CHAPTER 1

THE LATIN AMERICAN POSITION ON STATE RESPONSIBILITY. LOOKING INTO THE PAST FOR LESSONS ON THE FUTURE

Introduction: The Latin American Struggle against Diplomatic Protection

It is difficult to understand the BIT generation without looking first at the broader historical picture. Any descriptive and normative assessment of the BIT generation—such as the one attempted later in this work—requires, first, a review of the evolution of state responsibility for injuries to aliens under international law during the 19th and early 20th century.

Latin America has been a major player in the development of rules and principles governing state responsibility; this was particularly true during the 19th century. After claiming their independence from the Spanish Empire, the new states found themselves in need of nation-building.\(^1\) One of the first steps taken toward this end was to encourage Europeans to settle the vast and unoccupied territories comprising the new republics. While colonial times had been characterized by the strict prohibition against travel by

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\(^1\) See Mario Góngora, *Ensayo Histórico sobre la Noción de Estado en Chile en los Siglos XIX y XX* (Editorial Universitaria, Santiago de Chile 1986) (arguing that, in the case of Chile, the state built the nation).
non-Spanish citizens to the *Indias*—i.e., America—the new countries now implemented policies that intensively fostered European immigration and investment.\(^2\)

These Europeans brought great progress to Latin American countries. However, they also brought one of the most serious international political problems to face the continent in more than a century: diplomatic protection. As defined by the Permanent Court of International Justice (PCIJ), diplomatic protection consists of the State’s right “to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels”.\(^3\)

During the 19\(^{th}\) and first part of the 20\(^{th}\) century, diplomatic protection—in contrast to today—was not a *peaceful* method of dispute resolution.\(^4\) In fact, the process

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\(^2\) See Alejandro Alvarez, “Latin American and International Law” (1909) 3 AJIL 269 at 305, who explains that:

> Latin America felt a growing need not only of the culture and intellectual material and the commerce of Europe, but also of its capital and population to develop its wealth and populate its territories… [I]t is to the interest of the American states, colonizing their own territory, to bring from Europe the greatest possible number of skilled workmen fitted to develop the industries of the country.

In 1832, Andrés Bello, *Principios de Derecho de Jentes* (1\(^{st}\) ed Imprenta de la Opinion, Santiago de Chile 1832) 53-54, explained why it was necessary to encourage immigration and why laws and statutes should eliminate all civil differences between nationals and aliens:

> Las restricciones y desventajas a que por las leyes de muchos países están sujetos los extranjeros, se miran generalmente como contrarias al incremento de la población y al adelantamiento de la industria y los países que han hecho mas progresos en las artes y comercio y se han elevado a un grado mas alto de riqueza y poder, son cabalmente aquellos que han tratado con mas humanidad y liberalidad a los extranjeros.

\(^3\) Mavrommatis Palestine Concessions Case (Greece v. UK) [1924] PCIJ Rep Series A No 2 at 12. The PCIJ, *ibid*, also noted that “[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law”.\(^4\)


> The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the “ILC”), ‘diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that
was usually quite nasty. As Paulsson notes, “the diplomatic component of the expression ‘diplomatic protection’ was, in such circumstances, an ironic but hardly subtle fiction”.\(^5\)

Indeed, diplomatic protection was a process associated with “the exercise of military, political or economic pressure by stronger against weaker States”.\(^6\) The option of military self-help transformed diplomatic protection into a “gunboat diplomacy”.\(^7\)

Undoubtedly, European and U.S. citizens suffered injuries at one time or another in Latin America during this “organizational” era characterized by civil wars and periods of political unrest.\(^8\) The precarious political conditions of Latin American societies frequently meant levels of justice and law enforcement that fell below international minimum standards (IMS).\(^9\) This fact notwithstanding, the insurmountable military imbalance between European and Latin American countries made diplomatic protection an intrinsically illegitimate process. Both actual military interventions and mere “credible threats”, forced the region to accept many compensation schemes and arbitration agreements which would have been clearly rejected otherwise.


\(^8\) See Alvarez, n. 2, 273 (noting that the 19th century was a period of sudden political change in Latin America, including civil wards, dictatorships and constant modifications of fundamental rules).

The new Latin American republics fiercely resisted such gunboat diplomacy. As this Chapter will show, the regional opposition to the abuses of diplomatic protection was structured through two institutions: the so-called Calvo Doctrine and Calvo Clause.¹⁰

Contrary to what is usually assumed, neither the Doctrine nor the Clause were ideological or academic inventions. They were not even created by their namesake, the Argentine jurist Carlos Calvo. Furthermore, few international law commentators have recognized the true significance of the Calvo Doctrine: it was part of a framework designed to *incentive* foreign investment in the region. Foreign investors were offered and provided full civil (non-political) legal equality, a revolutionary statement for those times. The Doctrine represented the other side of that basic equality created to promote immigration and investment: if investors wanted such a benefit, then they could not ask for more than equality (unless they could prove a denial of justice).

The rather distorted contemporary understanding of the Doctrine maybe due to Marxist and revisionist developments in international law after the Second World War. These much later trends had the effect of obfuscating both the history and content of this institution, particularly during the Cold War, when many developing countries adopted nationalization and import substitution industrialization policies. The international agenda sought at that time to minimize the implementation costs of the latter policies.

But that was not the case during the 19th century. At the time when the Calvo Doctrine was originally launched, the main international dispute was between “national

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¹⁰ See also, F.V. Garcia-Amador, “Calvo Doctrine, Calvo Clause” in Rudolph Bernhardt (ed), 2 Encyclopedia of Public International Law 521 (North-Holland, New York 1992) 521 (arguing that the main function of the Calvo Doctrine was to prevent the abuse of diplomatic protection), and Frank Griffith Dawson, “International Law, National Tribunals and the Rights of Aliens: The Latin American Experience” (1968) 21 Vanderbilt Law Review 712 at 712 (explaining the difference between the Latin American and the European and African experiences, and how the former developed “a unique body of law, clustered around the Calvo Doctrine and the principle of national or equal treatment”).
standards”—espoused by developing countries—and “international minimum standards”—espoused by developed countries. This conflict was quite different in nature from the more blatant dispute in the second half of the 20th century between “expropriation without compensation”—espoused by developing countries—and the Hull Rule (“prompt, adequate, and effective compensation”11)—espoused by developed countries.

The original intent of the Calvo Doctrine was huts far from being a principle of irresponsibility in international law or a standard such as “expropriation without compensation”. The Doctrine was elaborated and adopted during a time when Latin American republics were under the control of people who believed in liberalism, laissez-faire, property rights and individual economic freedom, including the right of foreign investors to come to Latin America and acquire key assets of the national economies.

One of the main claims of this Chapter is that the Calvo Doctrine—when correctly understood in its historical light—presents important lessons for developing countries in the BIT generation. A careful historical review of the field of state responsibility for injuries to aliens and their property in the 20th century demonstrates that by signing BITs, developing countries have finally managed to adhere to IMS and the Hull Rule (but not beyond IMS12). In other words, history has spiraled full circle, with the result that we now find ourselves in a position somewhat similar to that of the 19th century. This permits us to evaluate the BIT generation according to some of the same

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12 See Chapter 6, ___ to ___. provides a more complete discussion regarding why the interpretation positing that the “fair and equitable treatment” clause goes beyond the “international minimum standards” should be rejected. In this chapter, I will simply show evidence proving why that interpretation is historically unacceptable.
perspectives and values that were predominant in the region during the 19th century, particularly those embodied in the original conception of the Calvo Doctrine.

The regulatory capitalist paradigm of the 21st century poses several of the same questions that Latin America was trying to resolve in the 19th century. In the 21st century globalized world, the market state has won general—yet not unanimous—acceptance. With the fall of communism, the ideological tensions of the 20th century have dissipated substantially, and we find ourselves in a scenario that resembles certain aspects of the liberal 19th century. Once more, we believe in property rights and market-based (though regulated) economies. And, in the field of foreign investment, we are again witnessing a world in which foreign investors own, operate, and exert control over infrastructure, natural resources and other capital-intensive industries.

This Chapter proceeds as follows. Section I explores the historical phenomenon of gunboat diplomacy, and analyzes the foundation of the Calvo Doctrine and Clause. Section II moves forward to the 20th century, describing how Latin American countries

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14 According to Paul Hirst & Grahame Thompson, “Globalization and the Future of the Nation State” (1995) 24 Economy and Society 408 at 428, “most globalizers have foreshortened memories: they forget that the international economy was in many respects as open between 1870 and 1914 as it is today and that determined efforts were made to recreate it after 1918”. See also, Niall Ferguson, “Sinking Globalization” (2005) 84(2) Foreign Affairs 64 (noting that “[f]rom around 1870 until World War I, the world economy thrived in ways that look familiar today”). See also, Harold James, The End of Globalization: Lessons From the Great Depression (Harvard University Press, Cambridge 2002), and Robert O. Keohane, “Governance in a Partially Globalized World. Presidential Address, American Political Science Association, 2000” (2001) 95 American Political Science Review 1 at 1.

15 As pointed out by Ian Ayres & John Braithwaite, Responsive Regulation. Transcending the Deregulation Debate (OUP, New York 1992) 12:

[T]he nineteenth century saw an expansion of markets into traditional domains of preexisting communities. In the twentieth century, the state asserted itself over domains that had become the prerogative of the market during the nineteenth century. By the late twentieth century, however, strong countercurrents had developed. One was the deregulation push to win back some of the encroachment the state had made on the market.

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were able to eliminate forcible self-help and put the problem of gunboat diplomacy to rest. Section III presents the development of state responsibility for injury to aliens after the Second World War, when developing countries defended the so-called New International Economic Order (NIEO), including the new substantive position of expropriation without compensation. Section IV describes how IMS reentered the international law scene in the form of BITs. Section V puts forth the argument that the similarities between the 19th and 21st centuries justify our taking lessons from the past in updating the Calvo Doctrine. The conclusions remark upon the value of adopting a normative stance based on equality, which the updated Calvo Doctrine would intend to do.

1. The Calvo Doctrine and Clause: Two 19th Century Anti-Diplomatic Protection Institutions

The Calvo Doctrine and Clause have not received sufficient attention among contemporary commentators. Today it is incorrectly assumed that they symbolize state irresponsibility in international law. In order to rectify this misunderstanding, this section presents a brief overview of diplomatic protection during the 19th century, an era that—as mentioned—resembles ours in several aspects. It then analyses the Doctrine’s and Clause’s historical foundations as institutions oriented to fight diplomatic protection.

a. The Practice of Diplomatic Protection in the 19th Century

The Calvo Doctrine and Clause were designed “to protect the state from the alien, extraordinary though it may sound”. As Mexico once argued, equality of treatment was established to defend “weak states against the unjustified pretension of foreigners who,

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alleging supposed international laws, demanded a privileged position”. The objective of these institutions was none other than to combat diplomatic protection and its more threatening manifestation, military self-help. In 1906, when defending the Clause that now bears his name—a clause indeed derived from the Calvo Doctrine—the Argentine diplomat Luis Drago expressed the spirit of the original Latin American stance regarding gunboat diplomacy:

[I]t was in obedience to that sentiment of common defense… that in a critical moment the Argentine Republic proclaimed the impropriety of the forcible collection of public debts by European nations, not as an abstract principle of academic value or as a legal rule of universal application outside of this continent (which is not incumbent on us to maintain), but as a principle of American diplomacy which, whilst being founded on equity and justice, has for its exclusive object to spare the peoples of this continent the calamities of conquest disguised under the mask of financial intervention.

The practice of diplomatic protection constitutes a key dimension of the international law landscape of the 19th century. The Great Powers’ use of forcible self-help to advance the claims of their citizens living or investing abroad transformed diplomatic protection into an institution well-suited to major abuses. The uneven balance of power between the North Atlantic countries and the new Latin American republics permitted the former to espouse not only legitimate claims but also bogus ones, on the part of their citizens. As Summers remarks, “the North Atlantic powers have often

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17 Mexico, “Translation of Note from the Minister of Foreign Affairs of Mexico to the American Ambassador at Mexico City (September 2, 1938)” (1938) 32 AJIL Supp. 201 at 205.
20 According to Carlos Calvo, 1 Derecho Internacional Teorico y Practico de Europa y America 188, §91 (1st ed D’Amyot, Paris 1869):

[E]stas indemnizaciones pecuniarias hechas sin exámen alguno de causa y como á la aventura, pero con la amenaza siempre, por parte de los gobiernos europeos, de apoyar con la fuerza sus reclamaciones, ha sido la fuente mas copiosa de las intervenciones de dichos gobiernos en America. Pero lo cierto es que en derecho internacional, no se puede admitir
intervened diplomatically without a sufficient examination of the facts of the particular case, taking it for granted that their action was justified, when the reverse may have been true.”  

Neither was Lillich mistaken when concluding that there is “no doubt” that “the Great Powers sometimes stretched the substantive standards and abused the diplomatic protection process”. 

The writer José María Torres Caicedo—cited by Carlos Calvo in his treatise—provides an accurate description of what was happening in the region during the 19th century in this regard: 

Pero há mucho tiempo que se quiere explotar otra veta, otro filón de esa rica mina de indemnizaciones. Unos ó muchos extranjeros reciben daño á consecuencia de una de esas revoluciones en que es tan fecunda la América latina. Los extranjeros así perjudicados que se les indemnice (si han perdido 1, reclaman 100); el Ministro respectivo apoya su reclamacion; sigue la historia de las escuadras, la protesta del Gobierno injustamente amenazado, y el pago inmediato, ó la promesa de pago hecha por ese Gobierno, al cual se le quita la palabra mostrándole la boca de los cañones.  

Torres did not exaggerate. Just to cite a few examples of military intervention in the region from a very long list: France blocked Argentina’s main ports from 1838 to 1840 for the purpose of giving protection to its citizens’ property and credits; then England and France intervened in Rio de la Plata from 1843 to 1850. Similarly, France invaded Mexico in 1838 in the so-called “pastry war” (among the injured was a French restaurant owner who suffered an assault on his supply of pastry). Once again, between 1861 and 1867, France, with the help of Spain and England, not only attacked Mexico but
also established the Austrian Archduke Maximilian as the Emperor there. Another well-documented case is the German, British and Italian blockage of the Venezuelan coast in 1902-1903. After all three countries bombed Puerto Cabello and seized military and merchant ships, they settled upon a peace treaty that included the administration of Venezuelan customs by Belgian officers.\footnote{25 See Miguel Cruchaga Tocornal, 1 Nociones de Derecho International (3rd ed Reus, Madrid 1923) 212 et seq, and Luis A. Podesta Costa, “La Responsabilidad Internacional del Estado” in 2 Cursos Monográficos (Academia Interamericana de Derecho Comparado e Internacional, La Habana 1952) 171-93. Calvo provides a more detailed history of interventions during the 19th century; see 1 Calvo, n. 23, 281-355, §§145-209. For a more recent account of the interventions suffered by Argentina, see Horacio A. Grigera Naón, “Arbitration in Latin America: Progress and Setbacks” (2004) 21 Arbitration International 127.}

In order to emphasize the unfairness characterizing the practice of diplomatic protection at the time, one need not point to actual military interventions. The mere possibility of forcible self-help—a very “credible threat”, using the language of game theory\footnote{26 See Jon Hovi, Games, Threats & Treaties. Understanding Commitments in International Relations (Pinter, Washington 1998) 11 (“[A] threat is contingent assertion signaling an intention to hurt somebody—physically, economically or otherwise—unless that somebody acts in the way prescribed by the threatener”). Indeed, as Hovi remarks, \textit{ibid} 33: [O]ne of the most fundamental international legal principles [developed in the twentieth century] is that the use of force is prohibited, except in self-defense… [Therefore] it was probably easier for Western leaders in the nineteenth century to make credible threats of violence than it is fore their present-day successors.}—deeply altered the relative positions of the parties at the bargaining table.\footnote{27 See e.g. Frank Griffith Dawson & Ivan L. Head, \textit{International Law, National Tribunals, and the Rights of Aliens} (Syracuse University Press, Syracuse 1971) 44-45 (“Although, in fact, the use of forcible self-help to secure conforming behavior was the exception and not the rule, the possibility of its invocation in a variety of situations in earlier times must have been continuously present in the minds of decision-makers”).}

Confronting this reality, Latin America fought strongly against diplomatic protection as well as one of its legal manifestations, the so-called international minimum standards. Nor was it fond of arbitration,\footnote{28 See Alvarez, n. 2, 299 n.36. According to Lionel M. Summers, “Arbitration and Latin America” (1972) 3 California Western International Law Journal 1 at 6-7, between 1794 and 1938 Latin American countries participated in nearly 200 arbitration arrangements, and in almost all of these cases, arbitration was a less harmful alternative as compared with military intervention. \textit{See also} Guillermo Aguilar Alvarez & William} which was frequently imposed as the sole alternative to undesirable intervention—including invasions, bombings, and the seizure of customs.\footnote{29 See e.g. Frank Griffith Dawson & Ivan L. Head, \textit{International Law, National Tribunals, and the Rights of Aliens} (Syracuse University Press, Syracuse 1971) 44-45 (“Although, in fact, the use of forcible self-help to secure conforming behavior was the exception and not the rule, the possibility of its invocation in a variety of situations in earlier times must have been continuously present in the minds of decision-makers”).}
b. The Calvo Doctrine

The Calvo Doctrine constitutes perhaps the finest legal/political product to be developed in this regional crusade against diplomatic protection.\(^3^0\) At its core lay equality:\(^3^1\) among nations, \(^3^2\) but more importantly, between foreigners and nationals.\(^3^3\) This equality consisted of two sides, one positive and one negative, that were each part of the same conceptual framework. First, in order to foster foreign immigration and foreign

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\(^{29}\) As W. Michael Reisman, “International Arbitration and Sovereignty” (2002) 18 Arbitration International 231 at 232, points out, “[i]f foreign governments did violate what Europe and the United States considered commercial law or market morality, gunboats could seize the customs houses of the violators and manage them until debts were discharged”.

