International Law and Private Foreign Investment

Elihu Lauterpacht, C.B.E., Q.C.
University of Cambridge

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the International Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ijgls/vol4/iss2/2

This Lecture is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Global Legal Studies by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
Thank you, Dean Aman, for your generous words of welcome. As you sought to persuade our audience of my virtues, I initially experienced some sense of disbelief and wondered whether you could really be speaking of me. As your description progressed, I began to be persuaded by your advocacy. By the time you had finished, I had so entered into the spirit of the matter that I even began to think that perhaps you were not saying enough.

I am delighted to be here—as is my wife. We immensely appreciate the hospitality that is being shown to us by yourself and by this distinguished Law School. My entry into the United States was not free of difficulty. It seemed that I had not matched the excellent administrative work of the Dean’s office by securing a visa appropriate to one who was deemed to be coming here to work rather than to enjoy himself. The immigration official threatened to ban my giving this lecture, even to exclude me. I welcomed his proposal saying that I would be glad to forego the lecture and explain to the audience why I could not continue to address it. My response was, alas, entirely counter-productive. A visa was immediately granted. The truth is, in fact, that nothing could give me more pleasure, or make me feel more privileged, than to have been afforded the present opportunity to deliver the first of the Earl Snyder lectures on international law in this Law School of which he is an alumnus. My pleasure is the greater because Earl Snyder, with whom I have enjoyed a friendship extending over many years, and his wife Gunhild have been able to make the journey from Washington to be present on this occasion.

Dr. Snyder has shown a constant devotion to international law for virtually half a century and the subject is much indebted to him for the varied and generous ways in which he has supported it. I am happy to recall the encouragement that he has constantly given to the Research Centre for International Law at Cambridge. He has endowed a scholarship which

---

* Honorary Professor of International Law, University of Cambridge; former Director of the Research Centre for International Law, University of Cambridge.
annually enables an alumnus of this Law School to spend three months at the Centre. We have now had the pleasure and benefit of six such visitors. Of each of them you here in Indiana may be justly proud as possessed of personal and academic qualities which make them worthy ambassadors of your scholarly and social tradition. They may be no more than names to you now, but we remember them in Cambridge with the warmest feelings: Sarah Lynch; Philip Hatfield; Antje Petersen; Jasmin Rasim; David Laserwitz and currently, Jack Bobo. In addition to funding the scholarships, Dr. Snyder has given a considerable sum toward the construction of an extension to the Research Centre building which will enable us the better to receive future Snyder scholars and other visitors from abroad.

Now Earl Snyder has taken the initiative in establishing the lectureship which brings me here today. It will help to link Indiana and Cambridge more closely. We were delighted that some years ago Dean Aman spent some time at Cambridge. Now the opportunity exists for a more regular series of exchanges. I hope that, as the system develops, these visits will extend beyond a single lecture to something more substantial.

The subject of this lecture is International Law and Private Foreign Investment. It was suggested by Dr. Snyder as a central one in international law and one that is close to his interests.

A cynic was once asked, what is the difference in foreign relations between an investment and a gift? From a gift, he replied, one may derive some goodwill; but from an investment, one may be relatively sure that little will be recovered. Even if that pessimistic assessment may not be entirely accurate in a world where the concept of “debt-forgiveness” is now familiar, a lawyerly interest in the treatment of foreign investment is fully justified. The subject is, of course, so large that it must immediately be reduced to manageable proportions. As between public and private investment, I limit myself to private investment. As between direct and indirect investment, that is, portfolio investment, I limit myself to direct investment. This includes cases where the foreign investor enters into an agreement with a host government or public authority for the purpose, say, of developing a natural resource within the host country or where the investor purchases an entire enterprise, large or small, within the host country. But, truth to tell, the precise definition of what I mean by “foreign investment” is not critical to my treatment of the subject. No matter how much I may narrow the topic, it is evident that I cannot, within the scope of this lecture, attempt in any helpful manner systematically to expound any significant aspect of it in a
comprehensive manner. Instead, I propose to use the subject of foreign investment as an illustration—a paradigm, if I understand that word correctly—of the remarkable changes that have taken place in international law during the last five decades.

