

Political Risks in Patent Licensing

Protection against noncommercial risks in foreign investments; factors not easily assessed, but there are guidelines

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The very rapid increase during the past decade in the level of direct private investment in foreign countries by nationals of the United States, Japan, and Western Europe¹ has correspondingly increased the level of concern within the commercial community regarding the non-commercial, "political," risks associated with direct foreign investment.

Although a substantial body of legal literature has been devoted to the act of physical expropriation of the assets of a foreign investor,² a dearth of information appears on the question of the political risks borne by the licensor of industrial property interests.³ Owing to their relative importance as a framework for embodying a transfer of legal or financial interests, patents represent one significant element in international licensing of industrial property rights. Often the technological advance represented by the patent itself is not the major constituent of a licensing agreement⁴ but rather the patent is a mode of transfer, a legal framework, for transferring other important know-how or financing interest.⁵

A major concern of the licensor lies in assessing the value of the expected remuneration he will receive from a license in view of certain factors quite distinct from the ordinary commercial judgments made in domestic licensing or licensing among nationals of countries having long-standing reputations for commercial and political stability.

The major noncommercial concern of the licensor is centered on unforeseeable political or economic changes in the country of the licensee or in the country of the situs of the licensed interest if it is different from the country of the licensee.

Important interests of the licensor in the technology, contractual relationships, and physical embodiments thereof, may be exposed to substantial risks in the nationalization or expropriation of the assets of the foreign business to which they relate. Furthermore,

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patents may be subject to cancellation or limited exploitation restrictions by government action.⁶ The foreign government may also impose production quotas or apply other damaging marketing or price restrictions. A major non-commercial risk is that the medium of exchange may become inconvertible into the hard currency required by the licensor as consideration for his disclosure of know-how or his license of patent interests.⁷ It is the design of this article to examine relevant provisions and customs of international law relating to the termination, expropriation, nationalization, or confiscation of patents and the inconvertibility of the royalties or other compensation due under patent licenses. In particular, emphasis will be placed upon available means for affording some measure of risk-reduction in foreign patent licensing matters through the mechanism of home-country investment guarantees. Unless specifically indicated otherwise, reference to the act of expropriation is intended also to apply to acts commonly termed nationalization or confiscation.

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INTERNATIONAL LAW ASPECTS OF PROTECTION FOR PATENT LICENSE AGREEMENTS

Nearly every government has maintained that it has an inherent right of lawful expropriation in the exercise of its function as a sovereign entity in the pursuit of public utility, or overriding national interests.⁸ There are four generally recognized conditions which must be satisfied before an expropriation is considered to be legally valid under international law:

1. The property or legal interest must be within the jurisdiction of the acting state.
2. The act must be supported by *bona fide* social or economic purpose.
3. There must be no discrimination relating to the property taken or the owners affected thereby.
4. The action must be accompanied by just and timely compensation or an effective and adequate measure to effect compensation.⁹

The elements involved in defining a "legally" recognized and proper act of expropriation do not admit of easy definitions. Each of the four elements involves complicated construction of the relevant facts, history, economics, and course of prior dealing between state and its nationals or those of a foreign state.¹⁰

For the individual private investor or corporation, enforcement of rights or achievement of international recognition of the impropriety of an order for expropriation is difficult to accomplish. The opportunity to raise legal claims in a forum beyond the jurisdiction of the expropriating state only inures to the foreign

national and not the national of the acting country,¹¹ so the acting-country national can resort only to local courts if an action exists at all. In the case of the nonnational, however, several reasonably difficult alternatives are available.¹²

Legal Remedies for Nonnational Licensors

First the nonnational can turn to local law remedies in the expropriating state. There may be constitutional or statutory provisions in the local law requiring prerequisites similar to those found in international law. Many national governments have instituted such provisions in an effort to strengthen their position in attracting desirable foreign investment.¹³ Of course, a part of the "risk formula" in foreign investment includes the possibility that even the statutory or constitutional guarantees will be overturned in the event of large-scale expropriation. The nature of local law investment guarantees varies widely and care should be taken to ascertain their limits prior to the execution of industrial property licenses. The particular applicable local law guarantee represents a significant factor in the assessment of risk in view of the fact that a failure of a state to observe the commitments made thereunder would result in negating the principal purpose of the laws, to attract foreign investment. Local law guarantees can also be important in showing discrimination upon application of international law standards in the event that only selected industries have been expropriated.¹⁴

