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The Controversies and Conflicts

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All of the efforts I put into this book are dedicated to
Helen and Jean Georges Mourra

Mary Helen Mourra

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Introductory Note

By Mary Helen Mourra

Over the past two decades, Latin American States have signed more than five hundred bilateral investment treaties with countries around the world. Bilateral investment treaties are legal instruments signed by two countries guaranteeing certain reciprocal rights and protections to investors of one Contracting State in the territory of the other. These protections generally include the guarantee of fair and equitable treatment, protection from expropriation, guarantees of non-discrimination, the guarantee of free transfer of means, and protection and security for the investment. The treaties also generally include a dispute-resolution provision whereby an investor who alleges that his rights under the treaty have been breached, may have recourse to international arbitration. Often, bilateral investment treaties refer to arbitration under the auspices of the World Bank's International Centre for the Resolution of Investment Disputes (ICSID).

Prior to the establishment of these instruments, in the event of disputes with a State over an investment, foreign investors operating in Latin America had little recourse other than to avail themselves of the jurisdiction of the courts of host States or to appeal to their own governments for diplomatic support. Diplomatic recourse was uncertain and depended on the interest, willingness, and terms prescribed by the investor's State to redress the harm. Diplomatic intervention politicized the dispute and, because it often involved armed intervention or economic blockades, it sowed the seeds of more than one hundred years of bitterness that characterized Latin America's relationship with the capital-exporting States that were entangled in its political and economic development since the end of

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colonialism. Those countries include France, Germany, the United States, and to a lesser degree, Spain.

Foreign parties to litigation in Latin American courts often complain of the biases against them and the parochial attitudes of judges. In Latin America, the legal tradition is to define commercial rules in detail without allowing for flexibility in respect to their interpretation. Governing contracts and commercial transactions are rigid, black-letter rules that do not often give way to modern international commercial concepts of contractual freedom. Formal requirements generally still govern the structure of court proceedings. Judges strictly interpret the rights of the parties, the rules of evidence and discovery, and the scope of judicial review. Parochial attitudes on the part of judges, as well as unjustified delays and biases in proceedings, have been the subject of grievances on the part of commercial parties in Latin America as well as their commercial counterparts in other parts of the world who, until recently, had no alternative but to endure them.

The propositions embraced by bilateral investment treaties sought to remove investors from these constraints and biases and to put disputes between foreign investors and States on a level playing ground, most prominently by removing them to a neutral forum. Specifically, these instruments promised to protect investors from harm sustained by foreign investments as a consequence of politically motivated or discriminatory acts of the State, and to ensure compensation in such cases.

In the last decade, however, Latin American States have found themselves having to defend an ever-increasing number of arbitrations before international tribunals involving claims amounting to millions and even billions of dollars, brought by foreign investors. In many cases, the disputes have arisen from regulatory measures involving matters of public interest, including general welfare, health, environment, security, or economy. Investors claim these measures have affected or interfered with their investments and have resulted in monetary damages. The awards rendered against States in these cases must ultimately be paid for by citizens of the States. These arbitrations have brought to the surface the need to define the limits of investor rights and protections more clearly when balanced against the State's duties and obligations to its citizens. The doctrine of sovereign immunity, in the classic sense, provides that a sovereign cannot be sued in its own courts or in any other court without its consent. By signing bilateral investment treaties, States have clearly consented to submitting to the authority of arbitral tribunals in treaty-based claims brought by investors. In the context of arbitrations, important legal questions have arisen regarding the limitations and conditions of that consent as well as the applicable standards for reviewing investor-State claims.

Chapter One of this book explains the background, history, and evolution of the relationships between foreign investors and Latin American States. It also puts the present state of those relationships into perspective, a state which is defined, in large part, by modern investment treaties. It discusses some of the controversies and conflicts that are emerging in investment disputes, as well as the serious academic debates regarding the varying interpretations of the terms of these treaties

by different arbitral tribunals. Chapter Two surveys the forty-three ICSID cases concluded to date with findings against Latin American States, and the cases that have been dismissed on jurisdictional grounds in the last decade. Chapter Four provides a detailed analysis of provisions regarding non-precluded measures, the state of necessity defence, and State liability for harm sustained by investors in exceptional circumstances. It examines the protection that may be available to States when responding to emergencies or exceptional situations in which investor interests may be harmed without subjecting the State to liability. It argues that both treaty law of the bilateral investment treaty regime itself and customary international law may provide States with independent defences to the wrongfulness of their actions and may alleviate any obligation for States to compensate investors in the case of exceptional threats. It argues that while treaty and customary law on this question is both clear and well-founded, the approach taken by ICSID tribunals to date has been problematic. Chapter Five is a guide for government officials managing investment treaty obligations and investor-State disputes. It highlights facts and figures that establish that there is a compelling need for States to develop greater awareness of their investment treaty obligations with a view to diminishing the likelihood of claims, and properly managing those claims that are submitted to arbitration. It provides a brief history and outline of international investment agreement protections and describes the stocktaking process that should form part of any State's efforts to manage its investment treaty obligations and claims by investors that the State has breached those obligations. It presents nine additional specific recommendations for the effective administration of State obligations and investor-State disputes. It also highlights selected procedural and substantive issues that States should consider in connection with their investment obligations and the handling of claims. The final sections briefly consider some options available to address investment treaty provisions that States find troubling and the utility and effectiveness of the recommendations presented.

