Colloquium on Certain Legal Aspects of Inter-American Cooperation

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Among the subjects of universal concern in the international community in the nineteen seventies have been the restructuring of the international law of the sea to take into account technological as well as political changes in the world, and the search for generally accepted methods for the adjustment of economic disputes involving states. Striking manifestations of this urgent concern are the Diplomatic Conference on the Law of the Sea, whose first session took place at Caracas in June 1974,¹ the Special Session of the General Assembly which took place in April 1974 and the session of the UNCTAD Working Group on the Charter of Economic Rights and Duties of States whose June 1974 session in Mexico City was concerned inter alia with dispute settlement.²

¹ The Caracas Conference proved to be a worldwide forum for discussing the problems attendant to the law of the sea, but no agreement could be reached on any of the ninety-two issues on the agenda. Certain trends did develop but most delegates seemed willing to wait for the next conference scheduled for March-April, 1975, in Geneva before undertaking the task of reconciling the diverse viewpoints into an acceptable compromise package. Among the major topics debated were the breadth of the territorial sea, passage through and above narrow straits, the development of deep seabed resources, limited economic zone proposals, and a program for international scientific research. It has been suggested by Professor Dean Rusk, who was an advisor to the official United States delegation to the conference, that the absence of accords reached at Caracas might signal that the proposals of the experts must now be submitted to the highest political authorities of the participating states before sufficient general consensus can be reached allowing formulation of international rules by the Diplomatic Conference.

² The Working Group on the Charter of Economic Rights and Duties of State (UNCTAD) held its fourth session from 10 to 28 June 1974. The draft articles prepared by the Working Group (UNCTAD Document, TD/B/AC. 12/4), many of which contained alternative texts, are addressed to the full spectrum of economic relationships between states and set forth certain basic principles, inter alia, sovereign equality of states, the duty of all states to work for economic and social progress of all countries, especially developing countries.
In Chapter II of the draft charter, paragraph 2 deals with the rights of states over the wealth and national resources within their boundaries (whether on land or in the sea). Four alternative texts are set forth. Each alternative reflects the approach of a group of states to the problems. It is interesting to note that the divergences in approach were reflected in the discussion at the Colloquium.

Alternative 1 (submitted by the Group of 77 - i.e., the Developing States) declares that "every State has full permanent sovereignty over the wealth and national resources whether on land within its international boundaries, or in the sea or continental shelf within the limits of its national jurisdiction and, consequently, has the inalienable right to the full exercise of its sovereignty freely to dispose of them, including the right to nationalization." Sub-paragraph 3 adds that "every State has the right to regulate and control foreign investment in accordance with its laws and regulations and in conformity with its development objectives and priorities." Sub-paragraph 4 states: "No State whose nationals invest in a foreign country shall demand privileged treatment for such investors." Sub-paragraph 5 provides that "Every State has the right to regulate and control the transnational corporations operating within its national jurisdiction in accordance with its laws, rules and regulations. . . ." Sub-paragraph 6 states: "The above rights include the right to nationalization or the transfer of ownership to the nationals of the nationalizing State, as an expression of its sovereignty."

Sub-paragraph 7 and 8 concern the mechanisms for dispute settlement. Sub-paragraph 7 states: "In the event of nationalization, the payment of compensation, as appropriate, shall be in accordance with the domestic law of the nationalizing State." Sub-paragraph 8 adds: "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."

Alternative 2 (a compromise proposed by the Philippine delegate), after asserting that "every State has permanent sovereignty over its natural wealth and resources and the inalienable right fully and freely to dispose of them," gives each State the right to: "(c) . . . regulate and supervise the activities of transnational corporations within its national jurisdiction . . . ; (d) . . . nationalize, expropriate or requisition property, provided that in the case of foreign property just compensation shall be paid in the light of all relevant circumstances; (e) . . . require that recourse be had to its national jurisdiction in any case where the treatment of foreign investment or compensation therefore is in controversy, unless otherwise agreed by the parties; (f) . . . settle disputes where so agreed by the parties concerned through negotiation, good offices, inquiry, fact-finding, conciliation, mediation, arbitration or international adjudication on the basis of the principles of sovereign equality of states and free choice of means." Paragraph 2 provides that "States taking measures in the exercise of this right shall fulfill in good faith their international commitments or undertakings."

Alternative 3 (which appears to be the formulation of the economically Developed States) provides that "every State has permanent sovereignty over its natural wealth and resources and jurisdiction over foreign persons and property within its territory and, accordingly, has the inalienable right subject to fulfillment in good faith of its international obligations, fully and freely to dispose of those resources and exercise its jurisdiction by: (a) enacting legislation and promulgating rules and regulations, consistent with its development objectives, to govern the entry and activities within its territories of foreign investment; (b) entering into investment agreements relating to the import of foreign capital, which agreements shall be observed in good faith; (c) regulating and supervising the activities of transnational corporations within its national jurisdiction . . . ; (d) nationalizing, expropriating or requisitioning property in which foreign investors have an interest, provided that just compensation is paid to such investors; (e) requiring that recourse be had to its national jurisdiction in any case where the treatment of foreign investment or compensation thereof is in controversy unless otherwise agreed by the parties concerned; (f) settling disputes, where so agreed by the parties concerned, through negotiation, good offices, inquiry, fact-finding, conciliation, mediation, arbitration or international adjudication, on the sovereign equality of States and free choice of means." Alternative 4 adheres closely to the opening sentences of Alternative 3 on the permanent sovereignty of States over national resources. However, it adds that "The
These subjects have been of intense concern and interest in the Americas for both practical reasons and reasons of principle. The Americas have provided leadership as the world-wide discussion of the basic problems regarding the present status and the restructuring of the law of the sea and the law of international economic affairs. The discussion of these problems within fora in the Americas has recently been given encouragement at the highest political levels.

On the occasion of the 1974 session of the General Assembly of the Organization of American States in Atlanta, Georgia, it appeared appropriate to organize a colloquium at which concerned jurists from the various parts of the Americas could exchange viewpoints on subjects of immediate and urgent concern. The two subjects for discussion were selected on the basis of urgency and importance. It is hoped that the Colloquium served some useful purpose as part of the continuing examination among jurists in the Americas of methods for the appropriate resolution of certain crucial economic and political problems of the Americas and more generally of the entire community of states.

The Colloquium was held on April 20, 1974, at the University of Georgia Law School and was presented in cooperation with the Georgia Society of International Law and the American Society of International Law. The chairman of the Colloquium was Professor Gabriel M. Wilner; the rapporteur for the session on the establishment of mechanisms for the settlement of economic disputes was Professor Dale Furnish; the secretary of the Colloquium was Mr. Michael Robison, President of the Georgia Society of International Law.

The participants in the Colloquium were the following:

Mr. Carlos Allurralde
Legal Department
Inter-American Development Bank

Mr. Celso L. N. Amorim
First Secretary of the
Brazilian Mission to the
Organization of American States

sovereignty and rights in question shall be exercised in accordance with the applicable rules of international law, in particular with regard to the payment to the owners of prompt, adequate and effective compensation. . . . All States have the right, subject to the relevant norms of international law, to regulate foreign investment within their jurisdiction.” The last sentence of Alternative 4 provides: “States should cooperate in good faith to resolve conflicts of jurisdiction in the application of their law to transnational corporations, due regard being paid to applicable international obligations and to the interests of each country concerned.” (emphasis added in the texts set forth above).

The draft Charter was adopted by vote rather than general consensus at the 29th Session of the U.N. General Assembly (1974). The adopted text follows the alternative proposed by the Developing States.
Dr. Enrique E. Bledel  
Vice President and  
General Counsel  
Latin American Division  
Coca-Cola Export Corporation

Dr. José Joachim Caicedo Perdomo  
Professor of Law  
Advisor to Ministry of Foreign Affairs of Colombia

Professor A. A. Fatouros  
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Professor Dale Furnish  
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Mr. David A. Gantz  
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Dr. F. V. García-Amador  
Legal Director of the Organization of American States

Mr. Moorhead C. Kennedy, Jr.  
Director  
Office of Investment Affairs  
Department of State, United States

Dr. C. Luppinacci  
Professor of International Law  
University of Montevideo  
Delegation of Uruguay

Dr. Valerie T. McComie  
Ambassador of Barbados  
Embassy of Barbados

Dr. A. Molina Orantes  
Professor of International Law  
University of Guatemala  
President of the Inter-American Juridical Committee

Mr. Francisco Orrego Vicuña  
Legal Department  
Organization of American States

Mr. José Pagés  
School of Law  
University of Georgia

Professor Seymour Rubin  
School of Law  
American University  
Member of the Inter-American Juridical Committee

Professor Dean Rusk  
School of Law  
University of Georgia

Professor Gabriel M. Wilner  
School of Law  
University of Georgia
Cooperation is a popular word in recent inter-American relations, as is the word dialogue. We are gathered in Athens, just down the road from the OAS meeting in Atlanta, to engage in a sort of satellite dialogue concerning the current status and future prospects for inter-American cooperation in the settlement of investment disputes. Our panel is blessed with a broad range of experience and diversity of viewpoint. I propose to take full advantage of our array of talent, by playing the role of animador. In this role, and in the drafting of this discussion paper, I feel positively licentious in an academic sense, uninhibited by any need to pull things together and footnote our conclusions.

There are many recent and standing disputes over investment in Latin America today, virtually all of them involving investments by the United States or non-Latin American countries. These will serve as our major focus, but we could easily and meaningfully expand our inquiry beyond them. Other possibilities might also be classified as economic disputes, ranging from trade preferences, to the transfer of technology, to territorial seas, to foreign aid and beyond. In fact, almost all matters of current import in the inter-American dialogue might be called economic in nature. If one will check the list of topics drawn up by the Foreign Ministers of Latin America and the Caribbean in Bogota last November, one will see that it is top-heavy with economic subjects. However, perhaps even more thought-provoking than the fact that most matters covered by inter-American dialogue may be designated as "economic" in nature, is the fact that they likewise qualify as "disputes." The dialogue is between two groups of interests (and it is probably valid to talk of Latin America as one entity in this context, a recently developed viewpoint) moving in opposite directions.

