INTERNATIONAL INVESTMENT LAW AND ARBITRATION AMIDST GLOBAL CHANGE

DISCUSSION LEADER

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Consensual economic transactions, while not necessarily equally enriching, leave each participant net better off for them; where a common culture obtains, the participants, for all their grumbling, usually appreciate, at some level of consciousness, that the transactions were worthwhile and bear repeating. Transactions involving direct foreign investments should be no exception to this generality, but thanks, perhaps, to factors such as the cultural and linguistic differences of the participants and the turnover of representatives during the longer duration of the investment, direct foreign investments, compared to one-off transactions, seem more prone to conflicts. In the current global era, direct foreign investment outstrips international trade and it is probable that it will continue to be an important wealth-producing factor as the international system evolves into an increasingly science-based and technological global civilization. It is equally probable that direct foreign investment will continue to be conflictive in old and new ways.

From the rise of European imperialism, in particular, direct foreign investment acquired the image (not entirely undeserved) of an exploitative instrument of mercantilism and foreign domination. Later, the staggered introduction of the industrial revolution enabled European transportation and communications companies to carry their technologies to comparatively less developed countries: key parts of direct foreign investment were henceforth dedicated to and often controlled infrastructural development and its management in national economies that had yet to experience industrialization. To many citizens of those states, it seemed that the great corporations and mighty banks and financial institutions of a distant Metropolitan "owned" their electrical grids, their water supply, their railroads, their countries.

Customary international law had established minimum standards for the protection of aliens and their property but in the absence of institutional methods for applying those standards, their mode of implementation was left to the discretion of the states of the investors themselves: euphemistically called "diplomatic protection of nationals," those methods of protection were often as coercive as the investor's state chose to make them. The very method of enforcement of the international law standards rendered international investment law even more controversial.

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[*]Excerpted from W. Michael Reisman, International Investment Law and Arbitration Amidst Global Change, Address at The Future of Investment Treaty Arbitration: Challenges and Response, Seoul National University School of Law (May 25, 2012).

The Russian Revolution, installing the command economy as a competing model for accelerated and more equitable national development, reinforced the perception of direct foreign investment as an instrument of exploitation. After the Second World War, as the great European empires were dismantled, many of the new states that emerged from them adopted the command economy model, and, along with it, the image of foreign investment and its international modalities of protection, as an equally sinister but more subtle instrument for neocolonialist exploitation and domination. The most explicit normativization of this view of foreign investment was to be found in the United Nations' General Assembly's Declaration on the Establishment of a New International Economic Order (NIEO) and its Charter of Economic Rights and Duties of States.

Ironically, this burst of economic nationalism in many of the newer states coincided with a demand for *national* economic development. The political imperative for elites in many of these states was to grow their national economies, increase the national wealth, and, through some form of distribution, whether by provision of opportunity, entitlement or some mix of both, to expand the economic and other life opportunities of their citizens. Indeed, for non-democratic elites, the promise and delivery of economic development became a substitute for political legitimacy. No surprise then that in 1986, the General Assembly of the United Nations, which had decreed a "new international order," also resolved not only that "the right of development is an inalienable human right" but that "states have the duty to take steps individually and collectively to formulate international development policies with a view to facilitating the full realization of the right to development."

Alas, development cannot simply be legislated. Efforts to achieve it solely by reliance on indigenous resources, of which Chairman Mao's "Great Leap Forward" was the most extreme example, demonstrated conclusively that, in the contemporary world, a satisfactory rate of development is virtually unachievable without the participation of foreign capital, technology and enterprise. The community of new states, which had advanced, at least terminologically, if not factually from the rubric of "under-developed states" to "developing countries," looked to international organizations for assistance.