\(^{30}\) Grigera Naón, n. 25, 131, captured this idea earlier:

> The Calvo Doctrine is a response to the menace of foreign European intervention in South America, epitomised by the utterances of Thiers, the minister of Napoleon III, who considered Latin American countries as imperfect, bankrupted republics, which because of social and political instability and unrest, their failure to honour their debts, ensure personal security and provide proper police protection, and their inefficient and slow court system, were not to be considered equal to the countries of Europe.


\(^{32}\) Similarly, Calvo, *ibid* 396-97, §294, insists on this point:

> En derecho internacional hay que recordar ante todo que los Estados soberanos son independientes é iguales, principio olvidado completamente por los que sostienen la necesidad de las convenciones extranjeras [demandas de indemnización] ó de la aplicación de la regla inglesa [empleo de la fuerza] á los Estados americanos. Entre estos y los de Europa no cabe mas que una relación de derecho, que debe estar fundada en su completa igualdad.

\(^{33}\) As Calvo, n. 20, 393, §294, explains:

> [L]a regla que en mas de un caso han tratado imponer las primeras [las potencias europeas] á los segundos [los Estados americanos] es, que los extranjeros merecen mas consideracion y mayores respetos y privilegios que los mismos naturales del pais en que residen. Este principio, cuya aplicación es notoriamente injusta y atentatoria á la ley de la igualdad de los Estados, y cuyas consideraciones son esencialmente perturbadoras, no constituye regla de derecho aplicable en las relaciones internacionales de los de Europa, y siempre que se ha exigido por alguno, la contestacion del otro ha sido absolutamente negativa. Y debia ser asi, porque de lo contrario los pueblos relativamente debiles estarian a merced de los poderosos, y los ciudadanos de un pais tendrian menos derechos y garantias que los residentes extranjeros.
investment in the region—both important public policies in Latin America during the 19th century—equality dictated that aliens establishing themselves in Latin America were to receive the same treatment as nationals; that is, they would enjoy the same rights and the same protection in domestic courts as those given to indigenous people. It should be noted that this positive component was “a great advance for the times, not only in limiting the territorial sovereignty of the State, but also in promoting human rights”. In fact, even today such a principle has not been fully accepted in customary international law.

At the same time—far from being a “perversion of their early laudable attempts” to give foreigners the same rights as nationals—equality was understood according to the phrase “equality is the maximum”. As Carlos Calvo explains, “the responsibility of governments toward foreigners cannot be greater than the responsibility of governments toward their own citizens”. Accepting more extensive responsibility one the part of the

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34 British investors were the leaders in the region. See Robert E. Grosse, Multinationals in Latin America (Routledge, New York 1989) 7-10 (Chapter 1, “A History of MNE [Multi National Enterprises] in Latin America”, provides an overview of the history of foreign direct investment in the region). See also, J. Fred Rippy, “The British Investment ‘Boom’ of the 1880’s in Latin America” (1949) 29(2) The Hispanic-American Historical Review 281 (describing the large sums that British capitalists invested in the region during the period from 1880 to 1890).

35 Dawson & Head, n. 27, 7. According to Lillich, n. 7, 5, Latin American countries, “laudably” went “beyond then-existing international law” by “granting aliens equality of treatment with nationals”. See also, Alvarez, n. 2, 344.


37 Lillich, n. 7, 5.

38 Freeman, n. 9, 468.

39 3 Calvo, n. 23, 138, §1276:

La responsabilité des gouvernements envers les étrangers ne peut être plus grande que celle que ces gouvernements ont à l’égard de leurs propres citoyens. On ne saurait prétendre, en effet, que les droits d’hospitalité puissent restreindre le droit qui appartient à un gouvernement d’user de tous les moyens légaux pour pourvoir à la conservation de l’Etat, ou que les étrangers puissent obtenir une position privilégiée.
state toward foreigners would be “souverainement injuste”.

Hence, if aliens were to reside in those countries and take full advantage of the equality being offered, they should accept their legal systems “as is”: “aliens who establish in a country are entitled to the same rights to protection enjoyed by nationals; they cannot expect to have more extended measures of protection”.

These two dimensions of equality reflect the equilibrium that Latin America tried to strike between the goals of fostering foreign immigration and investment, and confronting the abuses that diplomatic protection of those same aliens and investments would create in the future. In any case, as an instrument designed to combat abusive diplomatic protection but not to oppose foreign investors and their investments, the Calvo Doctrine “was never a bar to those international claims based on breaches of well-established international obligations regarding the treatment of aliens”. Indeed, the Doctrine recognized that, in cases of denial of justice construed in more or less narrow terms, aliens could have recourse to diplomatic protection. As Garcia-Amador explains:

[A]dvocates of the doctrine—both governmental officials and learned publicist, beginning with Calvo himself—have always admitted that, in cases of denial of justice and other well-established wrongful or arbitrary acts and omissions under international

\[\text{Ibid} 140, \S1278.\]

\[6 \text{ Calvo, n. 23, 231, } \S256 \text{ (“Il est certain que les étrangers qui se fixent dans un pays ont au même titre que ses nationaux droit à la protection, mais ils ne peuvent prétendre à une protection plus étendue”). See also, 3 Calvo, n. 23, 140, } \S1278.\]

\[6 \text{ Garcia-Amador, n. 10, 521. See ibid 522 (“[T]he doctrine cannot be characterized as an absolute ban to the exercise of diplomatic protection”). See also, Alwyn V. Freeman, “Recent Aspects of the Calvo Doctrine and the Challenge to International Law” (1946) 40 AJIL 121 at 132-33 (“The plea [of Carlos Calvo], in other words, was for recognition of the general principle of submission of foreign subjects to the local law—a thoroughly reasonable demand. But it did not go to the extent of maintaining that equality with nationals under that law was in itself a bar to any international inquiry”). (emphasis added).}\]

\[6 \text{ The concept of denial of justice was at the center of the North-South conflict. Not surprisingly, according to Freeman, n. 9, 460-61, Latin American States would have wanted to define diplomatic protection as being available only in cases where denial of justice was narrowly defined according to municipal law. See also, Summers, n. 21, 460.}\]
law, the State of residence is responsible whether or not the nationals have sustained injuries from those acts or omissions.44

A clear demonstration of this proposition can be found in Article 3 of the Convention Relative to the Rights of Aliens, accorded during the Second Panamerican Conference (1902), a provision that embodied the Calvo Doctrine and the denial of justice exception:

Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country and such claims shall not be made through diplomatic channels except in the cases where there shall been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of international law” (emphasis added).45

The most solid proof that the Calvo Doctrine was not designed to immunize Latin American countries from aliens, or to justify the abuses committed against them, can be found in the intellectual and political background of the scholar, jurist, and statesman who first envisioned this institution. Contrary to what is usually assumed, Carlos Calvo did not create the Doctrine.46 Even learned contemporary commentators incorrectly attribute its authorship to the Argentinean jurist and diplomat. The real author was the

Venezuelan jurist Andrés Bello, one of the greatest intellectuals that the region ever produced.\(^47\)

Among other impressive achievements, Bello was the first Latin American internationalist—having written the first treatise on the subject in the region—the drafter of the Chilean Civil Code of 1855, the founder of Universidad de Chile (and its first President), and the author of a Spanish (Castilian) language grammar. More importantly, in Chile and several other Latin American countries, Andrés Bello is considered a symbol of the rule of law. Far from being a revisionist or ideologue of any sort, he was a strong supporter of property rights.\(^48\)

This is not the first time that Bello’s authorship over the Doctrine has been claimed.\(^49\) Dawson noted earlier that Bello was “the first publicist to express the doctrine [of non-intervention] in Spanish, thereby shaping the thoughts of generations of Latin-American jurists and statesmen”.\(^50\) Indeed, in the first Latin American international law treatise—*Derecho de Jentes*, published in 1832—Bello strongly defended the principles of non-intervention and equality among nations. This treatise—a highly influential work

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\(^{47}\) There are scores of biographies of Andrés Bello. An extraordinary insightful and well researched work can be found in Ivan Jakišić, *Andrés Bello: Scholarship and Nation-Building in Nineteenth-Century Latin America* (CUP, New York 2001), and Ivan Jakišić, *Andrés Bello: La pasión por el orden* (Editorial Universitaria, Santiago de Chile 2001).

\(^{48}\) See e.g. Pedro Lira Urqueta, *El Código Civil Chileno y Su Época* (Editorial Jurídica, Santiago de Chile 1956) 67-70 (explaining how private property was one of the central normative axes of the Chilean Civil Code of 1855). For instance, Lira, *ibid* 67, quotes the following words of Bello: “La propiedad ha vivificado, extendido, agrandado nuestra propia existencia; por medio de la propiedad la industria del hombre, este espíritu de progreso y de vida que todo lo anima, ha hecho desarrollar en los más diversos climas todos los gérmenes de riqueza y de poder”.

\(^{49}\) Historical mismatches between authors and theories occur not only in the social sciences, but also in mathematics and natural science. According to Roger Penrose, *The Road to Reality. A Complete Guide to the Laws of the Universe* (A.A. Knopf, New York 2004) 45, “there are other instances in mathematics where the mathematician(s) whose name(s) are attached to a result did not even know of the result in question”.

\(^{50}\) Frank Griffith Dawson, “The Influence of Andres Bello on Latin-American perceptions of the non-intervention and State Responsibility” (1986) 57 BYIL 253 at 273. Then, *ibid* 287, he explains that “the alien’s obligation to submit to local laws and jurisdiction which was to be an important constituent of the late nineteenth century Calvo Doctrine thus was first expressed by Bello as early as 1832”. *See ibid* 307.
that all regional commentators deeply admired, including Calvo himself\textsuperscript{51}—was written 36 years before the first edition of Calvo’s \textit{Derecho Internacional Teórico y Práctico de Europa y América} (1868), and more than half a century before the augmented French fifth edition of the same work—\textit{Le droit international théorique et pratique; précédé d'un exposé historique des progrès de la science du droit des gens} (1896, 6 Vols.).

As Bello explained in 1832, the alien entering a foreign state “agrees tacitly to be subject to the local laws and jurisdiction”.\textsuperscript{52} He also acknowledged that States must apply their laws to aliens in a just manner,\textsuperscript{53} and protect them against abuses at the hands of indigenous people.\textsuperscript{54} But diplomatic protection could only be requested in the event of a denial of justice.\textsuperscript{55} In the 1844 Edition of his Treatise, this time titled \textit{Principios de Derecho Internacional} (Principles of International Law), Bello expanded those words to the following set of carefully crafted ideas, which can be considered the first clear and solid formulation of the Calvo Doctrine:

\textsuperscript{51} See 1 Calvo, n. 23, 109-10:

Un des hommes les plus remarquables qu’aït produit l’Amérique latine est sans contredit Andres Bello, né à Caracas (Venezuela) en 1780 et mort en 1863. Bello s’est acquiss une juste renommée à la fois comme homme d’État et comme écrivain… En 1832, Bello, mettant à profit de l’expérience des affaires internationales que lui avaient donnée ses fonctions de secrétaire de diverses légations vénézuéliennes en Europe et le poste élevé qu’il occupait dans la direction des relations extérieures du Chili, publia, sous le titre de: \textit{Principios de derecho de gentes} (Principes du droit des gens), un traité élémentaire, dans lequel, quoique en un cadre restreint, sont résolues toutes les questions essentielles sur la matière… On peut le considérer comme le précurseur de Wheaton, le publiciste américain, qui lui a emprunté de nombreuses citations. Du reste, les auteurs les plus distingués sont unanimes à parler de l’œuvre de Bello avec éloge.

\textsuperscript{52} Bello, n. 2, 55 (“Al poner el pie en el territorio de un estado extranjero, contraemos, según se ha dicho, la obligación de someternos a sus leyes, y por consiguiente a las reglas que tienen establecidas para la administración de justicia”).

\textsuperscript{53} \textit{Ibid} 54 (“El extranjero a su entrada contrae tácitamente la obligación de sujetarse a las leyes y la jurisdicción local, y el estado le ofrece de la misma manera la protección de la autoridad pública, depositada en los tribunales”).

\textsuperscript{54} \textit{Ibid} (“En fin, es obligación del soberano que les da acogida atender a su seguridad, haciéndoles justicia en sus pleitos, y protegiéndolos aun contra los naturales, demasiado dispuestos a maltratarlos y vejarlos, particularmente en países de atrasada civilización y cultura”).

\textsuperscript{55} \textit{Ibid} (“Si éstos [los Estados] contra derecho rehusaren oir sus quejas, o le hiciesen una injusticia manifiesta, puede entónces interponer la autoridad de su propio soberano”).
Es obligación del soberano que les da acogida [a los extranjeros] atender á su seguridad, haciéndoles justicia en sus pleitos, y protegiéndolos aun contra los naturales, demasiado dispuestos á maltratarlos y vejarlos, particularmente en países de atrasada civilización y cultura. El extranjero á su entrada contrae tácitamente la obligación de sujetarse á las leyes y á la jurisdicción local, y el Estado le ofrece de la misma manera la protección de la autoridad pública, depositada en los tribunales. Si estos contra derecho rehusasen oir sus quejas, ó le hiciesen una injusticia manifiesta, puede entonces interponer la autoridad de su propio soberano, para que solicite se le oiga en su juicio, ó se le indemnizan los perjuicios causados. Los actos jurisdiccionales de una nación sobre los extranjeros que en ella residen, deben se respetados de las otras naciones; porque al poner el pie en el territorio de un Estado extranjero, contraemos, según se ha dicho, la obligación de someternos á sus leyes, y por consiguiente á las reglas que tiene establecidas para la administración de justicia. Pero el Estado contrae tambien por su parte la obligacion de observarlas respecto del extranjero, y en el caso de una palpable infraccion, el daño que se infiere á este, es una injuria contra la sociedad de que es miembro. Si el Estado instiga, aprueba ó tolera los actos de injusticia ó violencia de sus súbditos contra los extranjeros, los hace verdaderamente suyos, y se constituye responsable de ellos para con las otras naciones.  

Apart from being a prominent scholar, Bello was also a statesman and a diplomat. From 1829 to his death in 1865, Bello lived in Chile, where he held an important position at the Chilean Ministry of Foreign Relations (1830-1852). One can discern traces of the Calvo Doctrine in his work there. For example, when negotiating as a Chilean representative to the United States, Bello signed the “Additional and Explanatory Convention to the Treaty of Peace, Amity, Commerce and Navigation” (September 1st, 1833). This convention clarified the meaning of the “full protection and security” (FPS) clause contained in Article 10 of the Friendship, Commerce and Navigation (FCN) treaty, recently concluded between both nations (May 16th, 1833). The Doctrine is unmistakably present behind the following words:

It being agreed by the 10th article of the aforesaid treaty, that the citizens of the United States of America, personally or by their agents, shall have the right of being present at the decisions and sentences of the tribunals, in all cases which may concern them, and at the examination of witnesses and declarations that may be taken in their trials; — and as the strict enforcement of this article may be in opposition of the present due administration of justice, it is mutually understood, that the Republick of Chile is only

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56 Andrés Bello, Principios de Derecho Internacional (2nd ed J.M. De Rojas, Caracas 1847) 77 (emphasis added) (The ortography in this citation and previous footnotes—the Bello ortography—is different from modern Castilian ortography).

