March 11, 2009

War's Legacy in International Investment Law

James Thuo Gathii, Albany Law School

Available at: https://works.bepress.com/james_gathii/7/
War’s Legacy in International Investment Law

James Thuo Gathii
Associate Dean for Research and Scholarship and Governor George E. Pataki
Professor of International Commercial Law, Albany Law School

e-mail: Jgath@albanylaw.edu
phone: 518 445-3304

Length: 16,938 (including footnotes)
War’s Legacy in International Investment Law

Abstract

This paper discusses the role war has played in shaping rules of international investment law from the late nineteenth century. At the end of the nineteenth century and the beginning of the twentieth century, the move towards institutions, such as arbitration forums, and rules as an alternative to the use of force gave new impetus to the growth of international commercial law and related institutions.

These rules and institutions represented the hope that the use of force would be eclipsed as States moved forward towards more cooperative, consensual and non-coercive mechanisms of dispute settlement. Capital-importing states in Latin America however became acutely aware that these institutions and rules did not completely erase the coercive and uneven relations they had with capital-exporting states. In era after era of reformism from the Calvo era, to the NIEO and to the era in opposition to neo-liberal economic governance, capital-importing States have continued to resist and sometimes adapt to the coercive realities of the rules of international economic governance.

The paper begins by tracing the origin of Drago doctrine as a response to the practice of European states that engaged in aggression and conquest against militarily and economically weaker Latin American states as a means of collecting debts owed to their citizens. It then shows that while the denouement of forcible measures to resolve contract debt was overstated by early twentieth century international lawyers, international law nevertheless provided avenues for dispute settlement outside the use of force in international commercial relations.

Thus while protecting commerce from the scourge of war was a primary inspiration for the post-Second World War international economic order, I show how war has nevertheless continued to be an animating factor for former colonies particularly with regard to their State responsibility for war damage in the context of foreign investment.
# Table of Contents

Introduction ..........................................................................................................................3  
The Relevance of War in Shaping rules of International Economic Governance ....4  
The Calvo Clause and Its Progeny .................................................................................15  
African and Asian Challenges to International Economic Law and Governance .....17  
State Responsibility for War Destruction in Investment Disputes ..............................27  
From Forcible Interventions to Coercive and Unequal Economic Relations ..........43  
Conclusion ........................................................................................................................47
War’s Legacy in International Investment Law

Introduction

Recent scholarship has celebrated the peaceful consequences of regimes of the international economic order.\(^1\) The advent of the Bretton Woods institutions and the United Nations were in fact, institutional responses the Second World War that embodied a set of goals and principles as alternatives to resolving conflict by war. It is not therefore surprising that the pragmatism and functionalism of the post Second World War period, also regarded these institutions as a victory over the dark forces and passions that led to the outbreak of the Second World War.

Rules and institutions of international trade and investment also provide alternatives to the role of territorial conquests as ways of facilitating access to resources in formerly colonized countries needed by multinational firms. In addition, as shown in this paper, rules of international investment law and arbitral forums were seen as alternatives to the forcible collection of debts. In short, while territorial conquest in the nineteenth century facilitated the extraction of mineral and other resources from poor countries, in the twenty-first century international legal regimes ensure their continued non-violent access.

This paper explores the role war has played a role in the formation and consolidation of rules and institutions of international investment law. In so doing, this paper shows how notwithstanding the guarantees of self determination, equality of States and permanent sovereignty over natural resources, private international law to date continues to guarantee regimes of economic governance that protect rights of alien investors often at the expense of the former colonies. This continuity has an uncanny resemblance to the era when conquest and war were permissible means of international economic interaction.

The Relevance of War in Shaping Rules of International Economic Governance

In this section of this paper, I discuss continuities and discontinuities of rules of international economic governance particularly as they relate to issues surrounding war from the colonial to the post colonial era. While protecting commerce from the scourge of war was a primary inspiration for the post-Second World War international economic order, war was also an animating factor too for former colonies in designing new rules of international economic governance. The relevance of war for post-colonial economic governance, particularly in the nineteenth century for newly independent Latin American countries, is often understated or simply regarded as an instance of economic nationalism.

Two of the best examples of the influence of war in seeking to shape rules of international economic governance is the nineteenth century Latin American innovation required in contracts between foreign investors and nationals and Latin American
governments, known as the Calvo clause and the Drago doctrine. The origins of the
Calvo clause arose as a response to the nineteenth century practice of European states that
engaged in aggression and conquest against militarily and economically weaker Latin
American states as a means of collecting debts owed to their citizens. The Drago doctrine
arose from a 1902 warlike blockade of Venezuela by Great Britain and Germany with the
diplomatic support of Italy. Following unrest and turmoil in Venezuela, the Venezuelan
government refused to settle claims it owed to bondholders from Great Britain, Germany
and Italy. Venezuela proposed that it would only settle those claims in a Commission
comprised of Venezuelans. This blockade quickly coerced Venezuela into compliance.

In a letter dated December 29, 1902, the Venezuelan Secretary of Foreign Affairs, Luis
M. Drago, wrote a letter in which he protested the “collection of loan by military means”
for its inconsistency with Venezuela’s sovereignty, which not only amounted to a form
‘territorial occupation’ of Venezuelan territory, but also signified the ‘suppression or
subordination’ of Venezuela to these creditor nations. The letter then stated what became
known as the Drago doctrine in the following terms: “That the public debt cannot
occasion armed intervention nor even the actual occupation of the territory of American
nations by a European power.”

---

2 Luis M. Drago & H. Edward Nettles, The Drago Doctrine in International Law and Politics 8 HISP. AM.
HIST. REV. 204 (1928). There is some controversy regarding whether the purpose of this blockade. Some
suggested it was not so much to protect bond holder rights as to protect he lives, liberty and property of
British subjects, id. at 205-206. However, the forcible collection of debts was undoubtedly the primary
reason for the Drago doctrine.
3 Id.
4 Id. at 209.
5 Id. For a full exploration of this, Luis M. Drago, State Loans in their Relation to International Policy,
The Drago doctrine was therefore both a non-intervention principle as well as a statement of the special nature of public bonds and loans taken by States. It was a non-interventionist principle because it was aimed against armed interventions and occupation of debtor states by creditor states. It was a statement of the special nature of bonds and loans borrowed by governments because the doctrine was based on distinguishing the kinds of remedies that were available to creditors when the borrower was a private individual rather than the government. According to Drago, a lender who lends to a sovereign knows that “no proceedings for the execution of a judgment may be instituted or carried out against it.” The Drago doctrine is therefore closely associated with the now obsolete theory of absolute sovereign immunity when a sovereign enters into commercial transactions. I will return to this point below to show how, the now obsolete rule of absolute immunity enunciated in the Drago doctrine, represented an effort to move from the justifiable use of force in the collection of sovereign debt towards a juridical framework in which the use of force was impermissible, whether for public or private debt.

The Drago doctrine was an effort aimed at finding juridical proscription of the use of force in the economic relations between militarily weak debtor Latin American countries, on the one hand, and militarily powerful European States, on the other. Law for Latin

6 Dragó, supra note 5, as quoted in Drago & Nettles, supra note 2, at 211.

7 To day, it is generally recognized that foreign states are not immune from jurisdiction in a judicial forum when they have engaged in commercial conduct equivalent to that which private actors engage in. There is therefore no absolute immunity for acta jure imperii, (acts of state of a commercial nature) since they will be regarded as acta jure gestionis thereby subjecting the State to suit. See SIENHO YEE, TOWARDS AN INTERNATIONAL LAW OF CO-PROGRESSIVENESS 280-85 (2004). See also Robert Wai, The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary Legalism, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS 213 (Craig Scott ed., 2001).
American countries represented the best hope for restraining the use of force against them by countries with more military power. In fact, Drago specifically argued against the use of violence as inapplicable to Venezuela since it involved conquest.\textsuperscript{8} In so doing, he was advocating against the views of scholars of international law of his day such as W.E. Hall who held the view that States had the right to engage in forcible interventions to collect on public debt.\textsuperscript{9} In fact, U.S. Secretary of State Elihu Root, while asserting that the use of armed forces by a state for the collection of ordinary contracts debts on behalf of its citizens was regrettable, left open the possibility that it was justifiable to use force over non payment of public debts “when accompanied by such circumstances of fraud, wrongdoing or violation of treaties.”\textsuperscript{10}

When the Second Hague Conference met in 1906 and signed the \textit{Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts}, the contracting parties agreed not “to have recourse to armed force for the recovery of contract debt claimed from the Government of one country by the Government of another country as being due to its nationals.”\textsuperscript{11} However, consistent with Root’s reservation that the use of armed force was unjustifiable in all cases, a proviso to this prohibition in the Hague Convention provided that use of force would be permissible where a “debtor state refuses or neglects to accept an offer of arbitration, or after accepting the offer, prevents

\begin{flushright}
\textsuperscript{8} Drago, \textit{supra} note 5, at 725.
\textsuperscript{9} W.E. Hall, \textsc{International Law} (1880); Thomas H. Lee, \textit{The Safe-Conduct Theory of the Alien Tort Statute} 106 \textsc{Colum. L. Rev.} 830, 821 (2006) has also argued that “Under traditional state-based principles of international law – i.e., those from the eighteenth to the early twentieth centuries – the safe conduct promise was enforceable through the offended sovereign’s right to make war in the event of a breach,” \textit{id}. However, see Hershey, American Journal of International Law, 37 as well as Calvo who denied the existence of such a right.
\textsuperscript{10} Root’s instructions to the 1906 Hague Conference, as cited in Drago & Nettles, \textit{supra} note 5, at 218.
\end{flushright}
any compromise from being agreed upon, or, after the arbitration, fails to submit to the award.”