**Latin American Trends Bearing on Investment Disputes**

Successful cooperation has taken place in this hemisphere during the last two decades, but most notably south of the border of the United States. A consensus has developed there that foreign ownership is suita-
ble only to certain sectors of the economy, and that any foreign investment must be permitted only under careful controls established before entry. Thus, Latin America has become concerned about the behavior of its foreign investors in terms of their contribution to an overall approach to economic development, abandoning the attitude that foreign investment per se is a positive influence. It was this naive approach which led to the rash of recent expropriations, whereby relationships were terminated which proved untenable to the host countries once they were able to fully appreciate their effects.

The clearest indication of Latin American cooperation has probably been the movement towards economic integration. That movement has scarcely been smooth and has engendered its share of internal economic disputes, most of them unresolved to date. Still, it is notable that economic disputes among the Latin American countries should increasingly fall into the context of an effort to achieve a common market stretching from Mexico to Cape Horn. That eventuality indicates not only the growing unity of Latin American attitudes, but a new situation in which economic problems occur among and between Latin American countries rather than between individual countries and nations outside the community.

Latin America has undergone a great awakening in the last decade and a half, with implications which bear directly on its attitude toward foreign investment. In that time span we have seen the end of confidence in untrammeled foreign investment as the primary means to economic development. As late as 1961 at Punta del Este this hemisphere's developing nations apparently felt that they could create their own modernized societies, given sufficient foreign aid and investment and the requisite reform programs. Today and for the last several years, the same nations have turned to economic integration and a wary view of foreign investment, which they often see through the lens of dependency theory as valuable only if carefully harnessed to specific needs and only if the investor agrees to relinquish control to national capital at an early date. Foreign investment is no longer assured of a ready welcome wherever it may wish to go. In fact, it may in some cases be told it is not welcome under any circumstances.

Thinking in terms of the future and trying to trace a perspective for the current trend, Latin American nations may be moving towards a consensus that a "settlement" with foreign investment should be negotiated before it is even permitted in the country. If investors will read the

detailed rules being promulgated throughout Latin America, they will know the terms on which they gain entry and often when and how they must leave. I reiterate that this is a departure from past practices. One of the most frustrating things for U.S. investors in Latin America, expropriated or otherwise, has no doubt been the lack of definite, durable rules. Thus, at the same time that most countries were firmly committed to the Calvo Doctrine that any intervention by a government on behalf of one of its investors in a Latin American country was improper and an affront to sovereignty, the host states have also been prone to devalue their sovereignty by radical shifts in policy which seem unpredictable and capricious to investors.

The recent wave of expropriations in Latin America should not be viewed as another unforeseeable consequence of the mercurial Latin character and a political process that ill serves its own constituencies, and is constant only in its inconstancy. This kind of simplistic view probably demonstrates lack of understanding and this is especially so now as we enter a period of Hegelian synthesis in Latin American economies. Placed in context, the current investment disputes with Latin America must be seen as especially inappropriate—at least from a Latin American viewpoint—for resolution by arbitration or any other process imposed from outside the region. The day of free enterprise perhaps persisted longer in Latin America than in the United States but it is fast waning. Latin America is moving towards planned economies and state ownership of the factors of production. Most of the recent takeovers may be explained in those terms, since they involve the extraction of raw materials, infrastructure, and finances. It is unlikely that Latin America will agree to put this unique process, so essential to the goals of economic development and modernization, at the behest of international bodies. "International" bodies tend to understand and favor investors, as does the "international" law they apply. It is worth noting that we may never again see as much expropriation in this hemisphere as we have seen in the past few (and perhaps future few) years.

At the same time its approach has been changing and becoming more definite, Latin America has been gaining in self-confidence. The U.S. probably has not appreciated its power to intimidate Latin American nations and their people, but the effect of that power has been considerable. In Peru and Chile during the time of significant expropriations in both countries, I encountered genuine concern over possible reprisals. When Peru expropriated IPC in 1968, the Hickenlooper Amendment was a real menace and the nationalization was an act of courage to the extent that it defied the amendment. Today nations have learned to
thumb their noses at the Hickenlooper Amendment and their solidarity and resolve have been strengthened. Economic integration creates a similar effect, when countries find out that they can work together and achieve increased economic clout as a group, or as an enlarged potential market for the investor. Another contributing factor has been the erosion of U.S. hegemony in Latin America as investors from other foreign nations begin to enter the picture. All of this means that Latin America has unified and grown in self-respect, so that it is presently more capable than ever of carrying on a true dialogue with the United States.

**U.S. Attitudes and the World Bank Convention**

If the Latin American nations have moved to unity and strength (I do not wish to exaggerate this. I note it as a trend, most significant when compared with conditions in the recent past), what trends have developed in the United States over the same period? In a conference very much like this held at Charlottesville, Virginia three years ago, one careful observer from the United States remarked:

> "In no area of the world have the disputes about U.S. investment been so numerous. Nor in any area of the world—China, Russia, and Iran under Mossadegh included—has the threat of nationalization loomed over such a wide array of U.S. properties, or U.S. business investment been so important to the broader issues of international relations."

The United States has not been unmindful of the trends in Latin America. Its own technical assistance has fostered and contributed to many of the emerging concepts and programs that are changing the region. The dialogue formally begun at Tlatelolco last February has been several years in genesis. Certainly the United States has had its investors in Latin America well in mind. Secretary of State Kissinger’s address at the inaugural session at Tlatelolco devoted substantial attention to the question of investment disputes, suggesting the possibility of “a working group to examine various procedures for fact-finding, conciliation, or the settlement of disputes.” He took the occasion to “affirm . . . that a procedure acceptable to all the parties would remove these disputes as factors in United States Government decisions respecting assistance relationships with host countries.”

Presumably the 1965 World Bank Convention on the Settlement of Investment Disputes represents a procedure acceptable to the United States, which is signatory to it. In mid-1971 the Williams Senate Com-

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mission Report—"United States International Economic Policy in an Interdependent World"—recommended the use of the Convention and, more generally, the imposition of arbitration to resolve investment disputes, on pain of a cutoff in aid and refusal of trade preferences to any recalcitrant country. Other reports appeared on the heels of the Williams Commission Report and would have differed with it as to the most desirable approach to investment disputes, but the Williams Commission may have been a more representative source for thought by the United States. As Stantley Metzger pointed out, the "Report gives no sign that it was even aware of the fact that the Latin American countries en bloc refused to become parties to the World Bank's Convention."5

What is the nature of the Latin American resistance to the IBRD's Convention? Both Aaron Broches, General Counsel of the World Bank at the time the Convention was first submitted, and Paul Szasz, of the International Centre for the Settlement of Investment Disputes created under its auspices, have attempted to deal with the region's objections and to overcome them,6 but it seems to me that (perhaps for reasons of advocacy) they have missed the point. Szasz recognizes two major issues under the Calvo Doctrine: (1) that the Convention represents a "surrogate" for foreign-state intervention in economic disputes, and (2) that all foreigners must be treated precisely as nationals, who cannot avail themselves of the Convention in a dispute with their government. He rebuts the first complaint by pointing out that under the Convention a host government may get a binding waiver of home-state intervention by the investor, thus mounting "a serious attack on the doctrine of diplomatic intervention" by asserting "the international status of the individual."7 In response to the second reservation, he notes that there are inescapable and not necessarily insidious differences between foreign and domestic investors and argues that the Convention simply provides a "slight procedural guarantee" which is of "little significance if [the] domestic remedies are fair, which of course they should be."8

Regardless of the justifications for the Convention, which are completely plausible in an abstract sense, I should guess that Latin America will find it unpalatable. The new dialogue and the Spirit of Tlatelolco have nothing to do with it. The inescapable effect of binding oneself to

7 Id. at 261.
8 Id. at 262.
the Convention is that a dispute might be carried to final resolution by the host-state's decisional mechanism, and still be subject to a binding review in the Centre for the Solution of Investment Disputes. Such a situation could certainly arise whenever the host-state is a signatory to the Convention and has agreed in the original contract with the foreign investor that the Convention should apply. This seems to be precisely what Latin America does not want: to be bound by the tenets of an international law which may not understand or accept the special considerations, changing circumstances, and laws of the host countries.

Secretary of State Kissinger recognized at Tlatelolco that, "Realistically, we must admit that these two elements, [the Calvo Doctrine and the United States doctrine of diplomatic intervention], cannot be easily or quickly reconciled." An additional element should be added, in the words of Dr. Gustavo Fernandez, head of the Juridical Section of the Andean Group: "[ours] is not a system for attracting foreign capital; what interests us, fundamentally, is that foreign investment should contribute positively to the developmental efforts of our countries and not become a negative factor, accentuating dependency." Insofar as Latin America maintains that attitude it will be willing to forego opportunities to entice foreign investments. Ratifying the World Bank Convention makes eminent good sense for any country whose primary goal is the encouragement of foreign investment. For countries with a different vision, it may be more easily resisted. Latin American countries do differ in their approaches to foreign investment, but even those friendliest to outside capital are unlikely to agree to an arbitration compact simply because of the deep tradition of the Calvo Doctrine and current unity.

The Possibility of OPIC

The Overseas Private Investment Corporation, recent successor to AID's Office of Private Resources, might represent an alternative model for dispute resolution in Latin America. Although its primary function is the insurance of private United States investments in developing countries against the specific risks of inconvertibility, expropriation, and war, revolution or insurrection, OPIC also claims for itself a general beneficial effect on economic disputes involving OPIC-insured

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inter-American Cooperation

investments. Its present coverage is not comprehensive of course, but OPIC can function to pay off insured foreign investors and remove the aggrieved party from the dispute, which is then left to cooler and more leisurely negotiations between governments. Most significantly, it removes the reasons for public accusations against the host country (e.g., full-page ads in the New York Times) and the outcry necessary to create a cause sufficiently celebre that the government of the investor's state feels compelled to press the case. There are several salutary features to OPIC's procedures. An expropriation does not become compensable for one year, during which the investor must pursue its host-country remedies. If its efforts result in a compensation agreement, OPIC may step in to endorse the arrangement by converting its insurance liability to a guaranty of any settlement worked out between the investor and the host-country. In the interim OPIC has auditing rights in the investor's books and should be able to exert influence on it to keep its demands at a reasonable level.