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The second source of legal remedy for the nonnational licensor in the event of expropriation is the international legal system. There are two primary bodies of law to which the licensor can turn, customary international law¹⁵ and bilateral treaties between the licensor's home state or economic union and the expropriating state.¹⁶ There is substantial agreement in the world community concerning the previously discussed principles of customary international law in the event of expropriation.¹⁷ The licensor of a patent in the foreign country can benefit from customary international law rules by characterizing his interest as a form of property. However, the licensor of mere know-how may encounter more difficulty in availing himself of the customary relationship without the significant "property" attributes of a patent. Clearly, however, the licensor of patents and the licensor of know-how are in a much stronger legal position when a bilateral treaty exists comprising positive commitments regarding compensations and currency convertibility.

The foreign government enjoys broad authority to affect the contractual relationship between private foreign nationals and its own private nationals. That is particularly true in the areas of taxation, exchange controls, currency regulation, and the exercise of the police power.¹⁸ Many industrial states have negotiated treaties of "Friendship, Commerce, and Navigation" ("F.C.N." Treaty). The treaties have created a broad network of bilateral agreements regarding payments, remittances, and transfers of funds. The treaties also generally include a prohibition of exchange restrictions, but with broad "temporary" restriction escape clauses.¹⁹ The "F.C.N." treaties do, however, provide a measure of protection greater than that offered under

customary international law. Many of the treaties also make a guarantee of "national" or "most favored nation" status to foreign nationals enforcing industrial property rights and claims in the judicial and administrative systems of the contracting states.

Enforcement of Legal Rights of Licensors

Enforcement of rights in the international system is a quite distinct matter from the theoretical existence of the rights. First it should be recognized that legal recourse must be made, to the extent possible, in the internal courts or administrative agencies of the expropriating state. The doctrine of exhaustion of local remedies is a principle of international law and applies in expropriation circumstances.²⁰

Access to international judicial tribunals is available only to nation-states or recognized international organizations. That restriction raises significant problems for the licensor since he must move his own government to press his claim. At that point he encounters myriad domestic and diplomatic obstacles. One troubling aspect involved with diplomatic protection when the investment is in Latin America is the continued use of the "Calvo clause" in direct investment contracts. The "Calvo clause," which purports to deny access by the investor to the diplomatic protection of his home state in the event of dispute, appears to constitute internationally a promise by the investor to exhaust local remedies before seeking diplomatic protection. Its use in Latin America has been one reason for the failure of those nations to sign the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.²²

The *Barcelona Traction* case of the International Court of Justice is also of importance in assessing the risk involved when a patent or other property is traded for shares in a corporation having as situs (or principal offices) in a country other than that of the investor or the investment. The court determined that only the state of the corporate situs could exercise diplomatic protection on behalf of corporate interests of the shareholders, while the corporate entity is still — even remotely — in existence.²³ The case substantially increases the risk incurred by shareholders in view of the fact that they must move a government, often not their own, to pursue diplomatic remedies. One author commented critically that "... one has to conclude that property in the new form of shareholdings is not protected in international law."²⁴ Another stated, "If this case (*Barcelona Traction*) is to be considered as a test case for the present status of customary international law, then one has to conclude that international law presents a serious lacuna."²⁵

In general practice, the best forum for the assertion of the international legal rights of a licensor is before a permanent or *ad hoc* arbitration tribunal. Many organizations and *ad hoc* arbitration procedures are available to private parties.²⁶ The major difficulties to be overcome involve the enforceability of a contract term comprising an agreement to arbitrate future disputes and the doctrine of sovereign immunity when a state is a party.²⁷ Arbitration provisions, or agreements to arbitrate future disputes are very

common in foreign license agreements and are receiving broad enforcement support as the former common law objections to such agreements gradually have been abandoned.²⁸ Likewise, the doctrine of sovereign immunity has increasingly become a less significant barrier to enforcement of arbitration provisions when one party is a state. Several legal doctrines have emerged to overcome the international principle of sovereign immunity. The doctrines are centered principally upon the notion that the nation-state is involved in an activity which is proprietary in nature rather than governmental or that the state has the power to waive sovereign immunity in advance by entering into the arbitration agreement.²⁹ The further "internationalization" of arbitration agreements will continue to strengthen the compulsory nature of an agreement to arbitrate future disputes.³⁰

