The Future of Arbitration in Latin America, A Study of Its Regional Development

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NOTES

The Future of Arbitration in Latin America;
A Study of its Regional Development

The past 20 years have witnessed a marked change in the development of international trade manifested in the form of multinational or transnational enterprises that transcend many state boundaries. The traditional concepts of sovereignty take on new meaning in light of the broad and varied impact of foreign investment. Especially in regarding the developing nations, the economic and political dynamics of this vast market growth bear ramifications that will be felt in the ensuing decades.¹ One noticeable result has been the increased desirability and utilization of arbitration as a flexible, expeditious, and efficient method of handling international private commercial disputes. The rate and extent of its world-wide acceptance has been irregular though steadily increasing. Although arbitration has been actively incorporated into United States domestic law, especially in the field of labor relations, the United States has only recently acknowledged its importance in international transactions.² In 1958, the United Nations adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which was signed and ratified by numerous states throughout the world.³ However, to date the


² Scherk v. Alberto Culver, Co., 417 U.S. 506 (1974). In this landmark case, the United States Supreme Court upheld the validity and enforceability of an arbitration clause which required that any disputes arising out of a contract be tried before the International Chamber of Commerce in Paris, France. The Court further stated that a contractual provision which provided a forum for dispute litigation was an "indispensable precondition to achieving the orderliness and predictability essential to any international business transaction."

³ Done at New York, June 10, 1958, 3 U.S.T. 2117 T.I.A.S. No. 6997, 330 U.N.T.S. 38. The Convention requires the recognition and enforcement of awards rendered in foreign states, although a state may refuse to do so if it finds that the subject matter of the award cannot be settled under its domestic laws or that it is contrary to the state's public policy (ART. II). The following is a partial list of
Convention has been ratified by only three Western Hemisphere states, the United States having done so in 1970. The failure, or more accurately, the refusal of Latin American states to acknowledge arbitration as a viable method of private commercial dispute settlement has been of major concern to foreign investors seeking to do business in those countries. Growing nationalism and regionalism has been enveloping all nations, but most significantly the developing nations. Latin America is representative of a new outlook rapidly emerging in today's commercial setting: increased and tightened economic planning by developing countries designed to secure for them progressive national growth.

In what would nations which have accepted or ratified the Convention: Bulgaria, Central African Republic, Czechoslovakia, Denmark, France, Ghana, India, Israel, Japan, Poland, Romania, Syria, Tanzania, Ukrainian SSR, USSR, United States, Federal Republic of Germany. In short, the Convention has been adopted internationally by diverse nations of Communist, Western, and developing ideologies alike. For a discussion of the Convention see, Mirabito, The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years, 5 GA. J. INT'L & COMP. L. 471 (1976).


5 See generally Radway, Settlement of Investment Disputes in the Inter-American System, (unpublished paper) (1973). Mr. Radway analyzes the impact of the Calvo doctrine upon the trends in "institutional revitalization" in the Latin American states in the past decade. He concludes that despite the increased internal harmony among Latin American states "the confidence of foreign investors . . . does not in most cases presently extend to the prospect of either the host country courts or ad hoc or institutional arbitration in Latin America." at 25. Summers, Private Versus State Arbitration in Latin America, 4 CALIF. W. INT'L L. J. 121, 130-31 (1973). Mr. Summers concludes on a note of pessimism based upon a questionnaire sent to private investors asking their observations on the efficacy of arbitration in Latin America. Among some opinions noted: host state courts are unwilling to pay compensation for expropriation of foreign assets; the Latin American juridical system hinders the effectiveness of private arbitration; the Calvo doctrine, incorporated into many Latin American constitutions subjects foreign persons and courts to their courts as well as to their laws. This has been reaffirmed by the ANCOM states.

6 Perhaps the most important example of the developing nations' attempts to secure a positive economic future, which may well be the prototype for other developing economies, is the Andean Code (ANCOM). Also known as Decision 24, ANCOM was created by the Agreement of Cartagena signed in May 1969. Decision 24, 11 INT'L LEGAL MATERIALS 126 (1972). See Zamora, Andean Common Market — Regulation of Foreign Investments: Blueprint for the Future?, 10 INT'L LAW. 153 (1976). The original members were Bolivia, Chile, Colombia, Ecuador, and Peru. Venezuela joined in February 1973 by signing the Consensus of Lima. The foreign investment code was adopted in July 1971. Venezuela has adopted all agreements made prior to its joining in 1973. For information on ANCOM see generally: Andean Pact: Definition, Design & Analysis, Council of the Americas, New York, 1973; Oliver, The Andean Foreign Investment Code: A New Phase in the Quest for Nortative Order as to Direct Foreign Investment, 66 AM. J.
seem to be a reference to the Andean Pact nations, one observer of Latin American development says:

Latin America now has rules which direct investment into those sectors and enterprises which the host countries feel most necessary and appropriate for development. That is, there is increasing exertion of host country discretion at the inception of foreign investment. This is a healthy change from the days of unquestioning acceptance of foreign investment as an unalloyed positive factor.  