This is a particularly relevant period for me because it corresponds with the time over which my friendship with Earl Snyder has extended. But it is relevant, too, because the period is unique in the history of international law. Never before in the four centuries in which international law has been identified as a relevant factor in relations between States have there been as many developments in the content of the subject, both substantive and procedural, as there have been since 1945.

Did scholars half a century ago—or even a third of a century ago—foresee the nature and scope of the massive advance in international provision and machinery for the protection of individual rights? Could they then have envisaged the emergence in the Law of the Sea of the 200 mile Exclusive Economic Zone or of the Common Heritage of Mankind to which pride of place has been accorded in the 1982 Law of the Sea Convention? Who would have imagined that society’s awareness of the importance of the environment would be reflected in such an abundance of international treaty regulation that the most significant recent study of the subject runs to a thousand pages of closely packed print? Was it to be foreseen fifty years ago that the United States would jeopardise its standing in the international community by its hostility to the United Nations and, by withholding its contributions, bring that organisation to the brink of financial ruin, while at the very same time, that


organisation would be stationing forces,\textsuperscript{5} monitoring elections,\textsuperscript{6} mediating disputes in a score of countries, and otherwise institutionally participating in important peace keeping and peace-restoring activities\textsuperscript{7} on a scale far transcending the role originally laid down for it.

The manner in which international law has grown to deal with the treatment of private foreign investment can properly be compared with its development in relation to the items which I have just mentioned. In the early 1950s, the law relating to the treatment and protection of private foreign investment had remained relatively static since the middle of the nineteenth century. The nationalization of the Anglo-Iranian Oil Company in 1951 was approached in almost the same way as it would have been a century earlier. Recourse by the Company itself directly against the Iranian Government was permitted only by a contractual arbitration clause which was found, in the event, to be defective.\textsuperscript{8} The ability of the British Government effectively then to espouse the company’s claim before the International Court of Justice was excluded by the restrictive language of Iran’s acceptance of the Court’s compulsory jurisdiction.\textsuperscript{9} The substantive law applicable to the case was customary international law involving a controversial choice between two conflicting approaches. One was the contention of the British Government, based on the so-called “Hull Formula,” enunciated by U.S. Secretary of State Cordell Hull in relation to the Mexican oil expropriations just prior to the Second World War, that called for the payment of prompt, adequate and effective compensation.\textsuperscript{10} The other was a view derived from the extensive


\textsuperscript{6} See, for example, ONUMOZ, the U.N. operation for providing technical assistance and monitoring the elections in Mozambique in 1994. DEPARTMENT OF PUB. INFO., UNITED NATIONS, THE UNITED NATIONS AND MOZAMBIQUE 1992-1995 (1995). See also UNTAG, the U.N. mission aimed at ensuring free and fair elections in Namibia in 1989 and UNAVEM II aimed at monitoring the elections in Angola in 1992. \textit{id.}

\textsuperscript{7} See, in recent times, the deployment of UNMOT, the Mission of Observers in Tajikistan; the U.N. Verification Mission in Guatemala, whose deployment was requested jointly by the Government of Guatemala and the Union Revolucionaria Nacional Guatemalteca; and the U.N. assessment mission that will be sent to Sierra Leone to develop recommendations on ways the U.N. could assist the peace process. United Nations Info. Ctr. for the U.K. and Ireland, NEWS SUMMARY, Feb. 6, 1997.


\textsuperscript{9} Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93 (July 22).
measures of socialization adopted after the Second World War both in Eastern and Western Europe in which the compensation offered to foreign owners was no more than a small fraction of the true worth of the property. The number of these takings and the seeming acceptability of the low levels of compensation paid was seen as evidence of State practice reflective of the true content of international law on the subject. As it so happened, this disputed point of law was not at that time decided by an international tribunal as the parties reached an agreed settlement three years later.

