the Second World War (WWII), the process of international economic integration was rekindled, leading to the emergence of the contemporary investment treaty framework. It is crucial to consider this historical development in order to better understand current debates and contentious issues in investment treaty law.[7]

This chapter is divided into five parts. Part I delves into the historical origins of international investment law. Part II then explores developments in the post-WWII period, setting the background for Part III, which discusses the origins and development of IIAs. Part IV provides an overview of the current status of the IIA network. Part V discusses the basic structure of IIAs.

I HISTORICAL ORIGINS OF INTERNATIONAL INVESTMENT LAW

§1.2 Early history There is no comprehensive history of the treatment of foreigners and their property under international law. However, historical records attest to the fact that early political communities routinely denied legal capacity and rights to those who originated from outside their community.[8] These 'outsiders', often known as aliens, from the Latin word *alius*, meaning 'other', were frequently treated as enemies, barbarians or outcasts. The treatment and the legal status of the alien has markedly improved from ancient times through the Middle Ages to the modern era. In his classic 1915 treatise, *The Diplomatic Protection of Citizens Abroad*, Edwin Borchard wrote that the 'legal position of the alien has in the progress of time advanced from that of complete outlawry, in the days of the early Rome and the Germanic tribes, to that of the practical assimilation with nationals, at the present

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foreign investors, not the state itself as these expressions may wrongly suggest. Despite these conceptual limitations, the terms are useful since they reflect the tensions that have contributed to the development of the law governing relations between capital exporters and importers, as well as differing views about the nature and role of international investment law. As noted by Van Harten, *ibid.*, at 13-14, capital exporting states can be defined empirically as states whose outward foreign direct investment (FDI) stock exceeds their inward stock or whose outward stock exceeds USD100 billion. Based on data from the United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2005*, Annex Table B.2, Van Harten identifies 16 major capital exporters with outward stock of over USD100 billion. These are (ranked in order from the largest exporter): US, UK, Germany, France, Netherlands, Hong Kong, Switzerland, Japan, Canada, Spain, Italy, Belgium, Sweden, Luxembourg, Australia and Singapore. Capital importing states can be defined as states whose inward FDI exceeds outward FDI stocks by a ratio of at least 2 to 1. On this measure there are 111 capital importing states (Van Harten, *ibid.*, at 13). See UNCTAD's annual *World Investment Report* for recent statistics on foreign investments flows.

7. Given the breadth of this topic and the varied state practice, only the most important historical developments are highlighted and citations to specialized works in the area are provided.
8. On the status of foreign nationals or aliens in international law see R. Arnold, 'Aliens', in R. Bernhardt, ed., *Encyclopedia of Public International Law,* Vol. I (Amsterdam: North-Holland Pub. Co, 1992) [*Encyclopedia*] at 102.

time.'[9] These developments have continued through the twentieth and twenty-first centuries and are reflected in the current network of IIAs.

By the commencement of the modern era, international legal scholars considered that international law protected the rights of aliens to travel and trade.[10] Francisco de Vitoria argued that under international law foreigners had the right to travel, live and trade in foreign lands.[11] Hugo Grotius treated the status of foreigners under the category 'Of Things That Belong To Men In Common' and asserted a norm of non-discrimination in the treatment of foreigners.[12] However, Emmerich de Vattel was the first modern scholar to address the status of foreigners in detail. In *Law of Nations* (1758), Vattel argued that a state has the right to control and set conditions on the entry of foreigners.[13] Once admitted, foreigners are subject to local laws and the state is under a duty to protect foreigners in the same manner as its own subjects.[14] At the same time, however, foreigners retained their membership in their own state and were not 'obliged to submit, like the subjects, to all the commands of the sovereign.'[15] In Vattel's view, foreigners' membership in their home state extended to their property, which remained part of the wealth of their home nation.[16] As a result, a state's mistreatment of foreigners or their property was an injury to the foreigners' home state.[17] This view eventually coalesced into the international legal principle of diplomatic protection.

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9. E.M. Borchard, *Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York: Banks Law Publishing Co., 1915) [Borchard, *Diplomatic Protection*] at 33.
10. See generally H. Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815): A Contribution to the History of the Law of Nations* (Leiden: Sijthoff, 1971) at 47-55 for a summary of the views of early international law publicists on the economic interests of aliens.
11. See F. de Vitoria, *De Indis et De Ivre Belli : Relectiones* (1696), E. Nys, ed., J.P. Bate, trans. (Washington, DC: Carnegie Institution of Washington, 1917), s. III. For a critical assessment of Vitoria's work in the context of the colonial origins of international law and the Spanish conquest of the Americas, see A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005).
12. See H. Grotius, *De Jure Belli Ac Pacis Libri Tres* (1625), J. B. Scott, ed., F.W. Kelsey, trans. (Oxford: Clarendon Press, 1925), Book II, Chapter II, XXII, where Grotius refers to most-favoured-nation treatment: 'A common right by supposition relates to the acts which any people permits without distinction to foreigners; for if under such circumstances a single people is excluded, a wrong is done to it. Thus if foreigners are anywhere permitted to hunt, fish, snare birds, or gather pearls, to inherit by will, or sell property, and even to contract marriages in case there is no scarcity of women, such rights cannot be denied to one people alone, except on account of previous wrong-doing.'
13. E. Vattel, *Law of Nations*, J. Chitty, trans. (Philadelphia: T.&J.W. Johnson & Co., 1858), Book II, Chapter VIII, §100.
14. *Ibid.*, §104.
15. *Ibid.*, §108.
16. *Ibid.*, §109. For this reason, Vattel opposed the 'droit d'aubaine' or right of escheat, by which the property of foreigners passed to the host state at their death. See A.H. Roth, *The International Minimum Standard* (Leiden: Sijthoff, 1949) at 26-27 and Borchard, *Diplomatic Protection*, *supra* note 9 at 35-36.
17. F.V. Garcia-Amador argues that while Vitoria and Grotius viewed foreigners' rights as arising out of their status as members of the human race, and looked to nationality as a way to improve

§1.3 Diplomatic protection The exercise of diplomatic protection can be traced back to the Middle Ages, if not earlier.[18] The theory underlying the principle of diplomatic protection is that an injury to a state's national is an injury to the state itself, for which it may claim reparation from any responsible state.[19] Through the exercise of diplomatic protection, the home state makes a claim against the host state for an injury to the home state's national.[20] In the vernacular of international claims, a state 'espouses' the claim of its national. States exercised diplomatic protection throughout the eighteenth and nineteenth centuries, and by 1924 the Permanent Court of International Justice (PCIJ) recognized a state's right to exercise diplomatic protection over its nationals as an 'elementary principle of international law.'[21]

Although a comprehensive examination of the rules of diplomatic protection is beyond the scope of this book,[22] for present purposes, it is important to highlight

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their treatment, under Vattel's approach international legal rights and obligations arose as a result of nationality. See F.V. Garcia-Amador *The Changing Law of International Claims* (Dobbs Ferry, NY: Oceana Publications Inc., 1984) at 46.

18. See I. Brownlie, *Principles of Public International Law*, 6th edn (Oxford: Oxford University Press, 2003) [Brownlie, *Principles of Public International Law*] at 500. In addition to diplomatic protection, claims were also enforced through private means by obtaining letters of marque or reprisal from political authorities. See K.J. Partsch, 'Reprisals' in *Encyclopedia*, *supra* note 8, Vol. IV at 200.
19. Art. 1 of the International Law Commission's (ILC's) Articles on Diplomatic Protection adopted by the ILC's at its fifty-eighth session, in 2006, provides that 'diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'. See 'Report on the work of its fifty-eighth session', in *Report of the International Law Commission,* UN GAOR, 61st Sess., Supp. No. 10, UN Doc A/61/10 (2006), at 16.
20. See *supra* note 4 on the terms 'home' and 'host' state.
21. The PCIJ affirmed the principle in *The Mavrommatis Palestine Concessions* (1924) PCIJ Ser. A, No. 2 at 12: 'It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.' Also see *Panevezys-Saldutiskis Railway Case* (1939) PCIJ Ser. A/B, No. 76 at 14.
22. On diplomatic protection and international claims see Borchard, *Diplomatic Protection, supra* note 9; Garcia-Amador, *supra* note 17; C. Eagleton, *Responsibility of States in International Law* (New York: New York University Press, 1928); F.S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Baltimore: The Johns Hopkins Press, 1932); A. Freeman, *The International Responsibility of States for Denial of Justice* (New York: Longmans, Green and Co. Ltd, 1938); C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford: Clarendon Press, 1967); R.B. Lillich, ed., *International Law of State Responsibility for Injuries to Aliens* (Charlottesville: University Press of Virginia, 1983) and C.F. Amerasinghe, *Diplomatic Protection* (Oxford: Oxford University Press, 2008). In addition, see the various reports of the ILC's and International Law Association (ILA) on diplomatic protection, *supra* note 19 and *infra* notes 23 and 24.

three issues related to the espousal of international claims. First, the state must bring the claim in accordance with the rules relating to international claims, including the nationality of claims. These rules determine the eligibility of persons for whom a state may espouse a claim and address issues such as whether continuous nationality is required from the time of injury to adjudication of the claim.[23] Second, state responsibility for injury to foreign nationals may not be invoked if 'the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.'[24] Before a state may exercise diplomatic protection, the foreign national must have sought redress in the host state's domestic legal system. Finally, the right to exercise diplomatic protection is at the discretion of the espousing state.[25] A state may decide not to exercise protection for reasons unrelated to the merits of the claim, particularly if the state has other diplomatic, military or geo-political objectives that might be compromised by making a claim. As a result of this discretionary power, absent international treaty rights of action, a foreign investor has no control over the international claim-making process. As will be seen, IIAs provide a treaty-based right to bring claims through investor-state arbitration.[26] The extent to which elements of the

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23. The issue of nationality of claims has been the subject of extensive study and discussion by the ILA and the ILC. See *Report of the International Law Commission*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/59/10 (2004), and F. Orrego Vicuña, *The Changing Law of Nationality of Claims*, Report for the International Law Association Committee on Diplomatic Protection of Persons and Property, 69th Conference, London 2000 at 631-645 [Orrego Vicuña, *The Changing Law of Nationality of Claims*]. Nationality issues have arisen in a series of IIA cases, including *The Loewen Group, Inc. and Raymond L. Loewen v. United States; Tokios Tokelės v. Ukraine* and *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*.
24. Art. 44(b), International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly,* UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 at 11; 2001 YBILC, Vol. II, Part Two. The Articles and commentary are *reprinted in* J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002) [ILC's Articles on State Responsibility]. The issue of exhaustion of local remedies has been the subject of extensive study and discussion by the ILA and the ILC's. See *Report of the ILC's*, 56th Session (2004), *ibid.*, and Articles on Diplomatic Protection, *supra* note 19. See also J. Kokott, *The Exhaustion of Local Remedies*, Report for the International Law Association Committee on Diplomatic Protection of Persons and Property, 69th Conference, London 2000 at 3-27. Treatises on exhaustion of local remedies include C.F. Amerasinghe, *Local Remedies in International Law*, 2nd edn (Cambridge: Cambridge University Press, 2004) and A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge: Cambridge University Press, 1983). For a discussion of the rule in the context of investor-state arbitrations, see W.S. Dodge, 'National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter 11 of NAFTA' (2000) 23 HICLR 357.
25. 'The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it will be granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the case.' *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* [1970] ICJ Rep 4 at para. 79.
26. See *infra* §1.31 *et seq.* regarding the development of investor-state arbitration.

international law relating to diplomatic protection, such as the rules relating to continuous nationality, are relevant to IIA claims remains unsettled.[27]

§1.4 Dispute settlement by claims commissions and international arbitration Early state practice on diplomatic protection took a number of forms. In addition to the diplomatic settlement of claims[28] and settlement through coercive means,[29] states established *ad hoc* commissions and arbitral tribunals to adjudicate specific claims or classes of claims involving a host state's treatment of foreign nationals and their property. This practice dates from the 1794 Treaty of Amity, Commerce and Navigation between Great Britain and United States (Jay Treaty),[30] which, among other things, established a commission to decide claims regarding the treatment of British and US nationals during and after the American Revolution.[31]

From 1840-1940 states established over sixty arbitral commissions to deal with disputes arising from injuries to foreign nationals.[32] In addition, there were various *ad hoc* tribunals established to deal with specific claims[33] and national prize courts that adjudicated claims regarding the capture of property at sea.[34] State practice and the decisions of these commissions and tribunals formed the nascent jurisprudence on state responsibility for injuries to aliens. Although these claims commissions, by hearing claims based on individual losses, were designed to protect the rights of individuals, they generally relied on a model of diplomatic protection, meaning that only states, and not individuals, were party

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27. For an in-depth discussion of this issue, see Z. Douglas, 'Hybrid Foundations of Investment Treaty Arbitration'(2003) 74 BYIL 151.
28. The volume of diplomatic practice with respect to international claims increased substantially in the 19th century. US practice was collected in F. Wharton, *A Digest of the International Law of the United States* (Washington: Government Printing Office, 1886) and in J.B. Moore, *International Law Digest* (Washington: Government Printing Office, 1906) Vol. VII, both of which were official US government publications. In contrast, European state practice was less accessible and European publicists tended not to cite it. See I. Brownlie*, System of the Law of Nations, State Responsibility – Part I* (Oxford: Oxford University Press, 1986) [Brownlie, *System of the Law of Nations*] at 6.
29. See §1.5.
30. 19 Nov. 1794, 52 Cons TS 243, entered into force 28 Oct. 1795.
31. See B. Legum, 'The Innovation of Investor-State Arbitration Under NAFTA'(2002) 43 HILJ 534. The Jay Commissions issued over 500 awards. See A.M. Stuyt, *Survey of International Arbitrations, 1794-1989*, 3rd edn (Dordrecht: Martinus Nijhoff Publishers, 1990) at 2-3. Also see, D.M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena* (Leiden: Martinus Nijhoff, 2008) at 636.
32. Brownlie, *Principles of Public International Law*, *supra* note 18 at 500. See also J.H. Ralston, *International Arbitration, from Athens to Locarno* (London: Oxford University Press, 1972) and Stuyt, *ibid.*
33. Several of these were established under the auspices of the Permanent Court of Arbitration. See Ralston, *ibid.*, and Stuyt, *ibid.*
34. See Halsbury, *et al.*, *The Principles and Practice of Prize Law* (London: Butterworths, 1914).