Not everyone shares this optimism. Many investors regard such pragmatic nationalism, as evidenced by the promulgation of the Andean Code, with a certain amount of trepidation, unsure of the future security of long-term investments. These investors, notably those in the United States, Japan, and Western Europe, are deeply concerned with the ultimate threat of expropriation and nationalization of their foreign interests such as occurred under Allende in Chile, and Pérez in Venezuela. Viewing the volatile political history of Latin America with a jaundiced eye, they have long sought to establish a uniform, effective procedure for settling investment disputes in the host states.  

For just as long a period of time, these efforts have been virtually wholly frustrated (i.e., the non-ratification of both the 1958 U. N. Convention and the International Convention for the Settlement of Investment Disputes)
until recently in early 1975. At that time, the Inter-American Convention on International Commercial Arbitration was signed by 12 Latin American states in Panama. This note will outline the background of Latin American distrust of arbitration and discuss the future of arbitration as a possible means of commercial dispute settlement in those states.

**History of Arbitration in Latin America**

The Latin American nations’ experience with arbitration has generally been negative. Although these countries have participated in a little over 200 arbitration decisions in the past 150 years, most decisions rendered rarely favored the Latin American states involved in the disputes. Lionel Summers, who has long studied commercial activity in Latin America, has observed that initially the states often participated in such decisions either reluctantly or somewhat naively, placing their unbound trust in the American and European arbitrators chosen to decide the disputes. This was the age of neocolonialism coinciding with the industrial revolution that found Western imperialism forging its way into undeveloped countries rich in natural resources. Africa, Asia, and Latin America all succumbed to the Western expansion. Latin America was politically unstable and thus easily influenced and controlled by the “North Atlantic States” that exploited their natural wealth. Transient regimes were too weak for the superior external economic and political forces that left little room for equality of bargaining positions.


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13 *Id.* at 5. The phrase is employed to describe North American and European states as a collective body. The phrase is apt, because, despite the political differences between these powers, as an external force their military and economic domination of Latin America was complete.

14 Abbott, *supra* note 1. Mr. Abbott’s discussion of present Andean Code
The pretext of both the United States-Mexican War and the Maximillian adventure, which began as a three-nation demarche, was at least in part the failure of Mexico to pay claims. Other nations besides Mexico felt the heavy hand of neocolonialism or suffered from the intrigues of adventurers such as William Walker in Nicaragua.15

When arbitration was employed in dispute settlements, the arbitrators chosen were seldom native to Latin America.16 Despite any façade of objectivity that the foreign governments attempted to gloss onto the proceedings, the Latin American states involved soon realized that the bias was all too stark.

However, the fall of Mexico's Díaz in 1910 marked the ending of imperialism in Latin America generally, and was the turning point in the development of modern Latin America. The revolution in Mexico was the first to be truly born of social impetus. Latin Americans were attempting to remove the foreign yoke that had been the way of life during the previous three centuries.

From 1910 on, the number of arbitrations decreased markedly until they stopped altogether by the end of World War II.17 The strategy reflects how the effectiveness of ANCOM is based upon its ability to maximize its economic bargaining position. In other words, the Code is the logical result of Latin American experience with foreign investment — reaction against external control by consolidating state interests and trading Western technology for Latin American resources and markets in the effort to attain a more equal footing with developed powers. The pattern is not unusual, and in fact appears to be exemplary of the new struggle in international affairs. For example, in regard to the law of the sea, the developing nations have joined in attempting to create an international licensing authority that would stalemate developed states' advance into exploiting the resources of the seabed until such time as the developing states could make comparable inroads. For a discussion of the effect of the Group of 77 upon international law of the sea, see Murphy, Deep Ocean Mining: Beginning of a New Era, 8 CASE W. RES. J. INT'L L. 46 (1976), passim.