OPIC may also exercise a positive influence in selecting proper investments, structuring them to avoid future controversy, and monitoring them over time. Opportune utilization of its good offices has apparently prevented ailing situations from becoming terminal. Even making allowance for the probability that one is more apt to hear of OPIC's successes than its failures, it seems to have played a positive role in avoiding some investment disputes and easing settlement where others developed.

Why, then, has such a promising program cut back its operations in Latin America at precisely the time of greatest concern and insecurity among investors from the United States? According to Marshall Mays, OPIC's president:

. . . [T]he most important factor has been the adoption by several Latin American countries of the Andean Code, with its severe restrictions on foreign investments and its prohibition of investment agreements providing for subrogation of an investor's interests to a foreign government agency or international arbitration of disputes . . . Although OPIC's statute does not require that subrogation rights or international arbitration be spelled out in its agreements with host governments, the State Department has traditionally insisted on such provisions and some 85 countries have agreed to their inclusion in agreements approving the institution of OPIC's programs. 11

There is supposedly an effort afoot in the government to change some

of the shackling policies which prevent OPIC's meaningful operation in Latin America, but I have not heard of any concrete changes as a result of it.

Conclusions

Early in this paper I mentioned that the United States and Latin America are moving in two different directions in the areas germane to our discussion. This will tend to make dialogue easy and cooperation difficult. But specifically what are the directions? Latin America is moving towards planned economies and overt favoritism for the national investor as a means to autonomous development. However, it is also moving toward establishing more concrete "rules of the game," given added legitimacy because they may be part of an integration scheme in which it is more difficult for one country to deviate arbitrarily from an announced standard. Not just the investor and its home-country may be adversely affected, but other members of the economic integration unit may also be concerned. Along with a more definite and credible delineation of the rules for foreign investment, Latin America provides increased markets and investment opportunities, both because of economic integration and because of simple population and economic growth. The greatest part of developmental efforts in Latin America is and will be directed towards industrialization. There can be no mistake: Latin America ultimately wants an industrialized region, and foreign capital and technology are essential to achievement of that goal. However, capital and technology will be controlled and monitored as they have never been before in Latin America.

While Latin America moves to set down rules for foreign investment and expand its markets through integration and industrialization, U.S. investors have recoiled at the changing situation. Apparently sources of investments have shifted out of this hemisphere into Asia and other places. Perhaps United States investors have enjoyed their pre-eminent position in Latin America too long and, like the politicians under whom they achieved it, have become reactionary and unable to contribute to the new order. I do not think that this is necessarily true, and was heartened to see in Lima last summer a group from the Council of the Americas which had come to confer with the Peruvian government and the Andean Group's Junta to find common grounds of interest. Three years ago, the Council had nothing but vituperation for the Andean Group, its programs and future prospects. Other foreign investors—from Japan, Europe, and the Communist Bloc—have been less hesitant. These new elements, often encouraged by home governments
that want to establish export-import arrangements, are more prone to regard shuffled circumstances as an opportunity to get a piece of the action than as a reason for caution. New structures are evolving already. Capital seems more likely to go into Latin America in the form of loans than equity. Technology and service contracts are proliferating; for example, the Peruvian expropriation of ITT and subsequent contracting of a Japanese firm to help administer the state enterprise. In other instances, as under the Andean Group, the quid for foreign investors' quo may be a commitment to provide the capital-exporting government with part of the production of an enterprise it helps to establish. Infinite variations are conceivable and will develop.

The United States government has reacted in much the same way as its investors, thus far. It has indicated concern and hesitancy over events to the south, with a desire for greater control and security. But at a moment in time when many of the Latin American countries feel they have their destiny more firmly in hand than ever before and must go ahead unhampered by stifling conditions from abroad, pleas for control and security by the United States will get short shrift.

Any hope for inter-American cooperation in the establishment of mechanisms for the settlement of investment disputes depends on clear appreciation by both sides of their interests. I believe that thus far Latin America has done a better job of identifying its priorities and plotting its course in terms of what is acceptable to it. Given the unified voice with which it is apparently able to speak, that is an impressive fact to contemplate. The United States has recognized the increased solidarity and the activity against existing investments, but reacted defensively by turning to old remedies for its part in the dialogue. The current series of expropriations should be viewed, as I have tried to indicate, not as a model for future chaos and insecurity of foreign investment, but as a clean-up operation. There is probably not a great deal more which can be done for existing investors. At the same time, however, they are not faring all that badly under the status quo. IPC notwithstanding, most expropriated investors get some substantial compensation sooner or later under the ad hoc systems of dispute settlement which have characterized relations between the United States and Latin America for more than a generation of sporadic controversy. The aggravation and pain necessary to push some compulsory mechanism of "cooperation" through to inter-American agreement, presuming it is possible at all, may far outweigh the aggregate harm done to investors who lose their equity or portions thereof to the new wave of economic independence—I
do not like the term nationalism, for it does not accurately characterize what is going on in Latin America—and its attendant expropriations. It would be much wiser to muddle through the current rough period without trying to create institutions which will little serve the future state of affairs. There must be a dialogue, but let it be utilized to foster cooperation for future trends, not for defense of old ones. For example, why not an OPIC active in Latin America without the requirements for subrogation and arbitration? Or, better, why not create an inter-American agency for the insurance of specific risks, adjunct to the World Bank, the Inter-American Development Bank or ECLA? The establishment of such institutions, which have been suggested in a world-wide context, would weight them towards inter-American concerns and needs, and avoid the criticism that “international” criteria in inter-American relations all too often mean “United States” criteria.

Interdependence instead of dependency should characterize inter-American relations in the future. Cooperation, if cooperation there is to be, must take full account of Latin America’s new developmental ethos. The United States investor and his government should find their interests in wider markets and secure investments well served by Latin America’s new directions, once they project past the current transition period. Presumably that is the function of dialogue.

**DISCUSSION**

**PROFESSOR RUBIN**

One should examine one’s assumptions. In so doing, one must disagree with Professor Furnish in some respects. First, there is the assumption that a harmonious Latin American attitude about the relationship of investment to development exists, and this is not accurate. LAFTA and the Central American Common Market do not necessarily represent the wave of the future of Latin American economic integration. Even the European Common Market has not succeeded as one would have hoped. The problems of settlement of investment disputes have been with us for the last thirty to fifty years and have been much written about; in fact, some members of this panel have written on this topic.

There does not appear to be much real difference in the situation of

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*Each of the participants in the Colloquium has had an opportunity to revise his remarks to insure clarity and correctness.
the past as compared to the present situation. It is not desirable that the United States Government should participate directly at the initial stages of private investment in Latin America. In fact, the concept of the flag following the American dollar is something from which we seem to have gotten away. The participation of the U.S. Government in each investment negotiation does not seem to be realistic. In fact, the whole thrust of the criticism of OPIC by the Senate Subcommittee on Multinational Corporations is that OPIC involves the flag following the U.S. dollar—a concept with which I do not necessarily agree, but which must be noted as relevant to our discussion.

One of our basic problems is that we attempt to talk in terms of the settlement of investment disputes as a separate topic, when in fact we should be talking about the relationship between the investor and development. So let us focus on the desires of Latin America in terms of its development plans. Perhaps the approach of treaties of friendship, commerce and navigation should be tried with Latin America. Too much focus has been placed on the mechanisms of dispute settlements. A better approach would be that de facto arrangements should be worked out. After all, the dispute settlement problem comes only at the end of the process of investment. In particular, substantive accords can be agreed upon. For example, GATT is the type of arrangement that has been accepted by Latin America. All of this means that the stress should be placed on the substantive points of agreement, and work should begin from there leaving dispute settlement to one side. One has to look at principles upon which there can be a real consensus. Thus, one should go step by step, working out a series of agreements on specific topics. This would mean leaving overall settlement of disputes to the future since the settlement of disputes is just a minor aspect of the overall picture.

DR. BLEDEL

One can agree with Professor Furnish that there is definitely a unified trend in Latin America with respect to development. Latin America has become selective toward foreign investment. Professor Furnish places too much emphasis on the problem of expropriation. The great concern that U.S. investors now have is how to adapt themselves to the new order. The idea would be to adapt to new conditions and, therefore, no longer risk expropriation. It is true that free enterprise is not accepted in Latin America as it is in the United States. However, it does not necessarily follow that all the existing foreign investment will be expropriated. Investment must adapt itself to the new rules. Many Latin
American states are formulating new laws such as those on the transfer of technology (including trademarks and patents). This is a movement that cannot be overlooked. The issue of multilateral participation in mechanisms to resolve conflicts should focus on the new economic order.

One must think in terms of whether arbitration can be used in Latin America. For example, a new law has been promulgated in Argentina under which a foreign investment will not be accepted if the arrangement is that disputes are to be settled outside the country. Moreover, there is nearly no Latin American involvement in the International Center for the Settlement of Investment Disputes. The chances of using arbitration in Latin America are very slim. Again, stress must be placed on the new trend of investment under multiple national laws. Nevertheless, the present investor can survive in Latin America. In doing so, he must look to diversification of his investment.

**Professor Fatouros**

Concerning the "rules of the game" under which foreign enterprises are operating in Latin America, two points must be made at this stage.