Enforcement of an arbitral or judicial award presents still further difficulties to the licensor. Most national courts are willing to recognize the finality of an arbitral award upon satisfaction of certain "due process" or "natural justice" standards in the arbitration process together with a prima facie showing that there were no erroneous legal bases applied in arriving at the award.³¹ The "F.C.N." treaties have, for the most part, provided for mutual recognition of arbitration awards duly rendered.³²

In addition, the United Nations has proposed a worldwide Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958³³ which has been less than successful owing to the failure of a number of countries to sign the agreement. A great deal more success has been achieved on a regional basis by the United Nations in the European Convention on International Commercial Arbitration of the Economic Commission for Europe of 1961.³⁴ The United Nations has also met with some success in the adoption of the Rules for International Commercial Arbitration of the Economic Commission for Asia and the Far East of 1966.³⁵ The bilateral "F.C.N." agreements involving states which are signatories to the international conventions normally incorporate by reference to the provisions of the respective conventions.³⁶

An additional forum for the assertion of the licensor's rights is in the courts of his own country or a third country where certain physical or financial assets of the expropriating state are situated.³⁷ In that case, a trial on the merits is less likely to satisfy the claim of a licensor than a request for execution on a foreign judgment or arbitration award.³⁸

HOME-COUNTRY INVESTMENT GUARANTEES

The foregoing summary of international and foreign modes of protection for patent license agreements serves to illustrate the rather confused and uncertain nature of the "risk formula" for the licensor. The level of risk varies substantially and the nature of private and foreign country protection is also often a matter for private negotiation.

A major component of risk-reduction for the licensor in the area of noncommercial risks are home-country investment guarantees and, I hope someday, international organization guarantee programs.³⁹ At present home-country guarantees have been available

to eligible investors in the United States since 1948; Japan, 1956; Federal Republic of Germany, 1960; Norway, 1964; Australia, 1966; Denmark, 1966; Sweden, 1968; Canada, 1969; the Netherlands, 1969; Switzerland, 1970; Belgium, 1971; France, 1971; and the United Kingdom, 1972.⁴⁰

The home-country guarantees are directed toward the satisfaction of two basic governmental objectives,⁴¹ implementation of foreign policy and increased volume of export trade. The programs of the United States, the Federal Republic of Germany, Denmark, Canada, the Netherlands, Switzerland, and France, clearly favor the foreign policy purpose over the mere expansion of export markets since the respective insurance programs are limited to use solely in lesser-developed countries or are subject to bilateral agreements which have been negotiated primarily with lesser-developed countries.⁴² The coverage offered by the United States, the Federal Republic of Germany, Switzerland, and Sweden, is tied to the existence of a bilateral agreement with the country of the licensee or the investment status. However, there are now approximately 90 countries in Latin America, Africa, the Near East, and South and Far East Asia, where guaranteed investments may be made by United States nationals; approximately 40 countries having agreements with the Federal Republic of Germany; 11 countries with Sweden; and several with Switzerland.⁴³ The programs in Belgium and Denmark require preliminary governmental agreements but also provide for exceptions in special situations.⁴⁴ The guarantees in Japan, Norway, Australia, and the United Kingdom, are entirely unilateral and worldwide, in that they require no prior bilateral intergovernmental agreement.⁴⁵

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Coverage of Noncommercial Risks

The noncommercial risks generally covered are: (1) nonconvertibility of currency,⁽²⁾ loss of the foreign investment due to expropriation, nationalization, or confiscation by the foreign government; and (3) damage to tangible property as a result of war, revolution, or insurrection.⁴⁶ Under some programs, for example in the United States and Australia, the three components of protection may be elected individually by the investor, however in other countries no severance of coverage is permitted.⁴⁷ Under the United States program the full value of a loss may be recovered up to the face value of the insurance. In the Federal Republic of Germany, Australia, and Norway, the investor must bear 10% of the loss, and in Japan, he must bear 25% of the loss.⁴⁸

