

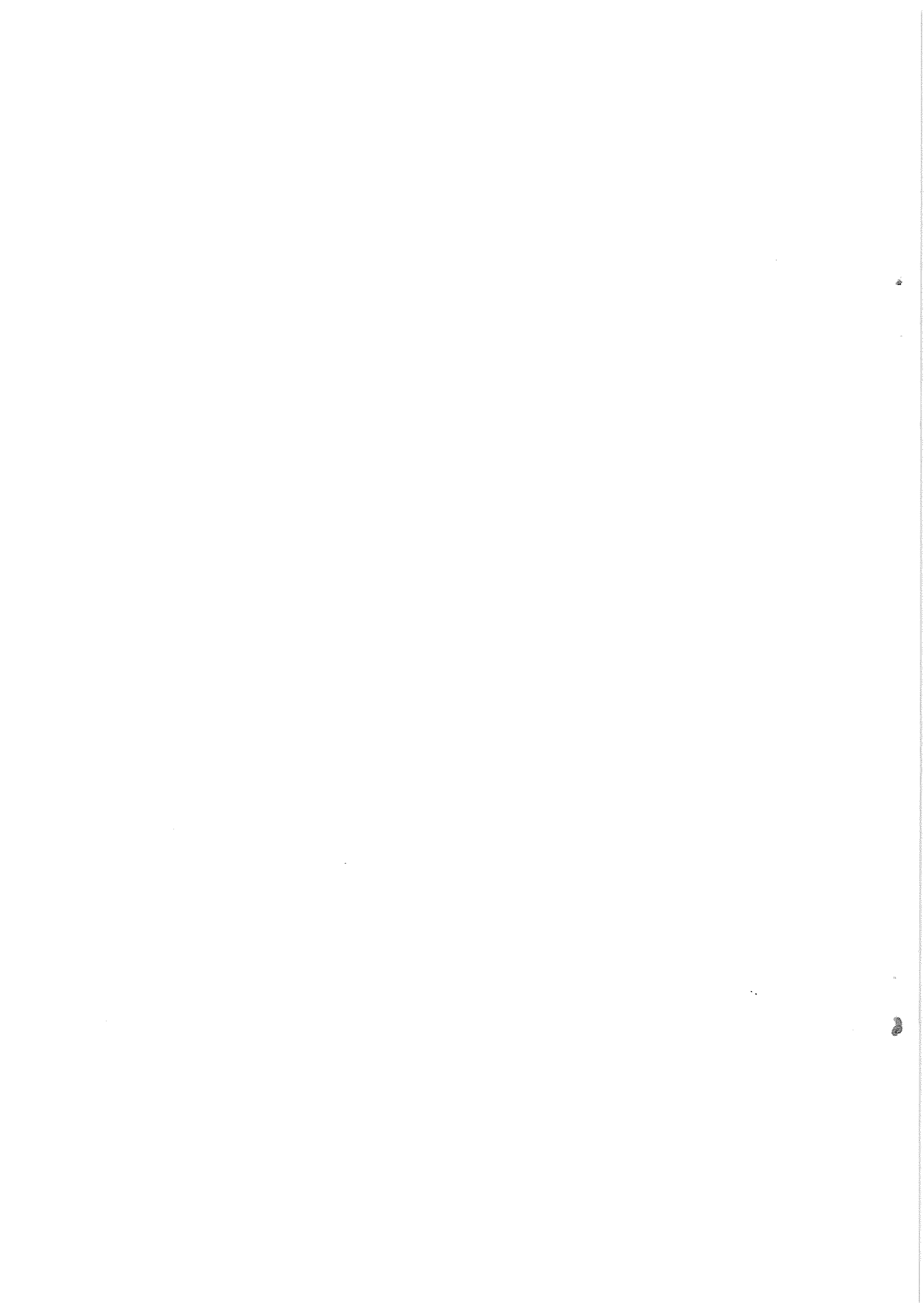
Working Paper Series No. 113

**LATIN AMERICA AND INTERNATIONAL
REGULATION OF FOREIGN INVESTMENT:
CHANGING PERCEPTIONS**

Paul Peters and Nico Schrijver

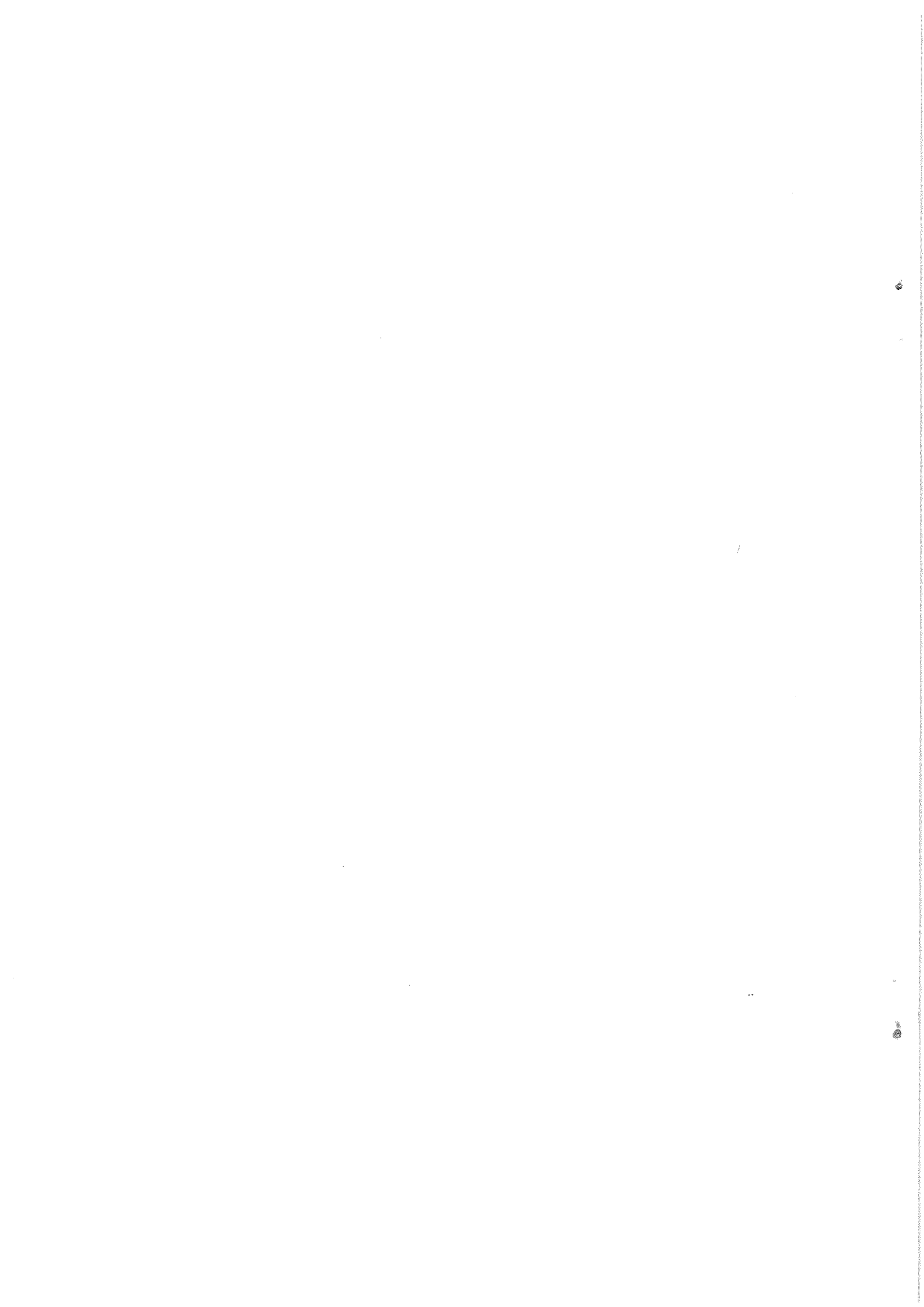
October 1991

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Contents

	<u>Page</u>
Introduction	1
Review of the Calvo doctrine and Calvo clause	2
Participation of Latin American countries in ICSID and MIGA	9
Latin-American bilateral investment treaties in the light of the Calvo doctrine	12
Conclusions	24
Appendix	26



LATIN AMERICA AND INTERNATIONAL REGULATION OF FOREIGN INVESTMENT:
CHANGING PERCEPTIONS

by Paul Peters and Nico Schrijver*

INTRODUCTION

Traditionally, Latin American countries¹ have put emphasis in their foreign policy on such principles as national sovereignty, territorial integrity and non-intervention as well as on the primacy of national law and domestic courts.² In their relations with Europe and the United States this policy served as a political and legal shield for defending their political and economic independence and their freedom to regulate their own affairs. With respect to the particular issue of foreign investment regulation, it served as the legal foundation for an attempt to exclusively subject foreign investors to the national law and the jurisdiction of the courts of the country in which they invest or operate. Thus, each Latin American country sought to equate foreign investors and its own nationals for the purpose of investment regulation. Therefore, this policy is also called the 'national standard'. It is closely associated with the name of the nineteenth-century Argentinean lawyer Carlos Calvo.

