

4-1-1963

The Legal Climate for Private Enterprise under the Alliance for Progress

John Gallup Laylin

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

John G. Laylin, *The Legal Climate for Private Enterprise under the Alliance for Progress*, 41 N.C. L. REV. 364 (1963).Available at: <http://scholarship.law.unc.edu/nclr/vol41/iss3/4>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

THE LEGAL CLIMATE FOR PRIVATE ENTERPRISE UNDER THE ALLIANCE FOR PROGRESS*

JOHN GALLUP LAYLIN†

My topic is the weather—the legal climate—as it affects private enterprise within the goals of the Alliance for Progress.

To speak of the weather as it is at present is of little interest. We are interested in whether and how it will change. That the climate for private enterprise has, in many Latin American countries, been unhealthy we all know—unhealthy for investments by citizens of the countries concerned and unhealthy for investments by foreigners. The climate to which I am addressing myself is not, however, that affecting foreign enterprise in Latin America. I am now focusing on the atmosphere surrounding local enterprise, Latin American enterprise in Latin America. I do not discount the importance to Latin Americans of foreign private enterprise. But more important to them and to us is a healthy legal climate in Latin America for private enterprise by Latin Americans for themselves.

While there is an undoubted sense in the countries of this hemisphere of an American community with a new world outlook toward the rest of the world this must not lead us to think that the Latin American members of our community necessarily see us as we see ourselves. Except for those who have lived among us or those who have come to know well North Americans who have lived among them, there is a decided suspicion that our interest in Latin America is only to exploit its resources to our advantage and their disadvantage. While this suspicion remains, any suggestion made by us as being in their interest is suspected in the sincere belief that it must be against their interest. It is up to us to demonstrate by our actions that while our interest may be selfish, it is enlightened to the point of promoting in our own interest only what we believe to be also in their interest. The effect of any suggestions without this demonstration will only be what they so aptly describe as *contraproducente*.¹ It

* A paper presented at the 1963 Southeastern Regional Meeting of the American Society of International Law, held February 1 and 2, 1963, in Chapel Hill, North Carolina.

† Member of the New York and District of Columbia Bars.

¹ This is admirably brought out in TANNENBAUM, *TEN KEYS TO LATIN*

is with these thoughts in mind that I wish to focus on Latin American investment in Latin America for the benefit of Latin Americans.

Within my topic I wish to focus still more sharply on what Latin Americans think of the changes that are desirable and on what some of them are doing about it. This will lead to a consideration of what they may wish us to do in helping them to improve the climate for their own investments in their own countries.

There is a recognition in Latin America of the need for change. Thoughtful Latin Americans are, indeed, convinced of the fundamental necessity of breaking the vicious circle engendered by the attitude initiated by the conquistadores. Their "take more than you give" attitude must be replaced with one of "give at least as much as you take." The wealth that nature provided in such abundance must, they recognize, be replenished with the creation of additional wealth. This new wealth is not to be found by discoveries. It must be produced with ingenuity and hard work. Furthermore, it must be distributed fairly among the producers—the workers, the management, and the investors who provide the tools.

Impatient to accomplish this, the prevailing view seemed to be that a short cut lay in developing industry and proper distribution through government ownership and management. This has often led to taking such industry as existed away from private ownership and management. The results have not been encouraging.

Recently it has come to be recognized that this short cut has a dead end. The solution is not to be found in more government and less private enterprise.² Let me give two examples, one illustrating

AMERICA (1962). See particularly his section *A View of the United States* at 213. Lest I appear to be hypocritical, let me make it clear that my primary interest in Latin America flows from the belief that it is to the interest of my country that the other countries in this hemisphere be prosperous and healthy. I believe that they need foreign investment but I also believe that the climate for foreign investment will never be healthy until the climate for local investment is equally healthy. I have undertaken to develop this theme in an address before the Inter-American Bar Assoc. in Bogota in 1961. See INTER-AMERICAN BAR ASSOCIATION 12TH CONFERENCE, BOGOTA, 1961, DEVELOPMENTS IN THE LAW OF STATE RESPONSIBILITY, EQUALITY OF TREATMENT AND THE INTERNATIONAL STANDARD (the text is in English, Portuguese, French, and Spanish).

