

7-1-1993

# ANCOM: A New Attitude Toward Foreign Investment?

Eduardo A. Wiesner

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## Recommended Citation

Eduardo A. Wiesner, *ANCOM: A New Attitude Toward Foreign Investment?*, 24 U. Miami Inter-Am. L. Rev. 435 (1993)

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# ANCOM: A NEW ATTITUDE TOWARD FOREIGN INVESTMENT?

EDUARDO A. WIESNER\*

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## I. INTRODUCTION

Since the 1980s, signatories to the Agreement on Andean Sub-regional Integration (Cartagena Agreement)<sup>1</sup> have taken unprecedented steps to attract foreign investment.<sup>2</sup> The enactment of favorable foreign investment laws and the creation of investment promotion agencies<sup>3</sup> are two such steps which demonstrate the new attitude of the Andean Common Market (ANCOM) member nations toward foreign capital. Today, foreigners may invest in most, if not all, sectors of the host countries' economies<sup>4</sup> and, in some instances, enjoy increased freedom with respect to remittance of profits.<sup>5</sup>

Despite ANCOM's recent efforts, foreign capital investment<sup>6</sup>

1. Agreement on Andean Subregional Integration, *opened for signature* May 26, 1969, translated in 8 I.L.M. 910 (1969) [hereinafter Cartagena Agreement]. The governments of Bolivia, Chile, Colombia, Ecuador, and Peru signed the Cartagena Agreement, the agreement which created the Andean Common Market. Venezuela joined the Andean Common Market in 1973, while Chile withdrew in 1976.

2. See generally *International Briefings*, INT'L FIN. L. REV., Jan. 1993, at 42; Sept. 1992, at 43-44; Aug. 1992, at 42; May 1992, at 44; Dec. 1991, at 41-43; Oct. 1991, at 42-43; see also *infra* text accompanying notes 101-98.

3. See *infra* text accompanying notes 101-98.

4. See *id.* In some instances, ANCOM member nations' laws do not require prior approval from state agencies for the entry of foreign capital.

5. See *id.*

6. This Article argues that, the liberalization of ANCOM member countries' investment climates has been limited to alterations in the macroeconomic factors affecting the flow of foreign direct investment. One author has divided those macroeconomic factors into three categories: institutional and policy, infrastructural, and legal. Ibrahim F. I. Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Invest-*

remains constrained by the tenets of an institutionalized legal framework. This framework is rooted in the Calvo Doctrine's restrictive approach to foreign investment in Latin America.<sup>7</sup> Thus, notwithstanding ANCOM's attempts to liberalize its foreign investment laws, the Calvo Doctrine's continued vitality has effectively neutralized the favorable impact of investment laws and impeded the influx of foreign capital.

In the late nineteenth and early twentieth centuries, Latin American republics—including those now comprising ANCOM—viewed the infusion of foreign capital into their local economies as a vehicle for wealthy nations of the world to intervene in their internal affairs.<sup>8</sup> Both foreigners and their capital were perceived as potential threats to the republics' sovereignty and natural resources. Thus, the Calvo Doctrine's two guiding principles evolved out of a desire to limit and control this perceived threat.<sup>9</sup> The first guiding principle posits that aliens should not be granted more rights and privileges than those accorded nationals, thus restricting aliens to seek redress for their grievances before the respective domestic tribunals under the respective domestic laws.<sup>10</sup> The second guiding principle holds that foreign states may not enforce their citizens' private claims by violating the territorial sovereignty of host states, either through diplomatic or forceful intervention.<sup>11</sup>

During the 1960s, foreign direct investment (FDI) comprised more than half of all private capital flowing from developed to developing countries (LDCs), "but by the late 1970s it represented barely one quarter of a much larger volume of such flows, most of which were accounted for by medium-term bank lending or export credits."<sup>12</sup> The oil crisis of 1973-74 further expanded commercial lending to oil producing LDCs because the enormous profits which oil producing nations invested in international banks amply financed the balance of payments, fiscal deficits, and investment

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*ment Guarantee Scheme*, 21 INT'L LAW., 671, 679-85 (1987).

7. See *infra* text accompanying notes 22-54.

8. See DONALD R. SHEA, *THE CALVO CLAUSE* 13-14 (1955).

9. *Id.*

10. CARLOS CALVO, *LE DROIT INTERNATIONAL THÉORIQUE ET PRACTIQUE* 118-64 (Arthur Rousseau ed., 5th ed. 1896).

11. *Id.*

12. FOREIGN PRIVATE INVESTMENT IN DEVELOPING COUNTRIES 3 (Int'l Monetary Fund, Occasional Paper No. 33, 1985) [hereinafter OCCASIONAL PAPER NO. 33].

programs of LDCs.<sup>13</sup>

However, economic events in the 1980s, principally the Latin American debt crisis, forced ANCOM countries to shift their attention from commercial loans back to FDI. The debt crisis caused "drastic reductions in net voluntary commercial bank lending to LDCs."<sup>14</sup> These reductions forced the LDCs to correct their external balances and seek alternative forms of external financing, most notably FDI.<sup>15</sup> As FDI flowed once again to developing countries, "global FDI figures grew from approximately \$47 billion in 1985 to \$132 billion in 1989."<sup>16</sup> At the same time, however, investment flows specifically to developed countries increased at a much faster rate than flows to developing countries.<sup>17</sup> Consequently, "the developing countries' [proportional] share of global FDI fell from approximately 24 percent to 13 percent over the same period."<sup>18</sup>

These figures suggest an apparent contradiction. If both ANCOM and its member states developed a more liberal attitude toward FDI to attract more investors, why then has ANCOM and its member states' share of FDI decreased despite the increase in global volume? The answer may lie in the capital-exporting nations' perceptions that, while ANCOM and its member states espouse a new openness to FDI, ANCOM's secondary<sup>19</sup> laws and its member states' supranational and foreign investment laws, remain true to the Calvo Doctrine's guiding principles.<sup>20</sup>

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13. *Id.* at 3-8.

14. See STIJN CLAESSENS, *ALTERNATIVE FORMS OF EXTERNAL FINANCE 1* (World Bank, Working Paper No. 812, 1991).

15. *Id.* The term "alternative finance" encompasses "all forms of external financing outside the public sector. . . . [Alternative finance] thus includes FDI, project lending, portfolio investment, closed-end equity funds, private non-guaranteed debt, licensing, joint ventures, quasi-equity contracts, and other forms of private-to-private lending." *Id.*

16. *Recent Trends in FDI for the Developing World*, FIN. & DEV., March 1992, at 50 [hereinafter *Recent Trends*].

17. *Id.*

18. *Id.* Although these statistics reflect all developing countries and not specifically ANCOM, one can infer that ANCOM's share of global FDI also fell; see also OCCASIONAL PAPER No. 33, *supra* note 12, at 3-4 (reporting that "[a]lmost all the decline in direct investment appears to be concentrated in the main borrowers in Latin America"); JOSHUA GREENE & DELANO VILLANUEVA, *PRIVATE INVESTMENT IN DEVELOPING COUNTRIES: AN EMPIRICAL ANALYSIS* (Int'l Monetary Fund, Working Paper No. 40, 1990). Chart 1, *Private Investment as a Percentage of GDP in Selected Developing Countries, 1975-87*, shows that private investment in Bolivia, Colombia, Ecuador, Peru, and Venezuela decreased from 1975-87.

19. "Legal norms enacted by the organization are called its 'secondary law,' the treaty establishing the organization being its primary law." IGNAZ SEIDL-HOHENVELDERN, *INTERNATIONAL ECONOMIC LAW* 77 (1989).

20. See *infra* text accompanying notes 57-198.

Generally, this Article explores how ANCOM's change in attitude toward FDI is reflected in both ANCOM's secondary laws and in the laws of ANCOM member states. Part II focuses on the Calvo Doctrine, the exemplification of Latin America's negative orientation toward foreign investors. Parts III and IV review ANCOM member states' bilateral and multilateral approaches to foreign investment to identify trends in expropriation, standard of treatment, settlement of disputes, and recognition of investors' rights to diplomatic protection.<sup>21</sup> This Article concludes that, unless ANCOM member states wrest their foreign investment laws from the still pervasive influence of the Calvo Doctrine, their share of the growing flows of FDI will increase at a disproportionately lower rate than if the Calvo Doctrine were put to rest.