In 1957, the International Court of Justice endorsed this interpretation in the Case of Certain Norwegian Loans when it noted that the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts while not requiring compulsory arbitration over contractual debts, imposed an obligation “that an intervening power should not have recourse to force before it had tried arbitration.” As Judge Sir Hersch Lauterpacht noted in his separate opinion in this case, Article 52(2) of the Hague Convention for the Pacific Settlement of International Disputes gave the Permanent Court of Arbitration competence to settle by agreement disputes “arising from contract debts claimed from one Power by another Power.” Sir Lauterpacht interpreted the recognition of the contract debts among sovereigns for arbitration as an indirect recognition that controversies relating to debts between states were “suitable for settlement by reference to international law.” In other words, international law came to be regarded as a substitute for war as means of collecting contract debt. Indeed, as President Roosevelt stated in support of the provision seeking to limit the use of force in the collection of debts in the Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts “such a provision would have

---

12 Id.
13 Case of Certain Norwegian Loans (Fr. v. Nor.) 1987 I.C.J. (July 6).
14 Id. (separate opinion of Judge Lauterpacht).
16 Case of Certain Norwegian Loans (separate opinion of Judge Lauterpacht), at38 ¶ 33.
International law was clearly being seen as an antidote to forcible measures.

Clearly then, we see in our discussion of the Drago doctrine and the negotiations and subsequent recognition of the principle of pacific settlement of disputes in the 1906 Hague Conference, the right claimed by States, particularly in the late nineteenth and early twentieth centuries, to collect debt by forcible means was sought to be limited under rules of international law. While the early twentieth century prohibition of the use of force to collect debts in the Hague Conventions was only partial, it represented an important step towards the eventual prohibition of the use of force between States in the United Nations Charter. For my purpose here, the move towards arbitration and away from the use of force to enforce contract debts shifted the concerns of weak, mostly non-western countries from the fear of forcible interventions to enforce contracts debt owed to western countries or their citizens, to the bias against them in the rules, processes and outcomes of arbitral forums. These countries saw these biases as a reflection of their

---

18 Article 2(4) of the United Nations Charter, which is regarded as a jus cogens norm under international law provides that “All members, shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” In addition, UN General Assembly Resolution 3314(XXIX) of 1974, on the Definition of Aggression defined aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations,” (Article 1) and further defined the “blockade of ports or coasts of a State by armed forces of another state” (Article 3 (c) as constituting aggression. Notably. The Drago doctrine arose precisely out of this kind of a blockade. Article 5 of the Aggression Resolution provides that “No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression,” id.
unequal bargaining power vis-à-vis the wealthy countries and their giant multinational firms on which they depended on for finance, technology and trade.

Thus, while the principle of the pacific settlement of disputes and the partial rejection of the use of force to enforce debt contracts were important advances in the relations between capital-exporting and capital-importing States, peaceful settlement of disputes through forums like arbitration did not necessarily eviscerate the coercion that was characteristic in contractual relations between economically stronger and weaker parties. In addition, without an explicit prohibition on the use of force, there was still the possibility that armed force could still be used in the collection of public debts after the Hague Conventions came into force. Without such an explicit prohibition on the use of force, defaulting States therefore lived under the threat that capital-exporting States might wage war against them to enforce their rights, rather than to submit to compulsory or obligatory arbitration as proposed in the course of the First and Second Hague conferences. Thirteen of what were termed the ‘small powers’ at the Second Hague Conference who were likely to be subject to forcible collection of debt, supported ‘obligatory arbitration.’ By contrast, the big powers, like the United States and Great Britain, sought to reserve their right to protect what they termed their ‘vital interests, independence and honor’ through the use of force.

20 Amos S. Hershey, *Hague Convention Restricting the Use of Force to Recover on Contract Claims* 1 Am. J. Int’l L. 78 (1908), “arguing that every State which considers itself aggrieved enjoys the sole right to decide the redress which it shall exact and, also, whether in a given case it has exhausted all peaceful remedies it should pursue in order to secure redress, The use of force is a recognized legal remedy by which states may settle their differences.” Id. at 85 (emphasis added). But see Michael Tomz, *Reputation and International Cooperation: Sovereign Debt Across Three Centuries* (2007) (arguing that the use of force to collect Venezuelan debt was exceptional and not motivated solely by default).

Today, high transaction costs, as well as prohibitions on the use of force, have reduced, if not entirely eliminated, the resort to war for the collection of contract debt. In addition, wars for debt collection came to be discredited as between ‘civilized nations,’ but also against ‘small and weak nations.’ The use of force to collect private debts against small and weak nations came to be regarded as a “violation of the doctrine of international law that independent nations should stand upon a footing of equality.”

As the use of force to collect debt fell into disuse, and the liberalization of financial markets grew in pace from the nineteenth century and accelerated even more in the twentieth century with the removal of obstacles to the flow of finance across national boundaries, the enforcement costs of contract debt became “as high if not higher than in the nineteenth century.” The enormous debt owed to capital-exporting states by capital-importing states has therefore unsurprisingly been a major theme in international

---

22 CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES (1985). Addressing the use of forcible interventions to address bond defaults notes, “Britain’s naval capacity and its diplomatic network were formidable. Direct and frequent interventions promised immediate and tangible gains. Yet such a course was both risky and costly. It was costly, even in the short run, if the desired results could be won diplomatically. It was risky in the long run because direct interventions undermined the basis of local political authority and social control. British policy in Latin America demonstrated a clear understanding of these alternatives. It was based on the idea that it was cheaper to hear the immediate costs of bond defaults than to risk sabotaging local governments by frequent interventions,” id. at 44-45 (emphasis added). Peter Liberman, The Spoils of Conquest 18 INT’L SECURITY 125, 150 (1993) (also argues that the costs of imperial adventures, among other factors such as nationalism, now outweigh the benefits of such adventures). See also Stephen Brooks, The Globalization of Production and the Changing Benefits of Conquest 43 J. CONFLICT RESOL. 646-70 (1999) (arguing that the central role of foreign direct investment in contemporary globalization may allow governments to substitute that instrument of external economic influence for older instrument of conquest).


24 Wars for Debt Collection, N.Y. TIMES, May 12, 1903, at 8.
economic relations at the end of the twentieth century and the beginning of the twenty first century.\(^{25}\)

Suffice it to say, the declining significance of the use of force to collect contract debt merely relocated from the battlefield to arbitral and judicial forums the same concerns that inspired the Drago doctrine. The belief of early international lawyers, including Luis Drago, was that rules and institutions of international law were neutral and apolitical alternatives to the use of force and would soon be under scrutiny. Influenced by the classical legal thinking of their time, these lawyers believed that there were only two ways of achieving harmony or reconciliation, force or law.\(^{26}\) Arbitration for them was an example of a larger set of voluntary and consensual processes that States could use to resolve conflicts rather than resorting to war.\(^{27}\) These lawyers celebrated international law as a non-coercive solution through which problems, domestic and international, could be cooperatively and beneficially resolved.\(^{28}\) Not only did this early thinking of international law therefore assume a harmony of interests that could be worked out impartially if not scientifically, but also it denied that “coercion was the basis of [international] legal efficacy.”\(^{29}\)

\(^{25}\) **World Bank, Can Africa Claim the 21st Century?** (2000) (noting the significance of debt and aid dependence as one of the major constraints on Africa’s development prospects in the twenty first century).

\(^{26}\) Joseph Beale, an early classicist for example argued that there “are only two methods of reconciliation: force, and law. Either the will of the physically strongest, or of the mentally alertest, must prevail-the way of the beast; or conflicting wills must be restrained by law-the way of organized human society,” *cited in* Jonathan Zasloff, *Abolishing Coercion: The Jurisprudence of American Foreign Policy in the 1920’s* 102 Yale L.J. 1689, 1698 (1993).


\(^{29}\) Steinberg &. Zasloff, *supra* note 26, at 68; Zasloff, *supra* note 25.
This early faith in the neutrality and impartiality of the law denied the role of power and coercion in international relations and institutions\textsuperscript{30} and in rules of law.\textsuperscript{31} Rules of law, after all, are more often than not politics by other means. For example, gross inequalities and disparities of bargaining power in contracts between indebted sovereign nations and financially sophisticated multinational firms could very well lead to the conclusion that such contracts are no more than a ‘power order’\textsuperscript{32} than consensually bargained deals. Thus, while poor countries now enjoy the autonomy to freely enter into commercial contracts, they continue to be concerned about the reciprocity or underlying fairness of these deals.\textsuperscript{33} For them, simply having an agreement, institution or process is insufficient to establish its fairness.

That is why, in arbitral forums, rules of private international law much like the right to use force to collect debt were challenged by poor countries as “furthering colonial

\textsuperscript{30} Steinberg & Zasloff, \textit{supra} note 26, at 72 (discussing realism in international law and international relations).

\textsuperscript{31} Duncan Kennedy, \textit{The Stakes of Law, or Hale and Foucault! XV LEG. STUDIES FORUM} 327 (1991) (arguing in part that early conservative economic rhetoric justified the existing capitalist system as being based on freedom in contrast to socialism which replaced freedom with state coercion and how realists showed that freedom or agreement was a product of coercion “by which they meant that neither party got what the wanted (the whole joint product) and that each had the experience of being ‘forced’ to settle for less,” \textit{id. at 328.}

\textsuperscript{32} ROBERTO MANGABEIRA UNGER, \textit{THE CRITICAL STUDIES MOVEMENT} 70 (1983).

