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From “North-South Divide” to “Private-Public Debate”: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law

*Wenhua Shan**

After dominating Latin American states for over a century, the Calvo Doctrine has been widely described as “dead,”¹ particularly in the wake of the global tide of economic liberalization that began in the 1990s. However, some recent moves within and beyond Latin America suggest that this principle is not dead, but on the resurgence. The “Revival of Calvo” phenomenon signals a change of direction in international investment law: neo-liberalism no longer dominates international

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¹ As early as 1955 Shea pronounced the Calvo Doctrine's death in light of its rejection by European and North American States. See DONALD SHEA, *THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY* 20 (UNIV. OF MINN. PRESS, 1955). More recently, Giesze wrote that, “[a]s a practical matter, the *Calvo doctrine* is a dead letter in the overwhelming majority of Latin American countries.” Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 INT'L LAW. 51, 77 (1998) (emphasis added). Shihata also considers the Calvo Doctrine less relevant in the current world. See Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV.—FOREIGN INV. L. J. 1, 24 (1986). In an article published in 1995, Manning-Cabrol pronounced the “imminent death” of the Calvo Clause. See Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 LAW & POL'Y INT'L BUS. 1169, 1169 (1995).

investment law-making, and a more balanced, and perhaps also a more conservative and nationalistic approach, is gaining ground.

This Article explores these recent events and analyzes to what extent the Calvo Doctrine is returning, as well as how the ideology of international investment law is changing. The Article proceeds in four parts. Parts I and II examine the events signaling the revival of the Calvo Doctrine within Latin America and the changing trend in international investment law beyond. Part III explores the future of the international investment regime by critically examining both the Calvo Doctrine and the neo-liberalist investment regime. Part IV concludes by arguing that the main theme in international investment law-making is being shifted from a "North-South Divide" towards a "Private-Public Debate."

I. REVIVAL OF THE CALVO DOCTRINE: WITHIN LATIN AMERICA

For over a hundred years, Latin American states adhered to the Calvo Doctrine, named after Carlos Calvo, a nineteenth century Argentine international lawyer and diplomat. The Doctrine essentially asserts "two concepts of non-intervention and absolute equality of foreigners with nationals,"² with emphasis placed on the rejection of the superiority or imperial prerogatives of powerful states and their nationals. The Doctrine can be further broken into three key elements, namely an "anti-supernational-treatment" standard, exclusive local jurisdiction, and the exclusion of diplomatic protection.³ The Latin American states "enthusiastically received" this doctrine and implemented it in their constitutions, domestic legislation, international treaties and contracts signed between foreign investors and Latin American governments,⁴ even though its validity was denied in Europe and North America.⁵ The early influence of the Calvo Doctrine went well beyond Latin America and won wide support in the developing world, particularly in the new states emerging in Asia and Africa during the decolonization process. It was even incorporated into United Nations General Assembly ("UNGA") resolutions when the New International Economic Order ("NIEO") movement reached its peak.⁶

² See SHEA, *supra* note 1, at 19–20.

³ See Wenhua Shan, *Is Calvo Dead?*, 54 AM. J. COMP. L. (forthcoming 2007), § I.1; see also Manning-Cabrol, *supra* note 1, at 1173.

⁴ See SHEA, *supra* note 1, at 21–32.

⁵ The Calvo Doctrine failed to gain the support of international lawyers in Europe and the United States in part because acceptance of the Doctrine "would eliminate the abuses of diplomatic protection, [but] it would also eliminate the institution itself, without substituting an acceptable alternative." SHEA, *supra* note 1, at 20.

⁶ Lillich noted that Latin American efforts on the Charter were "no more than a thinly-disguised attempt to endow the Calvo Doctrine." Richard Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AM. J. INT'L L. 359, 361 (1975). Other commentators considered the Calvo doctrine "a central

The influence of the Calvo Doctrine was severely challenged by the global wave of economic liberalization, which reached its height in 1990s. As a result, some commentators assumed or predicted that the Doctrine was already dead.⁷ The challenges to Calvo came primarily from the proliferation of international investment treaties, especially the bilateral investment treaties (“BITs”) entered into by Latin American states. The U.N. Conference on Trade and Development (“UNCTAD”) Statistics show that Latin American states did not engage in BITs until the late 1980s.⁸ By the end of 1990s, Latin American states had entered into a total of 300 BITs, among which ninety-three percent were signed in the 1990s.⁹ At a regional level, Mercosur followed the BIT approach¹⁰ and the Andean Pact (“ANCOM”) has been revised to accommodate member states’ need of flexibility in departing from the Calvo Doctrine.¹¹ Most Latin American

plank of the new International Economic Order (UNGA 3171 of 1973) and the U.N. Charter of Economic Rights and Duties of States (1974).” David Schneiderman, *Investment Rules and The New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 766 (Summer 2000); see also Kenneth J. Vandeveld, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT’L L. 373, 384 (1998) (noting the United Nations’ adoption of Resolution 3201, which contained “a Declaration on the Establishment of a New International Economic Order.”).

⁷ See *supra* note 1.

⁸ U.N. Conference on Trade and Dev. [UNCTAD], *Bilateral Investment Treaties 1959–1999*, 15, UNCTAD/ITE/IIA/2 (Dec. 15, 2000) (prepared by Abraham Negash), available at <http://www.unctad.org/en/docs/poiteiid2.en.pdf> [hereinafter UNCTAD, *BITs*]. According to UNCTAD, however, the total number of BITs concluded by Latin American and Caribbean states reached 451 by the end of 2004. UNCTAD, *Recent Developments in International Investment Agreements*, 2, IIA MONITOR No. 2, UNCTAD/WEB/ITE/IIT/2005/1 (Aug. 30, 2005), available at http://www.unctad.org/en/docs/webiteit20051_en.pdf [hereinafter UNCTAD, *International Investment Agreements*].

⁹ UNCTAD, *BITs*, *supra* note 8.

¹⁰ Mercosur is the Common Market of the South created in 1991 by four countries in Latin America, namely Argentina, Brazil, Paraguay and Uruguay. Mercosur adopted two Protocols regulating investment between member states and from non member states respectively [the Buenos Aires Protocol (extrabloc) and the Colonia Protocol (inrabloc)], with similar language. Article 2(c) of the Protocol regulating investments from non-member states (the Buenos Aires Protocol) provides for national treatment, MFN treatment and “just and equitable treatment” for foreign investment. The wording for “national treatment” and MFN treatment is in typical BIT language, which means treatment “no less favo[r]able” than that granted to national investors or investors from other non-member states. With regard to state-investor dispute resolution, Article 2(h) of the Protocol provides a “fork in the road” clause, which avails investors to choose between two options: either competent courts of the host state, or an international arbitration tribunal, which could be either an ad hoc or an institutional tribunal. Since it uses local remedies only as a conclusive alternative to international arbitration, it differs significantly from the Calvo principle of “exclusive local remedies.” See Protocol on Promotion and Protection of Investment Proceeding from Non-Member Countries of the MERCOSUL, Mar. 26, 1991, available at <http://www.cvm.gov.br/ingl/inter/mercosul/buenos-e.asp>.

¹¹ The revision was reflected in Decision 220 and Decision 291, which respectively

states also accepted the Convention for the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention"), providing an international platform for arbitration of state-investor disputes, the Convention Establishing the Multilateral Investment Guarantee Agency ("MIGA Convention"), recognizing rights of subrogation, and the New York Convention for the Recognition and Enforcement of Foreign Arbitration Awards ("New York Convention"), facilitating world-wide enforcement of arbitration awards.¹² Meanwhile, domestic laws and regulations in Latin American states have generally been relaxed to accept international standards and international dispute settlement mechanisms in order to protect and promote foreign investment.¹³ Although it might be incorrect to assert that Calvo is completely "dead," it can be argued that it had been, by and large, "de-activated" by the network of investment treaties providing an international platform for investment dispute settlement since the 1990s.¹⁴

The tide of investment liberalization, however, seems to have reversed

abandoned the stiff "Calvo Clause" in the previous investment code embodied in Decision 24, and opened the possibility for ANCOM member countries to accept international standards of treatment and jurisdiction of international arbitration tribunals. See Commission Decision 220 Replacing Decision 24, The Common Foreign Investment and Technology Licensing Code, May 11, 1987, 27 I.L.M. 974 (1988); see also Commission Decision 291—Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties, Mar. 21, 1991, 30 I.L.M. 1283 (1991). Article 34 of Decision 220 provided that, "[f]or the settlement of disputes or conflicts deriving from direct foreign investments or from the transfer of foreign technology, Member Countries shall apply the provisions established in their local legislation." Commission Decision 220 Replacing Decision 24, *supra*. Article 2 of Decision 291 provides that "foreign investors shall have the same rights and obligations as pertain to national investors, except as otherwise provided in the legislation of each Member Country." Commission Decision 291, *supra*.

¹² Those international treaties, particularly BITs, have generally accepted non-local remedies and general international law as the governing norms, which depart significantly from the Calvo principle. It can indeed be argued that a "silent revolution" has taken place in Latin America, particularly in the sense of accepting international arbitration for state-investor disputes. See Nigel Blackaby, David M. Lindse & Andrew Spinillo, *Overview of Regional Developments*, in *INTERNATIONAL ARBITRATION IN LATIN AMERICA* 10 (Nigel Blackaby, David M. Lindse & Andrew Spinillo. eds., 2002).

¹³ See Shan, *supra* note 3, § IV; see also Manning-Cabriel, *supra* note 1, at 1181–90; Eduardo A. Wiesner, *ANCOM: A New Attitude toward Foreign Investment?*, 24 U. MIAMI INTER-AM. L. REV. 435, 449–64 (1993).