Chapter One

The Conflicts and Controversies in Latin American Treaty-Based Disputes

By Mary Helen Mourra

I INTRODUCTION

In the late 1980s and early 1990s, Latin American countries began signing bilateral investment treaties (BITs). The move was a relatively abrupt shift in foreign policy for the region and went hand-in-hand with the adoption of policies opening Latin American economies to foreign investors, the signing of international conventions that the region had long resisted, and the implementation of laws that would guarantee protections and special treatment for foreign investors in the event of disputes between the investors and States. These changes came about as the region was struggling to emerge from the fiscal shocks of the Latin American Debt Crisis which hit hard in the 1980s and; for some countries, began as early as the late 1970s.

In the 1960s and 1970s, many Latin American countries – especially Argentina, Brazil, and Mexico – borrowed extensively to support development projects and programs in their countries. A shift in financial lending institution policies toward the region in the mid-1970s made access to greater loans possible, however, through commercial banks as opposed to direct loans from the International Monetary Fund (IMF) and the World Bank, and with a much higher

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debt service cost. Latin American debt quadrupled from USD 75 billion in external debt in the mid-1970s to USD 315 billion by the early 1980s – twice as much as the region's gross domestic product for that period. With trade imbalances and an advancing world recession raising United States and European interest rates, many of the region's countries could no longer pay their foreign debt and the situation finally imploded in the 1980s.

The lending policies of world financial institutions took a further turn in the 1980s; many loans became conditional upon the borrowing country's adoption of privatization programs and signing treaties and conventions that would guarantee protections to foreign investors in those countries, as well as assuring the use of neutral forums for dispute resolution arising from the new investor-State relationships. Many Latin American countries, desperate for a solution to the crisis, were eager to sign BITs in order to attract foreign direct investment (FDI) and foreign capital to privatization programs in the public sector, including electricity, gas, telecommunications, water, and sewerage services, among others.

While FDI to the region reached unprecedented levels initially following the conclusion of investment treaties, States did not envisage the full legal and financial consequences that signing BITs would ultimately entail; specifically, that foreign investors would bring a wide range of claims against host States for violations of the substantive rights that are listed in the treaties.

Due to the fact that most BITs provide for arbitration administered under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), the majority of these disputes are now pending in ICSID tribunals. The subject matter of the arbitrations often implicate natural resources and the State's industrial infrastructure, which are critical to the economic sovereignty of the country. In these disputes, investors often charge States with liability for actions and policies affecting or interfering with foreign investments, including measures taken in response to serious political or economic crises. Privatization of public sector enterprises – which, historically, rested within the exclusive jurisdiction and scrutiny of State courts – is now subjecting State regulatory measures involving their administration to international scrutiny as well, and States are increasingly being brought to defend claims of 'indirect expropriation' wherein regulatory measures taken by the State are said to effectively interfere with and harm the value of the investment.

Inconsistent decisions rendered by arbitral tribunals regarding State liability, especially in disputes arising from substantially the same or similar circumstances, have become problematic in recent years particularly in light of the already challenged relationship between certain Latin American countries and capital-exporting countries. Inconsistent decisions have an impact upon the overall legitimacy of the dispute resolution system and give rise to critical questions regarding the viability of privatization programs, as well as the adequacy of international arbitration in addressing a State's right and authority to regulate matters involving its environment, economy, public order, or matters concerning social welfare.

II HISTORICAL BACKGROUND OF FOREIGN INVESTMENT AND INTERVENTION IN LATIN AMERICA

Historically, foreign investment in Latin America has been characterized by a volatile relationship between host countries and investors, filled with revolutions, foreign interventions, and default on foreign debt. The crumbling of European colonies in Latin America in the 1800s brought the United States and European nations aggressively into competition to secure access to the continent's vast natural resources and markets.[1] Many countries, particularly in Central America and the Caribbean, were dependent upon the importation of foreign capital and energy, first from Europe and, thereafter, in the twentieth century, from the United States.[2] The relationships between foreign investors and States were defined in a multitude of government contracts and concessions for exploitation of natural resources or the operation of public services. The United States policy in the region was initially characterized by its fear that Europeans would return to try to exercise economic control over their former colonies. United States President James Monroe articulated the Monroe Doctrine in 1823 to demarcate United States hegemony over the region, declaring that Latin America was no longer open to colonization by Europeans; he professed to 'protect' the Americas as a region for democracy.[3] This ideology became the basis of the United States' perception of the role it should play in the region, and it formed the basis of its policy in Latin America over the next century, constituting a history of strong-arm diplomacy and military intervention.

Foreign dominance over the exploitation and extraction of natural resources fostered an embittered interdependence between Latin American governments and foreign investors from the beginning of their independence from colonialism. State-investor dispute resolution mechanisms for the nineteenth and early twentieth centuries generally featured physical seizures of property, expropriations, nationalizations by the host States, and, in response; armed interventions and embargoes by the home countries of the investors demanding redress for claims or unpaid debt. It was a policy that came to be known as 'gunboat diplomacy'.