\textsuperscript{33} MICHAEL J. SANDEL, \textit{LIBERALISM AND THE LIMITS OF JUSTICE} (1982) notes that “Unlike obligations voluntarily incurred, obligations arising under the ideal of reciprocity must presuppose some criterion of fairness independent of contract, some way in which the objective fairness of an exchange may be assessed,” \textit{id. at 107-08. See also, NAGLA NASSAR, SANCTITY OF CONTRACTS REVISITED: A STUDY IN THE THEORY AND PRACTICE OF LONG-TERM INTERNATIONAL COMMERCIAL TRANSACTIONS} (1995), arguing that “If as claimed by classical theorists, legal rules are merely concerned with resource allocation, then the unfairness of the classical rule in denying adjustment is somewhat but not completely, justifiable. From a societal perspective, the adjustment rule, according to the classical model, is considered inefficient, for it wastes society’s revenue on an unnecessary reallocation of resources…The validity of the above argument is very doubtful. First, it is misleading to assume that society ah no interest in the equitable reallocation of resources…Secondly, arguing that the main concern of the rule of law is to maximize wealth is a misleading proposition. Laws have been created…to establish social peace and promote exchange…This is particularly true of international society where actors come from different societies at different levels of economic development and with different legal rules…In the absence of a strong institutional organization, actors need to be assured that their interests will not be sacrificed because of an event they could not have known about or controlled…” \textit{id. at 233-234.}
inequalities” very much like the wars for debt collection. The Calvo clause, which I will turn to shortly, was an early effort to reform private international law to address such inequalities and the concerns of Latin American states.

The upshot of my argument so far is that the legalization and institutionalization of international commercial disputes did not end the concerns about the exercise of coercion and power by capital-exporting over capital-importing states. Perhaps nothing illustrates better the legalization and institutionalization of international commercial disputes than the arbitral proceedings that arose from the Allied blockade (British, German and Italian), of Venezuela that inspired the Drago doctrine in the first place. Having set aside 30% of all customs receipts of two Venezuelan ports to settle the claims of all her creditors, the Allied powers demanded preferential payment over all other creditor nations. Venezuela and the Allied powers decided, as a condition for lifting their blockade, that they would accept arbitration over the question of preferential treatment before the Permanent Court of Arbitration in the Hague. For Venezuela, the arbitration proceedings in this case were superior to enforcement of the contract claims by forcible means. Yet, in many ways Venezuela’s agreement to arbitral proceedings was in no small

34 ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 239 (2005). For a different view, see Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power 41 MD. L. REV. 563, 580 (1982) (arguing that the “real problem with freedom of contract is that neither its principles, nor is principles supplemented by common moral understanding, nor its principles supplemented by historical practice, are definite enough to tell the decision maker what to do when asked to change or even just to elaborate the existing law of agreements”).
35 The Venezuelan Preferential Case (Ger., Gr. Br., Italy, Venez. et. al.), in IX REPORTS OF INTERNATIONAL ARBITRAL AWARDS, 103 (United Nations ed., 1904).
36 Protocol Between Germany and Venezuela for the Reference of Certain Questions to the Permanent Court of Arbitration At the Hague (signed at Washington, May 7, 1903) in INTERNATIONAL ARBITRAL AWARDS, supra note 34, at 105-06; Protocol Between Great Britain and Venezuela Relating to the Settlement of the British Claims and Other Matters (signed Washington, February 13, 1904) in INTERNATIONAL ARBITRAL AWARDS, supra note 34.
way influenced by the vastly superior military/naval power of the allied forces while Venezuela was still subject to the allied powers blockade.\textsuperscript{37} So powerful were these blockading powers that they used the arbitral process, against Venezuela’s protestations, to win a right to preferential treatment above all other creditors.\textsuperscript{38} In fact, not only did the Permanent Court of Arbitration grant the blockading powers the right to preferential treatment, but it also rejected Venezuela’s argument on jurisdictional grounds to decide whether the allied powers had exhausted all other remedies prior to engaging in the use of force.\textsuperscript{39}

In the next section, I will examine how the legalization and institutionalization of international commercial disputes set the stage for more skirmishes between these countries. The debates about the Calvo clause represent one early episode in these disagreements.

\textit{The Calvo Clause and Its Progeny}

As we noted above, the Calvo clause proclaimed the sovereign equality of Latin American countries with more powerful states, and their independence from diplomatic interference with regard to matters arising out of contractual relations.\textsuperscript{40} In effect, both the Calvo clause and the Drago doctrines represented efforts by the newly independent

\textsuperscript{37} See \textit{In Fear of the Hague: Every Effort Making to Settle Venezuela Case in Washington}, N.Y. TIMES Feb. 5, 1903, at 1 (noting in part that negotiations were proceeding and that referring the matter to the Hague would prolong the blockade and would be of no good).

\textsuperscript{38} \textit{The Venezuela Preferential Case: Award of the Tribunal of Arbitration, in IX REPORTS OF INTERNATIONAL ARBITRAL AWARDS} supra note 34, at 107-10.

\textsuperscript{39} \textit{Id.} at 108.

\textsuperscript{40} M.R. Garcia-Mora, \textit{The Calvo Clause in Latin American Constitutions and International Law}, 33 MARQ. L. REV. 4, 205-06 (1950).
Latin American countries to overcome the unequal economic relations they had with capital-exporting states.

The Calvo clause required foreign investors to submit to the remedies available within the judiciaries of Latin American countries, rather than to be governed by rules of their home countries or rules of international law. It was designed to circumvent capitulation treaties which were imposed by capital-exporting states requiring capital-importing states to protect the rights of alien investors through the use of the law of the capital-importing state. The Calvo clause, in essence, required foreign investors to forfeit the option of pursuing alternative remedies, such as diplomacy or war to collect on their debts. Under the Calvo clause, foreign investors had the same degree of protection as domestic investors. It was a rule of equal treatment in the protection of foreign and national investors of Latin American countries.

As such, the Calvo clause was predicated on the view that there did not exist a universal or ‘international standard of justice’ that alien investors were entitled to under customary international law. Rather, under the Calvo clause foreign investors were entitled to exactly the same remedies as domestic investors. Domestic, rather than international law, was the source of rights for foreign investors. Only where a denial of justice occurred, under some Latin American Calvo clauses, could foreign investors resort to rules of international law for remedies. A violation of the Calvo clause resulted in the termination of the rights that a foreign investor had under the contract in question. As a Mexican jurist argued in 1944, the purpose of the Calvo clause was to prevent foreigners from
using the diplomatic protection of their countries as ‘an instrument of oppression used by strong States against weak ones’. 41

**African and Asian Challenges to International Economic Law and Governance**

If the nineteenth century system of capitulations and forcible enforcement of contractual rights was rejected by Latin American countries, neither was the post-Second World War regime of international economic law and governance embraced without severe reservations by newly independent countries of Asia and Africa. The best example of the objections these countries had to the old regime of international economic governance was the clean slate theory. States that adhered to this theory argued that they should be freed from having to assume obligations that legitimized colonial conquests and acquisitions. The Nyerere doctrine, for example, advocated that countries should be able to select only those treaty commitments that best comported with their newly acquired sovereignty. 42

However, as Antony Anghie has shown, efforts by these newly independent countries to undo treaty commitments and customary international law rules in the international investment area were strongly challenged by capital-exporting States. 43 Several arguments were deployed against the clean slate theory and the Nyerere doctrine. One of the primary means by which the continuity of prior treaty and customary rights was assured was through the assertion of the doctrine of state succession. Rules of state

---

41 Id.
42 E.E. PEATON & S.E. MALITI, TANZANIA TREATY PRACTICE (1973). See also M. BEJIAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 1100 (1979) (arguing that international law could not easily assume the task of transforming international relations since it had been “confined to protecting a type of international relations not yet purged of inequality and imperialism.”).
succession require new States to undertake treaty and other rights assumed by the old State. Under this doctrine, it is irrelevant how those treaties were procured or indeed, how illegitimate and unequal the commitments in these treaties and agreements were.

Developed countries and their supporters also invoked the doctrine of acquired rights, under which rights that pre-existed the independence of the new States were required to be upheld. While newly independent countries argued in favor of revising treaty commitments and mineral concessions that they had played no part in making while they were under colonial rule, developed countries argued that they were seeking to unilaterally modify these commitments, inconsistent with the principle of *pacta sunt servanda*. Indeed, several international law jurists from developed countries argued that changing these acquired rights or the customary international law rules that guaranteed the rights of alien investors would result in unraveling the very international legal order that had brought these countries into existence. One such jurist argued that, in so far as the rules newly independent countries wanted to repudiate were customary international law, they could only have done so when the rules were in formation! Since these rules were already in force, they had been in formation long before the independence of African and Asian countries.

---


45 Sir Humphrey Waldock, *General Course on Public International Law*, 106 REC. DE COURS 1, 49-53 (1962-II) This rule is also reflected in Restatement (Third) of Foreign Relations Law of the United States §102, c Comment d. See also, Norbett Horn, *Normative Problems of a New International Economic Order* 16 J WORLD TRADE L. 343 (1982); ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 202 (1991) (arguing that the NIEO was “unduly ambitious in that it attempted to replace free trade and cumulative justice with economic democracy and distributive justice).

46 Id.

47 Notably, in the interwar years, Soviet and Eastern European jurists of international law challenged international legal rules on foreign investor protection. These jurists argued that rules of international law could not regulate property relations within States. Within the socialist approach to economic governance,
In the 1970’s, developing countries sought to change various rules of international economic governance that they perceived as prejudicial to them through the legislative agenda of the United Nations General Assembly. They argued that rules of state responsibility gave them jurisdiction to regulate foreign investors within their territory, to enable them to regulate the conditions of under which these investors could enter into their economies, and in particular the jurisdiction to: exclude foreign investors from certain sectors of their economies, as well as to regulate the permissibility and scope of repatriating capital and profits and the conditions under which technology could or could not be transferred to their economies. Like in Calvo clause era, these countries argued that international law was only valid in so far as it required these newly independent countries to treat foreign and domestic investors similarly.  