But if that was the state of affairs in 1951, the situation today is very different. I propose in the rest of this lecture to speak of two of these major differences—one substantive, the other procedural.

The major substantive difference between the position forty years ago and the position today lies in the increasingly wide acknowledgement that the proper standard of compensation to be paid upon the taking of foreign property is that of prompt, adequate and effective compensation. It could not be said at the time of the Anglo-Iranian episode in 1951 that this was not the standard, but it was a standard that was accepted only in some quarters—the traditional capital-exporting States. I have mentioned that it was the view expressed in 1937 by the United States. It was recalled by Britain in 1951. I have mentioned, too, the strong criticism of the standard by, in particular, the Eastern European States. They argued, in the context of extensive post-war socialization, that if the standard of prompt, adequate and effective compensation were to be insisted upon, this would involve a far-reaching limitation upon the sovereignty of States. It was, they argued, inherent in the sovereignty of States that they should be able to regulate and control—even to the point of nationalization—the use and ownership of property within their territories. Since few, if any of them, could afford to pay "adequate" compensation, insistence on this standard would mean either that the State could not lawfully take foreign property at all or that, if it did take such property, it would have to devote the product of the property so taken to generating the funds necessary to pay for it. The sole result of the

nationalization, therefore, would be to transfer title and formal control of the property to the taking State. However, the latter would not derive any significant economic benefit from the taking and its true objective would thus be frustrated. 13

The criticisms of the prompt, adequate and effective standard did not come from the Eastern European States alone. They received significant (but by no means unanimous) academic support from the participants in the debate in the Institut de Droit International in the late 1940s and early 1950s, 14 as well as from many individual writers. 15 We must recall, moreover, that the late Fifties and the Sixties were the period principally associated with the ending of colonialism. The extent of this process can be measured in terms of the growth of membership of the United Nations. In 1958 there were 82 members; in 1970, 124. By 1995 this number had risen to 195. Of course, not all of this increase came from the ending of colonialism, but most of it did. As a result, the United Nations became the scene of the most public manifestation of the controversy—with the now very numerous new States using their voting strength in the General Assembly to push through, for example, the 1962 resolution on Permanent Sovereignty over Natural Resources. 16 This contained an article that limited the obligation of the taking State to the payment of "appropriate" compensation, as opposed to "adequate" compensation. The correct meaning of the word "appropriate" has never been authoritatively resolved. The then Deputy Legal Adviser of the State Department, who was deeply involved in the negotiation, was Stephen Schwebel, now the President of the International Court of Justice. 17 He argued strongly that "appropriate" was intended to have the same meaning as "adequate." 18 Even so, for many supporters of the Resolution "appropriate" meant something less than "adequate" and was intended to support the position of those States which had only limited funds available to support the exercise of their right to permanent sovereignty over their resources. Much the same language reappeared in the

so-called Charter of Economic Rights and Duties of States, adopted by the General Assembly in 1974, but with one important difference. Although the 1962 Resolution had sought to reduce the role of international law standards in relation to takings of property by stating that “appropriate compensation” shall be paid both in accordance with the rules in force in the taking State and “in accordance with international law,” even the reference to “in accordance with international law” disappeared in the 1974 text.

The legal effect of these resolutions is, of course, a much debated question. Some accord to them a quasi-legislative effect. Others deny them all legal effect. Others seek in them no more than evidence of an accumulation of individual State practice. But the answer to the question probably does not greatly matter any more because after the 1974 Resolution the tide began to turn. No longer was the question of compensation seen simplistically as an issue between north and south, between new countries and old or between developing and developed countries. This kind of dichotomy was replaced by a growing awareness on the part of investment-receiving countries that economic development could not be assured on the basis of public lending alone, whether by States or by international organizations. It had to be supported by private investment. It was realized that there was unlikely to be sufficient foreign private investment to meet all development needs. In the competitive situation thus resulting, private investment would be more likely to flow toward the safest areas. So, gradually, the right to nationalize or otherwise take foreign property, though never denied, came to be conditioned on the need for the payment of compensation at a level higher than that signified by the word “appropriate.”