Between the Spanish-American War and the Great Depression, the United States sent troops into Latin America on more than thirty-four occasions in the name of protecting United States investments in the region.[4] France, Germany, Italy, and Spain also frequently used armed intervention or blockades to redress the claims of their nationals or to collect unpaid debts. It was in this context that the Calvo Doctrine, discussed in detail below, gained support in Latin America. It was not

1. See generally, SAMUEL FLAGG BEMIS, THE LATIN AMERICAN POLICY OF THE UNITED STATES (1943).
2. Id.
3. See generally, ALBERT BUSHNELL HART, THE MONROE DOCTRINE: AN INTERPRETATION (1916); GRETCHEN MURPHY, HEMISPHERIC IMAGININGS: THE MONROE DOCTRINE AND NARRATIVES OF U.S. EMPIRE (Duke University Press, 2005).
4. Samuel Flagg Bemis, *supra* n. 1, at 230.

until 1936 that the United States formally renounced its 'right' to armed intervention to protect the investments of its citizens.[5]

The United States' renunciation of its foreign policy of gunboat diplomacy, however, did not put an end to the strained relations between foreign investors and Latin American governments. By that time, the Calvo Doctrine had been incorporated into the legal systems and institutions of all Latin American countries and the predominant jurisprudence was that foreign investments were to be governed exclusively by the domestic law of the host State and that disputes arising from investments could only be resolved by the State's domestic courts.

A THE CALVO DOCTRINE

The recent rise in populism in Latin America[6] and increased hostility toward investors in Bolivia, Ecuador, Nicaragua, and Venezuela over the past few years has been accompanied by a resurgence of support for the principles of the Calvo Doctrine, which governed investment laws in most Latin American countries until the 1990s. The doctrine, promulgated in 1868 by an Argentine legal scholar, Carlos Calvo, was premised upon the notion that jurisdiction over investment disputes rests with the domestic courts of the host State and that foreign investors are entitled to the same rights as nationals.[7] Carlos Calvo gained considerable attention in 1868 for his treatise on international law entitled *Le droit international théorique et pratique*, which was first printed in France just after Argentina recovered from a period of intense political turmoil.[8] According to the Calvo Doctrine, national courts have exclusive jurisdiction over any disputes between foreign investors and a sovereign State, and foreign investors are precluded from seeking diplomatic protection.

The doctrine contains both substantive and procedural elements. Substantively, the doctrine emphasizes that host States shall not grant any rights or benefits to foreigners that exceed those accorded to their own nationals. This specifically implies that the State may grant no special privileges or incentives to foreigners and foreign investors, effectively rejecting the so-called 'international minimum standard'.[9] Procedurally, the doctrine emphasizes that foreigners shall not be entitled to any remedies other than those available to nationals of a host State. It

5. Id.
6. See generally, LATIN AMERICAN ECONOMIC OUTLOOK (2008) 33, 34 (OECD Pub. 2007) (discussing the rise in populism and how the Latin American view of democracy hit an all-time low in 2001 as a consequence of failed expectations).
7. See Samuel Flagg Bemis, *supra* n. 1, at 230-234.
8. Id.
9. See Shan, Wenhua, *Is Calvo Dead?* AM. J. COMP. L. 55 (2007): 123, 126. The concept of a minimum standard of treatment is found in the vast majority of BITs and is derived from customary international law. Essentially, it means that the host State will accord treatment to investments of foreign investors in accordance with the international norms encompassed by the minimum standard of customary international law. States acting in bad faith or in a discriminatory manner, for example, would fall short of that standard.

therefore implies a rejection of both non-local remedies (i.e., foreign or international remedies including diplomatic protection or military intervention) and non-local laws (i.e., foreign or international law) as applicable laws.[10] One scholar describes the doctrine as 'a very classic, state-centric view of international law, based on an absolutist view of state sovereignty and equality of states'.[11]

The relevance of the principle is underscored by the history of foreign investment and intervention in Latin America. The doctrine would prove to become the single most influential legal doctrine affecting the development of Latin American laws pertaining to foreign investors in the twentieth century. It further promulgated the notion of absolute equality of States and the principle of sovereign immunity from foreign interventions. The doctrine became incorporated into most of the constitutions of Latin American countries.[12]

B SHIFTING POLICIES TOWARD FOREIGN INVESTMENT

The rapid influx of bilateral investment agreements concluded in the 1990s by Latin American countries signified a change in official policy with regard to the rights of foreign investors and went hand-in-hand with a change in policy with respect to international arbitration – after more than one hundred years of resistance and hostility to international arbitration. It signified, on many levels, that Latin America had resolved that submitting to international arbitration would serve its interest in expanding economic growth and promoting trade and development. Many Latin American States rapidly began ratifying the relevant conventions on international commercial arbitration and the recognition and enforcement of foreign arbitral awards during the same time period. Today, all Latin American States are parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the 'New York Arbitration Convention') and the Inter-American Convention on International Commercial Arbitration (the 'Panama Convention'). Most have signed the International Convention on the Settlement of International Disputes between States and Nationals of Other States (the 'ICSID Convention').[13] Most have either amended old arbitration laws or adopted new arbitration laws that reflect modern international standards recognizing arbitration as a valid and enforceable mechanism of dispute resolution for international commercial disputes.