## II. THE CALVO DOCTRINE

### A. History

To understand the Calvo Doctrine and its enacting legislation, one must first examine the historical environment that spawned it.<sup>22</sup> Argentine jurist Carlos Calvo<sup>23</sup> developed the Doctrine in 1868 as Latin America's response to foreigners who exploited the region's natural resources.<sup>24</sup> The French intervention in Mexico in 1861-62,<sup>25</sup> the combined German, British, and Italian action against Venezuela in 1902-03,<sup>26</sup> and the numerous instances of United States intervention in Central America throughout the late nineteenth and early twentieth centuries<sup>27</sup> constituted the *leitmotif* of Calvo and contributed to the suspicious and often hostile at-

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21. One should note that not every law studied in parts III. and IV. of this Article regulate all FDI. In particular, ANCOM member nations have passed specific laws governing foreign investment in natural resources such as oil and gas.

22. SHEA, *supra* note 8, at 9. See generally George Winfield Scott, *Hague Convention Restricting the Use of Force to Recover on Contract Claims*, 2 AM. J. INT'L L. 78, 81-94 (1908).

23. Carlos Calvo is best known for his writings in international law. See generally Alwyn V. Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law*, 40 AM. J. INT'L L. 121, 132 (1946); K. Lipstein, *The Place of the Calvo Clause in International Law*, 22 BRIT. Y.B. INT'L L. 130, 130 (1945); Lionel M. Summers, *The Calvo Clause*, 19 VA. L. REV. 459, 460 (1933); *Editorial Comment*, 1 AM. J. INT'L L. 129, 137-38 (1907).

24. SHEA, *supra* note 8, at 9.

25. *Id.* at 14. Soon after the French intervention, Emperor Napoleon III installed Maximilian as Emperor of Mexico.

26. *Id.* at 13.

27. See *id.* at 62-63.

titude toward foreign investment that still reigns throughout Latin America.<sup>28</sup>

From 1815 to 1830, the newly independent republics of Latin America were the most unstable members of the emerging world economy.<sup>29</sup> Adopting free trade policies to finance their armies through import-export taxes, Latin America's republics attracted an influx of primarily British capital and goods.<sup>30</sup> The republics' expenditures on imports soon outstripped their import-export tax revenues,<sup>31</sup> so Latin American countries turned to foreign loans for the first time.<sup>32</sup>

A Latin American mining boom strengthened between 1824-25, with English companies financing the region's mines.<sup>33</sup> The export-oriented economic policies that accompanied the foreign investment in mineral and other natural resources caused foreign capital to flow into Latin America, facilitating Latin American arms purchases.<sup>34</sup>

Their export-oriented policies economically benefitted the emerging countries until the first world financial crisis began in late 1825.<sup>35</sup> Because the financial crisis was due, in part, to Latin American nations excessive bond defaults, there was little to no foreign investment in the region for the next thirty-five years.<sup>36</sup>

FDI flows did not resume until English banks established branches in Argentina, Brazil, Peru, and Mexico in the 1860s.<sup>37</sup> The new wave of investments were "closely tied to the industrial

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28. See generally *id.* at 13-14.

29. PAUL JOHNSON, *THE BIRTH OF THE MODERN: WORLD SOCIETY 1815-1830* 883 (1991).

30. *Id.* at 884.

31. *Id.* at 884-85.

32. *Id.*

33. Irving Stone, *British Direct and Portfolio Investment in Latin America Before 1914*, 37 *J. ECON. HIST.* 690, 692 (1977).

34. JOHNSON, *supra* note 29, at 885-86.

35. *Id.* at 889. Describing the events leading up to the financial crisis, Johnson notes: Latin American mining shares had been drifting a little since January [1825], but at the end of October they fell dramatically and the panic began to gather momentum. In early November cotton-trading firms started to fail. The Bank of England tightened credit still further, and other London banks began to call in bills, chiefly from the country, to strengthen their reserves. . . .

That introduced the black month of December 1825, the beginning of the first world financial crisis.

*Id.*

36. CHARLES LIPSON, *STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES* 44-46 (1985).

37. *Id.* at 51.

needs of Europe and the United States.”<sup>38</sup> However, a conflict between investors seeking profits and Latin American governments seeking nationalization of foreign assets quickly ensued. Faced with the uncompensated seizure of their nationals’ assets, European nations and the United States began to use force to rectify what they perceived as outright robbery. Between 1820 and 1914, for example, Great Britain alone engaged in at least forty armed interventions into Latin America.<sup>39</sup> European nations and the United States believed that “it was their duty to extend the protection of international law to citizens wherever they might be.”<sup>40</sup>

As the armed interventions continued, political and legal debates grew between the capital-exporting nations and their host states in Latin America. Those debates centered on the sovereign rights of host nations to expropriate and the standards of compensation for expropriated property.<sup>41</sup>

### *B. International Property Rules*

The mere presence of foreign investors in Latin America posed complex legal problems because investors remained subject to the personal jurisdiction of their home states, yet became subject to the territorial jurisdiction of the foreign state in which they invested.<sup>42</sup> For example, where a citizen of State A lived and did business in State B, the question arose as to whether the municipal laws and territorial jurisdiction of State B prevailed, or whether international law gave states the right to protect their citizens in foreign countries when treatment accorded them fell below an international minimum standard.<sup>43</sup> Could the citizen of State A be subject to the territorial jurisdiction of State B while concurrently subject to the personal jurisdiction of State A? Did international law prevail over municipal law? Did territorial jurisdiction prevail over personal jurisdiction? Was jurisdiction based on a principle of exclusiveness, or could an act fall within the lawful ambit of more than one jurisdiction?<sup>44</sup>

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38. *Id.*

39. *Id.* at 54.

40. SHEA, *supra* note 8, at 11.

41. See LIPSON, *supra* note 36, at 55-56.

42. SHEA, *supra* note 8, at 4.

43. See, e.g., 1 L. OPPENHEIM, INTERNATIONAL LAW 344-45 (H. Lauterpacht ed., 8th ed. 1955).

44. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 311 (4th ed. 1990)



Latin America's need for foreign capital and technology to develop its natural wealth provided Calvo with an ideal laboratory in which to answer these theoretical questions. Factors such as broad-based economic imperialism during the turn of the century,<sup>46</sup> limited applicability of the Drago Doctrine,<sup>48</sup> generally accepted rules of national sovereignty, equality of states, and territorial jurisdiction fueled the principles of the Calvo Doctrine.<sup>47</sup> However, the Doctrine's underlying concepts of non-intervention (no right to diplomatic protection)<sup>48</sup> and absolute equality of foreigners with nationals (national treatment)<sup>49</sup> have been misinterpreted often. Calvo did not espouse state exemption from international inquiry or the abolition of diplomatic protection. Rather, he wished to prohibit world powers from protecting the rights of their nationals abroad who engaged in armed interventions in Latin American affairs.<sup>50</sup>

### C. *Implementation of the Calvo Doctrine*

ANCOM member states' implementation of the Calvo Doctrine through treaties, constitutional provisions, municipal laws, and contractual stipulations provides foreign investors with a clear but often unattractive legal framework that governs their investments. Multilateral instruments and individual foreign investment laws mirror the Calvo Doctrine's principles by guaranteeing foreign investors the same treatment as national investors and providing that only local courts and laws may settle investment disputes.<sup>51</sup>

Under ANCOM's implementation of the Doctrine, a breach of a private contract does not constitute an international wrong, and

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(rejecting the view that jurisdiction is based on a principle of exclusiveness).

