposition*

In United States practice, diplomatic interposition will lie against those acts of a foreign government which unreasonably infringe upon or interfere with private American investment, in principle irrespective of how such effect is caused and irrespective also of whether actual loss has been occasioned. Within the scope of a law review article, it is of course impossible to examine the entire field of state responsibility insofar as it has a bearing upon the protection of private investment, and no comprehensive treatment can therefore be presented here of the numerous instances of diplomatic interposition which may be grouped under such doctrinal headings as the minimum standard, denial of justice, or abuse of rights. Attention must instead be focused on questions where a diversity of opinion has developed among legal writers and on a few points where the practice of the United States is either relatively unknown or else has been misinterpreted. The following survey must for these reasons not be regarded as comprehensive; only a few selected problems will receive attention, and the selection has not necessarily been made with a view to the economic importance or the statistical frequency of actions of a particular kind.

1. *Breach or Non-fulfilment by States of Concession Agreements and Other Contractual Undertakings.*

a. The Doctrine as Defined by Publicists. The opinion is widespread that the Government of the United States will be less inclined to extend its diplomatic support in disputes concerning the fulfilment of concessions or contracts granted to American nationals by foreign governments than in cases of interference with the property interests of American nationals. In separating this question for examination, it is well to bear in mind Dr. Mann's clear delimitation of the problem, which will be adhered to in the following:

> This, then, is the peculiar problem of state responsibility in relation to state contracts: Is an act of sovereignty, which in regard to all other contracts is innocent, capable of attracting the international liability of the state in so far as it affects contracts made by the state?[118]

The theory supposedly adhered to in United States diplomatic practice has been succinctly stated by Charles Cheney Hyde as follows:

> Ever since the days of Madison the United States has been reluctant to interpose in behalf of a citizen seeking redress from a foreign State on

[118] Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572, 574 (1960).

> account of its disregard of the terms of a contract concluded with him. It has frequently been declared that unless the conduct of the contracting State was tortious, the citizen should be left to his own devices, save for the possible assistance derived from the good offices of his country lent for the purpose of encouraging the foreign State to give careful attention in a domestic sense to the equities of the case.[119]

Hyde proceeds by drawing a distinction to the effect that only breaches of contract which in addition to violating the agreement also present tortious aspects will justify diplomatic interposition.[120] This distinction has been best elaborated by Dunn, who with almost deceptive simplicity says that "the distinguishing feature is an interjection of governmental power to alter the situation envisaged in the contract."[121]

For Eagleton, the matter of interposition in disputes concerning concessions and contracts reduces itself essentially to a requirement of exhaustion of local remedies;[122] however, the local remedies rule need not be confused with the legal problems attaching to the substance of claims and thus will not receive attention *infra*.

It is of considerable importance to ascertain whether the theory thus propounded is a valid and true expression of United States practice for it

[119] 2 HYDE, INTERNATIONAL LAW 988 (1945). *Cf.* 3 WHITEMAN, *op. cit. supra* note 70, at 1553 (1943).

[120] HYDE, *op. cit. supra* note 119, at 990.

[121] DUNN, THE PROTECTION OF NATIONALS 167 (1932). Dunn's thesis is elucidated in the following manner:

"So long as the state remains within its character as a contracting party and does not take advantage of its superior governmental power to escape its obligations, then the private contractor is usually left to sustain whatever losses may accrue from the contract. But when it steps out of that character and takes action that a private contractor could not take, in order to escape its obligations under the contract, then it upsets the contractual basis and pursues a course of action that is quite incompatible with normal business relations; for example, if it declares the contract void by its own decision, or seizes property belonging to the other party to the contract, or declines to submit to suit thereunder, or seeks to alter the terms of the contract without the consent of the other party." *Id.* at 165–66.

It may be remarked in passing that the rationale stated by Dunn, *i.e.*, that the use of governmental power "alters the status of the government as a credit risk," (*id.* at 168) hardly is convincing. While it is always impossible to foresee future events with certainty, it does not appear substantially more difficult to calculate the *risk* of actions based on sovereign power than others; and in any project of foreign investment, the political risks are indeed assessed by investors at least as carefully as commercial risks.

[122] EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 167 (1928):

"The true test in these, as in all other cases in which the state responds for an injury done to an individual, is the provision which it makes for local redress. It is eminently desirable that states should be given the opportunity to repair, in their own courts, the damages caused by their actions; and it is even more desirable that states should offer redress against themselves, through judicial process, in such cases. The chief cause for diplomatic interposition in cases of breach of contract is the fact that the state does not permit judicial action against itself."

See also BORCHARD, *op. cit. supra* note 99, § 112 (1915). *But cf.* Clark, Book Review, 10 AM. J. INT'L L. 182–90 (1916).

has never been intimated that any other nation regards its diplomacy as fettered by a similar doctrine.[123]

Furthermore, the very fact that the theory has received so much publicity has tended to increase its appearance of being indicative of the practice of States generally, and thus of the status of contracts and concessions under international law. This is why it is necessary to analyze in some detail a number of interpositions made by the United States in protection of contracts and concessions held by American nationals.

b. The Crichfield Case. The *Crichfield*[124] case marks the twentieth century starting point for United States policy in relation to diplomatic protection of contractual rights granted to American nationals by foreign governments.