The International Bank for Reconstruction and Development (IBRD), the original name of the World Bank, had been established, as a specialized agency of the United Nations, with the task of assembling and then lending the public international funds necessary for the reconstruction of a Europe that had been devastated by the Second World War. The IBRD project succeeded brilliantly. By the late 1950s, Europe's economies had rebounded. But by then, more and more of Europe's former colonial territories, now independent, desperately needed to develop. They turned for assistance to the international organizations which had midwived them. Because their demand for development capital exceeded the supply of public international funds available to meet that demand, the only available source that could realistically address the shortfall was private direct foreign investment. But, as I noted earlier, foreign investment was being vilified as a neo-imperial tool of exploitation rather than as a potential adjunct tool for national development.

In this impasse, the real significance of the Washington Convention of 1965, by which developed and developing states established the World Bank's "International Centre for the Settlement of Investment Disputes (ICSID)," was its consensus decision: because of the indispensability of private investment to national economic development, an international seal of approval was accorded to private direct foreign investment. A central plank of the consensus was a radically innovative compact according to which the capital exporting states bound themselves to abjure "diplomatic protection" while capital importing states bound themselves to submit to arbitration of disputes with foreign investors—at the instance of the foreign investors themselves. Thus, the powerful governments of capital exporting states were, in theory, removed from the process of forcefully implementing customary international law's standards of protection of aliens and the responsibility for it was assigned to international arbitral tribunals.

It quickly became clear, however, that foreign capital alone was not a magic bullet. The mere introduction of capital would not necessarily produce multipliers with economic benefits for the local economy. An appropriate normative infrastructure, the "rule of law," was also required. In short order, a network of bilateral international agreements and their dispute resolution mechanisms assumed a role in, first, confirming the minimum standards for the governance of foreign investment by host states and, second and equally important, in designating the modalities with the exclusive competence for supervising and implementing them.

There are now close to 3000 investment treaties, including BITs, multilateral treaties and Free Trade Agreements with investment chapters. Although there are variations between them, each validates international investment and seeks to establish an orderly framework for it by creating, in the language of the draft trilateral investment treaty between Korea, China and Japan which was signed last week, "stable, favorable and transparent conditions for investment by investors of one Contracting Party in the territory of the other Contracting Parties."

The trilateral investment treaty thus acknowledges, as do thousands of BITs using similar language, that "stable, favorable and transparent conditions" are comprised of more than natural phenomena, such as climate, ecology, geography and natural and human resources. Critically, "favorable conditions" encompass appropriate internal legal, administrative and regulatory arrangements, conducted through procedures designed to ensure that the arrangements are applied as they are supposed to be applied. This, in turn, requires an effective system of implementation, composed of impartial courts, an efficient and legally restrained bureaucracy and transparency in decision-making. This international minimum standard of governance is now recognized as a necessary control mechanism over governments, whether dealing with their own nationals or aliens. Without these "favorable conditions," the investor may be able to reap short-term profits, but the potential for robust multiplier effects for the host state is limited.

Thus, contemporary international investment law and its instruments and institutions began to play a more particularized and increasingly assertive role in supervising internal arrangements within states parties. BITs, in the aggregate, were raising international law's bar for the way states conducted their internal affairs. Matters went from the *Neer v. Mexico* (Reports of International Arbitral Awards, 1926) standard (a case actually unrelated to foreign investment) of "an outrage . . . bad faith . . . to willful neglect of duty . . . an insufficiency of governmental action" to a more nuanced standard involving a searching inquiry into the administrative actions of the respondent government in a specific case. *Waste Management II* (ISCID, Award of Apr. 30, 2004), which undertook to summarize and synthesize the case law until that time, spoke generally of conduct that was "arbitrary, grossly unfair, unjust or idiosyncratic. . . ."

At this stage in the development of investment law, by a happy confluence of events, the rule of law arrangements, which were both a condition precedent for more direct foreign investment and, to an extent, a consequence of the application of international investment law, were being increasingly demanded by the social and economic strata in many of the investment-recipient states which had benefited from the development which foreign capital, technology and enterprise had helped to stimulate. But ironically, elements in these same, now politically effective strata often mobilize *against* direct foreign investment. The dynamic which accounts for this is complex and seems to be a function of more robust domestic politics as well as a function of the conditions that preceded the introduction of the foreign investment. I am not speaking of indignation at dishonest investments, for the international system has proved quite effective at exposing and sanctioning them, but of indignation at honest investments which become entangled in conflict. Let me explain by sketching two generic stories.