The emphasis already noted on the settlement of investment disputes, rather than on the entire process of initiation, operation and termination of foreign investment, is by no means accidental. It is highly convenient to the foreign-owned firms, that is to say, for our purposes, U.S. firms. It leaves them free to make any arrangements they wish, at the start, or during their operation, without any formal United States involvement. I stress the adjective "formal," for it would be too much to say that there is no involvement at all by the U.S. Government at the early stages of multinational enterprise investments in Latin America. There are many indirect and informal methods by which private firms can be assisted by U.S. officials, from introductions and phone calls to more open pressures. Be that as it may, emphasis on dispute settlement allows the U.S. Government to disclaim concern for anything but the eventual legal troubles a company may have with the host government. Any shady dealings at the time of establishment, any possibly negative developmental effects of the firm's operations, are left out of the picture. You can see how such a situation puts the foreign-owned firm in the most favorable posture possible.

The second point has to do with the much-vaunted United States concern for the internationalization of dispute settlement mechanisms. Like most other countries, the U.S. is quite selective in its internationalism. First, actual U.S. policy is expressed as much by import quotas,
so-called voluntary import-restriction agreements and eventually the Burke-Hartke bill, when and if enacted in some form, as it is by the gloriously internationalist statements of some officials at some times. Secondly, internationalization and broad participation in decision-making are deemed by the United States most appropriate for investments in developing countries but not for other matters. Consider U.S. reluctance to include the less developed countries in international discussions over monetary or energy problems. Finally, the love affair with international arbitration and adjudication does not seem to extend to antitrust measures by the United States against British or Swiss interests, in the U.S. or abroad, or, especially, to the application of the Trading with the Enemy Act to dealings of U.S.-owned foreign subsidiaries. My point is not that United States policies are in this respect exceptionally evil, but that they are not peculiarly virtuous.

DR. ORREGO VICUÑA

Latin America is not likely to accept dispute settlement procedures per se, unless such procedures are part of a larger framework within which the host of problems related to foreign investment might find an appropriate solution. The same is true in other areas. Latin America might, for example, accept dispute settlement mechanisms in the law of the sea only insofar as such mechanisms are part of a broad negotiation covering all the basic aspects of the law of the sea.

In fact, there does not appear to have been a need for particular dispute settlement procedures in Latin America since investors have come into the region without the existence of specific international mechanisms, and furthermore investors have even accepted and lived with the Calvo Clause. A good example of this situation has been Decision No. 24 of the Andean Group which related to protective policies regarding foreign investments and transfer of technology. At the beginning there was a major outcry in certain sectors of U.S. business, predicting that investments would no longer be available under those terms and conditions. However, after a number of years it does not appear that the problems have occurred, and those same business sectors have changed their views with regard to the Andean Group.

In general, the relationship between Latin America and the investor has been satisfactory. Therefore, the only possibility which might allow the creation of certain dispute settlement mechanisms is the negotiation of an overall context of cooperation. It is even possible to argue that given the present stage of international economic cooperation, perhaps any such mechanism should not be confined to mere hemispheric rela-
tions since many other countries are today major foreign investors in Latin America. Dispute settlement should be applicable to all investors, particularly in view of the present trends directed to control the operations of multinational corporations on worldwide basis.

The real short term issue is the need for cooperation between host states and the home state of the investor. The two governments must provide solutions. For example, if the home government was in a position to require disclosure of certain basic information regarding multinational corporations, certainly more general issues could be resolved, hence facilitating the relations with the host country. Antitrust problems could also come under this framework of cooperation, for the kind of restrictive business practices which today are common not only have adverse effects for the home country but also for the economies of host countries. The whole range of problems arising from the extraterritorial application of laws, which every passing day are more in conflict, should also be brought under the scope of cooperation.

Ambassador McComie

The question is whether we should have mechanisms at all, that is to say, whether the establishment of dispute settlement mechanisms will induce more disputes. It may well be that the best mechanism is the prevention of disputes — the placing of the whole question in the broad framework of social development. Economic development, after all, is only a facet of social development. The rules of the game have changed — there is now tremendous consciousness on the part of the developing world that underdevelopment is not to be an eternal condition.

It does not appear that Latin America will accept purely hemispheric mechanisms for dispute settlement. Latin America is becoming more conscious of the rest of the world. There will be an accelerated trend towards approaching other third world countries. In fact, Latin America may be called upon by other third world countries because of its experience in dealing with the United States on investment matters. Perhaps Latin America will, in fact, aid third world countries in their investment dispute problems with the United States. There is a great consciousness in the Caribbean area that there is a movement in Latin America towards a new economic trend. There is also a consciousness of what other sub-regional areas have done. An example of this is the establishment by Barbados of its first embassy in Latin America—in Venezuela.
Mr. Amorim

There is a trend toward Latin American unity. Foreign investment is no longer taken for granted in Latin America. In the past foreign investment was too intermixed with foreign aid. Investment today is no longer received as aid but as business. A number of countries, Brazil among them, have come to the conclusion that some regulation of investment is needed — the implication is that there can no longer be an unconditional open-door policy. Of particular concern, of course, are the multinational corporations. There is an element of doubt in Latin America that was not present in the 1960's regarding foreign investments — there is no question that the settlement of disputes is only one aspect of the problem. The question as to a general treaty regarding investment, and including dispute settlement mechanisms, depends in large measure on the results of the studies now currently being done by the United Nations on the multinational corporation problem. If we are to come to a code it will be on an international basis rather than a hemispheric one. Most of the economic problems which Latin America faces are global problems.

The relationships between Latin America and the United States have matured. There is a growing consciousness that investment is good for both parties, not just for the recipient country. This improves the bargaining position of Latin America. Moreover, there is increasing competition due to investment coming from other areas of the world.

Professor Molina Orantes

One should take into account that there are different systems of law and different economic systems in Latin America. It is difficult to generalize with respect to Latin America. One must agree with Ambassador McComie that Latin American integration is the great and ultimate good. There are sub-regional movements towards this, for example, the Andean Group, the Latin American Common Market (LAFTA), and the Central American Common Market. All of Latin America is in need of foreign capital. This is particularly the case of Central America. The host states of Latin America must also be concerned with investors from outside the Americas.

Thus, Latin America must look at investment not just as a question between the United States and Latin America but as one which brings Latin America in contact with the rest of the world. There are doubts that the trend is towards expropriation. For example, the Mexican Law on Foreign Investment classifies different types of investment; there are enterprises in which no foreign investment is permitted, others in which
partial investment from foreign sources is permitted, and there are others in which complete foreign investment is allowed. These are matters of policy — not law. Some say that in Latin America the trend is away from free enterprise and toward planned economy. I am not so certain that this is true; the state does not necessarily have to take over all private enterprise and abolish it.

Those countries which are in need of foreign capital must do two things. They must first create incentives for investment and second — they must take protective measures to safeguard the local economy. The measures that are taken depend upon local needs which vary from country to country. Brazil, for example, is the third largest capital importing country in the world.

In the Andean Pact Decision No. 24, which was mentioned earlier, there is an obvious interest in continuing the transfer of technology, even though certain protective measures are stated. However, the decision was written with an acute awareness of the problem of the balances of payments.

One must agree with Professor Rubin that the settlement of disputes must be placed at the end of the process. The important thing is to come up with preventative measures, and one must think, therefore, in terms of general agreement. The concept of arbitration has not been entirely acceptable in Latin America. Perhaps Secretary of State Kissinger's suggestion of a fact-finding system will lead to more satisfactory solutions. One should stress conciliation as a process.

PROFESSOR WILNER

The process of conciliation, mentioned by Professor Molina, has very recently been employed in the Convention on Liner Conference Practices. In that instance, a system of compulsory conciliation was established. What this means is that those persons involved in a controversy are at least obliged to attempt to settle the issues. It does not mean, however, a final determination by a neutral party, such as one finds in arbitration.

Naturally dispute settlement comes at the end of the investment process. Nevertheless, it is essential to consider at the beginning of the process what might happen if things do not go well between the parties involved in the investment process.

The important point is that there ought to be a process of settlement which does not require the parties to politicize what are essentially business problems each time a dispute arises. Among the basic results of international economic transactions (including the investment of cap-
it, the transfer of know-how and technology, and the importation of special skills) should be the promotion of healthy economies and world trade. If each time a dispute regarding the terms of the particular transaction are carried to the level of intergovernmental and thus political negotiations on an ad hoc basis, much effort is wasted, and much ill will is created; the results of such politicization of the business relationship can only have negative results with respect to international trade and development.

**DR. BLEDEL**

I find myself in disagreement with Dr. Molina’s comment that Latin America is not abandoning free enterprise in favor of planned economies. It suffices to cite price controls, regulations of contractual arrangements, limits on royalty rates, limits on profits, rules such as the Decision No. 24 of the Andean Pact, as well as rules being formulated which require private foreign investment to divest itself of part of its holdings, to see that free enterprise is no longer the rule.

**PROFESSOR WILNER**

It is difficult to say how much unrestricted free enterprise is left in the world. In the area of control of foreign investment, including the transfer of technology, one wonders whether the Western States do not operate under a double standard. Why is it acceptable for Spain to enact a law regulating the import of technology but not acceptable if a developing country in Latin America or Asia enacts such a law?

**MR. GANTZ***

A major role of the lawyer is to minimize or avoid conflicts and in fact lawyers are concerned about taking the appropriate preventative measures. In this sense I do not agree with Ambassador McComie. Lawyers should be present at the negotiating table when business deals are made. These negotiations between large corporations and host governments have sometimes resulted in “unbalanced” agreements, in part because of the absence at the table of skilled lawyers representing the host government. If there were more equality in legal expertise, there might be fewer disputes.

The United States investor will have to continue giving more consideration to forms of investment that involve less than majority ownership. Nationals of other developed countries are investing in Latin

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* The comments made by Mr. Gantz and Mr. Kennedy are wholly personal and not intended to represent the views of the United States Department of State or any other governmental body.
America and are using other types of arrangements, most of which are working out well in meeting their investment objectives.