In 1901, Crichfield, acting as the agent of a syndicate composed of American citizens and afterwards incorporated in New Jersey under the style of The United States and Venezuela Company, acquired a mineral concession in Venezuela by assignment and later was granted by the Government of Venezuela a concession for the building and operation of a railway. The railway contract contained a clause which, with certain minor exceptions, exempted the grantee from all national taxes or contributions. In reliance upon the

[123] Dr. Mann, after establishing, on the basis of the argument presented by the Swiss and French Governments in the *Losinger* case what he calls the "Swiss-French doctrine" of international law to the effect that a mere breach by a government of a contract with a foreign national is an international wrong, makes the surprising statement that "no other state seems to have adopted the Swiss-French doctrine." Mann, *supra* note 118, at 578. He thereafter states, citing secondary sources, that "the practice of the United States of America has, for more than a century and a half, been clearly opposed to it." *Ibid.* It is borne out in the subsequent parts of Dr. Mann's study where these statements appear that the argument which has now been quoted is the cornerstone in the largely negative answer which he gives to the query to which he addresses himself, quoted in the text at note 118 *supra.*

[124] The *Crichfield* (or *United States and Venezuela Company*) case was one of five cases which were subject to protracted diplomatic correspondence in the beginning of this century, the other cases being the Jaurett claim; the claim of the Manoa Co. (Ltd.), Orinoco Company (Ltd.), and Orinoco Corporation; the claim of the Orinoco Steamship Company; and the claim of the New York and Bermudez Company. The correspondence has been published by the United States in FOR. REL. 1905, 919–1030, 1907, II, 1093–96, 1908, 774–830, 1909, 609–30, 1910, 868; and by Venezuela in LIBRO AMARILLO (Venezuela) 1909, 103–16, 142–46, 1910, 311–13, 317–23, 1917, II, 501–09. See further *Correspondence Relating to Wrongs Done to American Citizens by the Government of Venezuela*, S. DOC. No. 413, 60th Cong., 1st Sess. (1908); *La New York and Bermudez Company Alegato de sus Derechos contra una Ilegal Resolución Ejecutiva* (1899); the pamphlet DAS RECHT UND DIE GERECHTIGKEIT VENEZUELAS UND DIE NEW YORK AND BERMUDEZ COMPANY; a statement by the Company entitled *In the Matter of the Suit Brought against the New York and Bermudez Company by the Venezuelan Government to Recover Damages for Aiding in the Matos Revolution*; another statement by the Company entitled *The Violent and Illegal Seizure of Bermudez Lake by the Venezuelan Government* (Aug. 22, 1904); *Annual Report to the Stockholders of the General Asphalt Company* (1906); *US Senate: Letter of the Company to the Committee on Foreign Relations* (April 22, 1908); Letter of John W. Foster to Hon. S. M. Cullough, April 14, 1908; *In the Matter of the New York and Bermudez Company v. Venezuela*, printed and distributed by the General Asphalt Company (1908).

contract, the concessionaire expended considerable amounts of money in the fulfilment of his obligations. Later, the Venezuelan Government imposed certain new taxes upon the company in contravention of the concession, and a dispute ensued in which the concessionaire maintained that imposition of the taxes was wrongful; the State Department was petitioned to call upon the Government of Venezuela to live up to and perform all the covenants and conditions on its part to be performed under the concession. The Venezuelan Government argued in defense that the railway concession granted by the President of Venezuela was not valid inasmuch as it had not been approved by special act of the Venezuelan Goverment.

In examining the petition, the State Department prepared a comprehensive memorandum of law which is written in a manner that suggests that the then Secretary of State, Elihu Root, may have been its author.[125] The memorandum is no ordinary policy paper but has all the qualities of a considered judicial opinion; in fact, the theory of "contract claims" has never been subjected to so penetrating a study. Its contents will now be summarized.

First it should be noted that the *Crichfield* case, in the view of the State Department, presented squarely the question of the admissibility of diplomatic interposition in contract cases. Thus, it was stated that "it is apparent that the claim ... is based upon the breach of a concession";[126] the contention of the Government of Venezuela that the concession was invalid was dismissed as "too flimsy to be worthy of notice."[127] The conclusion was therefore reached that "the concession is ... to use a technical expression, valid and subsisting."[128] Likewise, it was maintained that "the breach of the terms of the concession on the part of the Government of Venezuela is as clear as the validity of the contract is unquestionable."[129]

The State Department, after establishing these facts, faced squarely the problem arising from the circumstance that:

> the claim in the present case arises entirely from a breach of contract not associated with any tortious act—that it is a pure contract claim. And it is objected that according to the principles of international law and the enlightened practice of civilized nations such a claim furnishes no ground for international reclamations.[130]

In analyzing this problem, the memorandum acknowledged the fact "that there is a very considerable body of practice which lends more or less support to this view ...."[131] However, on principle, for reasons given, it was believed "that in the abstract there is no particular reason why a nation should intervene in order to protect its citizens who have suffered tortious

[125] S. Doc. No. 413, 60th Cong., 1st Sess. 95–118 (1908).

[126] *Id.* at 103.

[127] *Id.* at 104.

[128] *Id.* at 105.

[129] *Id.* at 105. *Cf. id.* at 106.

[130] *Id.* at 107.