The first story might be entitled "Sellers' Remorse." Before the existence of suspected natural resources in country X was confirmed and made exploitable by the creation of the necessary infrastructure, there was considerable domestic support for attracting a direct foreign investor to enter the market and find and develop them, precisely because domestic investors with the requisite capital and skills did not exist. But as soon as the foreign investor, who had been courted and invited in, succeeded in finding and exploiting the resource, an opposition formed to decry the sale of the national patrimony for "a mess of pottage" and to insist on a renegotiation to secure a "fair" allocation of the benefits of the resource. But that "reallocation," whether achieved by expropriation or escalated tax and royalty rates, undermines the financial planning on which the foreign investor's investment was based. The result was a foreign investment dispute, in which each side believed passionately in the iniquity of the other.

The second story might be called "Post-privatization trauma." Governmental control of the urban water supply (you may substitute electrical supply, rail and air transportation and so on) in State Y was subject to electoral politics. The degree of influence of those politics increased in direct proportion to Y's democratization: politicians trying to get into office or to stay there were under pressure to maintain low prices in response to popular demands and then to make up the inevitable shortfall by provision of state subsidies. In the meanwhile, more and more positions in the national water system were created as political favors and rewards. But subsidies must be paid for by taxes and the very populist imperative that maintained the cost of water at artificially low prices resisted increased tax rates. As the prices cum subsidies proved insufficient to allow for the maintenance and reinvestment in the water system (especially one with a bloated work force), its plant deteriorated and the water which it produced became erratic and its quality less and less potable.

At this point, privatization was presented as a solution and it won popular support. When tenders were issued, however, only foreign investors had the technology and access to capital necessary to reestablish an efficient water supply system. But the foreign investor was subject to the demand of the market rather than populist politics and applied an economic calculus in which price per water unit had to cover the actual cost of the investment, service of loans and still produce a profit for its own investors, all this without the cushion of state subsidies. The increased prices were viewed as price gouging and populist politics quickly mobilized voters against the foreign investment. Successive governments were under pressure to cap prices which undermined the economic viability of the investment. The result, again, was a foreign investment dispute.

The new ingredient in these and many other stories and scenarios is investor-state dispute settlement arbitration (ISDS) . . . .

As all international lawyers can attest, international law is replete with injunctions for high-minded standards. Most of them remain unfulfilled; indeed, some may have been enacted with such an expectation. What has distinguished these new developments in international investment law is that most contemporary international investment agreements allow the qualifying investor itself, acting without the intervention, permission or blessing of its state of nationality, to invoke an international tribunal to review host state action, in terms of, inter alia, whether it has constituted "fair and equitable" treatment. This is a procedural change with far-reaching substantive implications which make international investment law unique in international law.

In his "Early Law and Custom," Sir Henry Maine observed that "so great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." The insight is particularly relevant to this stage of the evolution of international investment law, for the procedural addition—the ascription of a meaningful independent international standing to the investor—has transformed what was heretofore soft, aspirational and only intermittently applied law into predictably effective law which, moreover, restrains governmental action in unprecedented ways. The initiation of the process of enforcement of investor rights is transferred entirely to the investor, a party that is driven only by an economic interest in the outcome. The investor's state's "national interest" (or disinterest) or its quotidian political objectives cease to be factors in deciding to press or abandon its national's claim. With more effective invocations of third party decision, there is more effective application of international investment law.