45. SHEA, *supra* note 8, at 13-14.

46. The Drago Doctrine originated in a December 29, 1902 correspondence between the Argentine Minister of Foreign Relations, Luis Drago, and the Minister of the Argentine Republic to the United States, Martin Garcia Merou. The Ministers formulated what would become known as the Drago Doctrine: "the public debt can not occasion armed intervention nor even the actual occupation of the territory of American nations by a European power." PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, H.R. DOC. NO. 1, 58th Cong., 2d Sess. 4 (1903). The Drago Doctrine addressed only those conflicts stemming from "public debts" of American states. See Luis M. Drago, *State Loans in Their Relation to International Policy*, 1 AM. J. INT'L L. 692, 695 (1907).

47. SHEA, *supra* note 8, at 19.

48. *Id.*

49. *Id.* at 19-20.

50. See Freeman, *supra* note 23, at 136.

51. See *infra* text accompanying notes 57-198.

one can effectively waive the right to diplomatic protection by signing a clause to that effect in a private contract.<sup>52</sup> Neither ANCOM member countries' laws nor their constitutions recognize a right of foreign investors to appeal to the diplomatic protection of their home states.<sup>53</sup> The Calvo philosophy is so deeply-embedded that the need for foreign capital, in the midst of a net reduction in voluntary commercial bank lending,<sup>54</sup> has not forced ANCOM member states to reject those parts of the Calvo Doctrine that hurt FDI.

### III. MULTILATERAL INSTRUMENTS

Multilateral instruments dealing with foreign investment include United Nations General Assembly (G.A.) resolutions and decisions of bodies created by regional agreements, such as ANCOM.<sup>55</sup>

#### A. G.A. Resolutions

##### 1. General Principles

The Universal Declaration of Human Rights<sup>56</sup> is a non-binding declaration of principles that may protect foreign investors<sup>57</sup> because courts could use those human rights principles to adjudicate the legality of expropriations.<sup>58</sup> G.A. resolution 626 is a more specific legal declaration that addresses foreign investment and the

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52. See *infra* text accompanying notes 101-98.

53. *Id.*

54. OCCASIONAL PAPER NO. 33, *supra* note 12, at 3-4.

55. Other multilateral instruments include: 1) inter-governmental charters for the creation of international organizations; 2) draft codes by international non-governmental organizations, such as the International Chamber of Commerce (ICC); 3) regional multilateral instruments; 4) private draft conventions; 5) conventions drafted by regional economic international organizations, such as the Organization for Economic Cooperation and Development (OECD); 6) declarations of specialized international organizations, such as the International Labour Organization (ILO); universal international bodies, such as the United Nations Centre on Transnational Corporations (UNCTC); draft decisions on Trade Related Investment Measures (TRIMs); and the draft Agreement on Trade in Services of the General Agreement on Tariffs and Trade (GATT).

56. *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A810 (1948).

57. Peter T. Muchlinski, Lecturer of Multinational Enterprises and the Law, Address at the London School of Economics and Political Science (June 3, 1992).

58. *Id.* Some, however, question the viability of using the Declaration as a standard since most expropriations occur for economic, rather than discriminatory, reasons. *Id.*

exploitation of natural resources.<sup>59</sup> However, the relevance of these resolutions is questionable because they lack the binding force of conventions or United Nations Security Council decisions.<sup>60</sup> Moreover, article 38 of the Statute of the International Court of Justice does not list G.A. resolutions as a source of international law.<sup>61</sup>

Some G.A. resolutions either explicitly or implicitly acknowledge a host state's right to expropriate foreign-owned property.<sup>62</sup> Host states may exercise this right in pursuit of economic activities, and as a corollary to their absolute sovereignty over their mineral and other natural resources.<sup>63</sup>

Some G.A. resolutions mention public purpose as a factor in expropriation decisions,<sup>64</sup> while others do not.<sup>65</sup> The G.A. resolutions set forth differing views concerning amounts and types of compensation. G.A. Resolution 1803, for example, states that host nations shall pay investors appropriate compensation in accordance with both the law in force in the host state and international law.<sup>66</sup> Without mentioning international law, G.A. Resolution 3281 asserts a standard of "appropriate compensation," and refers "appropriateness" disputes to the nationalizing state's laws and tribunals.<sup>67</sup> It also provides that "[n]o State shall be compelled to grant preferential treatment to foreign investment."<sup>68</sup>

59. *Right to Exploit Freely Natural Wealth and Resources*, G.A. Res. 626, U.N. GAOR, 7th Sess., Supp. No. 20, at 18, U.N. Doc. A/2361 (1952).

60. *See Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 53 I.L.R. 389 (Int'l Arb. Trib. 1978). Professor René-Jean Dupuy acted as the sole arbitrator. *Id.* The case acknowledges that some G.A. Resolutions are essentially political declarations, lacking the jurisprudential support required to be considered part of international law. *See, e.g., id.* at 492.

61. Statute of the International Court of Justice, art. 38, *reprinted in* CHARTER OF THE UNITED NATIONS AND STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 100 (1946).

62. *See, e.g., Permanent Sovereignty Over Natural Resources*, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962) [hereinafter Resolution 1803].

63. *See, e.g., Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974) [hereinafter Resolution 3281].

64. *See, e.g., Resolution 1803, supra* note 62, at 15. Resolution 1803 concerns sovereignty over national resources and provides that "[n]ationalization, 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." *Id.*

65. *See, e.g., Resolution 3281, supra* note 63, at 50.

66. Resolution 1803, *supra* note 62, at 15.

67. Resolution 3281, *supra* note 63, at 50.

68. *Id.*

## 2. Effect of G.A. Resolutions on Newly Sovereign States

G.A. Resolution 1803 confirmed the applicability of international law to expropriation of alien property and required countries to pay appropriate compensation for such property.<sup>69</sup> As such, Resolution 1803 marked the beginning of what one author characterized as the challenge by newly independent states of the late 1950s and early 1960s to customary international law.<sup>70</sup> For centuries, imperial powers exploited colonial nations that had territories rich in mineral and natural resources.<sup>71</sup> Once colonial nations gained their independence, they sought to influence the formulation of a new system of international law to govern their relationships with foreign states and investors.<sup>72</sup> A debate over the meaning of appropriate compensation ensued.<sup>73</sup> Consistently, where the G.A. failed to couple the assertion of the right to expropriate with the expropriating nation's duty to pay appropriate compensation in accordance with international law, the United States and other major, capital-exporting nations withdrew their support.<sup>74</sup>

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69. Resolution 1803, *supra* note 62, at 15. In cases of nationalization, expropriation, or requisitioning:

[t]he 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.

*Id.* at 15 (emphasis added).

70. Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 478 (1991). Norton discusses the apparent inconsistencies between the recent rulings of international tribunals requiring full compensation for expropriated foreign property and the view espoused by newly independent states in the 1950s and early 1960s that "the customary international law of expropriation is dead." *Id.* at 475.

71. See generally, S.N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863, 866 (1961).

72. See *id.* at 865-68; see also Norton, *supra* note 70, at 478.

73. See Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259, 267-78 (1982) (discussing the meaning of "appropriate" compensation); Norton, *supra* note 70, at 478.

74. See Franziska Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment*, in 1 LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT 69 (1992). For an example of a resolution linking nationalization and compensation, see *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Sess., at 325, U.N. Doc. A/9946 (1974) [hereinafter Resolution 3201]. Resolution 3201 proclaimed the right of each state to exercise control over its natural resources, "including the right to [nationalize] or transfer ownership to its nationals . . ." *Id.* at para. 4(e). Not satisfied with the scope of the resolution, the capital-importing nations passed G.A. Resolution 3281 by a vote of 108 to 6, with 10 abstentions. Resolution 3281, *supra* note 63. All major capital-exporting nations opposed Resolution 3281 or abstained from voting on it. Without referring to international law, Resolution 3281's standard was appropriate compensation, with the host state's laws and tribunals to determine questions of appropriateness.

### B. Decisions of Regional Bodies

The Cartagena Agreement of 1969 is the basis for Andean treaty law on foreign investment.<sup>75</sup> Under article 27 of the Cartagena Agreement, Bolivia, Chile, Colombia, Ecuador, and Peru pledged to adopt a common system for the treatment of foreign capital.<sup>76</sup> In 1970, pursuant to that pledge, the Andean Commission issued Decision 24,<sup>77</sup> also known as the Foreign Investment Code.<sup>78</sup> At that time, most Latin American nations—particularly ANCOM member states—experienced a wave of protectionism which plagued them until the early 1980s.<sup>79</sup> In 1987, the Commis-

Under Resolution 3281, each state has the right:

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

*Id.* at 50.