[131] *Ibid.*

injury at the hands of a foreign nation and refuse to take similar steps in behalf of its citizens who have suffered from the repudiation of contractual obligations . . . .," and since "the precise method by which they have been deprived of these rights, so long as it be illegal, would not seem to be material as a matter of principle."[132] While it was admitted that the general practice of the United States in the nineteenth century had been not to intervene in contract cases except unofficially by way of good offices, it was significantly added that:

> There are not wanting, however, expressions on the part of the Department of State which would seem to take a different view of the matter, and to place the refusal of our Government to intervene in such cases upon grounds of expediency rather than to explain it as based upon settled principles of international law.[133]

and it was stressed that "the adherence of the Department to this view has not, however, been universal and without exception."[134]

Indeed, in considering the statement by Moore that the State Department would see fit to extend diplomatic protection only in situations of confiscatory breaches of contract, the memorandum noted that a number of the cases discussed by Moore in the relevant section of *International Arbitrations* "are cases of simple breach of contract in which, so far as the record shows, there was no tortious element . . ." and "a number of these cases appear to be cases growing out of a simple breach of contract, nonpayment for supplies furnished, or services rendered."[135]

After emphasizing again that the case was one of a contract claim in which the tortious element was lacking,[136] and repeatedly stressing also that no

[132] *Id.* at 108.

[133] *Id.* at 109.

[134] *Id.* at 109.

[135] *Id.* at 111.

It may be observed that in the following section of the memorandum, a parallel is drawn between international law and municipal law in relation to the protection of contracts in which the following highly interesting passage occurs:

"The recognition of the right of a nation to intervene in behalf of one of its citizens within the territorial limits of another has followed the order which we found in the history of private law. First, the right has been recognized in cases of crime against the person; second, in the case of torts against the person or property; and third, in the case of breaches of contract resulting in gross injustice, especially if these breaches have been of a confiscatory nature amounting in fact to a tortious seizure of property. It seems, therefore, not unreasonable to suppose that the future development of international law, as its past development, in regard to the enforcement of contractual rights, will be along the lines of private law, and that inasmuch as there seems to be no difference in principle between the enforcement of a right growing out of a contract and a right growing out of a tort, and since in the history of private law the enforcement of a right growing out of a tort has come first, to be followed by the enforcement of contractual obligations, such should also be the course of public law, and that the public law in the future, as the municipal law of the present, may properly enforce without distinction rights arising out of the breach of contract and rights growing out of the tortious seizure of property." *Id.* at 114.

[136] *Id.* at 116.

tortious seizure of property had taken place which would make it justified to classify the act of the Venezuelan Government as a confiscatory breach of contract,[137] the memorandum stated that Crichfield would not have accepted the concession without its tax exemption clause. And after taking note of the fact that it would be unnecessary to exhaust local remedies since "the courts of Venezuela do not seem to be the handmaids of justice, but rather the instruments of its prostitution,"[138] the conclusion was reached that, "Under these circumstances, it is recommended that the Department attempt to secure an arbitration of this case before an impartial international tribunal . . . ."[139]

The reasons for extending diplomatic support to Crichfield could hardly have been more explicit.

Subsequent diplomatic interpositions followed the arguments and recommendation of the memorandum so closely that the instructions and dispatches of the State Department need not be extensively quoted here. In this regard, it may only be noted that Secretary of State Root carried on the correspondence mainly by sending detailed memoranda to the American Minister at Caracas, in which the arguments advanced in the State Department's memorandum were used.[140] As noted above,[141] the differences which evolved between the United States and Venezuela in regard to the *Crichfield* claim and to other cases dealt with simultaneously were so profound that at one stage the United States severed diplomatic relations with Venezuela. Eventually, however, an agreement was reached between the United States and Venezuela on February 13, 1909, to the effect that certain of the claims should be submitted to arbitration, including that of The United States and Venezuela Company.[142] Six months later, however, the *Crichfield* claim was settled by a special Protocol between the United States and Venezuela, signed on August 21, 1909. Pursuant to it, the Government of Venezuela took over the concessions and properties of the company against payment of $475,000, to be paid over a period of eight years.[143]

[137] *Id.* at 117.

[138] *Id.* at 115.

[139] *Id.* at 118.

[140] See particularly Secretary of State Root's memoranda of February 28, 1907, FOR. REL. 1908, 774–96, at 793–96, and of June 21, *id.* at 1907, 800–05, 804–05.

[141] See text at note 89 *supra*.

[142] FOR. REL. 1909, 617.

[143] *Id.* at 624–25; LIBRO AMARILLO (Venezuela) 1910, 311–13, and on the final payment, LIBRO AMARILLO (Venezuela) 1917, II, 501–09. It is not possible to examine in this context the diplomatic correspondence concerning the other claims of the United States against Venezuela which arose and were adjusted simultaneously with the *Crichfield* claim. However, a close study of it evidences that the stand taken by the United States which has been extensively described above was not unique. See the references *supra* note 124 and S. Doc. No. 413, 60th Cong., 1st Sess., Appendix 273–643 (1908), which contains some documents of interest that have not been printed in *Foreign Relations*.

c. Contract Claims in Twentieth Century Diplomatic Practice. The writer has not found any case subsequent to the *Crichfield* claim in which the United States has declined to interpose in support of rights of American nationals derived from contracts and concessions granted by foreign governments, except in circumstances where a refusal has been predicated upon the requirement of exhaustion of local remedies, and even such instances have been rare since representations have often been made before claimant has had recourse to courts or administrative procedures in the foreign country. Prominent among cases where support has been given in order to enforce fulfilment by foreign governments of their contractual obligations have been situations where, absent the contract, the acts of the State complained of would have been legitimate.[144]