At the political level, the principles enshrined in the 'Calvo doctrine' gained some popularity beyond Latin America during and in the immediate aftermath of the decolonization process in other parts of the developing world. The Latin American countries effectively urged these principles before the forum of the United Nations, in particular during the debate on the principle of permanent sovereignty over natural resources. This led to major

* Members of the Netherlands branch of the International Law Association. This working paper is based on two papers which were contributed to a symposium on Outstanding Issues in the Negotiations on a United Nations Code of Conduct on Transnational Corporations, convened by the UN Centre on Transnational Corporations and the International Law Association in the Peace Palace, The Hague, 15-16 September 1989. Paul Peters is a former legal adviser of companies of the Royal Dutch/Shell Group. Nico Schrijver is Senior Lecturer in International Law and International Institutions at The Institute of Social Studies, The Hague.

¹ The designation 'Latin American countries' has been used for different groups of countries. In this study we include the 20 countries listed in the appendix, i.e. countries which are traditionally referred to as Latin American countries and where a language descended from Latin is spoken (Spanish, Portuguese, French). Cf. the Concise Oxford Dictionary of Current English, 7th ed. (1982) under 'Latin'. This co-incides with the 20 Latin American members of the Economic Commission for Latin America (ECLA), as it was established in 1948.

² See Chapter IV on Fundamental Rights and Duties of States as included in the Charter of the Organization of American States, April 30, 1948, 119 United Nations Treaty Series (1952), p.3; see also the Convention on Rights and Duties of States, signed in Montevideo, December 26, 1933, 165 League of Nations Treaty Series, p.19.

controversies between capital-exporting and capital-importing States, especially in the 1970s. In recent years there seems to be less ideological emphasis on the Calvo doctrine, as is reflected in an increased willingness of Latin American countries to accede to multilateral investment agencies and to enter into bilateral investment treaties with capital-exporting States.

This working paper purports, firstly, to review the main characteristics of the Calvo doctrine and the Calvo clause as well as their implications for investment regulation. Secondly, some aspects of the attitude of Latin American countries towards the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA) will be discussed. Thirdly, the article presents an overview of the increasing number of bilateral investment treaties (BITs) concluded by Latin American countries and an analysis of their main characteristics. Finally, we draw some conclusions.

REVIEW OF THE CALVO DOCTRINE AND CALVO CLAUSE

In response to abuses of diplomatic protection of citizens abroad by western powers in the 19th century, Latin American countries put forward the claim that investment regulation in general and the taking of foreign property in particular are matters of domestic jurisdiction. Carlos Calvo (1822-1906) was the first to formulate this claim consistently.³ Consequently, it came to be known as the 'Calvo doctrine'.

The Calvo doctrine, also referred to as the 'national standard' (as opposed to the 'international minimum standard'⁴ adhered to by western countries) basically stipulates that the principle of territorial sovereignty of a State entails:

- (a) the principle of equality before the law between nationals and foreigners;
- (b) the subjection of foreigners and their property to the laws and judicial jurisdiction of the State in which they invest or operate;

³ C. Calvo, Derecho internacional teórico y práctico de Europa y América, 1868; Le droit international théorique et pratique, Paris, 5th éd., 1896.

⁴ On the international minimum standard G. Schwarzenberger, 'The Standard of Civilization in International Law', 8 Current Legal Problems (1955), and his book Foreign Investment and International Law, London, 1969. See also I. Seidl-Hohenveldern, International Economic Law, Dordrecht 1989, in particular chapter XIII on 'Property rights of aliens'.

- (c) abstention from interference by other governments, notably those of the home States, in disputes over the treatment of foreigners and their property rights (i.e., abstention from 'gunboat diplomacy' and restriction of diplomatic protection)⁵;
- (d) that the State has no obligation to pay compensation for damages suffered by foreigners due to civil wars or disturbances, unless its own law has created such obligation.

Through the years, various versions of the Calvo doctrine have been formulated in a number of constitutions and other laws, regional conventions, and investment contracts of Latin American countries; subsequently, similar principles have also been expressed in a number of laws of newly-independent States in Asia and Africa. Characteristic examples for Latin America include:

Article 136 of the Constitution of Peru:

Foreign enterprises domiciled in Peru are subject without restrictions to the laws of the Republic. In any agreement which the State signs with foreigners or with juridical persons, or in the concessions which are granted to them, the express acceptance by the former of the jurisdiction of the laws and the courts of the Republic and their renunciation to any diplomatic recourse must be made clear.

The State and juridical persons can submit disputes stemming from agreements with foreigners to judicial and arbitral courts established by virtue of international agreements in which Peru is a party.⁶

Article 27 of the Constitution of Mexico:

The State may grant the same right [to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or of waters] to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of noncompliance with this agreement, of forfeiture of the property acquired to the Nation.

Among regional conventions, Article 9 of the Montevideo Convention on Rights and Duties of States (1933) provides:

Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of nationals.⁸

⁵ For a more extensive review W.D. Verwey and N.J. Schrijver, 'The Taking of Foreign Property under International Law: a new legal perspective?', in 15 Netherlands Yearbook of International Law (1984), 1-96, at 22-27.

⁶ Constitution of the Republic of Peru, as amended in 1979; text in A.P. Blaustein & G.H. Flanz (eds.), Constitutions of the World, Binder XII, 1986, 69.

⁷ Article 27 of the Constitution of Mexico (1917, as amended); text in A.J. Paeslee, Constitutions of Nations, vol. IV, rev. 3rd ed. (1985), 900-901.

⁸ Op.cit. note 2.

Article 7 of the Pact of Bogotá (1948) reads:

The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State⁹.

A further interesting example was included in the 1970 Andean Foreign Investment Code, commonly known as 'Decision 24', of which Articles 50 and 51 provided:

50. Member countries shall not grant to foreign investors any treatment more favourable than that granted to national investors.

51. In no instrument relating to investment or to the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors.¹⁰

In recent years a number of Latin American countries have liberalized their foreign investment régime, or are in the process of doing so in order to attract more foreign investment and capital flows.¹¹ This is reflected in the recent replacement of the above-mentioned rather restrictive Andean Foreign Investment Code by a new Common Foreign Investment and Technology Licensing Code, adopted on May 11, 1987.¹² While Article 33 of the new Code maintains the text of the former Article 50, the settlement of disputes provision of Article 51 of the former Code has been changed considerably. In the new Code it is provided in Article 34 that:

For 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.

In other words, each country may apply such regulations as it deems appropriate in its particular national circumstances, including recourse to international dispute settlement procedures.

The Calvo doctrine does not imply that substantive legal principles of the international standard, such as those relating to expropriation (the rules of

⁹ American Treaty on Pacific Settlement, concluded in Bogotá, April 30, 1948. Text in 30 UNTS (1949), p.55. The US made a reservation to this provision: 'The Government of the United States cannot accept Article 7 relating to diplomatic protection and the exhaustion of local remedies. For its part, the Government of the United States maintains the rules of diplomatic protection, including the rule of exhaustion of local remedies by aliens, as provided by international law.'

¹⁰ Decision 24 was adopted on December 31, 1970 by the Andean Commission, established by the Cartagena Agreement (1969). The latest version of Decision 24 as regularly amended appeared in 16 ILM (1977), 138.

¹¹ Cf. the regular reports and publications by various institutions, incl. ICSID, IFC, the UN Centre on Transnational Corporations, and UNCTAD.

¹² Text in 27 ILM (1988), 974.

'public purpose', 'non-discrimination', and 'adequate compensation') are unacceptable. In fact, these principles have frequently been incorporated in Latin American national constitutions and laws. However, the Calvo doctrine claims that they stem from national law rather than from international law and that in principle disputes concerning their application should be settled under the domestic law of the host State and by its tribunals.