² For an example of cautious but perceptible and hopefully growing willingness on the part of Latin Americans themselves to recognize the importance of private capital to Latin American economic development, see *The First Year of the Alliance for Progress: An evaluation by the Ministerial Representations of IA-ECOSOC*, 47 DEP'T STATE BULL. 897, 899, 901 (1962). For recognition by the United States government that the success of the Alliance for Progress is dependent upon the development of the

what Latin Americans are thinking, the other illustrating what a few of them are doing, about the production and distribution of wealth.

Nearly all are deeply impressed with the way Western Europe has recovered from the ravages of the last war. They are not unaware that there were North Americans, some of them in influential positions in our present administration, who advised that, since recovery had to be quick, governments should take over in many areas where private enterprise had formerly functioned.³ They have noted that, in declining to follow this advice, the countries of Western Europe have enjoyed a recovery that was not only quick but through private enterprise has surpassed what could have been accomplished with state capitalism. This has led not only to early reconstruction and rapid development, but has provided a foundation for an expanding prosperity that is the admiration of the world.

On a much smaller scale, but in a no less dramatic way, in a very small segment of Latin America—the island of Puerto Rico—the lesson to be learned from Western Europe has been put into practice.⁴

Between 1940 and 1950 the Puerto Rican administration, with encouragement from the United States, sought to achieve economic development, not by private, but by state, enterprise. It was properly recognized that to overcome the poverty incident to overpopulation and under-employment, it was essential that the traditional exploitation of the land and the people to the near-exclusive benefit of the few, should be replaced by creative industry. Eighty-three projects were initiated, the more important being financed by the government and managed by the government. The purpose was good. The

private sector see, e.g., Martin, *Future of the Alliance for Progress*, 47 DEP'T STATE BULL. 951, 952, 954, 957 (1962); Blumenthal, *The World Economic Situation and Outlooks*, 47 DEP'T STATE BULL. 840, 842-43 (1962); Rusk, *Trade, Investment and United States Foreign Policy*, 47 DEP'T STATE BULL. 683, 687-88 (1962). The Congress has been sensitive to any indication that the executive agencies have forgotten the importance of private capital in administering United States foreign aid programs. See, e.g., *Hearings on H.R. 7372 and H.R. 8400 Before the House Committee on Foreign Affairs*, 87th Cong., 1st Sess. 323 (1961). See also Congressional Statement of Policy, Foreign Assistance Act of 1961, 75 Stat. 424 (1961), 22 U.S.C. § 2151 (Supp. 1962).

³ Cf., instances cited by former Under Sect. of Commerce Philip Alexander Ray in his provocative book *SOUTH WIND RED* at 107, nn. 116, 117, & 118 (1962).

⁴ For a similar account of the Puerto Rican experience see Ferre, *Private Initiative in Puerto Rico and Latin America*, Address before Farleigh-Dickinson College, April 30, 1962, at 4-6.

results, however, were disappointing. The government enterprises did not prosper. They incurred deficits that had to be made up from a public treasury to which they made no contribution as taxpayers. The country did not prosper.