These efforts included the 1970’s initiative to inaugurate a New International Economic Order (NIEO). Using their majorities in the United Nations General Assembly and acting together as the Group of 77, developing countries also drafted and campaigned for the adoption of the Charter of Economic Rights and Duties of States (CERDS). The Charter reintroduced the Calvo doctrine’s requirement of a uniform standard of treatment for domestic and foreign investors. It also recognized the right of a state to nationalize

domestic law governed the rights of foreign investors and international adjudication of foreign investor rights was not permitted. Rules of international economic governance were also critiqued for being incompatible with a state-led model of economic governance. Thus, like Latin American jurists of the nineteenth century, these jurists contested the laissez faire underpinnings of the rules international economic governance such as the inviolability of private property and the sanctity of contracts.


foreign owned property and the right of such a state to use its own law, as opposed to
international law, to measure compensation after nationalization. The NIEO agenda
sought to restructure international economic relations to establish a balance between the
predominantly raw material producing economies of the capital-importing states and
western industrial economies. The NIEO challenged unfair international trading,
investment and finance rules and advocated in favor of a right to development.\textsuperscript{50}

The NIEO approach was informed by the theoretical work of dependency theorists who
argued that countries that were formerly under colonial rule had failed to develop
economically become of their peripheral position in the international economy. Under
some of these dependency theories, capital-importing economies were thought vulnerable
due to the poor terms of trade for their unprocessed raw materials and because of the
downward trend in prices of their agricultural exports. Dependency theories attributed the
shape of poorer economies on western sources of aid, investment and loans that favored
industrial development at the expense of agriculture. Such policies, in turn, exploited the
peasantry while enriching a comprador class. Rather than trace uneven development to
internal problems within poor economies, dependency theorists emphasized the structural
limitations of the global economy posed by huge multinational corporations, unequal
exchanges between the north and the south, and the reliance on a few primary products
for export among poor economies.\textsuperscript{51} Some scholars even proposed that poorer economies
should delink from the richer industrial economies to resolve the relational foundations of

\textsuperscript{50} García-Mora, \textit{supra} note 39, at 205-06.
maldistribution of global wealth. The debate on the content, authority and fairness of international investment rules particularly those relating to compensation for nationalization of alien property were captured in the following terms by the United States Supreme Court:

“Certain representatives of the newly independent and underdeveloped countries have questioned whether the rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect ‘imperialist’ interests and are inappropriate to the circumstances of emergent states. The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations, between the social ideologies of those countries in favor of state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.”

While developing countries were challenging the fairness of rules of international economic governance in the 1960’s to the 1970’s as the foregoing observation suggests, some of them were also cautiously embracing these rules as well as market based models of national economic policy. For these countries, rules of international investment law including bilateral investment agreements provided a context within which they could enter into credible commitments with foreign investors. The adoption of market based models of economic development resulted in the spectacular economic success of the

---

52 S. Amin, Accumulation on a World Scale: A Critique of the Theory of Underdevelopment (Brian Pearce trans., 1974). See also Cardoso & Faletto supra note 47. For a critique that the agenda of the NIEO replicated the old rules, strategies and institutions of liberal modernity it sought to overcome and therefore could not promise fundamental change, see Dianne Otto, Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference 5 SOC. & LEG. STUD. 348 (1996)
East Asian economies such as South Korea. While most of the East Asian economies were experimenting with market reforms from the 1960’s, many other developing economies were far too skeptical.

This rejection of market led development on the part of some States was evident in the debates on the drafting of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in the late 1960’s. Representatives of Asian states, like Sri Lanka, feared that this new international investment tribunal would simply continue unequal economic relations between capital-importing and capital-exporting states. Scholars from third world states have often noted how the rulings of the Tribunals of the International Center for the Settlement of Investment Disputes work against the interests of their States. This attitude is also reflected in the Libyan defense in arbitration proceedings that its decision to nationalize oil concessions in 1973 and 1974 was a non-arbitral sovereign act. In perhaps one of the most well-known arbitration

55 M. Sornarajah, ICSID Involvement in Asian Foreign Investment Disputes: The Amco and AAPL Cases, 4 Asian Y.B. Int’l L. 69 (1994). For a view of the particular variation of free markets in the rise of the East Asian economies, relative to the neo-liberal model known as the Washington Consensus, see Alice Amsden, Why Isn’t the Whole World Experimenting With the East Asian Model to Develop?: Review of World Bank’s East Asian Miracle Report, 22 WORLD DEV. 4 (1994).

56 On this, see Deepak Lal, The Poverty of Development Economics,

57 Sornarajah, ICSID Involvement, supra 49 note at 69-70. Clearly, developing countries had a love-hate relationship to international law; they loved its promise of autonomy but criticized its continuation of colonial inequalities. One of the best examples of this attitude is MOHAMMED BEDIAOUI TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979). For a further discussion, see James Gathii, A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias 21 LEIDEN J. INT’L L. 317 (2008) (arguing that a defining question for the first generation of scholars from the former colonies after the Second World War was “how to establish a doctrinal basis or a set of principles to address not only their frustration with international law, but also how its rules and institutions could contribute to the challenges of the newly independent states,” id. at 318-9).

58 Id. at 70 n.4.

59 For example, M. SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT (1994); Ibironke Odumosu, Locating Third World Resistance in the International Law on Foreign Investment 9 INT’L COMMUNITY L. REV. 427 (2007). For a view skeptical of these reservations, see AMAZU A. ASOUZU, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT (2001).
investment decisions that followed, Arbitrator Rene-Jean Dupuy rejected Libya’s
decision. He held that Libya’s nationalization of the concessions it had granted alien
investors could not be determined exclusively under Libyan law and in Libyan courts. In
his view, the provision in the Charter of Economic Rights and Duties of States, which
would have allowed for such an outcome, was adopted with 86 votes but more
importantly 11 against and 28 abstentions. Among the objectors were capital-exporting
states including the U.S., Germany, Belgium, Spain, France, Japan and the United
Kingdom. Having found that the ‘most important western countries’ had not consented
to disregarding international law in determining compensation for nationalization,
Arbitrator Dupuy then turned to the United Nations General Assembly Resolution on the
Permanent Sovereignty Over Natural Resources of 1962, which was passed with the
approval of “many States of the Third World, but also several Western developed
countries with market economies, including the most important one, the United States.”
Dupuy concluded the appropriate compensation standard adopted in that resolution
reflected the “opinio juris communis” since it reflected a “consensus by a majority of
states belonging to the various representative groups.” Arbitrator Dupuy’s efforts to
precisely define the rules applicable to compensation for nationalization were clearly
present in the Sabbatino decision of the U.S. Supreme Court about a decade earlier. Thus,
in Sabbatino, the Court noted that its decision on a question related to the content of rules

60 Texas Overseas Petroleum Co. v. Libyan Arab Republic, 17 I.L.M. 1 (1978). The outcome in this case
contrasts sharply with that in the Sabbatino case discussed above, supra note 54 and accompanying text.
61 Id. at ¶ 85.
62 Id. He also noted that a number of developing countries abstained on this question and attributed their
abstention to their disagreement with disregarding international law on compensation for nationalizations.
“Nationalization, expropriation or requisitioning shall be based on grounds of public utility, security or the
national interest…[and] in such cases the owner shall be paid appropriate compensation”).
64 Id. at ¶ 84.
65 Id. at 87
of compensation for takings would hardly be regarded as “disinterested expressions of sound legal principles by those adhering to widely different ideologies.”\textsuperscript{66} This self-consciousness about the controversies surrounding the efficacy and authority of rules of international law in this period was also a reflection of the heated debates surrounding the large-scale nationalizations of natural resource concessions and entire industries that characterized the period following decolonization.\textsuperscript{67} The debate continues to date on the appropriate standard for compensation for expropriation.\textsuperscript{68}

\textsuperscript{66} \textit{Sabbatino}, 376 U.S. at 429. For another decision indicating a limited rather than expansive view of the duty of compensation in international investment law, see Case Concerning Barcelona Traction, Light and Power Co. (Belg. v. Swed.) 1970 I.C.J. 4 (Feb. 5) (holding that shareholder interests are indirect interests which do not qualify for international legal protection and a claimant state cannot espouse the claim of its nationals who have invested in foreign corporations absent treaties or agreements providing for such protections).

\textsuperscript{67} For perhaps this reason in \textit{Sabbatino, supra} note 54, Justice Harlan in similar circumstances as those in the Libyan case declined to invoke international law as Arbitrator Dupuy. Justice Harlan instead held that, “[w]e decide only that the Judicial branch will not examine the validity of a taking of property…in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.” \textit{Sabbatino}, 376 U.S. at 428; see also Richard Falk, \textit{The Status of Law in International Society} 409–13 (1970); Richard Lilllich, \textit{The Protection of Foreign Investments} 77–78 (1978); Jordan Paust, \textit{Correspondence}, 18 Va. J. Int’l L. 601–03 (1978).

\textsuperscript{68} The ‘prompt, adequate and effective compensation’ formulation of the Hull diplomatic note has been rejected by many capital-importing States. For example, Mexico rejected it in 1938. See 1938 Correspondence Between United States and Mexico, \textit{excerpted in} 5 G. Hackworth, Digest of International Law 655–65 (1942); see also Oscar Schachter, \textit{Compensation for Expropriation} 23 COLUM. J. TRANSNAT’L L. 615, 616 (1985) (arguing that there is a dispute as to whether the Hull formula represents customary international law). In addition, three UN resolutions have embraced the view that national treatment rather than prompt adequate and effective compensation is the rule governing expropriations. See G.A. Res. 3171, U.N. GAOR, 28th Session, Resolution on the Permanent Sovereignty Over Natural Resources, GA Doc. 3171/XXVII (1973); G.A. Res 3201, Declaration on the Establishment of a New International Economic Order, 29th Session, G.A. Doc. 3201/VI-6 (1974); G.A. Res Charter of Economic Rights and Duties of States, 30th Session, G.A. Doc. 3281/XXIX (1975). On the uncertainty of customary international law relating to foreign investment particularly in relation to Bilateral Investment Treaties, see Bernard Kishoiyan, \textit{The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law} 14 NW. J. Int’l L. & Bus. 327 (1994) (exploring the various compensation standards in a variety of bilateral investment treaties and concluding there is universally agreed standard since the practice evidences ‘so much uncertainty and contradiction’ as well as ‘so much fluctuation and discrepancy,’ id. at 372). For an overview of various standards applied in a variety of contexts, see R. Doak Bishop, James Crawford & W. Michael Reisman, \textit{Foreign Investment Disputes: Cases, Materials and Commentary} 1298-325 (2005).
While international law is now widely accepted as governing international investment and commercial disputes, the uncertainty about the precise content of many of its governing rules and the growing propensity particularly in Bilateral Investment Treaties (BITS) to over-protect the rights of investors has led a leading first world scholar to refer to BITS, which often provide the applicable rules for ICSID tribunals, as ‘bills of rights for foreign investors.’ In the recent past, Bolivia has denounced the ICSID Convention and withdrawn from it, arguing multinational corporations have used ICSID Tribunal to resist the exercise of sovereign responsibilities such as environmental laws. For precisely this reason, the United States Congress in 2002 enacted the ‘No Greater Rights Than’ principle, under which foreign investors have no greater rights than a U.S. citizen under the U.S. Constitution and local laws. In effect, while a U.S. corporation abroad has the full protections of an investor to challenge foreign laws and regulatory regimes standing in the way of their investment opportunities, foreign investors in the U.S. enjoy no such rights.