Latin American countries have frequently required the insertion of a so-called 'Calvo clause' in investment contracts with foreigners, by which the foreign investor commits himself not to seek diplomatic protection from his home State in case of a dispute with the host State but only to seek redress through local remedies. In this way he will find himself in the same position as national investors. A well-known example is the Calvo clause in the contract between Mexico and the North-American Dredging Company of Texas, which stipulated:

The Contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract.¹³

Although the Calvo clause has been characterised as 'an outstanding Latin American contribution to the development of international law'¹⁴, it should be noted that in most other parts of the world the right of diplomatic protection is considered to be a right of the State, which cannot be renounced by its nationals. Consequently, in international jurisprudence and the literature the Calvo clause is often recognized as having 'limited validity'. The most authoritative award on this matter was rendered by the American-Mexican General Claims Commission presided over by Van Vollenhoven, in the case of the North American Dredging Company of Texas (1926)¹⁵. As to the question whether an alien is legally competent to make a commitment not to call on the protection by the government of his home State in case of a dispute with the host State's government, the Commission stated in its award:

The Commission holds that he may, but at the same time holds that he cannot deprive the government of his nation of its undoubted right of applying international remedies to violations of international law

¹³ Text as quoted in D.R. Shea, The Calvo Clause. A Problem of Inter-American and International Law and Diplomacy, Mineapolis, 1955, 200.

¹⁴ F.W. García-Amador, 'Calvo doctrine, Calvo clause', in R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 8 (1985), Amsterdam, 63.

¹⁵ For an extensive review Shea, op. cit., 194-230.

committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract in this respect, tie the hands of his Government.¹⁶

However, this observation led the Commission to decide that in this particular case the international claim by the claimant was inadmissible:

... where a claimant has expressly agreed in writing, attested to by his signature, that in all matters pertaining to the execution, fulfilment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such a claim.

In principle, the operation of the local remedies rule will often make the Calvo clause superfluous. Unless the States concerned or the parties to the dispute have set aside the local remedies rule or unless there is déni de justice in the course of exhausting the local remedies or a special agreement to resort to arbitration at an early stage, a foreign investor is bound by international law to refrain from invoking diplomatic protection and his home State is not entitled to interfere. The Calvo clause then only comes into the picture if a foreign investor invokes diplomatic protection from his home State as a means of avoiding his obligations and circumventing the local courts. A major objective of the insertion of the Calvo clause was to prevent investment disputes becoming a serious object of inter-State relations in the absence of a denial of justice.¹⁷

In the period since the formation of the United Nations, Latin American countries have been campaigning to get international support for their national standard and to denounce the international standard. In the early 1950s, Uruguay took the initiative in formulating the sovereign right of each State "to freely exploit natural wealth and resources".¹⁸ In 1952, Chile proposed to include a paragraph dealing with permanent sovereignty in the draft text of Article 1 on self-determination of the draft Covenants on Human Rights.¹⁹

This led to the adoption by the UN General Assembly of the 1962 Declaration

¹⁶ Arbitral Awards (Reports of international arbitral awards), vol. IV, p. 29.

¹⁷ Ian Brownlie, Principles of Public International Law, 4th ed., Oxford 1990, 546-547.

¹⁸ GA resolution 626 (VII), December 21, 1952.

¹⁹ E/C.4/L.24, April 16, 1952. This text has been substantially modified during the negotiations and occurs in the Article 1 of both Human Rights covenants as they were finally adopted in 1966.

on Permanent Sovereignty over Natural Resources²⁰. Politically, this Declaration is widely considered to be one of the Assembly's landmark resolutions and as the economic equivalent of the earlier adopted Decolonization Declaration (GA res. 1514-XV, 1960). Substantively, it was generally interpreted as reflecting more elements of the international minimum standard than of the national standard, albeit that traces of the national standard can be found in some paragraphs of the Declaration. For example, paragraph 2 provides:

The exploration, development and disposition of ... resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

According to paragraph 4, in case of dispute about compensation for expropriation, the national jurisdiction of the host State must be exhausted, but 'upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication'. This text reflects a compromise by allowing an exception to the local remedies rule; it is noted, however, that the reference is to 'arbitration' rather than 'international arbitration' as might have been expected.

Finally, paragraph 8 of the Declaration clearly declares:

Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith.

In 1974, the political climate had changed and the campaign of the Latin American countries was more successful. In the Charter of Economic Rights and Duties of States (CERDS), developed upon a proposal made by Mexico during UNCTAD III held in Santiago de Chile in 1972, it is provided in Article 2:

Each State has the right:

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

The nationalization provision and its dispute settlement clause read:

[Each State has the right: ...]

(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States

²⁰ GA resolution 1803 (XVII), December 14, 1962.

concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

This Article was at the centre of the strong controversies during the adoption of CERDS, which is reflected in the separate vote on Article 2, paragraph 2 (104 votes to 16, with 6 abstentions) and the final vote on CERDS as a whole (120 to 6 with 10 abstentions).²¹

In later years, during reviews of CERDS, these provisions remained a major source of controversy and failed to gain additional support.²²

Finally, it is noteworthy that the draft UN Code of Conduct on Transnational Corporations²³ contains a number of provisions which reflect basic tenets of the Calvo doctrine. The most notable ones are:

8. An entity of a transnational corporation is subject to the laws, regulations and established administrative practices of the country in which it operates.

19. With respect to the exhaustion of local remedies, transnational corporations should not request Governments to act on their behalf in any manner inconsistent with paragraph 65.

50. (...), entities of transnational corporations should be entitled to treatment no less favourable than that accorded to domestic enterprises in similar circumstances.

56. An entity of a transnational corporation is subject to the jurisdiction of the country in which it operates.

57. Disputes between States and entities of transnational corporations, which are not amicably settled between the parties, shall be submitted to competent courts or authorities. Where the parties so agree, or have agreed, such disputes may be referred to other mutually acceptable or accepted dispute settlement procedures.

64. States should not use transnational corporations as instruments to intervene in the internal or external affairs of other States and should take appropriate action within their jurisdiction to prevent

²¹ 28 Yearbook of the United Nations (1974), 401-403. For a general discussion of CERDS R.F. Meagher, An International Redistribution of Wealth and Power. A Study of the Charter of Economic Rights and Duties of States, New York, Pergamon Press: 1979.

²² M. Bulajić (ed.), Ten years of the UN Charter of Economic Rights and Duties of States, Beograd, 1986.

²³ UN Doc. E/1990/94 containing the text, as proposed by the Chairman, of the Draft Code of Conduct on Transnational Corporations. The Chairman's text deviated on several points from earlier drafts of the Committee as a whole. These texts were critically discussed at the symposium referred to in the note at the head of this working paper and a consensus has not yet been reached on all of them. Outstanding issues include a reference to international law/obligations, dispute settlement, national treatment and transfer of payments. The differences of opinion on these few remaining questions of sovereignty, the primacy of international law and the need of international dispute settlement are fundamental; this may explain why it has not been possible to reach agreement so far. See also E/C.10/1991/8 containing a report of the U.N. Secretary-General on the progress made in the work on the code of conduct.

transnational corporations from engaging in activities referred to in paragraphs 16 and 17 of this Code.

65. Government action on behalf of a transnational corporation operating in another country shall be subject to the principle of exhaustion of local remedies provided in such a country and, when agreed among the Governments concerned, to procedures for dealing with international legal claims. Such action should not in any event amount to the use of any type of coercive measures not consistent with the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

On the one hand, these could be said to be 'Calvo flavoured' provisions. On the other, most of them reflect principles which are widely accepted, also by those States which do not subscribe to the Calvo doctrine.²⁴

PARTICIPATION OF LATIN AMERICAN COUNTRIES IN ICSID AND MIGA

For a long time Latin American countries felt that participation in ICSID²⁵ would not be in line with the Calvo doctrine, as ICSID provides for international settlement procedures for settling investment disputes while the Calvo doctrine primarily stipulates local remedies. It has been pointed out²⁶, however, that ICSID and the Calvo doctrine are not incompatible because ICSID:

- (a) is an international agreement between sovereign States;
- (b) fully respects the sovereignty of the host State;
- (c) aims to prevent a home State from giving diplomatic protection when an investment dispute is to be submitted to ICSID arbitration, possibly preceded by exhaustion of local remedies (Arts. 26 and 27 of ICSID);
- (d) provides that a contracting State may, but need not, "require the

²⁴ In previous versions of a draft Code there was one paragraph which clearly deviated from the Calvo doctrine, namely the last sentence of paragraph 52 (E/1988/39/Add.1):

Nothing in this paragraph should be construed as excluding the right of the host country to grant such special incentives and facilities to transnational corporations as may be considered necessary in its national interest.

It is notable that this paragraph has been deleted from the 1990 draft text of the Code. This deletion, as proposed in the two papers on which this article is based, was supported by a number of participants in the Peace Palace symposium held in September 1989.