The evolution of such trends cannot be presented on a strictly chronological basis. One cannot say that the old standard was “adequate,” that the new standard suddenly became “appropriate” and that there was then a gradual but complete reversion to “adequate.” That would be to overlook the necessary distinction between customary international law and treaty law—with the content of the former being more gradually formed and, consequently, more elusive and obscure than the latter. It would also be to disregard the fact that in terms of evidencing the policy of States viewed collectively the emergence of a uniform treaty pattern has some bearing on the content of customary international law.

And so it should not come as a surprise to find that even before the adoption of the Permanent Sovereignty resolution of 1962 there were already in existence a number of bilateral treaties, sometimes called treaties of friendship, commerce, and navigation, sometimes called treaties of amity or establishment, that, amongst other matters, regulated takings of property by reference to a standard of fair compensation reflecting the market value of the property. One such treaty was the 1955 Treaty of Amity between the United States and Iran which has played an important role in a number of cases brought both in the International Court of Justice and in the Iran-U.S. Claims Tribunal. However, these treaties tended to be concluded between developed States, with money to invest, and developing countries, anxious to obtain foreign funding. Arguably, therefore, the latter may have been the more willing to compromise their positions.

The vocabulary in which the standard of compensation was expressed varied from treaty to treaty. Some provided for "compensation" with no qualifying adjective but added the requirement that it "shall represent the equivalent of the investments affected." Coupled with the further requirement that the compensation should be actually realizable and freely transferable without undue delay, such provisions assured the investor of a significant measure of legal protection, provided always that there was some suitable mechanism for dispute settlement which would effectively apply the agreed standard of compensation—a matter to which I shall return presently. An early example of a treaty of this kind was the one concluded between Germany and Pakistan in 1959.

From then on the treaty repositories become increasingly filled with express compensation provisions describing the compensation payable by such adjectives as "fair," "just," "effective," "full" and "reasonable." But for all this variation of wording the net result must now be taken to be that the expropriating State cannot look to nationalization or expropriation as a means of enriching itself at the expense of the foreign investor.

The contemporary scene is dominated (though not exclusively) by a series of bilateral investment treaties described generally under the unsurprising


There are now some 400 of these treaties creating a web of relationships between some 145 States in every part of the globe and, therefore, to a large extent reducing the space available for the operation of customary international law rules. And these agreements—unlike those of two or three decades earlier—are not limited in their range to States which are traditionally respectively investment-importing and investment-exporting. Thus, to give an illustration, China and Turkey concluded an agreement in 1990 much in accordance with the standard form. As regards the standards of compensation to be paid, most BITS say much the same thing, namely, that the compensation shall be prompt, adequate and effective or that it shall be equal to the real or reasonable or market value of the property taken. But here, in referring to the value of the property taken, we come to an additional element in the situation of which the significance is sometimes not fully appreciated.

In theory, a clear distinction should be drawn between the standard of compensation to be paid and the value to be put upon the property for the purpose of applying the standard of compensation. Thus the value of an asset should be objectively determinable: it is worth whatever it is worth, regardless of whether the authority taking the property is required to compensate for that worth fully or only in part. The value of the refinery can be assessed by one or another economic techniques of valuation at, say, $10 million. If full compensation is to be paid, that is the amount payable. If half compensation is to be paid, only $5 million will be payable. So it is clear that in legal terms the identification of the standard of compensation payable is a legal question of prime importance. The actual valuation, however, should be an objective and separate process.