With respect to the requirement of exhaustion of local remedies, it is significant that seemingly the problems have never been discussed in legal literature that arise in disputes concerning concession agreements which contain arbitration clauses and where the foreign government declares either that the dispute is not arbitrable thereunder or else simply refuses to comply with stipulations of the arbitration clause:[145]

In 1921, in a dispute between Costa Rica and the Costa Rican Oil Corpora-

[144] This is not to say that instances are lacking where the tortious element has been present. This aspect has been predominant particularly in certain instances where foreign governments have sought to cancel or abrogate concessions, but it should be noted that in many of these cases, the foreign government has maintained that cancellation ought to result from non-performance by the concessionaire of his obligations; termination has thus often been expressly authorized in the text of the contracts, and the precise issue has been one of interpretation of the contract. See, *e.g.*, the protests of the Department of State against the attempt by the Chinese Government to cancel the so-called Siems-Carey railway contract, FOR. REL. 1920, I, 674–79, and the interesting correspondence concerning the controversy between the National Railroad Company of Haiti and the Government of Haiti, FOR. REL. 1915, 538–49, 1916, 368–85, and 1917, 813–33.

[145] See, however, Schwebel, *supra* note 75, at 269; *Report of the Committee on Nationalization of Foreign Property of the International Law Association* to the 48th Conference of the International Law Association, New York meeting (1958).

The evident admissibility of immediate diplomatic interposition in such circumstances may be the primary reason which prompts Dr. García-Amador to perceive a principal distinction between the status under international law of concessions which either contain no arbitration clause or are governed by municipal law and those which provide for arbitration of a clearly international character. *Cf.* the following statement appearing in Dr. García-Amador's Fourth Report on International Responsibility:

"The mere fact that a State agrees with an alien private individual to have recourse to an international mode of settlement automatically removes the contract, at least as regards relations between the parties, from the jurisdiction of municipal law. Unlike the *Calvo Clause* which reaffirms the exclusive jurisdiction of the local authorities, agreements of this type imply a 'renunciation' by the State of the jurisdiction of the local authorities. If an arbitration clause of this type were governed by municipal law, it could be amended or even rescinded by a subsequent unilateral act of the State, which would be inconsistent with the essential purpose of stipulations of this type, whatever the purpose of the agreement or the character of the contracting parties. Accordingly, as the obligation in question is undeniably international in character, non-fulfilment of the arbitration clause would directly give rise to the international responsibility of the State," U.N. Doc. No. A/CN. 4/119, 85–86 (1959).

tion, the Government, in contravention of the arbitration clause in the concession, demanded immediate reference of the dispute to a sole arbitrator. Secretary of State Hughes then instructed the Chargé in Costa Rica as follows:

> If corporation desires that representations be made, request Foreign Office to state what justification there is for demand that questions in dispute with Costa Rican Oil Corporation be arbitrated otherwise than as provided in corporation's concession. Add that arbitrary cancellation concession would presumably result in filing of international claim to which Department would necessarily give careful consideration.[146]

At a later stage, after the Department of State had had opportunity to study the precise terms of the concession against the background of a dispute centering upon its interpretation, a long instruction was sent to the Minister in Costa Rica in which the Company's contractual rights were subjected to a persuasive and detailed legal analysis and construction. The instruction concluded with the following remarks:

> In conclusion, you may express the hope that the Government of Costa Rica will find means of bringing to an end in a just manner the vexatious controversy which has been in progress between the Government and the corporation; that the Government will accord the company the cooperation contemplated by the concession contract in order that the corporation may enjoy the benefits to which it is entitled under the concession, the validity of which has not been questioned, and that its work may not be further impeded and its enterprise wrecked and investment of several millions of dollars lost, and in order also that the two Governments may be spared the inconvenience which attends measures looking to the recovery of indemnity for losses sustained as a result of unwarranted interference by the authorities of one Government in the enjoyment of legal rights possessed by the citizens of another.[147]

Another instance in which government interference with the contractual rights of American nationals has elicited the support of the United States Government occurred in 1932 when the Greek Government proposed to modify a contract held by the Monks-Ulen & Company since 1928. Secretary of State Stimson instructed the American Chargé in Greece to "inform the Greek Government that this Government expects that no action will be taken in violation of the terms and spirit of the contract without the consent of the American companies . . . ."[148]

The policy of the United States becomes even clearer in situations where the restrictive doctrine of contract claims has been invoked in defense by foreign nations against representations made on account of interference with the contractual rights of American nationals. Thus, the Government of

[146] FOR. REL. 1921, I, 669.

[147] FOR. REL. 1922, I, 1002.

[148] FOR. REL. 1932, II, 442.

Ecuador once questioned the right of the United States to support in diplomacy the claims of the Guayaquil & Quito Railway Company. The Foreign Minister of Ecuador, in a communication of February 28, 1917 pointed out that he did not find the attitude of the American Government in this matter in harmony with the policy previously observed, as stated by Secretaries of State Fish and Blaine in their well-known pronouncements in 1871 and 1881, respectively.[149]

The attitude of Secretary of State Lansing was, however, distinctly different. One of his instructions to the Minister at Quito read as follows:

> Advise Foreign Office that its reply to your note of January 15 is wholly unsatisfactory to Government of United States which finds ample warrant for its diplomatic intervention in the needed protection for large American interests threatened with destruction through failure of Government of Ecuador to respect its contractual obligations, and in the whole record of the dealings by that Government with these American interests.[150]

[149] FOR. REL. 1917, 741–43.