to the proceedings.[35] After the First World War (WWI), it became more common for agreements to provide that individual claimants could make claims directly.[36]

In addition to the mixed claims commissions of the nineteenth century, there were several direct investor-state arbitrations. One of the first was between *La Compagnie Universelle du Canal de Suez*, a Turkish company, and Egypt. In 1864, the company sought compensation from Egypt after a law was passed that disrupted a concession agreement to work on the Suez Canal. Although there was no arbitration clause in the original agreement, both parties agreed to use arbitration to resolve the dispute, and jointly agreed on Napoleon III as arbitrator.[37]

§1.5 Use and abuse of diplomatic protection The evolution and exercise of diplomatic protection should be viewed in its historical context. The espousal of claims developed in an era of colonialism and imperialism.[38] States exercised all possible means – political, economic and military – to protect their nationals' interests abroad. Reflecting on the development of the law of state responsibility for injuries to aliens, Henry Steiner and Detlev Vagts note that:

> The growth of the law of state responsibility reflected the more intense identification of the individual (or later, the corporation) with his country that accompanied the nationalist trends of the 18th to early 20th centuries. That growth would not have taken place but for Western colonialism and economic imperialism which reached their zenith during this period. Transnational business operations centered in Europe, and later in the United States as well, penetrated Asia, Africa and Latin America. Thus security of the person and property of a national inevitably became a concern of his government. That concern manifested itself in the vigorous assertion of diplomatic protection and in the enhanced activity of arbitral tribunals. Often the arbitrations occurred under the pressure of actual or threatened military force by the aggrieved nations, particularly in Latin America.[39]

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35. R. Dolzer, 'Mixed Claims Commissions' in *Encyclopedia*, *supra* note 8, Vol. III at 438.
36. Legum, *supra* note 31 at 533, notes that mixed arbitral tribunals were established to address claims by Allied nationals against Germany and the Iran-United States Claims Tribunal permitted direct claims. See *infra* §1.28 on the Iran-United States Claims Tribunal. On trends in international law to allow individual claims see Orrego Vicuña, *The Changing Law of Nationality of Claims, supra* note 23.
37. *Egypt v. Suez Canal Company* (Award, 1864) in Stuyt, *supra* note 31 at 471. For commentary, see Ch. Leben, 'La théorie du contrat d'Etat et l'évolution du droit international des investissements' (2003) 302 RDCADI 197 at 219. See Stuyt, *supra* note 31 at 472 *et seq.,* for lists of other early arbitrations between states and foreign entities. Also see E. Darby, *Modern Pacific Settlements Involving the Application of the Principle of International Arbitration* (London: Peace Society, 1904) on early international arbitrations and dispute resolution.
38. See Anghie, *supra* note 11. For another critical view of the law of state responsibility for injuries to aliens, see S.N. Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law' (1961) 55 AJIL 863.
39. H.J. Steiner & D.F. Vagts, *Transnational Legal Problems: Materials and Text*, 2nd edn (Mineola, N.Y.: Foundation Press, 1976) at 357.

During the nineteenth and early twentieth centuries, the exercise of diplomatic protection by powerful states was often accompanied by 'gun-boat diplomacy' – the threat or the use of force to back up diplomatic protection claims.[40] At the time, the use of force in the exercise of diplomatic protection was not inconsistent with international law.[41] Despite the fact that the 1899 and 1907 *Hague Convention for the Pacific Settlement of International Disputes* (Hague Conventions) provided for state parties 'to use their best efforts to ensure the pacific settlement of international differences,'[42] both the US and the European powers used force and threats of force on numerous occasions to back up and enforce claims of diplomatic protection.[43] For instance, between 1820 and 1914, Great Britain intervened in Latin America at least forty times to enforce British claims for injuries to its nationals and to restore order and protect property.[44] These claims were sometimes based on limited or erroneous evidence and frequently led to reprisals out of proportion to the injury suffered.[45]

Abuses, real and perceived, of diplomatic protection led Latin American states to resist its use, particularly in its more interventionist forms. This opposition solidified after armed English, German and Italian forces intervened in Venezuela in 1902 to enforce claims relating to state-issued bonds.[46] In reaction, Luis Drago, the Argentine foreign minister, authored a diplomatic note to the US in December 1902, arguing that the public debt of Latin American states should

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40. See D.R. Shea, *The Calvo Clause* (Minneapolis: University of Minnesota Press, 1955); M. Hood, *Gunboat Diplomacy 1895-1905* (London: George Allen & Unwin, 1975) and J. Cable, *Gunboat Diplomacy, 1919-1979: Political Applications of Limited Naval Force*, 2nd edn (London: Macmillan, 1981).
41. Moore, *supra* note 28, Vol. VII at 103-135.
42. Art. 1 of both conventions ((1898-1899) 187 Con TS at 410 and (1907) 205 Con TS at 233).
43. See the discussion of 'nonamicable' modes of redress and the practice of the US in Moore, *supra* note 28, §1089-§1099. Key incidents involving European powers include: French interventions in Mexico in 1838 and 1861 (see Shea, *supra* note 40 at 13); Great Britain threatening naval intervention in the 1836 Sicilian sulphur monopoly dispute (see J. Fawcett (1950) 27 BYIL 355); Italy sending a vessel to Colombia to rescue an Italian national in 1885 and later sending its fleet to enforce an arbitral award regarding the property of an Italian citizen (see W. Benedek, 'Cerrutti Arbitrations' in *Encyclopedia*, *supra* note 8, Vol. I at 555) and the embargo of Venezuelan ports by Great Britain, Germany and Italy in 1902-3 (see M. Silagi, 'Preferential Claims Against Venezuela Arbitration' in *Encyclopedia*, *supra* note 8, Vol. III at 1098). The US intervened in Dominican Republic in 1905 and 1916, Nicaragua in 1911 and Haiti in 1915 (K.J. Vandevelde, *United States Investment Treaties: Policy and Practice* (Boston: Kluwer Law and Taxation, 1992) [Vandevelde, *United States Investment Treaties*] at 8). As Vandevelde notes, US military intervention, while serving to protect US commercial interests, also reflected more general geopolitical considerations.
44. C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley: University of California Press, 1985) at 54.
45. Shea, *supra* note 40 at 12.
46. See Silagi, *supra* note 43 at 1098. On bond defaults and intervention, see Lipson, *supra* note 44 at 37-64. For a discussion of more recent attempts to enforce sovereign bond obligations through international arbitration, see M. Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 AJIL 711.

not give rise to a right of armed intervention.[47] This led to the development of the Drago Doctrine, which was incorporated into the *Hague Convention II of 1907 Respecting the Limitations of the Employment of Force for the Recovery of Contract Debts* (Drago-Porter Convention).[48] Under the Drago-Porter Convention, states agreed not to use armed force for the recovery of state debts unless there was a refusal to submit the claim to arbitration. Thus, even under the Drago-Porter Convention, and despite the general obligations in the Hague Conventions regarding pacific settlement of disputes, force remained a legal means of exercising diplomatic protection should a state fail to accept an offer of arbitration or accept any resulting award.[49] It was not until the *General Treaty for the Renunciation of War 1928* (Briand-Kellogg Pact) that international law prohibited the use of force and required states to resolve disputes only by pacific means.[50]

§1.6 Colonial territories and extraterritorial jurisdiction Much of the expansion of international trade and investment in the eighteenth, nineteenth and twentieth centuries occurred within colonial political and legal regimes. In this

47. See D. Drago, 'State Loans in Their Relation to International Policy' (1907) 1 AJIL 692; E.M. Borchard, 'Limitations on Coercive Protection' (1927) 21 AJIL 303 [Borchard, 'Limitations'] and discussion in Shea, *supra* note 40 at 15.
48. *Hague Convention II of 1907 Respecting the Limitations of the Employment of Force for the Recovery of Contract Debts*, 18 Oct. 1907 [Drago-Porter Convention] in (1907) 205 Con. TS 250.
49. Lipson, *supra* note 44 at 74. As discussed in §1.8, Latin American states' general adherence to the Calvo Doctrine reflected an unwillingness to accept international arbitration. In addition, the Drago-Porter Convention, *ibid.*, only applied to intervention for the purpose of collecting on public debt obligations. It did not address interventions for other types of diplomatic claims. Most Latin American states entered reservations to the Drago-Porter Convention and only Mexico ratified it. See I. Brownlie, *International Law and the Use of Force by States* (London: Oxford University Press, 1963) [Brownlie, *International Law and the Use of Force by States*] at 23-25. Proposals made at the Inter-American Conference for the Maintenance of Peace in 1936 and the Eighth International Conference of American States in 1938 that the Drago Doctrine should be given treaty form were not adopted (Brownlie, *International Law and the Use of Force by States*, *ibid.*, at 226).
50. *General Treaty for the Renunciation of War 1928*, 94 LNTS 57. There was some debate over whether the Briand-Kellogg Pact prohibited armed force that did not amount to war. As of 1945, Art. 2(4), *Charter of the United Nations,* prohibits the threat or use of force. Various types of overt or covert interventions by Western states nevertheless continued, related in part to the protection of economic interests. The Roosevelt Corollary to the Monroe Doctrine authorized the use of force to collect private debts owed to US citizens. See A. Rappaport, *A History of American Diplomacy* (New York: Macmillan, 1975) at 223 *et seq.* Further, commentators have argued that interventions by Western states in Iran (1954), Guatemala (1954), Egypt (1956), Cuba (1961), British Guinea (1973), Brazil (1964), Dominican Republic (1965) and Chile (1973) may have been, or were at least in part, motivated by the desire to protect foreign economic interests. See A. Akinsanya, *Multinationals in a Changing Environment* (New York: Praeger Publishers, 1984) at 252-306 and *The Expropriation of Multinational Property in the Third World* (New York: Praeger Publishers, 1980). It should be noted that the USSR, China and other states with communist and socialist economies also intervened in the affairs of other states and that these interventions were arguably also motivated at least in part by economic reasons.

context, there was no need for colonists to have recourse to international law processes since colonial political and military power protected colonists and their property from local interference or control.[51] In addition, extraterritorial jurisdiction, which allowed foreign powers to apply their laws to their nationals in foreign states, was exercised under treaties.[52] In some cases, these regimes were imposed by force through treaties of capitulation. Extraterritorial jurisdiction in one form or another existed in China, Japan, Thailand, Iran, Egypt, Morocco, Turkey and other parts of the Ottoman Empire.[53] The existence of extraterritorial regimes in Asia and the Far East, but not in Latin America, explains why Latin American states are the source of almost all early jurisprudence and cases on diplomatic protection.[54]

§1.7 The minimum standard of treatment The expansion of trade and investment in the nineteenth and early twentieth centuries directed increased attention to the legal status of foreign nationals abroad and to the protection of their economic interests.[55] By the early 1900s, there was general agreement amongst international lawyers in Europe and the US that there existed a minimum standard of justice in the treatment of foreigners.[56] At the same time, an emerging body of international

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51. M. Sornarajah, *The International Law on Foreign Investment*, 2nd edn (Cambridge: Cambridge University Press, 2004) at 19-20.
52. See A. Heyking, 'L'exterritorialité et ses applications en Extrême-Orient' (1925) 7 RDCADI 237.
53. See Lipson, *supra* note 44 at 12-16, L.T. Lee, *Consular Law and Practice*, 2nd edn (Oxford: Clarendon Press, 1991) at 7-17 and R. Jennings & A. Watts eds., *Oppenheim's International Law*, 9th edn (London: Longman, 1992), §406 at 911.
54. Dunn, *supra* note 22 at 54.
55. In 1910, Elihu Root, then President of the American Society of International Law and former US Secretary of War and Secretary of State, noted: 'The great accumulation of capital in the money centres of the world, far in excess of the opportunities for home investment, has led to a great increase of international investment extending over the entire surface of the earth, and these investments have naturally been followed by citizens from the investing countries prosecuting and caring for the enterprises in the other countries where their investment are made.' E. Root, 'The Basis of Protection to Citizen's Residing Abroad' (1910) 4 AJIL 517 at 518-519.
56. See Brownlie, *System of the Law of Nations, supra* note 28 at 7 with respect to the emergence of German, French and English language treatises on the principle of state responsibility in the late nineteenth century and early twentieth century. The international standards of treatment applicable to the economic interests of foreign investors were still, however, nascent. International law treatises written in the early 1900s focus on issues such as denial of justice, equality before the law and mob violence, usually in the context of the rights of the individual. J. Westlake's treatise, *International Law* (Cambridge: Cambridge University Press, 1904) devoted an eight page chapter to 'The Protection of Subjects Abroad' and addressed denial of justice and contract claims. In the 1905 first edition of *International Law*, L. Oppenheim touched on the 'Protection to be Afforded to Foreigner's Person and Property' in one page and simply focused on the requirement for the host state to provide equality before the law. L. Oppenheim, *International Law* (London: Longmans, Green, and Co., 1905) at 376. G.G. Wilson, Professor of International Law at Harvard University addressed the treatment of aliens in two pages and focuses on the right to exclude and expel. With respect to property, he wrote: 'Rights of property and inheritance may be determined by local laws.' G.G. Wilson, *Handbook*

law on state responsibility for the treatment of aliens was developing through various commercial treaties,[57] state practice and the decisions of arbitral tribunals and mixed commissions.[58] Most of the practice and jurisprudence in this area related to injuries to individual foreigners arising from the denial of justice or acts of violence. Although the principles applying to the treatment of economic interests were less developed, there was a consensus amongst capital exporting states that expropriation of property required compensation.[59]

In the early twentieth century, the major powers and capital exporting states, including the US and the UK, took the position that foreign nationals and their property were entitled, under customary international law, to a minimum standard of treatment. This minimum standard was essentially similar to standards of justice and treatment accepted by 'civilized states', including the European states and the US.[60] The capital exporting states' approach is reflected in Elihu Root's 1910 address to the American Society of International Law:

> Each country is bound to give to nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizen's, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.
>
> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form part of the international law of the world. A country is entitled to measure the standard of justice due an alien by the justice it accords its own citizens only when its system of law and administration conforms to this general standard. If any country's system of law and administration does not conform to that standard of justice, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.[61]

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of International Law (St Paul: West Publishing, 1910) at 145. C.C. Hyde primarily addressed denial of justice and mob violence. C.C. Hyde, *International Law: Chiefly as Interpreted and Applied by the United States* (Boston: Little, Brown and Company, 1922) at 491-496 and 516-524.