The establishment of a dispute settlement mechanism does not mean preserving the status quo as some host countries apparently feel is the case. For example, a regular process for review of the investment might be arranged to take place at five-year intervals. Other such innovations are possible.

At the present time, and for the foreseeable future, involvement by the United States Government in the settlement of investment disputes will be inevitable. This is likely to be true whether or not there is OPIC insurance. And in all this it should also be recalled that expropriation is the course of only one type of dispute—there being many other types of conflicts. If the United States and other investors continue to move away from insisting on majority equity investment there will be fewer disputes over "expropriations," but differences undoubtedly will arise over these other forms.

PROFESSOR WILNER

In reflecting upon the types of dispute settlement mechanisms that are more likely to work—is it more useful to have specifically created international substantive standards and rules on, inter alia, capital investment and transfer of technology (directly applicable within national legal systems), and leave dispute settlement to the national courts?

MR. ALURRALDE

The legal profession has one main responsibility, which is more important than the traditional one of settling disputes, inside or outside the court systems. That responsibility is the prevention of disputes through the promotion of cooperation among individuals and entities. For this reason I think that lawyers should not treat the subject of settling disputes without relating it to the overall investment project. As Professor Rubin has very timely stated, any analysis dealing exclusively with the concept of disputes tends to distort the real issue here which is the relationship between the investor and the host community and government.

Prospective investors should be advised that schemes which could appear legally and economically feasible, and financially attractive, may be ephemeral illusions if they are not accepted by the public opinion of the host country.

At any rate, projects of sizeable dimensions should be reviewed in order to identify their possible irritating aspects, since these aspects will
probably become direct or indirect causes of future disputes. Counseling should cover, among other elements, the terms and conditions of an investment and the profit expectations of the investors, as well as a procedure for the settlement of disputes which should include applicable law and mutually agreed-upon jurisdiction.

This counseling and reviewing should be carried out by a specialized agency of the home country, in close consultation with the prospective host government. The establishment of such an agency could very well be conceived as one of the "international economic obligations" of the home country. Some consider that this would be both inadvisable and unworkable in a country like the United States, but experience has shown us repeatedly that once a dispute has already arisen, involvement by the government of the investor's country becomes unavoidable and develops in a more unpleasant manner.

Mr. Kennedy

First one should speak of the role of the home government and of the investor in the investment relationship. For example, OPIC assures a United States Government presence in the investment situation which might not otherwise be there at the beginning. It is hard to know whether the presence of the home government at this initial stage is good or bad. Professor Furnish's point on OPIC is perhaps idealistic. OPIC can nevertheless provide much benefit for investment. In fact, OPIC has not been used as much as it should be.

If OPIC encourages the investor to restructure his investment, it is quite obvious that the United States Government is involved. Some have questioned whether the home government should take part in this stage of investment. The question has been raised in the United States Congress; it has been argued that what is at risk is not just what the investor brings in but potentially, a large sum of taxpayer money. In this regard how far can the United States Government go in protecting the investor? This brings up the question of whether OPIC in fact imparts the type of beneficial influence on the investment situation that Professor Furnish thinks it should. If it does not, can the United States afford to put its taxpayers' money at stake without some protection, such as subrogation of the rights of the investor to the United States, or binding neutral arbitration.

Professor Rusk

One cannot fail to be impressed by Ambassador McComie's remarks
regarding preventative measures. Obtaining agreement on major premises is an excellent idea. One does not get much nourishment out of the idea that Latin America is moving toward a new economic order. Involvement by government in the economy is not new, nor is it confined to certain areas of the world. With respect to the United States, for example, more than one-third of the gross national product is disposed of by government. Most countries, including the United States, have mixed economic systems. Nineteenth-century free enterprise does not exist any longer. Thus, one should not become so alarmed with what is happening in Latin America. It may be that some people in Latin America believe that the United States may be somewhat jealous of the new steps being taken. The United States would support just about any movement for economic unity on the part of Latin America. One of the elements for U.S. support for Latin American economic integration would be that it would give Latin America a stronger bargaining position in international trade.

Another element of the alleged jealousy by the United States involves extra-hemispheric relations in investment and trade. In fact the United States has encouraged the French, for example, to increase their aid and trade with Latin America. The capital needs of Latin America are beyond the means of any single capital-exporting country.

Since Latin America is concerned vitally with attracting capital, external sources will continue to be important. Private investment is three or four times larger in amount than the capital exported in the form of government funds. Private capital must be competed for and there is not much that the United States Government can do to require private capital to move anywhere. If, in a certain potential market for investment, heavy emphasis is laid on the Calvo Doctrine, it may be difficult to persuade capital to enter into the investment.

It should be recalled that there are at present difficulties in getting foreign aid appropriations through the Congress. At present there has arisen a new wave of liberal isolationism. It should also be pointed out that the House of Representatives voted against assistance to the International Development Association (IDA). Politically, it is becoming difficult to export government aid. In this respect there should be more thoughtful selectivity of the forms that foreign investment takes.

With respect to the form of investment there are some practices, such as the use of force to collect debts, that must, of course, be completely done away with. Unfortunately, some of the older investments have been in very sensitive political areas, such as the extractive industries. In terms of political sensitivity, manufacturing and service investments
are more desirable than some of the older forms. Another form of exporting foreign capital is through international organizations. The International Bank for Reconstruction and Development (IBRD) can conduct its operations in a less politically sensitive fashion. Again one has to convince the national legislature of the need for this type of mechanism for raising capital. In this connection it should be observed that the United States is substantially in arrears in its commitments to the Inter-American Development Bank.

It is hoped that we can find some way to agree on the major substantive premises in order to decide the framework in which disputes can be settled. Otherwise, we shall be driven to bilateral approaches which will vary with the unique problems, both political and otherwise, of each country.

Another important problem is that there has arisen the type of thinking that classifies certain countries as developed countries and others below a certain line as underdeveloped countries. It would be more satisfactory and desirable to state that every country has an obligation to help those which are less developed than it. Thus, reliance can be placed not only upon those highly industrialized Western countries but upon the countries exercising leadership politically and economically in each region.

It is to be hoped that Latin America will draw on capital from outside the Western Hemisphere. Sources for capital should be explored by means of every channel. It is far easier to transfer needed development capital by means of private sources than by means of governmental aid because political problems do not intrude in the former. Given this premise, it would be very harmful to development if private capital were to be frightened away by national and regional restrictions.

PROFESSOR WILNER

Returning to the issue of investment insurance, is such insurance not really a form of unilateral foreign aid? It seems to have been agreed by the proponents of every viewpoint that unilateral foreign aid is no longer desirable.

PROFESSOR FATOUROS

Agreement on dispute settlement mechanisms presupposes a perception of at least a possibility of common interests. The emerging demand for changing the "rules of the game" that Professor Furnish mentioned is founded, at least in some cases and in some respect, on a view which denies the existence of an ultimate global harmony of interests between
developed and developing countries. This is an emerging trend, by no means dominant yet, in several developing countries, including some, but by no means all, Latin American nations. Perhaps it will never become really predominant, chiefly because of reasons which have to do with existing structures in national societies. Let me try to list some of the fundamental tenets of this position.

It begins with profound disillusionment over development efforts in the past thirty years and with consequent doubts, leading to radical questioning of most accepted truths in development economics and politics. There are doubts concerning the value and contribution of private foreign investment to development. The operation of multinational enterprises in developing countries is seen as inherently political, as influencing the host countries' political process in the broadest sense of the term. There are doubts as to the propriety of the kind of development that has been envisaged and encouraged until now by most economists and policy makers, whether of the left or of the right. It is important to realize that the views we are discussing transcend established right-left divisions. For instance, current concern with maximizing employment and improving agriculture, with consequent decrease of the emphasis on industrialization, goes counter to strongly held views of the "old left." Finally, there are serious doubts as to the equity and workability of the present international economic order, which is seen as marked by the domination of the developed countries over the rest of the world and as functioning solely or primarily to their benefit.

The positive side of such views leads to a conception of an inward-directed development process, founded on self-reliance rather than external aid. There is a stress on decision-making on all issues by those most affected by decisions; decision-making by outsiders, even if technical in nature or demonstrably beneficial in short-run effects, is to be avoided or downgraded. Thus, the trend goes counter to principles of equal treatment for foreigners, found in Friendship, Commerce and Navigation treaties, since it insists on the necessity for closed rather than open economies and societies, with only a few controlled and selected links to the outside world—at least during the early stages of the development process.

A friendly dialogue between developed and developing countries is seen as unlikely—it is indeed often perceived as an illusion carefully nurtured by the developed countries. Continuing conflict, on several levels, is seen as much more likely. And it is conflict of competition among developed countries, along with possible collective action by the developing, that is seen as providing the latter with bargaining strength.
In this respect, the oil boycott and the boost in oil prices have had an enormous psychological impact among the developing countries—much more as symbols, I should add, than as realistic general patterns of action. It is improbable that two, three, a hundred OPEC's will spring forth in the immediate future.

I could go on at greater length but the fundamental point has been made: the issue, for many people in the developing countries and even for some people in developed countries, is not what kind of dispute settlement mechanism is desirable or acceptable today or tomorrow. The real issue is what kind of a global economic order is desirable, for developing countries and for the world community as a whole, and how it is going to be achieved.

MR. GANTZ

This is in reference to the requirements of OPIC's legislation under Section 237(b) of the Foreign Assistance Act of 1961, as amended: before it can provide insurance OPIC must determine that “suitable arrangements” have been taken to protect its interests. Until now at least, we have felt that this means subrogation and arbitration, or some alternative which will effectively protect U.S. financial interests. There have in fact been a number of Latin American countries that have agreed to subrogation and arbitration. There is little European and Asian investment in Latin America at this time, a fact which in my view makes the absence of such required government insurance programs in those countries of limited relevance. It is, of course, in the interest of the United States to have more non-United States investment in Latin America.