15 Summers, supra note 12, at 6.

16 Id. at 10. Among the many foreign dignitaries who served as arbitrators: The Pope, Victoria and Edward III of Great Britain, Wilhelm II of Germany, and the Presidents of France, Spain, and Switzerland. Often, arbitration was imposed by coercion. In 1903 Venezuela was required to submit to 10 separate arbitration commissions, with Mexico the only other Latin American country serving on the commission. At that time, Porfirio Diaz, President of Mexico, was virtually a United States puppet.

17 Id. at 11. This was in spite of the Bustamonte Code of Private International Law, signed in Havana in 1928, and the Treaty of Montevideo of 1889, amended and improved in 1940. Most of the Latin American states (except Venezuela, Mexico and the United States) signed either or both treaties which provided for the enforcement of foreign arbitral awards. However, n.b. the Protocol on Arbitration Clauses, signed at Geneva, Sept. 24, 1923, 27 I.N.T.S. 158, 8 REGISTER OF TEXTS OF CONVENTIONS & OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 21 (1973), which provided for compulsory arbitration and was signed only by Brazil.
growth of nationalism, disenchantment with foreign influence, and a growing sophistication of governmental and legal systems brought about the decline. Meanwhile, the United States also grew indifferent to arbitration, perhaps in reaction to an initial zealous proliferation of arbitration treaties in the early 20th century. The coinciding American attitudes aided in diminishing the application of commercial arbitration in Latin America until it became dormant.

Starting with the turn of the century, the Latin American governments became increasingly active in international affairs and, as they did so, attempted to formulate alternative means for handling investment disputes. They pioneered the international court concept with the formation of the Central American Court of Justice (antedating the Permanent Court of Justice by several years). The Court was virtually inactive during its brief 10-year life, but it exemplified the evolving Latin American view of the proper method for settling commercial disputes. There was an inherent distrust of any foreign apparatus designed to handle such conflicts—a feeling extant, in large part, today. The developing belief was that courts (domestic as well as international) were the most formal and efficient, and therefore optimum, mechanism for rendering decisions. They compelled the investor to accommodate an individual host state’s laws and court procedures in order to deal with the state commercially. By the close of World War II, 10 Latin American states had accepted the compulsory jurisdiction of the International Court of Justice.

Venezuela eventually signed the Bustamante Code, but stipulated reservations concerning execution and judicial notice. Article 127 of her Constitution requires contracts (which would provide for arbitration of disputes) involving the “public interest” to be consistent with domestic law. The provision exemplifies the Calvo doctrine which has been incorporated to varying degrees into the constitutions and codes of civil procedure of other Latin American states. For a treatment of different civil codes’ handling of arbitration see Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 Harv. Int’l L. J. 131, passim.

18 Summers, *supra* note 5, at 124. He agrees with George F. Kennan that the so-called Bryan Treaties of the early 20th century, 97 in all, were virtually moribund: only two were invoked in any way, upon which only two disputes were arbitrated. The other treaties were ignored. There was too much emphasis placed upon the fact of having made the treaties and not upon their worth in content and scope.

19 Summers, *supra* note 12, at 12.

20 This attitude is reflected in virtually every code of civil procedure in Latin American states, providing for close judicial review of commercial disputes. Abbott, *supra* note 17.

21 Summers, *supra* note 12, at 12. Seven states accepted conditionally: Co-
Thus, by post-World War II, most Latin American states acknowledged arbitration only in theory, instead extolling the virtues of adjudication through the court structures. Of course, one of the major problems of having to utilize the courts in a commercial dispute is the inertia inherent in such a formal proceeding. Furthermore, most foreign investors distrust local courts, claiming that the bias toward the host state precludes objective, much less expeditious, resolution of disputes. In today’s commercial setting parties simply cannot afford the vagaries of protracted suits imposed by having to utilize local remedies. They do not have the time to sift every new problem which arises through slow courts where judges are all too often ignorant of technical, specialized knowledge that is best found in an arbitrator having expertise and familiarity with the unique nature of such conflicts. Moreover, investors cannot ignore the realities of executive and legislative

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2 Literas, Ex Parte International Commercial Arbitration, October 1975 (unpublished paper). Dr. Literas lists 14 Latin American states which allow for arbitration of disputes, along formal guidelines, but which also enable the judge to appoint an arbitrator in an ex parte procedure. He analyzes a common provision of civil procedure — that of Argentina (long known for its opposition to arbitration of investment disputes).

