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INVESTMENTS- Promotion and Protection of Private and Foreign Investment Vol.VI

860

Invest. Prot. & Pvt.
Prv. & For. Invest.

VI

Bosky	AUG 27 1969	

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1966 - 1968.

RECORDS MANAGEMENT SECTION
February 1969

Investment

Files

December 17, 1965

L. Nurick

Mr. Lochmann of the United Nations Secretariat came in yesterday to see me and told me the following.

His department is starting to work on a publication to be published by the Secretary-General which would state the kinds of problems involved in a private foreign investment, and would come up with conclusions (he called them "guidelines") regarding appropriate solutions. These guidelines would cover matters such as taxation, repatriation, settlement of disputes, terms of entry and similar matters. In addition they would hope to distinguish between treatment to be afforded an industrial enterprise and an enterprise for the exploitation of natural resources. For this work they have hired as a consultant Professor Fatourous.

Another part of the publication would be devoted to the use of various financial institutions in the financing of projects in developing countries; i.e. the international institutions, local development banks consortia, etc. For this part they have hired Professor Nyhart.

c.c. Mr. A. Broches
Mr. G. Delaume
Mr. D. Suratgar

LN:hf LN

Investment - Promotion of Private Foreign Invest.

Mr. B. A. de Vries

June 1, 1965

P. Leon

Belgian "Plan"

April 29/65

1. Mr. Schick's memorandum on the above describes the plan and explains its various aspects. In my opinion, the major weakness of the plan is that it may have no real advantage. If the total amount of bonds the Bank can issue is limited - and our paper on the Horowitz proposal implies so - any dividend-bond issued by the Bank to stockholders and afterwards sold by them on the capital market will diminish the amounts the Bank can obtain on the market for its own bonds. Only insofar as stockholders do not sell the dividend-bond there may be a net increase in the market of all types of Bank bonds. This seems highly unrealistic. In any case, the amount of dividend bonds retained by stockholders potentially reduces their contributions to other bond issues on the market having similar characteristics (IBRD, EIB, IADB bonds, etc.). Furthermore, the capital acquired by the Bank through the dividend-bonds has to be invested in the country where the dividends came from, reducing our lending flexibility.

2. The encouragement to foreign private investment that the plan may yield is also dubious. Stockholders of small foreign firms have participated in the venture and will continue to do so only if their return is higher than in the home market. If their dividends are not in cash, no matter how liquid the bonds they obtain, they will switch to other investments. If the foreign enterprise is a subsidiary of a big company (say, Esso), then the mother company will get the dividend-bonds, not the stockholders. This may make the market of the dividend-bonds an "imperfect" one, due to the accumulation of such bonds in the hands of few big companies. I do not think the Bank would like this.

3. In conclusion, if we maintain a negative attitude on the Horowitz proposal we cannot be positive on the Belgian Plan. I think we should politely discourage the Belgians and perhaps say that we are taking up the general idea of studying the ways and means to encourage foreign private investment in LDCs. If I am not wrong, we are thinking about a new formulation of the Multilateral Investment Insurance scheme.

PLeon:cc

OECD - DAC - Investment Promotion - Protect

Files May 14, 1965

Arthur Karasz

DAC Meeting on Private Investments in Developing Countries

The meeting was held on May 12. As Willard Thorp was in Uganda, the chair was taken by Pierre-Brossolette, who had been elected vice-chairman of DAC to replace André de Lattre.

1. Fiscal Incentives in Capital Exporting Countries for Private Investment in Developing Countries

A working party of fiscal experts, mainly U.S. inspired, prepared a paper on the subject (DAC(65)11, dated May 3). The paper describes present procedures (tax exemptions, preferences, etc.), but does not contain proposals for the future.

While the U.S. seems to be favorable to the inclusion of the subject in the agenda of the forthcoming DAC ministerial meeting (July 22-23), the U.K. is opposed, at least at present. In the U.K. opinion tax incentives are not sufficient incentives for private capital.

The French are not exactly hostile to including the matter in the agenda; however, they would not like to burden the ministers with too many subjects, especially if they are controversial.

The meeting decided to "de-restrict" the text of the study submitted by the fiscal group ("de-restriction" is less public than "publication") and leave it to the Council to decide whether it will or will not be submitted to the high-level meeting.

2. Multilateral Investment Guarantees.

IBRD needs a decision from OECD on the continuation of its study on the subject. The Council of OECD is unable to make a decision because - as I was told confidentially - Greece and Portugal are against.

The OECD representative (a Mr. Peter Benjamin - Mr. Könz has resigned in the meantime) has made a report to the meeting. He admitted that there were still "some difficulties" but OECD is hopeful to solve them within the next two or three weeks". Therefore he requested IBRD to be patient for a little longer.

On instruction from Mr. Demuth I pointed out to the meeting that "UNCTAD I" had asked us (in Resolution A.IV.12) to submit the result of our study by September 1965 at the latest. Therefore, an early decision by OECD would be most desirable.