---


Nonetheless, a certain confusion has arisen between the two processes. This is illustrated by the Hong Kong-New Zealand bilateral investment treaty of 1993: "compensation shall amount to the real value of the investment immediately before the deprivation . . . . [W]here the value cannot be readily ascertained the compensation shall be determined in accordance with generally recognized principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rates and other relevant factors."25

So far as I have been able to make out (and I have had to rely on the text of the agreement alone), this provision does not appear to be matched in any of the other BITS which are all expressed in more traditional language. Let us analyze it, first, in terms of the compensation standard which it sets. "Compensation shall amount to the real value of the property." This in effect prescribes the standard of full compensation. When you say "compensation shall amount to" you are saying "compensation shall be equal to." You are not saying that "compensation shall be half equal to." But having defined the standard of compensation in terms of "the real value" of the property, the provision has rightly indicated that a value must then be put on the property in question.

And here we come to the unusual element—a reference to the process of valuation. What does the Treaty say about that? First, it contemplates the general possibility that the value can be "readily ascertained," for it introduces the rest of the sentence with the words "where that value cannot be readily ascertained . . . ." A "readily ascertainable value" is one that can be discovered simply, because the asset in question is one which is in common supply and is often traded, such as a basic commodity like tin, copper, pork bellies or whatever. But it is not commodities like these that are normally taken by a State for a public purpose. Rather the State may take a hotel, a bottling plant, a mine or a refinery and such like assets, the market value of which will vary according to function, age, location and so on.

When it comes to valuing assets such as these we are in the field of economics, not law. The economists tell us what is the proper method of measurement. If, therefore, the treaty is to say anything about valuation, it should be directing us to some established economic method: net book value;

The Hong Kong-New Zealand Treaty does this only in part by providing that "where the value cannot be readily ascertained the compensation shall be determined in accordance with generally recognized principles."

So far so good. But then it does something which, so far as I can ascertain, is quite unusual in these treaties: it introduces a new conception into the otherwise objective task of valuation—the idea of "equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rates and other relevant factors." Some of these additional considerations, as can readily be seen, are not entirely objective in character, but introduce into the valuation process some degree of subjectivity involving an assessment of the conduct of the owner of the property during the period of ownership. The use of the words "equitable principles" invites the judge or arbitrator performing the valuation to form a view of the behaviour of the owner of the property—a matter which can have no connection with the objective value of the property even though it may be material to the level of compensation which the owner should receive. It is to be compared with the introduction in 1969 of the same concept—of "equitable principles"—into the law relating to the delimitation of the continental shelf. Many feel that the role played by that concept in that context is open to significant criticism. This is not to say that discretion has no place in the valuation process. For example, the application of the method most favoured in relation to a complex asset like a refinery or an oil production business, the discounted cash flow approach, is crucially dependent upon the choice of the appropriate rate at which the future stream of profit is to be discounted, as well as on the length of the period for which the projection is to be made. But while those choices are largely discretionary, they are nevertheless governed by essentially objective considerations. The relevance to an objective valuation (as opposed to the level of compensation) of, for example, the amount of the "capital already repatriated" is highly questionable.

However, I have digressed into a technicality which is relevant to our theme only insofar as it shows the awareness of at least some States of the

---


importance of giving the international law of compensation deeper content. This represents an advance on the view hitherto widely accepted that it is sufficient merely to set an appropriate compensation standard and then leave it to a tribunal, without further guidance, to make the necessary valuation. This advance has no doubt been encouraged by the important jurisprudence of the Iran-U.S. Claims Tribunal over the past fifteen years—a subject too extensive to be further discussed here.\(^9\)

So let me return to conclude the identification of treaties which are contributing to the growing acknowledgement of prompt, adequate and effective compensation as the appropriate standard of compensation to be paid. Two further recent examples especially call for mention.

One is the European Energy Charter Treaty of December 1994.\(^30\) This provides in Article 13(1) that the nationalization or expropriation of investments of investors of a Contracting Party shall be “accompanied by the payment of prompt, adequate and effective compensation.” This is defined as “the fair market value” of the investment. The Treaty is of special importance because it was signed by 49 States and is already provisionally applicable to at least 25 of them. The States involved are primarily European and include virtually all of the States of Eastern Europe and of the former Soviet Union. But it also includes a number of non-European States, notably Australia and Japan, with the possibility in due course of participation by Canada and the United States. So we have here a wide range of States adhering on a multilateral and reciprocal basis to the standard of prompt, adequate and effective compensation and supporting it—as we shall presently see—with an effective means of dispute settlement.