57 See Jaksić, Andrés Bello: La pasión…, n. 47, 135.
bound by the aforesaid stipulation to maintain the most perfect equality in this respect between American and Chilean citizens, the former to enjoy all the rights and benefits of the present or future provisions which the laws grant to the latter in their judicial tribunals, but no special favors or privileges.\textsuperscript{58}

Similarly, many FCN treaties concluded between Chile and other Latin American countries while Bello was at the Ministry of Foreign Affairs included provisions espousing what has been previously referred to as the positive dimension of equality of treatment—i.e., the full equality of treatment to foreigners. This is the case, for example, with the Chile-Mexico FCN (March 7, 1831),\textsuperscript{59} the Chile-Peru FCN (January 20, 1835),\textsuperscript{60} and the Chile-Nueva Granada (Colombia) FCN (February 16, 1844).\textsuperscript{61} In addition, there are at least two examples of FCNs concluded between Chile and European Powers that evidence similar clauses. One is the Chile-France FCN (September 15\textsuperscript{th}, 1846), and the other, the Belgium-Chile FCN (August 31, 1858).\textsuperscript{62} Article III of the former provided that:

\begin{quote}
Les sujets et citoyens respectifs jouiront, dans les deux Etats, d’une complète et constante protection pour leurs personnes et leurs propriété. Ils auront un libre et facile, accès auprès des tribunaux de justice pour la poursuite et la défense de leurs droits. Ils seront maîtres d’employer, dans toutes les circonstances, les avocats, avoués ou agents de toute classe qu’ils jugeront à propos. Enfin, ils joiront sous ce rapport des mêmes droits et privilèges accordés aux nationaux eux-mêmes.\textsuperscript{63}
\end{quote}


\textsuperscript{59} Clive Parry (ed), 81 \textit{The Consolidated Treaty Series} (Oceana, Dobbs Ferry 1969) 261. See e.g. its Article II: “The Contracting Parties declare that Chilians and Mexicans respectively, immediately upon their entering the territory of either Republic, shall enjoy the same respect, rights and privileges, as are lawfully enjoy in each respective Country by those who obtained letters of naturalization”.

\textsuperscript{60} Clive Parry (ed), 85 \textit{The Consolidated Treaty Series} (Oceana, Dobbs Ferry 1969) 35.

\textsuperscript{61} Clive Parry (ed), 96 \textit{The Consolidated Treaty Series} (Oceana, Dobbs Ferry 1969) 150.


\textsuperscript{63} Clive Parry (ed), 100 \textit{The Consolidated Treaty Series} (Oceana, Dobbs Ferry 1969) 175 at 178 (emphasis added).
Furthermore, the Chilean Civil Code (1855), also drafted by Bello, recognized civil equality between aliens and nationals. Its Article 57, which is still in force, provides for this principle: “La ley no reconoce diferencias entre el chileno y el extranjero en cuanto a la adquisición y goce de los derechos civiles que regla este código”.64

In summary, the Calvo Doctrine—at least as Andrés Bello originally envisioned it—did not intend to dismantle state responsibility. Neither was it—as Sohn & Baxter affirm—a “reflection of a fundamental hostility on the part of some nations to the idea of accountability of state for asserted violations of the rights of aliens”,65 or—as expressed by Goebel—“a repudiation of the theory of responsibility, [and] a final effort to regulate the liability of the state by municipal legislation”.66 On the contrary, as Wälde notes, “the Calvo-doctrine, much opposed by Western governments with respect to developing countries, has in fact been—and still is—the dominant maxim of Western countries themselves”.67

c. The Calvo Clause

If the Calvo Doctrine has been the subject of historical and conceptual misunderstandings, then, the Calvo Clause has suffered a similar fate. The Calvo Clause required foreigners to be subjected exclusively to domestic law and tribunals, and to renounce diplomatic protection.68 It appeared either as a contractual provision in

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64 Edwin Borchard, “The ‘Minimum Standard’ of Treatment of Aliens” (1940) 38 Michigan Law Review 445 at 450, noted that equality between foreigners and nationals “was first introduced into modern civil codes by Andrés Bello, the famous Venezuelan who in 1855drafted the Chilean Civil Code”.
66 Julius Goebel Jr., “The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections, and Civil Wars” (1914) 8 AJIL 802 at 832.
68 See Freeman, n. 9, 456-57.
agreements, or as a provision of Statutes and Constitutions that forced its explicit or implicit incorporation into concession or construction contracts. Like the Doctrine, the Clause was also the product of weak countries’ efforts to protect themselves from colonialist Powers.

Despite this shared goal, the Clause is not a mere byproduct of the Doctrine, as sometimes assumed, but reveals at least two important differences. First, it did not operate unilaterally but bilaterally, that is, the investor “consented of his own free will to the abandonment of diplomatic protection”. Second, the Clause went further than the Doctrine by attempting to completely forbid diplomatic protection, even in cases where there was a denial of justice. Note that, in principle, the Clause was not an arbitrary attempt to unilaterally to eliminate state responsibility in international law; in the liberal 19th century, the Clause specifically invoked the freedom of contract as its basis of legitimacy.

As was the case with the Doctrine, Carlos Calvo did not invent the Clause. The earliest evidence for a Calvo Clause of which I am aware is a decree that Peru issued in

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69 See e.g., Articles 10 and 149 of the Constitution of Venezuela of 1893 and Article 38 of the Constitution of Ecuador of 1897. See Freeman, n. 9, 455-90.
70 See Summers, n. 21, 482.
71 See e.g. Cremades, n. 46, 80 (“The Calvo doctrine gave rise to the Calvo clause, which precluded arbitration and instead required disputes to be resolved in national courts”). See also, Grigera Naon, n. 25, 137.
72 Summers, n. 21, 465.
1846 (as noted before, the first edition of Calvo’s treatise is from 1868).\textsuperscript{75} In Chile, one of the most stable and foreign-investor friendly countries in Latin America during the 19\textsuperscript{th} century,\textsuperscript{76} the first observable Clause appeared in the construction contract for completion of the most important railroad line in the nation.\textsuperscript{77} That contract, concluded between the Chilean government and U.S. citizen Henry Meiggs on September 14, 1861—at a time when Bello was a highly influential statesman—regulated the construction of what would become the second line in Chile’s history, linking its two main cities (Santiago and Valparaiso).

The Latin American \textit{praxis} of incorporating Calvo Clauses in contracts and concessions can be observed throughout the 19\textsuperscript{th} century.\textsuperscript{78} To continue with Chile as a

\textsuperscript{75} Cited by Alexander Alvarez, \textit{Le Droit International Américain, Son Fondement - Sa Nature D'Après L’Histoire Diplomatique Des États du Nouveau Monde et Leur Vie Politique et Économique} (A. Pedone, Paris 1910) 120.

\textsuperscript{76} According to \textit{The Times}, April 22, 1880, Chile was “the model republic of South America”, cited by Harold Blakemore, \textit{British Nitrates and Chilean Politics, 1886-1896: Balmaceda and North} (Athlone Press, London 1974) 1.

\textsuperscript{77} Emilio Jofré, 1 \textit{Boletín de Leyes y Decretos sobre Ferrocarriles dictados por la República de Chile desde 1848 hasta 1890} (Imprenta “Santiago”, Santiago de Chile 1891) 71-76. Here, the Clause provided that:

\begin{quote}
El contratista don Enrique Meiggs, se somete desde luego a las autoridades y tribunales del país, en todo lo que concierne a la ejecución del fallo que pronuncien los árbitros y a los efectos del presente contrato, renunciando de la manera más formal y solemne al derecho que las prácticas, usos internacionales y tratados ó convenciones diplomáticas acuerdan a los extranjeros, para invocar la protección de los Ministros y Agentes Diplomáticos o Consulares de sus respectivos países, siempre que se vean vejados o perjudicados por las autoridades del Estado, en cuyo territorio residen; pues es su voluntad ponerse para todos y cada uno de los efectos de este contrato, en cualquier tiempo que se produzcan, a la par de los ciudadanos chilenos, sin que pueda hacer uso de otras prerrogativas, exenciones o derechos que los que les competen a dichos ciudadanos chilenos; y si de otros derechos o privilegios quisiere hacer uso, conviene desde ahora en que no se le oiga y permita el ejercicio de ellos, facultando a las autoridades de Chile para que hagan valer esta formal renuncia contra las reclamaciones que pudiera entablar por la vía diplomática; y para que en consecuencia se excusen de admitirlas y contestarlas, como si no se hubieren elevado nunca o como si después de elevados, el interesado mismo conviniera voluntariamente en retractarlas.
\end{quote}

\textsuperscript{78} As Shea, n. 31, 9-10, observed in 1955:

The Calvo Clause has existed as a legal and diplomatic problem for about eighty years. It is closely related to, and a result of, the development and exploitation of the natural resources in the underdeveloped regions of the world that occurred in the latter part of the nineteenth century and the early part of the twentieth… [T]he exploitation generally came in the form of

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case study, the Clause was commonly used in railroad construction contracts in the 1860s, and finally included in a more general regulation passed by the Ministry of Industries and Public in 1888. In railroad concession contracts (BOTs), it made its appearance in the 1880s. The later date for BOTs may be explained by the fact that most initial concessions were given to Chilean citizens. By 1886, as part of what seems to have been a general trend in Latin America during the last three decades of the 19th century, the Congress passed a general Statute requiring the incorporation of a Calvo Clause into every concession contract.

Another early example is the Calvo Clause appearing in the case Nitrate Railways Company Limited (UK) v. Chile. Here, a British investor acquired three railroad concessions from Montero Hermanos, a Peruvian partnership that had in turn obtained them from the Peruvian government between 1869 and 1871 (Chile annexed the large foreign investment and a consequent migration of foreigners to these countries to supervise and direct the development of their natural resources.

See also, ibid 121-193 (Chapter VI, “Arbitral Decisions Involving Calvo Clauses up to 1926”), where Shea refers to several Calvo Clauses agreed upon during the 19th century.

One example of this trend in Chile is the “Licitación ramal desde San Felipe a la línea central, 1869”, authorized by Decree of November 24, 1869, and by Statute of January 7, 1869. Its Article 15 provides that: “El contratista o contratistas si fueren extranjeros, se considerará para los efectos del contrato como ciudadanos chilenos. En consecuencia, renunciarán a la protección que pudieran implorar de sus respectivos gobiernos o que éstos pudieran oficiosamente prestarles en apoyo de sus pretensiones” (1 Jofré, n. 79, 82-85).

See e.g. Chilean Statute of 23 October 1884; Statute of 11 September 1884; Statute of 18 December 1885; Statute of 28 August 1886; and, Statute of 7 August 1885.

Chilean Statute of 28 August 1886:

Artículo único: Siempre que se otorguen permisos o concesiones para la construcción de una obra o trabajo público, o para el goce de algún derecho a una persona o empresa particular, ellas o quienes sus derechos representen, aun cuando sean extranjeras y no residen en Chile, se considerarán como domiciliadas en la República, y quedarán sujetas a las leyes del país, como si fueran chilenas, para la resolución de todas las cuestiones que se susciten con motivo de la obra para el cual se otorgan el permiso o las concesiones.

Anglo-Chilean Tribunal of Arbitration, 2 Reclamaciones presentadas al Tribunal Anglo-Chileno (Imprenta i libreria Ercilla, Santiago de Chile 1896) 220 et seq.
territories where the railroad was located as a consequence of the War of the Pacific, 1879-1884). In this case, the Tribunal upheld the Calvo Clause—a somewhat rare instance in the practice of 19th century claims commissions—seeming to find the following Chilean defense persuasive:

Los Gobiernos americanos han procurado poner coto a una situación tan molesta, por lo menos en los casos en que hacían concesiones a extranjeros o contrataban con ellos. Para este efecto, han consignado en las leyes, decretos y contratos, la condición de que el contratista o concesionario extranjero renunciaría al derecho de ocurrir a la vía diplomática, sometiendo sus cuestiones con el Gobierno a la jurisdicción de la justicia ordinaria o de jueces árbitros designados por las partes. Tal es el origen de la cláusula que contiene cada uno de los tres contratos celebrados con Montero Hermanos para la construcción de las diversas líneas férreas de Tarapacá, por la cual no se permite la transmisión a extranjeros de los derechos conferidos a esos señores, sin poder hacer uso de ningún recurso diplomático.\(^{85}\)

In sum, the Calvo Doctrine and Clause embodied the principle of national treatment as an attempt to curb the excesses of diplomatic protection. The Doctrine did not deny aliens and foreign investors’ their rights under international law,\(^{86}\) and the Clause did so only under the authority vested in the free will and freedom of contract of those aliens and foreign investors. When viewed in a proper historical light, the Calvo Doctrine and Clause illustrate the tensions inherent in Latin American policy between the priorities of fostering foreign immigration and investment on the one hand, and avoiding military self-help on the other.

### 2. The End of Gunboat Diplomacy

Latin American countries fought a long and organized battle against the use of forcible self-help as an extreme form of diplomatic protection. As this section will show,

\(^{85}\) Anglo-Chilean International Commission, n. 84, 282.

\(^{86}\) As García-Amador, n. 73, 212, explains, the Calvo Doctrine was not an instrument of international irresponsibility: “Dado su verdadero y único propósito —esto es, el de evitar el abuso del derecho a la protección diplomática—, la Doctrina Calvo no es incompatible con la responsabilidad internacional en que puede incurrir el Estado con motivo del incumplimiento de sus obligaciones hacia los extranjeros”.
throughout the 19th century and during the first part of the 20th century, they strongly
defended the national treatment standard—as opposed to IMS, the legal key opening the
door to military self-help—as well as exhaustion of local remedies, equality of states,
and, in general, the Calvo Doctrine.\(^87\) Although it took a long time, they were eventually
to succeed in converting diplomatic protection into a peaceful dispute resolution
mechanism.

Latin American countries typically pursued this agenda at the International
Conferences of the American States. In nearly all the Conferences, there were references
to the Calvo Doctrine, as well as attempts to establish rules and principles that would
embody it.\(^88\) Eventually, after careful study by an agency established for the codification

\(^87\) See Freeman, n. 9, 466 (explaining how Latin American countries continually fought for their doctrines,
and would not renounce them).

\(^88\) See Scott, n. 45. During the First International Conference (1889-1890), ibid 45, the majority of states
passed—against U.S. opposition—the following Recommendation:

The International American Conference recommends to the Governments of the countries
therein represented the adoption, as principle of American international law, of the following:
(1) Foreigners are entitled to enjoy all the civil rights enjoyed by natives; and they shall be
accorded all the benefits of said rights in all that is essential as well as in the form or
procedure, and the legal remedies incident thereto, absolutely in like manner as said natives.
(2) A nation has not, nor recognizes in favor of foreigners, any other obligations or
responsibilities than those which in favor of the natives are established, in like cases, by the
constitutions and the laws.

The Second Conference (1902) adopted the Convention Relative to the Rights of Aliens (ibid 90-91),
which prescribed, among other things, the following principles:

\textit{First}: Aliens shall enjoy all civil rights pertaining to citizens, and make use thereof in
substance, form or procedure, and in the recourses which result therefrom, under exactly the
same terms as the said citizens, except as may be otherwise provided by the Constitution of
each country.  
\textit{Second}: The States do not owe to nor recognize in favor of foreigners any
obligation or responsibilities other than those established by their constitutions and laws in
favor of their citizens.  
\textit{Third}. Whenever an alien shall have claims or complaints of a civil,
criminal or administrative order against a State, or its citizens, he shall present his claims to a
competent Court of the country and such claims shall not be made through diplomatic
channels except in the cases where there shall been on the part of the Court, a manifest denial
of justice, or unusual delay, or evident violation of the principles of international law”.