57. See Neufeld, *supra* note 10. On early friendship and commerce treaties, see *infra* §1.17.
58. See *supra* note 22 for the principal treatises.
59. See *infra* Chapter 7, §7.5.
60. The term was used almost exclusively to refer to Western or European states. Westlake, *supra* note 56 at 313, argued that these were rules 'on which the people of European civilization are agreed that legal and administrative procedure ought to be based.' E. Borchard, in 'The "Minimum Standard" of the Treatment of Aliens' (1939) 33 ASIL Proc 51 [Borchard, 'Minimum Standard'] at 53, states that international law is 'composed of the uniform practices of civilized states of the western world who gave birth and nourishment to international law.' These rules included a minimum standard of due process and justice. See the discussion in Anghie, *supra* note 11 at 52 *et seq.,* on the civilized/uncivilized dichotomy.
61. Root, *supra* note 55 at 521-2. Interestingly, Root's comments focus not only on the delicts of foreign states but also on the breach of international obligations by the US arising out of the mobbing and

§1.8 The Calvo Doctrine In response to assertions of a minimum standard of treatment, some states, particularly those in Latin America, endorsed a national treatment or equality of treatment standard. This position is most commonly associated with the Argentine jurist Carlos Calvo, who argued as early as 1868 against the exercise of diplomatic protection and the existence of a minimum standard of treatment. In Calvo's view, state equality required that there be no intervention, diplomatic or otherwise, in the internal affairs of other states, and that foreigners were not entitled to better treatment than host state nationals.[62] The Calvo Doctrine has three distinct elements: foreign nationals are entitled to no better treatment than host state nationals; the rights of foreign nationals are governed by host state law; and host state courts have exclusive jurisdiction over disputes involving foreign nationals.[63] The twin pillars of the Calvo Doctrine are the absolute equality of foreigners with nationals and the principle of non-intervention.[64] At its logical extreme, the doctrine would have abolished the principle of diplomatic protection[65] and the concept of the minimum standard of treatment.[66]

The Calvo Doctrine never attained the status of a principle of customary international law.[67] In the early twentieth century, capital exporting states maintained the view that international law requires a minimum standard of treatment. Capital importing states, however, continued to challenge the minimum standard of treatment, particularly with respect to compensation for expropriation. In 1917, the revolutionary government in Russia issued a decree abolishing all private property, including the property of foreign nationals.[68] Although Western states took the position that the decree violated international law, many of the claims

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lynching of Chinese, Italian and Mexican nationals in various US states between 1880 and 1901.

62. 'It is certain that aliens who establish themselves in a country have the same rights to protection as nationals, but they ought not to lay claim to a protection more extended.' C. Calvo, *Le droit international théorique et pratique*, 5th edn, 1896, Vol. VI at 231 as translated and quoted in Shea, *supra* note 40 at 18. From the Calvo Doctrine rose the Calvo Clause – a contractual clause by which a foreigner purports to waive any right to diplomatic protection vis-à-vis the host state. The clause attempts to ensure equality between foreigners and nationals. If effective, the foreigner, with respect to matters to which the contract applies, would waive any right to the protection of international law. In *North American Dredging Co.* (1926) IV RIAA 26, the US-Mexico Mixed Claims Commission held that a state is not bound by its own national's waiver of diplomatic protection, since the right of diplomatic protection belongs to the state. See Shea, *supra* note 40 at 210. See also M.R. Garcia-Mora, 'The Calvo Clause in Latin American Constitutions and International Law' (1950) 33 Marq L Rev 205 and K. Lipstein, 'The Place of the Calvo Clause in International Law' (1945) BYIL 130.
63. B.M. Cremades, 'Resurgence of the Calvo Doctrine in Latin America' (2006) 7 BLI 53 at 54.
64. Shea, *supra* note 40 at 19-29.
65. *Ibid.*, at 20.
66. The position of absolute equality between nationals and foreigners was formally adopted by Latin American states at the First International Conference of American States in 1889. See Shea, *supra* note 40 at 75.
67. See Shea, *ibid.,* at 20.
68. Lipson, *supra* note 44 at 66-70.

were never formally settled.[69] The Soviet nationalizations of private property were significant because they challenged the assumption that all states were committed to private property, a market economy and limited state control of the economy.[70] Prior to WWI, the need to protect private property had never been seriously challenged; however, after WWI, ideological divisions came to dominate.[71]

§1.9 Early jurisprudence on the minimum standard of treatment Despite the challenge posed by Russia and continued Latin American resistance to the minimum standard of treatment, the view that international law required a minimum standard of treatment was reaffirmed during the 1920s in several influential decisions of the US-Mexico General Claims Commission (the Commission). The US and Mexico established the Commission in 1923 to address claims by US citizens against Mexico and those of Mexican citizens against the US.[72] Commission decisions rejected Calvo's vision and affirmed the existence of the minimum standard of treatment.[73] For example, in *Harry Roberts*, the Commission stated that:

> Roberts was given the same treatment as that given to all other persons.… Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated according to ordinary standards of civilization.[74]

In addition to decisions of the Commission, there were other important decisions in the 1920s that reaffirmed the view held by capital exporting states. In 1922, an arbitral tribunal established between Norway and the US declared that international law requires 'just compensation' for the taking of property rights.[75] The

69. See A. Lowenfeld, *International Economic Law* (Oxford: Oxford University Press, 2002) at 392-393. The US recognized the Soviet government and the extraterritorial effect of Soviet expropriation decrees in the Litvinov Assignment Agreement. Under this Agreement, monies due to the former Russian government by US nationals were assigned to the US government, which in turn would use monies collected to pay off claims of the US and its nationals against the USSR. See J.W. Garner, 'Recognition by the United States of The Government of Soviet Russia' (1935) BYIL 171. France and Russia settled claims as recently as 1997. See P. Juillard & B. Stern, *Les emprunts russes: aspects juridiques* (Paris: Pedone, 2002).
70. Lipson, *supra* note 44 at 70.
71. *Ibid.*, at 73.
72. A.H. Feller, *The Mexican Claims Commissions: 1923-1934* (New York: Macmillan Company, 1935). A Special Claims Commission was also established to address claims arising out of revolutionary conditions in Mexico from 1910 to 1920.
73. Five decisions of the Commission are often cited to support the existence of the minimum standard of treatment: *Neer* (1926) IV RIAA 60, *Faulkner* (1927) 21 AJIL 349, *Harry Roberts* (1927) 21 AJIL 357, *Hopkins* (1927) 21 AJIL 160 and *Way* (1929) 23 AJIL 466. See also Roth, *supra* note 16 at 94-99. See *infra* Chapter 6 on the minimum standard of treatment.
74. *Harry Roberts*, *ibid.*, at 360-361.
75. 'Here it must be remembered that in the exercise of eminent domain the right of friendly alien property must always be respected. Those who ought not to take property without making just

tribunal ordered the US to pay compensation for its requisition of Norwegian ships during WWI.

These developments were further reinforced by judgments of the PCIJ. In *The Mavrommatis Palestine Concessions*, the PCIJ affirmed that diplomatic protection is an 'elementary principle of international law.'[76] Two years later, in the *Case Concerning Certain German Interests in Polish Upper Silesia*, the PCIJ confirmed that vested rights of foreign nationals must be respected.[77] The PCIJ also held, in the 1928 *Case Concerning the Factory at Chorzów*, that an illegal seizure of property requires reparation.[78] These judgments reflected the view that states owe a duty to other states to treat foreign nationals and their property according to a minimum standard of treatment.

§1.10 Efforts to codify treatment standards in the 1920s and 1930s In 1924, the League of Nations established a Committee of Experts for the Progressive Codification of International Law.[79] The Committee reported in 1927, recommending that seven subjects were ripe for codification. On 27 September 1927, the Eighth Assembly of the League of Nations resolved to submit three topics to the First Conference for the Codification of International Law (the 1930 Codification Conference), including the 'Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners.'[80]

In anticipation of the 1930 Codification Conference, a number of organizations, including the Institute of International Law, Association de Droit International du Japon, the American Institute of International Law and the International Commission of Jurists instituted research projects on rules of international responsibility relating to injuries to foreigners.[81] The Harvard Law School undertook a program of research in international law for the purpose of preparing a draft international convention on each of the three topics to be discussed at the 1930 Codification Conference.[82] The reporter for responsibility of states, Edwin Borchard, prepared a *Draft Convention on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners* (1929 Harvard Draft).[83]

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compensation at the time or at least without due process of law must pay the penalty for their action.' *Norwegian Shipowners' Claims (Norway v. US)* (1922) 1 RIAA 307 at 332.

76. *Mavrommatis*, *supra* note 21.
77. See *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (1926) PCIJ Ser. A, No. 7 at 22 and 42.
78. *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)* (1928) PCIJ Ser. A, No. 17 at 47. With respect to compensation for expropriation, see *infra* Chapter 7.
79. (1925) 5 LNOJ 143.
80. LNOJ Spec Supp 53 at 9. The other two topics were 'Nationality' and 'Territorial Waters'.
81. These projects resulted in various draft codifications, which are reproduced at (1929) 23 AJIL Spec Supp at 219-239.
82. The drafts had no official status. According to the Director of Research, Manley Hudson, the preparation of the drafts 'has been undertaken with the object of placing before the representatives of the various governments at the First Conference on Codification of International Law the collective views of a group of Americans specially interested in the development of international law.' (1929) 23 AJIL Spec Supp at 9.
83. The 1929 Harvard Draft and commentary is reproduced at (1929) 23 AJIL Spec Supp at 133-218.

Divided opinion on standards of treatment, however, was evident at the 1930 Hague Conference, during its proceedings on codifying customary international law rules on the 'Responsibility of States for Damage Caused in Their Territories to the Persons and Properties of Foreigners.'[84] Article 10 of the draft codification provides as follows:

> As regards damage caused to the person or property of foreigners by a private person, the State is only responsible if the damage sustained by the foreigner results from the fact that the State has failed to take the measures which may reasonably be expected of it in the circumstances in order to prevent, remedy or inflict punishment for the damage.[85]

In voting on the article, seventeen states (mainly capital importing states) maintained the position that foreign nationals were only entitled to equality of treatment with nationals, while twenty-one states, including the capital exporting states, maintained the existence of a minimum standard of treatment.[86] Divided opinion on the issue of the minimum standard was a significant factor in the breakdown of the conference's codification efforts in the area of state responsibility.[87] The final version of the codification was not adopted because it failed to receive the requisite support of two-thirds of the states at the conference.

§1.11 Convention on the Treatment of Foreigners In addition to the codification efforts at the 1930 Codification Conference, states also attempted to conclude a *Convention on the Treatment of Foreigners* (1929 Draft Convention), in the late 1920s and early 1930s, under the auspices of the League of Nations.[88] A diplomatic conference – the International Conference on the Treatment of Foreigners – was held in Paris in late 1929 with forty-seven states participating.[89] The origin for the conference lay in Article 23 of the *Covenant of the League of Nations*,

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84. See S. Rosenne, *League of Nations Conference for the Codification of International Law (1930)* (Dobbs Ferry, NY: Oceana Publications Inc., 1975), Vol. II at 423-702 for a collection of the documents relating to this topic. See also S. Rosenne, *League of Nations Committee of Experts for the Progressive Codification of International Law (1925-1928)* (Dobbs Ferry, NY: Oceana Publications Inc., 1972), Vol. 2 at 118 for the Report of the Sub-Committee of Experts by Guerrero, Rapporteur and Wang Chung-Hui. For commentary, see G.H. Hackworth, 'Responsibility of States for Damage Caused in Their Territories to the Persons and Properties of Foreigners' (1930) 24 AJIL 500 and E. Borchard, 'Responsibility of States at the Hague Codification Conference' (1930) 24 AJIL 517 [Borchard, 'Responsibility of States'].
85. See Hackworth, *ibid.,* at 513-514; Borchard, 'Responsibility of States', *ibid.,* at 533-537 and Roth, *supra* note 16 at 68-80.
86. See Hackworth, *ibid.,* at 514 and Roth, *ibid.,* at 74.
87. J.W. Cutler, 'The Treatment of Foreigners in Relation to the Draft Convention and Conference of 1929' (1933) 27 AJIL 225 at 230.
88. The text of the 1929 Draft Convention is reproduced in *International Conference on the Treatment of Foreigners*, *Preparatory Documents*, L.N. Doc. C.36.M. 21.1929.II. The conference proceedings are reproduced in L.N. Doc. C.97.M. 23.1930.II. For commentary see A.K. Kuhn, 'The International Conference on the Treatment of Foreigners' (1930) 24 AJIL 570 and Cutler, *ibid.*
89. See *Final Protocol of the First Session of the Conference on the Treatment of Foreigners* (Paris, 5 Dec. 1929), (1930) 11 LNOJ 171.