"SUBMISSION: the submission shall be formalized in a public instrument or a private instrument, or an act extended before the judge of the case. This is a very formal document, with specific requirements. After the demand for the constitution of the arbitral tribunal is submitted to the competent judge, it shall be transferred to the defendant for the purpose of formalizing the submission by the parties (art. 769). Should there be an unreasonable resistance on the part of one of the parties the judge shall act in lieu of the said party. The arbitrators shall be appointed by the parties. Should there be no agreement, the appointment shall be made by the competent judge. ARBITRAL CLAUSE: Any question between parties, that may be the object of settlement, can be submitted to an arbitral procedure may be agree in the contract or at a later time."

Procesal Civil y Comercial de la Nacion, arts. 763-769 (1967). The effective result is that the final arbiter is the judge, so that the courts maintain jurisdiction ultimately over the dispute.

23 A prime example of court lethargy in the international sphere is the ICJ’s handling of Barcelona Traction, Light and Power Co. [1964] 6 I.C.J. 688. The Court deliberated for several years on the issue of standing, eventually concluding that the Belgian government could not represent the claims of individual shareholders. Such laboriously wrought decisions do not induce parties of commercial disputes to submit to the jurisdiction of the Court.

24 Summers, supra note 5. The responses to the questionnaire reflect such investor skepticism toward Latin American national courts. For further discussion of local court bias see Cohn, The Rules of Arbitration of the International Chamber of Commerce, 14 INT’L & COMP L. Q. 132 (1965).
fiat which the courts, patterned after our own federal system, are often powerless to affect. 2

Concurrent with the emphasis placed upon the use of the courts was the regional implantation of the Calvo doctrine. 2 Briefly, the doctrine was designed to secure the use of local court review of disputes by denying to foreign investors access to external, perhaps prejudicial, adjudicative mechanisms that would tend to supersede the local court jurisdictions. The doctrine is the most vivid manifestation of the regional distrust and fear of an international law believed to be manipulated by foreign powers. The effect upon investors was to remove from them the protection of their commercial interests in the host state. The clause, a necessary condition of every contract made with a foreign investor, required the investor to be treated precisely the same as the nationals of the host state: without any benefit of invoking a supranational status. 27 Thus, the doctrine cut off diplomatic intervention by prohibiting an investor from seeking redress against the host state through his own government, the standard procedure recognized by most states internationally. The Calvo doctrine is anomalous to Latin America and remains vital today. It is the groundwork for the Andean Code, the basis for the tight controls that many Latin American states wish to impose upon foreign direct investment today.

Recent Developments

ANCOM. As was noted previously, Latin American recalcitrance in accepting arbitration, coupled with dramatic instances of expropriation of investments, has generated deep concern among

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25 Zamora, supra note 6, at 164. The Colombian Supreme Court had initially ruled unconstitutional the incorporation of Decision 24 (the Andean Code) into Colombian federal law. Whereupon, the Colombian executive and legislature enacted a law that essentially adopted the Code in its entirety.


27 The following is an example of a Calvo clause from United States (North American Dredging Co. of Texas) v. United Mexican States, Gen'l Claims Comm., 1926, Opinions of Commissioners 21 (1927):

"They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."
foreign investors. Moreover, investors are left in doubt as to the enforceability of foreign arbitration awards. 28 Further exacerabating those fears has been the adoption of Decision 24 by the Andean Pact nations. 29 However, initial fears of investors have abated somewhat and they are taking a second look at the ramifications of the Andean Foreign Investment Code. 30 The essential goal of ANCOM is to promote a healthy economic future for a host state by providing for a gradual nationalization of foreign investments. 31 The purpose is not to prevent such investment per se, but rather to screen out attendant ill-effects that plagued past ventures. The Code generally provides close host state scrutiny of the activities of such enterprises in regulating the flow of capital, management practices, areas of development — anything that may have an impact on the host state's economy as the state perceives it. The implementation of the Code standards depends in large part upon the economic motives of the host state. Whereas Venezuela has assumed a strong bargaining position as a result of the recent price upsurge in oil, Chile, a poorer nation, is inclined to be less stringent in its controls and instead would encourage foreign investment within its borders. 32 Thus, the result has not been the ready adoption of ironclad strictures as was initially believed by foreign investors. Decision 24 has not been uniformly adopted. What it does seem to signify is the general uniting of many Latin American states in order to screen out adverse effects of indiscriminate foreign investment, and as a result, be more selective in their