I would emphasize that the revolution here is not only in the right of the private initiation of claims but in the scope of their content as well. Scope has expanded dramatically. Compare the high thresholds set in *Neer*, which I mentioned earlier, which was very indulgent to the state, with some widely cited current formulations. In *Metalclad v. Mexico* (ISCID, Award of August 30, 2000), the tribunal found that it is "[t]he totality of these circumstances [which] demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly." *Tecmed v. Mexico* (ISCID, Award of May 29, 2003), in a paragraph that has been cited and recited by many other tribunals, set a higher, perhaps unachievable standard:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also the goals underlying such regulations.

Even more far-reaching is the statement in *Occidental v. Ecuador* (2004), where the tribunal said

> The relevant question for international law in this discussion is not whether there is an obligation to refund VAT, which is the point on which the parties have argued most intensely, but rather whether the legal and business framework meets the requirements of stability and predictability under international law.

Thus, some international investment tribunals seem to be molting into what are essentially international courts of appeal over the administrative actions of the respondent state, appraising not only (i) the adequacy of the entire administrative framework in terms of international law standards but even (ii) the specific applications of national law by the national administration in terms of its legal accuracy under that law.

To be sure, this expanded scope of review of matters which, until now, had been deemed quintessentially domestic, is all of a piece with other developments in international law: for example, the international human rights program. In a broader sense, it is part of the remarkable constriction of the sphere of "domestic jurisdiction" in general international law, which, as the Permanent Court of International Justice famously observed, is a function of the state of international relations at that moment. But, of course, every social change generates resistance, for each new constellation necessarily increases the power of those formerly disenfranchised, while reducing the power of the former incumbents. In the investment law context, these changes are now being resisted by many governments as well as some indigenous interest groups thanks to three coinciding factors.

The first of these factors is the administrative revolution that has taken place within states seeking development. The early ideal of the *Laissez-Faire*

State has yielded to the current model of the Regulatory State. It is now universally appreciated that accommodating an efficient economy to the complex political demands of democratic states, the protection of the most vulnerable strata of the population and the preservation of the environment is a task beyond the powers of the "Invisible Hand." Rather, it requires continuing managerial oversight and episodic adjustments by those governmental agencies in the national regime which are charged with regulating economic activity. So just as the developing state is learning, as did the states that went through this process in the early twentieth century, to manage its political economy through a panoply of regulatory agencies, the international investment law system seems to be subjecting those efforts to greater and greater scrutiny by external decision-makers who apply a set of international standards that was shaped by and reflects the values of the *Laissez-Faire* State.

The second factor is the empowerment in many of the host states of a multi-partite civil society. The force of this factor is amplified by the remarkable extent to which electronic communications enable that new "E-state" to press its own versions of the national interest. Many of those versions are not congruent with the programs pursued by the national government. In some instances, this private political activity works in favor of international investment law, such as where some groups within civil society press their governments to adjust policies and practices so as to more closely approximate its requirements. In other instances, however, non-governmental entities agitate against compliance with particular decisions and even against the regime of international investment law itself.

The third factor is the blurring of the line between capital-importing and capital-exporting states. Many developed states, which had essentially been capital-exporters, are now hosts to significant amounts of foreign investments and expect and wish to attract more; many of those investments are, moreover, of increasing importance to their economic infrastructure. Earlier these states had been champions of an international investment regime which provided protections to their own investors abroad. In that role, they had insisted on international supervision of domestic regulatory competences insofar as they impacted foreign investors. Now, however, with ISDS available *against them*, many of these states are behaving like traditional capital-importing states, jealous of trespasses on their own regulatory competences. The result, reflected in new generations of Model BITs as well as in negotiating positions, is a movement toward a constriction of investor protections and a greater tolerance for governmental actions against foreign investors. As a consequence of the operation of these three factors, the ambitious transformative role of international investment law is now being resisted in different ways by a surprisingly heterogeneous coalition of states and organized interest groups.