under which states undertook to 'secure and maintain equitable treatment for the commerce of all members of the League.'[90] At the World Economic Conference in Geneva in 1927, the International Chamber of Commerce (ICC) had submitted a report on the treatment of foreigners, recommending that the Council of the League hold a diplomatic conference.[91] The Council entrusted the Economic Committee of the League of Nations to prepare a draft convention to serve as a basis for discussions at the conference.[92]

The twenty-nine articles of the draft convention were far-reaching.[93] They accorded foreigners equality with nationals (national treatment) in almost all respects, including the right of establishment, freedom in relation to fiscal matters, freedom to travel, carry on a business and engage in all occupations, and the ability to exercise civil, judicial and succession rights.[94] The conference, however, revealed significant differences of opinion between capital exporting and importing states on the principle of equality. The report of the President of the Conference, M. Devèze, highlighted that:

> … after three weeks' discussion, the draft Convention has been so profoundly modified and its essential provisions so attenuated that the delegations with liberal tendencies stated their intention of not signing a convention which, in their view, would have constituted, not the progress they wished to achieve, but, on the contrary, a retrograde step as compared with the present situation.[95]

§1.12 Seventh International Conference of American States Overwhelming Latin American support for the equality of treatment standard was also evident a few years later at the Seventh International Conference of American States in Montevideo, where states concluded the 1933 *Convention on the Rights and Duties of States* (Montevideo Convention).[96] Article 9 of the Montevideo Convention provides, in part, that: 'Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.' The Convention was

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90. *Covenant of the League of Nations*, 28 Jun. 1919 (1920) 1 LNOJ 3 (entered into force 10 Jan. 1920).
91. Kuhn, *supra* note 88 at 571.
92. *Ibid.*
93. See *Work of the International Conference on the Treatment of Foreigners: Report by M. Devèze, President of the Conference,* Geneva, 14 Jan. 1930, L.N. Doc. C.10.1930.II [Report by M. Devèze].
94. The draft convention also provided a number of exceptions to the national treatment obligation, for example, the exclusion of certain professions (lawyers and stockbrokers), government contracts, exploitation of minerals and hydraulic power and limitation on ownership of land and business for national security purposes. National treatment extended to foreign companies (Art. 16(8)).
95. Report by M. Devèze, *supra* note 93.
96. *Convention on the Rights and Duties of States*, 26 Dec. 1933, 165 LNTS 19 (1933) (entered into force 26 Dec. 1924).

adopted, but with reservations deposited by the US and other capital exporting states.[97]

§1.13 The Hull Rule The disagreement between capital exporting and importing states over the minimum standard of treatment came to a head in an exchange of correspondence between Mexico and the US in 1938 regarding the standard of compensation for expropriation. The US insisted on the Hull Rule, named after US Secretary of State Cordell Hull, who, in response to the expropriation of American-held oil interests by Mexico in 1938,[98] argued that 'adequate, effective and prompt payment for the properties seized'[99] was required under international law. By contrast, Mexico argued that, in the case of general and impersonal expropriation for the purpose of redistribution of land, it was only required to pay compensation in accordance with its national laws. In Mexico's view, international law distinguished between expropriations resulting from a 'modification of the juridical organization and which affect equally all the inhabitants of the state and those otherwise decreed in specific cases and which affect interests known in advance and individually determined.'[100] General social reforms imposed no international obligation to provide immediate compensation, as foreigners were only entitled to the same treatment as Mexican citizens.[101] Thus, although the Hull Rule focuses on the required standard of compensation under international law, the actual dispute between Mexico and the US that gave rise to the articulation of the rule concerned the types of measures affecting property that are compensable under international law. The standard of compensation for expropriation continued to be a source of significant disagreement in the post-WWII era.

II POST-WWII DEVELOPMENTS

§1.14 Decolonization and nationalizations Disputes over the treatment of foreign investment increased and intensified after WWII as the process of decolonization resulted in colonial territories becoming states. Many of these newly independent states, along with the Eastern European communist states, adopted socialist economic policies, including large scale nationalizations of key sectors of their economies.[102] Notable examples include the nationalizations of major

97. For a discussion of Art. 9, see Borchard, 'Minimum Standard', *supra* note 60 at 69.
98. See J.L. Kunz, 'The Mexican Expropriations' (1940) 17 NYULQR 327.
99. US Secretary of State to Mexican Ambassador, 22 Aug. 1938, reproduced in 'Mexico-United States: Expropriation by Mexico of Agrarian Properties Owned by American Citizens' (1938) 33 AJIL Supp at 191-201.
100. Mexican Minister of Foreign Affairs to US Ambassador, 1 Sep. 1938, *supra* note 99 at 201-207.
101. See discussion by Lowenfeld, *supra* note 69 at 397-403.
102. See I. Foighel, *Nationalization: A Study in the Protection of Alien Property in International Law* (London: Stevens & Sons Limited,1957); G. White, *Nationalisation of Foreign Property* (London: Stevens & Sons Limited, 1961); R.B. Lillich, ed., *The Valuation of Nationalized Property in International Law* (Charlottesville: University Press of Virginia, 1972); M. Sornarajah, *The Pursuit of Nationalized Property* (Dordrecht: Martinus Nijhoff Publishers,

industries in Eastern European states, China, Cuba, and Latin America (Argentina, Bolivia, Brazil, Chile, Guatemala and Peru); the Indonesian nationalization of Dutch properties; the Egyptian nationalization of the Suez Canal; and the nationalizations of the oil industry throughout the Middle East and Northern Africa (Algeria, Iran, Iraq, Libya, Kuwait and Saudi Arabia).[103] The foreign investment disputes that ensued focused on two principal issues: the extent to which acquired rights, including natural resource concessions granted by colonial powers, were to be respected; and the standard of compensation for the expropriation of those acquired rights. In a series of cases, newly independent and developing states asserted that, upon independence, states were entitled to review concession agreements that had been granted by colonial powers, and, furthermore, maintained that compensation for the expropriation of property would be based on national laws.[104]

§1.15 The Havana Charter and the International Trade Organization The post-WWII political and economic climate stimulated a series of initiatives with the goal of establishing a multilateral legal framework for investment.[105] The first attempt arose during the negotiations for the proposed International Trade Organization (ITO), an institution intended as the third pillar of the new international financial system alongside the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the Word Bank).[106] The initial US proposal for the ITO contained no investment provisions. This reflected the US preference for bilateral commercial treaties with high standards of protection, rather than a multilateral agreement that reflected the 'lowest common denominator of protection.'[107] During the ITO negotiations, articles on investment protection with provisions for national treatment, most-favoured-nation (MFN) treatment and just compensation for expropriation were introduced. States, however, were unable to agree on the standards.[108] As a result, the final draft of the

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1986) and A.A. Akinsanya, *The Expropriation of Multinational Property in the Third World*, *supra* note 50.

103. See Lowenfeld, *supra* note 69 at 405. In the period from 1960 to 1977, there were on average ninety-eight cases of expropriation of foreign property a year. See F.N. Burton & H. Inoue, 'Expropriation of Foreign-Owned Firms in Developing Countries: A Cross National Analysis' (1984) 18 JWTL 396 at 397.
104. See *infra* §1.23.
105. For a comprehensive bibliography of works on multilateral approaches to foreign investment current to the early 1990s, see (1992) 7 ICSID Rev 504. See, in particular, the review of international instruments by F. Tschofen, 'Multilateral Approaches to the Treatment of Foreign Investment' (1992) 7 ICSID Rev 384.
106. On the investment aspects of the IMF and World Bank, see T.L. Brewer & S. Young, *The Multilateral Investment System and Multinational Enterprises* (Oxford: Oxford University Press, 1998) at 70-73. The role of the IMF *Articles of Agreement* with respect to transfer of funds is addressed at Chapter 8, §8.3.
107. C. Wilcox, *A Charter for World Trade* (New York: Macmillan, 1949) at 146.
108. See Brewer & Young, *supra* note 106 at 66-68.

Havana Charter for the International Trade Organization (Havana Charter)[109] only briefly addressed the issue of investment protection by providing a prohibition on 'unreasonable or unjustifiable action' and permitting the ITO to make recommendations for bilateral or multilateral investment agreements.[110] The Havana Charter never came into force and the ITO was never established, chiefly because the US Senate would not approve US ratification.[111] As a result, the *General Agreement on Tariffs and Trade* (GATT),[112] which had been negotiated to liberalize trade, was applied provisionally without an overarching ITO framework.[113] Thus, although international trade and investment are economically intertwined,[114] the absence of investment from the purview of the GATT meant that after 1947, international investment and trade law developed independently of one another.

§1.16 Non-governmental initiatives to create a multilateral legal framework for investment From the 1940s to the early 1960s there were four important non-governmental initiatives designed to create a multilateral legal framework for foreign investment. In 1949, the ICC proposed an *International Code of Fair Treatment for Foreign Investment* (ICC Code).[115] The ICC Code reflected high standards of treatment for foreign investment by providing national treatment and MFN treatment for investments, prohibiting restrictions on transfers of funds, ensuring 'fair compensation according to international law' in the event of expropriation, and providing binding state-to-state dispute resolution before the ICC

109. *Havana Charter for an International Trade Organization*, 24 Mar. 1948, UN Conference on Trade and Employment, U.N. Doc. E/CONF.2/78, Sales No. 1948.II.D.4.
110. Art. 11(1)(b) of the Havana Charter provides: 'No Member shall take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other Members in the enterprise, skills, capital, arts or technology which they have supplied.' Art. 11(2) provides, in part, that: 'The Organization may, in such collaboration with other intergovernmental organizations as may be appropriate: (a) make recommendations for and promote bilateral or multilateral agreements on measures designed: (i) to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another....'
111. J.H. Jackson, *The World Trading System Law and Policy of International Economic Relations*, 2nd edn (Cambridge, MA: MIT Press, 1997) at 38.
112. *General Agreement on Tariffs and Trade*, 30 Oct. 1947, 55 UNTS 814 (applied provisionally as from 1 Jan. 1948 pursuant to the Protocol of Provisional Application).
113. Jackson, *supra* note 111 at 39.
114. Where there are import barriers, a producer may decide to set up a local subsidiary to produce goods locally, thereby 'jumping' the trade barrier. In many cases, trade and investment are substitutes. Whether a producer decides to engage in trade or investment will depend on both economic factors and the regulatory environment, including the comparative legal barriers to trade and investment. See M. Trebilcock & R. Howse, *The Regulation of International Trade*, 3rd edn (London: Routledge, 2005) at 439-446.
115. International Chamber of Commerce, *International Code of Fair Treatment of Foreign Investment,* ICC Pub. No. 129 (Paris: Lecraw Press, 1948), *reprinted in* UNCTAD, *International Investment Instruments: A Compendium*, Vol. 3 (New York: United Nations, 1996) [*IIA Compendium*] at 273. The compendium is available online on the UNCTAD website.

International Court of Arbitration. States were reticent to accept such a broad ranging investment regime and the ICC Code was never adopted.

The next initiative was the International Law Association (ILA) *Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court* (ILA Statute).[116] The purpose of the proposed tribunal and court was to provide an impartial forum for the resolution of foreign investment disputes rather than to establish specific standards of treatment for foreign investment. States never adopted the ILA Statute.

Although the ICC Code and the ILA Statute were not adopted, the initiatives were significant in signaling both a conceptual and semantic change from the traditional notions of protection of aliens and their property. Instead of state responsibility for injuries to aliens and their property, the primary concern had become the protection of foreign investment with the object of promoting economic development.[117] The change reflected a shift in emphasis from the protection of private property as an end in itself to a policy of promoting conditions upon which the private foreign investment necessary for economic development could occur. This shift from the language of property to investment took place at the same time that newly independent states were beginning to challenge the system of acquired rights (concessions, contracts and other forms of tangible and intangible property) and could be seen as an attempt to reground the protection of private property in the language of international economic development.[118] This conceptual and semantic change would be reflected in future developments in the international legal framework for investment.

The third non-governmental initiative was the 1959 *Draft Convention on Investments Abroad* (Abs-Shawcross Draft Convention).[119] The Draft Convention was prepared under the leadership of Hermann Abs, the Director-General of Deutsche Bank, and Lord Shawcross, former Attorney General of the UK. The draft had its origins partly in a 1957 draft document entitled the *International*

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116. *Reprinted in IIA Compendium*, *ibid.*, at 259.
117. For example, the preamble to the ICC Code, *supra* note 115, notes that 'an ample flow of private investments is essential to the economic and industrial growth of their countries and to the welfare of their peoples …'
118. See T. Wälde, 'The Specific Nature of Investment Arbitration – Report of the Director of Studies of the English-speaking Section of the Centre,' *New Aspects of International Investment Law*, eds P. Khan & T. Wälde (Leiden: Matinus Nijhoff Publishers, 2007) at 43.
119. *IIA Compendium*, *supra* note 115, Vol. 5 at 395. The draft was first published in (1960) 9 JPL 116. See also H. Shawcross, 'The Problems of Foreign Investment in International Law' (1961) 102 RDCADI 334 and Chapter 8 of G. Schwarzenberger, *Foreign Investments and International Law* (New York: Frederick A. Praeger, 1969) for a history of and commentary on the Abs-Shawcross Draft Convention. For contemporary discussions of proposals for multilateral foreign investment protection, see A.S. Miller, 'Protection of Private Foreign Investment by Multilateral Convention' (1959) 53 AJIL 371; R. Gardner, 'International Measures for the Promotion and Protection of Foreign Investment' (1959) ASIL Proc 255; A.A. Fatouros, 'An International Code to Protect Private Investment-Proposals and Perspectives' (1961) 14 UTLJ 77; E. Snyder, 'Protection of Private Foreign Investment: Examination and Appraisal' (1961) 10 ICLQ 469 and D.A.V. Boyle, 'Some Proposals for a World Investment Convention' (1961) JBL 18 and 155.