²⁵ The International Centre for the Settlement of Investment Disputes (ICSID) was established under the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

²⁶ See Ibrahim F.I. Shihata, 'ICSID and Latin America', in I News from ICSID, no. 2, 1984, 2-3.

exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention" (Art. 26). Few States have in fact made such a condition;

(e) requires an arbitral tribunal to decide a dispute in accordance with the rules of law agreed to by the parties. This can very well include the law of the host State. In case there is no agreement on this matter, Article 42, paragraph 1 explicitly provides that the law of the host State (including its rules on the conflict of laws) will apply as well as 'such rules of international law as may be applicable'.

In recent years it has been recognized more and more that ICSID does not contradict the Calvo doctrine and the number of developing countries having signed and ratified ICSID has substantially increased.

As of September 4, 1991, the ICSID Convention had 95 contracting parties while a further thirteen States had signed, but not yet ratified it. Four Latin American countries had ratified the Convention, namely Paraguay (in 1983), El Salvador (1984), Ecuador (1986) and Honduras (1989). In addition, six other Latin American countries had signed but not (yet) ratified ICSID: Costa Rica (1981), Haiti (1985), Argentina, Bolivia, Chile and Peru (all in 1991).

In October 1985, on the proposal of the Board of Governors of the International Bank for Reconstruction and Development, a Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) was adopted. MIGA's main purpose is to issue guarantees to investors against non-commercial risks, in particular those attaching to investments in developing countries, and thus to encourage the flow of investments for productive purposes to developing countries. MIGA is designed to operate on a self-sustaining basis. In addition to its guarantee operations, it also provides a forum for international cooperation among capital-exporting and capital-importing countries as well as foreign investors. For voting and some other purposes, countries are classified as belonging either to Category One (industrialized) or Category Two (developing).²⁷

On April 12, 1988, the Convention entered into force after the required number of ratifications. As of August 6, 1991, MIGA had been signed by 104 States; 17 Category One and 87 Category Two States. Of these signatories, 78 States had ratified the Convention. Twelve Latin American countries had signed the MIGA Convention, five of whom had also ratified it. The latter include: Argentina, Chile, Ecuador (which signed the MIGA Convention on the

²⁷ Schedule A to the Convention provides the classification of individual countries. All Latin American participants belong to Category Two (together with several OECD member States: Greece, Portugal, Spain, Turkey).

very day of its approval), El Salvador, and Peru. Thus, Latin American participation in MIGA is already more extensive than in ICSID.

Although the MIGA Convention as an international instrument aims to influence the investment climate at the national level, it easily comes to terms with the Calvo doctrine. Criteria for eligibility of investments for coverage by MIGA include:

- compliance of the investment with the host country's laws and regulations (Art. 12, para.(d) sub (ii));
- consistency of the investments with the declared development objectives and priorities of the host country (Art. 12, para.(d) sub (iii));
- host country approval of the issuance of the guarantee by the Agency (Art. 15).

These conditions ensure that sovereign control over admission of foreign investment and MIGA's involvement rests with the host country. In principle, the MIGA Convention does not deal with substantive aspects of the standard of treatment of a foreign investors.²⁸ It could be argued that certain aspects of the dispute settlement procedure as outlined in Chapter IX of the Convention, are of a clearly internationalist character and thus against the Calvo spirit. For example, Article 56 provides that any question of interpretation or application of the Convention arising between a member and MIGA or among members shall be submitted to the Board of Directors of MIGA for its decision, with a possibility of appeal to the Council of Governors. Disputes between MIGA and a host country arising from subrogation may be referred by either party to international arbitration according to the procedures specified in Annex II of the Convention. The parties are free to agree on alternative methods for the settlement of such disputes, such as conciliation. Under certain circumstances it could mean that a MIGA member may involuntarily get involved in international arbitration, albeit - as Shihata puts it - in "a conflict between two international persons, two subjects of international law, unlike the typical case of a dispute between a foreign investor and the host government to which both the traditional objection to international arbitration and the Calvo doctrine apply".²⁹ However, as discussed above, the Calvo doctrine has a wider scope than the

²⁸ Article 12, paragraph (d) only provides that, in guaranteeing an investment, MIGA "shall satisfy itself as to ... the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment".

²⁹ Ibrahim F.I. Shihata, MIGA and Foreign Investment. Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency, Dordrecht, M. Nijhoff Publishers:1988, p. 264. Shihata also points out that submission to international arbitration of disputes concerning financial transactions between an international financial institution and a member State is accepted, among others, in loan agreements of the World Bank and the Inter-American Development Bank.

Calvo clause and has frequently been invoked by Latin American countries to object to any form of international arbitration.

LATIN-AMERICAN BILATERAL INVESTMENT TREATIES IN THE LIGHT OF THE CALVO DOCTRINE

Introduction. During the period 1955 - 1991 some 44 bilateral treaties specifically dealing with investment were concluded between Latin American States and developed countries. As far as we know, 23 of these treaties have entered into force so far.³⁰ The signatories of the 44 treaties include 18 Latin American States and 12 developed States.

Only 2 Latin American States, Brazil and Guatemala, never signed any investment treaty³¹; Guatemala also abstained so far from the ICSID and MIGA conventions. All others quite clearly have chosen at one time or another for an internationalist approach to foreign investment. In the case of Cuba, Dominican Republic and Mexico it is doubtful whether they favour an internationalist approach at the present time; the first two countries not only abstained from ICSID and MIGA, but it is a long time since they ratified the one treaty they each have to their name.³² On the other hand, neither of them ever denounced the treaty in question, as they could have done if they had wanted to show a change of policy in this regard. In fact, only in the case of Cuba it is quite clear that the present government is opposed to the internationalist approach, even though the majority of the former COMECON member States had concluded BITs long before the demise of the COMECON system.

The conclusion is interesting: even if Cuba and the other doubtfuls are reckoned to be on the anti-internationalist side, there is still a majority of 16 vs. 4 Latin American States which in recent years have shown an inclination for bilateral treaties, ICSID and/or MIGA. However, that minority of four includes one of the most important countries in the region: Mexico.

³⁰ One of these (US/Nicaragua) was later denounced (by the US in 1985).

³¹ The position of Mexico is not clear; it did sign an economic treaty (dealing with investment among other matters) with Spain in 1990, but the text is unavailable to us and it is not clear in how far it follows the internationalist line of most of the investment protection treaties on matters such as expropriation and arbitration. Treaties 32 and 34 (Argentina with Italy and Spain) do not contain the usual protection and arbitration provisions, but other Argentinian BIT's do and there is no doubt therefore that Argentina is prepared to follow the internationalist line.

³² Dominican Republic 1960, Cuba 1961.

The treaties. The 44 treaties concerned are listed below in chronological order, with dates of signature and entry into force (when known). The type of treaty is indicated as: C = treaty of commerce; E = treaty on establishment; Ec = economic treaty; FCN = treaty of friendship, commerce and navigation; P = treaty on the promotion, treatment and/or protection of investments; SR = treaty for the creation of a special relationship. Dates given day, month and year, in that order.

In the case of some of the treaties³³ the text is not available to the authors.

	<u>signed</u>	<u>in force</u>	
1 Costa Rica/France	02.06.55	10.04.59	E
2 Nicaragua/US	21.01.56	24.05.58 ³⁴	FCN
3 Dominican Rep/Germany	23.12.57	03.06.60	FCN
4 Cuba/Japan	22.04.60	20.07.61	C
5 Peru/Japan	15.05.61	18.12.61	C
6 Argentina/Japan	20.12.61	25.09.67	FCN
7 El Salvador/Japan	19.07.63	01.07.64	C
8 Chile/Germany	30.03.64	nif	
9 Colombia/Germany	11.06.65	nif	P
10 Ecuador/Germany	28.06.65	30.11.66	P
11 Costa Rica/Switzerland	01.09.65	18.08.66	P
12 Honduras/Switzerland	20.07.66	nif	P
13 Ecuador/Switzerland	02.05.68	11.09.69	P
14 Haiti/France	02.07.73	02.07.73	P
15 Haiti/Germany	14.08.73	01.12.75	P
16 El Salvador/France	20.09.78	nif	P
17 Paraguay/France	30.11.78	11.12.80	P
18 Paraguay/UK	04.06.81	nif	P
19 Costa Rica/UK	07.09.82	nif	P
20 Panama/US	27.10.82	30.05.91	P
21 Panama/France	05.11.82	09.10.85	P
22 Panama/UK	07.10.83	07.11.85	P
23 Panama/Switzerland	19.10.83	22.08.85	P
24 Panama/Germany	02.11.83	10.03.89	P
25 Haiti/US	13.12.83	nif	P
26 Costa Rica/France	08.03.84	nif	P
27 Haiti/France	23.05.84	25.03.85	P
28 Haiti/UK	18.03.85	nif	P
29 Bolivia/Germany	23.03.87	nif	P
30 Uruguay/Germany	04.05.87	nif	P
31 Bolivia/Switzerland	06.11.87	17.05.91	P
32 Argentina/Italy	10.12.87	06.03.89	SR
33 Bolivia/UK	24.05.88	16.02.90	P
34 Argentina/Spain	03.06.88	31.08.89	Ec
35 Uruguay/Netherlands	22.09.88	nif	P
36 Uruguay/Switzerland	07.10.88	22.04.91	P
37 Mexico/Spain	11.01.90	nif	Ec
38 Bolivia/Spain	24.04.90	nif	P
39 Bolivia/BLEU	25.04.90	nif	P
40 Venezuela/Italy	04.06.90	nif	P
41 Argentina/BLEU	28.06.90	nif	P
42 Bolivia/Sweden	20.09.90	nif	P
43 Argentina/UK	11.12.90	nif	P
44 Argentina/Switzerland	12.04.91	nif	P

³³ Nos. 8, 37, 38 and 39.