One response, until now only on the part of developing countries, is the recrudescence of the *Calvo* Doctrine in new raiment. Its vehicle is not a formal "*Calvo* Clause," nor an insistence that choice-of-law and choice-of-forum clauses in contracts with foreign investors should prevail over international treaty commitments. Rather, it contends that the only decision institution for investment disputes which is compatible with national sovereignty is a national court. The implications for international investment law of this blanket rejection of ISDS in general are more far-reaching than is generally appreciated.

At issue is more than a mere substitution of a national court for an international tribunal as the agency for the implementation of treaty-based investor protections. Investor-state dispute resolution regimes in BITs have always included as one of the optional forums for application of the treaty, at the election of the investor, national courts. In fact, they are not elected by investor claimants for many of the same reasons that designers of international commercial transactions select international commercial arbitration over adjudication in one of the parties' national courts. But in disputes involving the application of substantive treaty-based protections, there is an additional and distinctive reason. Unless the respondent state hews to an absolute and predictably effective Monism, in the sense of always super-ordinating international treaties over *all* national law (including the national constitution), its courts, even if they are absolutely independent and impartial, will apply national law over international law. Insofar as the injury to the investor arises from later prescribed national legislation, that legislation will prevail over the protections afforded by the BIT. And this, I suspect, is precisely what the latter day proponents of the *Calvo* Clause seek. So the revival of the *Calvo* Clause is not simply a mechanical change of one efficient forum for another: it is really a defeat of the guarantees of treaty-based international investment law.

A state that is both an importer and exporter of direct foreign investment may try to game the system by renouncing ISDS, thus requiring foreign investors whom it hosts to resort to local courts while at the same time expecting its own foreign investors to select BIT-friendly nationalities for their investment vehicles in order to have the benefit of their BIT protections. This nationality shopping by states that do not reciprocate has already generated a backlash, in instruments such as the Energy Charter Treaty. Article 22(2) of the new trilateral investment treaty between China, Japan and Korea effectively blocks such shopping.

But even if the *Calvo* proponents prevail, their victory will prove to be pyrrhic, as will the short-term victories of states that renounce all ISDS. The protections which will no longer be enforceable through treaty-based modalities will persist at customary international law—the only difference will be that the modality of their enforcement will revert to "diplomatic protection of nationals." Governments, which had beneficially been removed from the protection of their national investors, will be drawn back into it, reviving the politicization of the protection of international investment.

In a period in which the down-swings of economic cycles are coinciding with radical structural adjustments, other challenges to international investment law are presenting themselves. In terms of who may qualify as an investor, the shift of significant quantities of investment funds from the traditional private-sectors of capital exporting states to state owned enterprises (SOEs) and to Sovereign Wealth Funds (SWFs) now presents the question of whether these entities qualify as "investors" under investment treaties. Insofar as the function, if not *raison d'être* of international investment law, is to facilitate the movement of long-term investment across borders as a means of increasing economic productivity, the capital of SOEs and SWFs is an important resource, especially as it is often capable of being more "patient" than that of private venture capitalists. Given the language in many BITs and other investment instruments, this may require the production of a new *jurisprudence constante* pending a new generation of BITs. The question of the definition of "investment" is also being raised in acute fashion by defaults on sovereign bonds. The first question is whether they qualify as investments for the purposes of treaty protection. This is usually resolved in the affirmative by the definitions provision in a BIT, although the requisite "investment in . . . " has been debated by scholars and tribunals. The compensation issue may also prove to be acute. Where bonds have been purchased by major financial houses or by vulture funds at deep discounts and, more generally, where the market discounts price for risk, is compensation at face value appropriate? Where bonds have been retailed to small investors, should a different calculation of compensation operate? And should small investors be permitted to act through mass arbitration in circumstances in which each would be incapable of bringing a separate claim? These are questions which are *sub judice* and will shape a new chapter in international investment law.