[150] *Id.* at 737.

Other noteworthy instances in which the United States has extended diplomatic support aimed at securing fulfilment by foreign governments of contracts and concessions entered into by them with American nationals include: the correspondence concerning the concession of the National Bank of Haiti, FOR. REL. 1914, 334–82, 1915, 496–538, 1916, 338–68 and 1916, 385–88; the support lent to the Pacific Development Corporation in maintaining its rights under a contract with the Chinese Government, FOR. REL. 1920, I, 605–74, particularly at 631; the correspondence relating to the claim of the Mercantile Bank of the Americas against Ecuador for the debt of the Cacao Growers Association, FOR. REL. 1924, I, 701–07, particularly the vigorous protest of Secretary of State Hughes, *id.* at 705–07, FOR. REL. 1925, II, 59–64; the assistance of the Department of State to the United Fruit Company in Colombia concerning irrigation works, FOR. REL. 1928, II, 635–37; the activities of the Department of State in behalf of American interests in the Barco petroleum concession vis-à-vis Colombia, FOR. REL. 1928, II, 603–35, 1931, II, 18–28; the protection of interests of American oil companies in Colombia, FOR. REL. 1928, II, 588–603; the protection of the contract rights of the Oriental Consolidated Mining Company vis-à-vis acts of the Japanese Government, FOR. REL. 1934, III, 820–26, 1935, III, 1097–99; and the protection extended to All-America Cables Inc. vis-à-vis Ecuador in relation to a claim on the part of the Government for immediate payment of back taxes allegedly owed by the company, FOR. REL. 1938, V, 554–60.

In some instances, even payment of ordinary and minor commercial debts has been exerted by means of diplomatic pressure. See, *e.g.*, the settlement of the claim of Hall, or Weyman, FOR. REL. 1904, 392–93.

Reference may further be made to the assistance rendered by the Department of State to the Federal Telegraph Company which in 1921 signed a contract with the Chinese Government for the construction and operation of wireless stations in various Chinese cities. The terms of this contract conflicted with grants previously given by the Chinese Government in concessions concluded with Danish, British, and Japanese interests. The United States maintained that the latter contracts were ultra vires since a treaty between the United States and China of 1858 granted the United States most favored nation status; although the protests to the concessionaires' governments were rejected, the United States insisted on specific performance by China of her undertakings in the contract with the American company. See FOR. REL. 1921, I, 404–56, 1922, I, 844–60, 1923, I, 783–826, 1924, I, 570–80, 1925, I, 890–935, 1926, I, 1040–092, 1927, II, 472–82, 1928, II, 555–69, 1929, II, 829–33, and 1930, II, 626–27.

In order to avoid misunderstanding, it should be remarked that the voluminous diplomatic correspondence between the United States and Mexico,[151] which has attracted so much public attention, to a very limited extent concerned contractual claims, particularly inasmuch as the petroleum concessions held by American companies were rather to be viewed as property interests than as rights based on contracts.[152] Even though some instruments known as concessions in Mexican law did present more marked contractual features, such as the concession held by the Compañía Petrolera Maritima S.A.,[153] the diplomatic correspondence does not seem to have been directed to enforcement of specific contract rights since requests based on such grounds were merged with the over-riding aspect of confiscation of property rights in general. Besides, interpositions based on interference by Mexican authorities with concessions held by American nationals have to the writer's knowledge only been made in cases which have involved a tortious aspect by constituting, *e.g.*, outright confiscation or arbitrary cancellation.

Lastly, it may be remarked that the space does not permit a discussion of whether the attitude of the United States had differed materially in relation to protection of claims of American nationals based on bonds issued by foreign governments. It may merely be suggested that the policies and practice of the State Department underwent a substantial change in the wake of the

[151] United States diplomacy aimed at protecting investments in Mexico may be divided into two main phases, *i.e.*, between 1914 and 1921 and between 1925 and 1940. The documentation is published in FOR. REL. 1914, 668–784, 1915, 870–1004, 1916, 708–87, 1917, 1038–78, 1918, 687–792, 1919, II, 591–632, 1920, III, 200–26, 1921, II, 447–93, 1925, II, 512–54, 1926, II, 605–87, 1927, III, 169–228, 1928, III, 193–208, 1935, IV, 764–70, 1937, V, 644–78, 1938, V, 720–61, 1939, V, 667–719; the final settlement of the last phases of the disputes is recorded in AGREEMENT WITH MEXICO ON EXPROPRIATION OF PETROLEUM PROPERTIES. Nov. 19, 1941, E.A.S. No. 234; 9 DEPT. STATE BULL. 230 (1943), and Briggs, *The Settlement of Mexican Claims Act of 1942*, 37 AM. J. INT'L L. 222–32 (1943), with citations and references.