³⁴ Denounced by the US in 1985 and no longer in force.

An analysis of the terms of these treaties is given below, with particular reference to those clauses which reflect the Calvo doctrine or which, on the contrary, appear to indicate a deviation from -or liberalization of- the Calvo doctrine in its strictest form.

In one sense it may be said that any treaty aimed at promoting and protecting foreign investment and to that end specifying the manner in which foreign investment must be treated by the host country will inevitably make an inroad upon the Calvo doctrine. For one thing, it legitimizes diplomatic protection by the home country; it also precludes the application to the investments of legislation of the host country -existing laws as well as later amendments or new legislation - when it is contrary to the standard of treatment which the host country has undertaken to maintain under the terms of the treaty. Even if the treaty terms are often broad and imprecise, e.g. a requirement of 'fair treatment' or 'just compensation', the mere fact that such requirements have been laid down in a treaty means that the treatment of the foreign investor is no longer a matter exclusively of the host country, nor can it be maintained that the foreign investor will be treated in the same way as the domestic investor. The scope of the protection is enhanced when the host country undertakes, in the treaty, to respect obligations it has undertaken vis-à-vis the foreign investor (hereafter referred to as a pacta servanda clause).

We shall concentrate in the following paragraphs on the particular concepts which are most characteristic for Calvo:

- (a) Emphasis on national treatment;
- (b) Emphasis on the applicability of the national law;
- (c) Absence of any reference to international law or a minimum international law standard;
- (d) Access to the courts of the host country;
- (e) Insistence on adjudication of investment disputes by the local (host country) courts;
- (f) or, if international dispute settlement is allowed at all, then only after exhaustion of local remedies;
- (g) Avoidance of discrimination in favour of the foreign investor in comparison with the domestic investor. Such discrimination is usually created:
 - if the foreign investor is given most-favoured-nation treatment;
 - if the host country undertakes to limit its right to nationalize and to set standards for compensation which are unlikely to be applied to nationals;
 - if the host country is bound by a 'pacta servanda' clause; and
 - if the foreign investor is entitled to compensation for damage caused by civil war or other disturbance.

National treatment. This term, which denotes one of the basic principles of Calvo, originally meant that the foreigner, once his investment had been approved and admitted, would be treated no better and no worse than the host country's own nationals.³⁵ The treatment meted out to nationals, e.g. in case of expropriation, was often harsh; in practice the effect of the Calvo principle was to ensure that a foreigner would not be better off.

Most treaties contain national treatment clauses with an entirely different intent, for instance in the clause which provides that the foreign investor is entitled to national treatment or most-favoured-nation (MFN) treatment, whichever is more favourable to him. This means that the foreign investor must be treated according to a minimum standard; he is entitled at least to the treatment applicable to nationals, sometimes to a higher standard.

Some treaties put more emphasis on MFN-treatment than on national treatment or omit the latter altogether. E.g. in Treaty 5 (Peru/Japan) MFN-treatment applies under Article 2 (on remittances etc.), Article 3 (sojourn, tax, access to courts etc.), Article 4 (expropriation); while national treatment applies only under Article 3.3 (patents etc.) and Article 4 (expropriation). Only in matters relating to expropriation, the foreigner is assured both MFN-treatment and national treatment, that is to say whichever is more favourable to him. In the corresponding provision of Treaty 9 (Colombia/Germany) only MFN-treatment applies.³⁶

Reference to national law. The early treaties frequently emphasize that foreign investors are subject to the law of the host country and this may be seen as a vestige of the Calvo approach to foreigners. Thus, treaty 6 (Argentina/Japan) lays down in Article 2 the right to enter the host country, but this must be 'in accordance with the laws and regulations' of that

³⁵ The term is often used in a rather different sense, namely to indicate the right of the foreign national to make new investments in the host country on the same terms as apply to the host country's own nationals. See e.g. Treaty 20 (Panama/US), art.2. In most of the treaties here discussed, however, national treatment does not entail a right to invest, but a post-investment right. See for example para.1 of the Protocol to treaty (15): 'Tant que les dispositions légales ou réglementaires d'une Partie Contractante exigent ... une procédure d'agrément ou d'admission, les dispositions du présent Traité ne s'appliqueront à un investissement de capitaux déterminé qu'après que la procédure ... y relative aura été accomplie. A dater de l'agrément ou de l'admission, cet investissement de capitaux jouira de l'entière protection du présent traité'. Similar provisions are made in letter exchanges accompanying Treaties 16 and 17 (El Salvador/France and Paraguay/France).

³⁶ Treaty 1 (Costa Rica/France) provides that the exercise of civil law rights in the host country (the right to own goods, dispose of them etc.) is subject to mfn-treatment, but not to national treatment. Here the underlying philosophy may have been that nationals in matters of ownership of real estate have, and should keep, stronger rights than foreigners ought to have. Similarly, Treaty 16 (El Salvador/France) grants mfn-treatment but no national treatment (art.3); the same applies to treaty 42 (Bolivia/ Sweden).

country; and in matters related to sojourn, travel, residence and departure 'they shall conform themselves to the provisions of the laws and regulations' of the host country. There are numerous such references in the early treaties, but few in the more recent ones. In the absence of specific contractual provisions to the contrary, the fact that foreigners are subject to the law when they enter, reside, travel etc. is a matter of course and need not be spelled out.³⁷

The more recent treaties sometimes include an applicable law clause in the arbitration provision: the arbitral tribunal is instructed to base its decisions on the law of the host country³⁸, often including its rules on the conflict of laws, together with the applicable rules of international law. This formula is based on Article 42 of the ICSID Convention, albeit that under Article 42 the formula applies in the absence of a choice of law made by the parties to the dispute, while the provisions in the BITs disregard and override the principle of party autonomy.

Reference to international law. It might be expected that countries under the sway of the Calvo doctrine would show a tendency to steer clear of international law in the context of foreign investment. However, in 23 of the treaties reviewed the position is quite different. Sometimes an oblique reference is made to the minimum international law standard to which foreign investors and investments are entitled; in other cases international law is invoked in the instructions to arbitrators on applicable law or is relied upon in a more general sense.

Thus, in Treaty 2 (Nicaragua/US) it was laid down that nationals of the home country should receive in the host country 'the most constant protection and security, in no case less than that required by international law' (art.3.1). Treaty 25 (Haiti/US) has a very similar clause (art.2.4), in addition to a curious provision requiring local judicial review of expropriation to determine (inter alia) whether the expropriation and compensation conformed to 'the principles of international law as set forth in this Article' (art.3.3). In the corresponding provision of treaty 3 (Dominican Republic/Germany) the protection and security must not be less than that granted to nationals of a third country or that 'recognized by international law' (art.4.1). Treaty 16 (El Salvador/France) ensures 'un traitement juste et équitable, conformément aux principes du droit international' (art.3).³⁹

³⁷ Cf. art.7 (on mandatory rules of law) of the European Convention of 1980 on the law applicable to contractual obligations.

³⁸ Treaties 35 (Uruguay/Netherlands), 40 (Venezuela/Italy), 43 Argentina/UK) and 44 (Argentina/Switzerland); the last three specifically refer also to the pertinent rules of conflict of laws.

³⁹ There are similar provisions in treaties 17 (Paraguay/France), 26 (CostaRica/France), 35 (Uruguay/Netherlands) and 43 (Argentina/UK).