In 1950 it was decided to offer the government-owned and managed projects for sale to private enterprise. Local purchasers with local financing were found. Things began to improve. Let me cite an outstanding example. The purchasers of the government cement, paper, and ceramic plants within one year turned an operating deficit of one million dollars a year into an operating profit of one million dollars. Instead of drawing on the public treasury they paid taxes to it. In the ten years that followed the 1950 decision to promote private enterprise by restoring the incentives of free competition, 500 new plants were established in Puerto Rico in contrast to the eighty-three established between 1940 and 1950. The assessed value of property in Puerto Rico increased between 1950 and 1960 400 per cent, eight times the increase in the preceding decade.⁵

Far more impressive than these figures, however, is the fundamental change in the attitude of every class in Puerto Rico and in its standard of living. Each class is producing more, each is receiving more, and the government, through taxes collected on the basis of relative ability to pay from a prosperous producing community, is in a position to provide those services which it is the function of the government to provide. Puerto Rico is no longer obliged, from a meager income, to make up deficits in the inadequate production of government-owned plants.⁶

That this lesson has been learned generally in Latin America, or in Washington for that matter, remains to be seen. The amount of aid that is being sought by Latin America or that is going to Latin America, directly and indirectly, from the United States government continues to be heavily weighted on the side of government-to-gov-

⁵ *Id.* at 5-6.

⁶ The lesson to be learned from Western Europe and Puerto Rico is not restricted to that mentioned in the text. Without the tariff unions enjoyed by the members of the Common Market and the United States market to which Puerto Rican enterprise has access, their achievements would have been less spectacular. That lesson appears to have been learned. Two groups of Latin American countries have laid the ground work for similar common markets. That is all to the good. And one reason it is all to the good is that it will lead to an appreciation of the other lesson which must be stressed. In each of the incipient Latin American common markets the competition that will spring up will soon demonstrate the efficacy of setting free the incentives of free enterprise within the borders of each member country.

ernment assistance.⁷ It is my contention that most of this is no better than sugar-coated aspirin. It relieves the headache temporarily but its contribution to the cure is minimal. In too many cases it is a drug that is habit-forming and leads to repeated return visits to the United States for more of the same.

I do not include in this condemnation the government-to-government assistance for farm-to-market highways, schools, sanitation, or for other like public works that are appropriate government projects. Neither do I object to the government-to-government assistance provided through the International Monetary Fund.⁸ I do, however, include in this condemnation government-to-government grants and loans for projects that are better run by private enterprise, and loans that make up overdrafts which have resulted from a failure to provide a healthy climate for private investment.

Our program of insuring private investments against those risks that are retarding the development of so many countries in Latin America is, I believe, a step in the right direction.⁹ This program

⁷ The data made available by the Export-Import Bank of Washington does not clearly identify the governmental recipients of loans, but it appears that over 75% of all "Eximbank" credits for South America since January of 1959 have been in favor of governments or their agencies, and that an even larger percentage of long-term, low-interest "project" loans have been in favor of governments. See, *e.g.*, [1962] EXPORT-IMPORT BANK ANN. REP. This trend could be reversed were the Export-Import Bank to offer more favorable terms to private enterprise than it does to governments.

Governments received over 96% of the amounts made available for Latin American development by the Development Loan Fund. See [1961] DEVELOPMENT LOAN FUND TERMINAL REP.

Latin American governments were the direct recipients of 99% of the credits extended for Latin American projects by the World Bank for the fiscal year ending in 1962. See [1962] INT'L BANK FOR RECONSTRUCTION & DEV. ANN. REP.

A breakdown of the loans of the Inter-American Development Bank between loans to governments and to private enterprise has not yet been made public.

⁸ The stabilization of our currencies or, better said, the adoption of policies that make for the stability of a currency are proper governmental functions. The fund has wisely carried out its fundamental statute in supporting only those currencies that have their basic support in government policies consistent with sound monetary practices. Private enterprise, to be successful, must operate in an atmosphere of monetary stability, or at least relative monetary stability.