In order to understand the impact of changes in Latin American policies, it is important to distinguish arbitration involving States and foreign investors from private international commercial arbitrations. In general, it is fair to say that, as far

10. Id.
11. Id.
12. See SUBRATA ROY CHOWDHURY, ERIK DENTERS & P. J. I. M. DE WAART, THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW (2002): 116.
13. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, entered into force on 14 Oct. 1966. Mexico and Brazil are not parties to the ICSID Convention and it is unlikely that either will join in the near future. See n. 37 *infra*.

as arbitrations involving strictly private commercial parties are concerned, Latin America has advanced significantly in achieving greater acceptance of arbitration as an adequate and effective form of dispute resolution. Parties to arbitrations are now able to obtain support and assistance from national courts for the purposes of recognizing and enforcing arbitral awards, and respecting the general principles and standards reflected in the relevant international conventions on arbitration, including the principle of *Competenz-Competenz*, which upholds the authority of arbitrators to decide on matters regarding their own jurisdiction, and the freedom of parties to choose as to the terms of their transactions. Although the advances in private international arbitration are not discussed in this book, the significance of this important achievement for the region should not be overlooked despite the more apparent setbacks which, for the most part, have related to arbitrations involving State parties and foreign investors under BITs.

C SOVEREIGNTY OVER NATURAL RESOURCES

Several proposals for a New International Economic Order (NIEO) were made by developing States through the United Nations Conferences on Trade and Development (UNCTAD) in the 1960s and 1970s which would collectively re-define the economic rights of States, including the recognition of sovereign rights over natural resources. These efforts were largely seen as being in reaction to the Bretton Woods system which, until then, established the rules for commercial and financial relations between the world's industrial States in the post-World War II era, and was seen by the developing world as being exclusively to the benefit of those States that had created it – in particular, the United States.[14] The changes proposed by developing States were rejected by industrialized States.[15] In 1962, developing States, along with the vast majority of States across the world, voted in the 'United Nations General Assembly on the Resolutions on Permanent Sovereignty Over Natural Resources' and later, in 1974, on a resolution establishing the Charter of Economic Rights and Duties of States.[16] The principles embodied in these resolutions, set forth below, contrast with the general doctrine of BITs, which a decade or so later, many of the same States would begin signing.

The 1962 General Assembly Resolution on Permanent Sovereignty over Natural Resources is a declaration of the rights of States in respect to natural resources and provides, inter alia, that 'exploration, development and disposition of resources ... should be in conformity with the rules and conditions' of the State

14. See OSCAR SCHACHTER & CHRISTOPHER C. JOYNER, THE UNITED NATIONS LEGAL ORDER (1995): 535, 536.
15. See JERZY MAKARCZYK, PRINCIPLES OF NEW ECONOMIC ORDER (1988): 85, 86.
16. On 12 Dec. 1958, the United Nations General Assembly passed Resolution 1314(XIII) establishing a Commission on Permanent Sovereignty over Natural Resources and requested it conduct a full survey of the status of the rights of people and nations to permanent sovereignty over natural wealth and resources. The establishment of the commission was viewed by industrialized nations as a threat to foreign investors. See NICO SHRIJVER, Sovereignty Over Natural Resources: Balancing Rights and Duties (1997): 57, 58.

and that there should be equitable distribution of profits between investors and the host State derived from investments in natural resources.[17]

D THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

In 1974, the United Nations General Assembly passed a resolution establishing The Charter for Economic Rights and Duties of States (CERDS).[18] The Charter

17. Resolution on Permanent Sovereignty over Natural Resources, U.N.G.A. Res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962). The resolution states:
    (1) The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
    (2) The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
    (3) In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.
    (4) Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.
    (5) The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.
    (6) International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.
    (7) Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.
    (8) Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.
18. United Nations General Assembly Resolution A/RES/29/3281 (XXIX), 12 Dec. 1974. The vote was called for on 18 May 1972, when the United Nations Conference on Trade and Development, issued a resolution stressing 'the urgency to establish generally accepted norms to govern international economic relations systematically' and stating 'that it is not feasible to

contains many of the principles of the Calvo doctrine and has been described as a further effort by developing countries to push the Calvo doctrine in the United Nations.[19] The concept of a charter of economic rights for States was part of an effort to establish a new economic world order in which the developing world would enjoy greater participation and benefits.[20] The charter reiterates the principles of sovereignty, territorial integrity, political independence of States, and principles of non-intervention while rejecting attempts at 'hegemony over the region'.[21] One hundred twenty States voted in favour, six against, and ten abstained. The vote was described as 'a centrepiece of what has come to be called the NIEO'.

Articles 2(1) and 2(2) of the Charter are restatements of the principles of the Calvo Doctrine:

(1) Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

(2) Each State has the right:

(a) To regulate and exercise authority over foreign investment within its national jurisdiction in *accordance with its laws* and regulations and in conformity with its national objectives and priorities. *No State shall be compelled to grant preferential treatment to foreign investment*;

(b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;

(c) *To nationalize, expropriate or transfer ownership of foreign property*, in which case *appropriate compensation should be paid* by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the *question of compensation* gives rise to a controversy, it *shall be settled under the domestic law* of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. (Emphasis added.)