[152] It is illustrative to note in this connection the characterization presented by Mr. Wm. Loeb, Jr. in a letter to the Secretary of State on October 19, 1915 relating to confiscatory taxation measures employed by Mexican authorities:

"In conclusion, I beg leave to add that the matter here presented is in no way connected with the much misunderstood subject of Mexican 'concessions.' Such concessions are granted pursuant to law, and in the manner and under the rules prescribed by law (see law of Nov. 10, 1908). Foreigners may have the benefit of them not otherwise than natives may. They are not available to the mining industry except as they are available to every other industry. They are in the nature of franchises, analogous to our grant of a charter of incorporation, or of a license to engage in a certain business, and are granted to encourage the investment of capital in new enterprises and to aid in the development of new industries. They run for a limited term of years, and the exemptions they allow from certain minor forms of taxation are counter-balanced by the obligations they impose upon the concessionary, in respect of the amount of capital invested, the character of the development, and the subjection exacted to supervision by the state. Such mining concessions as this company and its subsidiaries have held have long since expired by limitation." FOR. REL. 1915, 961.

[153] The text is summarized in FOR. REL. 1916, 743.

Great Depression, which eventually was manifested, *inter alia*, in the organization of the Foreign Bondholders' Protective Council.[154]

d. Informal Assurances and Promises. Perhaps the best indication of the liberal policy and practice of the United States in relation to support of the contractual rights of American nationals vis-à-vis foreign governments will be found in cases where, *stricto sensu*, no explicit contracts or concessions have even been signed but where large investments have been made in reliance upon promises and assurances of a foreign government of an informal character.

Reference may be made here to the strong representations which were made to France in 1933 when it was reported that the French Government considered instituting a petroleum monopoly and as a first step to this end contemplated curtailing allocated import quotas for oil. At the time when this matter was brought to the attention of the State Department, there was "no tangible move towards taking over [the] storage tanks, equipment and refining facilities [of foreign or domestic oil companies in France]," but a Finance Commission had:

> avowed its purpose of creating an import monopoly and [was] studying the practicability of a refining monopoly, an intention which, if carried out, might destroy or greatly curtail the market for American oil and would probably reduce the status of American companies operating in France to that of mere middlemen. Furthermore, it would violate the system of licenses upon which these companies have predicated their investments in France.[155]

It was reported that the Commercial Councilor of the British Embassy made official verbal representations to the French Foreign Office, stating that:

> since British oil interests had made large investments in France on 20-year contracts guaranteed by existing legislation the establishment of a monopoly would necessarily call for strong formal protests on the part of his Government and indemnification to cover investments made.[156]

Secretary of State Hull instructed the Chargé in France to take up the matter orally but nevertheless as under instructions from his Government with the appropriate French authorities. He was recommended "an approach along the same lines as those taken by the British."[157]

[154] FOR. REL. 1933, I, 934–39, 1936, V, 149–58.

[155] FOR. REL. 1933, II, 168–76, at 170.

[156] *Id.* at 172.

[157] *Id.* at 173. The following passage in the dispatch illustrates the reliance placed by Secretary of State Hull upon the licenses issued by the French Government:

"In 1919, when a monopoly was first proposed following the war, you will find from your files that the Embassy made representations to the French Government and that the French

Another similar instance may be cited. In 1934, the assistance of the State Department was requested by the Vacuum Oil Company in an effort to secure from the Austrian Government an increased import quota for crude oil. It appears that the various foreign oil companies operating in Austria had for some years obtained import quota allocations corresponding to their refining capacity. In 1933, the Vacuum Oil Company considerably increased its refining capacity and subsequently requested a corresponding increase in its import quota. The American Minister in Austria examined the claim of the Vacuum Oil Company and arrived at the conclusion, concurred in by the Department of State, that assistance could not appropriately be given to the company in order to secure a higher import quota for 1934, since he had been informed by the Austrian Ministry of Finance that the investments had been made by the company without assurances from the Government of a larger quota. Therefore, the American Minister was of the opinion that:

> If the Government chooses to deny that assurances were given to the Vacuum Oil Company that its quota would be increased if its capacity were augmented, or if it did not make such promise, there can be no basis for representation on the grounds of discrimination .... *Discrimination does not exist unless it can be shown a definite promise was made by a responsible official of the Austrian Government.*[158]

An *e contrario* interpretation of the position taken by the United States Government in this matter suggests indeed that even a very slight contractual element entering into the relationship between an American investor and a foreign government justifies diplomatic interposition aimed at securing the fulfilment by the latter of its obligations. This is another illustration of the thesis that the United States has not regarded itself as severely bound by formal criteria in offering diplomatic protection. The State Department has pursued a flexible and realistic course in situations where, from a reasonable point of view, American investments may be said to suffer from unwarranted

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government replied to the effect that the question of establishing an oil monopoly was one of internal policy in which foreign governments may only find grounds to intervene if the monopoly jeopardizes any rights acquired by their nationals or if the monopoly deliberately favors exporters of certain nationalities to the prejudice of others. (See Embassy's telegram 1409, September 19, 1919). *The American companies maintain that through their license authorizations and by reason of the obligations which they have incurred thereunder, they have acquired rights for the period of the licenses in question, namely, 20 years.* Upon the basis of these licenses they have gone into France with their capital and established import facilities and refineries at a cost of approximately $50,000,000. If an import monopoly and/or a refining monopoly were established by the French Government the rights acquired under these licenses would be jeopardized." *Ibid.* (Emphasis added.)