The premium rates for coverage vary significantly. In the Federal Republic of Germany the investor must annually pay 0.5% of the insured amount. In Japan, the rate is from 0.55 to 0.70% and in the United Kingdom, 1.0%.⁴⁹ Owing to divisible coverage and other optional characteristics, the United States rates are more complex: 0.3% of the "Current Insured Amount" for inconvertibility; 0.6% for expropriation; and 0.6% for war, revolution, and insurrection coverage. The investor must pay 0.25% for the difference between the "Current Insured Amount" and the "Maximum Insured Amount" (generally termed

"standby coverage").⁵⁰ The "Maximum Insured Amount" is the full amount of insurance which will be issued for the investment insured and is normally approximately 200% of the initial investment value. The "Current Insured Amount" is the amount of coverage elected annually by the investor,⁵¹ which must be at least the amount of any expected risk.

A major issue for the licensor of patents or know-how is the extent to which his right to royalties, financial interests in the foreign business, or property interest in the patent, are covered by the guaranty program of his home country. All programs at present (with some reservations on the part of Belgium, Denmark, Norway, Sweden, and France) insure the convertibility of royalty payments, which covers the major risk incurred by most patent or know-how licensors.⁵² In the area of investment contribution to a business, the U.S. Government Corporation (Overseas Private Investment Corp.) has developed a distinction between patents, processes, industrial techniques, or licenses thereof and trade names, trademarks, or goodwill; the later three categories not constituting insurable investments.⁵³

It is important to note that, in general, the interests of a licensor of a patent or know-how under a royalty agreement (as opposed to a contribution of capital agreement) are not insurable against expropriation or war risks.⁵⁴ However, in the investment setting where patent or know-how license has a pre-established value and constitutes a contribution to capital, the interest in the business based upon the value of the contribution is insurable against expropriation.⁵⁵

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Cancellation of a Patent

A somewhat ambiguous situation appears to exist when a patent is cancelled or revoked by a state for political reasons not associated with the domestic patent law. The act would seem to constitute a "taking" of private interests similar to the seizure of a physical asset. However, the protection offered under the existing home-country investment guarantees is at best unclear. The administrative position in the United States, by creating a distinction between licensing of a patent for royalties and creating a distinction between licensing of a patent for royalties and licensing for a capital interest in the business,⁵⁶ would appear to yield a different result depending upon the form of the license agreement. If the license were for cash royalties, the cancellation of the patent would probably not create insurance liability. However, if the license were a contribution to capital, the cancellation would likely constitute an expropriation of property under the guarantee agreement.

In general, the risk of cancellation of a patent as a result of an act of war or insurrection would not be protected under any form of license agreement.⁵⁷ The greatest noncommercial risk for the patent licensor is nonconvertibility and only secondary expropriation.

It should be noted further that patent and know-how licenses are treated the same with respect to the scope of protection offered by the guarantee programs. In view of a recognized notion of the patent as a "property" interest, the exclusion of the patent itself from protection against expropriation, regardless of

the form of the underlying license agreement, appears to be unjustified. Nevertheless, the licensor should observe that by framing his license agreement in terms of a contribution to capital, he can obtain protection against acts of expropriation and, in some countries, acts of war. Should the circumstances surrounding the investment or the objectives of the licensor operate to preclude the contribution to capital alternative, then at least the royalty interests of the licensor may be protected against nonconvertibility.

All of the home-country guarantee programs maintain varying eligibility requirements, and the licensor must receive approval of the proposed investment both from his own country and the country of the investment before a contract of guarantee will be written by the home country. In addition, the license or investment must be "new" and cannot be a renegotiation or refinancing scheme.

Of course, the major deficiency in home-country guarantees is that they are available only to citizens and corporations of the countries offering them. Recognizing the favorable experience encountered under the existing programs, international guarantees to any investor should meet with similar success.

INTERNATIONAL INVESTMENT GUARANTEES

At present, international guarantees against non-commercial risks in a patent or know-how licensing are not available. Certain current proposals, however, appear to be promising, and the chances for initiation of an international investment guarantee plan are optimistic. The most realistic and promising proposal is the Draft Articles of Agreement of the International Investment Insurance Agency of the International Bank for Reconstruction and Development (World Bank Group).⁵⁸ In determining the scope of protection, inclusion of coverage for risks associated with the international monetary system, e.g. devaluation of a currency or use of a gold-standard clause, has been widely discussed.⁵⁹ At this point in the consideration of investment insurance, it appears safe to assume that the program ultimately implemented for insuring non-commercial risks in patent licenses will offer about the same scope of protection as the existing home-country programs. Although devaluation of currency protection would be a major breakthrough for the licensor, its availability in a final international plan is at best doubtful.