Convention for the Mutual Protection of Private Property Rights in Foreign Countries, published by a group of German business people called the Society to Advance the Protection of Foreign Investments.[120] The Abs-Shawcross Draft Convention provided for a minimum standard of treatment (defined as 'fair and equitable treatment'),[121] protection against 'unreasonable or discriminatory measures,' observance of undertakings, and 'just and effective' compensation for expropriation. Importantly, the Abs-Shawcross Draft Convention was the first instrument that expressly provided for direct investor-state arbitration.[122]

Two years later, the 1961 *Draft Convention on the International Responsibility of States for Injuries to Aliens*[123] (1961 Harvard Draft) was prepared by Louis Sohn and Richard Baxter at the request of the UN Secretariat in an attempt to codify the international law on state responsibility. The 1961 Harvard Draft is an updated version of the 1929 Harvard Draft.[124] Early drafts of the 1961 Harvard Draft were presented to the International Law Commission (ILC).[125] The draft has been cited by a number of IIA tribunals as an authoritative statement of certain aspects of the minimum standard of treatment.[126]

§1.17 Bilateral and regional initiatives In the post-WWII era, several states, including the UK, US and Japan, entered into bilateral treaties on commerce and navigation.[127] These treaties were often called Treaties of Friendship, Commerce

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120. This document is also known as the *Köln Draft Convention*. See Tschofen, *supra* note 105 at 389.
121. See *infra* Chapter 6, §6.14, for a discussion of early treaty practice on fair and equitable treatment.
122. Art. VII states that nationals may make claims for a breach of the convention before an arbitral tribunal established under the convention provided the state had consented to the arbitral jurisdiction through a special agreement or unilateral declaration.
123. (1961) 55 AJIL 545. The text of the 1961 Harvard Draft is accompanied by extensive commentary.
124. See *supra* §1.10.
125. (1961) 55 AJIL 545 at 546.
126. The Harvard Draft has been cited in several cases in the context of expropriation: *Saluka Investments BV v. Czech Republic* (Partial Award, 17 Mar. 2006) at paras 256-257; *Pope & Talbot Inc v. Canada* (Interim Award, 26 Jun. 2000) at para. 102; *Wena Hotels Limited v. Egypt* (Award, 8 Dec. 2000) at note 242, as well as in *United Parcel Service America Inc v. Canada* (Award on Jurisdiction, 22 Nov. 2002) at paras 90-91 on the issue of anti-competitive behaviour, and in *Mondev International Ltd. v. United States* (Award, 11 Oct. 2002) at footnote 57 on fair and equitable treatment. See also *The Loewen Group, Inc. and Raymond L. v. United States* (Award, 26 Jun. 2003) at para. 167 and *Tokios Tokelès Group, Inc. and Raymond L. v. Ukraine* (Award, 29 Apr. 2004) at para. 92. In *United Parcel Service, ibid.* at paras 89-89, the tribunal characterized it as 'something of a high water mark in the statement of the law for the protection of aliens.'
127. See generally D. Blumenwitz, 'Treaties of Friendship, Commerce and Navigation' in Encyclopedia, *supra* note 8, Vol. IV at 953. For British treaty practice, see G. Schwarzenberger, *Foreign Investments and International Law*, *supra* note 119. For US practice, see R.R. Wilson, *United States Commercial Treaties and International Law* (New Orleans: Hauser Press, 1960) and H. Walker, Jr. 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice' (1956) 5 AJCL 229. For Japanese practice, see L. Jerold Adams,

and Navigation, or FCN treaties.[128] Although traditionally the focus of FCN treaties had been to promote trade and commercial relationships,[129] in the post-WWII era the investment protection function of these treaties came to dominate.[130] FCN treaties, designed to facilitate post-war reconstruction in Europe, provided significant investment protections.[131] In addition, the implementation of the GATT in 1947 reduced the need for trade provisions in FCN treaties amongst GATT Contracting Parties.[132] In Europe the most significant development was the creation of the common market in 1957.[133]

One of the earliest post-war examples of a regional initiative was the Ninth International Conference of American States (1948), which adopted the *Economic Agreement of Bogotá*.[134] The Agreement was signed by twenty Latin American states, but never entered into force. Although certain provisions of the *Economic Agreement of Bogotá* could be viewed as providing for a minimum standard of treatment,[135] many Latin American states made reservations providing that standards of treatment were governed by the state constitution.[136]

In 1961, the then twenty Member States of the Organization for Economic Co-operation and Development (OECD) liberalized capital transfers and investment

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'Japanese Treaty Patterns' (1972) 12 Asian Survey 242 and L. Jerod Adams, *Theory, Law and Policy of Contemporary Japanese Treaties* (New York: Oceana Publications Inc., 1974).

128. From 1946 to 1966, the US entered into twenty-one FCN treaties. Two of the treaties were subject to proceedings before the International Court of Justice: *Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v. US*) [1984] ICJ Rep 392 and [1986] ICJ Rep 14, and *Elettronica Sicula S.p.A. (ELSI)* (*US v. Italy*) [1989] ICJ Rep 15 [*ELSI*].
129. The US entered into numerous FCNs with Latin American, Asian and African states in the nineteenth century. See Wilson, *supra* note 127, and Vandevelde, *United States Investment Treaties*, *supra* note 43.
130. Vandevelde, *ibid.,* at 15-16 and K.J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UCDJILP [Vandevelde, 'A Brief History'] at 162.
131. In 1956 Herman Walker, Jr., a former advisor on commercial treaties for the US State Department wrote that the 'FCN treaty as a whole is an investment treaty'. H. Walker, Jr. 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice' (1956) 5 AJCL 229 at 244-245.
132. See Wilson, *supra* note 127. Post-WWII US FCN treaties generally provided national and MFN treatment, the rights of foreign nationals to enter and stay in the host state, guarantees regarding freedom of conscience, fair and/or equitable treatment, a constant protection guarantee, compensation for expropriation, transfer of funds and freedom of navigation. Disputes regarding the interpretation or application of the treaties were to be resolved by the ICJ. Vandevelde, 'A Brief History', *supra* note 130 at 17.
133. P. Craig and G. De Búrca, *EU Law: Texts, Cases, and Materials*, 3rd edn (Oxford; New York: Oxford University Press, 2002) [*EU Law*] at 11-12.
134. Organization of American States Treaty Series No. 21, available on the OAS website.
135. In particular, Art. 25 provides: 'Los Estados no tomarán acción discriminatoria contra las inversiones por virtud de la cual la privación de los derechos de propiedad legalmente adquiridos por empresas o capitales extranjeros se lleve a cabo por causas o en condiciones diferentes a aquellas que la Constitución o las leyes de cada país establezcan para la expropiación de propiedades nacionales. Toda expropiación estará acompañada del pago del justo precio en forma oportuna, adecuada y efectiva.'
136. See Brownlie, *International Law and the Use of Force by States*, *supra* note 49. See C.G. Fenwick, 'The Ninth International Conference of American States' (1948) 42 AJIL 562.

in major service industries through codes on the liberalization of capital movements and current invisible operations.[137]

§1.18 Increasing resort to international arbitration post-WWII In the post-WWII era, the use of international arbitration to resolve foreign investment disputes significantly increased.[138] The assertion of economic sovereignty by capital importing states and the implementation of socialist economic policies in the 1950s augmented the risks for foreign investment of expropriations, nationalizations, the imposition of new regulatory controls, and breaches of contract.[139] Although many developing countries viewed international arbitration with distrust,[140] foreign investors generally preferred it to submitting disputes to local courts where decisions might be affected by bias, corruption and inefficiency. Investors began to use various contractual mechanisms, including stabilization, choice of law and international arbitration clauses in order to mitigate political risks.[141] Other risk management mechanisms, such as political risk insurance, also began to be available at this time.[142]

Many international arbitrations in the period immediately after WWII were the result of the cancellation or nationalizations of oil concessions.[143] In these

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137. The codes are legally binding on OECD Member States under the convention on the *Organisation for Economic Co-operation and Development* (14 Dec. 1960), 888 UNTS 179 (entered into force 30 Sep. 1961). As of 1 May 2008, thirty states have ratified the Convention. See *infra* Chapter 8, §8.4, for discussion of the codes on the liberalisation of capital movements and current invisible operations.
138. Prior to WWII, almost all arbitral tribunals or mixed commissions created to address foreign investment claims were established by agreement between the home and host state *after* a dispute had arisen. For example, see *The Jaffa-Jerusalem Railway Arbitration*, reproduced in S. Rosenne, 'The Jaffa-Jerusalem Railway Arbitration (1922)' (1998) 28 IYBHR 239. Also see M.R. Reynolds, 'The Jaffa-Jerusalem Railway Company Arbitration 1922' (1991) 57Arbitration 42. There were a number of arbitrations arising out of concession agreements made in the 1920s between Western companies and the Soviet Union. See V.V. Veeder, 'Lloyd George, Lenin and Cannibals: The Harriman Arbitration' (2000) 16 AI 115 and V.V. Veeder, 'The 1921-1923 North Sakhalin Concession Agreement: The 1925 Court Decisions Between the US Company Sinclair Exploration and the Soviet Government' (2002) 18 AI 185. Also see the award in the *Lena Goldfields Arbitration* and commentary by A. Nussbaum in (1950) 36 CLQ 31 and V.V. Veeder, 'The *Lena Goldfields* Arbitration: The Historical Roots of Three Ideas' (1998) 47 ICLQ 747. See also S.M. Schwebel & J.G. Wetter, 'Some Little Known Cases on Concessions' *reprinted in* S.M. Schwebel, *Justice in International Law* (Cambridge: Grotius Publications/Cambridge University Press, 1994) at 436.
139. See generally Rubins & Kinsella, *supra* note 5.
140. See J. Paulsson, 'Third World Participation in International Investment Arbitration' (1987) 2 ICSID Rev 19 and A.A. Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism' (2000) 41 HILJ 419.
141. See Rubins & Kinsella, *supra* note 5 at 43-68 and Sornarajah, *supra* note 51 at 404-415.
142. See *infra* §1.29.
143. See *Petroleum Development Ltd. v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144; *Ruler of Qatar v. International Marine Oil Co.* (1953) 20 ILR 534; *Saudi Arabia v. Arabian American Oil Co.* (ARAMCO) (1963) 27 ILR 117; *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.* (1963) 35 ILR 136; *BP Exploration Company Ltd. v. Libya* (1979) 53 ILR

arbitrations, tribunals had to consider the applicable law and the extent to which the proper law of the contract included general principles of international law, such as the observance of commitments in good faith and respect for acquired rights.[144] The cases gave rise to a continuing debate in international law regarding the extent to which state responsibility arises for a breach of a contract between a foreign national and a host state.[145]

§1.19 New York Convention The increased use of international arbitration to settle foreign investment and commercial disputes exposed the practical difficulties involved in enforcing international arbitral awards. A key development in the evolving international legal framework for international arbitration was the conclusion and widespread ratification of the *1958 New York Convention on the Recognition of Foreign Arbitral Awards* (the New York Convention),[146] which provides for the recognition and enforcement of foreign arbitral awards and limits the grounds upon which local courts may refuse to recognize and enforce awards.[147] Importantly, the New York Convention makes respect of arbitration agreements a treaty obligation. Although the New York Convention provides the foundation for international arbitration, it does not address the issue of state immunity; thus, even if a foreign investor obtains a favourable arbitral award and seeks to enforce it against state assets located in another state, the assets may be

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297; *Texaco Overseas Petroleum Co. (TOPCO) and Californian Asiatic Oil Co. v. Libya* (1977) 104 JDI 350 (French original), (1979) 53 ILR 389 (English translation); *Libyan American Oil Co. (LIAMCO) v. Libya* (1981) 20 ILM 1; *Kuwait v. American Independent Oil Company (AMINOIL)* (1982) 21 ILM 976; *Elf Aquitaine Iran v. NIOC* (1982) 11 YCA 112. For commentary on the cases and further sources see Lowenfeld, *supra* note 69 at 416-431 and D.W. Bowett. 'State contracts with aliens: contemporary developments on compensation for termination or breach' (1988) 59 BYIL 49-74. For a critical assessment of the arbitral treatment of state contracts, see Anghie, *supra* note 11 at 226-244.

144. See Lowenfeld, *supra* note 69 at 417-430 and Paulsson, *supra* note 140. See *infra* Chapter 2 for discussion of applicable law in IIAs.
145. See P. Weil, 'Problèmes relatifs aux contrats passés entre un Etat et un particulier' (1969) 128 (III) RDCADI 95; P. Weil, 'Droit international et contrats d'Etat' in D. Bardonnet *et al.* eds., *Mélanges offerts à Paul Reuter: le droit international: unité et diversité*, (Paris: Pedone, 1981) at 549; S.J. Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Cambridge: Grotius, 1990); T.E. Carbonneau, ed., *Lex Mercatoria and Arbitration: A Discussion of the New Merchant Law* (Dobbs Ferry, N.Y.: Transnational Juris Publications, 1990) and Sornarajah, *supra* note 51 at 416-433. This issue has also arisen under IIA provisions providing for the observance of undertakings. See *infra* Chapter 9.
146. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 Jun. 1958, 330 UNTS 38 (entered into force 7 Jun. 1959).
147. A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Boston: Kluwer Law and Taxation, 1981) and E. Gaillard & J. Savage, eds, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague; Boston: Kluwer Law International, 1999) at 966-997. See the *Yearbook of Commercial Arbitration* for discussion of court decisions applying the Convention. As of 10 May 2008, there were 142 parties to the New York Convention.

subject to immunity from execution under the law of the state where the asset is located.