[158] FOR. REL. 1934, II, 61–70, at 69. (Emphasis added.)

Cf. in this context the representations in support of the Standard Oil Company of Yugoslavia in respect to Yugoslav customs duties. FOR. REL. 1932, II, 606–17.

interference by foreign governments but where the strict and often cumbersome requirements of municipal law have not yet been fulfilled.[159]

2. *Unreasonable Infringement of Economic Rights and Interests.* In circumstances where breach by a State of undertakings made in contracts with aliens constitutes a breach of international law, such contracts mostly offer a clear basis for diplomatic interposition inasmuch as the act of the State can be judged to be in conformity or at variance with stipulated conditions.

In situations where governments have not undertaken any special obligations in regard to foreign investments, international responsibility will be incurred only if general principles and rules of international law have been infringed. As mentioned earlier, it is not possible to examine in this context all the grounds of international law upon which the United States diplomatic protection has rested. Perhaps it is true to say that most instances may be classified with greater or lesser accuracy under headings such as confiscation, discrimination, and procedural denial of justice. It is possible, however, that the United States practice may rather more adequately be said to have adhered to the view that the responsibility of a foreign State becomes engaged whenever there has been established an unreasonable infringement of economic rights and interests held by American nationals, for although not admitting of precise demarcation, certain aspects in the material are not sufficiently accounted for if the cases be grouped exclusively within traditional concepts.[160]

3. *Timing of Diplomatic Interposition.* While formal legal claims demanding, for example, compensation on account of confiscation of alien-owned property can hardly be permissible before concrete measures of taking have been implemented, the situation is entirely different with regard to diplomatic claims. Diplomatic interposition must then be regarded as comparable to

[159] In a dispute concerning forfeiture of a railway held by an American national in Honduras, Acting Secretary of State Wilson, in an argument directed against the contention of the Government of Honduras that the railway concession was invalid, made the significant statement that:

"It seems quite evident that, totally irrespective of whether or not the formal concession or lease granted to Mr. Valentine was valid and constitutional, the Honduran Government could not now expect successfully to maintain that by this governmental action the Government had not assumed such a special relation to Mr. Valentine in connection with his possession and operation of the railroad as would entail reciprocal rights, duties and obligations, which would have to be adjusted." FOR. REL. 1913, 594–607, at 601.

[160] Consider for instance the representations to the Brazilian Government regarding proposed insurance legislation affecting the rights of American companies, FOR. REL. 1937, V, 360–71; the representations in behalf of Standard Oil Company (N.Y.) in Bulgaria with respect to government action fixing the price of kerosene, FOR. REL. 1931, I, 886–91; the representations on behalf of Socony Vacuum Oil Company respecting Bulgarian monopoly legislation to safeguard American investment in "Petrole," FOR. REL. 1934, II, 106–09; the representations in behalf of the Chile Copper Company and the Andes Copper Mining Company regarding effects of a proposed coal law on American interests, FOR. REL. 1927, I, 537–41, and the representations in the same year to the Chilean Government regarding effects of proposed insurance legislation on American interests, *id.* at 541–49; and the representations against the Chilean petroleum bill of May 17, 1932, FOR. REL. 1932, V, 505–11.

such municipal legal relief actions as injunctions or cease and desist orders, which to be fully effective must be taken promptly. In fact, in the area under review, the overwhelming majority of interpositions have been made at a time when foreign government action has not proceeded beyond the enactment of a law which for its implementation has required further concrete administrative or other measures, or even when legislation has merely been proposed, recommended or suggested and has yet had to pass through sometimes cumbersome legislative or parliamentary processes. It is submitted that in fact the effectiveness and real value of diplomatic action often results from this very circumstance that the objections and representations of a complaining foreign government are made swiftly before any actual damage has been occasioned and before it may be too late psychologically for respondent government to reconsider its position.

Nearly all interpositions made by the United States in this century in protection of American investments evidence the thesis propounded above, and it is therefore not necessary to document it in detail.[161]

The right of the United States to intervene at so early a stage has hardly ever been questioned by foreign States, which evidently have acquiesced in the legitimate character of such action; differences of opinion have rather centered upon the substance of the representations made. It is also clear that interpositions by the State Department have often been successful in that after protests have been made, legislative proposals have been abandoned, or the foreign government has abstained from taking the measures which would have unreasonably injured the economic interests of American nationals.[162]

[161] Merely by way of one typical illustration, the following diplomatic incident may be referred to. On January 9, 1926 the American Minister in Roumania delivered a formal note of protest to the Roumanian Minister for Foreign Affairs in which he stated that the draft of a law then pending before the Chamber of Deputies would, if enacted, seriously prejudice American interests. The Secretary of State cabled that:

"The Department approves your action in informing the Foreign Minister that the proposed legislation regarding subsoil rights in embatic lands would, if enacted into law, seemingly destroy vested subsoil rights lawfully acquired by American interests.

"You may supplement your representations with a statement that the Government of the United States would view with concern any action by the Roumanian authorities which would prejudice American interests in subsoil rights acquired in accordance with the laws of Roumania and in good faith." FOR. REL. 1926, II, 903.