75. See Cartagena Agreement, *supra* note 1.

76. The Cartagena Agreement established the Andean Board and the Andean Commission as the "principal organs of the Agreement." *Id.* art. 5. The Board is a technical body consisting of three members charged with acting in the collective interest of all members. *Id.* arts. 13, 14. The Board is responsible for, *inter alia*, supervising the implementation of the Andean Commission's decisions, *id.* art. 15(a), and preparing and submitting proposals to the Andean Commission that expedite compliance with the Agreement. *Id.* art. 15(c).

The Andean Commission "is the supreme organ of the Agreement, constituted by one plenipotentiary representative from each of the Member State Governments." *Id.* art. 6. The Andean Commission's main concern is "[t]o formulate the general policies of the Agreement and to adopt any measures necessary to achieve its objectives." *Id.* art. 7(a). Member states must implement the Andean Commission's measures within six months after the Andean Commission adopts them. *Id.* art. 27.

77. *Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties*, Decision 24 of Dec. 31, 1970, Commission of the Cartagena Agreement, reprinted in 16 LL.M. 138 (1977) [hereinafter Decision 24].

78. One commentator has characterized Decision 24 as a "new juristic phenomenon." Covey T. Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763, 763 (1972). Decision 24 is noteworthy because it has "launched the world's first multistate, or regional system of prior restraints on the entry of new private sector investment from [foreign investors] . . ." *Id.* at 777. For a discussion of the origins of Decision 24, see generally Ewell E. Murphy, Jr., *Decision 24, Mexicanization, and the New International Economic Order: The Anatomy of Disincentive*, 13 TEX. INT'L L.J. 289 (1978).

79. See Decree/Law 444, March 22, 1967 (Colom.), reprinted in 30 LEGISLACION ECONOMICA No. 348, at 191 (1967); Law 6, Sept. 6, 1971 (Colom.), reprinted in 39 LEGISLACION ECONOMICA No. 456, at 139 (1971).

sion repealed and replaced Decision 24 with Decision 220,<sup>80</sup> and in 1991, repealed and replaced Decision 220 with Decision 291.<sup>81</sup>

### 1. Standard of Treatment

ANCOM and its member countries apply Calvo's national standard to the treatment of foreign investors.<sup>82</sup> Article 50 of Decision 24 introduced the multilateral aspect of Calvo's national treatment standard into law.<sup>83</sup> It forbade ANCOM member countries from "grant[ing] to foreign investors any treatment more favorable than that granted to national investors."<sup>84</sup> It did not guarantee foreign investors the same treatment as nationals, and thus, inherently, Decision 24 appeared to refute any notion of a substantive international minimum standard of treatment for foreign investors. ANCOM restated its foreign investment standard in article 33 of Decision 220, which provided that "[m]ember countries [could] not grant foreign investors a more favorable treatment than that granted to national investors."<sup>85</sup> Although article 33's text differed slightly from that of article 50, the effects were identical: foreign investors were not to be granted rights greater than those granted to nationals.

The alleged shift in ANCOM's attitude toward foreign investment occurred in Decision 291,<sup>86</sup> the latest and most liberal of the Commission's decisions. The Commission intended Decision 291 to stimulate foreign capital and technology flows into ANCOM's sub-regions.<sup>87</sup> To realize this objective, ANCOM relaxed the absolute mandates of articles 50 and 33, allowing individual, member countries discretion in their treatment of foreign investors.<sup>88</sup> Article 2 of Decision 291 provides that "[f]oreign investors shall have the same rights and obligations as pertain to national investors, except

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80. *The Common Foreign Investment and Technology Licensing Code*, Decision 220 of May 11, 1987, Commission of the Cartagena Agreement, reprinted in 27 I.L.M. 974 (1988) [hereinafter Decision 220].

81. *Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses, and Royalties*, Decision 291 of Mar. 21, 1991, Commission of the Cartagena Agreement, reprinted in 30 I.L.M. 1283 (1991) [hereinafter Decision 291].

82. See Ewell E. Murphy, Jr., *The Andean Decisions on Foreign Investment: An International Matrix of National Law*, 24 INT'L LAW. 643 (1990).

83. Decision 24, *supra* note 77, art. 50.

84. *Id.*

85. Decision 220, *supra* note 80, art. 33.

86. Decision 291, *supra* note 81, art. 2.

87. *Id.* p.mbl.

88. *Id.* art. 2.

as otherwise provided in the legislation of each Member Country."<sup>89</sup>

## 2. Settlement of Disputes

The evolution of ANCOM's attitude toward the settlement of disputes with foreign investors parallels ANCOM's shift in standard of treatment of foreign investors. Initially, article 51 of Decision 24 provided that "[i]n no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors."<sup>90</sup> Article 51's inflexibility obliged all ANCOM nations to adhere to the Calvo Doctrine,<sup>91</sup> thereby denying foreign investors the right to address their grievances through diplomatic protection.

Article 34 of Decision 220 provided that, "[f]or the settlement of disputes or conflicts deriving from direct foreign investments or from the transfer of foreign technology, Member Countries shall apply the provisions established in their local legislation."<sup>92</sup> One writer argues that, while Decision 220 failed to completely rid Latin America of the ghost of Calvo and his doctrine, it denied the Doctrine, nevertheless "an ANCOM passport to roam the Andes at will."<sup>93</sup> Because article 34 left the solution of controversies to the internal legislation of each member country,<sup>94</sup> the legislation of each country must still be examined to determine the extent to which Calvo has actually been put to rest.<sup>95</sup>

Article 10 of Decision 291 conforms with article 34 of Decision 220. Regarding a foreign investor's right to diplomatic protection it states, "[t]he Member Countries shall apply that provided in their domestic legislation with respect to the solution of controversies or conflicts deriving from direct foreign investment or subregional investment or the transfer of foreign technology."<sup>96</sup>

Current foreign investment legislation seemingly upholds only

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89. *Id.*

90. Decision 24, *supra* note 77, art. 51.

91. Murphy, *supra* note 82, at 653.

92. Decision 220, *supra* note 80, art. 34.

93. Murphy, *supra* note 82, at 653.

94. Decision 220, *supra* note 80, art. 34.

95. See *infra* text accompanying notes 101-98.

96. Decision 291, *supra* note 81, art. 10.

one of Calvo's principles—national treatment. If, as this Article argues, national laws only permit the settlement of disputes before local courts and under local laws, then Calvo's other principle that there is no right to diplomatic protection must also survive. By restricting foreign investors' ability to submit disputes arising out of their investments to their own courts and laws, host states force the foreign investors to waive any right of diplomatic protection until they exhaust local remedies.<sup>97</sup> Thus, host states ensure that they come under the scrutiny of international law *only after* a denial of justice occurs at the host state level.<sup>98</sup> As ANCOM member countries' laws make available numerous, necessary procedural<sup>99</sup> and substantive remedies,<sup>100</sup> they essentially ensure that a taking of alien property does not result in an alien's immediate recourse to an international forum.

#### IV. NATIONAL APPROACHES TO FOREIGN DIRECT INVESTMENT

With the growing need for alternative financing in developing nations,<sup>101</sup> ANCOM liberalized its laws governing FDI<sup>102</sup> and ANCOM members loosened their laws implementing the Commission decisions.<sup>103</sup> Despite the heavier FDI flows that resulted during the second half of the 1980s, the developing countries' share of global FDI fell dramatically.<sup>104</sup> While real factors<sup>105</sup> in capital-receiving countries may have contributed to the drop in FDI to

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97. For a review of the concept of exhaustion of local remedies, see generally CHITTHARANJAN F. AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 215-49 (1990).

98. See generally *id.* at 31-51 (defining denial of justice).

99. See CÓDIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV.] arts. 451-59 (Colom.); Judgment of Nov. 20, 1986, Corte Suprema de Justicia, 187 GACETA JUDICIAL No. 2426, at 523, 527 (Colom.) (ruling that administrative findings that expropriations are for a public purpose should be challenged at the administrative stage).