¹⁴ The author's survey of 9 major Latin American states' laws and regulations shows that most of the states still stick to the Calvo principles of excluding diplomatic protection and equal national treatment. Hence it would be incorrect to say that the Calvo Doctrine is completely dead. However, as most Latin American states have entered into international agreements subjecting state-investor disputes to international arbitration, the exclusion of foreign and international remedies has been largely discarded. This supports the argument that the Calvo Doctrine is not completely "dead," but only "de-activated." See Shan, *supra* note 3, § V.

itself in recent years. As a result the Calvo Doctrine has returned to the world stage, particularly to Latin America. The chief indicator of the Calvo Doctrine's revival is the dramatic increase of investment treaty-based arbitration cases, which have forced states world-wide, particularly in Latin America, to re-think their approach towards investment liberalization in general and the acceptance of international arbitration in particular. According to UNCTAD there were 219 investment treaty-based arbitration cases by November 2005, more than two-thirds initiated since 2002.¹⁵ In other words, an average of more than thirty cases have been initiated in each of the last four years. Almost all of these cases have been brought by investors against states.¹⁶ Most defendant states were developing states (forty-seven out of sixty-one), most frequently Latin American.¹⁷ Argentina topped the list with forty-two cases, which accounted for nearly twenty percent of the total caseload.¹⁸ Mexico followed with seventeen cases.¹⁹ Ninety-four percent of the states that had been sued two or more times were developing states, including three more Latin American states: Ecuador (seven), Chile (four) and Venezuela (three). Statistics from the ICSID shows that of seventy-two cases pending before ICSID in April 2004, forty-one were against Latin American states, nearly sixty percent of the total number.²⁰

The surge of investment treaty arbitration cases demonstrates the teeth of BITs and puts governments across the world on notice. Latin American states, the states with the strongest Calvo tradition, have naturally adopted, or are contemplating adopting, measures to limit investment treaty arbitrations and bring them under national control. This new trend is most perceptible in Argentina, Brazil and Venezuela.

A. Argentina

Argentina is the home country of Carlos Calvo, the father of the Calvo Doctrine. However, it was also among the most enthusiastic Latin American countries in departing from that Doctrine by entering into BITs.

¹⁵ UNCTAD, *Latest Developments in Investor-State Disputes Settlement*, 1-2, IIA Monitor No. 4, (UNCTAD/WEB/ITE/IIT/2005/2), available at http://www.unctad.org/en/docs/webiteit20052_en.pdf [hereinafter UNCTAD, *Investor-State Disputes Settlement*].

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ In UNCTAD statistics, there are fourteen developed defendant states, thirty-seven developing states, and ten Southeast European and the Commonwealth of Independent States (CIS). As Southeast European and CIS states are generally developing states, the number of developing states might be counted as forty-seven. *Id.* at 1-2.

¹⁹ *Id.*

²⁰ See Bernardo M. Cremades, *Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59 DISP. RESOL. J. 78, 81 n. 8 (2004).

Indeed, Argentina signed at least fifty-eight BITs, leading the BIT league table in Latin America.²¹ The recent dramatic rise of BIT-based arbitration cases against Argentina was triggered by Argentina's Emergency Law No. 25561, adopted in January 2002. The law, responding to an economic crisis, declared a public emergency until December 10, 2003, froze local tariffs, and abolished the one-to-one U.S. Dollar-Peso convertibility.²² Such measures had a significant negative impact on foreign investors who had stakes in privatised state-owned enterprises. One commentator observed that the net consequence of these measures for the utility companies was "a roughly two-thirds reduction in income."²³

Because of state-investor arbitration clauses, investors began to sue the Argentine government. Of the eighty-five cases pending before ICSID as of February 2004, thirty-five of the cases were brought against Argentina, accounting for nearly half of the total investment arbitration caseload worldwide,²⁴ a magnitude unheard of in the history of arbitration. Currently, Argentina still has thirty-one cases pending before the ICSID, amounting to twenty eight percent of its total caseload.²⁵

Such a large caseload for one country constitutes a significant burden, politically as well as financially. The average legal fee to defend a single investment treaty-based arbitration is estimated to be \$1–2 million, in addition to which are costs for the arbitration tribunals amounting to roughly \$400,000.²⁶ Therefore, Argentina will have to pay tens of millions of dollars annually in order to defend these cases. Should Argentina lose

²¹ UNCTAD data show that Argentina signed fifty-eight BITs by June 1, 2006, which is more than any other country in Latin America. See UNCTAD, Country Specific List of BITs, <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1>, (last visited Mar. 27, 2007).

²² Law No. 25561, Jan. 6, 2002, B.O. arts. 2–5, 8–9. For English sources see Cremades, *supra* note 20, at 81; Patricia C. Mastropierro & Larry B. Pascal, ALERT: Argentine Devaluation Law, available at http://www.haynesboone.com/knowledge/knowledge_detail.asp?groupid=all&page=pubs&pubid=380 (last visited Mar. 27, 2007); M. & M. Bomchil Abogados, Public Emergency Regulations on Public Works and Utilities Contracts and Licenses, available at http://www.ag-internet.com/bullet_iln_one_five/Bulletin-ContractsLicenses.doc (last visited Mar. 27, 2007).

²³ Paolo Di Rosa, *The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV., 41, 48 (2004).

²⁴ *Id.* at 43.

²⁵ See List of Pending Cases, available at <http://www.worldbank.org/icsid/cases/pending.htm>, (last visited Mar. 27, 2007) (showing that thirty-one out of the 110 pending cases are against Argentina).

²⁶ The legal costs to claimants are approximately the same as for defendants. See UNCTAD, *Issues Related to Investment Arrangements: Investor-State Disputes and Policy Implication*, 7, TD/B/COM.2/62 (Jan. 14, 2005), available at http://www.unctad.org/en/docs/c2d62_en.pdf.

every case, it would owe compensation amounting to roughly \$17 billion,²⁷ which, as alleged by Argentina, exceeds its annual budget.²⁸ Facing such severe legal challenges, Argentina has tried to cope by using procedural tactics.²⁹ Meanwhile, it has challenged the constitutionality of investment treaties and treaty-based arbitration.³⁰ Finally, Argentina has taken legislative measure to tackle the problem, and is currently considering further legislative measures.³¹

1. Procedural Tactics

In dealing with these cases, the Argentine government first makes every effort to reach a negotiated settlement with the disputant investors.³² If this fails, the Government then almost always challenges the arbitrator's jurisdiction.³³ So far, the Government has failed to win a single jurisdictional challenge.³⁴

These jurisdictional challenges have been launched on various grounds, some of which relate to "Calvo clauses" in BITs and/or concession agreements. In *Lanco International Inc. v. Argentine Republic*, a U.S. investor sued Argentina at the ICSID, based on a "fork-in-the-road clause" in a 1991 U.S.-Argentina BIT allowing a choice among local remedies, agreed channels and international arbitration.³⁵ The Argentine government challenged ICSID's jurisdiction, arguing that Argentina had not given the necessary written consent to grant the ICSID jurisdiction and that the dispute should be settled by the Federal Contentious Administrative Tribunal of Buenos Aires, as provided in the Concession agreement between the parties.³⁶ The tribunal held, however, that the BIT constituted an open offer by the government and "consent" for the purposes of Article

²⁷ Indeed, the CMS award, the first of the many Argentine cases, has required Argentina to pay the company \$1.33 billion. See UNCTAD, *Investor-State Disputes Settlement*, *supra* note 15, at 6; see also Luke Peterson, *Argentina Moves to Annul Award in Dispute with CMS Company over Financial Crisis*, INVESTMENT TREATY NEWS (Int'l Inst. for Sustainable Dev.), Oct. 26, 2005, § 4, available at http://www.iisd.org/pdf/2005/investment_investsd_oct26_2005.pdf.

²⁸ See Peterson, *supra* note 27.

²⁹ See *infra* Part I.A.1.

³⁰ See *infra* Part I.A.2.

³¹ See *infra* Part I.A.3.

³² See Cremades, *supra* note 20, at 81.

³³ See Yanru Wei, *On the Impropriety of China's Recent Acceptance of Full ICSID Jurisdiction*, 13 J. INT'L ECON. LAW 108, at 139-40.

³⁴ *Id.*

³⁵ *Lanco International, Inc. v. Argentine Republic* (Case No. ARB/97/6), Preliminary Decision on Jurisdiction of Dec. 8, 1998, 40 I.L.M. 457 (2001), at § 20, citing Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (Nov. 14, 1991), art. 7, §§ 2-3.

³⁶ *Lanco International, Inc.*, 40 I.L.M. 457, at § 6.

25 (1) of the ICSID Convention.³⁷ The tribunal made the later much-debated distinction between the contract claim and the treaty claim, and ruled that the Argentine government's consent to the BIT had not been withdrawn by its subsequent execution of the Concession Agreement with the investor concerned.³⁸

Subsequently in *CMS Gas Transmission Co. v. Argentine Republic*,³⁹ the Argentine government again challenged ICSID's jurisdiction. This time the government claimed, *inter alia*, that the license the Government granted to a corporation, TNG, contained a separate dispute settlement mechanism vesting exclusive jurisdiction in the Federal Court of Buenos Aires. The Tribunal nevertheless upheld the investors' right to ICSID arbitration, reasoning that CMS was not bound by the license as it was not a party to it. But the Tribunal went further and ruled out altogether the legal effect of such "Calvo clauses" by saying "... referring certain kinds of disputes to the local courts ... [is] not a bar to the assertion of jurisdiction by an ICSID tribunal under the treaty, as the functions of these various instrument are different."⁴⁰

While a full discussion of this issue could merit a doctoral dissertation, it is sufficient to note here that Argentina was unsuccessful in challenging the jurisdiction of the ICSID tribunal. The government then attempted a further procedural technique to tackle the problem: applying for annulment of the ICSID award once the award is made. Thus in September 2005, Argentina applied for annulment of the award on the merits of the *CMS* case.⁴¹ As of this article's submission, the annulment case is still pending before the ICSID.

2. The Unconstitutionality Argument

The Argentine government has recently challenged the constitutionality of BITs and, consequently, the BIT-based arbitration process.⁴² The Argentine prosecutor, for example, argued in a hearing in

³⁷ *Id.* at §§ 32–33.

³⁸ *Id.* at §§ 34–40. For further analyses on the distinction and relationship between contractual claims and treaty claims, see Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claim*, 99 AM. J. INT'L L. 835 (2005).

³⁹ *CMS Gas Transmission Co. v. Republic of Argentina*, Decision on Objections to Jurisdiction, ICSID ARB/01/8, 42 I.L.M. 788 (2003).

⁴⁰ *Id.* ¶ 76.

⁴¹ The annulment proceeding can at least provide some additional time for Argentina before the payment has to be made. See Peterson, *supra* note 27.