Also, in order to avoid forcible self-help, the Conference accorded the Treaty of Arbitration for
Pecuniary Claims (ibid 100-4), that was later confirmed in the Third Conference (ibid 132-33). In this
treaty, the parties agreed to “submit to arbitration all claims for pecuniary loss or damage which may be
presented by their respective citizens” (Article 1), and in particular “to submit [them] to the decision of the
Permanent Court of Arbitration” (Article 2).
of international law, the Seventh Montevideo Conference (1933) unanimously—i.e., including the U.S.—adopted the Calvo Doctrine.\(^{89}\) Article 9 of the Convention on Rights and Duties of States provided that: “The jurisdiction of states within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals”.\(^{90}\)

These Pan-American conferences primarily represented the position of capital importing countries. European countries were absent, and the U.S.—notwithstanding the treaty adopted at the Seventh Montevideo Conference—opposed almost all anti-diplomatic protection and anti-IMS initiatives. Consequently, Latin America sought wider forums in which to defend its position. In the end, it succeeded in at least one key dimension of its agenda: the proscription of the use of force. Indeed, three international conventions were produced during the first half of the 20\(^{th}\) century with the purpose of preventing forcible self-help in the context of diplomatic protection.

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During the Third Conference (1906), a Resolution on Public Debts was issued that recommended the invitation to the “the Second Peace Conference, at The Hague, to examine the question of the compulsory collection of public debts, and, in general tending to diminish between Nations conflicts having an exclusively pecuniary origin”. As will be seen below, that Conference at The Hague ended up producing the Porter Convention (ibid 135-36).

The Fourth Conference (1910) included another Convention on Pecuniary Claims (ibid 183-85), which gave jurisdiction to the Permanent Court of Arbitration over “all claims for pecuniary loss or damage which may be presented by their respective citizens and which cannot be amicably adjusted through diplomatic channels” (ibid 184). In the Sixth Conference (1928), a Convention in the Status of Aliens was concluded, but, in an exception, did not contain any Article embodying the Calvo Doctrine.

\(^{89}\) Freeman, n. 9, 466 explains the U.S. position in this Conference: “This resolution was unanimously adopted, not excepting the United States whose acquiescence was probably stimulated by the proviso that ‘should no agreement on said difference be reached through diplomatic channels, within a reasonable period of time, the matter shall be referred to arbitration’”.

\(^{90}\) F.V. García-Amador, 1 The Inter-American System. Treaties, Conventions & Other Documents (Oceana, New York 1983) 82.
The first was the *Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*—the so-called Porter Convention—concluded at the Second Hague Conference in 1907 (known also as the Second International Peace Conference). According to this Treaty, the use of forcible self-help in the collection of “contracts debts” was limited to cases in which the involved country did not want to avail itself of arbitration. The second was the *General Treaty for the Renunciation of War* of 1928 (Kellogg-Briand Pact). The third, and most important, was the UN Charter (1945), which finally banned definitively and unconditionally, the use of force for protecting property of aliens abroad.

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91 The name refers to General Porter, the U.S. representative, who presented the proposition that ultimately gave birth to the treaty. See A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War* (University Press, Cambridge 1909) 188 et seq.

92 See 1 Scott, n. 19, 386-422, and George Winfield Scott’s, “Hague Convention Restricting the Use of Force to Recover Contract Claims” (1908) 2 AJIL 78.

93 For the text of the *Convention Respecting the Limitation of the Employment of Force for the Recovery of Contracts Debt*, see 2 Scott, n. 19, 356-62. It may also be found reprinted in (1908) 2 AJIL Sup. 1 et seq. Article 1 of the Porter Convention, *ibid* 82, establishes that:

> The contracting powers agree not to have recourse to armed force for the recovery of contracts debts claimed from the government of one country by the government of another country as being due to its nationals. This undertaking is, however, only applicable when the debtor states refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any ‘compromis’ from being agreed, or, after the arbitration, fails to submit to the award.

94 The two relevant Articles of this Convention agreed upon in Paris on August 27, 1928, reprinted in (1928) 22 AJIL Sup. 171 et seq, are the following:

> Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another. Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

95 See Article 2.3 of the *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031, T.S. 993, 3 Bevans 1153:

> All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered... All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
With the progressive retirement of military self-help, the confrontation between the North and the South became more theoretical than political, as independence and sovereignty were no longer directly threatened. While the central legal conflict between national treatment and IMS was far from over, now, having less at stake, developing countries could defend their position with greater strength, and paralyze all international attempts to produce substantive norms on state responsibility for damage to aliens.

Many efforts were made to reach an agreement in this area of the law. Two such attempts, conducted under the auspices of the League of Nations, deserve special attention. The first, the failed Draft Convention on the Treatment of Foreigners, was expressly inspired by the “equitable treatment” principle recognized in Article 23(e) of the Covenant of the League of Nations:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: … will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind."96

In 1921, the League of Nations passed a Resolution, directing its Economic Committee to “consider and report upon the meaning and scope of the provision relating to equitable treatment of commerce contained in Article 23(e) of the Covenant”.97 Then, the following year, the Economic Committee reported four areas to be covered under the


norm, three relating to trade matters—unfair competition, customs issues, and unjust discrimination regarding goods or ships—and one relating to what we would refer to today as “investment”: “The application by any Member of the League of unjust or oppressive treatment in fiscal or other matters to the nationals, firms or companies of other Members of the League exercising their commerce, industry or other occupation in its territories”.98

Six years later, in 1928, the same Economic Committee produced the Draft Convention on the Treatment of Foreigners,99 a document carefully discussed at the International Conference on Treatment of Aliens, held in Paris between November 5 and December 5, 1929.100 However, because this Draft Convention did not go beyond the

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98 Ibid 14. Also, *ibid* 16, the Committee explained its understanding of this aspect of Article 23(e) of the Covenant, which implicitly reveals the North-South conflict:

The Committee realise that this subject is a very wide one and naturally divides itself into two parts, both of great importance:

1. The regime to be applied to foreign persons and organisations who have been duly admitted by law to carry on their occupation within the territories of a State;

2. The conditions governing the admission of such persons and organisations to carry on their occupation in another State.

The Committee are strongly of opinion that the principle of equitable treatment ought to apply in both cases. They have so far found it impracticable in the present political and economic conditions of the world to formulate any general rule applicable to the second branch of the subject, namely, the conditions of admission, which they could recommend for general adoption, without such important and numerous exceptions as to deprive the rule of all practical value. They have therefore confined their attention exclusively to the first heading and have endeavoured to formulate principles which should be observed in the treatment of persons, firms and companies from arbitrary fiscal treatment and unjust discrimination. In the course of this examination the Economic Committee have encountered many difficulties, mainly of a technical character, which required a wider and more detailed enquiry to solve. While, therefore, they are agreed as to the general principles which should guide Members of the League in respect of the above mentioned matters, they have been compelled with regret to postpone the submission of a definitive recommendation for practical action until they are in possession of the further detailed information they are now taking steps to collect. They hope, however, to be able to frame a definite proposal on the subject at an early date.


principle of national treatment—Articles 1, 2, 3, 4, 6, 7, 9, 10 and 11, for instance, adopted the national treatment standard— and even fell short of that treatment—as in the case of Article 7(2), which permitted important exceptions to it—the proposed text was not adopted.

At the same time, the League of Nations also tried to produce a treaty on the topic as part of a series of efforts to codify international law, but to no avail. First, from 1925 to 1928, a Committee of Experts worked to systematize several areas of international law. In the field of state responsibility for damages to aliens, it produced a Report, which was prepared by the great jurist from El Salvador and later Judge of the PCIJ, José Gustavo Guerrero (the so-called Guerrero Report). In 1929, a Preparatory Committee drew up

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Plenary Meeting held in Paris on November 5th, 1929, the President of the Conference, Mr. Devèze, described the mission of the meeting in these terms:

The preparatory studies of which our Conference is the fruit owe their inception to Article 23 of the Covenant, which lays down that the Members of the League of Nations will ensure the equitable treatment of international commerce in their countries. This text would remain a dead letter if the nationals of the State Members did not enjoy the most extensive guarantees in foreign countries as regards their private rights and economic activities... Our ideal will be to elaborate a stable contractual system based on law and equity and embodying the minimum guarantees which will henceforward constitute a charter for foreigners and for international trade.

101 In this Draft Convention, even compensation for expropriation was subject to national treatment (see Article 11(5)). According the Economic Committee’s official commentaries, n. 99, 29, “the principle of national treatment was finally adopted by the Economic Committee and embodied in the clause contained in Article 11”.

102 According to Edwin M. Borchard, “Responsibility of States,” at the Hague Codification Conference” (1930) 24 AJIL 517 at 538, “the proposed Convention of Paris, November, 1929, to govern the rights of foreigners... broke down on the issue of equality... because, it is understood, it would not concede equality to foreigners in municipal law”.

103 See Green H. Hackworth, “Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigner. The Hague Conference for the Codification of International Law” (1930) 24 AJIL 500 at 500 (“It was, however, left for the League of Nations to launch upon a world-wide effort to place in code form those rules which are regarded as the body of law”).

the “Bases for Discussion”, which included 31 Bases on the topic of “Responsibility of States for Damages caused in their Territory to the Person or Property of Foreigners”.

Those Bases were later discussed at The Hague Codification Conference held from March 13 to April 12, 1930. However, the Third Committee of the Conference—which was charged with producing a draft on state responsibility for damages to aliens—failed to reach an agreement. As expected, Latin America and other developing countries strongly defended the principle of national treatment and the Calvo Doctrine. In this regard, the Guerrero Report played a key role in articulating the position of capital importing countries’ at the Conference (according to Borchard, this


106 See its history, minutes and documents in Rosenne, n. 105 (4 Vols.). The two representatives of the U.S., Green H. Hackworth and Edwin M. Borchard of the Committee on Responsibility of States, reported their observations in two articles published by the American Journal of International Law. See Hackworth, n. 103, and Borchard, n. 102.

107 Because of the lack of two thirds majority required to reach an agreement, the Committee on Responsibility of States—the Third Committee—was unable to complete its work, and therefore, no report was sent to the Conference. For the minutes of the Third Committee, see 4 Rosenne, n. 105, 1427-61.

108 The Latin American countries—Brazil, Chile, Uruguay, Colombia, Cuba, Nicaragua, Mexico, and El Salvador—were joined by China, the Free City of Danzig, Hungary, Persia, Poland, Portugal, Rumania, Czechoslovakia, Turkey and the Kingdom of Yugoslavia.

109 For example, in its general observations submitted in relation to the Bases of Discussion, Chile—who clearly supported the Calvo Doctrine—noted that:

[It] is inadmissible and impossible to reach conclusions which would grant more favourable treatment to foreigners than to nationals. When institutions of the State place foreigners on the same footing as nationals in respect of individual guarantees, the acquisition and enjoyment of civil rights, and the right to bring judicial actions before the courts of the country—as is the case in Chile—actions for damages which foreigners may desire to bring against the State, its officials or private individuals, should be brought by these before the competent national authority, and claims through the diplomatic channel are only allowable in the case of a denial of justice” (2 Rosenne, n. 105, 433).

See also, Borchard, n. 102, 537-38, who thought that:

Developing countries insistence upon a categorical rule that equality of treatment with nationals was, presumably, the maximum that an alien could demand, moved seventeen nations to vote against the due diligence rule as framed, and ultimately served to prevent that two-third vote without which a convention could not be concluded.
Report was one of the key causes of the Conference’s failure\(^{110}\). Among its main assertions, one can find a clear defense of the national treatment standard:

> [I]t [international law] does not thereby recognise the right to claim for the foreigner more favourable treatment than is accorded to nationals. The maximum that may be claimed for a foreigner is civil equality with nationals... [A] State owes nothing more than that to foreigners, and any pretension to the contrary would be inadmissible and unjust both morally and juridically.\(^{111}\)

The capital exporting countries, meanwhile, were no less organized. They arrived at the Conference with a complete draft prepared by Harvard Law School, which, of course, supported IMS.\(^{112}\) The following provisions of the Harvard Draft provide a useful overview of these standards, including the definition of state responsibility in accordance with international law,\(^{113}\) the imposition of minimum standards regarding government conduct—i.e., *direct responsibility*—and the “duty of diligence” regarding the conduct of private individuals—i.e., *indirect responsibility*:

- **Article 2:** The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.

- **Article 4:** A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties.

- **Article 10:** A State is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

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\(^{110}\) See Borchard, n. 102, 517.

\(^{111}\) See Guerrero Report, n. 104, 182.

\(^{112}\) Harvard Law School (Research in International Law Series), *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners* (Harvard Law School, Cambridge 1929). This Draft can also be found at (1929) 23 AJIL Spec. Sup. 133.

\(^{113}\) It is worth noting that the application of the national treatment standard—if denial of justice had not been recognized—would have led to the contrary result. As Borchard, n. 64, 447, explains, “[i]f it is true that the doctrine of equality is the final test of international responsibility, then the source of international responsibility lies in municipal law”. See also, *ibid* 452.
Such radical divergence between national treatment and IMS made the goal of codifying state responsibility utterly impossible to achieve.\textsuperscript{114} As Green Hackworth, the U.S. representative to the Conference, noted, “one would perhaps not be accused of extravagance of expression if he suggested that a more difficult subject could hardly have been selected for the first Codification Conference”.\textsuperscript{115}

The result was that, by the 1940s, developing countries had effectively resolved the primary obstacle of forcible self-help, as well as the secondary problem of arbitration as a last-resort alternative to military interventions. Moreover, they accomplished this without having agreed to any general substantive norms of state responsibility for injuries to aliens, prolonging the irremediable clash between the national standard and IMS. Not surprisingly, arbitration involving state responsibility substantially decreased in the worldwide after the 1940s, and even earlier in Latin America.\textsuperscript{116} The reason for this is obvious: without the threat of military intervention, developing countries no longer accepted arbitration as a dispute resolution mechanism. In Vagts’ words, “when the pressure exerted by one state upon another does not involve the use of armed force, the degree of consensus is appreciably lower”.\textsuperscript{117}

In consequence, after more than a hundred years of collective efforts by developing countries, diplomatic protection was finally on the ropes. In 1940, the Yale

\textsuperscript{114} According to Borchard, n. 102, 538, “the proposed Hague Convention on the international responsibility of states arising out of injuries to foreigners… broke down on the issue of equality… because equality under all circumstances was not deemed by the majority sufficient”.

\textsuperscript{115} Hackworth, n. 106, 516.


\textsuperscript{117} Detlev F. Vagts, “Coercion and Foreign Investment Rearrangements” (1978) 72 AJIL 17 at 28. See also, Lillich, n. 7, 8 (noting that because developing states “now no longer need contemplate the possibility of being subjected to coercive measures at the end of the diplomatic protection continuum, they naturally have less incentive than in the past to agree to submit such claims to third-party adjudication”).
Law School Professor of international law and author of the most complete work ever on diplomatic protection, Edwin Borchard, wrote that “[w]hile at times diplomatic protection in the hands of dominant powers has oppressed weak states, I venture to say that the shoe is now on the other foot”. 118

3. From the Calvo Doctrine to Expropriation Without Compensation

This section explores the stance adopted by developing countries during the 20th century, particularly after the Cold War. This new stance can be summarized in the idea of expropriation without compensation. With the elimination of military self-help, developing countries began to fight for new substantive rules of state responsibility in international law, leaving behind the traditional national standard espoused during the 19th century.

We should recall that Latin America advanced and achieved the prohibition of forcible self-help before the Cold War’s polarization of the world. The efforts leading to this outcome were rooted in a regional concern, not in an ideological stance of any kind. Of course, everything changed with the Cold War. Although the First World War had already marked the beginning of a general abandonment of liberalism and laissez faire, 119 the Cold War “deformed the traditional international law that had developed over centuries to facilitate and regulate political, economic and other human relationships

118 Borchard, n. 64, 449.
119 According to Georg Schwarzenberger, “The Province and Standards of International Economic Law” (1948) 2 ILQ 402 at 403:

The turning point, however, was the First World War. Then the picture changed rapidly. The disequilibrium caused by the war, the problems of reparations and inter-Allied debt, the growth of economic nationalism and protectionist and last, but certainly not least, the general trend towards control by the State of activities formerly reserved to the individual, deeply affected national and international economies.
across national boundaries”. 120 As Dawson & Head explain, “[t]he] international legal order, which had developed in the late nineteenth century and had survived well into the twentieth century was destroyed forever by the emergence after the World War II of the two rival superpowers—the United States and the Soviet Union”. 121

In this new world order, developing countries rapidly and radically changed their expectations concerning the standards of protection to property of aliens, carrying to extremes their previously moderate positions. Beyond defending national treatment against IMS, they moved to significantly alter the substantive law of expropriations. At this point, the standard pursued became “expropriation without compensation”, or more accurately, the compensation that the state deems appropriate.