100. See Judgment of Nov. 30, 1956, Corte Suprema de Justicia, 83 GACETA JUDICIAL No. 2174-2175, at 727 (Colom.) (discussing factors to be considered when determining just compensation for an expropriation).

101. See *supra* notes 14-18 and accompanying text.

102. See *supra* note 81 and accompanying text.

103. See *infra* text accompanying notes 101-98.

104. *Recent Trends*, *supra* note 16, at 50.

105. CLAESSENS, *supra* note 14, at 13. In discussing real factors, Claessens states: For capital to flow across borders, the risk-adjusted real rate of return in the capital receiving country must be higher than in the capital providing country. The higher rate of return can be due to a number of reasons. These could include different factor endowments—lower wage costs, more natural resources, lower transportation costs, lower initial physical capital stock, lower initial human capital stock, etc.



LDCs, this part examines ANCOM member countries' foreign investment laws to discern their role in this phenomenon. Specifically, this part seeks to determine whether individual ANCOM member states' foreign investment laws have actually modified the way host countries deal with foreign investment, or whether the laws represent nothing more than a new gloss on Calvo Doctrine principles.

*A. Individual Laws on Expropriation*<sup>106</sup>

In the context of modern international law, a state exercising its sovereign right to expropriate alien property must do so in pursuit of a public purpose, in a nondiscriminatory manner, upon payment of compensation, and subject to due process of law.<sup>107</sup> Though nations generally adhere to these expropriation requirements, LDCs and capital-exporting nations disagree on whether to follow the traditional "prompt, adequate, and effective" standard for compensation, or whether to leave the question of compensation to the expropriating state's respective law.<sup>108</sup>

The Hull Formula<sup>109</sup> details the traditional standard of compensation for expropriated property adopted by "a number of the major capital-exporting countries" and incorporated in many bilateral investment treaties.<sup>110</sup> In 1940, in response to Mexico's expropriation of American oil companies' property, Secretary Hull made the now famous statement that "the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation."<sup>111</sup> The United States

106. For a study of the rules of positive international law on the expropriation of foreign property see generally John H. Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L L. 243 (1941).

107. UNITED NATIONS CTR. ON TRANSNAT'L CORP., *BILATERAL INVESTMENT TREATIES* at 49, U.N. Doc. ST/CTC/65, U.N. Sales No. E.88 E.88/II/A.1 (1988) [hereinafter *BILATERAL INVESTMENT TREATIES*].

108. *Id.*

109. The Hull Formula is named after Cordell Hull, former United States Secretary of State. WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 687 (2d ed. 1962).

110. *BILATERAL INVESTMENT TREATIES*, *supra* note 107, at 49; *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 712 cmt. c (1987) [hereinafter *RESTATEMENT*].

111. Note from Cordell Hull to Mexico's Ambassador to the United States (April 3, 1940), reprinted in BISHOP, *supra* note 109, at 687. See generally Frank G. Dawson and Buins H. Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?*, 30 *FORDHAM L. REV.* 727 (1962); Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981); M. Sornarajah, *Compensation*

has consistently maintained that Hull's "'prompt, adequate, and effective' standard of compensation is required by international law."<sup>112</sup> Most LDCs, on the other hand, have passed resolutions giving states the right to expropriate property if they pay "appropriate compensation."<sup>113</sup> The LDCs' rejection of the Hull Formula may evince international law's discontinuation of the requirement for full compensation for the expropriation of foreign property.<sup>114</sup> ANCOM member countries' constitutions and national laws concerning foreign investment are consistent with this LDC approach to compensation.

### 1. Bolivia

Article 22 of the Bolivian Constitution sets forth general principles for the treatment of foreigners and governs expropriation.<sup>115</sup> It permits the taking of foreign-owned property for public utility reasons and guarantees prior payment of just compensation.<sup>116</sup>

A bilateral investment treaty between Bolivia and the United Kingdom (U.K.-Bolivia BIT)<sup>117</sup> permits expropriation of foreign-owned property provided that payment of just and effective compensation is made and that the expropriation is necessary to effectuate a public purpose.<sup>118</sup> The BIT also requires that expropriations be carried out in a manner that guarantees payment of prompt, adequate, and effective compensation.<sup>119</sup>

### 2. Colombia

Article 58 of the Colombian Constitution requires private property interests to yield to public or social interests.<sup>120</sup> In most

for Expropriation: *The Emergence of New Standards*, 13 J. WORLD TRADE L. 108 (1979).

112. See RESTATEMENT, *supra* note 110, § 712 cmt. c; see also Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121 (1984).

113. See *supra* notes 62, 63 and accompanying text.

114. Norton, *supra* note 70, at 474.

115. BOL. CONST. art. 22, translated in 2 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 25 (Albert P. Blaustein & Gisbert H. Flanz eds. & Gisbert H. Flanz et al. trans., 1992).

116. *Id.*

117. Agreement for the Promotion and Protection of Investments, May 24, 1988, U.K.-Bol., 1990 Gr. Brit. T.S. No. 34 (Cm 1071) [hereinafter U.K.-Bolivia BIT].

118. *Id.* art. 5(1).

119. *Id.* art. 5(2).

120. COLOM. CONST. art. 58, translated in 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 9-10 (Albert P. Blaustein & Gisbert H. Flanz eds. & Peter B. Heller trans., 1991).

instances of expropriation, the judiciary or an administrative agency determines the amount of compensation.<sup>121</sup> However, Colombia's legislative body "may [for equitable reasons] determine those cases in which there is no ground" for compensation.<sup>122</sup> Thus, the Colombian Constitution does not conform to the Hull Formula for compensation.

### 3. Ecuador

The Ecuadoran Constitution recognizes and guarantees the right to own property,<sup>123</sup> provided ownership serves a social function.<sup>124</sup> Municipalities are empowered to expropriate to promote the right to housing and to conserve the environment.<sup>125</sup> However, Ecuador's Constitution is void of any reference to a standard of compensation.

### 4. Peru

Peru's Constitution guarantees nationals and foreigners the right to own property.<sup>126</sup> The state may limit that right for legally defined public utility or social interest reasons only.<sup>127</sup> In cases of war or agrarian reform, the state may elect to compensate property owners in cash or government bonds, with payment in full or in installments.<sup>128</sup> Thus, Peru's Constitution does not conform to the tenets of the Hull Formula.

### 5. Venezuela

In Venezuela, the state may expropriate any property for public utility or social interest reasons, after obtaining a final judgment and paying fair compensation.<sup>129</sup> Confiscation of any prop-

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121. *Id.*

122. *Id.*

123. ECUADOR CONST. art. 48, translated in 5 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 21 (Albert P. Blaustein & Gisbert H. Flanz eds. & Louise Moreno trans., 1987).

124. *Id.* art. 48.

125. *Id.* art. 50.

126. PERU CONST. art. 126, translated in 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 65, 67 (Albert P. Blaustein & Gisbert H. Flanz eds. & Louise Moreno trans., 1989).

127. *Id.* art. 125.

128. *Id.*

129. VENEZ. CONST. art. 101, translated in 20 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 16 (Albert P. Blaustein & Gisbert H. Flanz eds. & Gisbert H. Flanz trans., 1983).

erty may neither be decreed nor executed except when Congress, by an absolute majority, orders the taking of property of those individuals who were "unlawfully enriched under the protection or usurpation of power by illegitimate rulers."<sup>130</sup>

*B. Analysis of the ANCOM Countries' Laws on Expropriation*

With one exception, recent international arbitral tribunal decisions have upheld the principle that, where possible, a state must pay full market value for a foreign national's expropriated property.<sup>131</sup> However, by requiring only just compensation—an ambiguous term subject to each country's individual interpretation—ANCOM member countries have implicitly rejected the full compensation standard. ANCOM member countries' rejection of the Hull Formula in their laws on expropriation may support the view that, since the Hull Formula grew from nineteenth century liberal capitalism,<sup>132</sup> it is inconsistent with more recent theories on the relationship between property and the state.<sup>133</sup>

Most ANCOM member states rely on constitutional and internal laws when expropriating foreign investors' assets.<sup>134</sup> Almost uniformly, the member states reject a right based on international law traditions of prompt, adequate, and effective compensation.<sup>135</sup> Often, investors are guaranteed just compensation.<sup>136</sup> Those foreign investors who appreciate the potentially limited nature of the compensation afforded them by ANCOM member states' expropriation laws invest their money elsewhere or risk expropriation-related loss within ANCOM countries.