⁴² There are two lines of argument for the unconstitutionality of the ICSID Convention and its awards. One is the position actually adopted by the Argentine Government. The other is a more recent and also more radical argument, which has not been adopted by the Argentine Government. It holds that both BITs and the ICSID regime are unconstitutional

the *CMS Gas Transmission Co. vs. Republica Argentina* case that:

a) Bilateral treaties do not supersede the National Constitution and therefore a company can not invoke such treaty to avoid trying the case in Argentina before local courts and violate the right of defense in court of the Argentine State.

b) A company that is engaged in the rendering of public services can not impose a limitation on the sovereign right of the government to change its economic policy or the tariffs.⁴³

The Prosecutor also conducted a public campaign advocating the re-adoption of the Calvo and Drago⁴⁴ doctrines and attacking BITs and the ICSID by stating that Argentina should never again agree to submit a contractual dispute to a system with ICSID characteristics.⁴⁵

The foundation of the constitutional argument is Sections 27 and 75 of

because they were approved in violation of the process established in the Argentine Constitution as reformed in 1994.

Since the ICSID Convention was ratified and hence entered into force after the constitutional reforms took effect, and the domestic implementation bill was also subsequently published, the new constitutional provisions should apply. Additionally, the new Constitution requires a special and very stringent procedure for “treaties of integration which delegate powers and jurisdiction to supranational organizations.” CONST. ARG. § 75.24. It is argued that since the acceptance of the arbitral jurisdiction of the ICSID requires transfer of sovereign power of domestic jurisdiction to be transferred to the ICSID, the ICSID Convention has “integration” purposes and as such must be subjected to the special constitutional procedure. Because such a procedure has never been undertaken, the validity requirement under the new system has not been completed and consequently any arbitration carried out by the ICSID against Argentina can be declared null and void by a domestic court.

The argument goes further that the special procedure required by the new Constitution is mandatory, and as a result, such treaties delegating powers and jurisdiction to international bodies as the ICSID Convention should be rendered null and void *per se* with the enactment of the reform.

For further details of the arguments, See Carlos E. Alfaro & Pedro M. Lorenti, *The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict between International and Domestic Law?* 6 J. WORLD INVEST. & TRADE 417, 425–29 (2005). Alfaro and Lorenti consider that the ICSID Convention is merely a treaty of “cooperation”, not an “integration treaty”, and therefore does not require the fulfilment of the special procedure required by the new constitution. *Id.* at 429–30.

⁴³ Carlos E. Alfaro, *The Battle of the Century: Argentina Against the ICSID Arbitration and the BITs*, World Law Group E-news Issue No. 31 (Nov. 2004) [hereinafter Alfaro, *Battle of the Century*], available at http://www.imakenews.com/bcastro/e_66201_86528.pdf.

⁴⁴ The Drago Doctrine was announced in 1902 by the Argentinean Minister of Foreign Affairs Luis Maria Drago, arguing mainly that no foreign power, including the United States, could use force to collect debt. See Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 Am. J. Int’l L. 26, 28–30 (1907).

⁴⁵ Alfaro, *Battle of the Century*, *supra* note 43.

the Constitution of Argentina. Section 75.22 sets forth the legal status of international treaties as beneath the Constitution, but above the laws, excepting certain human rights treaties, as expressly stipulated in the Constitution, which enjoy constitutional status.⁴⁶ In short, most treaties, such as BITs and the ICSID Convention are subordinate to the Constitution. Section 27 further subjects such treaties to “the principles of public law laid down by this Constitution.”⁴⁷ As a result, two commentators argue, “the validity of the ICSID Convention in Argentina could be tested by ascertaining its compatibility with said ‘public law principles’ of the Constitution.”⁴⁸ The commentators continue by saying that the same ‘public law principles’ test could be applied to arbitration awards rendered by the ICSID tribunals because they are the “products” of the ICSID.⁴⁹ Therefore, the Congress should not have ratified treaties such as the ICSID Convention that conflict with the Constitution’s “public law principles” of the Constitution, nor should the President have negotiated the treaty in the

⁴⁶ Chapter IV, Section 75.22 of the Constitution of the Argentine Nation reads:

Treaties and concordats have a higher hierarchy than laws.

The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House.

In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress.

CONST. ARG. § 75.22.

⁴⁷ Section 27 of the Argentine Constitution reads, “[t]he Federal Government is under the obligation to strengthen its relationships of peace and trade with foreign powers, by means of treaties in accordance with the principles of public law laid down by this Constitution.” *Id.* § 27.

⁴⁸ However, Alfaro and Lorenti seem to have entertained an expansive interpretation on the concept of “public law principles in the constitution” by extending them to cover all “matters of public law,” with which the author of the present paper does not agree. See Alfaro & Lorenti, *supra* note 42, at 420, 423–25.

⁴⁹ *Id.*

first place.⁵⁰ The power to review treaties for unconstitutionality, however, lies in the hands of the Judiciary and, ultimately, the Federal Supreme Court of Argentina.⁵¹

In this connection, it is relevant to note that the Argentine judiciary recently echoed the Administration's position in a landmark case that, in matters of public policy, the Argentine courts may review the reasonability, fairness and constitutionality (i.e., the merits) of an arbitration award.⁵² The case, *Jose Cartellone Construcciones Civiles S.A. v. Hidroelectrica Norpatagonica S.A.*, reportedly concerned a domestic arbitration involving a public services contract between a private Argentine company and a state-owned enterprise.⁵³ The contract had an arbitration provision excluding any appeal to courts.⁵⁴ The Federal Supreme Court of Argentina decided that the Court may "review arbitral awards if 'unconstitutional', 'unreasonable' or 'illegal', even when the parties involved have specifically agreed to waive the right to appeal."⁵⁵ This decision "reaffirmed the Supreme Court's role of 'guardian' of the Constitution and of *public policy*, even in those cases that ha[d] been previously submitted to arbitrators and where judicial review ha[d] not been admitted by the parties."⁵⁶ In supporting the decision, the Supreme Court invoked Article 872 of the Civil Code, which states that "rights granted with aim at public policy cannot be waived."⁵⁷ With this, the Court effectively rejected the possibility of any parties' agreement restricting review over matters of public policy.

This decision implies that an award rendered by an international arbitration tribunal may be challenged in Argentina as "unreasonable" or "unconstitutional." This decision "is already influencing Argentine lower courts in connection with international arbitrations."⁵⁸

From an international law point of view, the aforementioned constitutionality argument is hardly tenable. The Vienna Convention on the

⁵⁰ *Id.* at 421.

⁵¹ *Id.*

⁵² Corte Suprema de Justicia [CSJN], 1/6/2004, "Jose Cartellone Construcciones Civiles S.A. v. Hidroelectrica Norpatagonica S.A.," La Ley [L.L.] (Causa J-87, XXXVII R.O.) (Arg.), available at http://www.csjn.gov.ar/documentos/cfal3/toc_fallos.jsp.

⁵³ Carlos E. Alfaro, Argentina: ICSID Arbitration and BITs Challenged by the Argentine Government, Alfaro-Abogados, Dec. 21, 2004, available at <http://www.alfarolaw.com/ima/tapa/alfaro3.htm>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (reporting on Corte Suprema de Justicia [CSJN], 1/6/2004, "Jose Cartellone Construcciones Civiles S.A. v. Hidroelectrica Norpatagonica S.A., La Ley [L.L.] (Causa J-87, XXXVII R.O.) (Arg.) available at http://www.csjn.gov.ar/documentos/cfal3/toc_fallos.jsp (citing 11 Cód. Civ. 872 (Arg.))).

⁵⁸ Horacio A. Grigera Naon, *Arbitration in Latin America: Progress and Setbacks*, 21 ARB. INT'L 127, 165 (2005).

Law of Treaties establishes that a state may not invoke the provisions of its internal law as justification for its failure to perform according to treaty.⁵⁹ Likewise, a state may not assert that its consent to be bound was expressed in violation of a provision of the state's internal law requiring competence to conclude treaties, unless violation of the provision was manifest and concerned a rule of its internal law of fundamental importance.⁶⁰ In the case of Argentina, establishing that the consent given by the Argentine Congress in BIT practice has been in "manifest" violation of a provision of Argentine internal law would be very difficult. Even if the "violation" could be established, it could hardly be shown that the violation was "manifest," as a violation is only "manifest" if "objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith."⁶¹

Judicial review for ICSID awards is more straightforward, as the ICSID Convention clearly requires member states to recognize ICSID awards as binding and enforce them as if they were final judgment of a court in that state.⁶² Nevertheless, the issue may arise for investment arbitrations rendered by other arbitration tribunals such as International Chamber of Commerce ("ICC") Court of Arbitration or *ad hoc* tribunals established in accordance with the rules of the United Nations Commission on International Trade Law ("UNCITRAL"). Thus Argentine courts could review the merits of such awards and set them aside on the ground that they were "unreasonable" or "unconstitutional."

3. Legislative Measures

While using procedural tactics to suspend and delay the arbitration process and the unconstitutionality argument to defend its position, the Argentine government has also taken and is considering taking further legislative measures to limit and prevent further investment arbitration

⁵⁹ Vienna Convention on the Law of Treaties art. 27, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁶⁰ *Id.* art. 46. Some Argentine constitutional scholars have also noted such limitations imposed by international law. For example, Nestor Sagues has pointed out that the unconstitutionality of an international treaty could only be declared in the case where such a treaty violates the competence rule as set forth in the Article 46 of the Vienna Convention on the Law of Treaties. See Alfaro & Lorenti, *supra* note 42, at 422.

⁶¹ Vienna Convention, *supra* note 59, art. 26(2). The aforementioned *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* case also touched upon Article 46, but held it irrelevant as it is about "invalidity of treaties," because the BIT at issue did not actually enter into force. *Case No. ARB/97/4 Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic Decision of the Tribunal on the Objections to Jurisdiction of May 24, 1999*, 14 ICSID REV.—FOREIGN INV. L. J. 251, 265 (2000).

⁶² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 54(1), Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

cases. To this end, the government has canceled a 1996 decree⁶³ and is contemplating a new law to control international arbitration.