For example, Mexico famously defended the principle of expropriation without compensation against the U.S., in a note written on August 3, 1938 (i.e., shortly before the Cold War). In that note, the Government of Mexico contested the United States’s claim to compensation for land belonging to U.S. citizens, that had been expropriated since 1927:

> My Government maintains, on the contrary, that there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land. 122

The famous letter by the U.S. Secretary of State Cordell Hull, which is the origin of the Hull Rule, was written in response to that statement. 123 This demonstrate that the

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120 W. Michael Reisman, “International Law after the Cold War” (1990) 84 AJIL 859 at 860.
121 Dawson & Head, n. 27, 31. See also, García-Amador, n. 73, 26.
122 “Translation of note from the Minister of Foreign Affairs of Mexico to the American Ambassador at Mexico City (August 3, 1938)” (1938) 32 AJIL Supp. 186 at 186.
123 “The Secretary of State of the United States (Cordell Hull) to Mexican Ambassador at Washington D.C.” (1938) 32 AJIL Supp. 181 et seq.
rule of “prompt, adequate, and effective compensation”, which according to many commentators reflected customary international law at the time, had to be formally defended through diplomatic channels for the first time only in 1938, 106 years after the first appearance of the Calvo Doctrine in Andrés Bello’s Derecho de Jentes (1832).

As Lillich explains, in the second half of the 20th century, all discussions of minimum standards and the national standard turned out, in reality, to be about expropriation and compensation, and nothing more. Thus, the classic claim—the 19th century Calvo Doctrine, whose aim had not been to erode the rule of law but to terminate forcible self-help through national treatment—was transmuted into a new and opportunistic one: expropriation without compensation.

The new claim was opportunistic in the sense of being strategic. Expropriation without compensation dovetailed perfectly with the cycle of nationalizations that developing countries were facing between the 1950s and 1970s. Such a standard minimized the costs of any nationalization programs being carried out or planned for launch in the near future.

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124 See Rudolph Dolzer, “New Foundations of the Law of Expropriation of Alien Property” (1981) 75 AJIL 553 at 558-59, citing cases in proof of that assertion. See also, Alexander P. Farichi, “International Law and the Property of Aliens” (1929) 10 BYIL 32 at 55, who after reviewing several international case law examples of the 19th and 20th centuries, concluded that:

[I]t is a general rule of international law that if a state expropriates the physical property of an alien without the payment of full compensation commits a wrong of which the state of the alien affected is entitled to complain, even if the measure of expropriation applies indiscriminately to nationals and aliens.

But see, John Fischer Williams, “International Law and the Property of Aliens” (1928) 9 BYIL 1 at 28, concluding that “where no treaty or other contractual or quasi-contractual obligation exists by which a state is bound in its relations to foreign owners of property, no general principal of international law compels it not to expropriate except on terms of paying full or ‘adequate’ compensation”.


Yet, in Latin America, that claim was inconsistent with the 19th century republican legal tradition—including the legal thought of Andrés Bello—and even with the pre-republican Spanish law tradition. The latter not only speaks to the roots of Latin American legal history, but was also positive law in many of these countries throughout the 19th century. This included the famous Las Siete Partidas (written between 1256 and 1265), a text that contained explicit rules of expropriation by the king and the compensation due in favor of his subjects:

Otro si dezimos, que quando el Empedrador quisiesse tomar heredamiento, o alguna otra cosa a algunos para sí, o para darla a otro; como querer que el sea Señor de todos los del Imperio, para ampararlos de fuerza, e para mantenerlos en Justicia, con todo esso non puede el tomar a ninguno de lo suyo sin su plazer, si non fiziesse tal cosa, porque lo deuesse perder segund ley. E si por auentura gelo oviesse a tomar por razon que el que el Emperador oviesse menester de fazer alguna cosa en ello, que se tornasse a pro comunal de la tierra, tenudo es por derecho de le dar ante buen cambio, que va a tanto a mas, de guisa que el fin que pagado a bien vista de omes buenos.

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127 See e.g., the Chilean Statute of Expropriation of August 14, 1838, surely written by Mariano Egaña under the influence of Andrés Bello, in Ricardo Anguita, 1 Leyes Publicadas en Chile desde 1810 hasta el 1o de junio de 1912 (Imprenta Barcelona, Santiago de Chile 1912) 312:

Artículo 1.° La espropiacion por causa de utilidad pública, a que hubiere lugar, con arreglo a lo dispuesto en el número 5, art. 12 de la Constitucion, solo podrá llevarse a efecto por decreto de la autoridad judicial… Art. 3.° El juez dispondrá que se proceda en efecto a la tasación, nombrándose para ella por cada una de las partes un tasador, i un tercero para el caso de discordia. Art. 4.° No aviniéndose el propietario ni el comprador en el nombramiento del tercero, lo hará el juez de oficio, nombrando a un perito de notoria buena reputación… Art. 5.° Declarado por el juez el legítimo valor de la especie, con arreglo a la tasación, decretará que éste se cubra por el comprador, i sin su previo y entero cubierto, no mandará dar posesión a éste de la especie sobre que ha recaído la expropiación, a menos que intervenga consentimiento expreso del propietario.

128 See Las Siete Partidas in Los Códigos Españoles Concordados y Anotados (Madrid, Imprenta de la Publicidad, 1848).

129 Partida 2ª, Tit. I, Ley II, in 2 ibid 320. See also, Partida 3ª, Tit. XVIII, Ley XXXI in 3 ibid 200:

Contra derecho natural non deue dar priuilejo, nin carta, Emperador ni Rey, ni otro Señor. E si la diere, non deue valer: e contra derecho natural seria, si diessen por priuilejo las cosas de un ome a otro, non auiento hecho cosa, por que los deuiessen perder aquel cuyas eran. Fueras ende, si el Rey las oviiesse menester, por fazer dellas, o en ellas alguna lauor, o como si fuesse alguna heredad, en que oviesse a fazer castillo, o torre, o puente, o alguna otra cosa semajante destas, que tornasse a pro, o a amparamiento de todos, o de algun lugar señaladamente. Pero estos deuen fazer en una destas dos maneras: dandole cambio por ello primeramente, o comprando dezeno segun que valiere”.

See also F. Clemente de Diego, “Notas sobre la evolución doctrinal de la expropiación forzosa por causa de utilidad pública. Glosadores y Postglosadores” (1922) 9 Revista de Derecho Privado 289 et seq
The claim here is not that what was good in the past would be good in the present or in the future. The point is only to emphasize the very real difference between the Calvo Doctrine and “expropriation without compensation”, in order to show that the Hull Rule is not foreign to the Spanish rule of law that had applied in the region ever since Columbus discovered it in 1491.

As is well known, the new standard of expropriation without compensation was part of a broader agenda, the new international economic order (NIEO), that capital importing countries pursued during the second half of the 20th century.130 The history of NIEO is well documented in international law, so it will not be repeated here.131 The important thing to note here is that during the 1960s, developing countries intensified their efforts to implement their values and perspectives. The turning point came in 1973, when the General Assembly adopted Resolution 3171 on Permanent Sovereignty over

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130 According to Dolzer, n. 124, 556, “expropriation is in many corners considered to be the (symbolic or real) central issue in the struggle for a new international economic order”.

Natural Resources (December 17, 1973),\textsuperscript{132} and one year later with the adoption of the Charter of Economic Rights and Duties of States (December 12, 1974) (CERDS).\textsuperscript{133}

At the same time, to no one’s surprise, efforts to codify the law governing state responsibility for injuries to aliens, efforts which continued under the auspices of the United Nations, completely failed to produce an acceptable document. The process that ultimately gave birth to the International Law Commission’s (ILC) Articles on state responsibility in 2002 is a long and detailed one, described elsewhere.\textsuperscript{134} I will only provide a short summary, stressing those aspects that are relevant from the perspective of damage to aliens.

This history begins with the General Assembly Resolution 799 (VIII) of December 7\textsuperscript{th}, 1953, which ordered the ILC to initiate the task of codifying the field of state responsibility. Its first Special Rapporteur, the Cuban jurist F.V. Garcia-Amador, tried to obtain state consent on “primary rules” of behavior, that is, on rules of state

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[T]he application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute which might arise should be settled in accordance with the national legislation of each State carrying out such measures.


responsibility regarding injuries suffered by aliens to their persons or property. García-Amador’s project was based on the idea of “minimum standards”, but this time rooted in human rights norms. Notwithstanding his efforts to develop a relevant treaty based on this philosophy of “noble synthesis”\textsuperscript{135}—i.e., an amalgam of national treatment and IMS\textsuperscript{136}—his draft failed to obtain the consent of developing countries.

Simultaneously, the Director of the Codification Division of the Office of Legal Affairs of the United Nations “suggested”\textsuperscript{137} to the Harvard Law School the production of a Draft Agreement on the matter. Between 1959-1961, under the direction of Louis Sohn and Richard Baxter, a Commission produced several versions of a draft entitled “Convention on the International Responsibility of States for Injuries to Aliens”.\textsuperscript{138} Not surprisingly, this Draft Convention recognized rules and principles in accordance with IMS.

From 1969 to 1979, the Italian professor Roberto Ago succeeded García-Amador in the task of codifying state responsibility as Special Rapporteur. His strategy was radically different from that of his predecessor. He sought to “reconceptualize” the field,

\textsuperscript{135} Garcia-Amador’s Draft Articles and Reports, with some minor changes, can be found in Garcia-Amador, n. 46.

\textsuperscript{136} See Garcia-Amador, n. 46, 5:

Now, both the ‘international standard of justice’ and the principle of equality between nationals and aliens, hitherto considered as antagonistic and irreconcilable, can well be reformulated and integrated into a new legal rule incorporating the essential elements and serving the main purpose of both. The basis of this new principle would be the ‘universal respect for, and observance of, human rights and fundamental freedoms’ referred to in the Charter of the United Nations and in other general, regional and bilateral instruments.

\textsuperscript{137} According to Louis B. Sohn & R.R. Baxter, “Final Draft with Explanatory Notes. Convention on the International Responsibility of States for Injuries to Aliens”, in F.V. Garcia-Amador, Louis B. Sohn & R.R. Baxter (eds), \textit{Recent Codification of the Law of State Responsibility for Injuries to Aliens} (Oceana Publications, Dobbs Ferry 1974) 133 at 135. “[t]his draft Convention was prepared at the suggestion of Dr. Yuen-li Liang... [who] expressed the view that such a draft Convention would be of considerable usefulness to the International Law Commission”.

setting aside the primary rules of state responsibility for the treatment of aliens, in order to focus exclusively on general and abstract rules of responsibility, particularly those known as “secondary rules”. These rules dealt with the nature and consequences of breaches to international obligations, across all branches of international law. As a result, the more specific topics of diplomatic protection, as well as damages to aliens and their property, were abandoned to the murky waters of customary international law.\textsuperscript{139}

Even these abstract and general principles would encounter a winding road ahead. After forty-five years of debate, the General Assembly of the United Nations in its 85\textsuperscript{th} plenary meeting held in December 12\textsuperscript{th}, 2001, \textit{took note} and \textit{welcomed} the Articles that had been prepared by Ago and later completed by Willem Riphagen, Gaetano Arangio-Ruiz and James Crawford.\textsuperscript{140} However useful these Articles are in general terms, they did not resolve (nor did they even attempt to resolve) the longstanding conflict between national treatment and IMS. As indicated earlier, they are abstract and doctrinaire in character, and contain nothing in the way of primary rules for state behavior regarding injuries to aliens. Not surprisingly, they have come under criticism from scholars such as McDougal\textsuperscript{141} and Lillich.\textsuperscript{142}

In any case, it is not an exaggeration to affirm that by the mid 1970s, developing countries had won crucial aspects of the battle over the definition of substantive law

\textsuperscript{139} In the words of Richard R. Baxter, “Reflection on Codification in Light of the International Law of State Responsibility for Injuries to Aliens” (1965) 16 \textit{Syracuse Law Review} 745 at 746, “the Commission had decided to drop the subject of State responsibility for injuries to aliens and to take up a new and markedly different subject—the international responsibility of states in general”.


\textsuperscript{141} According to Myres S. McDougal et. al., \textit{Human Rights and World Public Order. The Basic Policies of an International Law of Human Dignity} (Yale University Press, New Haven 1980) 762, these Articles have been defined “at such a high level of abstraction as to shed but a dim light upon specific controversies”.

\textsuperscript{142} See Lillich, n. 7, 21 (“Ago’s work, in marked contrast to García-Amador’s, offers little or no guidance to persons concerned with fashioning a contemporary international law governing the treatment of aliens”).
regarding compensation in expropriations.\(^{143}\) By strenuously advocating the standards embodied in NIEO, they succeeded at introducing enough confusion into the discussion that formerly accepted standards of state responsibility began to resemble unsound law.\(^{144}\)

Two cases decided in the 1960s and 1970s—at two of the most important world forums—reflect the weakening status of pre-NIEO international minimum standards. In the *Barcelona Traction* case (1970), the ICJ used language that cast doubt upon classic rules and principles of international law:

> Considering the important developments of the last half-century, the growth of foreign investment and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests.\(^{145}\)

\(^{143}\) *See* Andrew T. Guzman, “Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties” (1998) 38 *Virginia Journal of International Law* 639 at 651 (“[D]eveloping countries had won a clear victory. The international rules governing North-South investment were entirely uncertain and individual states were in a position to determine what constituted appropriate compensation”).

\(^{144}\) *See also*, Dolzer, n. 124, 553 (“The present state of customary international law regarding expropriation of alien property has remained obscure in its basic aspects”). *See also*, Mark K. Neville, Jr., “The Present Status of Compensation by Foreign States for the Taking of Alien-Owned Property” (1980) 13 *Vanderbilt Journal of Transnational Law* 51 at 51 (noting that “no other exercise of the prerogatives of national sovereignty during the past two decades has proven so divisive to the community of nations or created such uncertainty in international commerce as the taking of alien investor’s property by host States”); Greta Gainer, “Nationalization: The Dichotomy Between the Western and Third World Perspectives in International Law” (1983) 26 *Howard Law Journal* 1547 at 1554-55, and 1563 (stating that “there is no global consensus on what constitutes controlling international law in this area [the standard of compensation in cases of expropriations]”, including the question of “whether the nationalizing state is obligated to compensate an alien for expropriated property”); and Oscar Schachter, “Compensation for Expropriation” (1984) 78 *AJIL* 121 at 121 (observing that no subject of international law has aroused as much debate as the question of the standard for compensation in case of expropriation).

\(^{145}\) *Barcelona Traction, Light, and Power Company, Limited* (Second Phase) (Belgium v. Spain) [1970] ICJ Rep 3, ¶ 89. It also added, *ibid*, that:

> It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.
Even more striking, in *Sabatino* (1964), the U.S. Supreme Court declined, under the act of state doctrine, to review an expropriation that had occurred in Cuba, because among other reasons, “there are a few, if any, issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens”. The Court then went on to say that:

[T]he disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.

The result of all this is that by the end of the 1970s, both the *classic* and *opportunistic* claims made by Latin American and developing countries had been successfully advanced in international law. The first half of the 20th century witnessed the dominance of the *classic* claim, and during the second half its *opportunistic* counterpart gained enough momentum to wreak havoc on the entire question of state responsibility, by making it hopelessly ambiguous.

### 4. International Minimum Standards Strike Back

It was in the midst of this “dark night” of IMS that bilateral investment treaties began to emerge like small stars, re-enacting pre-NIEO minimum standards on a country-by-country basis. This section explores the initial years of the BIT generation, a period

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See also, *ibid* ¶¶ 61-63, that shows how the Court sympathizes with rules of compensation that do not correspond to the Hull Rule, and how it disregards the jurisprudential value of previous international arbitration awards.


147 *Ibid* 429.
whose proper understanding is essential to grasping the essence of BITs and the protection they offer.

The first BIT was concluded between Germany and Pakistan in 1959, and the ICSID Convention came into force on October 14, 1966. Both BITs and the ICSID Convention emerged against the confusing background of customary international law well-described in the previous section. Ironically, it was precisely the relative success of NIEO that made BITs desirable: both developed and developing countries now had solid reasons to adopt “primary rules” of state responsibility on a bilateral basis. In the

148 It came into force after 20 countries—17 of which were developing nations, mostly African states—ratified the Convention; see Christoph H. Schreuer, The ICSID Convention: A Commentary (CUP, New York 2001) 1274.