CONCLUSION

The noncommercial investment risks assumed by the licensor of patents or know-how in a foreign country do not admit of easy assessment. The major factors in assessing the risks are the long-term reputation of the foreign country for domestic and international political and economic stability, political and economic trends, guarantees offered by the foreign government, and the existence of bilateral or multilateral commitments involving both the home country and the foreign country.

All of the previously identified factors operate, in combination with prospects for enforcement and

adequate compensation, to create the "risk formula." However, after the risk has been determined, those eligible licensors of countries offering home-country foreign investment guarantees may further reduce personal financial risk by obtaining that protection.

In analyzing the extent to which personal financial risk may be reduced, the licensor who wishes to utilize the home-country guarantee should fashion his license agreement in view of the potential differences in coverage arising from different forms of interests in the license and the business activity involved in the license transaction. Finally it should be pointed out that the nature and scope of available investment guarantees is in a state of flux, and particular attention should be paid to the potential development of international investment insurance institutions by licensors in countries where similar protection is not offered at present and by all licensors of patents and know-how in the event that the international protection includes protection against risks associated with fluctuations in the international monetary system.

NOTES

1. See Z. Kronfol, *Protection of Foreign Investment*, 13, Leiden 1972; G. Schwarzenberger, *Der Schutz von Auslandsinvestitionen—Multilaterale Kodifikationsversuche*, 28, Bad Homburg 1969; E. Solomon, "Japan and Foreign Investment: A Study in Law and Policy", in J. Starke (ed.), *The Protection and Encouragement of Private Foreign Investment*, 143, Sydney 1966; S. Robock and K. Simmonds, *International Business and Multinational Enterprises*, 52, London 1973; A. Rugman, "Motives for Foreign Investment: The Market Imperfections and Risk Diversification Hypotheses", 9 *Journal of World Trade Law* 567, 1975; W. Adams, "The Emerging Law of Dispute Settlement Under the United States Investment Insurance Program", 3 *Law and Policy in International Business*, 101, 1971; S. Rubin, "Multinational Enterprise and National Sovereignty: A Skeptic's Analysis", 3 *Law and Policy in International Business*, 1, 1971, at 2.
2. A good, albeit dated, bibliography appears in E. Re, *Foreign Confiscations*, 171, New York 1951; a later bibliography is in Kronfol, *Id.*, at 171.
3. The term "industrial property" is the victim of a wide variety of definitions, however it generally is utilized to denote a body of legal rights comprising patents, trade-marks, designs, know-how, and trade secrets. Some writers also consider copyrights to be a form of "industrial property", see L. Eckstrom, "Industrial Foreign Licensing Agreements", *A Lawyer's Guide to International Business Transactions*, W. S. Surrey, ed., 112, Philadelphia 1963; Rabl, *Common Market and American Antitrust*, 244, New York 1970.
4. It has been estimated that no more than 2 per cent of the transfer of technology to developing countries is effected through patents, see Hiance and Plasseraud, *Brevets et sous-développement*, Paris 1972, at 95; S. Lall, "The Patent System and the Transfer of Technology to Less-Developed Countries", 10 *Journal of World Trade Law*, 1, 1976.
5. Lall, *Id.*, at 9; In addition the patent represents a type of psychological guarantee of more reasonable prospects of a profitable and positive development atmosphere. See, "The Role of Patents in the Transfer of Technology to Under-Developed Countries", Report by the Secretary General of the United Nations, UN Doc. E/3861, E/C 5/52 Rev. 1, March 9, 1964, at 117; Lall, *Id.*, at 11.
6. See, Pugh, "Legal Protection of International Business Transactions", *A Lawyer's Guide to International Business Transactions*, W. S. Surrey, ed., 303, Philadelphia 1963.
7. The nature of the concept of "convertibility" is discussed in Geiger, "Legal Aspects of Convertibility", 4 *Ga. J. Int'l. / Comp. L.* 76, 1974; A sample license provision effecting termination after an initial term in the event of impairment of the licensor's rights is presented in Eckstrom, *Supra* note 3, at 164. Of course, termination often yields an unsatisfactory remedy when the disclosure of know-how and trade secrets has already been accomplished.