In 2003, the Argentine government passed a new decree terminating a 1996 Menen administration decision, which authorized the submission of disputes between Argentine government and certain foreign investors to international arbitration tribunals.⁶⁴ The new decree pointed out that referring such disputes to international arbitration “presented a series of difficulties from the legal, political and economic point of view.”⁶⁵

This was not the end of the story, but rather the first step of the government’s attempt to “renationali[z]e” state-investor disputes.⁶⁶ Horacio Rosatti, then head of the office of the Attorney General in the Treasury, reportedly said that the aim of the government was to “recover the jurisdiction of national courts.”⁶⁷ Further, he said that the government was considering measures to bring other state-investor disputes back within Argentina’s ambit, including measures to ensure that, first, companies had “exhausted all legal channels in Argentina” and second, “the final decisions of international tribunals should then undergo ‘analysis’ by the local courts.”⁶⁸

Following a speech by President Kirchner in March 2005, which severely questioned eventual decisions of international or arbitration tribunals on state-investor claims,⁶⁹ two House Representatives of the ruling party reportedly promoted a bill aimed at limiting the intervention of national or international arbitral tribunals in cases involving the State, State agencies or enterprises.⁷⁰ The proposed bill prohibits access to international arbitration in such cases unless: a) an appeal of their decisions before Argentine federal courts is provided, b) the State’s counterparty in the dispute is a foreign state (state-state disputes), or c) the Congress has exempted the case through a specific statute.⁷¹ The bill also requests the Executive to inform the appropriate authorities of Argentina’s repeal of any treaty accepting such jurisdiction and demands that the Executive, its

⁶³ Decree No. 1021/96, Sept. 6, 1996, available at <http://www.boletinoficial.gov.ar/bora.portal/PrimeraSecci%C3%B3n/BusquedaRapida/tabid/81/Default.aspx>.

⁶⁴ Decree No. 966/2003 of Oct. 28, 2003, available at <http://www.saij.jus.gov.ar/news/files/decreto966.html>. See also Laurence Norman, *Government Reopens 7-Year-Old Case Vs Oil Group*, DOW JONES INT’L NEWS, Oct. 28, 2003 (reporting the 2003 decree annulling the 1996 executive order) and Cremades, *supra* note 20, at 81.

⁶⁵ Decree No. 966/2003, *supra* note 64.

⁶⁶ Norman, *supra* note 64.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Guido Santiago Tawil, *Is Calvo finally back?*, 3 TRANSNAT’L DISP. MGMT. 3 (2005).

⁷⁰ *Id.*

⁷¹ *Id.*

agencies, and its enterprises issue necessary orders or decisions in order to annul prior agreements or decisions contrary to such provisions.⁷² Since the bill generally requires all state-investor arbitration cases to be subject to the ultimate control of national courts, it would effectively abolish the finality and hence, the autonomy of arbitration.

Other bills of similar nature have reportedly been introduced before the Argentine Congress since 2004.⁷³ For instance, a bill introduced in September 2004 in the House of Deputies would “subject all disputes to which the State is a party to the exclusive jurisdiction of the Argentine courts and would prohibit any clause to the contrary.”⁷⁴ The bill would also require the denunciation of treaties in which the State had agreed to the jurisdiction of judicial or arbitral tribunals.⁷⁵ Another bill introduced in August 2005 would demand “that matters related to . . . economic policy and determinations by Argentine courts concerning direct or indirect expropriation should not be subject to review by international courts or tribunals.”⁷⁶ The August 2005 bill would also require that a provision “to that effect be included in each investment treaty as a condition for approval.”⁷⁷ If such bills are adopted, the Calvo Doctrine can be said to have finally returned to its birthplace. It remains to be seen, however, whether the bills are mere rhetoric or will be ultimately adopted.

B. Brazil

Brazil, the Latin American giant, had long been resistant to arbitration until 1996 when the Arbitration Act was adopted *to recognise and facilitate arbitration practice*. In 2002, Brazil ratified the New York Convention and paved the way for recognition and enforcement of foreign arbitration awards.⁷⁸ Yet Brazil remains suspicious of international arbitration on some level. This is witnessed first by a constitutionality challenge against the Arbitration Act and more recently by the restrictive approach taken in the 2004 Public-Private Partnership Law (“PPP Law”).

⁷² *Id.*

⁷³ See Oscar M. Garibaldi, *Carlos Calvo Redivivus: The Rediscovery of the Calvo Doctrine in the Era of Investment Treaties*, TRANSNAT’L DIS. MGMT., Dec. 2006, at 43.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 43–44.

⁷⁷ *Id.* at 44.

⁷⁸ United Nations Commission on International Trade Law [UNCITRAL], Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Apr. 10, 2007).

1. The Constitutionality Challenge

In October 1996, soon after the Arbitration Act was approved, an appeal, *MBV v. Resil* was brought before the Brazilian Federal Supreme Court challenging the validity of the Arbitration Act as a violation of the Constitution.⁷⁹ As the first case concerning the Arbitration Act, the case was brought to the attention of the eleven justices of the Court.⁸⁰ The case originated in a request of enforcement for a foreign arbitration award issued in Barcelona, Spain.⁸¹ The Court, however, took the opportunity to review the constitutionality of the entire Act.⁸²

Initially, the reporting justice, Minister Sepúlveda Pertence, considered that certain articles—including Articles 6 and 7, admitting specific performance of the arbitration clause, Article 41, providing the exclusion of courts when faced with an arbitration clause, and Article 42, listing the circumstances under which an appeal might be made against a judgment given under Article 7—of the Arbitration Act were unconstitutional, mainly because they would represent a general denial of access to the judicial review provided for in Article 5, XXXV of the 1998 Constitution.⁸³ After more than five years of discussion, however, the position of the reporting judge was defeated in December 2001 by a seven to four decision, and the Arbitration Act was declared constitutional.⁸⁴

Although the final decision was pro-arbitration, the position of the reporting judge and the other three dissenting judges, as well as the long deliberation, has demonstrated Brazil's suspicion and hesitation towards international arbitration.

2. The PPP Law

On December 30, 2004, Brazil adopted Federal Law No. 11079,

⁷⁹ For details of the case, see Joao Bosco Lee, *Brazil*, in INTERNATIONAL ARBITRATION IN LATIN AMERICA 61, 63–66 (Nigel Blackaby et al. eds., 2002); see also Guido Santiago Tawil, *The Role of Arbitration and International, Regional, Subregional and Bilateral Treaties in Latin America*, <http://www.bomchil.com/cas/articulos/The%20role%20of%20arbitration%20and%20international.pdf> (last visited Mar. 27, 2007).

⁸⁰ Tawil, *supra* note 79, at 14.

⁸¹ *Id.*

⁸² In Brazil, the Supreme Court takes charge of the control of constitutionality, and has jurisdiction to examine the constitutionality of the entire law in case one of its provisions is called into question. Therefore, even though the matter of the validity of the arbitration clause was not argued in the enforcement procedure, the Court raised the issue on its own initiative. See Lee, *supra* note 79, at 64 n. 15.

⁸³ Article 5, XXXV of the Constitution provides that “the law shall not exclude from review by the Judiciary any violation of or threat to a right.” C.F. art. 5, XXXV (Braz.). For further details of the reporting justice’s reasoning, see Lee, *supra* note 79, at 63–64. See also Tawil, *supra* note 79, at 14–15.

⁸⁴ See Tawil, *supra* note 79, at 15.

establishing a legal framework for Brazilian public-private partnerships (“PPPs”) and for bids and concession agreements within the scope of federal, state and local governments.⁸⁵ The PPP Law permits parties to choose arbitration as a means to settle any dispute arising from PPP contracts.⁸⁶ It requires, however, that the seat of the arbitration be in Brazil and the proceedings be conducted in Portuguese.⁸⁷ Furthermore, the PPP Law only accepts domestic arbitration and prohibits the submission of any disputes in relation to a PPP contract to international arbitration. Foreign investors therefore can only seek redress before local courts or arbitration tribunals applying Brazilian law. This affirms the reluctance of the Brazilian Government to subject cases involving public entities, such as state-investor disputes, to international arbitration.⁸⁸

C. Venezuela

Certain events which occurred in Venezuela in recent years have also been regarded as evidence of the resurgence of the Calvo Doctrine;⁸⁹ most notably, the Exploration Round Case and the *MINCA* case.

1. *The Exploration Round Case*

“In December 1995 a petition was filed with the Venezuelan Supreme Court asking for a ruling on the constitutionality of” arbitration provisions “in the Congressional Accord approving the 1995 Exploration Bidding Round.”⁹⁰ One provision in the Congressional Accord, Condition 17, stated that all disputes arising from Association Agreements (i.e., oil exploration agreements with investors concluded following the bid) will be resolved by binding arbitration.⁹¹ A group of Venezuelan citizens, however, challenged that this provision violated Article 127 of the Venezuelan Constitution,

⁸⁵ Lei No. 11.079, de 30 de dezembro de 2004 (Braz.), available at https://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/L11079.htm. An English version is available at http://www.planejamento.gov.br/arquivos_down/ppp/legislacao/lei_11079_301204_eng.pdf.

⁸⁶ *Id.* art. 11, III.

⁸⁷ *Id.*

⁸⁸ As noted by Rubins, the only path towards international arbitration recognized in Brazil is by carefully drafted arbitration clauses in contracts between a foreign investor and the Brazilian government, as “Brazil lacks the legal infrastructure that in many other countries of Latin America give foreign investors explicit guarantees of equitable treatment and access to international arbitration.” See Noah D. Rubins, *Investment Arbitration in Brazil*, 4 J. WORLD INVESTMENT & TRADE 1071, 1080–81, 1091 (2003).

⁸⁹ See Cremades, *supra* note 20, at 81.

⁹⁰ Elisabeth E. Eljuri, *Oil Opening: A Constitutional Challenge*, NAT’L L. CTR. FOR INTER-AMERICAN FREE TRADE (1996), <http://www.natlaw.com/pubs/spveen1.htm>.

⁹¹ See *id.*

which, they believed, gave local courts exclusive jurisdiction over such contracts.⁹² Article 127 of the 1961 Venezuelan Constitution states as follows:

[I]n contracts of public interest, even when not expressly stated, there is considered to be incorporated, if not against the nature of the contract, a clause pursuant to which any doubt or dispute that may arise in connection with such contracts and which cannot be amicably resolved by the parties, shall be decided by the competent courts of the Republic, in accordance with its laws, and may not give cause or reason to foreign claims.⁹³

Since the validity of arbitration had never been decided by the Supreme Court and there had been contradictory opinions from the Attorney General's office on this issue,⁹⁴ the case was rather controversial.