   It was against this background of apparently eroding standards that the UK formulated its first Model Agreement for the Promotion and Protection of Investments. The impetus came from a White Paper published in 1971 in which the government announced its intention of preparing such a draft and seeking negotiations with as many developing countries as possible.

   See also, Jeswald W. Salacuse, “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries” (1990) 24 International Lawyer 655 at 659 (“Not only did customary international law contain no generally accepted rules on the subject, it also lacked a binding mechanism to resolve investment disputes”); and M. Somarajah, The International Law of Foreign Investment (CUP, New York 1994) 233 (“In this confused state of conflicting norms [referring to customary international law], bilateral investment treaties provided the parties with the opportunity to set out the definite norms that would apply to the investments their nationals make in each other’s state”).

   BIT practice can be much explained by its function to provide a legally binding alternative to the advocacy of absolute sovereignty propounded by the NIEO, its legal instruments (mainly UN General Assembly resolutions of 1974) and its proponents… BIT practice was then intentionally developed into an instrument to counter these NIEO positions.

151 See e.g. Herman Walker, Jr., “Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice” (1956) 5 AJIL 229, 243 (explaining that FCN treaties—the U.S. equivalent of BITs during the 1950s—“illustrate the feasibilities of bilateralism”).
words of a BIT Tribunal: “[t]he impressive development of BITs has been a response to the uncertainty of customary international law relating to foreign investment”.

From a historical perspective, there are at least two features of BITs that tend to be overlooked in the usual recounting of the BIT generation’s emergence. With respect to procedure, BITs originally relied on state-to-state arbitration as the proper means of dispute resolution. With respect to substance, BITs sought the re-enactment of classical pre-NIEO IMS (i.e., IMS-as espoused by developed countries).

The popular conflation of BITs with investor-state arbitration—that is, the assumption that BITs, by definition, permit investors to make claims against states before international arbitral tribunals—is an erroneous generalization. After a careful survey of the dispute settlement provisions for a large proportion of BITs signed between 1959 and 1989, I have classified these BITs into three groups: first, those that provide only state-to-state arbitration (state-to-state BITs); second, those that allow investors to have recourse to international arbitration for violations of any provision of the treaty (investor-

152 Total S.A. v. Argentina, ICSID Case No. ARB/04/01 (Sacerdoti, Alvarez, Herrera), Decision on Jurisdiction (Aug. 25, 2006), ¶ 78.


154 For instance, Andrew T. Guzman, Zachary Elkins & Beth Simmons, Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000 (May 2005) 1, 10, presented in American Law & Economics Association 15th Annual Meeting. Working Paper 31 (available at <http://law.bepress.com/alea/15th/bazaar/art31>, accessed 3 November 2008), wrongly noted that “the core of the terms of the treaties are always present: BIT invariably provide for mandatory dispute resolution before an international arbitration body, a private right of action for investors”. Not controlling for this variable is indeed a cause of critique in their study of BITs and FDI.

155 The source of those treaties is the UNCTAD database (available at <http://www.unctad.org/templates/DocSearch_____779.aspx>, accessed 31 October 2008). When the database was incomplete, I referred to the U.N. treaty series. Still, some treaties mentioned in the ICSID website’s BITs lists can be found neither on the UNCTAD database nor on the U.N. treaty series.
state BITs); and third, those that provide investor-state arbitration, but only in relation to the amount of compensation in cases where states recognize the existence of a formal expropriation (limited investor-state BITs).  

State-to-state BITs were most popular during the first historical phase of BIT development. In aggregate terms, they comprised the majority of all BITs concluded until 1986 (inclusive). This proves a relatively obvious but important fact: BITs were not designed with the purpose of giving direct cause of action to investors. By contrast, they were intended to function in the traditional state-to-state setting of international law, including the customary rule of exhaustion of domestic remedies.

Investor-state BITs can be regarded as an historical accident, resulting from the combination of three separate institutional experiments: first, the original state-to-state BITs which provided the substantive provisions; second, the ICSID Convention, which expanded the agenda of investor-state arbitration into international investment law, albeit with concession contracts rather than treaties in mind; and third, the 1959 Abs-Shawcross Draft Convention—followed by the 1963-1967 OECD Draft Convention—whose Article 7 first mentioned investor-state arbitration in an investment treaty (though still requiring consent in a separate document).

The first investor-state BIT was concluded between Gabon and Germany in 1969, and the first limited investor-state BIT between France and Morocco in 1975. Yet, as late recently as 1987, both investor-state and limited investor-state BITs (taken together)

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156 Only 2 treaties from this period do not fit these categories, due to the fact that they provide no dispute resolution mechanism whatsoever.

began to outnumber state-to-state BITs. The limited investor-state BITs were primarily used during the 1980s by communist countries, and peaked in 1989, a year for which they were the most popular investment treaty. Table 1, and Figures 1 and 2 present comprehensive data on the type of BITs concluded between 1959 and 1989.158

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158 See also the excellent empirical study of Jason Webb Yackee, “Conceptual Difficulties in the Empirical Studies of Bilateral Investment Treaties”, Legal Studies Research Paper No. 1053, October 2007 (available at <http://ssrn.com/abstract=1015088>, accessed 24 January 2009), in which the author analyzes the dispute settlement provisions of nearly 1,000 BITs, observing also that “the majority of BITs in force until the early- to mid- 1990s were weak BITs—those containing no trace of investor-state dispute settlement provisions—and BITs with highly imperfect such provisions” (ibid 28).
Table 1: State-to-State BITs (BITs A), Investor-State BITs (BITs B), and Limited-Investor State BITs (BITs C) (by year and cumulative)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total BITs (Year)</th>
<th>State to State BITs (BITs A) (Year)</th>
<th>Investor State BITs (BITs B) (Year)</th>
<th>Limited Investor State BITs (BITs C) (Year)</th>
<th>BITs B + BITs C (Cum.)</th>
<th>Not reviewed (Year)</th>
</tr>
</thead>
<tbody>
<tr>
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<td>2</td>
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<td>7</td>
<td>6</td>
<td>24</td>
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<td>0</td>
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</tr>
<tr>
<td>1965</td>
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<td>9</td>
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<td>0</td>
<td>0</td>
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<td>1980</td>
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<td>3</td>
<td>99</td>
<td>6</td>
<td>34</td>
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<td>3</td>
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<td>11</td>
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<td>180</td>
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</table>
Figure 1: State-to-State BITs (BITs A), and Investor-State BITs (BITs A) plus Limited Investor-State BITs (BITs C), By Year (1959-1989)
Figure 2: State-to-State BITs (BITs A), and Investor-State BITs (BITs A) plus Limited Investor-State BITs (BITs C), Cumulative (1959-1989)
The state-to-state jurisdiction established in most BITs until the mid-1980s underscores the “conservative” or non-innovative origins of these treaties.\(^\text{159}\) It also reminds us that, from a substantive perspective, BITs did not attempt to advance anything novel, but merely to re-enact pre-NIEO IMS—including the Hull Rule, the most important provision at the time.\(^\text{160}\) The basic *quid-pro-quo* was none other than IMS for an expected increase in foreign investment. Lord Shawcross, a key player during the early phase of BITs, described this “deal” in the following terms:

The *quid pro quo* for the borrowing States’ undertakings is, in fact, in the English vernacular, the provision of the ‘quids,’ that the capital importing countries in return for agreeing to abide by the generally recognised procedures of International Law, will receive more private investment and with the capital, the benefits of the technical and commercial skills which go with them than would otherwise be the case.\(^\text{161}\)

An individual review of the original provisions proves this assertion. Because there as been a striking *de facto* convergence among BITs toward what game-theory experts call a “non cooperative standard”,\(^\text{162}\) the main provisions we see today in BITs

\(^{159}\) Commentators usually infer the wrong conclusions as a consequence of believing that BITs were originally designed with investor-state dispute settlement mechanisms, particularly in the context of the IMS vs. FET debate. See e.g. Ioana Tudor, *The Fair and Equitable Treatment Standard in The International Law of Foreign Investment* (OUP, New York 2008) 67:

*The main problem with equalizing FET with IMS is that it limits the scope of FET. The IMS provides for action only in extreme cases. In other words, the rights of the foreign Investor have to be violated in a serious manner in order to obtain reparation from the host State. In contrast, it appears that FET offers the foreign Investor a type of guarantee which is much more generous and designed to be operational. Moreover, the IMS was intended to function in a State-to-State type of settlement of dispute organized around the diplomatic protection mechanism not in an Investor-State one, as it is today the case in the existing BITs and agreements.* (emphasis added).

\(^{160}\) See e.g., Denza & Brooks, n. 149, 911-2, explaining that in the U.K. BIT program the most politically sensitive provision was the expropriation clause. See also, Herman Walker, Jr., “Modern Treaties of Friendship, Commerce and Navigation” (1958) 42 *Minnesota Law Review* 805, 823, a U.S. diplomat that after reviewing the provisions on “Protection of Persons and Property” contained in the sixteen FCNs, concluded by the U.S. between 1946 and 1958, noted that: “Most importantly, any sequestration or expropriation must be accompanied by prompt, just and effective compensation… This is an especially valuable right in a day when nationalizations, often entailing great losses to the private owners, has tended to become not uncommon”. (emphasis added).

\(^{161}\) Earl Snyder, “Protection of Foreign Investment, Examination and Appraisal” (1961) 10 ICLQ 469, 482 (emphasis added).

\(^{162}\) See infra Chapter 2.
first appeared, worded in closely similar terms, in the earliest German and Swiss BITs concluded between 1959 and 1961. That convergence—amplified by the effect of the MFN clause—justifies paying special attention to the original formulations and understanding that thousands of forthcoming BITs would later copy and paste.

The standards of no expropriation without compensation, national treatment, and full protection and security date from the 1959 Germany-Pakistan treaty (the first BIT). Similarly, the most favored nation clause (MFN) dates from the 1960 Germany-Malaysia treaty (third BIT), and the fair and equitable treatment standard (FET) from the 1961 Switzerland-Tunisia treaty (seventh BIT).


(a) Expropriation: Article 3(2): “Nationals or companies of either Party shall not be subjected to expropriation of their investments in the territory of the other Party except for public benefit against compensation, which shall represent the equivalent of the investments affected. Such compensation shall be actually realizable and freely transferable in the currency of the other Party without undue delay. Adequate provision shall be made at or prior to the time of expropriation for the determination and the grant of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law”. The Protocol of this BIT provides, in its No.3, that: “The term ‘expropriation’ within the meaning of paragraph 2 of Article 3 shall also pertain to acts of sovereign power which are tantamount to expropriation, as well as measures of nationalization”;

(b) National Treatment: Article 1(2): “Capital investments by nationals or companies of either Party in the territory of the other Party shall not be subjected to any discriminatory treatment on the ground that ownership of or influence upon it is vested in nationals or companies of the former Party, unless legislation and rules and regulations framed thereunder existing at the time of coming into force of this Treaty provide otherwise”; Art. 2: “Neither Party shall subject to discriminatory treatment any activities carried on in connection with investment including the effective management, use or enjoyment of such investments by nationals or companies of either Party in the territory of the other Party unless specific stipulations are made in the documents of admission of an investment;” and,

(c) Full Protection and Security: Article 3(1): “Investments by nationals or companies of either Party shall enjoy protection and security in the territory of the other Party”.


Unless specific stipulation made in the document of admission provide otherwise, investment by nationals or companies of either Contracting Party in the territory of the other Contracting Party, shall not be subjected to treatment less favourable than that accorded to investments by
Yet, none of these provisions were original to those first BITs. No expropriation without compensation, including the Hull Rule, had already been the pre-NIEO customary international law rule on the matter. Full protection and security—including variations such as “protection and security” and “the most constant protection and security”—was a recurring clause in the 19th century FCN treaties. National treatment was nothing less than the essence of the Calvo Doctrine, and was a usual provision of the FCN treaties. Similarly, the MFN clause has a long tradition in the general history of treaties.

The case of the FET standard is no different. As previously explained, it first appeared in Article 23(3) of the League of Nations Covenants as the “equitable treatment” standard. Then, the failed Havana Charter of 1948 incorporated a “just and equitable treatment” into its Article 11(e), although this was not directly applicable for the protection of investors and investments. Later, in 1948, the Ninth International Conference of American States, adopted the Economic Agreement of Bogotá—never

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166 See n. 124.

167 See Section 1 of this Chapter. See also, Robert R. Wilson, “Property-Protection Provisions in United States Commercial Treaties” (1951) 45 AJIL 83 at 92.

168 Ibid 94.

169 See Article 11(2) reprinted in Clair Wilcox, A Charter for World Trade (Macmillan Co, 1949). As Stephen Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice” (1999) 70 BYIL 99 at 108, explains, “[the Havana Charter] did not itself seek to guarantee this standard of treatment to investors. Instead, it merely authorized the International Trade Organization to recommend that this standard be included in future agreements; as such, Article 11(2) was even less than a pactum de contrahendo”.

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ratified and subject to a significant number of reservations at the time of its signature\textsuperscript{170}—

whose Article 22 established:

Foreign capital shall receive \textit{equitable treatment}. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied.\textsuperscript{171}

Following the language of the League of Nations Covenant and the Economic Agreement of Bogotá, many U.S. FCNs concluded since 1949 contained an “equitable treatment” clause.\textsuperscript{172} However, several other U.S. FCNs concluded in the same time

\begin{flushleft}
\textsuperscript{170} Several countries made reservations to Chapter IV of the Economic Agreement of Bogotá—“Private Investment”—at the time of signature, including Argentina, Cuba, Ecuador, Guatemala, México, Uruguay, and Venezuela. The Mexican reservation—in Secretaría de Relaciones Exteriores (Mexicana), \textit{Conferencias Internacionales Americanas. Segundo Suplemento 1945-1954} (Secretaría de Relaciones Exteriores, México 1956) 169—is particularly telling:

\begin{quote}
Reserva de la Delegación de México a los Artículos 22, 224 y 25 del Convenio Económico de Bogotá: . . 2. Aun estando de acuerdo con el espíritu de equidad en que se inspiran el párrafo tercero del artículo 22 y el primer párrafo del artículo 24, la Delegación de México hace también reserva expresa sobre sus textos, por cuanto, en la forma en que están redactados, pudieran interpretarse como una limitación al principio según el cual los extranjeros están sujetos, como los nacionales, a las leyes y a los tribunales del país. (emphasis added).
\end{quote}

The excessive number of reservations to Chapter IV of this Agreement was the object of study by a special commission. See Report of the Special Commission on Reservations concerning the Economic Agreement of Bogotá (Pan American Union, Washington, July 13, 1949, Spanish original), cited by Walker, n. 151, 241. Furthermore, it is worth noting that, at the time, the main focus of the discussions was the expropriation provision (Art. 25). See e.g. Dardo Regules, \textit{La Lucha por la Justicia y por el Derecho. Apuntes sobre la IX Conferencia reunida en Bogotá durante el mes de abril de 1948} (Barreiro y Ramos, Montevideo 1949) 88 (“Este tercero aspecto [expropiación y compensación] fué uno de los más debatidos en la Conferencia”), and \textit{Ninth International Conference of American States. Bogotá, Colombia, March 30-May 2, 1948. Report of the Delegation of the United States of America With Related Documents} (1948) 64-68.
\end{flushleft}

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\textsuperscript{171} \textit{Ninth International Conference...}, n. 170, 207-8 (emphasis added).
\end{flushleft}

\begin{flushleft}
\textsuperscript{172} See e.g. the \textit{Treaty of Friendship, Commerce and Economic Development signed between the U.S. and Uruguay} (23 November 1949). Its Article II(1) provided that:

The Each High Contracting Party shall at all times accord equitable treatment to the capital of nationals and companies of the other Party. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests of such nationals and companies in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied. (Cited by Wilson, n. 167, 102).
\end{flushleft}

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period used the slightly different expression of “fair and equitable treatment”.\textsuperscript{173} Note that according to Vandevelde, counsel to the U.S. BIT negotiating teams during the 1980s—both formulations “equitable treatment” and “fair and equitable treatment”—are equivalent.\textsuperscript{174}

If the historical background is to be taken seriously, then the FET standard, at the time it was first used, could not have meant anything higher than IMS. At a time when the opposing North-South legal camps were, respectively, IMS and national treatment, the FET standard could not have referred to either an autonomous standard or to a higher standard than those minimums. The League of Nations equitable treatment standard certainly did not imply something autonomous or higher than IMS; indeed, as we have seen, the Draft Convention that was attempted under its guidance failed even to achieve the national treatment standard. Neither did U.S. negotiators promote such a standard as part of the FCN program.\textsuperscript{175} At best, FET originally meant IMS; at worst, something less than that.

\begin{flushleft}
\textsuperscript{173} See the Treaty of Amity and Economic Relations between the U.S. and Ethiopia (7 September 1951) TIAS No 2864. Its Article VIII(1) provided that:

Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

See also the following FCNs concluded by the U.S. during the 1950s: (1) Germany (29 October 1954) TIAS No 3593, Art. I(1); (2) Netherlands (27 March 1953) TIAS No 3942, Art. I(1); (3) Muscat and Oman (20 December 1958) TIAS No 4530, Art. IV(1).