The establishment of the Charter appeared to be a victory for developing countries which, for the most part, adopted the view that foreign investments should be governed by national laws; foreign investors should not enjoy more rights or privileges than nationals; and compensation should be determined by national laws as opposed to customary international law.[22] The vote was rejected by industrialized States on that very basis. Developing States argued that the vote evidenced customary international law because it demonstrated the overwhelming agreement of States as to what laws should govern expropriation and compensation involving foreign investments. [23] Developed States, on the other hand, argued that the Hull standard for compensation represented customary international law because it was increasingly being incorporated into international treaties. If anything is clear, it is that the vote was an attempt to reject the position that the Hull standard reflected customary international law.[24] The standard of compensation in the NIEO Charter

establish a just order and a stable world as long as a charter to protect the rights of all countries, and in particular, the developing States, is not formulated'. United Nations Conference on Trade and Development, Resolution 45 (III) of 18 May 1972. The resolution was preceded by a series of United Nations resolutions reiterating the need to establish a charter that would 'constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries'. See U.N.G.A. res. 3037 (XXVII) of 19 Dec. 1972, U.N.G.A. res. 3082 (XXVIII) of 6 Dec. 1973, and U.N.G.A. res. 3201 (S-VI) and 3202 (S-VI) of 1 May 1974.

19. See A.J. Van Den Berg, International Commercial Arbitration: Important Contemporary Questions (2003) 396.

20. In 1981, one of the editors of the American Journal of International Law described the vote as 'Signaling the end of complete Northern hegemony and the emergence of a new interdependence of power and wealth.' This NIEO Charter raises fundamental questions about what is fair and just, quintessentially legal and moral questions that, in Ali Mazrui's well-chosen words, mirror a Third World 'caught between the indignity of charity and the ambition of economic justice'. See Burns H. Weston, *The Charter Of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, Am. J. Int'l L.* 75 (1981) 437 (citing Mazrui, 'Panel Discussion On The New International Economic Order', in *The New International Economic Order: The North-South Debate*, ed. J. Bhagwati (1977), 371, 374.

21. Ch. 1 of the Charter states: 'Economic as well as political and other relations among States shall be governed, inter alia, by the following principles ... Sovereignty, territorial integrity and political independence of States ... Sovereign equality of all States ... Non-aggression ... Non-intervention ... Mutual and equitable benefit ... Peaceful coexistence ... Equal rights and self-determination of peoples ... Peaceful settlement of disputes ... No attempt to seek hegemony and spheres of influence ...'.

22. Burns H. Weston, *supra* n. 20, at 438–439, stating:
A break from the past seems clear. The so-called public purpose (or public utility) doctrine is disregarded. The 'doctrine of alien nondiscrimination' is ignored. And the much heralded international law principle of compensation appears to be 'domesticated', i.e., rejected as an international regulatory norm. Provoking not a little consternation and complaint among capital-exporting constituencies, the provision is a vivid demonstration, even if primarily a symbolic one, of the central NIEO demand for restructured perspectives and patterns of international economic order, as most recently, albeit rather ineffectually, evidenced by the General Assembly's 11th Special Session on international development issues (which anticipated the upcoming 'global negotiations' on international co-operation and development). (Citations omitted.)

23. See generally Nico Schrijver, Sovereignty Over Natural Resources; Balancing Rights and Duties (Cambridge Press: 1997) (discussing the evolution of the concept of permanent sovereignty over natural resources in international law, opining that it did not evolve in a vacuum).

24. Burns H. Weston, *supra* n. 20, at 438–439 (indicating that the Chairman of the UNCTAD working group charged with drafting the Charter stated that the wording was not intended to diminish the remedy or to explicitly omit references to international law but rather 'to avoid the inference, per the industrial West, that appropriate compensation ... in accordance with international law 'necessarily means, specifically, 'prompt, adequate, and effective compensation'.) Id. (quoting Ambassador Jorge Castaneda).

is arguably even more limited than the standard in UNGA resolution 1803 (XVII) because it qualifies the remedy for nationalization and expropriation even further with the use of the word *should*, providing that 'appropriate compensation *should* be paid by the State'.[25]

Many developing States argue that Article 2 of CERDS precludes granting investors a firm right to international arbitration as in included in most BITs.[26] Although the vast majority of States voted in favour of the resolution, the standards for expropriation and compensation expressed in the Charter are, arguably, not reflective of customary international law because they do not, and did not then, indicate the *actual practice* of States.[27] The principle of sovereignty over natural resources continues to be reflected nonetheless in many resolutions taken by the General Assembly of the United Nations.[28] Scholars differ in opinion in respect to the status of that principle. Some argue that it is *ius cognens*, a fundamental principal of international law which is accepted by the international community of States as a norm.[29]

The principle of permanent sovereignty over resources is said to exist at three levels: the international level, at which the principle was formulated; the national