Treaty (21): '... un traitement juste et équitable, conformément à sa législation dans le respect du Droit International' (art.3)⁴⁰. Treaty 20 (Panama/US): 'The treatment, protection and security of investment shall be in accordance with applicable national laws and international law (art.2.2).⁴¹

Treaty 9 (Colombia/Germany) provides more generally that, if at any time the host country will be subject to obligations under international law which give rise to more favourable treatment of the foreign investment than is provided under the treaty, that regime will prevail insofar as it is more favourable (art.7.1).⁴²

Treaty 11 (Costa Rica/Switzerland) invokes international law specifically in connection with compensation for expropriation: 'à condition que ces mesures donnent lieu au paiement d'une indemnité effective et adéquate, conformément au droit des gens' (art.4).

As mentioned above, some recent BITs invoke international law, together with the law of the host country, in the arbitration clause.

Finally, most of the British BITs⁴³ contain a final clause to the effect that investments made thereunder will be governed by the rules of general international law when, a number of years after the BIT is terminated, its provisions shall have ceased to apply.

The right of access to the courts is emphasized in 18 of the treaties, although this would hardly seem to be necessary; there can be no doubt that those concerned would have such access, whether or not it is so stipulated in the treaty. As stated above, it may be that the clause mainly serves as a reminder of the Calvo principle.

An example of such a clause is Article 5.1 of Treaty 2 (Nicaragua/US) which provided that the foreign national or company would be accorded national treatment and MFN-treatment 'with respect to access to the courts of justice and to administrative tribunals and agencies' in the host country, 'in all degrees of jurisdiction, both in pursuit and in defense of their rights ...'.

⁴⁰ The same clause exists in Treaty 27 (Haiti/France). As to treaty 21 (Panama/France), it is interesting that it also refers to international law in its preamble: 'Souhaitant développer la coopération économique entre les deux Etats dans le respect du Droit International'. The use of capital letters -unusual in French and Spanish- is no doubt a mark of the respect invoked. No other references of this kind have been found in preambles.

⁴¹ Similarly Treaty 23 (Panama/Switzerland): '... un traitement juste et équitable, conformément à sa juridiction interne et aux normes du droit international' (art.2).

⁴² The same clause is found in other German treaties, e.g. nos. 10, 15, 24, 29 and 30 (with Ecuador, Haiti, Panama, Bolivia and Uruguay) and in a Dutch treaty (no.35 with Uruguay).

⁴³ With the exception of Treaty 22 with Panama.

The provision was not wholly superfluous, for the Protocol elaborated that access included legal aid and security for costs and judgment. The corresponding provision of Treaty 1 (Costa Rica/France) added that the foreign party had the same rights and benefits as host country nationals (national treatment) but that questions regarding the cautio judicatum solvi and legal aid were to be worked out between the home and host countries (art.5).

Not all treaties contain such provisions. For example, it is interesting to note that it is absent from Treaty 6 (Argentina/Japan) although the Argentine is the cradle of the Calvo doctrine. In Treaty 7 (El Salvador/Japan) it appears in an emaciated form: in that treaty (art.3.2) the foreigner does not get an absolute right of access to the courts, but merely MFN-treatment in that regard.

Adjudication by the host country courts of any dispute regarding a foreign investment is one of the basic principles of the Calvo doctrine. Such adjudication would be the only remedy available in countries adhering to Calvo when no express provision had been made for dispute settlement at the international level, either between the foreign investor and the entity in the host country with which it has entered into a contract, or between the host and home countries. Surprisingly, there is only one treaty - no.4 Cuba/Japan - without any such international dispute settlement arrangements. Of 38 treaties reviewed, 34 provide for inter-State dispute settlement by reference to the International Court of Justice (ICJ) or arbitration, 27 for arbitration at the level of the investor, although in 4 cases in a half-hearted and non-committal manner.

Dispute settlement arrangements between the States concerned are lacking only in some of the early treaties.⁴⁴ In Treaties 2 and 3 (Nicaragua/US and Dominican Republic/Germany) there is provision for referring disputes to the ICJ; in nos.1, 9 and all subsequent treaties there is provision for arbitration between the States concerned.

Some of the early treaties, and all of the later ones, make provision for international arbitration between the foreign investor and the host country. But in the early treaties⁴⁵ it is a curious, half-hearted provision, clearly restrained by Calvo thinking:

contracts ... that provide for the settlement of disputes by arbitration, shall not be deemed unenforceable ... merely on the ground that the place designated for the arbitration proceedings is outside [the host country] or that the nationality of one or more of the arbitrators is not that of [the host country]. An award duly rendered pursuant to any such contract ... shall not be deemed invalid or denied effective means of enforcement ... merely on the

⁴⁴ Viz. Treaties 4 to 7 (the Japanese treaties with Cuba, Peru, Argentina and El Salvador).

⁴⁵ This applies to Treaties nos. 2, 5, 6 and 7.

[same] grounds ...' (art.5 of Treaty 5 Peru/Japan).⁴⁶

It is interesting to note, again, that of the four Latin American countries concerned, Argentina appears to make the greatest inroad upon the Calvo doctrine in this respect.⁴⁷ These clauses tolerate international arbitration, but they are a long way from making it compulsory. Most of the subsequent treaties - indeed, all treaties concluded since 1978 - contain a full-fledged compulsory arbitration clause, based on ICSID, ICC, UNCITRAL or ad hoc arbitration rules.⁴⁸

The expropriation clause of some treaties deals with the right to 'due process' by the host country courts as a separate issue. Treaty 3 (Dominican Republic/Germany), for instance, provides that it must be possible for the legality of the expropriation measure and the amount of compensation to be tested by normal judicial proceedings.⁴⁹

⁴⁶ In Treaty 6 (Argentina/Japan) the second sentence is somewhat more specific: 'Awards duly rendered ... shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered within the territory of such Party'. In connection with the Peruvian treaty, it is interesting to recall an incident which caused much excitement at the 1974 ILA conference in New Delhi. Mr Andrew Freeman drew attention there to the arrest in Peru of the president and other leading members of the Lima Bar Association, the closure by the Peruvian government of some magazines and the exile of a number of journalists, all in connection with an international arbitration clause in a contract between Japanese and Peruvian companies, which was deemed to be an infringement of Peruvian sovereignty. Cf. Report of the 56th Conference of the ILA, published in London, 1976, p.519. In the light of Treaty 5 it is difficult to understand the excitement, unless it is assumed that the treaty itself - which clearly allowed international arbitration in the circumstances - was an infringement of the Constitution.

⁴⁷ See the quotation from the Argentina/Japan treaty in the previous note. Perhaps, however, there is no inroad at all, namely if public policy is interpreted as including the Calvo doctrine as a whole. In that case awards would be enforceable in Japan, but not in Argentina. However, according to Shea (supra note 13, p. 275), Argentina 'does not adhere to the use of the Calvo clause', nor is the Calvo doctrine applied in business affairs as far as known.

⁴⁸ Treaties no.16 to 20 contain a straightforward ICSID clause; nos. 24, 26, 29, 30, 31, 35, 36, 40 and 44 provide in the first instance for ad hoc or UNCITRAL arbitration, with ICSID as an alternative; no. 25 provides for ICC arbitration; no.28 for UNCITRAL or ICC; finally, there are 7 Treaties - nos. 21, 22, 23, 27, 33, 42 and 43 - which designate the UNCITRAL rules without alternatives.

⁴⁹ A number of other treaties have similar provisions, e.g. Treaties 9, 16, 18, 19, 40 and 43.

Exhaustion of local remedies before arbitration proceedings may be commenced would be a logical requirement under the Calvo doctrine, if any other dispute settlement procedure is allowed at all. It is surprising, therefore, that few of the treaties - not even those that contain the half-hearted arbitration facility - include a specific or implied requirement for exhaustion of local remedies.⁵⁰ Treaty 9 (Colombia/Germany) does have such a clause:

In accordance with the general principle of international law and having regard to the principle of equal treatment of nationals and foreigners, recourse to arbitration in connection with a claim from an investor can only be had after national judicial remedies have been exhausted, it being understood that denial of justice shall be deemed equivalent to exhaustion of such remedies (§7 of Protocol).

Rather less specific is Article 11.5 of Treaty 10 (Ecuador/Germany):

arbitration as provided for in this clause [i.e. inter-governmental arbitration] does not in any way prejudice the jurisdiction of the courts of the host country.

Some treaties, on the other hand, emphasize the acceptance of arbitration at the end of the period set aside for local remedies by requiring an end to all court proceedings once arbitration commences.⁵¹

Expropriation clauses. All the treaties reviewed contain a specific, often detailed, clause on expropriation. It is, in fact, the core and main *raison d'être* of the treaties. Almost always these clauses imply special treatment of the foreign investor. Such special protection of certain rights of foreign investors has been a long-standing feature of 'classical' general international law as interpreted by most European and North American international lawyers; but it is, of course, contrary to the basic tenets of Calvo.