§1.20 Permanent Sovereignty Over Natural Resources Confronted with the legacy of colonialism and continued foreign control over resources, throughout the 1950s developing states sought to affirm their economic independence. One avenue for the assertion of economic independence was through the United Nations General Assembly, which in 1952, passed the first of seven resolutions on Permanent Sovereignty Over Natural Resources.[148] In the late 1950s the UN Commission on Permanent Sovereignty over Natural Resources was established to study the question of national control over resources. In 1962, the General Assembly passed Resolution 1803, which declares that the 'right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.'[149] The Resolution reaffirmed that the admission of foreign investment was subject to the authorization, restriction or prohibition of the state.[150] Once admitted, however, foreign investment was to be treated in accordance with national and international law.[151] Paragraph 4 of the Resolution addresses expropriation as follows:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

Paragraph 4 affirms that appropriate compensation *shall* be paid for expropriation, thereby confirming the customary international law requirement of compensation

148. GA Res. 626 (VII), (1952) YBUN at 387.
149. GA Res 1803, 14 Dec. 1962, *reprinted in* (1963) 2 ILM 223. The resolution was passed by eighty-seven votes in favour, two against (France and South Africa) and twelve abstentions (Communist states, Ghana and Burma). For a discussion of the drafting of the resolution, see S.M. Schwebel, 'The Story of the UN's Declaration on Permanent Sovereignty Over Natural Resources' (1963) 49 ABAJ 463 *reprinted in* Schwebel, *Justice in International Law*, *supra* note 138 and K. Gess, 'Permanent Sovereignty Over Natural Resources' (1974) 13 ICLQ 398. For a critical commentary on the resolution and K. Gess' article, see A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 216-220.
150. *Ibid.*, at para. 2.
151. *Ibid.*, at para. 3.

for expropriation.[152] The US had proposed that appropriate compensation be defined as 'prompt adequate and effective compensation,' but this proposal was withdrawn because it lacked support. An amendment by the USSR proposing that national law ought to govern the standard of compensation was defeated.[153] Thus, the reference to 'appropriate compensation,' without elaboration, was a compromise between the US position and the position of states advocating a national treatment standard.

Resolution 1803 also provides that 'foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith,' but does not expressly address foreign investment contracts entered into before a state had acquired independence.

§1.21 International Centre for Settlement of Investment Disputes The establishment in 1965 of the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the World Bank was the next important step in the creation of the international legal framework for foreign investment protection.[154] Discussions on the standard of investment protection in multilateral fora, including the United Nations, had revealed the divided state of opinion on substantive standards. In 1961, Aron Broches, General Counsel of the World Bank, proposed creating a mechanism for the impartial settlement of international investment disputes, rather than seeking agreement on substantive standards of treatment.[155] The ICSID was the result, and was designed to provide a neutral forum for the settlement of investment disputes[156] with the desired consequence of creating 'an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.'[157] Ibrahim

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152. It should be noted, however, that the preamble to the resolution expressly provides that 'nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule.'
153. See Lowenfeld, *supra* note 69 at 408; Gess, *supra* note 149 at 420-429 and Schwebel, *supra* note 149 at 465-466.
154. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 Mar. 1965, (1965) 4 ILM 524. The convention is commonly called the ICSID or Washington Convention. As of 4 Nov. 2007, 155 states have signed and 143 have ratified the ICSID Convention. For legal commentary on the Convention and references to other sources see: C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) [Schreuer, *ICSID Commentary*]; E. Gaillard, *La Jurisprudence du CIRDI* (Paris, Pedone, 2004); L. Reed, J. Paulsson & N. Blackaby, *Guide to ICSID Arbitration* (The Hague: Kluwer Law, 2004); and S. Manciaux, *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats, Trente années d'activité du CIRDI* (Paris: Litec, 2004). The ICSID website contains an extensive bibliography of works on the ICSID.
155. E. Lauterpacht, foreword in Schreuer, *ICSID Commentary*, *ibid.*, at xi.
156. I.F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA* (Washington: ICSID, 1993).
157. Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention of the Settlement of Investment Disputes between States and

Shihata noted in his well-known article, 'Towards a Greater Depoliticization of Investment Disputes,' that the ICSID provides:

> A forum for conflict resolution in a framework that carefully balances the interests and requirements of all the parties involved, and attempts in particular to 'depoliticize' the settlement of investment disputes.[158]

The ICSID is not a permanent arbitral tribunal; rather it provides a legal and organizational framework for the arbitration of disputes between Contracting States and investors who qualify as nationals of other Contracting States. The ICSID Convention makes the agreement to arbitrate an investment dispute before the ICSID a treaty obligation. Thus, an arbitration agreement providing for ICSID proceedings engages the state's international responsibility. The ICSID allows investment disputes to be arbitrated without interference from domestic political or judicial organs in the same manner as a dispute between states can be made subject to international adjudication by an international court or tribunal.

Arbitration under the ICSID is subject to four conditions: (1) the parties must have agreed to submit their dispute to dispute settlement under the ICSID; (2) the dispute must be between a Contracting State to the ICSID (or a subdivision or agency of that state) and the national of another Contracting State; (3) the dispute must be a legal dispute; and (4) the dispute must arise directly out of an investment made in the host Contracting State.[159] The ICSID Convention provides that, where the parties have consented to ICSID arbitration, the consent operates to exclude any other forum or remedy.[160] In particular, states may not exercise diplomatic protection once a claim has been submitted to the ICSID, except where there is a failure to comply with an award.[161] In addition, where a state has consented to arbitration, it cannot withdraw consent unilaterally nor, require that there be an exhaustion of local remedies unless this has been made an express condition of its consent to arbitration.[162]

One of the purposes of the ICSID is to 'delocalise' disputes by making ICSID arbitration and awards subject solely to the ICSID Convention, rather than national law. This does not mean that national law is irrelevant to the resolution of disputes under ICSID arbitration.[163] Rather, the substantive law applicable to the investment dispute will largely depend on the relationship between the host state and the investor in question (e.g., the dispute might arise out of a contract,

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Nationals of Other States, 1 ICSID Rep 23 [Report of the Executive Directors on the Convention].

158. I.F.I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes' (1986) 1 ICSID Rev 1. Shihata became the Secretary General of the ICSID in 1983, serving in that role and as General Counsel of the World Bank until 1998.
159. The conditions for the jurisdiction of ICSID are set out in Art. 25(1) of the ICSID Convention. See *supra* note 154 for commentary on the jurisdiction of ICSID tribunals.
160. Art. 26, *ibid.*
161. Art. 27, *ibid.*
162. Art. 25(1) and 26, *ibid.*
163. See *infra* Chapter 2 for a discussion of applicable law in the context of IIAs.

foreign investment code or an IIA).[164] However, the ICSID Convention provisions govern the conduct of the arbitration. Awards made by ICSID tribunals are binding on the parties and can only be annulled by an *ad hoc* committee established under the ICSID Convention.[165] This is designed to prevent national courts from reviewing the merits of ICSID awards.

Another important innovation under the ICSID Convention is the definition of 'nationals of another Contracting State.' Under the principles of diplomatic protection in customary international law, states espouse the claims of their nationals.[166] In the foreign investment context, however, local laws may require that a foreign investment be made using a locally incorporated company, which is technically the national of the host state. The ICSID Convention addresses this issue by providing that the host state can agree to treat legal entities created under its jurisdiction as nationals of another party if those entities are under foreign control.[167] As a result, a locally incorporated company controlled by foreign investors can begin ICSID arbitration against the state in which it is incorporated, even though technically the company is not a foreign national.

In 1978, ICSID created an Additional Facility that allows the ICSID Secretariat to administer arbitration proceedings where one of the parties is not a Contracting State to the ICSID Convention or a national of a Contracting State.[168] The Additional Facility allows the ICSID Secretariat to administer arbitrations not otherwise falling within the purview of the ICSID Convention. An important difference between arbitrations under the ICSID Rules and the Additional Facility Rules is that national laws, rather than the ICSID Convention, apply to the enforcement of awards made under the Additional Facility Rules. Article 19 of the Additional Facility Rules provides that arbitration proceedings are to be held only in states that are parties to the New York Convention. Many IIAs now provide for arbitrations under the both the ICSID Arbitration Rules and the Additional Facility Rules.

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164. Art. 42(1), ICSID Convention provides that: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.'
165. See Art. 50, *ibid.* On annulment, see *supra* note 154 for commentary, and E. Gaillard & Y. Banifatemi, eds, *Annulment of ICSID Awards,* IAI International Arbitration Series No.1 (New York: Juris Publishing, 2004). If an award is annulled, the claimant may still resubmit the claim. A number of IIA awards have been subject to annulment proceedings, including: *CMS Gas Transmission Company v. Argentina; Compañía de Aguas del Aconquija, & Compagnie Générale des Eaux v. Argentina; Consortium R.F.C.C. v. Morocco; Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Peru; Mr. Patrick Mitchell v. Congo; MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*; and *Wena Hotels Limited v. Egypt*.
166. See *supra* §1.3 for a discussion of diplomatic protection.
167. Art. 25(1), *supra* note 154.
168. Rules Governing the Additional Facility for the Administration of Proceedings By the Secretariat of the International Centre for Settlement of Investment Disputes. The original rules are published in 1 ICSID Reports 213. The rules were revised effective 1 Jan. 2003.

§1.22 OECD Convention on the Protection of Foreign Property In 1962 the OECD released the *Draft Convention on the Protection of Foreign Property*,[169] which was revised and approved by the OECD in 1967 (1967 Draft OECD Convention).[170] Given the membership of the OECD,[171] it is not surprising that the 1967 Draft Convention generally reflects the views of the major capital exporting states on the minimum standard of treatment. The 1967 OECD Council Resolution approving the Draft Convention highlights that it 'embodies recognised principles relating to the protection of foreign property' and that it 'will be a useful document in the preparation of agreements on the protection of foreign investment.'[172] The 1967 Draft OECD Convention sets out the minimum standards of treatment as follows:

> Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures. The fact that certain nationals of any State are accorded treatment more favourable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter.[173]

With respect to compensation for expropriation, the 1967 Draft OECD Convention reflects the Hull Rule requirement for prompt, adequate and effective compensation. Taking of property is to be:

> … accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto.[174]

Although the 1967 Draft OECD Convention failed to gain sufficient support among OECD countries for adoption as a multilateral convention,[175] its substantive provisions have served as an important model for bilateral investment treaties (BITs).[176] It should be noted that the 1967 Draft OECD Convention, although

169. (1963) 2 ILM 241.
170. (1968) 7 ILM 117.
171. *Supra* note 137.
172. Resolution of the OECD Council, 12 Oct. 1967, (1968) 7 ILM 117.
173. Art. 1(a), *ibid*., at 119. See *infra* Chapter 6, §6.4 *et seq.,* on the development of the minimum standard of treatment.
174. Art. 3, *ibid.*
175. This was due, in part, to the reluctance of some less developed members, including Greece, Portugal and Turkey, to be bound by the provisions. See, UNCTC, *Bilateral Investment Treaties* (New York: United Nations, 1988) (Doc. No. ST/CTC/65) at 7.
176. R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff Publishers, 1995) at 2.

setting out a mechanism for investor-state arbitration, conditions arbitration on a separate declaration of consent to arbitral jurisdiction by the state.[177]

§1.23 Charter of Economic Rights and Duties of States Throughout the late 1960s and 1970s, developing states sought to reconstruct the legal framework for international economic relations. In the UN, these efforts culminated in a series of General Assembly resolutions, including the 1974 *Declaration on the Establishment of a New International Economic Order* (NIEO Declaration) and the 1974 *Charter of Economic Rights and Duties of States* (Charter).[178] The NIEO Declaration asserts that the international economic system, including neo-colonialism and the inequitable distribution of income, are obstacles to developing states. While reaffirming the principle of permanent sovereignty over resources and economic activities, it sets out principles for a new system of economic relations, including such items as: terms of trade for raw materials and primary commodities; the reform of the international monetary system; the financing of development; the transfer of technology; and the regulation of transnational corporations.

The Charter elaborates on the principles in the NIEO Declaration and contains specific measures concerning foreign investment.[179] It affirms the right

177. See Art. 7, 1967 Draft OECD Convention, *supra* note 170.
178. 'General Assembly Resolution on Permanent Sovereignty over Natural Resources', GA Res 3171, 17 Dec. 1973, (1974) 13 ILM 238; 'Declaration on the Establishment of a New International Economic Order', GA Res 3201, 1 May 1974, (1974) 13 ILM 715; 'Charter of Economic Rights and Duties of States', GA Res 3281, 12 Dec. 1974, (1975) 14 ILM 251. For commentary, see M. Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979); I. Brownlie, 'Legal Status of Natural Resources In International Law (Some Aspects)' (1979) 162 RDCADI 245 [Brownlie, 'Legal Status of Natural Resources'] and N. Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997). See *supra* §1.20 on the 1962 Resolution 1803.
179. Section 2.2 of the Charter provides:

    1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
    2. Each State has the right:
        a. To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
        b. To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;
        c. To nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the questions of compensation give rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other

of states to regulate foreign investment within their jurisdictions and provides that no state can be compelled to grant 'preferential treatment' to foreign investment.[180] The Charter also states that transnational corporations are not to intervene in the internal affairs of states and affirms the right of states to regulate transnational corporations. Simultaneously, the Charter encourages states to co-operate in regulating the activities of transnational corporations.[181] In contrast to the 1962 General Assembly Resolution 1803 on Permanent Sovereignty over National Resources, which recognized that there is an international law standard of compensation for expropriation ('appropriate compensation'),[182] the Charter provides that compensation for expropriation is to be determined in accordance with national laws and omits any reference to international law or a minimum international standard in determining compensation.[183]

The Charter, like the NIEO Declaration, was an assertion of national sovereignty by developing states. Although the Charter was adopted by an overwhelming majority as a result of the numerical preponderance of developing states in the General Assembly, most developed states either voted against its adoption or abstained from voting.[184] In his influential arbitral award, *Texaco Overseas Petroleum Co. (TOPCO) and Californian Asiatic Oil Co. v. Libya*,[185] René-Jean Dupuy observed that although the 1962 Resolution 1803 on Permanent Sovereignty over Natural Resources was assented to 'by a great many states representing not only all geographic areas but also all economic systems,'[186] the NIEO resolutions – 3171, 3201 and 3281[187] – were supported 'by a majority of states but not any of the developed countries with market economies which carry on the largest part of international trade.'[188]

Although the Charter and NIEO Declaration were strong political and programmatic statements, as General Assembly resolutions, they have no binding force and did not purport to be restatements of existing law. Further, they had little long-term impact on state practice relating to foreign investment protection.