69 Other notable examples here include the North American Free Trade Agreement which includes an investment chapter that effectively guarantees investors compensation for losses arising from a regulatory measure that a NAFTA member may take to protect the environment. On this, see Frederick M. Abbot, The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Legal Integration 23 HASTINGS INT’L & COMP. L. REV. 303 (2000).


72 The immediate reason relating to the US’s concern about Chapter 11 of NAFTA arose from a suit filed against the US by Methanex a Canadian company claiming $ 970 million compensation for loss of business it would lose because of California’s plan to phase out the use of Methyl Tertiary Butyl Ether (MTBE), an oxygenate that cleans gasoline because of concerns the additive was contaminating drinking water.
Ultimately, arbitration proceedings before bodies like the ICSID are an indication of how international investment law has empowered private actors, such as multinational corporations, to bring suit against States hosting their investments. By giving private actors the power to sue and have a choice with regard not only as to forum but as choice of law, vests these actors with enormous legal authority over host States over which they may already exercise significant market leverage. In short, although the significance of the diplomatic protection of foreign investment through forcible means has largely declined, the role of politically unaccountable investment dispute forums has grown.\(^{73}\) This, together with the retaliatory threats exercised by capital exporting States to protect their investors and interests in capital importing States, in many ways tilts international economic governance in favor of investors from capital exporting States.\(^{74}\) To continue

---


\(^{74}\) One of the best well known retaliatory threats is super 301 contained in the Trade Act of 1974, 19 U.S.C. § 2242 (2000), amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-416, 102 Stat. 1105. Under this section, the United States Trade Representative (USTR) is required within thirty days after the submission of the annual National Trade Estimates (foreign trade barriers) to report to Congress those foreign countries that (1) “deny adequate and effective protection of U.S. intellectual property rights” and (2) those countries under (1) “that are determined by the USTR to be priority foreign countries.” *Id.* The USTR identifies as priorities only those countries “that have the most onerous or egregious acts, policies, or practices that . . . have the greatest adverse impact on the relevant United States products and that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective intellectual property rights” protection. *Id.* The United States blacklisted India and Brazil leading up to the conclusion of the Uruguay Round of negotiations thereby effectively ending their opposition to the Uruguay Round bargain. See James Gathii, *Construing Intellectual Property Rights and Competition Policy Consistently With Facilitating Access to Affordable AIDS Drugs to Low—End Consumers* 53 FL. A. L. REV. 756 (2001). In a challenge at the WTO, this provision of U.S. law was sustained. See World Trade Organization Report of the Panel, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R ¶ 7.22 (Dec. 22, 1999).
this exploration of the power of international investment law over capital-importing States, next I will discuss a decision of the ICSID in the context of state responsibility for war destruction.

**State Responsibility for War Destruction in Investment Disputes**

*Asian Agricultural Products Limited (AAPL) v. Democratic Socialist Republic of Sri Lanka* was an ICSID case which raised the question of state responsibility for war destruction.\(^75\) AAPL, a foreign owned firm operated a prawn farm under the name, Serendib Seafoods Limited, a Sri Lankan public company in which the Sri Lankan government participated in as an equity partner. AAPL claimed damages for losses it suffered on the Prawn farm as a result of a military operation conducted by the Sri Lankan military against Tamil tiger fighters.

Besides claiming liability on a war destruction clause, AAPL primarily based its claim on the view that Sri Lanka bore “strict or absolute liability” under a Bilateral Investment Treaty Sri Lanka had signed with Great Britain and Northern Ireland.\(^76\) AAPL argued that the customary international law due diligence standard of state responsibility had been replaced by this new rule of ‘strict or absolute liability.’ AAPL claimed that the ‘most favored nation’ and ‘full protection and security’\(^77\) clauses in the treaty imposed ‘strict or


\(^{76}\) Id. at ¶ 9. The Tribunal’s majority opinion found that in light of the failure of the parties to agree on a choice of law, during the arbitration proceedings, they had presented their case in a manner that showed that they mutually agreed that the provisions Sri Lanka/U.K. Bilateral Investment Treaty was ‘the primary source of the applicable legal rules,” id. at ¶ 20. However, the dissenting opinion of one member of the Tribunal, S.K. B. Asante took issue with the tribunal’s finding that the treaty was the primary source of rules for determining the dispute, see dissenting opinion of S.K.B. Asante in ICSID REV.-FOREIGN INVESTMENT L.J. 576-78 (1990).

\(^{77}\) AAPL v. Sri Lanka, supra note 56, at ¶ 26 (A), where AAPL argues argued that “the ordinary meaning of the words ‘full protection and security’ points to an acceptance of the host state of strict or
absolute liability’ even if it could be shown that AAPL’s investments were destroyed by persons whose conduct could not be attributable Sri Lanka and under circumstances beyond its control. In fact, as the Tribunal noted, AAPL exhibited ‘hostility to the general applicability of customary international law rules’ and showed “reluctance to admit Sri Lankan domestic law as the basic governing law.”\textsuperscript{78} Suffice it to say here, AAPL’s claims are consistent with the traditional attitude investors have of overstating the responsibility of host states beyond that recognized under customary international law. As Sri Lanka argued in response, with the concurrence of the Tribunal, the ‘full protection and security’ clause of the treaty could not be construed to impose strict or absolute liability.\textsuperscript{79} In fact, the Tribunal noted it could find no case in which such a clause had been construed to impose a strict or absolute liability.\textsuperscript{80} This conclusion was also endorsed in the dissenting opinion of one of the arbitrators.\textsuperscript{81}

Having rejected AAPL’s novel but not unusual basis for seeking to hold Sri Lanka liable, the Tribunal then moved to consider Sri Lanka’s liability under the war destruction clause of the treaty. Under this clause, the Contracting Parties were liable for losses suffered “owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory.”\textsuperscript{82} Sri Lanka argued that, for it to be held liable under this clause for failing to act reasonably under the circumstances, it had to be shown that it

\textsuperscript{78} Id. at ¶ 23.
\textsuperscript{79} Id. at ¶ 32.
\textsuperscript{80} Id. ¶¶ 48-55.
\textsuperscript{81} Id. at ¶ 4 (dissenting opinion of Samuel K.B. Asante).
\textsuperscript{82}AAPL v, Sri Lanka, supra note56 at ¶ 65. Under the treaty, liability would be remediable by “restitution, indemnification, compensation or other settlement,” id. at ¶ 66.
had been “negligent in the use of or in the failure to use, the forces at its disposal for the prevention or suppression of the insurrection.”\textsuperscript{83}

According to the Tribunal, the duty of vigilance required to establish the “degree of security reasonably expected” depended on the circumstances.\textsuperscript{84} The Tribunal noted this degree of security could be established by Sri Lanka’s failure to take by “all means reasonably necessary” steps to prevent acts of revolutionaries that caused injury or damage to AAPL’s investment.\textsuperscript{85}

AAPL argued that the destruction of its “office structure, repair shed, store and dormitory,” as well as “the opening of its sluice gates to the grow-out ponds,” and the resulting destruction of its prawn crop and 21 of its staff members, was not necessary since ‘less destructive’ measures short of the destruction and murders could have been taken by the Sri Lankan military.\textsuperscript{86} Sri Lanka countered by arguing that its operation on AAPL’s farm was necessary to “prevent the spread of terrorism and the erosion of government control in the towns surrounding the shrimp farm.”\textsuperscript{87} The government also contended the farm had been used by the Tamil rebels as an operations base; that the farm’s management had cooperated with the rebels’ and that the Tamil fighters had engaged in fierce combat with the Sri Lankan Special Task Force on the day of the raid, and that it was the Tamil fighters who had actually occasioned the damage complained of by AAPL.\textsuperscript{88} It was agreed by both Sri Lanka and AAPL that the area in which the farm

\textsuperscript{83} Id. at ¶ 69.
\textsuperscript{84} Id. at ¶ 73.
\textsuperscript{85} Id. at ¶ 73.
\textsuperscript{86} Id. at ¶ 79.
\textsuperscript{87} Id. at ¶ 82(a).
\textsuperscript{88} Id. at ¶ 82(b)-(e).
on which the damage occurred was infiltrated by Tamil fighters and was out of the control of the Sri Lankan government for several months before the raid.\textsuperscript{89}

The Tribunal found the Sri Lanka government had not acted reasonably because it had failed to use peaceful alternatives in dealing with Tamil fighters, an option in the Tribunal’s opinion the government had because it had established a “high level channel of communication in order to get any suspect elements excluded from the farm.”\textsuperscript{90}

According to the Tribunal, Sri Lanka’s:

\begin{quote}
“failure to resort to such precautionary measures acquires more significance when taking into consideration that such measures fall within the normal exercise of governmental inherent powers-as a public authority-entitled to order undesirable persons out from security sensitive areas. The failure became particularly serious when the highest executive officer of the Company [AAPL] reconfirmed just ten days before his willingness to comply with any governmental requests in this respect.”\textsuperscript{91}
\end{quote}

Having no evidence of either Sri Lankan forces being directly responsible for the damage or even having had control of AAPL’s premises or that the Tamil fighters caused the damage, the Tribunal nevertheless found Sri Lanka liable. In the Tribunal’s view, the appropriate course of conduct was either to “institute judicial investigations against them to prove their culpability or innocence, or to get them off the Company’s farm.”\textsuperscript{92}

According to the Tribunal, Sri Lanka had failed to give full protection and security to AAPL’s farm and it was therefore liable.\textsuperscript{93} As such, Sri Lanka’s decision to deal with, what was essentially a national security issue, forcibly particularly because it involved

\begin{footnotesize}
\begin{enumerate}
\item Id. at ¶ 85(a).
\item Id. at ¶ 85(b).
\item Id.
\item Id.
\item Id. ¶ 86-87.
\end{enumerate}
\end{footnotesize}
claims relating to terrorism was reviewable in international investment proceedings if it conflicted with its treaty obligations to protect AAPL’s commercial rights.