25. See Art. 2(2), Charter for Economic Rights and Duties of States. Art. 2.2(C) gives states the right 'to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation *should* be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent'. See also Weston, id. at 449 (discussing the tenuous right to compensation under the Charter.)
26. See Subrata Roy Chowdhury, Erik Denters & P.J.I.M. de Waart, *supra* n. 12, at 117.
27. See Burns H. Weston, *supra* n. 20, at 453 stating 'if we contemplate the truism that the venerable "legal question/political question" distinction invariably produces results that can be rationalized only by knowing the relevant identifications, expectations, and demands of the decision maker involved, it is not enough to indulge in normatively ambiguous classification and terminology, which tends more to obfuscate than to clarify. What is needed is frank recognition that, as Lewis Carroll's Humpty Dumpty would tell us, a "charter," "declaration," or "resolution" will be called "binding" or "recommendatory" depending largely upon one's policy preferences, qualified by processes of "reciprocal claim and mutual tolerance," and that therefore *it is the actual practice of states and other actors (and the policy reasons underlying that practice) that finally determines whether the NIEO Charter in general, and Article 2(2) (c) in particular, have "binding," "recommendatory," or no effect whatsoever*' (emphasis added). See also Rudolf Dolzer, 'New Foundations of the Law of Expropriation of Alien Property', *Am. J. Int'l. L.* 75 (1981): 553 (stating that neither the Calvo Doctrine nor the Hull Standard represented customary international law at the time, but that the practice of States demonstrates that customary international law falls somewhere between the two standards).
28. See generally Legal Opinion of United Nations Office of Legal Affairs in Respect to the Legality of the Oil-Contracts Signed by Morocco, addressed to the United Nations Security Council, S/2002/161, U.N.S.C.S/2002/161 02/12/ 2002 *available at* <www.wsahara.net/legalcounsel.html>. See also UNGA Res. 62/181, 19 Dec. 2007. In a recorded vote, the General Assembly adopted a resolution that reaffirmed the right of permanent sovereignty of the Palestinian people and the Arab population of the occupied Syrian Golan over their natural resources. The Assembly took that action by a recorded vote of 166 in favour and 7 against (Australia, Canada, Federated States of Micronesia, Israel, Marshall Islands, Palau, United States), with 6 abstentions (Cameroon, Cote d'Ivoire, Fiji, Nauru, Tonga, Vanuatu) (Annex I).
29. See Subrata Roy Chowdhury, Erik Denters & P.J.I.M. de Waart (discussing the principles embodied in the CERDS and the NIEO declaration), *supra* n. 12, at 37.

level, incorporating the principle into national constitutions and laws; and the contractual level, incorporating the principle into concession agreements.[30]

E The Latin American Debt Crisis

Globalization and the increased interdependence of States necessitated a complete transformation, in many respects, of the economic structure and legal processes of countries in order to facilitate economic intercourse. Effective processes of trade necessarily hinge upon an adequate, efficient, and neutral forum for adjudicating disputes that arise in the process. The decision of Latin American States to conclude the relevant conventions and BITs evidences recognition of that need. However, the decision was also influenced by economic necessity in most cases. Since its independence, Latin America has relied heavily on foreign capital to finance its development. While foreign capital helped foster development in Latin America, it frequently burdened the continent with foreign debt. The relationship between Latin American States and foreign capital sources explains, at least in part, the reason for the years of hostility toward arbitration as well as its eventual acceptance of it.

The Latin American Debt Crisis of the 1980s brought many of the region's States to unprecedented levels of financial ruin. As mentioned previously, in the 1970s and 1980s, financial lending institutions began making loans conditional on stringent requirements that often led States to short-term, high-interest, private loans which, by the 1980s, mushroomed to insurmountable levels of debt.[31] The crisis became official in 1982 when Mexico first announced that it could no longer service its foreign debt.[32] Coupled with a world economic recession, brought on in large part by the petroleum crisis of the 1980s, foreign credits to the region came to a halt and lending institutions began to deny further credit to Latin American countries. International financial lending institutions began to formulate new rules and policies for loan programs for Latin American countries. Many countries, jolted by the crisis, were ready to accept the new conditions set by these institutions and agreed to adopt economic plans that were designed to attract FDI and guide them out of their indebtedness.

One of the most famous and most controversial economic plans that was said to have been imposed on Latin American States during that period became known

30. See M. Somarajah, The International Law on Foreign Investment (2004) 43 (stating that this principle 'has also led to the drafting of contracts which ensure that the host state has more control over the process of exploitation of minerals. The production sharing agreement in the oil industry provides the best example. In the mineral resource industry, which it was principally designed to affect, the doctrine of permanent sovereignty over resources reflects a change that is now well established. In any event, it merely asserts a truism in international law that the sovereignty of a state includes control over all persons, incidents and substances within a state unless such control has been removed by a treaty').
31. See generally Alexandre Theberge, The Latin American Debt Crisis of the 1980s and Its Historic Precursors (1999) available at <www.columbia.edu/~ad245/theberge.pdf> (last visited 4 May 2007).
32. Id.

as the 'Washington Consensus'. The plan, a ten-point program proposed in 1987 by economist John Williamson, was touted as a 'standard' reform package for Latin American States devastated by the economic crisis.[33] It was promoted by Washington-based institutions, namely, the IMF, World Bank, and United States Treasury Department. The plan would later come under staunch criticism when the Argentine economy collapsed in 1999, although there is significant debate among economists as to how closely Argentina adhered to the plan.[34] The plan focused on fiscal discipline, the liberalization of trade and development regimes, deregulation of domestic markets, and the privatization of public enterprises.[35]

While the region's vast resources remained an attraction for Europe and the United States, the political and economic instability that plagued Latin American States made investors reluctant to invest without certain guarantees and assurances.