⁹ The investment guaranty program, now administered by the Agency for International Development, is embodied in the Foreign Assistance Act of 1961, §§ 221-24, 75 Stat. 429-32 (1961), 22 U.S.C. §§ 2181-184 (Supp. III, 1962). As of December 28, 1962, the following Latin American countries had entered into treaties with the United States establishing an investment guaranty program: Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica,

ought not to be necessary, and I hope it will be only temporary. However, I agree that it is now necessary and I believe it is providing immediate benefits.¹⁰

The hope that private investment in Latin America by Latin Americans and foreigners would substantially supplement public aid has not been fulfilled. Owing to the unhealthy climate (accentuated by our making foreign government borrowing easier than private ones) new foreign private investment has been reduced to a trickle and has been more than offset by an increased outflow of Latin American savings for investment in the United States, Canada, and Europe.¹¹ Without our investment guaranty program the flow of capital into Latin America would, I believe, have been substantially less than it has been, and the *net* outflow of private capital would, of course, have been greater.

The feature of the investment guaranty program that is particularly appealing to a lawyer is the structure of underlying agreements.¹² These provide that in the event of expropriation with inadequate compensation, the resulting claims which will be taken over by the United States will be resolved by compulsory arbitration or adjudication. The very existence of such an agreement to arbitrate helps to promote the necessary change of attitude. It offers domestic as well as foreign investors promise of a better climate.¹³ In time the

Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. See [Dec. 28, 1962] AGENCY FOR INT'L DEV. QUARTERLY REP. ON INV. GUARANTIES. All of the treaties provide for protection of access to existing exchange markets (to permit repatriation of earnings and principal amounts at least to the extent that this was possible at the time of investment), and all of the treaties except those with Argentina, Chile, and Peru include protection against the risk of expropriation. Notably absent from the list are Brazil and Mexico. The treaties typically provide that the host government shall have an investment project before a guaranty will be issued. They clearly establish the rights of the United States as subrogee once the private claim has been indemnified under the guarantee, and compulsory arbitration occurs if, after a reasonable period, diplomatic representations are unavailing.

¹⁰ But see [1962] INT'L BANK FOR RECONSTRUCTION & DEV., STAFF REP. ON MULTILATERAL INV. INS. pt. II, at 4-5, for an appraisal discussing the limited effect of investment insurance availability upon the flow of capital.

¹¹ See, e.g., Blumenthal, *supra* note 2, at 842; Martin, *supra* note 2, at 957; *The First Year of the Alliance for Progress: An evaluation by the Ministerial Representatives of IA-ECOSOC*, *supra* note 2, at 899.

¹² See, e.g., Agreement with the Dominican Republic on Guaranty of Private Investments, May 2, 1962, T.I.A.S. No. 5005.

¹³ Where domestic capital has combined with foreign capital in some form of joint venture, it would be more difficult for a government to act upon the domestic interests without affecting the foreign interest. In such situations local capital may feel actually protected by the presence of the guarantee

climate may improve to the point that insurance will no longer be purchased. In the meantime, however, it would seem that the investment insurance program should not only be continued and enlarged, it also should be supplemented so as to provide coverage for others besides citizens of the United States or companies substantially owned by citizens.

A Mexican economist is reported to have estimated that not less than six billion dollars of Latin American capital is presently invested abroad.¹⁴ I have already mentioned the continuing expatriation of capital to swell these enormous overseas holdings. It is not surprising. We too, if we lived in a climate so adverse for private enterprise as is that of a great many of the countries of Latin America, would transfer to a healthier climate as much of our mobile wealth as we could. Wherever expropriation of wealth is recurrent, the expatriation of wealth becomes the rule.

What can be done to discourage the further expatriation of wealth and the repatriation of the six billion dollars that is said to be invested abroad? The cure, of course, is a fundamental change in the attitude that has brought about the unsatisfactory legal climate. But this cannot be done overnight. Of course, if more private capital remained in Latin America and that which has been sent abroad were repatriated, the local owners and managers of the enterprises would themselves become influential in bringing about the fundamental change in attitude that is at the heart of the problem. Is there not some temporary measure desired by Latin Americans which we could join in implementing to encourage Latin Americans to bring these influences to bear?