*C. Standard of Treatment Toward Foreigners*

The Calvo Doctrine concepts of non-intervention and absolute equality of foreigners with nationals served as a basis for the estab-

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130. *Id.* art. 102. Moreover, any confiscation of foreigners' property permitted by international law is excepted from this provision. *Id.* art. 102.

131. See Norton, *supra* note 70, at 488.

132. See Dawson and Weston, *supra* note 111, at 728-29.

133. See generally Higgins, *supra* note 73, at 273-78 (describing the historical evolution of state views on private property).

134. See *supra* text accompanying notes 107-30.

135. *Id.*

136. *Id.*

lishment of the equal treatment standard still favored in Latin America.<sup>137</sup> Beginning in 1855, Latin American countries placed aliens on the same level as nationals in civil matters.<sup>138</sup> Years later, during the First International American Conference in Washington, D.C.,<sup>139</sup> those assembled passed a resolution which recognized the equal civil rights status shared by natives and foreigners.<sup>140</sup> The resolution stated that "[a] nation has not, nor recognizes in [favor] of foreigners any other obligations than those which in favour of the natives are established, in like cases, by the constitution and the laws."<sup>141</sup> In response, the world powers made it clear that they expected national treatment to remain within the boundaries of an international minimum standard.<sup>142</sup> The 1933 Convention on the Rights and Duties of States<sup>143</sup> reinforced the equal treatment standard inspired by the Calvo Doctrine.<sup>144</sup>

One commentator has called the doctrine of absolute equality between nationals and foreigners "incompatible with the supremacy of international law."<sup>145</sup> Many nations view discriminatory acts by a state against an alien's property as violations of international law.<sup>146</sup> Therefore, these nations assert that, regardless of a country's standard of treatment toward its nationals, it must act according to a universally recognized minimum standard of treatment toward aliens in cases of expropriation.<sup>147</sup>

Thus, two very different schools of thought have emerged: the national treatment standard and the international minimum treatment standard.<sup>148</sup> ANCOM member states' foreign investment laws

137. See SEIDL-HOHENVELDERN, *supra* note 19, at 135.

138. In 1855, Venezuelan statesman Andrés Bello drafted the Chilean Civil Code, the first Latin American code to grant aliens and nationals civil equality. Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 MICH. L. REV. 445, 450 (1940).

139. The Conference took place in 1889-90. SEIDL-HOHENVELDERN, *supra* note 19, at 135.

140. *Id.*

141. *Id.*

142. *Id.*

143. Convention on Rights and Duties of States, Dec. 26, 1933, T.S. 881, 165 L.N.T.S. 19.

144. Article 9 of the Convention provided that "[n]ationals 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." *Id.* art. 9.

145. Borchard, *supra* note 138, at 452.

146. See BROWNLIE, *supra* note 44, at 532-33.

147. *Id.*

148. See generally *id.* at 523-25 (explaining both the national treatment standard and the international minimum treatment standard).

reflect the influence of the national treatment standard.

*D. Individual Laws on Standard of Treatment*

1. Bolivia

Bolivian Law No. 1182 (Bolivian Foreign Investment Law) governs its foreign investment.<sup>149</sup> Article 2 of the Bolivian Foreign Investment Law expressly adopts the national treatment standard by providing that, "except where otherwise established by law, foreign investors and the entities or companies in which they take part, have the same rights, duties and guarantees that the laws and regulations give to national investors."<sup>150</sup>

The U.K.-Bolivia BIT establishes the standard of treatment for British investment in Bolivia and vice-versa.<sup>151</sup> The BIT provides that:

Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.<sup>152</sup>

Article 3 further establishes the primacy of the national treatment standard with the following language:

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their invest-

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149. Ley de Sept. 17, 1990, Inversiones No. 1182, GACETA OFICIAL DE BOLIVIA, Sept. 26, 1990 [hereinafter Bolivian Foreign Investment Law].

150. *Id.* art. 2.

151. U.K.-Bolivia BIT, *supra* note 117, art. 2(2).

152. *Id.*

ments, to treatment less favorable than that which it accords to its own nationals or companies or to nationals or companies of any third State.<sup>153</sup>

## 2. Colombia

Articles 1 and 3 of Law 09 of 1991 regulate foreign investment and foreign exchange in Colombia.<sup>154</sup> Pursuant to these provisions, the National Economic and Social Policy Council of Colombia (CONPES) issued Resolution 51 of 1991.<sup>155</sup> That Resolution promotes and regulates foreign capital investment in Colombia without reference to other laws, decrees or resolutions.<sup>156</sup> Resolution 51 does not use the term "foreign investment." Rather, it adopts the broader phrase, "international investments," in order to encompass investments made in Colombia by non-residents, as well as those made outside Colombia by residents.<sup>157</sup>

Article 2 of Resolution 51 uses economic criteria to define "investments."<sup>158</sup> Both Articles 2 and 4 use the phrase "investments

153. *Id.* art. 3. The U.K.-Bolivia BIT embodies the concept of most-favored-nation relationships between countries. For an interpretation of the most-favored-nation treatment standard, see Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 668 (1990) (stating that "[m]any BITs contain 'most-favored-nation clauses' that guarantee treaty-protected investments will receive treatment at least as favorable as the treatment the host country grants to investments by nationals and companies from any third state").

154. See *Nuevo Regimen de Capitales Internacionales*, REVISTA DE LEGISLACION ECONOMICA, Feb. 28, 1991, at 241 (Colom.). CONPES Resolution 51 made adjustments to the original Statute of International Investments of Colombia contained in CONPES Resolution 49 of 1991 which was published in the *Diario Oficial* No. 39.650, January 30, 1991. The Statute incorporates all previous legislation that dealt with foreign investment, i.e., Decree 444 of 1967, CONPES Resolution 17 of 1972, Decree 1265 of 1987, Law 74 of 1989 and Law 45 of 1990. For a thorough study of CONPES Resolution 49 of 1991, see Alejandro C. Linares, *Apuntes en Torno al Nuevo Régimen General de las Inversiones de Capital del Exterior en Colombia*, REVISTA DE LA ASOCIACIÓN DE DERECHO ECONOMICO DE COLUMBIA (1991).

155. Resolución 51 del Consejo Nacional de Política Económica y Social (Colom.) reprinted in REVISTA DE LEGISLACION ECONOMICA 1991 (Colom.) [hereinafter Resolution 51].

156. *Id.* art. 1.

157. *Id.* arts. 1, 2, 5 and 60. Thus, it governs investments in Colombia by both Colombian and British citizens residing in England.

158. Article 2 provides:

International investments, subject to the present Statute, are foreign capital investments, understood to be the investments made in Colombian territory by natural persons not resident in Colombia and by foreign persons, as well as the investments made by a national in the country residing outside its territory or in a Colombian free trade zone.