III THE BILATERAL INVESTMENT TREATY BOOM

Seeking to attract foreign investment, Latin American States began signing the international conventions governing foreign investment and international arbitration. By the early 1990s, Argentina, Belize, Bolivia, Chile, Columbia, Costa Rica, Ecuador, Guatemala, Guyana, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay had ratified the ICSID Convention.[36] During the same period, Latin American States began to undertake sweeping privatization programs designed to attract foreign investment, signing hundreds of BITs that guaranteed rights and

33. Pedro-Pablo Kuczynski & John Williamson, After the Washington Consensus: Restarting Growth and Reform in Latin America (2003).
34. See John Williamson, *What Should the World Bank Know About the Washington Consensus? available at* <www.worldbank.org/research/journals/wbro/obsaug00/pdf/(6)Williamson.pdf> (explaining the tenets of the ten-point plan).
35. See Shahid Javid Burki & Guillermo Perry, Beyond the Washington Consensus, Institutions Matter (World Bank Publications, 1998) 1.
36. Brazil and Mexico did not sign the ICSID Convention and it is unlikely that either will in the future especially in light of the flood of investor claims against Argentina in the wake of the 2001–2002 economic crisis. While Bolivia, Ecuador, Nicaragua, and Venezuela initially signed the convention, all have recently announced their intentions to withdraw and several have taken steps to in fact do so or to limit ICSID's jurisdiction over disputes involving their natural resources. See *A Guide to the World Bank* (World Bank Publications, 2007) 127. In May 2007, Bolivia sent a letter to ICSID announcing its withdrawal from the Convention. See Manciaux, Sebastián, *La Bolivia se retire du CIRDI*, REVUE DE L'ARBITRAGE 351. Venezuela and Nicaragua shortly thereafter announced the same intention. Ecuador sent a letter to ICSID stating that it would no longer accept ICSID jurisdiction over disputes arising from its mining and petroleum industries. See ICSID Announcement, *Ecuador's Notification under Article 25(4) of the ICSID Convention Dec 5, 2007* available at <http://icsid.worldbank.org/ICSID/Index.jsp> (last visited 23 May 2008). There is considerable speculation about the future political and economic policies of Paraguay because of the recently elected populist President, Fernando Lugo. See *Paraguay's Lugo Faces Major Challenges*, Forbes (4 Apr. 2008). See also ss IX, X, and XI *infra* discussing recent measures taken by Bolivia, Ecuador, and Venezuela.

protections to foreign investors, such as the right to fair and equitable treatment, the protection against expropriation without just compensation, and the right to arbitrate disputes based on claims arising from the treaties. FDI into the region reached unprecedented levels in 1999.[37] Many Latin American States also passed new laws allowing States or state enterprises to enter into private commercial contracts that contain arbitration clauses.

BITs, while differing from one another, generally contain:

(1) a provision defining an investment;
(2) a provision defining the admission of the investment and the right of establishment;
(3) a national treatment provision;
(4) a most-favoured nation (MFN) clause;
(5) a provision guaranteeing fair and equitable treatment;
(6) provisions providing for compensation in the event of expropriation or nationalization; and
(7) a dispute resolution clause.[38]

By the end of 2006, 2573 BITs were concluded across the world, 482 of which involved Latin America and the Caribbean.[39] The conclusion of BITs around the world reached a peak in 2001, after which there was a steady decline, bringing the conclusion rate to an average of approximately seventy-five BITs per year.[40] In 2006, thirteen new Latin American BITs were concluded.[41] Two more were concluded in the first half of 2007.[42] The total number of BITs involving Latin America and the Caribbean as of mid-2007 reached approximately 497.[43]

IV LATIN AMERICAN TREATY-BASED DISPUTES

Over the past ten years, there has been a surge of investor-State arbitrations as a consequence of the signing of BITs. At least forty-two new cases were registered

37. Foreign direct investment levels dropped sharply in 2000, in the aftermath of the Argentine economic crisis, and continued downward through 2003. In 2004 and throughout 2005, foreign direct investment to the region began to increase again although not reaching the 1999 levels. See UNCTAD *World Investment Report 2006: FDI from Developing and Transition Economies, Implications for Development* 68 (United Nations 2006).
38. See generally United Nations Conference on Trade and Development [hereinafter 'UNCTAD'] *World Investment Report 2003: FDI Policies for Development and International Perspectives* 99–144 (2003) (discussing the central issues involving international investment agreements).
39. See UNCTAD *Recent Developments in International Investment Agreements: International Investment Agreements (2006-June 2007)*, IIA Monitor, No. 3. (2007), 2–4.
40. Id.
41. Id.
42. Id.
43. Id. (indicating that 'Latin American and Caribbean BITS totalled 482, representing 16% of the total by the end of 2006').

in the first eleven months of 2005.[44] By November 2005, the cumulative number of known treaty-based cases had risen to 219.[45] Latin American governments are respondents in sixty-five of the 124 cases currently pending in ICSID.[46] By the end of 2006, the total number of treaty-based arbitrations had risen to 259, 161 of which were brought before the ICSID.[47] Thirty-six new arbitrations have been registered with ICSID since the beginning of 2007, sixteen of which are against Latin American States.[48] Those States with ICSID claims registered against them include Argentina (thirty-six pending, ten concluded), Bolivia (two pending, one concluded), Chile (two pending, one concluded), Costa Rica (three pending, one concluded), Ecuador (eight pending, two concluded), El Salvador (one concluded), Guatemala (one pending), Honduras (one pending, one concluded), Mexico (one pending, eight concluded (North American Free Trade Agreement (NAFTA) claims)), Nicaragua (one concluded), Panama (one pending), Paraguay (one pending, one concluded), Peru (three pending, two concluded), and Venezuela (five pending, three concluded).[49] The total number of outstanding investor-State arbitrations is impossible to ascertain because the only international arbitral institution with a public registry of claims is ICSID. The cases have given rise to debate over questions of customary international law like never before.