I believe that there is a way. In cooperation with those countries which truly desire an improved climate for private enterprise, I suggest that we join in establishing an international institution to issue guarantees to their nationals as well as to our citizens against the insurable risks of an unhealthy legal climate.¹⁵ This could, but need

itself as well as heartened by the general expression of respect for property which the underlying treaty represents.

¹⁴ See RAY, *SOUTH WIND* RED 45 (1962).

¹⁵ I do not have in mind anything so ambitious as the multilateral Investment Insurance Program considered in the World Bank Study. See [1962] INTERNATIONAL BANK FOR RECONSTRUCTION & DEV., *STAFF REP. ON MULTILATERAL INV. INS.*, *supra* note 10, at annex B. The member countries should be limited to those in this hemisphere that are on their own initiative ready to support insurance against the more serious non-business risks. The risks covered, to be realistic, should encompass not only outright expropriation but

not be, a companion institution to the Inter-American Development Bank. Membership should be open to all countries of this hemisphere, but the institution could and should start with only those countries that immediately see the advantages to themselves in joining. These countries would enter into agreements between themselves and with the insurance institution similar to the bilateral treaties underlying our present investment guaranty insurance program.

The insurance would be available to those who are eligible under our present insurance program, but a significant new feature would be that every entrepreneur of any member country would be eligible. For instance, the initial members might consist of Colombia, Costa Rica, the Dominican Republic, and the United States. A citizen of the Dominican Republic, timid because of uncertainty as to whether his country may follow the path of Castro's Cuba, but nevertheless hopeful that it will follow the example of Puerto Rico, could take out insurance against non-business risks to new approved investments in his own country. A United States, Costa Rican, or Colombian citizen or company could also take out such insurance for his investment in the Dominican Republic or in Colombia, Costa Rica, or the United States.

I had recently an impressive demonstration in Santo Domingo of the appeal of such a program. A businessman there pointed out

those other forms of undermining private enterprise that have come to be known as "creeping confiscation." There appears to be considerable interest in Europe in establishing a similar multi-national insurance institution.

The NATO Parliamentarians' Conference which met in Paris November 12-17, 1962, adopted the following recommendation: "Noting the large amount of private capital invested in developing countries; *But realizing* also that this amount and the amounts being newly invested are insufficient for the pressing needs of developing countries: RECOMMENDS that the NATO Council consult with the OECD and NATO Member Governments and further examine the possibilities of *multilateral guarantees of private investment in developing countries* to protect against expropriation, devaluation, undue limitations on transfer of earnings or capital, and civil commotion or war; and consider the need for any additional Bank or other international organisation to finance infrastructure among the developing nations." (Emphasis added.) This was followed by recommendations approved by a forum on Latin America sponsored by the International Union of Christian Employers and Managers which met in Brussels November 21-23, 1962. These included the establishment of investment guarantee systems (presumably European) against non-business risks.

If Western Hemisphere and European insurance institutions are established, they should of course cooperate and might eventually amalgamate. In the meantime a western hemisphere institution with those members ready to join without delay is indicated.

what it would mean in his own case. For expansion of his business in the Dominican Republic he is raising local capital by borrowing at eight per cent.¹⁶ He already has adequate capital but it is invested abroad. That yields only four per cent. He keeps this capital out of his country at this relatively low yield as a measure of self-insurance. The difference between the eight per cent he pays for borrowing at home and the four per cent he receives on his capital abroad represents a premium for this self-insurance against the risks incident to the still unpredictable legal climate for private enterprise in the Dominican Republic. The premium for his insurance is thus four per cent. The premium payable for insurance against expropriation under our AID program is one-half of one per cent.¹⁷ If the new multi-national insurance program I suggest should charge four times that much, the premium would still be one-half the amount now paid by my friend.