On August 17, 1999, "the Venezuelan Supreme Court rendered a milestone decision in the Exploration Round Case,"⁹⁵ upholding the constitutionality of the arbitration clause in the Accord. The Supreme Court held that although the agreements were "contracts of public interest," they fell within the exception in Article 127, which waived the application of the local court jurisdiction requirement in case such application would be "against the nature of the contract."⁹⁶ The Court held that this exception "enabled the [g]overnment, subject to subsequent congressional approval, to decide—on a case-by-case basis—whether to include an arbitration clause in a contract of public interest."⁹⁷ The Court justified its conclusion by stating that, in the present case, "an eventual arbitral tribunal would not be confronted with issues concerning 'the national interest.'"⁹⁸

Although the Exploration Round Case was resolved in favour of arbitration and foreign investors, the uncertainty of the constitutionality of arbitration has not been eradicated, given that the Venezuelan Supreme Court did little to clarify the ambiguity surrounding the "nature of the contract" exception. The new Constitution, adopted in 1999, after the case was settled, did nothing to resolve the question. Contrary to what foreign investors have hoped for, the new Constitution retained Article 127's existing language along with its exception, but renumbered it as Article

⁹² See Cremades, *supra* note 20, at 81.

⁹³ *Id.*

⁹⁴ See Eljuri, *supra* note 90.

⁹⁵ Cremades, *supra* note 20, at 83 (citing Supreme Court Decision of August 17, 1999, File No. 812-829).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

151.⁹⁹

In March 2001 the President of Venezuela issued Instructive Order No. 4 “to regulate the internal review mechanisms of public interest contracts to be executed by the Republic, particularly, in connection with the inclusion of international arbitration clauses.”¹⁰⁰ According to this Order, contracts concerning public interests must be submitted to the Attorney General of the Republic for an opinion with regard to the legality of the arbitration clause in light of Article 151 of the new Constitution.¹⁰¹

Additionally, as new members of a recently-established Supreme Tribunal of Justice have been appointed, the Supreme Court’s previous favorable ruling upholding the constitutionality of an arbitration clause in a public contract might also be changed.¹⁰² This perception seems to have been confirmed in the *Minera las Cristinas, C.A. (“MINCA”) v. Corporación Venezolana de Guyana (“CVG”)* case (“MINCA case”),¹⁰³ a discussion of which follows.

2. The MINCA Case

The *MINCA* case involved a 1992 mining agreement between CVG, an agency of the Venezuelan Government, and MINCA, a Venezuelan company ninety-five percent owned by a Canadian company, Vanessa Ventures Ltd. The agreement was for the exploration, development and exploitation of gold and copper in an area called “Las Cristinas.”¹⁰⁴ The agreement contained a dispute resolution provision requiring “that any dispute between parties would be referred to an arbitration seating in Venezuela, in accordance with the ICC Arbitration Rules and the Venezuelan Code of Civil Procedure.”¹⁰⁵ A dispute arising in 2001 between the two parties resulted in the CVG terminating the mining agreement and then taking physical control of the site.¹⁰⁶ Later the Ministry of Energy and Mines passed a resolution to terminate the mining agreement and the government “issued a Presidential Decree declaring the area of Las

⁹⁹ CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA art. 151. An unofficial English translation of the Constitution can be found at the Australia Venezuela Solidarity Network website, available at <http://www.venezuelasolidarity.org/?q=node/53> (last visited on Mar. 27, 2007).

¹⁰⁰ Bernardo Weininger & David M. Lindsey, *Venezuela*, in INTERNATIONAL ARBITRATION IN LATIN AMERICA 223, 235 (Nigel Blackaby et al. eds., 2002).

¹⁰¹ *Id.* at 235–36.

¹⁰² See Cremades, *supra* note 20, at 83.

¹⁰³ Bernardo M. Cremades, *Resurgence of the Calvo Doctrine in Latin America*, 7 BUS. LAW INT’L 53, 65 (2006) [hereinafter Cremades, *Calvo Doctrine*] (citing Decision No. 0083 of the Political Administrative Chamber of the Supreme Court, July 15, 2004).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 66.

¹⁰⁶ *Id.*

Cristinas reserved to the National Government.”¹⁰⁷

MINCA first challenged CVG’s action, and then the ministerial resolution and the Presidential Decree before domestic courts, but all of its requests for judicial review were dismissed.¹⁰⁸ In May 2002, MINCA filed a petition in front of the Supreme Court of Justice, “requesting the enforcement of the arbitration clause.”¹⁰⁹ The Supreme Court dismissed MINCA’s petition on the ground that the subject matter concerned state assets and therefore could not be subject to arbitration.¹¹⁰ The Court based its decisions on, *inter alia*, the aforementioned Article 151 of the Constitution, which generally subjects contracts of public interests to the exclusive jurisdiction of local courts.¹¹¹ It thus resurrected the uncertainty of Venezuela’s position towards international arbitration.

The aforementioned events in Argentina, Brazil and Venezuela, together with similar events in other Latin American states,¹¹² such as Ecuador’s cancellation of oil contacts with Occidental Petroleum¹¹³ and Bolivia’s nationalization of its hydrocarbons sector,¹¹⁴ clearly suggest that the tide of investment policy seems to be turning. No longer are Latin American states as eager to embrace neo-liberalism. Rather, a more conservative or nationalistic approach seems to be gaining the upper hand in these states.¹¹⁵ As a result, Calvo does not seem to be dead, as many

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Cremades, *Calvo Doctrine*, *supra* note 103, at 66.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 67.

¹¹² Apart from the said three states, other Latin American states have also expressed increasing dissatisfaction in international arbitration. For example, the Attorney General of Ecuador has reportedly said that he is studying whether Ecuador should terminate the BIT with the United States. Di Rosa, *supra* note 23, at 74 n. 88.

¹¹³ Luke E. Peterson, *Ecuador Moves Against Occidental Petroleum Contract and Assets*, INV. TREATY NEWS, May 16, 2006, available at http://www.iisd.org/pdf/2006/itn_may16_2006.pdf.

¹¹⁴ In May 2006, Bolivia issued a decree through which natural hydrocarbon resources were nationalized. The decree stipulates that companies conducting activities in the gas and petroleum production industry have to turn over the entire production of hydrocarbons to “Yacimientos Petrolíferos Fiscales Bolivianos” (YPFB), “which will control the distribution of these resources, and will also determine the amount and conditions at which gas and petroleum will be allocated to the domestic and foreign markets.” Am. Soc’y of Int’l Law, Bolivia: Presidential Supreme Decree 28701 (Nationalization of Hydrocarbons Sector) (May 1, 2006), International Law In Brief, (May 25, 2006), <http://www.asil.org/ilib/2006/05/ilib060525.htm#l1>.

¹¹⁵ The “revival” or “resurgence” of the Calvo Doctrine in Latin America has attracted wide attention. For instance, in September 2005, the Washington D.C. Bar organized a timely seminar entitled “The Resurgence of the Calvo Doctrine?” District of Columbia Bar, “The Resurgence of the Calvo Doctrine?” seminar program, http://www.bg-consulting.com/docs/calvo_program.jpg (last visited Mar. 27, 2007).

assumed or predicted, but rather alive and well.

II. THE REVIVAL OF THE CALVO DOCTRINE: BEYOND LATIN AMERICA

The resurgence of the Calvo Doctrine identified above is not confined to Latin America. Indeed, Latin American states' recent Calvo move coincided with a worldwide trend reflecting, revising and rejecting neo-liberalist investment instruments, while embracing a more conservative and balanced regime for international investment. Thus, to everyone's surprise, the Calvo Doctrine "suddenly is in vogue again . . . in the U.S. Congress!"¹¹⁶ Mounting cases against the U.S. government before international arbitration tribunals, particularly North American Free Trade Agreement ("NAFTA") tribunals, has put the United States, a long-time unreserved advocate of investment liberalism, on defense, and forced it to re-examine investment treaties and treaty-based arbitration for the first time in history from a defendant's position. It has been noted that, since the mid-1990s, there has been "a gradual, relatively moderate (but unmistakable) weakening" in the United States of the commitment to the traditional high standard of investment protection.¹¹⁷ Thus in 1994 the Clinton administration dropped in its model BIT the "Umbrella Clause", a provision requiring the state to observe obligations it had assumed in relation to the foreign investment.¹¹⁸ In 2001, the three NAFTA member states, led by the United States, adopted a binding interpretation declaring that "[t]he concept of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens,"¹¹⁹ in an effort to eliminate the undesired influence of the *Pope & Talbot Inc. v. Canada*¹²⁰ jurisprudence. A bill was enacted in 2002 regarding the Executive's authority to negotiate trade and investment

¹¹⁶ David Schneiderman, Calvo in Congress: The Migration of Constitution-Like Investment Rules, <http://www.ualberta.ca/GLOBALISM/pdf/Aus%20pdfs/schneidermanab.pdf> (last visited Mar. 27, 2007).

¹¹⁷ Garibaldi noted that such change might be the result of a political compromise between the country's traditional position and the pressure from the circumstantial alliance of at least three political forces, namely the pro-regulation interests on the left and the legal defense interest and anti-internationalist interests on the right. Garibaldi, *supra* note 73, § 1.03[3][c].

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Pope & Talbot Inc. v. Canada*, 13 WORLD TRADE & ARB. MAT'L 61 (2001), available at http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf. The Award held that fair and equitable treatment and full protection and security standards imposed an additional obligation to the international minimum standard of treatment under general international law. See *Id.* at ¶ 111.

treaties, which requires that,

[T]he principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice.¹²¹

This bill was regarded as “Calvo in the Congress” because it adopted language very similar to the Calvo Doctrine as policy in international investment treaty-making practice. As a result, the U.S. government recently revised its Model BIT¹²² and adopted a more conservative approach in its BIT practice. A narrower definition of “investment,” for example, was adopted in the U.S.-Uruguay BIT signed in December 2004, the very first after the 2004 Model BIT was adopted.¹²³ Indirect expropriation has been clarified and redefined so that mere adverse effect on the economic value of an investment does not constitute an indirect expropriation and that, except in rare circumstances, non-discriminatory regulatory actions by a party aimed at protecting legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations. A special procedure was devised in the U.S.-Uruguay BIT at the early stages of the dispute settlement process, with a view to discarding “frivolous” claims.¹²⁴ Moreover, the BIT envisions the possibility of setting up a mechanism for appellate review, in order to ensure greater consistency in arbitral awards.¹²⁵

¹²¹ Trade Act of 2002, Pub. L. No. 107-210, § 2102 (b)(3), 116 Stat. 995 (emphasis added).