\textsuperscript{174} See Vandevelde, n. 150, 220 (“[I]nvestments of companies and nationals of the other party must be accorded ‘fair and equitable’ treatment, the equivalent of the ‘equitable treatment’ required by the modern FCNs”). See also, United Nations Conference on Trade and Development (UNCTAD), Fair and Equitable Treatment (United Nations, 1999) 14.

\textsuperscript{175} According to a U.S. diplomat, Walker, n. 160, 811-12:

[T]he utility of this approach [non-contingent or absolute standards] is quite limited… [T]he non-contingent standard finds its best utility in a few context in which, no contingent standard being adequate, some recognizable body of international law and terms of art has nevertheless evolved. (emphasis added).
\end{flushleft}
Why, then, did negotiators use the expression “fair and equitable treatment”, instead of the more direct “international minimum standards”\(^\text{176}\)? From the perspective of developed countries, there were at least three reasons to follow this strategy: first, to avoid using such a politically loaded expression; second, to avoid specifying those standards in further detail (which would have been a deal-breaker);\(^\text{177}\) and, third, to expand the limited scope of the 19\(^{\text{th}}\) century full protection and security clause (FPS).

Indeed, the FPS clause—the traditional expression of IMS—corresponded, in essence, to the “duty of diligence” standard. It mainly covered “indirect responsibility”, that is, failures to maintain the *ordre publique* and to properly operate the criminal law system—both main functions of the 19\(^{\text{th}}\) century *Nightwatch State*.\(^\text{178}\) Due to the explosive expansion of the State’s activities and functions during the 20\(^{\text{th}}\) century, the FET clause was enacted to ensure coverage of the “direct responsibility” dimension of IMS, which FPS tended to neglect.\(^\text{179}\)

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\(^{176}\) In my opinion, UNCTAD, n. 174, 13, puts too much emphasis on the textual dimension without giving sufficient consideration to the history of the standard: “If States and investors believe that the fair and equitable standard is entirely interchangeable with the international minimum standard, they could indicate this clearly in their investment instruments; but most investment instruments do not make an explicit link between the two standards”.

\(^{177}\) See Walker, n. 160, 811-12:

There is also a certain margin for the play of non-contingent standards, or ‘absolute’ rules, in the formulation of treaty provisions… The scope of these treaties is such that, to be manageable, their content of rules must be stated essentially in a summary or simple fashion. A summary contingent rule has definiteness, because its content is measured against a determinable pole of reference. But a summary non-contingent rule may often be considerably less than so, when reduced to language of agreement between nations of unlike faculties of appreciation and different cultural and juridic backgrounds… An attempt to construct a treaty primarily in non-contingent terms can prove self-defeating because increases in specificity spawn corresponding increases in reservations. (emphasis added).

\(^{178}\) See e.g. George Adams Kennedy (U.S.A.) v. United Mexican States (1927) 4 RIAA 194 at 198 (available at <http://www.un.org/law/riaa/>), accessed 22 May 2008), ¶ 7: “[T]here is no evidence that there may have been failure to maintain the usual order which it is the duty of every state to maintain within its territory”. (emphasis added).

\(^{179}\) As Schwarzenberger, n. 119, 411, explained in 1948, “[t]he last standard which can claim to be of general interest in this field is the standard of equitable treatment. The special importance of this standard lies in spheres affected by an increase in State planning”. (emphasis added).
This identification of the FET standard with IMS is less problematic than it might seem because, at the time, IMS were also considered to be dynamic standards, embodying “nothing more nor less than the ideas which are conceived to be essential to continuation of the existing social and economic order of European capitalistic civilization”. In 1940, writing on IMS, Borchard remarked upon the connection between IMS and general principles of law recognized by civilized nations—principles of indisputably evolutionary nature:

[International law] is also composed of the uniform practices of the civilized states of the western world who gave birth and nourishment to international law. Long before article 38 of the Statute of the Permanent Court of International Justice made the “general principles of law recognized by civilized states” a source of common international law, foreign offices and arbitral tribunals had relied on such general principles to work out a loose minimum which they applied constantly in interstate practice. The international standard is compounded of general principles recognized by the domestic law of practically every civilized country, and it is not to be supposed that any normal state would repudiate it or, if able, fail to observe it.

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180 See e.g. Borchard, n. 64, 457-58.
181 Frederick Sherwood Dunn, “International Law and Private Property Rights” (1928) 28 Columbia Law Review 166 at 175 (1928).
182 Borchard, n. 64, 448-49.
183 Ibid 458. In 1965, the American Law Institute also identified IMS with general principles of the law. See Restatement of the Law, Second: Foreign Relations Law of the United States, as Adopted and Promulgated by the American Law Institute, May 26, 1962 (American Law Institute, Saint Paul 1965) 501, ¶ 165.2:

The international standard of justice… is the standard required for the treatment of aliens by:
(a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles, (b) analogous principles of justice generally recognized by States that have reasonably developed legal systems. (emphasis added).

Then Comment (a), ibid 502, notes that:

This Section follows the prevailing rule that such national treatment is not always sufficient, and that there is an international standard of justice that a state must observe in the treatment of aliens, even if the state does not observe it in the treatment of its own nationals, and even if the standard is inconsistent with its own law.

Also, Comments (d) and (e), ibid 503, note that:

The test for determining whether conduct attributable to a state complies with the international standard is two fold. It must, in the first place, comply with the requirements specified by international law as established by the usual sources of such law… However, where authority from such sources is conflicting or absent, international law adopts, in this as in many other areas, analogous principles from reasonably developed legal countries… Reference to the international standard of justice as the standard of “civilized states” is customary in the literature of international law, and the Statute of the International Court of
Before BITs’ leap in popularity during the late 1980s—and before Mann’s 1981 article initiating the opposite trend—many BIT commentators expressed certainty that the FET standard was equivalent to IMS. One of the most authoritative examples can be found in the official commentary to the OECD Draft of 1967. It should be noted that this Draft, though never opened for signature, “represented the collective view and dominant trend of OECD countries on investment issues and influenced the pattern of deliberations on foreign investment in that period.” The FET clause of the OECD Draft—which had been taken from the Abs-Shawcross Draft Convention of 1959—came accompanied by the following observation:

Justice lists among the sources of law to be applied by the Court those derived from “the general principles of law recognized by civilized nations”. Article 38(1)(c).

See F. A. Mann, Further Studies in International Law (OUP, New York 1990) 238 (“The terms ‘fair and equitable treatment’ envisage conduct which goes beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words”) (This position was firstly adopted by Mann in his article “British Treaties for the Promotion and Protection of Investments” (1981) 52 BYIL 241 at 244). Following Mann, many modern commentators have adopted this position, including: (1) Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties (M. Nijhoff, Boston 1995) 60; (2) UNCTAD, n. 174, 37-40; (3) Vasciannie, n. 169, 144; (4) Christoph H. Schreuer, “Fair and Equitable Treatment in Arbitral Practice” (2005) 6 Journal of World Investment and Trade 357 at 364; and, (5) Tudor, n. 159, 65-68. Georg Schwarzenberger, Foreign Investments and International Law (Praeger, New York 1969) 114-15, is sometimes credited for having first advanced this theory, but a careful review of his words does not lead to a clear conclusion. It should be remarked that in a later book, Mann changed his mind; see Francis A. Mann, The Legal Aspect of Money (5th ed OUP, New York 1992) 526 (referring to “the overriding principle of ‘fair and equitable treatment’, which, it must be repeated, in turns is perhaps no more than a (welcome) contractual recognition and affirmation of that principle of customary international law which requires States to act in good faith, reasonably, without abuse, arbitrariness, or discrimination”). It should also be noted that, before Mann, at least one commentator advanced the idea of FET as a standard different from IMS: Roy Preiswerk, “New Developments in Bilateral Investment Protection (With Special Reference to Belgian Practice)” (1967) 3 Revue Belge du Droit International 173 at 186.

That is also the case with FCN commentators. See Walker, n. 151, 232 (“It has become settled, also, that he [alien] and his property shall receive not only equal protection, but also a certain minimum degree of protection, as under international law, regardless of a Government’s possible lapses with respect to its own citizens”). (emphasis added).

See n. 157.


See n. 157. The Abs-Shawcross Draft Convention also reflected the view of capital-exporting countries. See e.g. Arthur Larson, “‘Recipients’ Rights Under an International Investment Code” (1960) 9 Journal of Public Law 172 at 172 (“The principal flaw in the Draft Convention is its one-sidedness. In form it is
The phrase ‘fair and equitable treatment’, *customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals*. The standard requires that—subject to essential security interests [see Article 6(i)]—protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. *The standard required conforms in effect to the ‘minimum standards’ which forms part of customary international law.*

Similarly, in 1980, the Swiss Foreign Office—the bureau in charge of the BIT program containing the oldest FET clause—stated that: “On se réfère ainsi au principe classique du droit de gens selon lequel les États doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du ‘standard minimum’ international c’est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques”.

In 1984, the OECD insisted again that the FET clause “introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated”. Explaining the origins of the U.S. BIT program, Pamela B. Gann noted in 1985—after working with the U.S.T.R. Investment Division—that:

[T]his standard [FET] is meant to supplement the nondiscrimination provisions in paragraphs 1 and 2 [of the U.S. Model BIT] by providing a residual, but absolute minimum, degree of treaty protection to investments, regardless of possible vagaries in the host party’s national laws and their administration, or of a host party’s lapses with evenhanded...

In substance, however, the entire concern of the Convention is the protection of the rights of the investor”). Note that, according to Antonio R. Parra, “Applicable Substantive Law in ICSID Arbitration Initiated Under Investment Treaties” (2001) 16 *ICSID Review—Foreign Investment Law Journal* 20 at 22 (2001), “the first BITs were made in the period 1959-1969. Much of the inspiration for these and the later treaties came from the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the 1967 OECD Draft Convention on the Protection of Foreign Property”.

189 *See OECD Draft Convention on the Protection of Property*, n. 157, Notes and Comments to Article 1, No. 4 (a) (emphasis added).

190 *Annuaire suisse de droit international* 178 (1980), cited by Mann, n. 184, 238. By the early 1980s, developing countries had a similar understanding. *See e.g.* Iván Meznerics, “Guarantees for Foreign Investors”, in Zotan Peteri & Vanda Lamm (eds), *General Reports to the 10th International Congress of Comparative Law* (Akadémiai Kiadó, Budapest 1981) 331 at 350.

respect to treatment of its own nationals and companies. The standard provides, in effect, a “minimum standard” which forms part of customary international law.\(^{192}\)

Similarly, when commenting generally on the first U.K. BIT draft, in 1987, Denza & Brooks explained that although there were interest groups strongly advocating for principles that provided “higher” standards of protection, the most important provisions did not attempt to go further than international law:

Some of the articles in the draft would of course impose obligations which did not derive from customary international law—for example the provisions for most-favoured-nation treatment and national treatment, on exchange control freedom for investment and returns from them, on subrogation and on compulsory arbitration. But the most political sensitive provisions—on expropriation, compensation for damage sustained during armed conflict or revolt and on the nationality of individuals and companies—were drafted in considerable detail but not so as to go beyond what was thought to reflect international law.\(^{193}\)… The effect [of nearly 300 treaties] has been to create an infrastructure of agreements based on realistic accommodations rather than political rhetoric, and to provide important support for those standards of customary international law which had seemed to be slipping away.\(^{194}\)

In one further example, in 1988, the United Nations Centre on Transnational Corporations clearly affirmed that:

Fair and equitable treatment is a classical international law standard. As such, although not precisely defined, the principle has been shaped by State practice, doctrine and decisions of international tribunals… Classical international law doctrine normally considers certain elements to be firm ingredients of fair and equitable treatment, including non-discrimination, the international minimum standards and the duty of protection of foreign property by the host State.\(^{195}\)

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\(^{192}\) Pamela B. Gann, “The U.S. Bilateral Investment Treaty Program” (1985) 21 Stanford Journal of International Law 373 at 389 (emphasis added). It worth noting the description of the author in this article: Pamela B. Gann is Professor of Law at Duke University Law School. From January to July 1984, she worked wit the Investment Division of the United States Trade Representative while and International Affairs Fellow at the Council on Foreign Relations. Substantial parts of this article rely upon her work pertaining to U.S. bilateral investment treaties. (emphasis added).

As Gann explains, ibid 374, “the Office of the U.S. Trade Representative (USTR) primarily handles the negotiations of BITs”.

\(^{193}\) Denza & Brooks, n. 149, 911-12 (emphasis added).

\(^{194}\) Ibid 913.

\(^{195}\) United Nations Centre on Transnational Corporations, Bilateral Investment Treaties (Graham & Trotman, Boston 1988) 30-31 (emphasis added).
In summary, BITs were launched in response to NIEO and the ambiguous status of customary international law that existed by the second half of the 20th century. BITs, as originally conceived, were not “novel” in any relevant sense. They did not provide for investor-state arbitration, but only for traditional state-to-state arbitration. BITs did not embody standards more demanding than IMS, since capital exporting countries during this time were not fighting for such a thing. In the political context of the 1950s and 1960s, it is rather difficult to envision negotiators of capital exporting countries trying to impose a standard that would delegate to arbitrators the power to decide investment disputes according to whatever “fair and equitable” could have meant as an “autonomous” standard. Even more difficult is to envision negotiators of capital importing-countries accepting it.

This step-by-step bilateral plan to re-impose IMS to capital importing countries enjoyed only modest until the late 1980s. However—as Chapter 2 will analyze in detail—it eventually began to expand exponentially throughout the world. As a consequence, we live today in an era—the BIT generation—in which IMS, or even more demanding standards according to some, reign once more in international law. More than 2,500 BITs have enabled principles that were long resisted to be accepted today as general and irrefutable truths of the legal landscape.

5. UpdAting the Calvo Doctrine in the BIT Generation

This section moves from the descriptive to the normative. It claims that

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196 Additionally, all multilateral efforts failed, including: (1) Draft Convention on the Treatment of Foreigners, Paris (1928-1929); (2) Hague Codification Conference (1930); (3) the Havana Charter (1948); (4) the Economic Agreement of Bogotá (1948); and (5) the “International Convention for the Mutual Protection of Private Property in Foreign Countries”, promoted by the Society to Advance the Protection of Foreign Investments (1957). For this last effort, see Arthur S. Miller, “Protection of Private Foreign Investment by Multilateral Convention” (1959) 53 AJIL 371. See also, Walker, n. 151, 239-41.
the paradigm shift occurring after the end of the Cold War revisits several of the same questions that Latin American jurists and statesmen were attempting to resolve during the 19th century. Although the challenges we face today are very different from those of the 19th century, this section seeks to look into the past for lessons on the future. The central purpose is to update the Calvo Doctrine, and to assess the BIT generation according to the perspectives and values embodied in its original formulation.

What can we say today about the BIT generation as a pillar of the new world order in light of the *classic* claims made by Bello, Calvo, Guerrero and other Latin American statesmen and jurists? At the core of the Calvo Doctrine was equality between nations, and between aliens and nationals. From this historical perspective, the critical normative question should therefore be whether the BIT generation currently fosters, and will continue to foster, that universal value.