The same is true of the second example, the North American Free Trade Agreement between Canada, Mexico and the United States, where similar standards are prescribed. Thus, Article 1110.2 provides that “Compensation shall be equivalent to the fair market value of the expropriated investment . . . Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate to determine fair market value.”\(^31\)

---

29. See generally Brower, supra, note 26; Iran-U.S. Cl. Trib. Reports.
31. North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 605, 641. Since the delivery of this lecture, publicity has been given to a further multilateral arrangement which, when it enters into force, will be of major importance. The draft Multilateral Agreement on Investment, currently being negotiated in the O.E.C.D., also incorporates the requirement of “prompt, adequate and effective
To this treaty evidence of the crystallisation of the prompt, adequate and effective standard must also be added—in a manner which must be limited to a mere passing reference—recent arbitral experience. This is to be found principally in recent times in the work of the Iran-U.S. Claims Tribunal and of the ICSID arbitral tribunals. These tribunals have generated a number of significant arbitral decisions which support the evidence of the content of customary international law to be perceived in the pattern of treaties to which I have been referring.\textsuperscript{32}

The mention of these arbitral bodies provides me with a bridge between the two sections of this lecture—the first dealing with substantive advances (which I now end) and the second with procedural advances (to which I now turn).

Important as is the advance to certainty in relation to the level of compensation, it would be much less significant were it not accompanied by certain major developments in the procedures relating to the making of compensation claims. These procedures enable individuals and corporations to act effectively on their own behalf in a manner never realistically contemplated, though frequently prayed for, forty years ago.

In this connection we can concentrate upon processes involving third-party settlement of disputes by reference to law.

It is not necessary to recall here the defects in the earlier period revealed at the time of the nationalization in 1951 of the Anglo-Iranian Oil Company. These have already been mentioned.\textsuperscript{33}

Since 1951, however, international practice has evolved so considerably that the possibility of any specific dispute now falling outside the scope of one dispute settlement procedure or another is significantly reduced, though it has not disappeared entirely.

First, the dispute settlement clauses inserted in agreements between investors and the host Government have become much more sophisticated. Most such agreements now contain watertight provisions which will exclude any attempt by the host State unilaterally to frustrate an arbitration. The model for this development was established in the very agreement which settled the Iranian oil dispute in 1954—the so-called Consortium Agreement.\textsuperscript{34} The

\textsuperscript{32} See Brower, supra, note 26, at 336-330 (relating to the Iran-U.S. Claims Tribunal).

\textsuperscript{33} See supra p. 262.

\textsuperscript{34} Iranian Consortium Agreement, supra note 12.
essence of the relevant provision in this agreement was that in the event of a
dispute each party was obliged to nominate an arbitrator and, if either failed
to do so, the other could request the President of the ICJ to make the
appointment. Recalling the defects in the provision in the 1933 Concession
which had conferred a similar power on the President of the PCIJ, but which
had collapsed because the PCIJ had ceased to exist in 1945, six years before
the dispute arose, the Parties inserted a succession clause to the effect that if
the office of President of the ICJ were to disappear the appointing function
would descend to whomsoever might be the President of the “successor”
tribunal. Comparably “watertight” provisions now appear in most resource
development agreements concluded directly between States and foreign
investors. They are also often incorporated in national legislation establishing
model clauses. The recent student of the subject may take such provisions for
granted. But their novelty, and the spirit which underlies them, should be
recognised.

Another, but more technical aspect of the growing acknowledgement of
the position of the individual and of the corporation in international law is the
acceptance by many Contracting States and by a number of international
tribunals that the proper law of contracts between States and non-State parties
can be something other than a given system of national domestic law. In 1929
the PCIJ, in the case of the *Serbian Loans*, applying the strictly positivist
doctrine of the 19th century, enunciated the doctrine that international law
could be applied only to relations between States and that other relationships
were necessarily governed by national law. Not so today. The procedural
capacity of the individual in direct State/investor relationships has been
accompanied by the acknowledgement that such contracts may be lifted
outside the sphere of domestic law and are to be governed instead in
accordance with international law or general principles of law. Moreover,
many such agreements also include provisions which prohibit any unilateral
amendment by the States parties--so-called “stabilization” clauses.