¹²² U.S. State Department, Treaty Between the Gov’t of the United States of Am. and the Gov’t of [Country] Concerning the Encouragement and Reciprocal Prot. of Inv. (2004 Model BIT), http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

¹²³ Instead of the previously used open asset-based definition of investment, the U.S.-Uruguay BIT has opted to define the term “investment” in economic terms, which in principle covers every asset that an investor owns and controls, but adds the qualification that such assets must have the “characteristics of an investment,” such as “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Oct. 25, 2004, U.S.-Uru., § A, art. 1, available at http://www.ustr.gov/assets/World_Regions/Americas/South_America/Uruguay_BIT/asset_upload_file582_6728.pdf [hereinafter U.S.-Uruguay BIT]. This is complemented by exclusions of several kinds of assets (e.g. certain debt instruments). *Id.*

¹²⁴ UNCTAD, *International Investment Agreements*, *supra* note 8, at 5.

¹²⁵ *Id.*

Second, many other states, like Canada, Japan, and certain Latin American states, are following the steps of the United States. Thus, James McIlroy has observed that Canada's new model BIT is noteworthy "because it steps back from a current high water mark of private investor protection."¹²⁶ Further, an UNCTAD study has discovered that a "new generation of BITs" has actually emerged, modelled after the new U.S. and Canadian model BITs.¹²⁷ These new BITs exhibit four main features, most of which have the effect of either narrowing down substantive obligations, or tightening-up access to the state-investor dispute settlement mechanism.¹²⁸

Third, world-wide efforts have failed time and again to create a global mechanism that protects and liberalizes investment flows. The debacle of the Multilateral Agreement on Investment ("MAI")¹²⁹ within the OECD demonstrated that a liberal approach toward international investment was not viable even among developed countries, namely the OECD member states.¹³⁰ The Cancun ministerial conference, which led to the abandonment of the talks on a MAI within the WTO framework,¹³¹ in turn, clearly refused another major effort to set forth a liberal investment regime on a global scale.

Finally, the change of governmental attitude towards investment liberalization is also reflected in domestic legal changes and BIT growth trends. As Table 1 shows, restrictive measures have been on the surge since 2000. In 2000, only two percent of the legal changes were geared toward more restrictions—this increased to seven percent in 2001. In 2003 it reached ten percent, followed in 2004 by an additional three point increase. The only drop during this period occurred in 2002, from seven to five percent, and did not change the general conservative trend. While there are still new BITs concluded each year, the general trend of newly-signed BITs has declined since 2001, as shown in Chart 1.

¹²⁶ James McIlroy, *Canada's New Foreign Investment Protection and Promotion Agreement: Two Steps Forward, One Step Back?*, 5 J. WORLD INVESTMENT & TRADE 621, 646 (2004).

¹²⁷ UNCTAD, *International Investment Agreements*, *supra* note 8, at 4.

¹²⁸ *Id.* at 4–6.

¹²⁹ Org. for Econ. Co-Operation and Dev. (OECD), Multilateral Agreement on Investment: Documentation From the Negotiations, <http://www1.oecd.org/daf/mai/> (last visited Mar. 27, 2007).

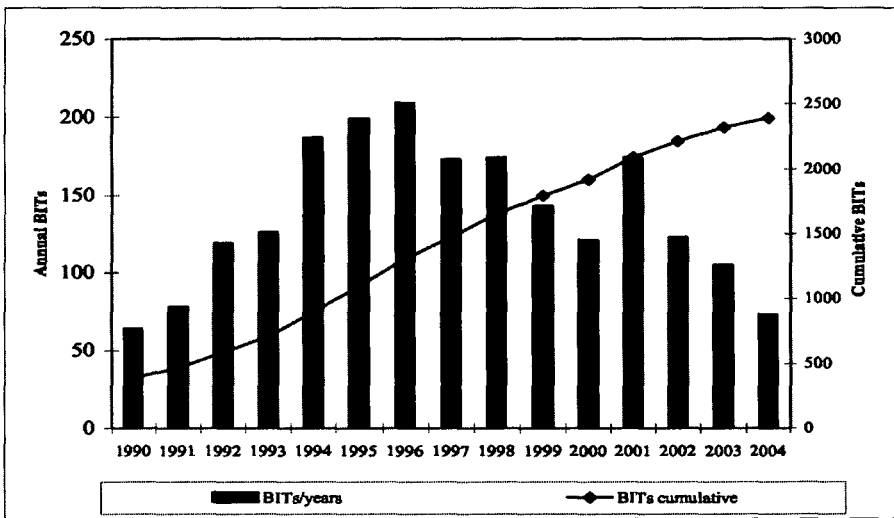
¹³⁰ *Id.*

¹³¹ Decision Adopted by the General Council, *Doha Work Programme*, § (1)(g), WT/L/579 (Aug. 2, 2004), available at http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf.

Table 1: Restrictive Measure Adopted 2000-2004

Year	Number of legal changes	Number of more restrictive measures adopted	Percentage of restrictive measures in total changes
2000	150	3	(2%)
2001	208	14	(7%)
2002	248	12	(5%)
2003	244	24	(10%)
2004	271	36	(13%)

Chart 1: Number of BITs concluded, cumulative and year by year, 1990-2004¹³²



The international investment regime tide has been turning even beyond Latin America: neo-liberalism is no longer unreservedly favored by all countries, developed and developing states alike.¹³³ On the contrary, now

¹³² UNCTAD, <http://www.unctad.org/iaa>.

¹³³ The 1990s may be regarded as an era of 'neo-liberalism'. In that period, investment and trade liberalization had gain almost universal support in all states, developed or developing. The best manifestation of this was that even the staunchest advocates and

even developed states, including the strongest advocates of a liberal investment regime, such as the United States, have started to rethink the roles and functions of international investment treaties and to redesign their BIT programs in order to contain the threats posed by the previously unfettered liberal investment regimes.¹³⁴ Calvo is regaining ground in the battle of international investment law.

III. THE FUTURE OF INTERNATIONAL INVESTMENT LAW: A THIRD WAY BETWEEN NEO-LIBERALISM AND THE CALVO DOCTRINE?

The resurgence of the Calvo Doctrine demonstrates that the neo-liberalist ideology underpinning international investment instruments exemplified by existing BITs¹³⁵ is neither ideal nor sustainable. However, it is unclear whether the current trend is going to eventually lead to, and sustain, a complete restoration of the Calvo Doctrine in its original form, or whether it is only a transitory phenomenon, which will soon die off. In other words, it is uncertain whether the political economy of international investment law will be completely replaced by the Calvo Doctrine (as an example of “economic nationalism”), or will continue to be dominated by neo-liberalism (or “economic liberalism”).¹³⁶

supporters of Calvo Doctrine in Latin America had changed their attitude toward foreign investment and had started to enter into BITs that embrace investment liberalism. For details of these changes, see Shan, *supra* note 3, §§ II–VI.

¹³⁴ The aforementioned ‘Calvo in Congress’ episode is the best example of such change of attitude in developed states.

¹³⁵ BITs present themselves as liberalist instruments, as evidenced by the goals typically referred to in their preambles, i.e., to create favorable conditions for investment and to increase economic prosperity. The history of the birth and development of BITs also shows that, as observed by Kenneth Vandeveld, “a principal inducement for states to enter into a BIT has been precisely that it affirms liberalism.” Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT’L L. 621, 627 (1998). This nature of BITs, as embodied in their preambles, has actually been acknowledged by arbitration tribunals and has had an impact in the interpretation of BIT provisions. *Id.* at 627–28.

¹³⁶ According to Vandeveld, who pioneered studies in the political economy of BITs, there are three dominant political economic theories relevant to BITs: economic nationalism, economic liberalism and Marxist economics. Among them, Marxist economics is generally hostile to foreign investment, considering it a tool of neo-colonialism that subjects local economies to foreign control and promotes underdevelopment. Following the collapse of the Soviet Bloc and the reforms in China and other formerly Communist states, this theory is no longer practised. “Economic nationalism” holds that international investment should be regulated to ensure that it promotes national political policy. Economic nationalist developing states therefore have sought to control inward and outward investment flows through interventionist measures—such as protective tariffs, tax incentives, investment screening, and performance requirements. The goals are to attract those foreign investments that would further their development policy, to prevent establishment of those investments that would not, and to ensure that investment, once established, would continue to operate in accord with national policy. Calvo Doctrine is a typical reflection of this theory, particularly

The current trend is likely to continue, but unlikely to restore Calvo in its original form. Rather, Calvo will be revived in a modified form, striking a balance between the rights and interests of the investors and those of the states. There are two reasons for the sustainability of this trend. First, as elaborated above, the resurgence of Calvo is not a single event happening in one country or one region. Rather, it has been echoed throughout the world. Such a global trend is unlikely to quickly disappear. Second, and more fundamentally, the decline and resurgence of Calvo has exposed a fundamental flaw in both the previous classical Calvo regime and the current dominant neo-liberal regime: the imbalance of the rights and obligations between the host state and foreign investors.

Before the 1980s, when Calvo dominated Latin America and indeed international forums such as the United Nations General Assembly, states had every power and no substantial international law restraints,¹³⁷ while investors took great commercial and non-commercial risks without sufficient international legal protection. There was an imbalance in favor of the states. Since the 1980s, and particularly in the 1990s when states—including Latin American states—embraced the neo-liberalistic investment regime, foreign investors have enjoyed every “constitution-like” guarantee and privilege derived from BITs and other investment instruments,¹³⁸ while governments were forced to retreat—there was too much of an imbalance favoring foreign investors. Neither regime is ideal, although both of them may have some merit.

Calvo is unlikely to be completely restored because no country can now afford to be entirely cut off from interactions with the world in this era of globalization. With intensified international interactions, there come

in developing states. Economic liberalism posits that free markets, unfettered by state regulation, would result in the greatest prosperity for all. Accordingly, liberalism also advocates the free movement of capital across borders, which in essence holds that the state should permit the market to determine the direction of international investment flows. This theory is generally favored by developed capital exporting states, which have actively promoted BIT programs, particularly since the 1970s, as an essential neo-liberalist tool. For a good analysis of the basic features of these theories, and BITs as quintessentially liberalist instruments, see *id.* at 621–28.