28 Radway, supra note 5, passim.
29 See generally note 6, supra. Article 51 incorporates the Calvo clause into all contracts made by ANCOM members with foreign investors. 11 INT'L LEGAL MATS. 126 (1972).
30 Zamora, supra note 6, at 154. He notes, "It [Decision 24] is now in force to varying degrees in all of the ANCOM countries. However, only Venezuela has acted to implement Decision 24 to its full extent. Other countries, particularly Chile, are taking a more cautious approach."
31 Id. at 156. Mr. Zamora discusses the adoption of the Code by Venezuela. Enterprises are roughly divided into three classes: National, Mixed, and Foreign. A National enterprise is incorporated in the host state and has 80 percent of its capital owned by national investors. A Mixed enterprise is also incorporated in the host state and has more than 51 percent but less than 80 percent of its capital owned by nationals. Finally, a Foreign enterprise has less than 50 percent of its capital owned by national investors. The Code also stipulates that enterprises must attain the Mixed status within 15 to 20 years—depending upon the economic muscle of the host state. For further reference to the Code provisions see, Gaceta Oficial de la Republica de Venezuela, Nos. 1,620, Nov. 1, 1973, and 1,650, April 29, 1974.
32 Id. at 159.
acceptance of such investments. At the moment, the change would appear to be a healthy one after all.\textsuperscript{33}

ICSID. Past attempts to promote arbitration in Latin America have failed, especially in contrast to the progress it has achieved internationally.\textsuperscript{34} Perhaps the most significant example of such efforts is the International Centre for the Settlement of Investment Disputes (ICSID).\textsuperscript{35} A product of the World Bank, ICSID was created in 1965, the result of years of work to generate the creation of a uniform arbitration structure by such individuals as Martin Domke, co-chairman of the World Peace Through Law Center, and Aaron Broches, General Counsel of the World Bank.\textsuperscript{36} The main goal of ICSID is to make accessible special forums in which uniform procedures may be applied in the settlement of investment disputes.\textsuperscript{37} The ultimate purpose is to promote economic growth through encouraging private investment,

by creating the possibility, always subject to the consent of both parties, for a Contracting State to settle any legal dispute that might arise out of such an investment by conciliation, and/or arbitration before an impartial, international forum.\textsuperscript{38}

ICSID also establishes rules of procedure which stipulate that prior agreements of parties to arbitrate are binding and cannot subsequently be revoked by one party wishing to avoid arbitration.\textsuperscript{39}

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\textsuperscript{33} See Radway, \textit{supra} note 5, at 22-24. Mr. Radway points out that ANCOM spawned the Congress of Andean Group Lawyers which has moved toward promotion of commercial arbitration in private investment disputes which would apply the rules of procedure of the Inter-American Commercial Arbitration Commission.

\textsuperscript{34} Summers, \textit{supra} note 5, \textit{passim}.

\textsuperscript{35} \textit{Done at Washington, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159; text at 4 INT'L LEGAL MATERIALS 532 (1965).}

\textsuperscript{36} Liber Amicorum, \textit{supra} note 10.


\textsuperscript{38} ICSID, \textit{What it is, What it Does, How it Works}, Washington, D. C., May 1, 1973. This is a pamphlet providing a cursory description of ICSID.

\textsuperscript{39} Article 25(1) provides that advance consent must be written. Article 54 provides that once agreement has been made and an award rendered, the award is binding and must be enforced "as if it were a final judgment of a court of that state." It is this matter of advance binding consent that Latin American states criticize as being contrary to their domestic laws. However, the consent provision is of vital importance to investors who wish to secure in advance the access to the ICSID forum through a \textit{clause compromissoire} (which avoids the ad hoc
The Centre has representatives of each contracting state on its administrative board and, essentially, attempts to provide the neutral, objective settlement procedure it espouses. Yet, ICSID has been signed by no Latin American state. Why? Paul Szasz cites and buttresses Aaron Broches’ delineation and refutation of five primary arguments posed by Latin American critics of the Centre. The arguments are noticeably Calvoesque. Szasz refutes such criticisms by arguing that the flexibility of contract coupled with the voluntary nature of the initial agreement to arbitrate provides a host state ample opportunity to safeguard its own interests. He finally cites Article 27 as obviating Latin American fears by prohibiting diplomatic intervention by the investor’s government: the parties’ accession to the ICSID Convention negates any possibility of “impermissible interference in the internal affairs of the host state.” Though the Latin American criticisms are unconvincing, ICSID remains unacceptable to Latin American problems attending the submission of a compromis when the host state becomes reticent to submit such a compromis). See, Comment, A New Approach to United States Enforcement of International Arbitration Awards, 1968 DUKE L. J. 258, 266-67 (1968). The comment concludes that the local law provisions in arts. 54 and 55 render enforcement of awards virtually impossible.