8. "Expropriation" is used generally to identify a lawful interference with property and "confiscation" is an interference constituting an international tort, see Schwarzenberger, *Supra* note 1, at 33; See also, Portuguese-German Arbitration (1919), Award II (1930), in United Nations, *Reports of International Awards, II*, at 1039; Von Glahn, *Law Among Nations* (2d), London 1970, 234.
9. See, D. P. O'Connell, *International Law*, London 1965, at 851.
10. A recent case exemplifying the definitional problems is: *The Anaconda Company and Chile Copper Company v. Overseas Private Investment Corporation* (American Arbitration Association), case No. 16-10-0071-72, 14 *Int'l. Leg. Mat.* 1210 (1975); The case involves a determination of liability of OPIC under foreign direct investment guaranty contracts issued on behalf of the U.S. government to Anaconda and its affiliates.
11. O'Connell, *Supra* note 9, at 836; It should be recognized that it is conceivable that a treaty or other international agreement might provide a form of international remedy to a national of the expropriating country, but such a right is not available at the present time.
12. See, *Barcelona Traction* case, (1970) I.C.J. 3, 9 *Int'l. Leg. Mat.* 227 (1970); also generally Pugh, *Supra* note 6, at 304 et seq.
13. A survey of foreign investment laws appears in Starke (ed.), *The Protection and Encouragement of Private Foreign Investment*, Sydney 1966; An example of an internal law is Art. 32 of the Korean Foreign Investment Encouragement Law of 1960, as amended:
 - "1. The assets of registered enterprises under this law shall not be subject to any compulsory expropriation . . . except appropriation by the government for a public purpose.
 2. In the event of the expropriation of the assets . . . just compensation shall be paid in accordance with law. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken.
 3. The investor shall have the right to remit abroad without delay any sums of money received as payment for action taken under this article free of taxes or fiscal charges."
 Pugh, *Supra*, note 6 at 307.
14. See Pugh, *Supra* note 6, at 316 et seq., for a general discussion of the international effect of a violation of a local-law guarantee to a foreign licensor; A country-by-country analysis of local-law guarantees is found in Aufrecht, "A Study of Foreign Investment Law: A Cross-section View of the Foreign Investment Laws in Force in 1957", Starke (ed.), *Supra* note 13, at 23; See also the *Barcelona Traction* case, *Supra* note 12, at Para. 90.
15. In his working paper on Article 24 of the Statute of the International Law Commission, M. O. Hudson expresses the elements required for the establishment of a principle of customary international law as follows:
 - "(a) Concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
 - (b) Continuation . . . [or] repetition of the practice over a considerable period of time;
 - (c) Conception that the practice is required by, or consistent with, prevailing international law; and
 - (d) General acquiescence in the practice by other States."
 O'Connell, *Supra* note 9, at 17.
16. As of 1968, the Federal Republic of Germany had engaged in 18 private investment protection treaties for German nationals in developing countries; France: 22; Japan: 9; Switzerland: 15; Great Britain: 2; and the United States: 14 (these numbers do not indicate the number of countries where investment guarantees are available, for example, they are available in approximately 90 countries for U.S. nationals), see Kronfol, *Protection of Foreign Investment*, Leiden 1972, at 164 et seq.
17. See text accompanying note 9. *Supra*.
18. Pugh, *Supra* note 6, at 322; Metzger, "Multilateral Convention for the Protection of Private Foreign Investment", 9 *J. Pub. L.* 133, 1960.
19. Pugh, *Supra*, note 6, at 323.
20. See, *Interhandel Case (Switzerland v. United States of America)* International Court of Justice, 1959 I.C.J. Rep. 6 (1959); See also, the United States Department of State memorandum regarding the Cuban nationalization of property belonging to American nationals, which required exhaustion of remedies unless ". . . there are none to exhaust or if the procurement of justice would be impossible . . .", 56 *Am. J. Int'l. L.* 166 (1962), also reproduced in Steiner and Vagts, *Materials on Transnational Legal Problems*, New York 1968, at 179.
21. Some of the difficulties encountered in moving one's own government to pursue a claim are described in W. Bishop, Jr., *International Law Cases and Materials* (2d ed.), Boston 1962, at 630-632. See *Mavrommatis Palestine Concessions*, Permanent Court of International Justice, 1924 P.C.I.J., Ser. A, No. 2; 1 *Hudson, World Court Reports* 293 (1934).
22. J. Ryans & J. Baker, "The International Centre for Settlement of Investment Disputes (ICSID)", 10 *Journal of World Trade Law*, 63, 1976, at 66; With respect to the "Calvo