Argentina continues to have the greatest number of arbitrations registered against it, most of which have been registered with ICSID. At least thirty-four of the ICSID arbitrations related to Argentina involve disputes that arose from economic measures that the country took in respect to the 2001-2002 financial crisis.[50] The large number of arbitrations against Latin American States, amounting to billions and billions of dollars, has called into question whether the advent of signing the treaties was, for this region of the world, all that it promised to be.[51]

44. See UNCTAD *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR NO. 4 (2005) 1.
45. Id.
46. This figure is based on the cases listed on ICSID's website as of 6 May 2007. The list can be viewed at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending>.
47. UNCTAD, *Investor State Dispute Settlement and Impact on Investment RuleMaking* 7 (Geneva 2007).
48 See ICSID website for a list of pending and concluded ICSID arbitrations at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> (last visited 13 May 2008).
49. These figures were compiled based on the cases listed on the ICSID website as of 12 May 2008.
50. UNCTAD *Recent Developments in Investment Agreements*, IIA Monitor No. 2 (2005), at 13.
51. A World Bank policy paper on BITs, commenting on recent investment arbitrations, states, '[T]hey show that the rights given to foreign investors may not only exceed those enjoyed by domestic investors, but expose policymakers to potentially large-scale liabilities and curtail the feasibility of different reform options .... Formalizing relationships and protecting against dynamic inconsistency problems are still important, but the results should caution policymakers to look closely at the terms of agreements .... It should be noted that the rights secured in a BIT are reciprocal; investors from country A investing in country B are the same as those given to investors from country B investing in country A. However, in practice, there is usually tremendous asymmetry as almost all the FDI flows covered by BITs are, in fact, in one direction. It is precisely those cases where FDI flows in substantial amounts in both directions that countries have balked at ratifying BITs. It is striking that there is a dearth of such agreements between rich OECD countries. Rich OECD countries do participate in BITs, but almost exclusively with developing countries. It could be that in such a case there does not seem to be a need for a BIT to stimulate investment as it is already substantial. Or while OECD countries secure such rights for their companies overseas, they balk at granting such rights to MNCs within their own borders'. See *Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only A Bit – And They Could Bite?* The World Bank Policy Research Working Paper Series No. 3121 (2003). An UNCTAD matrix of inward FDI performance and potential, which used performance for a three-year average for 2002–2004, ranked Argentina, Brazil, and Chile among countries with a 'high potential FDI'. Chile, however, was the only Latin America country whose performance was listed among the High FDI front-runners. Argentina and Brazil ranked among the 'below potential' countries for that period. El Salvador, Paraguay, Peru, Uruguay, and Venezuela ranked were among the under-performers for FDI potential while Bolivia, Ecuador, Honduras, and Nicaragua ranked above potential for low FDI potential countries. See UNCTAD World Investment Report 2006, supra n. 37, at 24. But see, e.g., PETER EGGER & MICHAEL PFAFFERMAYER, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. OF COMP. ECON. 788–804 (2004) (arguing that investment treaties exert a significant positive effect on outward FDI if they are actually implemented.)

V DISTRUST REVISITED IN THE WAKE OF A MULTITUDE OF INVESTOR-STATE ARBITRATIONS

Latin American enthusiasm for signing BITs and attracting foreign investment in the 1990s was revisited by an old and familiar distrust on the part of various Latin American States in the first few years following the year 2000 in the wake of the proliferation of arbitrations brought against them, many of which have been very politically consequential. The region has seen a revival, in some countries, of support for the Calvo Doctrine and a decreased enthusiasm generally among Latin American States for concluding more BITs. In 2004, for example, only six BITs were concluded with Latin American States.[52] In addition to a growing reluctance on the part of all States to sign more treaties, there is a tendency to exercise more caution in defining central elements in the treaties. States, for example, are paying much closer attention to how treaties define terms such as what constitutes an 'investment'.[53]

FDI flows to Latin America and the Caribbean declined for several years beginning in 2000, mostly concentrated in the area of services.[54] The decline has been linked to a variety of factors including political instability and the devaluation of currency, and coincides with the Argentine financial crisis and the multitude of

52. UNCTAD *Recent Developments in Investment Agreements*, IIA Monitor No. 2 (2005) *supra* n. 50, at 3.
53. Art. 1 of the recently concluded BIT between the United States and Uruguay, for example, contains a list of assets 'more likely to have the characteristics of an investment', as well as a list of other assets that are not likely to have such characteristics. See Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (signed 4 Nov. 2005 and entered into force on 1 Nov. 2006).
54. UNCTAD World Investment Report, *supra* n. 37, at 52.