If, strictly speaking, these advances are to be viewed as substantive aspects
of the relationship between States and foreign investors, they are nevertheless
so closely related to the process by which disputes arising out of such
relationships are to be adjudicated that, at this point, some reference to these
procedures is permissible--the more so because one of the most significant

---

35. Payment of Various Serbian Loans Issued in France (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) No.20,
at 41 (July 12).
areas in which the direct application of international law to State/investor relations occurs is in the operation of the so-called ICSID system.36

ICSID was established in 1966. The letters stand for the International Centre for the Settlement of Investment Disputes, an institution set up under the auspices of the World Bank. It was the product of the imagination and energy of the then-General Counsel of the Bank, Mr. Broches. Basically, the system enhanced the arbitration provisions in investment agreements between private parties and host States by giving such clauses treaty support and protection. It acknowledged, incidentally, the possibility of the direct application of international law in any arbitration arising under such contracts.37 The system is predicated upon the national State of the investor and the investment-receiving State both being parties to the ICSID Convention. It is then possible for the investor and host State to insert in the investment agreement an "ICSID Arbitration Clause." This brings compulsory arbitration under the ICSID system of disputes into the investment agreement. The Centre administers the process. The applicant places the case before the Centre. If the respondent fails to cooperate in the establishment of the arbitral tribunal the Centre ensures the completion of the tribunal.38 The award is, of course, in any event contractually binding between the parties.39 But the Convention additionally constitutes for the State-party to the dispute a treaty obligation to implement the award. If the respondent State fails to meet its obligations under the Convention, the national State of the private party is entitled to treat that non-implementation as a breach of treaty committed against it. More directly helpful, however, is the obligation of the Parties to the Convention to provide within their domestic legislation for the direct enforceability of ICSID awards just as if they were the judgments of foreign courts.40

Some time after the original Convention was concluded, provision was made for the extension of the ICSID facilities to contracts where only one of the relevant States is a party to the Convention. This Additional Facility, as it is called, is theoretically important as showing that the applicability of the proper law provision of the system is not—as some would suggest in relation

36. For the relevant texts, see I ICSID REP. 3-273 (R. Rayfuse ed., 1965).
38. Id. art. 38, at 184.
39. Id. art. 53, at 194.
40. Id. art. 54(1).
to the ICSID system itself—dependent upon a treaty relationship between the host State and the State of nationality of the investor.\textsuperscript{41}

The ICSID procedures have now been made available on an even wider scale by the practice of referring to them in bilateral investment treaties. The importance of this lies in the fact that, whereas what we may call the standard ICSID procedures operate only in relation to disputes arising under contracts which contain a specific provision for ICSID settlement, the ICSID provisions in the BITS make the ICSID procedures available in non-contract cases or in contract cases where no reference was made to ICSID.

The same pattern of providing in a separate treaty that private parties may have recourse to arbitration under the ICSID system is to be found in both the European Energy Charter and in the NAFTA—both already referred to.\textsuperscript{42}

All these developments are striking and significant because they put an end to the myth, so prevalent until the end of the Second World War, that only States are subjects of international law and that individuals cannot possess rights or bear duties directly under international law. We have in this respect moved into a new age, in which we have also seen the emergence of parallel and better known developments both in the field of human rights and of the law of the sea. In those great areas also, the individual rights of procedural access to international bodies have developed on an even more striking scale.