¹³⁷ For details of the origin of Calvo Doctrine and its international influence before the 1980s, see Shan, *supra* note 3, § I.

¹³⁸ Some scholars have argued that BITs and other investment treaties display the characteristics of domestic constitutions in that they bind governments over long periods of time to constitution-like rules designed to protect the private property of individuals and firms against discriminatory treatment or takings of investment interests, and that they generate constitution-like entitlements legally enforceable before tribunals and courts. See David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. OF TORONTO L.J. 499 (1996). See also Stephen Clarkson, *Somewhat Less Than Meets the Eye: NAFTA as Constitution*, Address at the International Sociological Association Annual Meeting (Jul. 27, 1998), <http://www.chass.utoronto.ca/~clarkson/manuscripts/econstitution98.html>.

more extensive international rules, setting forth international substantive standards and procedural remedies. To reject such standards and remedies altogether, as Calvo originally advocated, would be neither plausible nor desirable. The classical Calvo Doctrine no longer fits the world as it is now, if it ever fit the world before. On the other hand, the neo-liberal regime must be reformed to avoid repeating the “Catch-22” situations that Argentina and many other Latin American states have faced in recent years.¹³⁹ An ideal FDI regime, therefore, might have to be found somewhere between the two previously existing regimes, perhaps a “Third Way” in international investment law.

The new generation of BITs, exemplified by the new U.S. and Canadian model BITs, may be regarded as a step in that direction.¹⁴⁰ They nevertheless demonstrate only small changes within the previous liberalist paradigm of BITs. These changes do not alter the fundamental character of these investment treaties as quintessential liberalist instruments, which only protect and “empower” investors without sufficient consideration of the rights of host states and the duties of the investors.

To fully address the problem of the imbalance of rights and obligations between investors and states, a more radical, and even revolutionary solution is needed. There are two alternative possibilities: one is to complement the current liberalist or capitalist BITs with binding instruments, in the form of bilateral, or preferably global, agreements on the rights of states and the obligations of foreign investors (a “complementary approach”). Efforts of this nature have been made at global and multilateral levels, but with only very limited success.¹⁴¹ Hence, within the OECD, the Guidelines for Multinational Enterprises have been adopted to regulate the conduct of multinational corporations, but lack binding force.¹⁴² Globally, the U.N. Code of Conduct on Transnational Corporations had been drafted and discussed intensively in the 1970s and 1980s, but was finally abandoned in the 1990s during the heatwave of global investment

¹³⁹ In the annulment application, for example, Argentina argued that the judgment by the ICSID in the CMS case placed the country in a “Catch-22” when facing an emergency economic situation: a state may either do nothing and let the economy collapse, or do something to rescue the economy but then go bankrupt paying huge compensation to investors affected by such rescuing efforts. See Peterson, *supra* note 27, § 4.

¹⁴⁰ For instance, James McIlroy has noted that the new Canadian model BIT attempts to “strike a balance between private investors’ rights and the right of a sovereign State to regulate in public interest.” McIlroy, *supra* note 126, at 644.

¹⁴¹ See WENHUA SHAN, THE LEGAL FRAMEWORK OF EU-CHINA INVESTMENT RELATIONS 274 (2005).

¹⁴² See Organization for Economic Cooperation and Development, OECD Guidelines for Multinational Enterprises, http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html, (last visited Mar. 27, 2007).

liberalization.¹⁴³ It may be easier to simply resume work on the U.N. Code of Conduct with a view to establishing a binding global treaty on the regulation of the duties and responsibilities of international investors.

The other possibility, which might be called a “consolidated approach,” is to add provisions on the responsibilities of foreign investors to the existing bilateral or multilateral investment instruments. This would effectively redefine the nature and ideology of BITs, moving from a one-sided liberalist instrument assuring and empowering foreign investors, toward a more rational instrument that balances the interests, rights and responsibilities of all parties concerned, particularly between host state and foreign investors. In this regard, one has to refer to the impressive work done by the International Institute for Sustainable Development (“IISD”), which developed the IISD Model International Agreement on Investment for Sustainable Development (“IISD Model Investment Agreement”).¹⁴⁴ The IISD Model Investment Agreement marks the first major attempt to construct such a consolidated instrument on international investment. It aims to address the balance of interests among foreign investors, the host states and the home state. In a separate article entitled “Objective,” it sets out its objectives “[promoting] foreign investment that supports sustainable development, in particular in developing and least developed countries.”¹⁴⁵ The goal of promoting investment is no longer a singular objective, but one that is complemented and qualified by the goal of sustainable development. Also, the Preamble clearly states that it seeks “an overall balance of rights and obligations in international investment between investors, host countries and home countries.”¹⁴⁶ To strike such a balance, the text of the IISD Model Investment Agreement provides for sets of substantive rights and obligation for each of the actors, as shown in Table 2 below. The Agreement also sets out three mechanisms to implement such rights and obligations. It encourages states to incorporate the rights and obligations in the Agreement into domestic laws, which eventually enables domestic remedies to be brought to bear on investors.¹⁴⁷ It allows host states to raise the issues of compliance with the obligations in front of the international dispute settlement mechanism devised therein, either by a direct claim by a

¹⁴³ The last draft version was completed in 1988, but work on it was suspended in early 1990. For further details of the draft code, see M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (2004).

¹⁴⁴ International Institute for Sustainable Development, *IISD Model International Agreement on Investment for Sustainable Development*, [hereinafter *IISD Model Agreement*] 20 ICSID REV.-FOREIGN INV. L.J. 91 (2005).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Howard Mann, *The IISD Model International Agreement on Investment for Sustainable Development: An Introductory Note*, 20 ICSID REV.-FOREIGN INVESTMENT L.J. 84, 86 (2005).

host state to annul rights of an investor under this Agreement due to persistent failure to comply with the obligations, or a counterclaim to an investor-state claim based on the breach of an obligation by an investor.¹⁴⁸ Finally, it models the OECD Guidelines on Multinational Enterprises and provides for a national authority to thoroughly investigate civil society complaints of non-compliance in the host or home state.¹⁴⁹

The IISD Model Investment Agreement notably contains some interesting innovations. For example, allowing a direct claim by host states against foreign investors for failing to comply with their investor obligations is a novel approach.¹⁵⁰ Although it is yet unknown whether and how it might work in practice, it is indeed a “logical corollary” of the one-sided investor-state dispute settlement regime that exists for current international investment instruments.¹⁵¹ Despite that it is still in the early stages of development and that there is certainly room for further improvement,¹⁵² the IISD Model Agreement represents the first genuine effort to strike a balance between the rights and obligations of host states and foreign investors and therefore deserves serious consideration.

Table 2: Summary of Key Rights and Obligations of Foreign Investors, Host States and Home States¹⁵³

Parties	Rights	Obligations
Foreign Investors	<ul style="list-style-type: none"> - National treatment - Most favored nation - Minimum international standards - No expropriation without compensation - Senior management - Transfer of assets 	<ul style="list-style-type: none"> - Comply with local laws - Pre-establishment impact assessment - Anti corruption - Environmental management/international environmental obligations - Human rights protection - Core labor standards - Provision and publication of information - Investor civil liability

¹⁴⁸ *Id.* at 86.

¹⁴⁹ *Id.* at 87.

¹⁵⁰ *IISD Model Agreement*, *supra* note 144, art. 18(C).

¹⁵¹ Mann, *supra* note 147, at 86.

¹⁵² For example, Articles 11(A) and (B) might be improved by referring to the overriding effect of binding international law, particularly international treaty obligations, when asserting the applicability of local laws and local jurisdiction of the host state. *See IISD MODEL AGREEMENT*, *supra* note 144, art. 11(A)–(B).

¹⁵³ Mann, *supra* note 147, at 88.

Host States	<ul style="list-style-type: none"> - Inherent right of states to regulate, articulate development policy - Right to performance requirements (exception from national treatment) - Investment promotion - Access to investor information 	<ul style="list-style-type: none"> - Procedural fairness - Maintenance of environmental standards, labor standards - Minimum standards for: environmental assessment, core labor, human rights - Anti-corruption - Publication of information
Home States	<ul style="list-style-type: none"> - Claim protection of investor rights in dispute settlement 	<ul style="list-style-type: none"> - Assistance to facilitate foreign investment - Provide information on investors - Ensure procedural laws allow for hearing on investor liability - Anti-corruption

IV. CONCLUDING REMARKS: FROM A “NORTH-SOUTH DIVIDE” TO A “PRIVATE-PUBLIC DEBATE”

The revival of Calvo in and beyond Latin America not only signals a significant change of attitude and ideology toward the international investment regime, but also marks a noticeable shift of tension in international investment law, indicating progress. In previous debates on international investment instruments, such as U.N. General Assembly Resolutions¹⁵⁴ and BITs, the tension was primarily between developed states, with capital-exporting countries representing the interests of foreign investors, and developing states, and with capital-importing countries representing the interests of host states.¹⁵⁵ In other words, the previous

¹⁵⁴ Resolutions 1803 and 3281 are the most important resolutions relating to the standard of treatment for international investment, particularly on the issue of expropriation and its compensation. The two instruments are traditionally read as taking contrasting stands and having different legal effects. The author is, however, of the view that the two resolutions should be read together as one emerging standard of two different development stages, carrying the same legal implications. See SHAN, *supra* note 141, at 181–87. See also Declaration on Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/RES/1803 (Dec. 14, 1962); Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. Doc. A/RES/29/3281 (Jan. 15, 1975).

¹⁵⁵ The literature on this debate has been tremendous. See, e.g., S. FRIEDMAN, *EXPROPRIATION IN INTERNATIONAL LAW* (Greenwood Press, 1983) (1953); Charles N. Brower, *Current Developments in the Law of Expropriation and Compensation: Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT’L LAW. 639

international investment law-making process has been dominated and characterized by a North-South divide, with developed states trying to push for a neo-liberalist agenda, and developing states attempting to resist such an agenda and maintain their inherent rights to regulate and control foreign investment. The picture has recently changed and become much more complicated. The North-South divide has narrowed from what it was three or four decades ago. Currently, a more dominant issue seems to be the conflict between the private interests of foreign investors and the public interests of states, namely host states. In other words, the featured debate of international investment law-making seems to have shifted from a "North-South Divide" to a "Private-Public Debate." The following four major factors might have contributed to this shift.