Some of the causes of tensions within international investment law are part of the very fabric of this sector of law. Governments are different from other actors. Even when they enter the market place, their responsibilities to internal communities and constituencies continue; in all but the most brutally totalitarian of them, governmental power is temporary and often shaky. Even strong governments are beholden to internal constituencies which may have little appreciation of, or respect for, the international arrangements that their governments have concluded but which later come to be popularly perceived as affecting their own lives and aspirations. Compensation metrics in international investment law have always been somewhat mysterious and they come under intense pressure in circumstances in which awards, which are easily justified in terms of ordinary commercial standards, are not politically feasible and the specter of Versailles is raised. Yet, here, as everywhere else, there is, in Milton Friedman's words, "no free lunch." Redressing compensation quanta in favor of respondent governments which claim "*non possumus*" simply passes the losses through to the ultimate investors, the pension funds of vast numbers of individuals in the developed world or, even, ironically, to SWFs of developing countries. The mere prospect of such a reassignment of losses could well chill the appetite for foreign investment by the very international market which ICSID had sought to mobilize.

The fact that there are stresses within the legal arrangements now collectively referred to as international investment law should occasion no surprise. All law is dialectical in nature and every arrangement, which provides comparative benefits to some and less to others, immediately generates pressure to be adjusted or terminated and replaced with a different value configuration. Some of the adjustments that result from this dialectical process operate within the established constitutive structure of international investment law. Others are truly revolutionary, rejecting the constitutive structure, as a whole, or particular arrangements within it. One cannot, as a result, assume a straight-line projection from the past or an organic extension of the current situation into the future. Without according excessive importance to the economic vicissitudes which the world economy is now experiencing, one can identify five alternative futures. Each constructive future is based on latent tendencies in current trends. Any one could emerge from the current system of international investment law. . . .

One possible future would involve the reinforcement of the trends toward globalization, with English functioning as the *lingua franca*, within a context of a planetary-wide civilization of science and technology. In such a future, more and more direct foreign investment would be made world-wide, on the basis of economic rather than political considerations. The law-making and law-applying functions of international investment law and the national decision processes influencing them, would continue to fall within the jurisdiction of international arbitral tribunals, whether under the aegis of ICSID, the Permanent Court of Arbitration, or ad hoc tribunals operating under UNCITRAL Rules administered by private transnational arbitral associations. This future would witness new generations of BITs, with common provisions affording identical enhanced protections to investors. It would also include the pluralization or multilateralization of investment treaties, in place of much of the current network of bilateral instruments and an explicit investment role for the World Trade Organization (WTO). It would likely include the installation of an appeal mechanism, perhaps on the model of the WTO's Appellate Body, which would make arbitral applications more uniform.

A future of global integration would include more decisions by international investment tribunals with respect to the quality of governance within states which hosted foreign investment with a view to moving steadily toward a homogenization of national practice in accordance with increasingly robust international standards.

A second possible future would be marked by regional and sub-regional integration rather than the high level of global integration as the central feature of the preceding future. Regional blocks in Europe, North and Central America, in the southern cone of South America, Africa, and Asia would trade and principally invest among themselves. In place of a single *lingua franca*, dominant regional languages would operate. Extra-regional investment might continue but it would be relatively reduced, as compared to the more intense regional and sub-regional investment. New generations of BITs and Free Trade Agreements, instead of running North and South or East and West, as in the recent past, would tend to be between members of the same regional bloc. Instead of international standards, regional standards would emerge, on the model of "regional customary international law." As for the tribunals charged with deciding disputes, they would be increasingly composed of members of a single region, on the model of the Chamber-system of the International Court of Justice.

A third possible future would be characterized by increased protectionism and mercantilism, driven by economic uncertainty and perceived resource scarcities. Protectionism would manifest itself in limitations on outward foreign investment as well as increased restrictions on inward foreign investment. Both limitations would be justified as measures necessary for the protection of national security and other vital national interests.

A recrudescence of mercantilism could be exacerbated by a perception of a critical shortage of key natural resources in a world whose population has grown and the demands of whose members for a better material lifestyle have universalized. Such a future is likely to see a new generation of BITs, marked by enhanced competences assigned to host states, including rights of counterclaim by the host state against foreign investors. In such a future, the amount of general foreign investment would be expected to decline significantly, to be replaced by "diaspora networks."