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

180. Subparagraph (a) was approved by 113 states and opposed by ten. Four states abstained from voting. See (1975) 14 ILM 251 at 264.
181. Subparagraph (b) was approved by 119 states and opposed by four. Six states abstained from voting. *Ibid.*
182. See *supra* §1.20.
183. Subparagraph (c) was approved by 104 states and opposed by sixteen. Six states abstained from voting. *Ibid.*
184. The Charter was adopted by a vote of 120 in favour to six against with ten abstentions. *Supra* note 180 at 251. Belgium, Denmark, Federal Republic of Germany, Luxembourg, UK and US voted against the Charter. Austria, Canada, France, Ireland, Israel, Italy, Japan, The Netherlands, Norway and Spain abstained from voting.
185. *Texaco Overseas Petroleum Co. (TOPCO) and Californian Asiatic Oil Co. v. Libya* (1977) 104 JDI 350 (French original), (1979) 53 ILR 389 (English translation).
186. *Ibid.*, 53 ILR at 487, para. 84.
187. *Supra* note 178.
188. *Supra* note 185, 53 ILR at 491, para. 86.

During the following decades, developing states entered into IIAs to promote and protect investments on terms that departed significantly from the principles reflected in the Charter and the NIEO Declaration.[189]

§1.24 Draft UN Code of Conduct on Transnational Corporations One of the clear objectives of the NIEO Declaration and the Charter was more stringent regulation of multinational enterprises.[190] In 1974, the UN Economic and Social Council established the Commission on Transnational Corporations, the primary purpose of which was to draft a Code of Conduct on Transnational Corporations (TNC Code of Conduct).[191] From the earliest discussions, disagreement emerged between capital exporting and importing states as to whether the Code would only apply to the conduct of transnational corporations or whether it would extend also to the treatment of TNCs by host states. In 1980, the Economic and Social Council decided the Code would address both issues.[192] For the next ten years the drafting of the Code's substantive provisions was characterized by continued disagreements over its content, inclusion of references to the minimum standard of treatment and compensation for expropriation, and its legal status.[193] Negotiations were suspended in 1992.[194]

§1.25 OECD Declaration on International Investment and Multinational Enterprises The 1976 OECD *Declaration on International Investment and Multinational Enterprises* (OECD Declaration)[195] was a response by OECD member states to the NIEO Declaration and Charter and the draft TNC Code of Conduct.[196] The OECD Declaration highlights the importance of international investment to economic development, commits the OECD states to national treatment of foreign enterprises,[197] and includes the *OECD Guidelines on Multinational Enterprises* (the Guidelines). In the OECD Declaration, the OECD

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189. T. Wälde, 'A Requiem for the "New International Economic Order": The Rise and Fall in International Economic Law and a Post-Mortem with Timeless Significance,' in G.L.G. Hafner *et al.*, eds, *Liber Amicorum Professor Siedl-Hohenveldern*, (The Hague: Kluwer Law International, 1998) 771.
190. *Supra* note 178.
191. See P. Muchlinski, *Multinational Enterprises and the Law*, 2nd edn (Oxford: Oxford University Press, 2007) [Muchlinski (2007)] at 660 and W. Spröte, 'Negotiations on a United Nations Code of Conduct for Transnational Corporations' (1990) 33 GYIL 331.
192. See P. Muchlinski, *Multinational Enterprises and the Law* (Cambridge, Mass: Blackwell Publishers, 1995) [Muchlinski (1995)] at 593.
193. The draft code is available in (1984) 23 ILM 626.
194. Muchlinski (1995), *supra* note 192 at 661. The last draft of the text of the code is dated 31 May 1990. In addition to the draft code, in 1977 the International Labour Organization adopted the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* setting out principles with respect to employment, training, conditions of work and life and industrial relations (1978) 17 ILM 422. See Muchlinski (1995), *ibid.*, at 473-506.
195. The *OECD Declaration and Decisions on International Investment and Multinational Enterprises*, DAFFE/IME(2000)20, available on the OECD website.
196. Muchlinski (2007), *supra* note 191 at 658.
197. See *infra* Chapter 4, §4.6 *et seq.,* with respect to the OECD National Treatment Instrument.

states recommend that multinational enterprises operating in or from their territories observe the Guidelines. The Guidelines provide voluntary principles and standards for responsible business conduct and encourage 'the positive contributions which multinational enterprises can make towards economic and social progress.'[198] The Guidelines set out standards for multinational enterprises in areas including disclosure, employment, environment, corruption, consumers, science and technology, competition and taxation. The Guidelines affirm that states have the right to regulate multinational corporations, subject to international law standards, although they do not elaborate on the content of those standards.[199]

§1.26 Lump sum agreements and national claims commissions A lump sum agreement is a settlement agreement whereby claimant and respondent states agree to settle claims through lump sum compensation. The claimant state then distributes the lump sum settlement amongst its nationals who have made claims, typically by establishing special domestic tribunals or claims commissions to adjudicate the merits of its nationals' claims.[200] In the past sixty years, states have concluded more than 200 lump sum agreements,[201] making them the primary method for settling international claims concerning the treatment of nationals and their property.[202] Lump sum agreements have been popular because they provide for a final settlement of claims between states and thus resolve the diplomatic, political and economic frictions caused by outstanding claims, while at the same time allowing states to avoid binding dispute settlement mechanisms and adjudication of the merits of any particular claim.

Despite the extensive practice involving lump sum agreements, there is a division of opinion on the jurisprudential significance of lump sum agreements.[203] Do lump sum agreements simply reflect negotiated resolutions of claims motivated by extra-legal considerations, or do they represent a source of customary

198. Para. 2. The original guidelines are reproduced at (1976) 15 ILM 967. The Guidelines have been reviewed four times since 1976 and were last updated in 2000. See OECD, The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarification, 31 Oct. 2001, DAFFE/IME/WPG(2000)15/FINAL.
199. Para. 8 of the Guidelines provides: 'Governments adhering to the Guidelines set them forth with the understanding that they will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations.'
200. The US has been a predominant practitioner in this area. The United States Foreign Claims Settlement Commission and predecessor US agencies have adjudicated more than 660,000 claims under forty-three claims programs. See online: <http://usdoj.gov/fcsc>.
201. See R.B. Lillich, 'Lump Sum Agreements' in *Encyclopedia*, *supra* note 8, Vol. III at 268.
202. D.J. Bederman, *Lump Sum Agreements and Diplomatic Protection*, Report for the International Law Association Committee on Diplomatic Protection of Persons and Property, 70th Conference, New Delhi 2002.
203. See R.B. Lillich & B. H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Charlottesville: University Press of Virginia, 1975); R.B. Lillich & B.H. Weston, *International Claims: Contemporary European Practice* (Charlottesville, VA: University Press of Virginia, 1982); B. H. Weston, R.B. Lillich & D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995* (New York: Transnational Publishers, 1999); and D.J. Bederman, *Lump Sum Agreements and Diplomatic Protection, ibid.*

international law reflecting legal determinations of claims? With respect to the admissibility of claims and claims involving state responsibility, there has been significant uniformity between the practices under lump sum agreements, the results of claims commissions and customary international law. Thus, although lump sum agreements are clearly influenced by extra-legal considerations, the international law relating to diplomatic protection and state responsibility has had a significant impact on the agreements and claims commission practice.[204]

One of the most controversial issues regarding lump sum agreements is the jurisprudential significance of the standard of compensation for expropriation. On the one hand, since most lump sum agreements provide for less than full compensation for large scale nationalizations, some international publicists argue that state practice supports the position that only partial compensation is required for large scale nationalizations.[205] On the other hand, others argue that it is difficult to generalize about the standard of compensation because different views on the amount of compensation for an expropriation may simply reflect different views of the merits of specific claims.[206] Further, settlements are often driven by political objectives and may not reflect general rules on standards of compensation.

§1.27 Investment disputes before the International Court of Justice Despite the intense conflict over the past sixty years regarding the standards that apply to foreign investment under customary international law, the International Court of Justice (ICJ) has played a minimal role in resolving foreign investment disputes and in the development of jurisprudence on substantive standards of foreign investment protection. Since the Court's creation in 1945, only six foreign investment related cases have been brought before it.[207] In three of these cases the ICJ held that it did not have jurisdiction to deal with the complaint, while the fourth

204. See R.J. Bettauer, 'International Claims: Their Settlement by Lump Sum Agreements, 1975-1995. (Review)' (2000) 94 AJIL 810. In his ILA report, *supra* note 202, Professor Bederman puts the position as follows: 'The jurisprudential significance of lump sum settlement lies not in their discount of the face value of claims, but, rather, in the substantive rules they articulate for such matters as claimant eligibility, attribution of State conduct, the nature of compensable claims, and the general standard and modalities of prompt, adequate and affective compensation.'

205. See discussion in Professor Bederman's ILA Report, *ibid.*

206. *Ibid.*

207. As of 1 Jun. 2008.

was denied on the merits. The fifth (*Ahmadou Sadio Diallo*)[208] and sixth (*Pulp Mills on the River Uruguay*)[209] claims are currently before the Court.

The first investment dispute before the ICJ was the 1952 *Anglo-Iranian Co. Case*,[210] which arose out of Iran's nationalization of its oil industry in 1951. The Court held that it lacked jurisdiction because Iran's 1930 declaration accepting the jurisdiction of the Court did not apply to treaties made prior to the declaration. The second dispute, the *Case of Certain Norwegian Loans*,[211] involved a claim by France that Norway had breached its obligations under a series of state bonds. Here the Court also held that it did not have jurisdiction based on the scope of Norway's declaration accepting the jurisdiction of the Court.

The *Barcelona Traction* case (1970)[212] was also one where the ICJ ultimately determined it did not have jurisdiction, but it remains both a controversial and important decision respecting international investment law. Belgium alleged that the acts and omissions of the Spanish courts in placing Barcelona Traction into bankruptcy constituted a denial of justice and an expropriation of the Barcelona Traction shares held by Belgian nationals. Spain objected to the ICJ's jurisdiction on the basis that Barcelona Traction was incorporated in Canada and that Belgium was not entitled to exercise diplomatic protection on behalf of a Canadian company, even if owned by Belgian shareholders. In a much criticized judgment,[213] a majority of the

208. *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*). The case arose out of the 1995 expulsion of Mr. Diallo from Zaire (the predecessor to the Democratic Republic of the Congo (DRC)). Mr. Diallo was the shareholder in several companies doing business in the DRC and incorporated in the DRC. In its Judgment on Preliminary Objections of 24 May 2007, the ICJ held that Guinea could not exercise diplomatic protection 'by substitution' on behalf of two private limited liability companies created under DRC law but held that Guinea had standing to bring a claim on behalf of Mr. Diallo as an individual and as majority shareholder (para. 65). At para. 61, the Court affirmed that: 'only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law.'

209. In *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Argentina has brought a claim against Uruguay alleging that the government of Uruguay unilaterally authorized the construction of two pulp mills along the River Uruguay, without the compulsory notification and consultation required under the Statute of the River Uruguay signed by both states in 1975. Argentina claims that the mills would have a deleterious effect on the biodiversity of the river and constitute a health hazard to the residents of the area. The pulp mills are to be built by two different foreign investors.

210. *Anglo-Iranian Oil Co. Case* (*UK v. Iran*), [1952] ICJ Rep 93.

211. *Case of Certain Norwegian Loans* (*France v. Norway*), [1957] ICJ Rep 9.

212. *Supra* note 25. For a fascinating discussion of the political and legal context of the case, see J. Brooks, 'Annals of Finance – Privateer' *The New Yorker*, 21 and 28 May 1979. Also see F.A. Mann, 'Protection of Shareholders' Interests in the Light of the Barcelona Traction Case' in F.A. Mann, *Further Studies in International Law* (Oxford: Clarendon Press, 1990) at 217.

213. See F.A. Mann, 'The Protection of Shareholders' Interests in Light of the Barcelona Traction Case' (1973) 67 AJIL 259; R.B. Lillich, 'Two Perspectives on the Barcelona Traction Case: The Rigidity of Barcelona' (1971) 65 AJIL 522; R. Higgins, 'Aspects of the Case Concerning

Court held that 'where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.'[214] As a result, Canada, not Belgium, was the proper party to bring a claim before the Court. This, however, was not possible as the Court did not have jurisdiction for disputes between Canada and Spain. In determining that it did not have jurisdiction, the Court highlighted that there had been an 'intense conflict of systems and interests'[215] concerning the protection of foreign investment and that states 'ever more frequently'[216] were providing foreign investment protection through bilateral and multilateral agreements. It noted that no such instrument was in force between Belgium and Spain.[217] By making these statements the ICJ signalled that progressive developments in international investment law would mainly be treaty-based.