The dissenting opinion in the case regretted that the Tribunal’s decision failed “to appreciate the full implications of the formidable security situation and the grave national emergency that confronted the Sri Lankan authorities.”\(^94\) It went on to note that it was not in dispute that the entire province within which the investment losses had occurred had been embroiled in civil war pitting the government against ‘a powerful and well-armed group’ that were engaged in ‘sophisticated guerilla warfare against the Sri Lanka government forces,’\(^95\) which had established its headquarters within 1.5 miles of the farm where the losses occurred.\(^96\) As a result, even the Managing Director of AAPL had not been able to visit the farm for six months prior to the government’s counter insurgency operation during which the investment losses occurred.\(^97\)

Article 4 of the Sri Lankan/Great Britain Bilateral Investment Treaty provided for circumstances under which liability for compensation arises when investment losses result from war or other armed conflict, revolution, state of emergency, revolt or insurgency and where the losses resulting are attributable to the host state or its agents.\(^98\)

\(^94\) \textit{Id.} at ¶ 4 (dissenting opinion of Samuel K. B. Asante).
\(^95\) \textit{Id.} at ¶ 5.
\(^96\) \textit{Id.} at ¶ 3.
\(^97\) \textit{Id.} at ¶ 4.
\(^98\) Article 4 (Compensation for losses) (1) Nationals or companies of one Contracting Party whose investments in the territory of other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards to restitution, indemnification, compensation or other settlement, no less favorable than that which the latter Contracting Party accords to its own nationals or companies of any third State; (2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from (a) requisitioning of their property by its forces or authorities, or (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution
Under this Article, state responsibility is precluded where investment losses are not attributable to a State or where the destruction is “not caused in combat action or by the necessity of the situation.” Quoting extensively from the literature on responsibility for war destruction, the dissenting opinion arrived at two conclusions. First, that the provisions of Article 4 of the treaty were a statement of the customary international law position on responsibility for war destruction. Second, that responsibility for war destruction did not prescribe a substantive obligation on the part of the host State to pay compensation where foreign investments sustain losses by reason of war or other armed conflict, revolution, a state of national emergency, revolt or other civil disturbance.

In other words, the treaty provision only contained the customary international law provision of property/investment protection, contrary to the Tribunal’s interpretation as a specific undertaking on the part of Sri Lanka ‘to pay compensation to all aliens from all countries.’

The dissenting opinion noted that, even if the treaty clause could be interpreted as the Tribunal had done, Sri Lanka had effectively waived this obligation in its Constitution in so far as the obligation conflicted with its national security. Thus, while Tribunal’s...

99 AAPL v. Sri Lanka, supra note 56 at art. 4(2).
100 Dissenting opinion of Samuel K.B. Asante, supra note 57, at 585-86.
101 Id. at 588. Asante notes that such an interpretation of Article 4(1) of the Treaty was more consistent with the understanding of the MFN provision and as such, the majority opinion had in effect obliterated “the juridical distinction between the concept of most favored nation treatment, a creature of treaty, and the general requirements of customary international law,” id. at 589.
102 Id. at 589. It is not unusual for commercial or trade treaties to have security exceptions. Article 21 of the General Agreement on Tariffs and Trade, 1948 as amended in 1994 embodies such an exception.
opinion focused primarily on the exceptional circumstances under which a state is responsible for war destruction relating to wanton destruction or unnecessary force, the dissenting opinion focused on the general rule of customary international law under which a State is not responsible for investment losses arising from war, armed conflict, insurrection, revolt, riot, a national emergency or other civil disturbances; except where the destruction was not attributable to the state or caused in combat or by the necessity of the situation.

Applying this rule of customary international law, the dissenting opinion proceeded as follows. First, it was not in contention there was a general insurrection in the area where AAPL had its shrimp factory and that the government had been engaged in seeking to regain control of the area. Further, that this was “a legitimate and praiseworthy act of a sovereign government.” 103 Second, both Sri Lanka and AAPL, as the Tribunal found, had insufficient evidence to definitively establish who destroyed AAPL’s farm. As such, the dissenting opinion found that AAPL had “failed to establish the fundamental basis of the claim, namely that the Government’s security forces had used excessive force in its military operation resulting in the wanton destruction of the farm.” 104

The dissenting opinion then proceeded to argue why it found the Tribunal’s argument that Sri Lanka was liable for failing to use precautionary measures unconvincing. The dissent noted that the Tribunal raised the ‘fundamental question’ regarding the propriety of the decision to engage in a military operation at that particular time, a question which

103 Id. at 592.
104 Id.
“touches on the sovereign prerogatives of a Government fighting for its very life.”\textsuperscript{105} The dissent noted it would not have been feasible for the Sri Lankan government to be expected to have taken the sort of precautionary measures that the Tribunal held it should have, since it was engaged in sophisticated guerilla warfare against powerful insurgents.\textsuperscript{106} Ultimately, the dissent noted that “the applicable rules and principles of customary international law, the regime of property protection under the Sri Lanka/U.K. Treaty and Article 157 of the Sri Lankan Constitution all recognized that the requirements of national security warrant a departure from the normal principles of responsibility in respect of the protection of foreign property.”\textsuperscript{107}

The vigorous debate between the dissent and the opinion of the ICSID Tribunal in \textit{AAPL v. Sri Lanka} may be exceptional.\textsuperscript{108} In a later arbitration, \textit{American Manufacturing & Trading, Inc. v. Republic of Zaire},\textsuperscript{109} the Arbitrators found that the then Zaire had failed to fulfill its obligation of vigilance to prevent the occurrence of acts of violence on its territory that had resulted to the looting and destruction of investments made by American Manufacturing and Trading Inc. In this case, unlike in \textit{AAPL v. Sri Lanka}, Zaire did not contest its responsibility for destroying and looting the investor’s property, finished goods, raw materials and other objects of value. However, consistent with the dissent in \textit{AAPL v. Sri Lanka}, Zaire argued that, since it had not compensated domestic

\textsuperscript{105} Id. at 593.

\textsuperscript{106} Id. at 594.

\textsuperscript{107} Id. at 594-95.


businesses and other foreign investors, Article IV of its BIT with the U.S. was unavailable. The Arbitration Panel, however, found that the clause did not require such national treatment. The finding against Zaire was arguably much broader than in AAPL v. Sri Lanka. This is particularly so given that the primary basis for holding Zaire responsible was the protection and security clause which the AAPL v. Sri Lanka Tribunal had avoided as a basis of holding Sri Lanka responsible. In addition, unlike in AAPL v. Sri Lanka, damage to the investors’ property was not caused by its armed forces or army, but rather by rioters and looters. Ultimately, unlike in AAPL v. Sri Lanka, the Tribunal found against Zaire primarily under the protection and security clause of its BIT with the United States and only secondarily under Article IV, the war destruction clause on which the AAPL v. Sri Lankan Tribunal had relied on to hold Sri Lanka responsible.

Finally, in Wena Hotels Limited v. Arab Republic of Egypt, the ICSID Tribunal, without much discussion, found that Egypt had violated the full protection and security clause of UK/ Egypt Agreement for the Promotion and Protection of Investments in the forcible seizure of a hotel. The Tribunal cited the American Manufactures v. Zaire case for the proposition that States have an obligation of vigilance “to ensure the full enjoyment of protection and security” of their investments and that a country could not “invoke its own legislation to detract from any such obligation.” Thus, the controversial origins of responsibility for war destruction in AAPL v. Sri Lanka have evolved in an ever-

---

110 Id. at ¶ 7.01, 7.09.
111 The Tribunal found that Zaire had “manifestly failed” to comply with its duty of vigilance and care by its failure to take precautionary measures to protect the investors property, id. at ¶¶ 6.04-6.11. The Tribunal found that the protection and security obligation in Article II of the BIT was reinforced by “a special Article IV on compensation for damages due to war, or similar events, including riots and acts of violence.” Id. at ¶¶ 6.12-6.14.
113 Id. at ¶ 84.
tightening obligation upon States to take preventive measures to avoid loss or damage to the property of alien investors in the context of war and domestic unrest.\footnote{See also \textit{CME Czech Republic B.V. (The Netherlands) v. The Czech Republic}, Partial Award, September 13, 2001 and \textit{Azurix Corp. v. Argentina}, ICSID Case No. ARB/01/12, Award, 14 July 2006, which show how ICSID Tribunals have heightened the responsibility of states under the full protection and security clauses of BITS to go beyond the kind of security that may be provided by security forces and in particular to include a secure investment environment – arguably much superior to that enjoyed by domestic investors. For another example, see \textit{Occidental Exploration and Production Company v. The Republic of Ecuador}, Award, July 1, 2004 at \textit{ ¶} 187, where Ecuador’s amendment of its tax laws was found to constitute a violation of its obligation to provide full protection and security to investors.} Therefore, even while ICSID Tribunals cite \textit{AAPL v. Sri Lanka} for the proposition that full security and protection do not embody absolute obligations,\footnote{E.g. \textit{Wena Hotels Limited v Arab Republic of Egypt} ICSID Case No. ARB/98/4; 41 ILM 896 (2002) \textit{ ¶} 84.} the effect of these decisions has been to effectively heighten the obligations of states for war destruction towards such absoluteness and strictness.