Until recently, OPIC has not attempted to influence insured investors until expropriation becomes imminent. Perhaps greater influence could be exerted before problems arise, but there is little experience to date to show that such action would reduce the danger of expropriation to the point where arbitration provisions are no longer needed. Another factor to be considered respecting this question of “suitable arrangements” and protection of the insurer is whether insurance should be viewed as a form of foreign assistance. If OPIC is seen as an indirect form of aid, one may be less concerned about dispute settlement mechanisms or recovery by OPIC of its losses. But if the taxpayer is to be protected from having to finance the payouts, the covering of losses has to be taken into account. Moreover, the existence of binding arbitration provisions may encourage settlement short of arbitration. For example, Chile in 1963 concluded an OPIC agreement which included arbitration
and subrogation provisions: it was never submitted to the Chilean Congress and was thus never in force in Chile. Chile under Allende, in general, lived up to its international agreements and in my view would have gone to arbitration over insured investments if it had been required to do so by international agreement.

**Ambassador McComie**

It is interesting to note Mr. Rusk's comment that the amount of capital exported by private firms is three times that of governmental capital export. One wonders how private is the private investment? Such investment is in fact public because the government has a direct interest in investment. The investment represents potential tax revenues so that the government has an interest in protecting it.

Aid is a paternalistic concept that is being perpetuated. In fact, it is just investment. There would be fewer disputes if both sides understood what was involved in such an investment.

Why is there such difficulty for multilateral institutions to acquire funds from each country? Developed countries do not yet realize that the poorer countries have in fact placed greater reliance on multilateral institutions. Nevertheless, as soon as poorer countries seek refuge in multilateral development institutions the rich countries become reluctant to support the institutions.

One has to look at both the various types of bilateral relations and the multilateral institutions when deciding upon the type of dispute settlement mechanisms that will be best suited to bring about satisfactory results.

**Professor Rubin**

Disputes over the terms for mechanisms for the settlement of investment disputes have been discussed for over thirty years with no results. Experience with various codes leads one to despair as to the possibility of general agreement or dispute settlement as long as such mechanisms remain the center of attention. And it has also been shown that it is not necessary to have organized general dispute settlement mechanisms in order for economic relations to continue. For example, no agreement exists between the United States and Canada with respect to dispute settlement, yet investment has continued to flow into Canada. The same, of course, is true with respect to Latin America.

We are in a new game, especially given the development of the multi-
national corporation. Trade has also changed tremendously. Thus, we are talking about direct foreign investment in a new context.

PROFESSOR WILNER

The discussion leads one to wonder whether there are certain neutral principles that could be agreed upon in order to smooth the way for an equitable solution to disputes arising from investments, not only into Latin America but eventually from Latin America towards the North and East. Do some countries prefer an atmosphere of indecision and lack of generally agreed upon rules so that they can obtain the best deal for themselves? Implicit in this question is whether the United States, for example, would accept the same rules and dispute settlement mechanisms for Latin America investment into its market as it wishes to have for the investment abroad of its own nationals.

Divergent views have been expressed at this Colloquium regarding the behavior of the United States investor, the desirability of unilateral aid as compared to multilateral aid, the duty of the home government of the investor to guarantee the investment and the obligation of developed countries to assist in general international economic development. In this connection, it has generally been agreed that a certain minimum element of agreement on fundamental substantive questions of foreign investment is a necessary condition for the creation of effective mechanisms for the settlement of economic disputes. In the view of many participants, the mechanisms are more likely to be developed in specific areas of trade and development where it is possible to reach a consensus on the basis of substantive rules.

[COMMENTS MADE SUBSEQUENT TO THE COLLOQUIUM BY RAPPORTEUR FURNISH]

Having enjoyed the first word, in the form of the working paper which appears above, I was constrained to sit quietly during the remainder of the morning session. The antidote to my slight discomfort on that occasion is this epilogue, which may clarify some of my own thoughts.

As might have been expected, comments strayed from the confines of this hemisphere and investment disputes per se. There was strong and proper resistance to focusing exclusively on the resolution of expropriation controversies. Rather, "investment disputes" were thrown into a complex mix of many elements, all of which might be included in the general problem of capitalizing development. Foreign aid and multinational corporations were frequently mentioned, as were evolving economic philosophies of Latin America, the present and future of free
enterprise, and the political implications (for the international system as for the nations on both sides) of the investment issue. The Colloquium viewed foreign investment and development as world-wide concerns, with any resolution machinery most appropriately pitched at that level. There seemed to be a consensus that Latin America currently presents a more united region than formerly, at least on those issues discussed in Athens, and that bilateral structures were probably non-availing.

All in attendance seemed to agree that it would be better if there were no disputes, and a multilateral system were formulated which forestalled all controversy and made it possible for foreign investment to enter a host country with all terms and contingencies defined to the satisfaction of both sides. *Rebus sic stantibus* will ever fight *pacta sunt servanda*, however, and as David Gantz noted, it is difficult to assure stability and define the role of foreign investment in a dynamic situation, since the essence of such a situation is lack of stability and changing desires on the part of host countries. Disputes are probably certain in any case, but change will almost surely aggravate the tendency.

With that in mind, it seems desirable to place investment disputes in a broader context. It seems incorrect to conclude that the job is done by simple classificatory dismissal; just because investment disputes are really an essential part of the capitalization of development issue does not mean that one may immediately stop worrying about them. Most properly, it means, as several of our participants pointed out, that procedures and mechanisms for the settlement of investment disputes must be treated as part of a package if there is to be any hope of successful agreement and cooperation.

The time may well come when circumstances allow a de facto cooperation between the United States and Latin America with respect to foreign investment. Latin America now has rules which direct investment into those sectors and enterprises which the host countries feel are most necessary and appropriate for development. That is, there is increasing exertion of host country discretion at the inception of foreign investment. This is a healthy change from the days of unquestioning acceptance of foreign investment as an unalloyed positive factor. This does not mean that circumstances have stabilized, but it does mean that the host country may begin to fulfill the screening function that worried the Colloquium. How will investment fit into the development efforts of the host? Let the host determine that, and impose its conditions accordingly.

There is virtually no question that the United States, and likely other
capital-exporting countries, will continue to exert diplomatic pressures in many instances. Such efforts will no doubt prove unpleasant on most occasions. Despite the pain and aggravation, however, time has proven that sovereign nations will protect their nationals' investments in other sovereign nations when the investment is sufficiently important. The most viable means of doing so appears to be a form of insurance, which first forces the investor to make a good faith effort to reconcile differences with the host, then compensates him and thrusts the insurer forward in his place before the host sovereign. It may not be relevant that OPIC has not performed this function, or that Senator Church and his committee attack OPIC, for much may be learned from OPIC while avoiding the inherent weaknesses in its operation and requirements.

Ultimately, unless one is resigned to the current ad hoc practice, it becomes a matter of finding a proper agency utilizing a proper method. OPIC, as an agency of the United States Government, is clearly inappropriate. So is any other agency which would attempt to exercise final review of national resolutions regarding foreign investment controversies. If "fact-finding" means "fact-reviewing," Secretary of State Kissinger's reference at Tlatelolco is probably unworkable, for example. A strong Latin American agency like CEPAC (it has never done anything like this, one of the reasons I propose it) might provide a prestigious imprimatur if it were given the responsibility to decide what were insurable investments. It might also play a significant and effective role in monitoring investments and smoothing potential conflict. The process might have the incidental benefit of educating investors and national governments about each other's problems and coordinating efforts toward development.

Ideally, such an agency would be funded by contributions from both host countries and home countries. Its personnel would be heavily, if not exclusively, composed of host country nationals. All of this may be unthinkable politically, but it may also be the only alternative to the present non-system for the settlement of investment disputes.

VIEWS IN THE AMERICAS ON BASIC QUESTIONS RELEVANT TO THE LAW OF THE SEA DISCUSSION

Professor Wilner

This part of the Colloquium will focus on views articulated in the Western Hemisphere regarding the various aspects of the law of the sea. Divergent views abound in the Americas on the characteristics as well
as the breadth of territorial water, the characteristics of the high seas, jurisdiction over the seabed, the regime for the living resources of the sea, narrow straits and innocent passage by vessels on, under and over the sea, and the creation of an international regime for the exploitation of the resources of the sea.

Professor Lupinacci has agreed to make some introductory comments of a historical nature and to describe some of the basic points of view that have been expressed up to the present.

PROFESSOR LUPINACCI

The historical background of the law of the sea and a general overview of the views of Latin America on the subject have admirably been set forth in a recent article by Dr. García-Amador. This introduction is to some extent a summary of the material discussed in that article. Among the basic issues on the law of the sea confronting the international community are the problems attaching to the concept of the territorial sea and the problems relating to pollution and the protection of the living resources of the sea and the marine environment. The discussion in this Colloquium might well focus on these matters.

Modern concepts of the territorial sea emerged four centuries ago and were first manifested in the confrontation of the views of Grotius and Selden. A belt or zone of sovereignty of the coastal states was established; later this belt was to be set at three miles. The fundamental interest involved in this was the security of the coastal state. Over the centuries economic matters such as the exploitation of the resources of the sea came into play. This initially related to the sources of wealth in the adjacent waters and then to the subsoil. They both came to be protected by the institution of the territorial sea. In recent times another basic concern by the coastal state has been added, namely the protection of the living resources and of the marine environment against pollution and depletion.

In Latin America the new era regarding the law of the sea began with legislative measures adopted by certain countries with a Pacific Ocean coast (Chile, Peru, Ecuador) establishing rights of the coastal states with respect to the adjacent sea up to a distance of 200 miles; this legislation dealt with the exploitation of resources. A declaration made in 1952 at Santiago, Chile regarding the maritime zone laid claim to sovereignty up to a distance of 200 miles out to sea. This was done in order to protect and exploit the resources of the sea. It was stated in support of

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this position that there is a close relationship between the people of the coastal states and the sea; these people depend upon the sea to support them. This is not a phenomenon limited to Latin America. For instance, Iceland is an excellent example of a state which substantially depends upon the resources of the sea for its economic life. This concept of dependence is the first basis for the Latin American claim to the adjacent waters. This position is reflected in the 1970 Montevideo Declaration regarding the right of Latin American countries to extend their jurisdiction over the seas to a reasonable limit. The reasonable limit did not necessarily mean 200 miles but depended upon the characteristic of the adjacent sea. In the South Pacific, for example, countries such as Peru could extend their jurisdiction over an area up to 200 miles. This could not be done in the Caribbean. A regional individual criteria for the breadth of the territorial sea would have to be met. The Declaration of Montevideo and Lima reflect the general position of the Latin American States.