The supplementing of our present national insurance program with a multi-national one, such as I have described, would retain the benefits of the current program and add the significant and vital advantage of encouraging Latin Americans to invest their savings in their own and other Latin American countries. It would, I believe, also encourage joint ventures by local and foreign investors. Furthermore, it could result in a material lessening of those payments to Latin American governments which are at best simply palliative. It would cost us less even in the short run because our contribution would be in the form of lending our credit rather than actually disbursing cash.¹⁸ In the long run it would cost even less since the members of such an insurance institution would generally abstain

¹⁶ This is a low rate of interest for most of Latin America. For a report on prevailing Latin American interest rates, see Robertson, Remarks to National & State Banks Division of the American Bankers Assoc., Dec. 10, 1962, excerpts in Barron's Nat'l Business & Financial Weekly, Jan. 7, 1963, pp. 8, 14, 16-18.

¹⁷ *Agency for Int'l Dev. Memorandum to Businessmen on Aids to Business*, 24 DEPT STATE PUB. (undated).

¹⁸ Moreover as pointed out in Clubb & Vance, *Incentives to Private U.S. Investment Abroad*, 72 YALE L.J. 475, 490 n.62 (1963): "In the case of loans, the U.S. takes not only all the political risks covered by guarantees, but the business risks as well, because if the borrowing entity fails, the loan is not repaid. . . . Thus in no case is the risk assumed under a guaranty as large as the risk assumed under a loan." This is in addition to the fact that in the case of loans the United States must pay interest to those from whom it borrowed the money, while in the case of guarantees the United States would not have to borrow and pay over any amounts until the injury insured against in fact occurred.

from the practices against which their institution issued insurance.¹⁰ The resultant savings to our own budget and balance-of-payments position would contribute to the preservation, or even the improvement, of the climate for private enterprise in our own country.

To preserve the climate at home, to decrease the need for aid abroad, and overdrafts on our income must be our long-term policy. Latin Americans have already initiated this policy in Puerto Rico. The actions of our fellow Americans in Puerto Rico speak more convincingly than any quantity of words or amounts of money.

I was delighted to learn of the welcome given by Latin Americans to the Puerto Rican businessmen and bankers sent by AID to various of the South American countries to discuss the role of private enterprise in the Alliance for Progress. Latin American businessmen would most likely welcome opportunities provided for selected groups to visit Puerto Rico. I have talked with some of the Puerto Ricans who travelled for the Alliance. They tell me that they would be delighted to arrange for all such visitors coming to Puerto Rico to meet and discuss common problems with the persons who have so successfully changed the despair of the people of Puerto Rico into a hope well on the road to realization. These Puerto Rican businessmen and bankers have suggested that the tours be extended to the continental United States. I would add to this suggestion that to each such group at least one of these Puerto Ricans be invited to join, not merely to bridge differences of language, but especially to harmonize different modes of thinking.

Lawyers from the United States should participate in some of the meetings of these businessmen. In addition we should arrange for conferences between selected groups of Latin American lawyers, interested in improving the legal climate for private investment, and lawyers in this country familiar with the legal institutions that affect a healthy climate. These conferences should be working ones with a concrete program, with papers that are both scholarly and realistic, and with round-table discussions and a reporter to digest what is said and circulate copies of the proceedings for further comment by corre-

¹⁰ It has also been pointed out that capital importing countries may have special scruples about acting against an investor who is insured by a multilateral institution to which other capital importing, as well as capital exporting, countries belong; and in the case of purely bilateral relationships the capital importing country may feel that special diplomatic considerations will cause the insurer to compromise its claims whereas a multilateral institution would present less opportunity for political negotiations. See [1962] INT'L BANK FOR RECONSTRUCTION & DEV., STAFF REP. ON MULTILATERAL INV. INS.

spondence. Out of these conferences might well come a document that reflects the legal realities of our time and points to a future in which the owner, the manager, the worker, the consumer, and the government, each shares with confidence in proportion to his or its contribution.²⁰ These deliberations could have, on the participants and the reading public, a fundamental influence and through them contribute to establishing a legal climate healthy for private enterprise.