- clause" in general see Von Glahn, *Supra* note 8, at 239; Bishop, *Supra* note 21, at 710; *U.S. v. United Mexican States*, U.S.-Mexico General Claims Comm. (1929), *Opinions*, 1927, at 21.
23. *Barcelona Traction* case, *Supra* note 12, at Para. 66; See, note, "Economic Internationalism vs. National Parochialism: Barcelona Traction", 3 *L. & Pol. Int'l. Bus.* 542, 1971.
 24. Abi-Saab, "The U.S. in World Affairs", *Annals of International Studies* 16 (1971), as cited in C. Vuylsteke, "Foreign Investment Protection and ICSID Arbitration", 4 *Ga. J. Int'l. L.* 343, 1974.
 25. Vuylsteke, *Id.*, at 344.
 26. For example, The International Centre for the Settlement of Investment Disputes (ICSID), The International Chamber of Commerce, or The American Arbitration Association, among many other permanent organizations. A list of U.S. and European arbitration organizations may be found in the United Nations publication, "Handbook of National and International Institutions Active in the Field of International Commercial Arbitration," U.N. Doc. No.: Trade/W.P.1/15/Rev. 1; The Rules of Arbitration of the International Chamber of Commerce are partially reproduced in D. Rivkin, "International Litigation and Arbitration", *A Lawyer's Guide to International Business Transactions* W.S. Surrey, ed. 1019, Philadelphia 1963; The Permanent Court of Arbitration at The Hague is also open to private parties when one party is a State, see, 9 *Neth. Int'l. L. Rev.* 339, 1962; An examination of ICSID procedures is found in Vuylsteke, *Id.*; A major weakness in the otherwise positive ICSID program is the failure of Latin American countries to sign the convention particularly since the area is one of relatively high risks in terms of expropriation and confiscation, Ryans, *et al.*, *Supra* note 22, at 66.
 27. Rivkin, *Id.*, at 986-922; See also, F. Tsegah and S. Tiewul, "Arbitration and Settlement of Commercial Disputes: A Selective Survey of African Practice", 9 *Journal World Trade Law*, 378, 386, 1975.
 28. See Cohn, "Waiver of Immunity", 34 *British Yearbook of International Law* 260; Although the United States position is somewhat unclear at present; it represents the most significant country where an agreement to arbitrate future disputes might not be enforceable, Rivkin, *Id.*, at 984; The U.S. trend is in favor of agreements to arbitrate future disputes with 19 states of the U.S. permitting such clauses in spite of the common law rule to the contrary.
 29. See, for example, *Ocean Transport Co. v. Government of the Ivory Coast*, 269 F.Supp. 703 (EDLa, 1957); Tsegah, *et al.*, *Supra* note 27, at 388; The "Tate Letter", 26 *Dept. State Bul.* 984 (1952), stated the position of the United States that a government involved in activity of a proprietary or commercial nature should not be permitted to enjoy sovereign immunity in actions arising out of the "nongovernmental" activity.
 30. See Vuylsteke, *Supra* note 24, at 348.
 31. See Tsegah, *et al.*, *Supra* note 27, at 393; Rivkin, *Supra* note 26, at 986.
 32. Rivkin, *Supra* note 26, at 987. An example of a bi-lateral agreement for mutual enforcement of arbitration awards between countries signing the two Geneva arbitration agreements is the treaty between the United Kingdom and Japan on Foreign Investment, see E. Solomon, "Japan and Foreign Investment: A Study in Law and Policy", Starke (ed.), *Supra* note 13, at 159.
 33. United Nations, Economic and Social Council, E/CONF. 26181, Rev. 1 (1958).
 34. United Nations, Economic Commission for Europe, E/ECE 4234, E/ECE/Trade/48 (1961).
 35. See, Kronfol, *Supra* note 16, at 143.
 36. *Supra* note 27.