The only case involving foreign investment that the ICJ has addressed on the merits to date is the *Elettronica Sicula S.p.A. (ELSI)* case *(*1982).[218] This case was brought under the 1948 Italy-US *Treaty of Friendship, Commerce and Navigation* (FCN), which provided for ICJ jurisdiction for disputes arising under the treaty.[219] Elettronica Sicula S.p.A. (ELSI) produced electronic components in Italy and was a subsidiary of two American corporations. ELSI's board of directors decided to shut down operations and liquidate ELSI to minimize ongoing losses. In order to protect employment, the local mayor issued a requisition order under which the town took temporary control of ELSI's factory. ELSI appealed this order and subsequently made a bankruptcy petition. The requisition order was later annulled by the Italian courts and the trustee in bankruptcy brought a suit for damages, arguing that the requisition order had caused the bankruptcy. In the case before the ICJ, the US claimed that the requisition, and the delay in overturning it, interfered with the American corporations' management and control of ELSI, as well as their interests in it, and causing the bankruptcy. The ICJ, however, found that

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the Barcelona Traction, Light and Power Company, Ltd.' (1970) 11 VJIL 327; F. Orrego Vicuña, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000) 15 ICSID Rev 340; and Orrego Vicuña, *The Changing Law of Nationality of Claims*, *supra* note 23.

214. *Supra* note 25 at para. 88.
215. *Ibid.*, at para. 89.
216. *Ibid.*, at para. 90.
217. *Ibid.*
218. *Supra* note 128. The decision was made by a Chamber of the ICJ consisting of Judges Ruda, Oda, Ago, Schwebel and Jennings. For commentary on the case see: F.A. Mann, 'Foreign Investment in the International Court of Justice: The *ELSI* Case' (1992) 86 AJIL 92; S.D. Murphy, 'The ELSI Case: An Investment Dispute at the International Court of Justice' (1991) 16 YJIL 391 and K.J. Hamrock, 'The *ELSI* Case: Toward an International Definition of 'Arbitrary Conduct', (1992) TILJ 837.
219. The factory was owned by ELSI, an Italian company, which was in turn wholly owned by two US corporations. The US claimed that Italy had breached the 1948 Italy-US FCN Treaty, a 1951 Supplementary Agreement to the FCN Treaty and customary international law. Art. I of the Supplementary Agreement provided protection against 'arbitrary or discriminatory measures … resulting particularly in: (a) preventing … effective control and management of enterprises … or, (b) impairing … other legally acquired rights and interests …'.

ELSI's bankruptcy was caused not by the requisition order, but rather by the company's precarious financial situation. The Court denied the US's claim that Italy's actions were covered by the FCN Treaty as the mayor's order did not cause or trigger the bankruptcy. It also denied the US's claim that ELSI's shareholders were deprived of their rights to dispose of property, holding that the mayor's action was not the cause of the property loss.[220] Of particular importance with respect to the minimum standard of treatment, the Court addressed the meaning of 'arbitrariness' in international law.[221]

The majority judgment in *ELSI* largely avoided the issue of whether the US was entitled to bring the claim under the FCN Treaty and proceeded on the basis that the property protected under the treaty was not ELSI's plant and equipment (its property), but ELSI itself (the company).[222] In his Separate Opinion, Judge Oda addressed the treaty rights afforded to US nationals with respect to shareholdings in Italian companies. In his view, the treaty did not augment the rights of shareholders and the US shareholders of ELSI could only claim those rights guaranteed to them as shareholders under Italian law.[223] In contrast, in his Dissenting Opinion, Judge Schwebel stated that the treaty protected shareholders' rights. In his view, the treaty's guarantees with respect to the organization, control and management of corporations protected the US shareholders' interests in ELSI.[224]

In its jurisprudence the ICJ has addressed few of the controversial legal issues relating to foreign investment, such as the responsibility of states to foreign investors under customary international law and the standard of compensation for the expropriation of foreign investment. The *Barcelona Traction* and *ELSI* cases, however, highlighted some of the procedural and substantive inadequacies with the diplomatic protection model in safeguarding shareholder interests. These uncertainties and inadequacies may have provided compelling rationales for the development of IIAs. The *Barcelona Traction* case demonstrated

220. See Hamrock, 'The *ELSI* Case: Toward an International Definition of 'Arbitrary Conduct' *supra* note 218 for a discussion of the case.
221. See *infra* Chapter 6, §6.9.
222. *Supra* note 128 at 64, para. 106. The issue of shareholder's rights in *ELSI* is discussed in V. Lowe, 'Shareholders' Rights to Control and Manage: From Barcelona Traction to ELSI,' in N. Ando, E. McWhinney & R. Wolfrum, eds, *Liber Amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002).
223. *Supra* note 128 at 87-88.
224. Judge Schwebel noted: 'it was maintained that the Treaty was essentially irrelevant to the claims of the United States in this case, since the measures taken by Italy (notably, the requisition of ELSI's plant and equipment) directly affected not nationals or corporations of the United States but an Italian corporation, ELSI, whose shares happened to be owned by United States corporations whose rights as shareholders were largely outside the scope of the protection afforded by the Treaty. The Chamber did not accept this argument. Nor did it accept the contention that the right to organize, control and manage a corporation was limited to the founding of a Company and the election of its directors and did not include its continuing management; nor that the right to control and manage was unaffected by the requisition of that corporation's plant and equipment.' *Supra* note 128 at 94-95. See also *ibid.*, at 100: 'the foreign investor shall enjoy the benefits of the Treaty and its Supplement, whether he invests in a corporation of his or the other party's nationality.'

that, depending on the place of incorporation of the investment vehicle, a home state may be unable to espouse the claims of its nationals. In addition, the Court signalled that clarification of the law in the area of foreign investment would need to be treaty-based given the intense conflict in the area. The opposing opinions of Judges Oda and Schwebel in *ELSI* highlighted the need for IIAs to address the extent to which investors holding shares in a corporation incorporated in a host state are entitled to claim for breaches of an IIA where the state measures in question are directed at the locally incorporated company. Finally, both *Barcelona Traction* and *ELSI* demonstrated that the diplomatic protection model was slow and cumbersome.[225]

§1.28 Iran-US Claims Tribunal The Iran-United States Claims Tribunal was established in 1981 to address claims by US and Iranian nationals arising out of the 1979 Iranian revolution.[226] This tribunal was the first international tribunal since WWII to consider a large number of investment claims. Its decisions have contributed substantially to international jurisprudence on state responsibility for injuries to foreigners.[227] Not surprisingly, the tribunal's jurisprudence has been cited extensively by investment treaty tribunals.[228]

§1.29 Foreign investment insurance Foreign investment insurance developed in the post-WWII era to provide foreign investors a mechanism to manage the inherent political risks of investing abroad.[229] National agencies were established by many capital exporting states to provide foreign investment insurance against political risks, including expropriation, restrictions on transfer of funds and political

225. The events giving rise to *Barcelona Traction* occurred between 1948 and 1952. Belgium's first ICJ application was filed in 1958. The final court judgment was delivered in 1970. The events giving rise to *ELSI* began in 1968. The US application to the ICJ was made in 1987 and the Chamber of the ICJ formed to deal with the case delivered its judgment in 1989.
226. The tribunal was established under the Claims Settlement Declaration, 19 Jan. 1981 (1981) 1 Iran-US CTR 9. See generally G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford: Clarendon Press, 1996); C.N. Brower & J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague: Martinus Nijhoff Publishers, 1998); D. Caron & J. Crook, *The Iran-United States Claims Tribunal and the Process of International Claims Resolution: A Study by the Panel on State Responsibility of the American Society of International Law* (Ardsley, New York: Transnational, 2000) and C. Gibson & C. Drahozal, *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State and International Arbitration* (Oxford: Oxford University Press, 2007).
227. As of 11 Jul. 2007, the tribunal had made final awards, decisions or orders in 3,936 cases. See Office of the Secretary-General of the Iran-United Stated Claims Tribunal, Communiqué, 25 Apr. 2008, No. 08/2.
228. See C. Gibson & C. Drahozal, 'Iran-United States Claims Tribunal Precedent in Investor-State Arbitration' (2006) 23 JIA 521.
229. See generally Chapter 3, 'Investment Insurance', in Rubins & Kinsella, *supra* note 5. Most private and public foreign investment insurers are members of the International Union of Credit & Investment Insurers (Berne Union). See online: <http://berneunion.org.uk>.

violence.[230] In 1985, the *Multilateral Investment Guarantee Agency* (MIGA) was created under the auspices of the World Bank to encourage foreign direct investment (FDI) flows between Member States and less developed countries by providing foreign investment insurance, technical assistance and policy advice.[231]

Foreign investment insurance mechanisms interact with investment treaty law in three important ways. First, in deciding whether to offer investment guarantees, insurers will look to whether a state has signed an IIA. In some cases, the existence of an IIA may be a precondition for providing political risk insurance.[232] For example, MIGA's Operational Regulations provide that, in considering the investment conditions of a host state for the purposes of assessing risks, an 'investment will be regarded as having adequate legal protection if it is protected under the terms of a bilateral investment treaty between the Host Country and the Home Country of the investor.'[233] Second, IIAs often provide for subrogation in investment treaty claims, thereby allowing the insurer who has paid a claim under a foreign investment policy to take up an investor's treaty claim.[234] Third, foreign investment insurance regularly covers risks such as expropriation and restrictions on transfers. A claims determination concerning foreign investment insurance, although based on the terms of a specific insurance contract, may address questions of state responsibility, such as attribution of responsibility or the types of conduct amounting to expropriation in international law.[235] Although foreign investment claim

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230. As of 1992, the US, German and Japanese state agencies accounted for over 80% of national political risk insurance. See M.D. Rowat, 'Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA' (1992) 22 HILJ 103 at 119 as quoted by Rubins & Kinsella, *supra* note 5 at 70. The US government's program is run by the Overseas Private Insurance Corporation (OPIC). Japan's insurer is Nippon Export and Investment Insurance (NEXI). In Germany, foreign investment insurance was formally provided through Treuarbeit. In early 2003, the German Government appointed a consortium formed by PricewaterhouseCoopers and Euler Hermes to manage its investment guarantee scheme. See Rubins & Kinsella, *ibid.*, at 94.
231. *Convention Establishing the Multilateral Investment Guarantee Agency* (1985) 24 ILM 1605 [*MIGA Convention*]. As of 28 Apr. 2008, MIGA had 172 members. Online: <miga.org>. For commentary, see P. Chatterjee, 'The Convention Establishing the Multilateral Investment Guarantee Scheme' (1987) 36 ICLQ 76 and I.F.I. Shihata, *MIGA and Foreign Investment: Origins, Operations, Policies, and Basic Documents of the Multilateral Investment Guarantee Agency* (Dordrecht: Martinus Nijhoff Publishers, 1988).
232. See UNCTAD, *supra* note 175 at 4.
233. Para. 3.16, MIGA, Operational Regulations, as amended by the Board of Directors through 27 Aug. 2002.
234. Subrogation agreements may also appear in separate agreements. For example, the US has investment guarantee agreements with a number of states that provide the right of OPIC to make a claim against the state where it has paid out on a political risk insurance policy. For example, see US-Poland Investment Guaranty Agreement, dated 13 Oct. 1989, TIAS 12039. In addition, MIGA is empowered to enter into investment guarantee agreements with states. See Art. 23(b)(ii), MIGA Convention, *supra* note 231.
235. For example, V.R. Koven, 'Expropriation and the "Jurisprudence" of OPIC' (1981) 22 HILJ 269. OPIC publishes its Memoranda of Determinations on its website.

determinations are based on contractual obligations, IIA tribunals have referred to claims determinations for guidance on legal issues arising under IIAs.[236]

III INTERNATIONAL INVESTMENT AGREEMENTS

§1.30 The origins of international investment agreements[237] The development of IIAs was primarily a response to the uncertainties and inadequacies of the customary international law of state responsibility for injuries to aliens and their property.[238] In addition, capital exporting states sought to obtain better market access commitments from capital importing states for investors and investment, and to obtain progressive development in the standards of investment protection. As already noted, although there were early efforts to create an international framework for foreign investment, disagreement between capital exporting and importing states about standards of treatment for foreign investors derailed the conclusion of a multilateral treaty. As a result, capital exporting states began concluding BITs dedicated to foreign investment promotion and protection.[239]

Prior to the development of the investment-focused BITs, treaty-based investment protection was available under some general economic treaties. As discussed above, after WWII numerous states, including the US and the UK, entered into FCN treaties that focused on the protection of property rights and the business interests of foreigners.[240] For example, the 1956 *Treaty of Friendship, Commerce and Navigation* between Nicaragua and the US, although not formally called a BIT, essentially served the same function – the treaty's preamble highlights the contribution to be made by 'mutually beneficial investments' between the two states. Indeed, the 1956 Nicaragua-US FCN Treaty might be considered as providing

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236. For example, several IIA tribunals, in discussing the meaning of expropriation in international law, have referred to the determination made in the arbitration *In the Matter of Revere Copper and Brass, Inc. and Overseas Private Investment Corporation* (Award, 24 Aug. 1978) 17 ILM 1321 and 56 ILR 258.
237. For a bibiliography of articles on books on BITs current to 1996, see the ICSID website. An earlier version of this bibliography is available in (1992) 7 ICSID Rev 497.
238. See UNCTC, *supra* note 175 at 1.
239. For an overview of treaty practice, see the following three comprehensive studies: UNCTC, *ibid*.; UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva: United Nations, 1998) (Doc. No. UNCTAD/ITE/IIT/7) and UNCTAD, *Bilateral Investment Treaties 1995-2006* (New York and Geneva: United Nations, 2007) (Doc. No. UNCTAD/ITE/IIT/2006/5). Also see the overview of BIT practice as of 1995 by Dolzer & Stevens, *supra* note 176. For the texts of specific BITs see the compilation of investment treaties in ICSID, *Investment Promotion and Protection Treaties*, looseleaf (Dobbs Ferry, New York: Oceana Publications Inc., 1983) [*Investment Protection Treaties*]. UNCTAD also has two comprehensive online databases on its website: one for BITs and one for other investment instruments.
240. See *infra* §1.17.