[162] It is another matter that for reasons of convenience the State Department has sometimes desired to temporarily withhold representations before concrete measures have been taken in compliance with proposed or enacted laws. See, *e.g.*, the following passage occurring in an instruction from the Acting Secretary of State to the Ambassador in Spain of August 13, 1927:

"As there seems to be a certain possibility that the Spanish oil-monopoly scheme may prove to be unworkable and may not actually be put into effect, it is the opinion of the Department that any direct observations to the Spanish Government on the subject at the present time would be premature and might be misconstrued and hence tend to increase the determination of the Spanish Government to put the decree into full force," FOR. REL. 1927, III, 668.

D. *Remedies Sought*

A few brief remarks should be made on the question of what remedies the State Department has sought in diplomatic claims concerning private American investment. No clear and settled rules are discernible in this respect, and an examination of the material hardly yields more than an overall impression that although there are exceptionally wide leeways for the formulation and substance of requests made in diplomacy, it is difficult and perhaps not even feasible to link the use of such requests with a general theory of the legitimacy of remedies. The choice of remedies has closely depended on the circumstances in each case, and the aim of the State Department has invariably been the flexible and reasonable one of seeking to prevent whatever government actions that might be prevented, or if that is too late, to obtain reparation or compensation such as has seemed appropriate and effective in the circumstances at hand.

As will have appeared from the notes above on the subject of timing of diplomatic interposition, the remedies demanded have most often been of a negative character. The United States has in such situations called upon foreign governments to abstain from acting in a manner that has been proposed or threatened, and thus to repeal or modify enacted legislation, or refrain from implementing enacted laws in a manner which would be detrimental to American economic interests. The precise nature of the demands has been as varied as the entire range of governmental measures against which representations have been directed, including legislative, executive and administrative actions of all kinds.

Where loss or concrete injury has already been caused, the natural remedy has been compensation and/or damages. The material on this topic is so large that it cannot even be discussed here; it may be remarked merely that differences of opinion as to the appropriateness of remedies demanded have arisen almost exclusively with regard to compensation, reparation or damages.

Sometimes, and particularly in disputes concerning the interpretation of contracts and concessions, the United States has called upon foreign nations to settle the differences between them and the concessionaires in direct negotiations. At other times, an initial request has been made merely for a friendly settlement of some kind, and often only for agreement on a specific procedure for settlement; among cases of the latter kind, requests for judicial or arbitral examination of claims figure most prominently.

Lastly, it should be observed that among the remedies which are positive in character is that of restitution in kind, which usually has been requested in cases of taking of property. Furthermore, the extensive section above on contract claims has shown that the United States has often insisted on specific performance by foreign States of undertakings made in contracts vis-à-vis American nationals.

Generally, one may say that the most important end of diplomatic remedies is speedy and complete relief and that, therefore, remedies like compensation or damages have less importance than those which from a practical point of view afford more direct and immediate protection to private investment. Far from hesitating to make such demands, in the nature of injunctions or specific performance, the United States has invoked them to the maximum extent in its constant endeavor to render realistic and flexible protection to American economic interests abroad.

CONCLUSION

The object of this study has been to show how, in support of the investments and economic interests of American nationals, the power and prestige of the United States has been brought into action in diplomacy vis-à-vis many foreign nations.

The results obtained shed some light on what the position of customary international law actually is in the area under review. In particular, it is believed that some misconceptions have been dispelled as to what the practice of the United States, and indirectly the practice of other States, has in fact been.

The *Foreign Relations* present a vivid picture of the United States Government actively engaged in enforcing the rights under international law of American citizens. While the first part of this paper demonstrates that the State Department has displayed a certain restraint in rendering support in the establishment of investments, it has been observed that the reasons for such restraint do not and have not been deemed to apply in situations where existing investments have needed protection. Yet there are overtones even in situations of the latter kind of a certain caution which has found its most striking expression in the understandable reluctance of the United States to resort to force and to sanctions of a comparable nature.

Another feature, difficult to delimit with exactitude, emerges from a study of the diplomatic correspondence which has been examined. It may be expressed as a rule of reason. It evolves as a rather vague, yet tangible, rule to the effect that, although the United States recognizes few doctrinal restrictions upon its right to intervene in support of any private American investment abroad, this right will be exercised only in circumstances when the acts of the foreign government are unreasonable.

With necessity, the precise meaning and effect of this rule of reason will vary from time to time and from case to case. It is not a hard and fast rule but rather a general standard admitting of flexible interpretation. Thus, evidently some measures which called for diplomatic protest a half-century ago would now be viewed as admissible under international law and would elicit no representations. Again, undoubtedly world opinion in the nineteen-sixties will rule out the possibility of exercising a diplomacy entirely like

that employed in the beginning of the century. Nevertheless, the basic approach to the diplomatic protection of foreign investment will, it is believed, remain essentially the same. This may perhaps be seen most clearly in situations where the legal relationship between the investor and a foreign State has found expression in written terms and conditions which through negotiation have become legally binding upon the parties and where, therefore, the doctrines of eminent domain, police power, and the sovereign prerogatives of the State arguably cannot be used in defense of measures which unreasonably infringe upon foreign investments.

This paper has yet another aim—to recall that the informal but vastly important diplomatic intercourse between nations must be kept in mind as the primary source of customary international law. That fact has been ignored or overlooked in much of the recent debate on the status under international law of private investments, whether or not made pursuant to concessions, contracts or similar precise government assurances. The "case" law evolved in diplomatic correspondence is too rich, too original and too constructive to be neglected by scholars of international law.