The first factor is the shift, or the realization, of the role of leading developed states with regard to international investment. Before the 1990s, developed states such as the United States and Canada viewed themselves, and rightly so, as capital-exporting states and representatives of foreign investors, and therefore fought hard to secure the highest possible standard of protection for their investors abroad by pushing ahead BIT and multilateral investment treaty programmes. Since the 1990s, particularly after a series of NAFTA Chapter 11 cases, these countries have woken up realising that they are also major capital-importing states and therefore also have every reason to defend their interest as host states, just like what the developing states had done in the 1960s and 1970s. According to Todd Weiler, so far there have been sixteen NAFTA cases against the United States and thirteen against Canada.¹⁵⁶ Such litigation has forced the two governments into the shoes of capital-importing states, a standing point that used to be exclusive to developing states. Consequently, as mentioned above, they have stepped back from their previously unfettered liberal approach and have started to revise their BIT programs. Such a change by leading developed states helps to establish a shared understanding and a common interest between them and developing states: the need to effectively tame and regulate foreign investors and their investment in the

(1987); Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981); Francesco Francioni, *Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity*, 24 INT'L AND COMP. L.Q. 255 (1975); Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 263 (1982); Eduardo Jiménez de Aréchaga, *State Responsibility for the Nationalisation of Foreign Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179 (1978); Davis R. Robinson, Notes and Comments, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176 (1984); Oscar Schachter, *Compensation for Expropriation*, *id.* at 121; M. Sornarajah, *State Responsibility and Bilateral Investment Treaties*, 20 J. WORLD TRADE L. 79 (1986); F. A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 241 (1981).

¹⁵⁶ See Todd Weiler, Naftaclaims.com, http://www.naftaclaims.com/disputes_canada.htm; *id.*, http://www.naftaclaims.com/disputes_us.htm (last visited Jul. 31, 2006).

international investment law-making process.

The second factor is that the role of developing countries in the international investment process has also been undergoing change. A number of developing countries have become more and more important foreign investment suppliers in the world. In its World Investment Report 2004, UNCTAD highlighted that “outward FDI from developing countries is becoming important.”¹⁵⁷ The report noted that some developing economies such as Malaysia, South Korea, and Singapore had already developed an established track record in outward investment.¹⁵⁸ Others, such as Chile, Mexico and South Africa, have become players relatively recently.¹⁵⁹ Others, such as Brazil, China and India, are at the take-off stage.¹⁶⁰ Viewed in relation to gross fixed capital formation, a number of developing economies, such as Singapore, Hong Kong (China), and Taiwan rank higher than a number of developed countries (Germany, Japan, and the United States) in FDI outflow. In other words, a number of developing countries, relatively speaking, are already among top investors.¹⁶¹ Moreover, annual FDI outflows from developing countries have grown faster over the past fifteen years than those from developed countries—from negligible up until the end of the 1980s, to over one-tenth of the world total stock and some six percent of world total flows in 2003 (\$0.9 trillion and \$36 billion, respectively).¹⁶² Some developing economies are now large investors by global standards.¹⁶³

The changing role of developing states is also witnessed by a notable increase of South-South BITs in recent years. The 2005 World Investment Report, for example, noted that the largest number of the new BITs signed during 2004 were between developing states.¹⁶⁴ The change in the role of

¹⁵⁷ UNCTAD, *World Investment Report 2004: The Shift Towards Services*, at 19, U.N. Doc. UNCTAD/WIR/2005, U.N. Sales No. E.04.II.D.33 (2004) [hereinafter UNCTAD, 2004 Report]. See also Chart 2.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

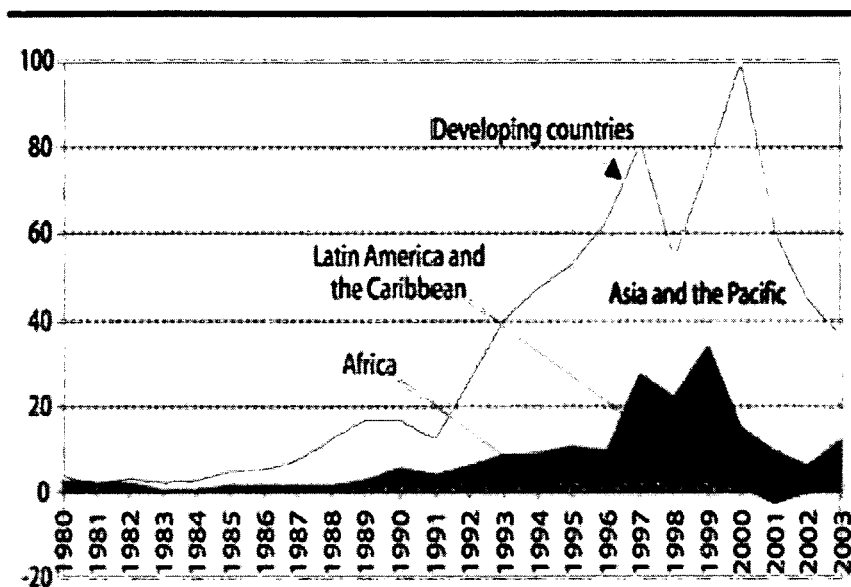
¹⁶² *Id.*

¹⁶³ In 2003, for instance, Hong Kong (China) had a larger outward FDI stock than Sweden, even if round tripping and indirect FDI is taken into account. Also, transnational corporations (TNCs) from Hong Kong figure prominently among the leading TNCs from the developing world, along with those from Singapore, Mexico and South Africa. UNCTAD, 2004 Report, *supra* note 157.

¹⁶⁴ The Report noted that there were twenty-eight BITs signed between developing states accounting for thirty-eight percent of the total, followed closely by the twenty-seven BITs between developed and developing states. See UNCTAD, *World Investment Report 2005: Transnational Corporations and Internationalization of R&D*, at 24, U.N. Doc. UNCTAD/WIR/2005, U.N. Sales No. E.05.II.D.10 (2005) [hereinafter UNCTAD, 2005 Report], available at http://www.unctad.org/en/docs/wir2005_en.pdf.

developing states thus echos similar changes in the role of the developed states identified above, and further enhances the shared understanding and interest in international investment law-making between the two groups.

Chart 2: FDI outflows from developing countries by region 1980–2003¹⁶⁵
(\$ Billions)



The third factor is that the domestic legal infrastructure in developing states for the protection and promotion of foreign investment has been significantly improved, as a result of the extensive legal changes that favoured foreign investment and the massive BIT networks established, particularly during the 1990s. According to the 2005 World Investment Report, an average of sixty-four states a year have made some changes to their FDI laws and regulations since 1991. Among the 2156 changes made during that period, 2006 were changes aimed toward a more liberal investment regime, accounting for ninety-three percent of the total changes (see Table 3).¹⁶⁶ Meanwhile, there has been an explosive expansion of the BIT network in the world. UNCTAD statistics show that by the end of 2004, the number of BITs world wide had reached 2392, among which

¹⁶⁵ UNCTAD, FDI/TNC Database, www.unctad.org/fdistatistics (last visited Mar. 27, 2007).

¹⁶⁶ *Id.* at 28.

2010 were concluded in the 1990s (see Chart I).¹⁶⁷ Moreover, states actively entered into bilateral, regional and trans-regional preferential trade and investment agreements ("PTIAs"). By April 2005, 212 such agreements had also been concluded, among which approximately eighty-seven percent were signed in the 1990s.¹⁶⁸ Such changes in domestic law, together with the extensive international investment treaty network, have significantly narrowed the gap between developed and developing countries in terms of the legal protection and promotion of international investment. Although the gap admittedly still exists, it is by far less significant than it was three decades ago. Consequently, the need for further legal protection of foreign investment has been greatly reduced, as has the tension between developed and developing states in international investment law making process. This obviously paved the way for a shift of attention to a more universal question, namely the conflict between public and private interests.

Table 3: Changes in Domestic Legislations (1999–2004)¹⁶⁹

Year	Number of countries changed FDI laws	Number of changes made to FDI laws	Changes in favour of foreign investors	Changes detrimental to foreign investors
1991	35	82	80	2
1992	43	79	79	0
1993	57	102	101	1
1994	49	110	108	2
1995	64	112	106	6
1996	65	114	98	16
1997	76	151	135	16
1998	60	145	136	9
1999	63	140	131	9
2000	69	150	147	3
2001	71	208	194	14
2002	70	248	236	12
2003	82	244	220	24
2004	102	271	235	36

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ UNCTAD, 2005 Report, *supra* note 164, at 26.

The fourth and final factor is that the increased participation of civil society in the international investment law-making process has highlighted the need for and importance of regulating international investment. Earlier NAFTA cases on investment arbitration, particularly the controversial *Metalclad Case*,¹⁷⁰ focused the attention of many non-governmental organizations (“NGOs”) on international investment treaties and related arbitration practice. The debate on the Draft Multilateral Agreement on Investment within the OECD and the discussions about a multilateral agreement on investment within the WTO framework in the Doha Round have demonstrated the width and depth of NGO participation in the global investment law-making processes. While individual NGOs have different missions and therefore different foci, they all share a main concern: that investment liberalization cannot be achieved at the expense of important public interests, such as human rights, environmental, and labor standards. In other words, they have helped highlight the importance of regulating foreign investment for the public good. Such voices from NGOs, most of which are actually based in developed states, have over the years become more and more influential in domestic and international law and policy making. As a result, they have raised the awareness of the general public, particularly in the developed world, of the need to regulate foreign investment, and thus contributed to the shift of tension in international investment law making.

To conclude, recent years have witnessed a shift of tension on international investment law-making, from “strong states” versus “weak states” (i.e., a “North-South divide”), towards “state sovereignty” versus “corporate sovereignty”¹⁷¹ (i.e., a “Private-Public debate.” If this is what is happening, there should be a better chance to strike a sensible global deal on the protection, supervision, promotion, and regulation of international investment for the general good of the world.

¹⁷⁰ *Metalclad Corp. v. United Mexican States (U.S. v. Mex.)*, ICSID Case No.ARB (AF)/97/1, ICSID REV.-FOR. INVESTMENT L.J. 168 (2001).

¹⁷¹ Given the size and strength of some transnational corporations, and that they are now often equipped with the standing to directly bring lawsuit against host governments before international forums such as the ICSID under BITs and other investment instruments, it is not too much of an exaggeration to say that they enjoy certain elements of “sovereignty”, which may be referred to as “corporate sovereignty”.