*Id.* art. 2 (author's trans.).

of foreign capital” and remove the focus on investor’s nationality, replacing it with a territorial focus.<sup>159</sup> Article 3 of Resolution 51 establishes the national treatment standard:

Subject to Article 100 of the Constitution of Colombia, and to Article 15 of Law 09 of 1991, and except for those matters relating to the transfer of funds abroad, the investment in Colombia of foreign capital will be treated, for all effects and purposes, in the same way as are the investments of residents in Colombia. Consequently, and without prejudice to the provisions set forth in special regulations or regimes, no discriminatory conditions or treatments may be imposed on those who invest foreign capital vis-á-vis national private resident investors, nor may investors of foreign capital be given a more favorable treatment than that granted to national private resident investors.<sup>160</sup>

### 3. Ecuador

Executive Decree 2501 of 1991,<sup>161</sup> issued in observance of ANCOM Decisions 291 and 292,<sup>162</sup> establishes Ecuador’s foreign investment regime. Ecuador’s national treatment standard stems from Article 14 of the Ecuadoran Constitution.<sup>163</sup> Article 14 provides that, with the exception of limitations established in the Constitution and by law, foreigners enjoy, generally, the same rights as do Ecuadorans.<sup>164</sup> Furthermore, article 4 of Executive Decree 2501 states that:

[b]ased upon the provisions set forth in Article 14 of the Constitution of the Republic, and upon Article 2 of Decision 291, foreign investors, sub-regional and neutral, shall enjoy in Ecuador the same rights and shall have the same treatment as national investors.<sup>165</sup>

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159. *Id.* arts. 2, 4. Article 4 considers direct, indirect, and portfolio investments as foreign capital investments. *Id.* art. 4.

160. *Id.* art. 3 (author’s trans.). The principle of equal treatment established by Resolution 51 does not apply to the taxation of foreign investment. *Id.*

161. Exec. Decree 2501, REGISTRO OFICIAL, June 17, 1991, at 2 (Ecuador) [hereinafter Exec. Decree 2501].

162. *Id.* p.mbl.

163. ECUADOR CONST. art. 14.

164. *Id.*

165. Exec. Decree 2501, *supra* note 161, art. 4 (author’s trans.).



#### 4. Peru

Peru's Legislative Decree 662 of 1991<sup>166</sup> has as its objective the removal of:

[o]bstacles and restraints to foreign investors in order to guarantee the equality of rights and duties applicable to foreign and national investors. . . . The Government must grant foreign investors a regime of legal stability through the recognition of certain guarantees that ensure the continuity of existing regulations.<sup>167</sup>

Article 2 of Decree 662 establishes the national treatment standard for foreign investors in Peru by providing that, except for constitutional and decree limitations, foreign investors and their companies have rights and obligations equal to those of national investors and companies.<sup>168</sup>

#### 5. Venezuela

Article 45 of the Venezuelan Constitution provides that, "subject to the limitations or exceptions contained in this Constitution and the law, foreigners have the same rights and duties as do Venezuelans."<sup>169</sup> Decree 2095 of 1992<sup>170</sup> governs foreign investment in Venezuela and states that, subject to limited exceptions, "foreign investors will have the same rights and obligations as national investors."<sup>171</sup>

#### *E. Individual Laws on Diplomatic Protection and Dispute Resolution*

One of the Calvo Doctrine's cardinal principles is that states may not intervene, diplomatically or otherwise, to enforce the rights of their citizens in a foreign country.<sup>172</sup> Consistent with that principle, the laws of certain ANCOM member countries deny for-

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166. Legis. Decree 662, EL PERUANO, Sept. 2, 1991 (Peru) [hereinafter Legis. Decree 662].

167. *Id.* pmb. (author's trans.).

168. *Id.* art. 2.

169. VENEZ. CONST. art. 45.

170. Decree 2095, GACETA OFICIAL, March 25, 1992 (Venez.) [hereinafter Venezuela Investment Law].

171. *Id.* art. 13.

172. See SHEA, *supra* note 8, at 19.

eigners a right to diplomatic protection,<sup>173</sup> except in the event of a denial of justice.<sup>174</sup> These laws raise certain fundamental questions: whether diplomatic protection is an established right under traditional international law; whether host states may unilaterally deny a foreign national the right to diplomatic protection; and, assuming a right to diplomatic protection exists, whether citizens may waive that right and bind their home states by that waiver?

Historically, capital-exporting nations have held that "an injury done by one state to a citizen of another state through a denial of justice is an injury done to a state whose national is injured. The right of his state to extend what is known as diplomatic protection cannot be waived by the individual."<sup>175</sup>

In *North American Dredging Co. v. United Mexican States*,<sup>176</sup> the Mexico-United States Claims Commission held that, under the rules of international law, an alien could promise (1) not to seek the diplomatic protection of his home state and (2) to submit all matters arising from his activities in the host country to the local jurisdiction.<sup>177</sup> However, the Commission went on to state that an alien could not "deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his [detriment]."<sup>178</sup> Thus, an alien's waiver of diplomatic protection, either by contractual agreement or submission to the constitution and laws of the host state, does not appear to vitiate the home state's right to invoke the remedies afforded under international law.

International law traditionally governs a state's international

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173. One commentator has observed that:

[d]iplomatic protection is merely the advancing of a claim in diplomatic form without the exertion of any force behind it, without any coercion behind it. It simply asks the defendant country to submit to the process of law. Why should any country object to that? Why should any country regard it as an insult to be asked to conform to the rule of law, and even to be willing to submit an issue to arbitration?

10 PROCEEDINGS OF THE EIGHTH AMERICAN SCIENTIFIC CONGRESS, WASHINGTON D.C. 71 (Dep't of State 1943).

174. In international law, denial of justice means that "the state's responsibility is engaged by every act (or omission) on the part of officials charged with administering justice to aliens which fails to meet certain reasonable civilized standards, regardless of its propriety as tested by the respondent state's national law." Freeman, *supra* note 23, at 123.

175. *Id.* at 130 n.44 (quoting 1926 letter from the U.S. Secretary of State to the Mexican Minister of Foreign Affairs in S. Doc. No. 96, 69th Cong., 1st Sess. 22).

176. 4 R.I.A.A. 26 (Mex.-U.S. 1926).

177. *Id.* at 29.

178. *Id.*

obligations, regardless of contrary provisions in a state's municipal laws.<sup>179</sup> Increasingly, however, LDCs are allowing aliens to turn to their home states for assistance only where exhaustion of local remedies has ended in a denial of justice. All ANCOM member states have incorporated this aspect of Calvo's political theory into their laws.

The following country by country discussion of individual laws on diplomatic protection and dispute resolution reveals that the domestic courts of those ANCOM member states favoring the national treatment standard tend to adhere to a common set of legal provisions when settling disputes between foreign investors and host states.

### 1. Bolivia

Article 24 of the Constitution of Bolivia expressly denies foreigners the right to diplomatic protection by stating that "[f]oreign subjects and enterprises are subject to Bolivian laws, and in no case may they . . . have recourse to diplomatic claims."<sup>180</sup> If foreign companies or individuals feel that they have been denied justice, they must seek redress within Bolivian law, using the *Recurso de Amparo*.<sup>181</sup>

Pursuant to the Bolivian Constitution, foreigners are subject to Bolivian laws and may not seek recourse to diplomatic protection unless permitted by law.<sup>182</sup> Article 10 of the Foreign Investment Law of Bolivia permits investors to agree to settle their disputes in courts of arbitration.<sup>183</sup> Accordingly, cases involving technical disputes may be referred to international arbitration panels governed by international arbitration rules.<sup>184</sup> Investment disputes between the United Kingdom and Bolivia are controlled by the U.K.-Bolivia BIT which distinguishes between disputes arising between investors and host states, and those arising between privately contracting parties.<sup>185</sup> This Article addresses the former. Where an issue concerning an investor in a host state

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179. See, e.g., Borchard, *supra* note 138, at 447.

180. BOL. CONST. art. 24.

181. Letter from Mr. Fernando Rojas to Mr. Eduardo A. Wiesner (May 29, 1992) (on file with author).

182. BOL. CONST. art. 24.

183. Bolivian Foreign Investment Law, *supra* note 149, art. 10.

184. *Id.*

185. See U.K.-Bolivia BIT, *supra* note 117, arts. 8, 9.

arises and is not resolved within the six-month period following the filing of a written claim, the parties may agree to international arbitration before any one of the following organizations: (1) the International Center for the Settlement of Investment Disputes; (2) the Court of Arbitration of the International Chamber of Commerce; or (3) an international arbitrator or ad hoc arbitration tribunal to be appointed by special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.<sup>186</sup>

## 2. Colombia

Colombian law denies foreign capital investors the right to diplomatic protection.<sup>187</sup> Colombia's Commercial Code regulates the administration of contracts with foreigners.<sup>188</sup>

Though Colombia maintains a sovereign right to jurisdiction over all investors within its borders, it does not preclude foreign investors from filing suits related to their Colombian investments outside Colombian territorial jurisdiction. Article 23 of Resolution 51 states that:

[e]xcept as provided by in international treaties and conventions in force, the provisions set forth in Colombian law shall be applied to the resolution of controversies or conflicts derived from the application of the Regime of Investments of Foreign Capital [the Statute]. International arbitration will be subject to the provisions of Decree 2279 of 1989 as well as the norms and regulations that amend or supplement it.