As we move towards the end of this presentation, mention should also be made of the emergence of an international system to insure investors against non-commercial risks, especially expropriation. National systems for the same purpose have long existed in the United States and other countries. Now MIGA, the Multilateral Investment Guarantee Agency, established in 1985, makes such insurance available on an international basis.\textsuperscript{43} The system is founded on an international treaty, the MIGA Convention, and is available to investors who are nationals of a party to the Convention in respect of investments—both equity investments and direct investments—made in the territory of a developing country that is also a party to the Convention and approves the issuance of the guarantee.

\begin{footnotesize}
\begin{enumerate}
\item ICSID Additional Facility, 1 ICSID Rep., supra note 36, at 213. See also Arbitration (Additional Facility) Rules, 1 ICSID Rep., supra note 36, at 249 (with special reference to Art. 55, at 268).
\item See supra notes 30-31 and accompanying text.
\end{enumerate}
\end{footnotesize}
This has necessarily been an incomplete review of the impact of developments during the last half-century upon the law relating to the treatment of foreign private investment. You will have no difficulty in identifying some of the major issues that I have not covered, like the definition of what is a taking, the treatment of corporate claims and the rights of shareholders, the effect of clauses in investment agreements intended to exclude or limit the right of the State to interfere with the contract, and the distinction between lawful and unlawful takings. I have not neglected them because they are unimportant.

But despite these omissions, the message is clear: in the treatment of investment, as of so many other topics of international law, there have, in the space of less than fifty years, been changes of which an earlier generation could hardly have dreamed. If some had faith at the beginning of the period in the eventual general acknowledgement of the "prompt, adequate and effective" standard of compensation, few could have foreseen the extent to which the individual or the corporation would acquire status as independent actors on the international stage. For decades the procedural incapacity of non-State entities was proclaimed as an article of faith. Today that incapacity is scarcely recognizable.

For most of us these developments signify progress. Even so, we should not be lulled into thinking that there is no room for further change or that such changes will necessarily be an advance in terms of the standards we welcome today.

We must, of course, try and think of the direction in which the law will move. In terms of standards of the treatment of property we should not assume that the content of the law is not like a pendulum and that rules which have swung one way will not eventually reverse their direction. Difficult though it is to see why the current standards should change, one cannot exclude the possibility that the worldwide trend toward privatization which has reduced the importance of considerations pertinent to nationalization will not last forever. Economic conditions within particular States may alter to such a degree that hostility to foreign investors will once again emerge and that States will no longer see advantage in according them special protection. Will such a reversion to the conditions of the period 1950-1980 lead to a change back to the standards of that time? Are we in a ratchet situation—like a cog which, having turned in one direction, cannot be turned back again? To such question no confident answer can be given. Much will depend upon the fate of the bilateral and of the multilateral treaties which have been emerging in recent
years. We must not forget that the bilateral treaties, on which the improvements that I have identified depend so much, are not of unlimited duration. The general pattern of these treaties is that they are expressed to last for periods of ten or fifteen years, and that thereafter notice may be given to terminate them. It is true that if they are denounced, the protection they provide is assured for a further twenty years to investments made in reliance upon them. But it is a fact that these treaties can be brought to an end.

However, even if we cannot exclude the possibility of a change in the substantive rules, it seems much less likely that the procedural advances will be reversed. True, the procedural capacity of individuals is the result of specific treaty provisions and that those provisions appear in the same treaties as contain the substantive standards that are open to change in the manner just described. Yet while it is possible to contemplate changes in standards, it is difficult to foresee the denial to individuals of the procedural competence that has now been so widely conferred on them. It is an old maxim that freedom once conferred cannot be withdrawn; and so, I believe, it is likely to be with the freedom that has now been given to individuals to assert their rights on the international plane. This is the more likely to be true because these individual procedural rights extend beyond the protection of property to the whole range of political and civil rights as well as to the protection of the environment.

And so I conclude having, I hope, been able to show how in one area of law the rules of international society have moved in half a century onto a higher plane; and though prophecy is a dangerous thing, I see the standards as likely to stay there, even though they may undergo some change; while the procedures will stay there because they are a reflection of the major societal move toward the acknowledgement of the individual as the ultimate unit of our international community.