A fourth possible future would see the return of an effective coalition of developing countries and developed mineral-exporting countries, trying to use their numerical superiority within international organizations to enact international instruments comparable to the Charter of Economic Rights and Duties of States of the New International Economic Order. In this future, states would insist on the right of expropriation for a broad range of self-judging reasons with "appropriate" compensation to be determined exclusively by institutions of the host state. This future would see significant withdrawals from ICSID and its consequent decline as the central institution in international investment dispute resolution (without regard to decline due to endogamous factors such as loss of confidence in its control mechanism). Many BITs would also be denounced. Insofar as mineral extraction industries would still be obliged to pursue natural resources wherever they might be found, the system of international investment law based on the provision of protections for investors and their implementation by international arbitration tribunals would decline, to be replaced by alternative risk-management or risk-abatement methods. Thus political risk insurance might be more widely used with the consequent additional costs of investment passed through to consumers. At the international organizational level, in this future construct, the Multilateral Investment Guarantee Agency (MIGA) and its private counterparts would supersede ICSID in importance.

A final possible future would involve a continuation of the present mixed and contradictory system in which international law continues to commit itself to the encouragement and protection of international investment through the maintenance of international standards and some soft supervision of the practices of host states in terms of those standards. In this future, many of the antinomies that are characteristic of contemporary international investment law would continue.

One engages in the intellectual task of the creation of alternative images of futures in order to refine strategies that will increase the likelihood of achieving desirable or utopic futures and decreasing the likelihood of the eventuation of dystopic ones. I consider Future One the most desirable, for its promise of enhanced production and the efficient use of the resources of our planet, a future in which everyone is net better off and in which, moreover, there are procedures for adjustment of arrangements and internationally supervised modes of dispute resolution. The resulting interdependence, one hopes, will also act as a restraint on the use of violence. By contrast, the third and fourth futures are, in my view, undesirable.

In theory, international arbitration tribunals are well-positioned to make ad hoc adjustments in disputes precipitated by changed circumstances but factors such as the limits on arbitral authority and the ever-present peril of annulment for *excès de pouvoir* constrain their ability to redesign long-term economic arrangements so that an appropriate balance of the benefits and burdens of the transactions can be reestablished. Hence, in navigating through the present toward any of the imagined futures, the emergent future of the international investment system and its role in the growth and maintenance of the global economy will depend more on the statesmanship and wisdom of national leaders.

Traitez de Paix, Bernard Picart, 1726. Frontispiece.
Jean Dumont, Corps universel diplomatique du droit des gens.
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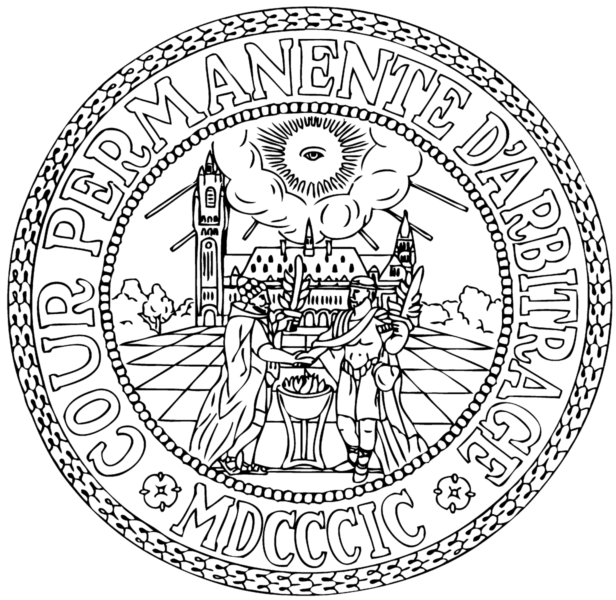

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A 1987 meeting of the Iran-United States Claims
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