With the same exception established in the preceding paragraph and without prejudice to actions that may be brought before foreign jurisdictions, all matters pertaining to the investment of capital from abroad will also be subject to the jurisdiction of Colombian tribunals as well as to Colombian arbitration rules.<sup>189</sup>

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186. *Id.* art. 8.

187. Colombia's denial of diplomatic protection is the natural result of its national treatment standard. *See supra* notes 154-160 and accompanying text for Colombia's official adoption of the national treatment standard.

188. Contracts of a commercial or private nature are governed by article 869 of Colombia's Commercial Code, which provides that "[c]ontracts signed abroad and whose performance takes place within the country will be governed by Colombian law." *CÓDIGO DE COMERCIO [Cód. COM.] art. 869 (Colom.)*.

189. Resolution 51, *supra* note 155, art. 23.

Article 23 indicates that, if a foreign investor opts to bring an action outside Colombia, all matters pertaining to that individual's investments in Colombia must also be submitted to the jurisdiction of Colombian courts and laws. Furthermore, in cases submitted to international arbitration, Resolution 51 clearly mandates that Colombian arbitration rules alone shall govern the case.<sup>190</sup>

However, Resolution 51 provides that if a treaty or international convention to which Colombia is a party allows foreign investors the right to submit investment-related disputes to the jurisdiction of an international court, then the above-quoted article 23 requirements may be waived.<sup>191</sup>

### 3. Ecuador

Article 16 of Ecuador's Constitution denies foreigners the right to diplomatic protection:

Contracts executed between the Government, or between Public Entities and natural or legal foreign persons, will implicitly entail the waiver of any diplomatic protection; it is not allowed to agree to submit the aforementioned contracts to a foreign jurisdiction if they are executed in the territory of the Republic of Ecuador.<sup>192</sup>

Section 33 of Ecuador's Code of Civil Procedure governs foreign investment dispute resolution and mandates that all such disputes be resolved before Ecuadoran Courts and under Ecuadoran Law.<sup>193</sup> Ecuador has signed the MIGA Convention.<sup>194</sup>

### 4. Peru

Neither Peru's Constitution nor its Foreign Investment Law<sup>195</sup> expressly address a foreigner's right to diplomatic protection. One may assume, however, that as a consequence of Peru's national

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190. *Id.*

191. *See, e.g.*, Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, art. 56, *reprinted in* 1 ICSID REV.-FOR. INV. L.J. 148 (1986) [hereinafter MIGA Convention]. *See generally* F.I. SHIHATA, MIGA AND FOREIGN INVESTMENT: ORIGINS, OPERATIONS, POLICIES AND BASIC DOCUMENTS OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (1988).

192. ECUADOR CONST. art. 16 (author's trans.).

193. Cód. Proc. Civ. arts. 1013-49 (Ecuador).

194. *See* MIGA Convention, *supra* note 191.

195. Legis. Decree 662, *supra* note 166.

treatment standard<sup>196</sup> foreigners do not have the right to diplomatic protection without first exhausting every effective local legal remedy available to them and proving an actual denial of justice.

In Peru, a presumption exists in favor of investment-dispute settlement before Peruvian courts and under Peruvian law. Article 16 of Peru's Foreign Investment Law provides that "[t]he State may agree to submit disputes arising from the Stability Agreements to Arbitration Tribunals as provided by in the international treaties to which Peru is a party."<sup>197</sup> However, foreign investors can never be certain if the Peruvian government will agree to submit disputed matters to an international arbitration tribunal. Such uncertainty has not promoted a positive and stable investment environment in Peru.

## 5. Venezuela

Venezuela also fails to expressly address a foreigner's right to diplomatic protection. Again, one may assume that before a foreign investor may seek the diplomatic protection of the home state, the foreign investor must first exhaust every effective local legal remedy available and prove an actual denial of justice.

Article 25 of Venezuela's Foreign Investment Decree states that "all jurisdictional and arbitrage or conciliatory methods [of dispute resolution] provided in the laws, may be used in the settlement of controversies or conflicts derived from foreign direct investments, sub-regional investments or the transfer of foreign technology [to Venezuela]."<sup>198</sup> Though its language is ambiguous, article 25 suggests that resolution of foreign investment related disputes under Venezuelan law may proceed either in the courtroom or before an arbitrator. Most notably, the drafters of article 25 have left it to future legislators to specify the preferred method of dispute resolution. Thus, article 25 gives the Venezuelan government the flexibility to waive its jurisdictional priority when such waiver becomes necessary, for example, by the terms of a multilateral agreement to which Venezuela is a signatory nation.

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196. *See id.* art. 2.

197. *Legis. Decree 662, supra note 166, art. 16.*

198. *Venezuela Investment Law, supra note 170, art. 25 (author's trans.).*

## V. CONCLUSION

The attitude of ANCOM member countries have held toward FDI has both economic and legal aspects. Recently, in order to attract greater flows of FDI, ANCOM members have embarked on an economic liberalization program, the aspects of which have been explored in this Article. Undeniably, foreign investment laws recently issued by ANCOM and its member states have altered the macroeconomic conditions under which foreigners invest in that region's economies. For example, one may now invest in almost any sector of the economy without prior authorization from a government screening entity.<sup>199</sup> Moreover, foreign investors face fewer barriers to transferring capital and profits abroad.<sup>200</sup>

Despite these commendable structural changes in their macroeconomic policies,<sup>201</sup> ANCOM member states have seen their proportional share of global FDI decrease while FDI in developed nations has increased. Therefore, the change in the macroeconomic attitude toward FDI has not been enough, standing alone, to attract new and greater amounts of foreign capital.

Another factor contributing to the decrease in ANCOM and its member states' share of FDI is the lack of evolution in ANCOM's legal attitude toward FDI. Today, of ANCOM's five member states, all but Peru deny foreign investors the right to diplomatic protection. All guarantee foreign investors treatment equal to, but no better than, that awarded to national investors. Furthermore, all ANCOM member states assert jurisdiction over investment disputes, but none accept the Hull Formula of compensation for expropriation.

Perhaps the policy-makers of the region should consider the benefits of complementing the change in the macroeconomic attitude towards FDI with a change in the legal attitude with which foreign investment has been treated since the adoption of the

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199. See, e.g., Resolution 51, *supra* note 155, art. 9; Bolivian Foreign Investment Law, *supra* note 149, art. 3; Exec. Decree 2501, *supra* note 161, art. 5; Venezuela Investment Law, *supra* note 170, art. 26.

200. See, e.g., Decision 291, *supra* note 81, arts. 4, 5; Resolution 51, *supra* note 155, ch. IV; Bolivian Foreign Investment Law, *supra* note 149, art. 5; Exec. Decree 2501, *supra* note 161, art. 5; Venezuela Investment Law, *supra* note 170, art. 35.

201. For a preliminary look at how various macroeconomic factors have affected private investment activity during the post 1974 period in a number of developing countries see, JOSHUA GREENE & DELANO VILLANUEVA, PRIVATE INVESTMENT IN DEVELOPING COUNTRIES: AN EMPIRICAL ANALYSIS (Int'l Monetary Fund, Working Paper No. 40, 1990).

Calvo Doctrine in the early nineteenth century.

Overstating the importance of predictability in economies as volatile as those comprising ANCOM would be a difficult task. A change in the Calvo attitude towards FDI through national adoption of recognized international property rules—such as the Hull Formula for compensation, international minimum standard of treatment, depoliticized international investment dispute resolution mechanisms, and the right to diplomatic protection in cases of denials of justice—would help significantly to eliminate that region's policy barriers to foreign capital.