 37. See *U.S. v. Pink*, 315 U.S. 203 (1942); cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which must be considered with subsequent U.S. legislation attempting to "reverse" the effect of the decision in future situations, 22 U.S.C. §2370(e) (2), (1964) generally termed the "Hickenlooper" or "Sabatino" amendment; see also, *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 215 A.2d 864 (Penn., 1968); *Iraq v. First National City Bank*, 353 F.2d 47 (2d. Cir. 1965).
 38. *Id.*
 39. One promising possibility for international guarantee of investment in the area of noncommercial risks is the proposal by the World Bank to establish an international investment insurance agency, see United Nations, "The Role of Private Enterprise in Investment and Promotion of Exports in Developing Countries", TD/35/Rev. 1, April 1968, at 29.
 40. Kronfol, *Supra* note 16, at 36; Robock, *et al.*, *Supra* note 1, at 200; G. Phillips, "Insurance of Overseas Investments: The Australian Scheme", in Stake (ed.), *Supra* note 13, at 119.
 41. The earliest home-country program for investment guarantees was instituted by the United States in 1948 to assist in the recovery of Japan and Western Europe, however, the emphasis changed to other lesser developed countries after full-recovery in Japan and Western Europe, Robock, *et al.*, *Supra* note 1, at 198; H. L. Freeman, a former Vice President for Finance of OPIC, has asserted that the guarantee program will play an increasingly reduced role in developmental policy as compared with the investment loan program of OPIC, Freeman, "Project Development and Structuring: the Metamorphoses of the Financing Facilities of the Overseas Private Investment Corporation", 7 *L. & Pol. Int'l. Bus.* 739 (1975); See also Adams, *Supra* note 1.
 42. Phillips, *Supra* note 40, at 120; See also, OPIC, "Incentive Handbook for Investment Insurance", Overseas Private Investment Corporation, Washington, D.C. (Jan. 1973 rev.), at 4; Robock, *et al.*, *Supra* note 1, at 200; Today nearly two-thirds of U.S. non-petroleum investment in lesser developed countries is insured by OPIC, "OPIC Country List", Sept. 1974.
 43. OPIC, *Id.*, at 5; See also Robock, *et al.*, *Supra* note 1, at 200; By 1971, 21 claims had been filed for losses insured by the U.S. Adams, *Supra* note 1, at 106.
 44. See Kronfol, *Supra* note 16, at 37; Robock, *et al.*, *Supra* note 1, at 200.
 45. Kronfol, *Supra* note 16, at 37.
 46. See, for example, scope of United States coverage at 22 U.S.C. § 2194 (a), as amended.
 47. Kronfol, *Supra* note 16, at 37; Phillips, *Supra* note 40, at 126.
 48. Kronfol, *Supra* note 16, at 37.
 49. Kronfol, *Supra* note 16, at 38; Robock, *et al.*, *Supra* note 1, at 200.
 50. See OPIC, *Supra* note 42, at 5.
 51. *Id.*; See the *Anaconda* case, *Supra* note 10, for a discussion of the coverage under the U.S. program of insurance.
 52. For example, the U.S. Statute at 22 U.S.C. § 2198 (a), defines investment to include "... any contribution of ... services, patents, processes, or techniques, in the form of ... the purchase of a share ownership ... [or] participation in royalties, earnings, or profits ..."; In Belgium, Denmark, Norway, Sweden, and France, special attention must be paid to the form of the license agreement if protection is available at all owing to a more restrictive definition of insurable interests.
 53. OPIC, *Supra* note 42, at 8.
 54. *Ibid.*
 55. See, Adams, *Supra* note 1, at 126 *et seq.*; also Phillips, *Supra* note 40, at 133, where an exception in the Australian program is indicated; Specific "tangible" property loss is required under the war risk coverage protection of national plans.
 56. See text associated with note 54, *Supra*.
 57. See Phillips, *Supra*; note 40, at 133; Adams, *Supra* note 1, at 138.
 58. Note 39, *Supra*; See also Schwarzenberger, *Supra* note 1, at 116.
 59. See, for example, Schwarzenberger, *Supra*, note 1, at 120.