There are, however, a number of differences among the Latin American states; there have even been changes in positions in recent times. First, are the states which support a concept of a territorial sea of up to 200 miles. For these countries (including Brazil, Uruguay, Equador, and Peru) sovereignty extends to 200 miles. But even within this group there are differences; Brazil, for example, has adopted the principle of a territorial sea in the classic sense — the 200-mile limit of the territorial sea with a right of innocent passage through all of the 200 miles. The Uruguayan view is that of two regimes for navigation over the 200-mile limit which is known as the principle of the plurality of regimes in the territorial sea. In the view of Uruguay the first 12 miles would be territorial waters in the classic sense including the right of innocent passage; after 12 miles and up to 200 miles of the territorial sea, freedom of navigation and overflight would be recognized. In the exploitation of the living resources of the territorial sea two regimes would also be established; the first 12 miles of the coast would be exclusively reserved for nationals. Beyond the 12 miles, exploitation could be undertaken by outsiders with the authorization of the coastal states. Argentina has taken a similar position in that it has considered that sovereignty of the coastal state should extend to 200 miles. Argentina, however, has subscribed to the same view as that of Uruguay regarding two regimes within the 200-mile zone. In fact, Uruguay and Argentina have entered into a treaty regarding their maritime boundaries which clearly reflects this position. In this treaty both countries recognize the freedom of navigation and overflight beyond the first 12 miles.
A second position is taken by those countries who support the concept of the "patrimonial" sea. For these countries the territorial sea extends to 12 miles. However, beyond the 12 miles and up to 200 miles the coastal state can exercise sovereign control over the exploitation and conservation of the resources of the sea. Thus, in the 188-mile zone, the coastal state exercises its rights with respect to specific objectives such as the regulation of conservation and exploitation; these states do not exercise their sovereignty on the entire zone but only on the resources of the zone. States, thus, among other things, exercise control by means of pollution measures. It is interesting to note that other countries, especially in Africa, support the idea of economic zones — a concept that is very similar to that of the "patrimonial" sea. There is somewhat of a difference between the two concepts in the sense that in the one case ("patrimonial" seas) consideration is of resources; whereas with respect to the other case (economic zones), the stress is put on zones rather than specific resources. Nevertheless with respect to both concepts the exercise of sovereign rights in the zone is for purposes of exploitation and conservation.

A third view is based on the concept of exclusive or preferential rights rather than sovereignty. Thus, states would have the exclusive right in some cases or preferential rights in other cases with respect to the exploitation of specific resources of the sea. It is difficult to know what the position of the United States is with respect to the positions stated above. It may be that the United States believes that the coastal states can exercise certain preferential, though not exclusive, rights. The Soviet Union has adopted a strict position on the breadth of the territorial sea; it considers that the maximum limit should be 12 miles. However, it appears that after several years of discussion the Soviet Union is beginning to concede the existence of an economic zone beyond the 12-mile limit.

The crucial problems are to define the nature of the economic zones and to articulate the rights of the coastal state in the economic zone. Naturally, the size of the zone must also be worked out. Another crucial problem is related to the protection of the living resources of the sea. Coastal States have not only the right to establish regulations on this matter and control it in their zone of maritime sovereignty but also the duty to take into account the international standards with respect to such regulations.

**Professor Wilner**

In addition to the various South American views, the point of view of the Caribbean states must be taken into account.
This is a complex geo-political question. The Montevideo Conference was irrelevant to the Caribbean since the Caribbean area contains a great number of states and colonial territories within a relatively small area. In a sense one can say that the Caribbean countries are the largest bloc in Latin America; the bloc contains 17 active members of the Organization of American States plus Cuba. There are also a number of other territories some of which are self-governing or are in association status and some of which are not self-governing. The theory of the "patrimonial" sea is basically supported by Barbados and by other Caribbean states. These states realize that it is difficult for them to exploit the resources of this zone. In this connection, there have been a series of meetings by the English-speaking subgroup within the Caribbean states. More efforts along this line will be made before the June 1974 Diplomatic Conference at Caracas. It should be realized, of course, that in any case it is impossible for Caribbean states to claim exclusive jurisdiction up to 200 miles.

Another important issue relates to the rights of landlocked countries with respect to the sea. This is a subject that must be discussed and it contains problems that must be resolved.

Has there been any discussion of sharing resources among the developing countries themselves under the concept of the "patrimonial" sea or economic zones, or is it thought that these resources belong to the coastal states individually? This question is addressed to Professor Lupinacci.

There must be distinctions made according to the different situations. It is important to note that landlocked states support the idea that in economic zones they should have equal rights with the coastal states. This may be a tactical claim rather than a realistic claim. Nevertheless, in the draft submitted by Uruguay it is recognized that landlocked states should have preferential rights to exploit the economic zones under agreement with the coastal states involved.

The limits of national jurisdiction over the ocean space are presently the most important problem for the law of the sea negotiations. As is well known, Latin America has favored a uniform jurisdiction over a
200-mile area which includes the seabed and its subsoil as well as the superjacent waters. The close relationship existing between the seabed and the waters is a strong argument in favor of this policy: such relationship is evident not only with regard to fisheries but also in that any exploitation of the seabed will inevitably affect the uses of the waters, particularly insofar as navigation and pollution are concerned. For example, at present, consideration is being given to the idea of closing off in several years the whole area of the North Sea to navigation in order to facilitate exploitation of the oil of the subsoil.

Latin America has also favored some exceptions with regard to the 200-mile policy, in order to accommodate the interests of some countries, such as Argentina and Mexico, the continental shelves of which exceed the 200-mile distance. In these cases jurisdiction is admitted up to the outer limit of the continental rise, but only with regard to the shelf and not to the waters.

However, even if an agreement is reached with regard to the limits of national jurisdiction, a number of other important issues will also require some definition. One of these issues is the nature and extent of the rights which the coastal state may exercise within the 200 miles. Probably these rights will be functional in purpose, and they will refer to the exploitation of resources and other related aspects, such as those that have been proposed under the name of economic zones or patrimonial seas. Another important issue is that of baselines. The definitions of the Geneva Conventions are not sufficiently precise at present and new criteria should be introduced. Ambassador Pardo of Malta has given clear examples of the difficulties encountered in the application of baselines: if straight baselines were drawn between the state of Hawaii and some of the islands under its jurisdiction, an enormous maritime area would become enclosed, creating a zone far in excess of 200 miles. Problems of islands, international straits, landlocked and shelflocked countries, among many others, are also waiting for some definition and resolution.

With regard to the seabed area beyond the limits of national jurisdiction, Latin America has favored the inclusion of all the resources of the seabed and subsoil under an international regime, a position which is common to third world countries. Also, strong powers have been favored for the international machinery, particularly to prevent the adverse effects which may ensue for the land producers of the same minerals, as well as to ensure an appropriate distribution of benefits.
PROFESSOR WILNER

The plan then appears to be to include all aspects of the law of the sea within one overall multilateral convention. Alternatively a number of conventions could be drawn up to be signed at the same time and to come into effect only when all of the other conventions have been similarly signed and ratified.

The Latin American plans appear to hinge on the size of the coastline of the particular state. Will need be taken into account under the Latin American view? Alternatively, will it be a matter of the accident of the size of the coastline in that countries with a long coastline will get a large proportion of the adjacent seas while countries with a small coastline will get much less? Would this be an equitable distribution of jurisdiction over the seas and of the profits made from the exploitation of the sea?

The international regime which would be set up to control and regulate the seas beyond national jurisdiction should be as all encompassing as possible, and it would be consistent with a sense of internationalism and fairness for the rights of all states that the traditional concept of the high seas for purposes of navigation and overflight be maintained beyond the 12-mile limit, and that the exploitation as well as the protection of the living resources of the sea and of the seabed resources be placed within the jurisdiction of the international regime.

PROFESSOR FATOUROS

Whatever the intentions and the professed principles of an international sea regime, it is evident that it would reflect the present structure of the international political system, with its radical inequalities in power and capabilities. Within such a regime some countries will have more of a say than others. The way I hear such regimes often described, they seem far more equitable and balanced than anything we have up to now and, frankly, anything that we can realistically expect to have in the near future.

PROFESSOR WILNER

The problem is a worrisome one and it involves making a decision whether an imperfect international regime is better than abandoning the seas either to exclusive national appropriation or to a scramble by the technically advanced exploiters of the resources of the sea with little if any regard to the needs of mankind. It should be noted that the international regime envisaged here would exercise real control over the exploi-
tation of the resources of the sea and would not merely, as has been suggested by some, open the way to exploitation by anyone who can get there.

MR. AMORIM

Any attempt to internationalize the sea beyond a 12-mile limit would benefit those countries capable of extracting the resources. Moreover, if the system is based on need one finds great difficulty with measuring need. For example, the United States has a great deal of need — but is it real need?

A logical question to be asked in connection with the proposal for an international regime is why all the resources of the United States should go only to the United States — why not give some of these resources to other countries? This could be a question which would arise out of Professor Wilner's approach. The recent statement by the Soviet Union agreeing to preferential rights beyond 12 miles might be an important concession. One wonders whether the Soviet position envisages financial assistance to help raise the technological capabilities of developing countries and what would be its impact on the U.S. position?

PROFESSOR LUPINACCI

The primary interest of the coastal state is to protect the resources of the sea. It is possible to establish general rules to protect those resources but it is the coastal state which is best able to render such protection.