This heightened standard of state responsibility for war destruction is clearly demonstrated when one compares the standard of vigilance states have in the investor context, with that in the context of ensuring their territory is not used for purposes inimical to other states. In \textit{Democratic Republic of Congo v. Uganda}, the I.C.J. strongly suggested that the duty of due diligence or vigilance expected of a government with respect to rebel activity that may result in violating the rights of a neighboring state may be lower if the geographical terrain was remote and difficult.\footnote{Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 at \textit{ ¶} 304 (Dec. 19).} In fact, this is the customary international legal standard of due diligence that is certainly not absolute. Rather, it is based on the assumption that a State had ‘the means, or to provide protection’ and if it did not or the possibility of providing protection was remote, liability would not
automatically attach." In addition, this standard was based on the assumption that a State had the opportunity to “prevent the act but failed to do so.” Taken together, these tests require before imposition of liability that the conduct of the state be “judged by [its] reasonableness under the circumstances.” This in my view is the approach taken by the ICJ in *Congo v. Uganda*.

Clearly, the heightening of the responsibility of states for war destruction is consistent with the heightening of the responsibility of states in the terrorism context. Yet, the obligations of investors have remained the same. This protection that investors enjoy in the investment context is also parallel to heightened binding legal standards for economic actors such as private military and security companies.

In fact, it is not heresy to imagine a different liability regime for war destruction in BITS. There are a few BITS between developed and developing countries that have an escape clause to safeguard security interests of the signatory countries in the same way that Article 21 of the General Agreement on Tariff and Trade (GATT) does. This clause, already contained in some U.S. BITs provides “[t]his Treaty shall not preclude the

---


118 *Id.* This view is also confirmed by the International Law Commission’s Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, which discusses the duty of due diligence and specifically explains that the degree of due diligence expected of a State differs from a State that has a “well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed. Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected,” International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, at 395, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf (last visited Aug. 16, 2006)


application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance and restoration of international peace or security, or the protection of its essential security interests.”

Such an escape clause would work perhaps the same way the national security exception in GATT does. The GATT security escape clause allows member States to invoke national security as an excuse to depart from the rules of non-discriminatory trade without risking the imposition of compensating trade concessions for departing from these otherwise binding obligations.121

For example, in 1985, the United States prohibited the importation of all goods and services of Nicaraguan origin as well as exports from the U.S. into Nicaragua.122 Nicaragua lodged a complaint before a GATT Panel arguing in part that this prohibition had nullified and impaired its trade benefits it had accrued inconsistently with the U.S.’s GATT obligations.123 Nicaragua further argued that the U.S. and Nicaragua were not at war, and that they had maintained diplomatic relations. Instead, Nicaragua argued that as “a small developing country,” it had not attacked the United States and could not pose a security threat to the United States. Nicaragua argued that it was, in fact, the United States that was using force against Nicaragua inconsistently with the prohibition against

---

121 Art. XXI(b)(iii) of GATT provides that: “Nothing in this Agreement shall be construed…to prevent any contracting party from taking…in time of war or other national emergency in international relations…any action which it considers necessary for the protection of its national security interests.” Remarkably, this security exception in the GATT regime is very similar in substance to the doctrine of suspension that allowed belligerents to confiscate private property in war, but to return it upon cessation of hostilities.122 Exec. Order No. 12,513, 3 C.F.R. 342 (1985). The only exception to this ban was goods intended for the democratic resistance. The order also banned air and naval transportation to and from Nicaragua to the United States. This ban was issued under the expansive authority the U.S. President enjoys under the International Emergency Economic Powers Act, see Dames & Moore, 453 U.S. at 699 noting that the language of the IEEPA is “sweeping and unqualified.” id. 123 Report of the Panel, United States – Trade Measures Affecting Nicaragua (L/6053) (Oct. 13, 1986).
the use of force.\textsuperscript{124} Nicaragua referred the GATT Panel to a decision of the International Court of Justice, finding that the U.S. had violated the non-use of force prohibition of the UN Charter. For Nicaragua, the GATT had to be interpreted in accordance with rather than inconsistently with international law.\textsuperscript{125}

The United States, by contrast, argued that the Panel could examine neither the validity nor motivation for the invocation of national security as an excuse for departing from its GATT obligations. In short, the U.S.’s case was simply that a GATT member country could, in its sole discretion, determine when its national security was threatened and as such, to depart from its GATT obligations. In cases involving national security, the U.S. argued that the nullification or impairment of benefits under the GATT agreement could not be presumed.\textsuperscript{126} In the U.S.’s view, the dispute was political and the judgment of the International Court of Justice was not only irrelevant to the dispute\textsuperscript{127}, “but clearly outside the Panel’s terms of reference.”\textsuperscript{128}

Agreeing with the United States, the GATT Panel determined that it was precluded from examining the justification and as such the validity and motivation for the U.S.’s invocation of GATT’s national security exception.\textsuperscript{129}

This case shows how the security exception in the GATT regime creates a liability-free space within which trade rules would be suspended to enable a State to

\begin{flushleft}
\textsuperscript{124} \textit{Id. at} \textsuperscript{¶} 4.5.
\textsuperscript{125} \textit{Id.} Further, Nicaragua’s argument in this case that “GATT did not exist in a vacuum but was an integral structure of international law” foreshadowed the Treaty Establishing the WTO of 1994, which affirmed this position.
\textsuperscript{126} \textit{Id. at} \textsuperscript{¶} 4.9.
\textsuperscript{127} \textit{Id. at} \textsuperscript{¶} 4.15.
\textsuperscript{128} \textit{Id. at} \textsuperscript{¶} 4.16. This argument is completely analogical to the one made by Zaire in American Manufacturing & Trading, Inc. v. Republic of Zaire, supra note 209.
\textsuperscript{129} \textit{Id. at} \textsuperscript{¶¶} 5.2, 5.3.
\end{flushleft}
pursue a national security agenda without attracting responsibility for violating the rules of the trading regime. Within this space, States invoking the exception can arguably engage in a unilateral advancing of their war agenda without attracting legal responsibility for departing from their trade obligations if they decided to do so. That is why such a broad reading of Article 21 has generated much debate and opposition. This is particularly so since the entire post-Second World War UN Charter system was predicated on prohibiting the use of force, and yet the system nevertheless created exceptional circumstances under which the use of forcible measures was nevertheless permissible.

In short, while rules of international trade in the post-Second World War era were designed to preserve the national security of their members, even if this resulted in departures from GATT obligations, the international investment regime has gone in the opposite direction. It has imposed ever heightened responsibilities upon states for war destruction. While there are differences in the substantive rules in GATT and with the typical war destruction clause we have been discussing, my point is that national security in the GATT context can provide a safe harbor from attracting international legal liability. The opposite is true in the international investment context. What is more, it is developing economies or capital importing states that are more likely to be subject to the

---

130 See CARL SCHMIT, THE NOMOS OF THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM 99 (G.L. Ulmen trans., 2003) (noting a “historical and structural relation between such spatial concepts of free trade, and free world economy, and the idea of a free space within which to pursue free competition and free exploitation).

131 This would of course include the right to self defense. However, my point here is less the self defense exception than that the GATT regime though intended to promote peaceful commerce following the experience of the Second World War, nevertheless permitted a zone of discretion upon States to unilaterally decide when to depart from this regime of trade rules to protect their national security as they perceived it.
heightened obligations of state responsibility for war destruction in the investment context. In addition, as the Nicaragua case shows, escape clauses in the GATT context are more likely to benefit countries with enormous market power such as the United States.

My view is fortified by the ICJ’s decision in the Case Concerning Oil Platforms (Iran v. United States). In that case, the United States was alleged to have violated the freedom of commerce and navigation clause contained in Article X(1) of the Treaty of Amity, Economic Relations, and Consular Rights it had signed with Iran. It had done so by bombing and destroying Iranian Platforms. The Court held that the United States had not violated Article X(1). According to the Court, the United States could not have violated freedom of commerce clause unless it could be shown that the platforms had directly and actually contributed to oil exports between Iran and the United States. In addition, the Court held that ships were only protected to the extent they were actually engaged in commercial transport at the time of their destruction. In the Court’s view, injury to potential commerce did not constitute injury to freedom of commerce. According to the Court, “the possibility must be entertained that [freedom of commerce] could actually be impeded as a result of acts entailed the destruction of goods destined to be exported” but only so far as the goods to be exported were already in existence. Thus, unlike in investment disputes where claimants often successfully claim both

---

132 2003 I.C.J. 90 (Nov. 6).
133 The Court also observed that at the time of the attacks there was a U.S. oil embargo against Iran.
134 Iran v. United States, supra note 132, at ¶ 92.
135 Id.
present and expected earnings from their investments,\textsuperscript{136} here the ICJ confined its findings to merely that which physically lost by the bombings even though the platforms were to be operational only within a “few days.”\textsuperscript{137} In this case, unlike in the Nicaragua GATT case we saw above, the Court rejected the U.S. argument that the bombing was necessary to protect international peace and security under Article XX(1)(d) of the Treaty. The court also rejected the U.S.’s counterclaim that certain attacks from Iran violated the freedom of commerce clause. Thus, although in this case the Court held against the United States’ claim that the attacks on the platforms were justifiable self defense under the Charter, it nevertheless construed the freedom of commerce clause so narrowly\textsuperscript{138} as if the clause could not be read to protect commerce generally – “whether or not there was actually any commerce going on at the time” of the bombing.\textsuperscript{139} This decision was also inconsistent with an earlier decision in the preliminary stage of the case where the court had noted that treaty protected commerce generally and included “not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce.”\textsuperscript{140}

The upshot of my claim here is that by using a security lens, freedom of commerce will often take a back seat. The ICJ opinions in the Nicaragua decision as well

\textsuperscript{136} For a discussion of restitution and compensation for unlawful, tortuous and delictual conduct, see BISHOP, CRAWFORD & REISMAN, \textit{supra} note 68 at 1278 ff (for methods of valuing losses see 1331 ff).