Treaty 1 (Costa Rica/France) is still inspired by Calvo. It provides that the host country will not take measures whereby the property, rights and interests of the foreign nationals are expropriated or limited in the public interest if such measures would not, under the same conditions, also apply to its own nationals or⁵² to those of any other State; and that the same applies to the compensation to which such measures will give rise (art.6). Ten years later Costa Rica signed Treaty 11 which is rather more outspoken in this

⁵⁰ A local remedies rule is included in Treaties 9, 10, 18, 19, 30, 35, 36, 40, 43 and 44. In 18 and 19 a three-months period is set aside for exhaustion of local remedies; this can be little more than token exhaustion. In nos.30, 35, 36, 40, 43 and 44 this period is 18 months and in some treaties (e.g. nos.35 and 36) appeal or cassation proceedings are excluded.

⁵¹ Treaties 40 and 44 contain such a clause calling for 'désistement de l'instance judiciaire'.

⁵² One would have expected the conjunction 'and' here.

regard:

Aucune des Hautes Parties Contractantes ne pourra prendre des mesures d'expropriation ... à l'encontre de biens appartenant à des sociétés ou à des personnes physiques de l'autre Partie, si ce n'est pour des raisons d'utilité publique et à condition que ces mesures donnent lieu au paiement d'une indemnité effective et adéquate, conformément au droit des gens. Le montant de cette indemnité, qui devra être fixé à l'époque de l'expropriation ... sera réglé dans une monnaie transférable et sera versé sans retard à l'ayant-droit ... (art.4).⁵³

Early German treaties such as 9 (with Colombia) and all later treaties have similarly elaborate and specific clauses on expropriation and compensation.

The 'pacta servanda' clause. Twenty six of the treaties⁵⁴ contain such a clause. The German model provides that the host country will respect:

toute autre obligation qu'elle aura assumée relativement à des investissements de ressortissants ou de sociétés de l'autre Partie Contractante sur son Territoire (Treaty 15, art.7).

Swiss treaties have a somewhat different approach, e.g.:

Les dispositions plus favorables que celles du présent accord qui ont été convenues par [the host country] avec des sociétés ou des personnes physiques de l'autre Partie demeurent réservées (Treaty 11 art.5).

The French clause is usually as follows:

Les investissements ayant fait l'objet d'un engagement particulier de l'une des Parties ... à l'égard des nationaux et sociétés de l'autre Partie seront régis, sans préjudice des dispositions de la présente Convention, par les termes de cet engagement, dans la mesure où celui-ci comporterait des dispositions plus favorables que celles qui sont prévues par la présente Convention (Treaty 16, art.10).

The UK clause is:

Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

A more specific 'pacta servanda' clause is part of the expropriation provisos of a number of treaties. In Treaty 21 (Panama/France), Article 5, for instance, it is one of three conditions precedent: expropriation is allowed only if it is (i) 'pour cause d'utilité publique ou d'intérêt social'; (ii) 'à condition que ces mesures ne soient ni discriminatoires'; (iii) 'ni contraires à un engagement spécifique en la matière'. Another example: Treaty 25 (Haiti/US), Article 3.1 spells out 5 conditions precedent, one of which is

⁵³ Later Swiss treaties, (13) and (23), contain the same or even more specific clauses. Thus, art.4 of treaty (23) enumerates four conditions which must be fulfilled for expropriation to be allowed: reasons of public utility or social interest; the measures must be non-discriminatory; they must be in accordance with the law in force; and there must be effective and adequate compensation; the latter, moreover, must be established at the time of expropriation.

⁵⁴ Viz. all treaties analyzed, from no.9 onwards, with the exception of nos.12, 22, 32 and 34.

that the expropriation 'does not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the party making the expropriation'.⁵⁵ In addition this treaty lays down in Article 9 that it does not 'supersede, prejudice, or otherwise derogate from (a) ...; (b) ...; or (c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization, ... that entitle investments ... to treatment more favorable than that accorded by this Treaty in like situations.'

Losses due to war or revolution. Some⁵⁶ of the pre-1980 treaties and almost all of the more recent ones contain a clause on compensation for losses or damages incurred by the foreign investor as a result of war, revolution or other disturbances. In 24 treaties the investor is entitled to a minimum standard, viz. national treatment and/or most-favoured-nation treatment.⁵⁷ Nine of these treaties offer in addition an absolute right to compensation or redress; in 5 cases this applies to a limited category of losses (requisitioning and wanton destruction by the armed forces); in 4 treaties the investor is entitled to adequate compensation in any case.⁵⁸

What is left of Calvo? Evidently, not much in these treaties. In the early treaties, up to 1965, there was considerable reticence with regard to international arbitration between the investor and the host country. But even then, there were only two treaties - nos. 9 and 10 - which called for exhaustion of local remedies, or (in the last-mentioned treaty) at least paid lip service to that principle. In subsequent years there are a further 6 cases where the local remedies rule plays a role, by holding up arbitration proceedings for 1½ years. All Latin American countries concerned in BITs during the last 15 years have accepted international arbitration; all except Uruguay, Venezuela and Argentina have shown a lack of interest in the

⁵⁵ The other conditions precedent are: public purpose; due process of law; not discriminatory; and 'accompanied by prompt, adequate and effective compensation'.

⁵⁶ Nos. 1, 9, 10 and 15 (Costa Rica/France, Colombia/Germany, Ecuador/Germany and Haiti/Germany).

⁵⁷ In one case (Bolivia/Sweden) only MFN-treatment; in two cases Costa Rica/France 1955 and Paraguay/UK) only national treatment. In the other 21 treaties the investor is entitled to both, that is to say to whichever is most beneficial to him.

⁵⁸ The first-mentioned 5 treaties are nos. 18, 19, 25, 28 and 33 (the UK BITs with Paraguay, Costa Rica, Haiti and Bolivia; and Haiti/US). The last-mentioned four treaties are nos. 21, 26, 27 and 31 (the French BITs with Panama, Costa Rica and Haiti; plus Bolivia/Switzerland). It may well be that the latter 'absolute' clause - which is more favourable to the investor than any of the others - can be invoked by investors from most of the other countries involved, on the basis of the MFN-treatment to which they are entitled.

exhaustion principle. This, in our view, is a sensible and progressive policy, for neither host country nor investor has any real interest in litigation in the local court if its verdict can subsequently be reversed by arbitration. It clearly demonstrates the decline of the doctrinaire view embodied in the Calvo tradition.

Similarly, as we saw in the previous paragraph, most of the post-1980 treaties offer something more than national treatment when it comes to compensation for losses due to war or revolution, and thereby deviate from the Calvo line.

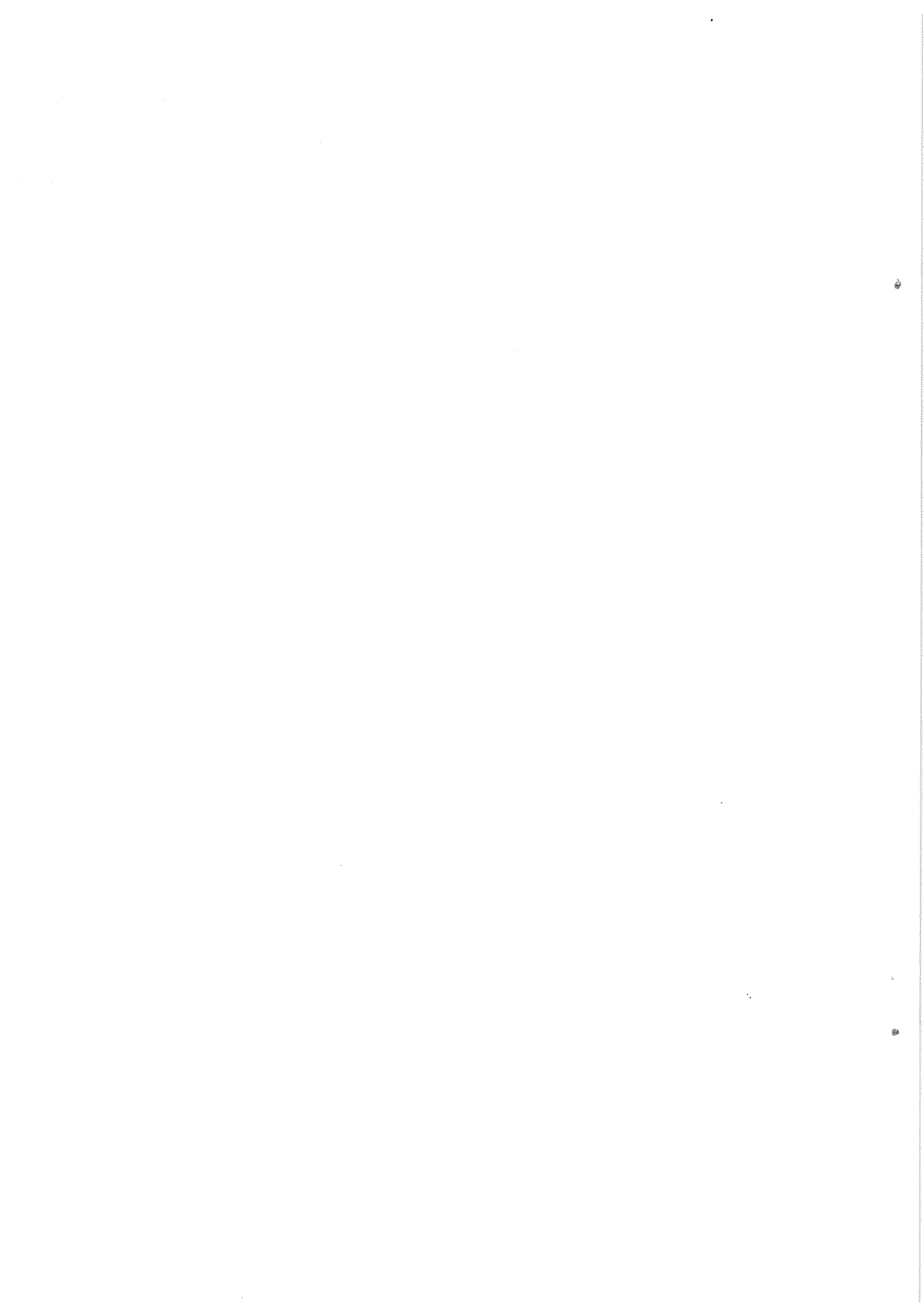
The purest relic of Calvo language left in the body of treaties here considered is the preamble of Treaty 23 (Panama/Switzerland):