40 Szasz, supra note 37, at 258. Broches poses the following arguments of the Latin American critics, paraphrased by this writer: 1. It is unacceptable because it introduces compulsory arbitration. But it must initially be agreed to by the parties in writing; 2. Submission to international arbitration of a state versus a private foreign investor is prohibited by Latin American constitutions. That is true only in Venezuela, despite arguments to the contrary by the Andean Group; 3. Acceptance violates the constitutional principle of equality of citizens and aliens. It confers no special right because an alien brings an action only with consent of the state; 4. Arbitration undermines the national courts. Actually, investors do not fear the courts, but their inability to check legislative and executive action that may be taken against an investor; 5. Arbitration has had a poor history in Latin America. That is past and does little good to obviate establishment of a procedure designed to allow an investor to arbitrate with a host state’s consent. See Broches, The Convention of the Settlement of Investment Disputes, 9 ABA SECTION INT’L & COMP. L. BULL. 11 (July 1965).

41 Further, Article 4 prohibits the exertion of political influence upon members by the Centre. It is compelled to remain neutral in any dispute.

42 Szasz, supra note 37, at 260-61:

“In this state of affairs it should be recognized that Article 27 of the Convention does offer precisely what capital exporting states had never conceded in any other general treaty and what the Calvo Clause incorporated into a private contract between an investor and a host government cannot fully accomplish: the possibility of an effective (because authorized by each contracting state through its ratification of the Convention) waiver by an investor of the right to his state’s diplomatic protection with regard to any matter that the host state is willing to take to the Centre for arbitration.”
ARBITRATION IN LATIN AMERICA

states. Calvo logic prohibits the subordination of local judicial determination of vital economic disputes deemed to be within the "public interest" of the host state. Despite the arguments put forth by Szasz and Broches, those states wish to retain the ability to have their courts review foreign arbitration awards as being compatible with the public interest as determined by local law. By acceding to the ICSID rules of procedure they would essentially give up that right. The debate must be regarded in terms of the incipient national economic growth and possible future stabilization of these developing countries. They are on the threshold of attaining a stature previously unknown and are thus unwilling to lose their seemingly new-found regional identity.

OPIC. Another effort to encourage investment development, though much more regional in its focus than ICSID, has been the Overseas Private Investment Corporation (OPIC), successor to AID's Office of Private Resources. Essentially, OPIC provides insurance to investors abroad once it has ascertained that "suitable arrangements" have been effected to protect its interests. This is the crux: many Latin American states, noticeably members of ANCOM, are opposed to the foreign subrogation of investments, because they fear subsequent intervention into their domestic affairs by the United States Government seeking to safeguard OPIC-backed investments. However, commentators have noted that in the past several years, the tameness of the United States'...

43 Article 42(1) of the ICSID Convention implies that whenever any conflicts arise where no law has been designated to govern the contract, standards of international law will prevail. Given the Latin American belief that international law would ultimately be biased against regional standards, the non-ratification of ICSID appears understandable. However, the article has also been interpreted by commentators as saying that when a law is designated by the parties, the ICSID forum will be constrained to apply it (i.e., the law of the host state) even if it contravenes accepted standards of international law. See Broches, Arbitration in Investment Disputes, INTERNATIONAL COMMERCIAL ARBITRATION: DOCUMENTS AND COLLECTED PAPERS, pt. 2, at 292, 296-97 (C. Schmitthoff ed. 1974).

44 See Colloquium, supra note 7, at 150. Rapporteur Dale Furnish states: "This seems to be precisely what Latin America does not want: to be bound by the tenets of an international law which may not understand or accept the special considerations, changing circumstances, and laws of the host countries."