\textsuperscript{137} \textit{Iran v. United States}, \textit{supra} note 132, at ¶ 93.

\textsuperscript{138} See \textit{Iran v. United States} (Dissenting Opinion of Judge Al-Khasawneh; Dissenting Opinion of Judge Elarany and Separate Opinion of Judge Simma) \textit{supra} note 132.

\textsuperscript{139} Separate Opinion of Judge Simma \textit{id.} at ¶ 3.6. Notably the court’s interpretation also excluded commerce with third parties other than the two contracting parties. Yet, Article VIII of the treaty seemed to contemplate such a broader view of commerce. That clause provided that in part that the treaty was intended to cover “products of the other High Contracting Party, from whatever place and by whatever type of carrier…by whatever route….”

\textsuperscript{140} \textit{Iran v. United States}, Preliminary Objections, 1996 ICJ Rep. at ¶ 819.
as in the *Oil Platforms* case are arguably made from the vantage point of security. By contrast, in the investment context, I have shown that cases involving questions of responsibility for war destruction are decided mostly from the view of protecting alien investors. The outcome of this contrasting approach to the intersection of war and commerce is often to protect the security and investment interests of developed economies and their investors at the expense of those of developing economies and their investors.

*From Forcible Interventions to Coercive and Unequal Economic Relations*

Briefly then, what we see here is a continuity of a structure of rules supportive of the rights of alien investors carried from the colonial past into the post colonial present. As the public side of international law was guaranteeing the newly won right of political autonomy from colonial rule, thanks to the extension of the principle of self-determination to Africa and Asia, the continuity of rules of international economic governance oversaw continuity from the past to the present of colonial economic relations. For example, post-colonial countries in which there was European settlement were required as a condition of the grant of its independence by its former colonial power to guarantee white European settlers property and citizenship rights as well.\(^{141}\) Paradoxically, the acquisition of the autonomy by the new States became the new basis upon which unequal and inegalitarian relationships of international economic governance would be played out. After all, these new States were required to play by exactly the same rules that applied to the older States.

This in turn made possible the continuities of rules and obligations from the colonial past to the post colonial present and exemplifies international law’s role as ‘a systematic regime of accumulation’ in favor of rich multinational corporations with their third world allies. Elsewhere, I examined how the conquest legitimized acquisition of territory and how colonial courts used conquest to legitimize these acquisitions of territory and those that had not been acquired by treaty or conquest. If law was central to legitimizing public and private acquisitions of territory and their subsequent exploitation, then post colonial rules of international economic governance are not any different particularly as my discussion in this paper. In this sense, rules of international economic governance seem less given than the result of the political economy of extraction and exploitation of wealth in Africa.

In this sense, rules of international economic law were as much a reflection of the exploitative nature of colonial interests as they once were of the intellectual strength of Europe. This strength dominated the doctrines and rules which governed relations between the West and Non-West politically, legally and economically. From this perspective, these rules and doctrines could not immediately be expected to inaugurate a new era of equality that reversed what had become hardened and deepened rules of international economic governance. Capital-exporting States, of course, were using their intellectual strength to strenuously defend these rules by rejecting efforts to revise them.

From this vantage point, rules of international economic law then may be regarded as a set of assumptions and limitations that set the terms upon which powerful and less powerful countries relate. These set of assumptions and limitations were, and continue to be, based on assumptions of the superiority of Europe and the United States. The reverse is also true – the presumed inferiority of non-Europeans who lacked the technology, sophistication and material progress that was argued to be possible only by virtue of commerce. International economic law is also a realm of specialized and privileged knowledge, such as in the arbitration proceedings involving host states and multinational investors. My contention is that this body of specialized knowledge primarily defined the prerogatives of the former colonies and their business interests. Repeated efforts to counter and challenge this knowledge in each round of post-colonial skirmish from the nineteenth century to the present has not made much progress in loosening the hardened rules.

This hardening has been justified as necessary because of the dangerous investment area the developing world continues to be. In other words, alien investors need all the protection necessary against the fragile investment climate resulting from chaos, disorder, war and nationalizations that characterizes these countries. Resistance to changing these rules therefore frequently invokes the very images of disorder and war that in the first place justified colonial conquest and the very inauguration of rules of international economic law in both the nineteenth century Calvo clause era, as well as in the post-Second World War era. To date, rules of international economic governance continue to be presented as effortlessly managing disorder in each period.
Just as rules of international of the nineteenth century created consent for non-sovereign non-European entities to enable them to enter into treaties disposing off their territory with no other rights attached, international law today has created a sphere of rules allowing capital-importing states to be sued as private actors when they participate in market transactions without regard to whether the commercial transactions they engaged in were an exercise of a regulatory authority, rather than merely of commercial nature.\(^{144}\) Thus, like colonial international law, contemporary international law rules such as the restrictive theory of immunity have stripped developing countries of their sovereign immunity and given private actors the right to sue and recover against third world States in the courts of the developed world and in arbitral forums.\(^{145}\) In addition, rules of international law such as the act of state and comity doctrines that were used by colonial governments to preclude judicial inquiry into their overseas conduct are now unavailable to defend capital-importing States when the exercise of the regulatory authority intersects with investor rights.\(^{146}\) In short, rules of international law have hollowed out the sovereignty of capital-importing states when they engage in transnational commercial activity. This means that, even if a capital-importing State seeks to defend its inability to meet a commercial obligation because of its role as a State superseded its contractual obligations, courts in first world countries would more likely still hold it liable.\(^{147}\) In the


\(^{146}\) *Id.*

\(^{147}\) See *Commercial Bank of Kuwait v. Rifidian Bank and Central Bank of Iraq*, where the Second Circuit held that a default occasioned by war, economic sanctions and the freezing of its assets making it
international investment context with regard to state responsibility for war destruction, no case illustrates this point better than the AAPL v. Sri Lanka.

Conclusions

At the end of the nineteenth century and the beginning of the twentieth century, the move towards institutions, such as arbitration forums, and rules as an alternative to the use of force gave new impetus to the growth of international commercial law and related institutions. These rules and institutions represented the hope that the use of force would be eclipsed as the world moved forward towards more cooperative, consensual and non-coercive mechanisms of dispute settlement. In the nineteenth century, the capital-importing states in Latin America became acutely aware that these institutions and rules did not completely erase the coercive and uneven relations they had with capital-exporting states. In era after era of reformism from the Calvo era, to the NIEO and to the era in opposition to neo-liberal economic governance, capital-importing States have had to contend with the coercive realities of the rules of international economic governance.

As such, while the rules and institutions of international economic governance have created possibilities and alternatives to the use of force in the economic relations between capital-importing and capital-exporting states, these rules have nevertheless not completely eliminated the power of capital-exporting states to influence the content and meaning of these rules.148 Contrary to what international lawyers of the early twentieth century believed.

---

148 Susan Strange refers to this ability to set “the rules of the game” as structural power. See Conversation With Susan Strange, available at http://www.geocities.com/jtrevino41/STRANGE.DOC (last visited June 4, 2003). Note, she gives the following example of the exercise of structural power: “An individual like the Pope has structural power because he manages the Catholic Church, and the Catholic Church, for example, prevents some Catholics from contraception or abortion in their range of options; so he is exercising
century thought, these rules did not entirely represent a clean break from the coercive past. Instead, these rules and institutions in many ways repackaged the inequalities between capital-exporting and capital-importing states. In a variety of ways, these rules continue to perpetuate the subordinate position of these formerly colonial countries in a manner that uncannily reflects the imbalances that characterized colonial rule.

While the denouement of forcible measures to resolve contract debt was overstated by early twentieth century international lawyers, international law nevertheless provided avenues for dispute settlement outside the use of force in international commercial relations. The challenge for lawyers from non-western capital-importing states therefore became whether their advocacy for revising these rules to accommodate the interests of their countries would be accepted as legitimate demands for the revision of international law. By contrast, for the most part, international lawyers of the capital-exporting states and their governments denounced the agenda of the NIEO as an illegitimate effort to exercise sovereignty over economic affairs while sovereignty was merely a political doctrine.149

I want to note in concluding that, while undemocratic capital-importing States fear loss of whatever economic sovereignty they have, rules of international investment law enable them to have access to foreign capital and investment without domestic democratic oversight. As such, the contractual nature of engaging in foreign investment decisions is often rife with corruption within capital-importing States. This combination of especially

structural power.” Id. Further, she argues that it is “only by looking at the structural power exercised—often unconsciously—over other states, markets, private individuals, and firms by the agencies of the United States can the extent of the asymmetries of state power be appreciated.” Susan Strange, The Defective State 124 DAEDULUS 55, 64 (1995).

friendly pro-investor rules and corruption undermines the promise of foreign investment to contribute to increased productivity.\textsuperscript{150} Such outcomes are even worse off in mineral rich war torn Least Developed African countries which continue to attract increased amounts of foreign direct investment\textsuperscript{151} and the accompanying human tragedy these wars result in.

\textsuperscript{150} See Kenneth J. Vandevelde, \textit{The Economics of Bilateral Investment Treaties} 41 Harv. J. Int’l L. 469 (2000) (arguing that bilateral investment treaties are inefficient in promoting foreign investment because they focus on “controlling and protecting the desired investment flow rather than on maximizing productivity through market allocations of capital,” \textit{id.} at 491.). Vandavelde argues that BITS merely “shift control of an asset from a local investor to a foreign investor without increasing the productive capacity of the asset” and this is occurs because these investors are more interested in controlling the movement of the capital rather than it’s the promotion of its movement, \textit{id.} at 492.

\textsuperscript{151} UNCTAD, \textit{World Investment Report 2001: Promoting Linkages} (2001). This trend has continued because of the boom in natural resources in recent times, see UNCTAD, \textit{World Investment Report: FDI from Developing and Transition Economies – Implications for Development} (2006). However as a share of global FDI flows, least developed countries still receives a miniscule percentage.