An important item on the agenda would be the principles of international law respecting state responsibility applicable to today's world. The Tenth Conference of the Organization of American States in 1954 recommended to its juridical organs that they prepare a study or report on the contribution of the American states in this field.²¹

The Inter-American Juridical Committee undertook to make the study. Unfortunately a majority of the members confined the study "to the past—to what 'has been done' and not to what may be done or what it may be desirable to do."²² This decision was made notwithstanding a resolution of the Inter-American Economic and Social Council brought to the attention of the majority which was adopted also in 1954. That resolution called for "every possible effort to maintain or improve a favorable climate for private investment."²³

In 1962 the Committee issued its report.²⁴ In this a majority of six of the eight members, recognizing it to be to the interest of the great powers to extend the responsibility of states "in order to protect their nationals abroad," assumed it therefore to be to the interest of the other nations "to reduce or abolish" such responsibility.²⁵ The majority then proceeded to formulate a statement which, if accepted,

²⁰ I would most certainly include government lawyers, but as lawyers both free and duty bound to give their own professional opinions enriched with the experience that comes from public service. To avoid embarrassment and to make progress, any conclusions reached would, however, be the private professionally disciplined opinions of the individual participants.

²¹ This action was expressly related to the action of the General Assembly of the United Nations in recommending to the International Law Commission the codification of the law governing state responsibility.

²² Observations made by the Inter-American Council of Jurists, Juridical Committee, *Contribution of the American Continent to the Principles of International Law that Govern the Responsibility of the State*, at 2 (CIJ-39, Eng.) (1958).

²³ *Id.* at 15.

²⁴ INTER-AMERICAN COUNCIL OF JURISTS, JURIDICAL COMMITTEE, *Contribution of the American Continent to the Principles of International Law that Govern the Responsibility of the State* (OEA/Ser. I/VI. 2; CIJ-61, Eng.) (1962).

²⁵ *Id.* at 6.

would most certainly reduce or abolish a healthy legal climate for any investment, local or foreign.

Lest I tax your credulity, let me quote directly from their 1961 report, published in January 1962 by the Pan American Union. It carries the title *Contribution of the American Continent to the Principles of International Law that Govern the Responsibility of the State*. The "majority of the American states" have contributed to the law of state responsibility, according to the majority of the members of the Committee, by struggling "constantly and tenaciously to reduce or abolish it."²⁶

As a statement of historical fact, of "what 'has been done' and not what may be done or what it would be desirable to do,"²⁷ this statement of the majority has an element of truth. It is accurate in the sense that fifteen of the Latin American countries ratified a treaty signed in 1933²⁸ which reduces the responsibility of the signatories to one another to the so-called standard of equal treatment. This standard, taken to the extreme to which the committee majority has reduced it, would mean that if Castro treats a Venezuelan as badly as he treats Cubans, Venezuela may not complain, no matter how far Castro's treatment of his fellow citizens falls below "the normal standard of civilized nations." Lest I appear to be taking their statements too literally, let me again quote directly from the majority report. It quotes with approval the following passage from a textbook entitled *Elements de Droit International Public* by the French author M. Jean L'Huillier:

The international responsibility of the State is a matter governed almost entirely by custom. A partial codification of the rules of law concerning it was attempted in vain, in 1930, by the Codification Conference of The Hague.

The complete failure of that attempt was due in large measure to the resistance put up by certain American States to the preservation of rules generally admitted regarding the

²⁶ *Ibid.*

²⁷ *Id.* at 17.