46 Id. at § 237 (b).

reaction to expropriation (when those states expected much harsher retaliation) has buttressed Latin American self-confidence.\textsuperscript{48} Perhaps, then, the mood in Latin America is shifting enough so that those states will become more amenable to OPIC investments in future years. Professor Dale Furnish notes that "its present coverage is not comprehensive of course, but OPIC can function to pay off insured foreign investors and remove the aggrieved party from the dispute, which is then left to cooler and more leisurely negotiations between governments."\textsuperscript{49}

Ultimately, the fact remains that if arbitration is to gain a meaningful hold in Latin America it must be the product of a consensus of those states.\textsuperscript{50} The past shows clearly that these nations have gradually grown together and have increasingly articulated and asserted their regional ethos in international law, despite their political and social differences: Thus, the final object of this note is to focus upon the possibility of such a consensus: the Inter-American Commercial Arbitration Commission and the Convention signed by its representatives in January 1975.\textsuperscript{51}

\textsuperscript{48} Colloquium, supra note 7, at 165.

\textsuperscript{49} Id., at 150-51. Professor Furnish concludes: "Most significantly, it removes the reasons for public accusations against the host country (e.g., full-page ads in the New York Times) and the outcry necessary to create a cause sufficiently célèbre that the government of the investor’s state feels compelled to press the case. There are several salutary features to OPIC’s procedures. An expropriation does not become compensable for one year, during which the investor must pursue its host country remedies. If its efforts result in a compensation agreement, OPIC may step in to endorse the arrangement by converting its insurance liability to a guaranty of any settlement worked out between the investor and the host country. In the interim OPIC has auditing rights in the investor’s books and should be able to exert influence on it to keep its demands at a reasonable level.” Note further the comment of Marshall T. Mays, General Counsel for OPIC, \textit{Inter-American Arbitration}, Second Quarter (1973) at 3: "With regard to its role in resolving investment disputes, OPIC and its predecessors have paid or settled 13 expropriation claims to date without the involvement of the United States government in a dispute with a foreign government. OPIC’s programs tend to de-politicize international disputes.”

\textsuperscript{50} For an overview of the various regional efforts that have developed in the past several years, see Radway, supra note 5, passim. He furnishes an inside view of the various Latin American commercial arrangements and their impact upon arbitration in that continent.

\textsuperscript{51} Inter-American Convention on International Commercial Arbitration, January 29, 1975. For a copy of the English text in its entirety, see Norberg, \textit{Inter-American Commercial Arbitration Revisited}, 7 LAW. OF AMER. 275, 286-289 (1975). Mr. Norberg believes the 1975 Convention to be a major step in establishing uniform commercial arbitration in the Western Hemisphere. Id. at 276.
The IACAC and the Panama Convention

The IACAC was created in 1934 by Resolution 41 of the Seventh Conference of the Organization of American States held in Montevideo. The organization of the Commission was effected by the American Arbitration Association. The Commission acts as coordinator of its National Sections in the Americas in promoting the development of domestic and international commercial arbitration through the application of its own rules of procedure. The IACAC is an international organization of a non-governmental nature: it is composed of individuals from the private sectors of the member states and does not purport to represent the political/legal views of the states. Although old in fact, the Commission was not truly viable until 1967. At that time it was rejuvenated and has since steadily augmented both its stature and activity among the Latin American states in handling commercial developments. It appears to be the type of regional organization that has been needed to spark the alliance of all Latin American states to progress away from the narrow regional tenets held in the first half of the century. The Commission has attained a certain degree of credibility and prominence as a body able to promulgate commercial trade standards for Latin America. The procedure is flexible and, as such, has at least initially generated positive steps toward promoting uniform commercial arbitration. The gradual

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53 See RULES OF PROCEDURE OF THE INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION, (amended and in effect, April 1, 1969) at 3.

54 In 1967 the IACAC produced the Draft Uniform Law on Inter-American Arbitration. The text is printed in INTER-AMERICAN COMMERCIAL ARBITRATION — ANNEX C21 (1968). The draft was approved by no state. Its failure to provide for the setting aside of an arbitration award which would conflict with the public policy of the enforcing state detracted from its desirability to the Latin American states. See, Abbott, supra note 17, at 135-37.

55 The Fifth IACAC Conference was held in Bogota, Colombia, December 4-6, 1974, with representatives attending from seven Latin American states. It resolved: "That the Inter-American Juridical Committee of the OAS had recognized the IACAC as the preferred organization for arbitration in the Western Hemisphere." INTER-AMERICAN ARBITRATION, Fourth Quarter (1974) at 3. Also, in INTER-AMERICAN ARBITRATION, Second Quarter (1970) at 2: "In May of 1970 in Lima, Peru, the First Convention of the Chambers of Commerce of the Andean Pact, with representation from Colombia, Chile, Ecuador, and Peru, adopted a resolution recommending that any contract executed in the area should have the arbitration clause recommended by the IACAC."