In my opinion, developing countries, have not frustrated the ideal of equality by the mere fact of signing BITs. The abstract principles set down in BITs do not constitute an abdication of Latin America’s 19th century heritage in this regard. After all, those principles *per se* are, as Reisman & Arsanjani remark, no more than mere “indulgences”.197 Indeed, in the absence of military self-help, Bello would certainly have adhered to principles as reasonable as FET/IMS, national treatment, and no expropriation without compensation. And, if international commercial arbitration were able to work as a truly neutral and reliable mechanism for dispute settlement, Bello would have not rejected it.

Yet, the reality is that BITs protect investment through highly open-ended terms. Although any of those terms is not objectionable in itself, the concrete jurisprudence resulting from them may easily end up posing a serious threat to developing countries’ sovereignty and independence. The point is that by signing BITs, developing countries gave rise to a dynamic process which has the ultimate potential to lead to either equality or inequality. As will be shown in Chapter 2 and 3, by adhering to such principles—particularly if they are considered not to be restraint by general international law and IMS—developing countries have institutionalized a process of judicial norm-creation whose final result is still largely uncertain.

If the BIT generation is going to be an instrument of global governance and expansion of the rule of law, rather than a set of privileges created and maintained to the exclusive favor of foreign investors, the regional history tells us that two minimal conditions of legitimacy must be fulfilled: first, BIT jurisprudence on basic substantive standards should not crystallize in more protective terms than those applied by the courts of developed countries toward their own national investors; and second, that BIT jurisprudence—if it complies with the first condition—should permeate developing countries’ legal systems, with the effect of improving the content of domestic constitutional and administrative law. In EU nomenclature, the goal is to avoid any potential reverse discrimination, where local citizens receive less favorable treatment than foreigners. This, succinctly, is the updated Calvo Doctrine.

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> Multiple mutual permeation is a good thing. Let us, where possible, promote it... [I]n conformity with the principle of equal treatment it is a good thing that persons who are in the same situation, irrespective of the legal area involved, receive equal treatment, first and
The updated Doctrine is not, in principle, concerned with IMS, but with the process of judicial norm-creation that results from excessively broad and undefined standards. There is, hence, a significant difference between the updated and original versions of the Calvo Doctrine. The main threat existing today is that BITs might be interpreted as providing standards higher than those generally applied in developed countries.

Undoubtedly, BITs require from States the creation, implementation, and proper management of functional domestic regulatory systems. They can therefore act as rule-of-law-enhancers, a desirable outcome. However, BIT jurisprudence can also end up crystallizing concrete rules that protect property rights and economic freedoms to a much greater extent than what constitutional and supreme courts in the U.S. and Europe have traditionally done. It is indeed somewhat shocking—and, at least once barred by the principle of allegans contraria non est audiendus—199—that a U.S. investor may lose a case against its government in the U.S. Supreme Court, a German investor may lose the same case in the Bundesverfassungsgericht (Constitutional Court), and a French investor may

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199 According to Bin Cheng, General Principles of Law: As Applied by International Courts and Tribunals (Grotius Publications, Cambridge 1987) 143, in the State-to-State context of diplomatic protection, this has indeed been an application of the principle of allegans contraria non est audiendus:

This principle was also applied by the German-United States Mixed Claims Commission (1922) in the Life-Insurance Claims Case (1924) to preclude a State from asserting claims which, on general principles of law, its own courts would not admit, for instance, claims involving damages which its own municipal courts, in similar cases, would consider too remote. Incidentally, this case also shows one of the means whereby general principles of law find their application in the international sphere. A State may not disregard such principles as it recognises in its own municipal system, except of course where there is a rule of international law to the contrary. (emphasis added).
lose it in the Conseil d’État; but, nevertheless, any of them may win it against a
developing country before a BIT tribunal.

Speaking very broadly, BIT jurisprudence can crystallize at two different
equilibríanone, the good case or BITs-as-developed countries-constitutionsal law-and-no-
more, in which BIT jurisprudence recognizes standards of protection of investments no
higher than those that state courts in developed countries apply to their own nationals;
and at the other extreme, the bad case or BITs-as-gunboat-arbitration, which
corresponds to a jurisprudence that converts BITs into a form of insurance for foreign
investors, where any diminution in value resulting from state action gives those investors
the right to be compensated.

The good case or BITs-as-developed countries-constitutionsal law-and-no-more
constitutes more than an aspiration based on the general principle of equality. It is also a
matter of positive law. I see no way to interpret BITs as giving foreign investors higher
protection than developed legal systems do. BITs embody IMS—including
expropriation with compensation, FET, and FPS—and IMS, as Borchard explains, are
essentially “general principles recognized by the domestic law of practically every
civilized country”.

Neither developed nor developing countries have domestic legal
systems characterized by a Lochnerian conception of property rights—that is, a court
stance that is “synonymous with inappropriate judicial intervention in the legislative

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200 I am following the classic 19th century Latin American characterization of diplomatic protection as gunboat diplomacy.
201 This proposition will be analyzed in detail in Chapter 6.
202 See n. 183.
203 See Lochner v. New York (1905) 198 US 45. In that case, the Supreme Court struck down a New York
statute establishing maximum hours for bakers. The right to contract affirmed in Lochner was later
expanded to cover property rights in Coppage v. Kansas 236 US 1 (1915).
process—and, accordingly, they could not have adopted such a strong commitment to the status quo when concluding BITs.

Like all developed legal systems, the BIT network must achieve an acceptable equilibrium between investments and the public interest. Most capital exporting countries have, in fact, been long committed to broader collective goals such as the protection of health, safety and the environment, and more generally, to personal autonomy and individual flourishing. The jurisprudence of the BIT generation, therefore, cannot adopt a libertarian stance that would generally be deemed incompatible with more progressive goals transcending the maximization of wealth.

The second condition of legitimacy—equality between aliens and nationals—is of domestic character; thus, developing countries must attain it via their own internal political processes. This condition requires that substantive BIT standards, once they have crystallized at a reasonable level according to the previous condition, must extend to all investors doing business in those territories. Constitutional equal protection provisions

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The conventional story of Lochner equates constitutional property with the substantive due process jurisprudence that was antire redistributive, politically motivated, unprincipled, and undemocratic. The term “Lochner”, in fact, is a trope signifying judicial activism protecting the property rights of a few at the expense of the democratic will of majorities.


205 Considering the European experience, BIT tribunals should conduct a form of “majoritarian activism”. Poiares Maduro, n. 198, 78 devised this concept, explaining it along these lines:

What the Court [ECJ] does when it considers Article 30 is not to impose a certain constitutional conception of public intervention in the market, but to compensate for the lack of Community harmonisation. This is why the regulatory balance set by the Court normally corresponds to the view of the Commission, and to the legislation of the majority of Member States. On the one hand, the Court is not imposing its own particular economic model of regulation. On the other hand, the Court does not accept State’s different economic models, even if non-protectionist. Its yardstick is what the Court identifies as the European Union majority policy, in this way subjecting States regulation to harmonisation in the Court. (emphasis added).
in developing countries must be taken seriously; nationals must receive the same
treatment as foreigners. 206

Unlike other commentators, I do not go so far as to claim that the procedural
safeguards that BITs confer to foreign investors should also be extended to domestic
investors. 207 My claim extends only to the key substantive standards of protection of
investment and property rights. Any policy that discriminates between national and
foreign investors, on a structural/constitutional level as basic as the standards of
protection of property rights and economic freedoms, should be deemed inappropriate.
As Been & Beauvais remark, “[t]his discrimination seems objectionable on its face” 208

Yet, even provided that standards of protection of property rights under BIT
jurisprudence are reasonable, how will these new standards be incorporated by
developing countries into their own legal systems? If we do not wish BITs to become
“legal enclaves” for foreign investors, 209 then the mechanisms for internalization and
implementation of these standards remain highly relevant concerns for the updated Calvo
Doctrine.

It would be somewhat naive to assume that international law can enhance
domestic legal systems—and the rule of law—merely by itself. Neither the “halo

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206 In the European context, Søren J. Schønberg, *Legitimate Expectations in Administrative Law* (OUP, 
New York 2000) 27, does not accept that reverse discrimination breaches the principle of equality.
207 See e.g. Wälde, n. 150, 188 (noting that the “aim should be an external governance discipline available
to both national and foreign investors—such as Article 1 of the Additional Protocol of the European
Convention on Human Rights”).
208 Vicki Been & Joel C. Beauvais, “The Global Fifth Amendment? NAFTA’s Investment Protections and
the Misguided Quest for an International ‘Regulatory Takings’ Doctrine” (2003) 78 New York University
209 The term was coined by Ronald J. Daniels, *Defecting on Development: Bilateral Investment Treaties
and the Subversion of the Rule of Law in the Developing World*, Draft (available at
effect”,210 the “desideratum effect”,211 nor the “signaling effect”212 possesses sufficient strength to introduce reasonable international standards into a country’s internal legal culture. Something more is required in order to fully exploit the BIT generation’s potential for enhancing the rule of law, while successfully avoiding the creation of “legal enclaves”.

The two cases represented by the internalization of the international law of human rights, and the “constitutionalization” of European Law, provide valuable lessons for the updated Calvo Doctrine. Following those examples, one useful policy might be to recognize BITs as self-executing treaties, that is, as treaties containing norms which are directly applicable to foreign investors before local courts.213

This policy, however, does not directly achieve equality. Even if BITs are self-executing, they continue to be lex specialis, applying only to foreign investors. In other words, because national investors are not treaty beneficiaries, they cannot claim any treaty violation before domestic courts. Nevertheless, this feature can produce a significant “communicating vessels” effect, in which BIT minimums are incorporated as “real domestic law” by domestic tribunals. Foreign investors would then be able to bring causes of action under BITs, in substitution for small and medium-size cases that

210 World Bank, *World Development Report* (OUP, New York 2005) 179 (“While ICSID is designed to encourage foreign investment, domestic firms can benefit from the halo effect provided by stronger constraints on arbitrary government action”). (emphasis added).
211 Sohn & Baxter, n. 65, 28 (“By the establishment of an international minimum standard, the law has not only protected aliens but has also suggested a desideratum for States in their relationships with their own nationals”). (emphasis added).
212 Wälde, n. 150, 188 (“The example effect of treaty-based contract protection is likely to have an indirect effect also on the treatment of domestic investors, as it signals to the host-State institutions what a proper, international and universal standard of governance is. Such signaling effect provides a benchmark for domestic judicial procedures as well”). (emphasis added).
otherwise would have been litigated not in international arbitral tribunals, but under domestic constitutional and administrative law schemes.

This solution does not involve a mere legal technicality. As the history of European law illustrates—albeit in a very different historical, institutional and legal setting—a “direct effect” policy can have powerful implications for governance in domestic legal systems. Domestic tribunals, working as international tribunals, would begin to develop jurisprudence that would inevitably cross-fertilize domestic law with elements and principles of international law. As a result, international law and institutions would no longer be seen to represent esoteric categories separate from the domestic political and legal process.

But, more importantly, domestic politics will be more effective in its role if BITs are self-executing. Only when domestic tribunals apply two different standards, will domestic constituencies fully realize the need for a serious revision of their own standards in those areas where such gaps disadvantage nationals. Intense pressure will then fall upon the political branches of government to reform the legal system in order to forestall future discrimination against national investors.

214 See J.H.H. Weiler, “The Transformation of Europe” (1991) 100 Yale Law Journal 2403 at 2413-14, who explains how the doctrine of direct effect played a crucial role in the “constitutionalization” of the Community Legal Structure. See also, Alex Stone Sweet, The Judicial Construction of Europe (OUP, New York 2004) 64 et seq (explaining how supremacy, direct effect, and related constitutional doctrines created by the ECJ “reconfigured the normative foundations of the Community, thereby upgrading the capacity of the legal system to respond to the demands of transnational society”; ibid 65). For more detailed legal studies of the doctrine of direct effect, see Paul Craig & Gráinne de Búrca, EC Law. Text, Cases, and Materials (OUP, New York 1995) 151 et seq, and Brunno de Witte, “Direct Effect, Supremacy, and the Nature of the Legal Order” in Paul Craig & Gráinne de Búrca (eds), The Evolution of EU Law (OUP, New York 1999) 177.

In sum, it is essential that we update the Calvo Doctrine to specifically meet the governance dilemmas that the BIT generation presents to us. Those dilemmas remind us, as Keohane remarks, that “although institutions are essential for human life, they are also dangerous”. As explained, the excessively broad principles contained in BITs can lead to a Lochnerian BIT jurisprudence that protects investors to a higher extent than the rules and principles currently in place in mature regulatory capitalist nations. From an international perspective, this is the greatest danger, and it presents a serious risk to the achievement of equality and the rule of law.

**Conclusions. Building a Normative Stance Based on Equality**

It is not unusual to hear the adage that globalization produces inequalities. Whenever and wherever this is true, it is the responsibility of the legal community, among others, to help to overcome those undesirable externalities of globalization. In the particular case of the BIT generation, the history of Latin American legal thought assists us coping with the inequalities and other normative puzzles it brings with it.

In analyzing the present state of affairs, this chapter has stated that the BIT generation constitutes a new paradigm which puts forward similar questions and dilemmas to those that preoccupied Andrés Bello and other Latin American jurists statesmen during the 19th century. Our responsibility must then be to update the Calvo Doctrine, and define—from the historical perspective outlined above—certain basic conditions of legitimacy with which the BIT generation must comply.

Following a careful study of the regional legal tradition of Latin America with respect to the field of state responsibility, this chapter has presented two minimal

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216 Keohane, n. 14, 1.
conditions of legitimacy, which the BIT generation must meet in order to aspire to be considered a just and successful instrument of global governance and the rule of law. First, BIT jurisprudence should not crystallize rules and norms for protection of property rights in terms more rigorous than those generally applied by domestic courts in developed countries. Second, the substantive standards of BITs, if crystallized at a reasonable level, should be extended to nationals and all investors doing business in developing nations. The first condition—the one that we must demand from the investment treaty law jurisprudence, as opposed to the second, which is of domestic nature and depends on the will of developing countries—define the normative stance from which this work will assess the BIT generation.

The updated Calvo Doctrine differs from the original 19th century version. Instead of arguing that national treatment is the maximum, this updated version claims that BIT minimums should be reasonable as compared to domestic public law in developed countries, and if so, should be extended to domestic investors. More than a century ago, Roth commented that “South America was and remains the centre of the propaganda which maintains that the alien can have no different nor greater rights than the nationals”. The new Calvo Doctrine intends to rescue that tradition, but this time by leveling the playing field in an upward, and not downward, direction.

A BIT jurisprudence equilibrium like the one envisioned by the updated Calvo Doctrine should not be underestimated. The protection of property rights and economic liberties in developed countries, as practiced today, has proven to be a more than sufficient condition for the healthy performance of regulatory capitalist societies. And,

217 Roth, n. 16, 69.
imposing a reasonable jurisprudence top-down from the international level—by virtue of the second minimal condition of legitimacy—may be an effective means of bypassing the powerful practices of local elites and special interest groups, who are some of the main culprits responsible for the institutional weaknesses of developing countries.\footnote{John O. McGinnis & Mark L. Movsesian, “The World Trade Constitution” (2000) 114 Harvard Law Review 512, make a similar argument in the context of the WTO. They argue, ibid 512, that “the WTO can be understood as a constitutive structure that, by reducing the power of protectionist interest groups, can simultaneously promote international trade and domestic democracy”. For the EU case, see Karl-Heinz Ladeur, “Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?” in Karl-Heinz Ladeur (ed), Public Governance in the Age of Globalization (Ashgate, Burlington 2004) 89 at 117-18 (“In spite of the rhetoric of democratic decision-making, political processes in Member States are increasingly characterized by a dominance of special interest groups. This is due to the fact that the integrative function of representative ‘encompassing’ groups (Olson) is breaking down, whereas constraints of reciprocity and compliance may exclude narrow short-term interests at the European level”).} The political process in many of those countries will continue to be slow in enhancing the rule of law. The international legal process represents one possible—if admittedly, partial—solution to this problem.

Keohane has noted that “[i]f global institutions are designed well, they will promote human welfare. But if we bungle the job, the results could be disastrous”.\footnote{Keohane, n. 14, 12.} The Calvo Doctrine, duly updated, tells us what we should demand from the BIT generation: a commitment to equality and to the rule of law, and ultimately, to personal autonomy and individual flourishing. Excessive protection of property rights and investments, and the corresponding limitation of the State’s power to pursue public interest regulation, represent real threats to these commitments. Again, as Keohane reminds us, “to make a partially globalized world benign, we need not just effective governance, but the right kind of governance”.\footnote{Ibid 1.}