PROFESSOR RUSK

This statement is not made on behalf of the United States delegation since a private citizen cannot speak for the United States. However, it is one's impression that the United States attaches great importance to a comprehensive scheme to deal with the law of the sea. There can be no general international law accepted by all states unless all legal systems are in accord; that means much negotiation and adjustment. It would seem that there can be different kinds of international law for different regions. Perhaps one should not think in terms of a general line but rather in terms of a multiplicity of lines of responsibility as to the uses of the sea, for example, the right of innocent passage and international civil aviation rules, the encroachment upon the territorial sea, custom controls, fisheries and others. There can be different regimes with respect to each of these uses of the sea.

On the matter of the seabed if one injects the problem of economic
need into the matter it is possible to say that the needs of Brazil and the United States are much higher than those of Uruguay. Under this view, if Uruguay is permitted to reach out 200 miles then perhaps the United States and Brazil can reach out a thousand miles. Moreover, the Uruguayan concept of reasonableness is relative.

The resources of the seabed should be brought as much under an international regime as is possible. The issues relating to the law of the sea cannot necessarily be determined by votes at an international conference. Vital issues are locked into these questions. Ultimately it comes down to the politics of power and thus the maximum number of votes does not necessarily control. I am somewhat disturbed by the ideas expressed by other members of the Colloquium that certain questions are non-negotiable. An example of this is the question of the 200-mile limit. If one group comes to the table with non-negotiable positions then the solution can only be one which is linked to the relative power of the parties. The United States is trying to leave room for negotiation. It is recognized everywhere that if no adequate solutions are found there could be a race for the resources of the sea and for control of the oceans which is not a good prospect in a nuclear world.

DR. GARCÍA-AMADOR

At the 1971 session of the Seabed Committee the United States proposed that the preferential fishing rights be recognized to the coastal state beyond the 12-mile limit. Earlier the United States had talked of a limit on preferential fishing rights based on effective fishing capacity. The United States has subsequently made other proposals along similar lines. Therefore, there is a good chance that the United States will give up a bit more of its position at the Diplomatic Conference.

DR. MOLINA ORANTES

The Inter-American Juridical Committee in 1973 drafted a series of 15 Principles regarding the law of the sea. The document was voted on article by article by the committee and was approved as a whole by nine of the members present. The various members of the Inter-American Juridical Committee set forth their views on each of the items and these views appear in the document containing the Principles. The First Principle states that the "sovereignty or jurisdiction of a coastal state extends beyond its territory and internal waters to an area of the sea

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adjacent to its coast up to a maximum distance of 200 nautical miles, as well as to the airspace above and the bed and subsoil of the sea." There is then a reference to Principle 4 as a condition to Principle 1. Principle 4 states, in part, that "within the limits of the zone adjacent to the zone up to 12 miles, the ships and aircraft of any state, whether coastal or not, shall enjoy the right of free navigation and overflight subject to the pertinent regulations of the coastal state with regard to the preservation of the marine environment, the activities of exploration, exploitation and scientific research conducted therein, and the safety of maritime navigation and transportation, all in accordance with international law."

Principle 3 states that within the limits of the zone up to 12 miles, the ships of any state shall enjoy the right of innocent passage in accordance with international law. Principle 5 deals with the issues of straits: "Ships and aircraft that transit through or over international straits that are customarily used for international navigation and that join two free seas enjoy the freedom of navigation and overflight regulated in paragraph 4. . . ."

Principle 6 states the objectives that the coastal states should have with respect to the utilization of resources from the 12-mile limit to the limit of 200 miles; the objectives should be "the maximum development of their economies and the raising of the standards of living of their peoples." The Seventh Principle relates to the powers of the coastal state in the zone extending from the 12-mile limit to the 200-mile limit. These include the power to "regulate and conduct exploration of the sea, its bed and subsoil and exploration of the living and the non-living resources that are found there . . . to regulate and to adopt the measures necessary for the purpose of preventing, reducing, or eliminating the damage and risks of pollution and other effects harmful or dangerous to the ecological system of the marine environment . . . ."; other powers are "to promote scientific research . . . ." Principle 8 relates to the laying of cables and conduits recognized under international law.

Principle 9 deals with landlocked states: "The coastal state shall authorize the non-coastal state in the region to exploit the living resources within the zone that extends from the 12-mile limit to the limit of 200 nautical miles, granting them preferential rights in relation to third states and in accordance with criteria that shall be set forth in multilateral, regional, or bilateral agreements."

Principle 11 relates to the possibility that the sovereignty of the coastal state may extend beyond the 200-mile limit set forth in Principle 1. It states: "The sovereignty of the coastal state extends beyond the
zone mentioned in paragraph 1 throughout its sector of the continental shelf, for the purpose of exploration and exploitation of the natural resources existing in the bed and the subsoil of the sea." Principle 12 sets forth the definition of the continental shelf. It should be recalled that the definition set forth in the 1958 Geneva Convention has been abandoned by the Latin American states who believe that the Convention is obsolete. Thus the definition in Principle 12 is the following: "The continental shelf comprises the seabed and the subsoil of the undersea areas adjacent to the coasts up to the outer border of the continental rise. That is, the boundary with the ocean basin or abyssal depth."

Principles 13 and 14 relate to the zone beyond the 200 nautical miles and beyond the continental shelf. Principle 13 states: "The seabeds and ocean floors located beyond the zone of 200 nautical miles and beyond the continental shelf, as well as the resources that may be extracted from them, are the common heritage of mankind." Principle 14 states: "The future legal system governing the high seas and the exploitation of their resources should be organized on regional and not on worldwide bases."

**Professor Wilner**

It would then seem that the preference in Latin America is for a strong international regime beyond the 200-mile zone except when the continental shelf extends beyond the limit of 200 miles and in fact even if it extends to as much as a thousand miles.

**Dr. Orrego Vicuña**

Most of the resources of the seabed, except for petroleum, are beyond the 200-mile limit.

**Dr. Caicedo Peraldo**

Realistically speaking, a 12-mile territorial sea is possible only if there can be an economic zone beyond 12 miles; thus the real compromise is for an economic zone between 12 and 200 miles. The real issues are the differences of opinion on the rights of the coastal state in the area between 12 and 200 miles. A basic issue regarding the territorial sea will be that of the definition of islands and the manner in which settlement may be found regarding disputes on boundaries.

**Professor Wilner**

It is assumed that you would include problems of boundaries between adjacent states as well as those involving islands.
Professor Fatouros

I wonder how far it is possible to define several functional zones, if technological capacities with respect to their particular functions are not well known at this time or are rapidly changing. Other members of the Colloquium have also expressed concern regarding the manner and the extent to which technological change will affect functional divisions of the sea.

Dr. Orrego Vicuna

One way of taking technological advances into account would be to provide that the general convention would be in effect for a period of, for example, 15 years and then would be modified to take into account technological advances.

Professor Lupinacci

With respect to the remarks made by Professor Rusk it must be remembered that we are in the period of a revolutionary change in the law of the sea. It is difficult to explain the Latin American view if one relies on old concepts. Within the 200-mile limit a state has both rights and duties. A clear example of these rights and duties is to be found in the case of pollution. The coastal state has the duty to protect the sea from pollution. The coastal state must thus apply the general recommendations set forth by the international organization in this area. The coastal state thus has many duties and they are consequences of sovereignty over the area. Nevertheless, certain rights must be recognized — these include the right of transit through international straits. This right must be recognized without the possibility of either suspension of such transit or discrimination against any country.

There must be a conciliation of the interests of the coastal state and other states. A dialogue is of great importance.

The reason that the proposal of Uruguay speaks in terms of reasonable breadth of sovereignty over the seas is because international law has not yet established specific limits. Moreover, we think that a state has a right to fix the limit of its territorial sea using the criterion of reasonability. Such a criterion takes into account the various needs of different countries and the geographical, geological, and biological characteristics of the respective adjacent seas.

Professor Furnish

All one can say is that today the criteria as to limits to national
sovereignty over the seas are in flux. One can only have a pessimistic view of this in that every country needs as much as it can get, and it should negotiate from that position. International regimes, that is, the reordering of basic structures, change only after traumatic events. One wonders if it will take another great international upheaval, such as a world war, to make such an international regime possible.

**Professor Fatouros**

There may be an inherent limit to the expansion of national control to the extent such control involves at the same time international responsibility, more particularly, liability for pollution. The more the sea and the seabed are exploited, the more problems of pollution will arise. There may be a point where the individual states (especially those which are not major powers) can no longer cope with pollution—policing and cleaning up—and will not want to shoulder this responsibility. This may be a built-in impediment to unrestricted expansion of jurisdiction.

**Professor Caicedo Pérdomo**

It would appear to be difficult to think in terms of renegotiating the law of the seas every ten years. While it is true that there will be technological changes, a basic establishment of a general regime for the seas should take this into account and provide for orderly modification.

**Professor Wilner**

The failure of the international community to set up a viable international regime for the exploitation of the resources of the sea would be a serious setback for the international law of cooperation. Much, with respect to the future of mankind, reposes on the ability of the states to organize an effective international regime. Such a regime with respect to the sea would be an essential model; thus if it worked it could be pointed to as a success which could then be used with respect to cooperation in other essential areas.

**Mr. Amorim**

One need only cite the increase in oil prices as an example of a case where the developed states have suddenly begun worrying about the interests and needs of developing countries. Thus basically the concern with an international regime is only an indication of a preoccupation by the developed states with their own problems.

**Professor Wilner**

It would be an unfortunate portent for the future if the attitudes of
the developing states towards the international community were to imi-
tate the worst elements of nationalism as practiced by the industrial
states of Europe and North America. A call for an equitable distribution
of the resources of the seas is one that is worthy of close attention by
all segments of the international community.

Diverse and in some cases antithetical positions have been expressed
at this session. But it has also been stated by many of the members of
the Colloquium that the time for compromise has arrived.

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