²⁸ Convention on Rights and Duties of States (sometimes called The Convention of Montevideo). The United States ratified this convention with reservations excluding the equal treatment provisions. The majority of the Inter-American Juridical Committee recognizes that the doctrine "that there is no responsibility to an alien except in those instances in which a state is responsible to a national is not acknowledged by the United States." *Id.* at 13.

liability incurred by a State for damages that its action may cause to foreign subjects. Those American States sought to have adopted the principle that they apply in their mutual relations, in accordance with which the position of the foreigner can in no case imply treatment more favorable than that of the national, whereas the common international law allows that the foreigner should benefit by more favorable treatment when the internal law places nationals in a position inferior to the normal standard of civilized States.²⁹

Dissenting from the conclusions of the majority, the Argentine member of the Committee, Dr. Hugo Gobbi, in a scholarly opinion demonstrates that the historic doctrine of equal treatment was never meant to be reduced to such an extreme. For the doctrine to apply, he reasons, the treatment of nationals must conform to the normal standard of civilized states. He points out that "the most outstanding writers in this field, Calvo and Drago, never opposed all international inquiry by affirming the absolute irresponsibility of the state in this field."³⁰

The doctrine of equality of treatment was first propounded to ward off armed intervention by the great powers in order to secure for their nationals abroad treatment believed to be above the international standard.³¹ Dr. Gobbi points out that since such intervention has been ruled out by treaty, there is certainly no reason to go further than the doctrine as originally expounded. "It would also be unusual," he observes, "and in fact a contradiction of the historic process, if, now that Latin America has abolished the greatest danger to its fraternal harmony—intervention under the guise of diplomatic protection—tendencies should be affirmed which are more restrictive than those that were propounded at the outset precisely to prevent this form of authoritarianism."³²

The majority report is accurate in reflecting what "has been done" to the extent that it reflects the views popularly held in some Latin American countries respecting the equal treatment doctrine. But it is accurate as to what has been done only to that extent. It is not accurate as to the doctrine of equal treatment, as propounded by

²⁹ *Id.* at 17.

³⁰ *Id.* at 55.

³¹ *Id.* at 3, 5, 54.

³² *Id.* at 55.

Calvo³³ and most certainly it operates against the realities of what it is to the interest of the Latin American countries to espouse.³⁴

To the conference of American lawyers—South, Central and North American lawyers—which I have suggested, the members of the Inter-American Juridical Committee—the majority and the minority—should of course be welcomed, as observers if they prefer, but with the right to participate as much as they, acting as individuals, might choose. The conference would most certainly make an objective study of what “has been done,” but it should not stop there. It should attempt to formulate what the law is—keeping in mind the interests of each of the states of this continent, individually, and as members of a community, striving tenaciously to accomplish the goals of the Alliance for Progress.

³³ 3 CALVO, *LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE* 136 (5th ed. 1896). Among the other notable Latin American writers who have supported the existence of a minimum standard have been: 1 ACCIOLY, *TRATADO DE DIREITO INTERNACIONAL* § 416 (1933); ALVAREZ, *EXPOSE DE MOTIFS ET DECLARATION DES GRANDS PRINCIPES DU DROIT INTERNATIONAL MODERNE* art. 25 (2d ed. 1938); AMERICANO, *THE NEW FOUNDATION OF INTERNATIONAL LAW* 37 (1947); 1 BEVILAQUA, *DIREITO PUBLICO INTERNACIONAL* 219 (1910); CANTERO HERRERA, *COMMENTARIOS ANTE LA COMISION PERMANENTE DE WASHINGTON* 7 (1936); MAURTUA & SCOTT, *RESPONSIBILITY OF STATES* 45 (1930); 1 ULLOA, *DERECHO INTERNACIONAL PUBLICO*, 224, 243 (2d ed. 1938). See also 2 *PROCEEDINGS OF HAGUE PEACE CONFERENCE OF 1907*, at 247-49 (1920) (remarks of Drago and Ruy Barbosa).

³⁴ Where else in the world are the policies of governments being frustrated by their officially chosen lawyers proclaiming that their governments' policy as regards state responsibility is to struggle “constantly and tenaciously to reduce or abolish it”? From the most recently emergent countries the assurances are—and I believe them to be sincere—we will play by the rules of the game.