... Affirmant que pour promouvoir et maintenir le flux international de capitaux, il est nécessaire d'établir et de maintenir un climat approprié pour le développement et le rétablissement des investissements privés, qui respectent pleinement la souveraineté et en plein accord avec les lois du pays hôte ayant juridiction sur eux et se confirmant aux politiques et aux priorités adoptées par le pays hôte pour assurer l'efficacité de leur contribution au développement ... (emphasis added).

Another vestige of Calvo is worth mentioning. In Article 2.11 of Treaty 25 (Haiti/US) it is said that:

except for the obligations specified in this Treaty, neither Party is obliged to provide to the investments of the other Party treatment more favorable than that granted to the investments of its own nationals and companies

This clause, however, represents no more than lip service, as Article 2.2 of the same treaty has already provided for national treatment or MFN-treatment, whichever is the most favorable (emphasis added).



CONCLUSIONS

To sum up, historically the Calvo doctrine has served as a major doctrine of newly-independent States to secure their political independence and to promote economic self-determination. As such it has acquired a significance which reaches beyond Latin America and beyond the mere issue of treatment of aliens and foreign investments. The Calvo doctrine and the Calvo clause, however, cannot be labeled as being part of generally recognized international law.

In the 1980s the controversies concerning the national vs. the international minimum standard seem to have lost much of their relevance and colour. As is reflected in the debates in the United Nations, the arguments are less doctrinaire and more pragmatic, aimed at bridging gaps rather than exposing doctrinaire differences. No doubt, this development has been induced by the establishment of transnational corporations having their parent companies in developing countries on the one hand, and by a decrease of foreign investment in developing countries (also in Latin America), on the other. At the national level this trend is apparent in new or revised national investment regulations, purporting to generate confidence among potential foreign investors and to maximize their contribution to national development; at the bilateral level in the increasing number of bilateral investment treaties, now numbering over 40 and concluded by an increasing number of Latin American countries (in fact all barring two or three); at the regional level in the revised Andean Investment Code; and at the multilateral level in the increasing number of Contracting Parties to the ICSID Convention as well as in the membership of MIGA.

In addition, it could be argued that today the traditional doctrines relating to a national standard and to an international minimum standard are losing relevance as a result of (a) the development of international human rights law by which the distinction between nationals and foreigners has become less relevant, and (b) modern trends in international economic law including those relating to international dispute settlement procedures.

After a slow and hesitant take-off, spread over a period of 25 years (1955-1980), there has been a truly remarkable development of bilateral investment treaties in Latin America. With few exceptions (Brazil, Cuba, Guatemala, perhaps Mexico) Latin American governments - like the East European socialist governments and China during the 1980s - have come to recognize the usefulness of BITs for creating a propitious climate for investment. Two of the main stumbling blocks derived from the Calvo doctrine, viz. rejection of international arbitration between investor and host country, and insistence on exhaustion of local remedies, have almost disappeared. What is left in some

countries (Uruguay, Venezuela, Argentina) is an 18 months delay before a dispute can go to international arbitration.

The Calvo doctrine used to be considered by Latin American lawyers as a legitimate and necessary defence against economic imperialism. It now seems to be increasingly recognized that the same national interests can be safeguarded more effectively by means of permanent sovereignty, international economic co-operation and international arbitration. Permanent sovereignty enables the government to allow only those foreign investments which it wants and on such terms as it deems in the national interest. International economic co-operation, including membership of multilateral institutions such as ICSID and MIGA, aims at promoting the flow of foreign investments to developing countries. International arbitration, if truly independent, will protect the legitimate interests of the host country more effectively than its national courts can do, if only because the award of the arbitral tribunal has a better chance of international recognition. In any case, once arbitration is agreed, there is no longer a need for recourse to the local courts, whether in a single instance or through 2 or 3 stages of appeal and cassation.⁵⁹

⁵⁹ Cf. the Judgment of the ICJ in the *Elsi* case, i.e. the Case concerning *Elettronica Sicula SpA (US v. Italy)*, ICJ Rep. (1989), p15. See P. Peters: *Dispute Settlement Arrangements in Investment Treaties*, para.3.6 at note 123, NYIL 1991. The following remarks in para.3.6 of that article are relevant to the point under discussion here: 'The question is whether it is in the best interests of the parties to adopt a procedure whereby a dispute is first dealt with by the courts of the host State and thereafter is submitted to arbitration elsewhere. From the point of view of the investor recourse to the local courts will be seen as a waste of time, effort and money. Such waste also applies to the host country of course. There are two further reasons which may make a duplicated procedure unattractive to the host country: the acrimony caused by public proceedings in the courts may harm the investment climate (more so than arbitral proceedings, which are held in private); and it is embarrassing if the verdict of the highest court of the host country is subsequently quashed by 'foreign' arbitrators. Historically there is a certain logic in the requirement to exhaust local remedies; only after such exhaustion could the State be held responsible for any injustice. Nevertheless it is doubtful whether the satisfaction derived from sticking to historically and constitutionally important principles will outweigh the practical disadvantages outlined above. Although the *Elsi* Judgment ... seems to breathe some new life into the local remedies doctrine, the trend in a long line of BITs indicates that in the field of international investment law doctrinal views increasingly make way for practical considerations. It is not surprising therefore that the vast majority of BITs do not require any recourse to the courts.'

A P P E N D I X

State	ICSID ¹		MIGA ²		Number of BIT's (or equiv.)		No participation in any such treaty	
	signed	ratified	signed	ratified	signed	ratified	since 1945	since 1980
1 Argentina	1991		1990	1990	6 ³	3		
2 Bolivia	1991		1986		6	1		
3 Brazil			1990		-	-		
4 Chile	1991		1986	1988	1	-		
5 Colombia			1986		1	-		
6 Costa Rica	1981		1989		3	2		X
7 Cuba					1	1		X
8 Dominican Republic					1	1		
9 Ecuador	1986	1986	1985	1986	2	2		
10 El Salvador	1982	1984	1991	1991	2	-	X	
11 Guatamala					-	-		
12 Haiti	1985		1987		4	2		
13 Honduras	1986	1989			1	-		
14 Mexico					1 ⁴	-		
15 Nicaragua			1990		1	1 ⁵		
16 Panama					5	4		
17 Paraguay					2	1		
18 Peru	1981	1983	1990	1991	1	1		
19 Uruguay	1991		1986		3	-		
20 Venezuela					1	-		

Sources: Information provided by the Secretariats of ICSID and MIGA as well as own research by the authors.

1 As of September 4, 1991.

2 As of August 6, 1991.

3 Including two treaties which do not provide for international arbitration and protection against expropriation

4 This treaty may not provide for international arbitration etc. (text not yet available)

5 Denounced by US in 1985, no longer in force.