56 See Report, supra note 52, at 9:

"The IACAC establishes the rules of procedure for international arbitra-
advancement toward adopting arbitration as a desirable form of dispute settlement has brought about a subtle shift from former views. For some observers the progress of the IACAC charts a growing awareness of Latin American nations that arbitration is not the specter it once was.

However, despite such prognostications, the Treaty has yet to be ratified by a single state. Ironically, it is fully compatible with the 1958 U. N. Convention which provides for local law review of an award. Other features of the Treaty provide for foreign arbitrators—a reversal of former strictures that disallowed them. It stipulates that the arbitral award shall have the force of a final judgment as if it had been rendered by the national courts.

57 For example, in 1970 the IACAC published information regarding the effectiveness of recognition and enforcement of foreign arbitral awards within the Inter-American system. The article cites the Bustamante Code of 1928 and the Treaties of Montevideo of 1889 and 1940 which contain specific provisions for the execution of awards made in the signatory countries. All Latin American states have signed one or the other treaty. The outcome, the article concludes, is that "there is extant today a juridical system capable of enforcing foreign awards rendered in any of the Latin American countries with the exception of Mexico and Venezuela — and even in these two countries execution on the basis of reciprocity is always a possibility." INTER-AMERICAN ARBITRATION, Second Quarter (1970) at 4.

58 In 1969, for example, the Colombian Supreme Court declared constitutional the state's 31-year old arbitration law, rejecting the Calvo argument that arbitration was a delegation of the administration of justice to citizens outside the judiciary and as such was unconstitutional. INTER-AMERICAN ARBITRATION, Second Quarter (1969) at 1. Mr. Norberg states, supra Note 51, at 276: "The convention has now formalized and crystallized for the first time in the Western Hemisphere the rules and parameters for utilizing arbitration to resolve disputes flowing from international economic disputes."

59 Norberg, supra note 51, at 276. Signatories to the Treaty are: Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Uruguay, and Venezuela.

60 Article 5(2) provides that the "competent authority of the state in which the recognition and execution is requested" may refuse to do so if it conflicts with that state's public policy ("ordre public") or if the subject matter could not be settled under local laws. Ostensibly, then, the Treaty has obviated prior Latin American criticisms against having to lose such rights of review. Apparently, the only explanation can come from some understanding of the regionally-oriented Calvo logic: general distrust of international law.

61 Id. at Art. 2.

62 Id. at Art. 4. The Article acknowledges the Bustamante Code and Treaties of Montevideo in providing for the recognition and enforcement of foreign arbitral awards. This, Mr. Norberg asserts, is compatible with such constitutions (i.e., Argentina, which does not recognize the validity of foreign awards). Thus, it is a plus for foreign investors, because it opens the way for reciprocal enforce-
Thus, on paper the Treaty provides for the first time a uniform arbitration mechanism to be employed in private-state commercial disputes. It incorporates into its articles earlier Latin American arguments assailing such bodies as ICSID, seemingly establishing a truly regional dispute settlement instrument.63 Against a background of years of Latin American intransience, the future seems brighter for the possible accommodation of the conflicting interests of foreign investors and the host states. If those states truly wish to step out from behind the wall the Calvo doctrine erected and fortified, the old fears engendered by Western imperialism must fade with the advent of modern commercial realities. To attain their economic goals, the Latin American nations need to demonstrate to potential investors their desire to cooperate in internationally-accepted dispute settlement procedures. Adoption of the IACAC Treaty would be a vital first step in that direction.

The Calvo doctrine expressed the suspicion Latin American states held toward foreign investment and intervention. It has required time for those countries to grow in international stature and to attain a position of economic leverage before the barriers could be lifted. Whether those barriers have been lifted remains to be seen. The IACAC is the kind of regional body, subject to Latin American control and direction, that has been necessary for the adoption of arbitration. The degree and rapidity with which the Treaty will be ratified and employed is an open question. Undoubtedly, it serves to encourage foreign investors to believe that arbitration is more of a reality than it was just five years ago.

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63 Lliteras, supra noté 47, at 5. Dr. Lliteras states, however, that four of the six Andean Pact states have signed the Treaty, thus initially lending to it a sense of credibility and perhaps removing the Calvo strictures Decision 24 places upon commercial arbitration. Were those states to ratify the Treaty, it would mark a major change in Latin American attitudes toward enforcement of foreign arbitration awards.

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