3. Convention on the Settlement of Investment Disputes.

At the request of the chairman I reported on the present state of the Convention, on Tunisia having been the first government to ratify, and

requested the assistance of the delegations to obtain action on ratification, as fast as possible, in their respective legislations.

The chairman agreed and requested the delegations to act.

4. Draft Convention on the Protection of Private Property.

OECD Assistant Secretary-General Hahnemann reported to the meeting. There is no agreement yet on the subject and it is the Council's opinion that priority should be given to the negotiations on Multilateral Investment Guarantees.

5. Promotion of Possibilities in Private Investment.

Mr. Gilbert Carter, of AID Washington, reported on AID's activities in this field.

a. A specialized section of AID prepared an index of feasibility studies on possible projects all over the developing world. At present the index contains about 1500 studies and is being constantly reviewed.

In reply to my question we were told that, as of now, there has not been any discussion on this subject between IFC and AID. AID would be happy to exchange its material with that of IFC.

b. The "Pre-Investment Feasibility Survey Program" is another initiative taken by AID. Its purpose is to subsidize the preparation of feasibility surveys.

The survey is prepared by the potential private investor. If the results are such that the firm does not want to make the investment, AID pays 50 per cent of the cost of the survey. No such reimbursement is done if the result is positive, i.e. the survey leads to effective investments.

According to AID the program, only about one year old, is proving to be successful. At present there is no coordination yet between AID and the GATT Trade Information Centre or the UN Special Fund.

c. Management Training Program. Its main purpose is to assist smaller privately-owned firms.

Assistance is given in the form of a demonstration program and management training institutes.

Last year the U.S. industry contributed speakers, allowed visits of U.S. factories, etc. Management training institutes are financed partly by U.S., partly by the receiving country (i.e. Colombia, Nigeria).

d. International Executive Service Corps. A sort of "Peace Corps of Executives" started on the proposal of David Rockefeller. Volunteers from the U.S. business community (retired or active) agree to work for LDC business ventures. Over 3,000 businessmen have volunteered already.

By June 1965 there will be 30-35 volunteers in the field. In 1966 there will be several hundred - 155 business projects are under discussion in 30 different countries which wish to participate in the program.

AID will provide headquarters and personnel and 75 per cent of operating costs in the first year. The local enterprise will pay living expenses and, if possible, travel. No salaries will be paid.

6. Coordination. The U.S. representative proposed the creation of a working group consisting of representatives of interested DAC countries, of BIAC (the Business and Industry Advisory Committee to OECD) and international organizations; the purpose of the group would be to keep discussing current problems of private investment. The group will be interested in receiving assistance from IBRD, particularly on questions relating to EDI, IFC and also development banks.

The DAC Secretariat was requested to prepare terms of reference of the working group. Final decision will be taken at a later date.

Enclosure

ORGANISATION FOR ECONOMIC
CO-OPERATION AND DEVELOPMENT

RESTRICTED TO PARTICIPANTS

Paris, 3rd May, 1965.

DAC(65)11

DEVELOPMENT ASSISTANCE COMMITTEE

FISCAL INCENTIVES IN CAPITAL EXPORTING COUNTRIES FOR PRIVATE INVESTMENT IN DEVELOPING COUNTRIES

(Note by the Secretariat)

The purpose of this note is to review briefly the background and nature of the Report by the Fiscal Committee on Fiscal Incentives in Capital Exporting Countries for Private Investment in Developing Countries [C(64)139], and to set out suggestions for action by the D.A.C. in its consideration of the document.

I. Background of the Report by the Fiscal Committee

1. The promotion of private direct investment in the less-developed countries has been of long-standing concern to the Members of the Development Assistance Committee and its predecessor, the Development Assistance Group. At its Fifth Meeting, held in Tokyo, 11th to 13th July, 1961, the Development Assistance Group "agreed that the problem of incentives to private investment in developing countries should be regarded as a continuing part of the work of the D.A.G.," and "agreed to ask the Council of the O.E.E.C. to request the O.E.E.C. Fiscal Committee to study the problems regarding the desirability and character of fiscal incentives in capital exporting countries."(1) The Council of the O.E.C.D. accepted this suggestion and, at its second meeting on 13th October, 1961, instructed the Fiscal Committee to undertake such a study.(2)

2. A Working Party consisting of the Federal Republic of Germany, Greece and the United States (Rapporteur), was formed by the Fiscal Committee to conduct the study. A questionnaire was circulated in May 1962 to Members of the Fiscal Committee for the purpose of eliciting detailed information on the fiscal policies of the various Governments regarding private foreign investment. The Fiscal Committee devoted a number of meetings to the analysis of the replies to the questionnaire and discussion of the draft reports prepared by its Working Party. A final report was adopted by the Fiscal Committee at its meeting of 22nd - 25th September, 1964. The Report thus represents a considerable effort by both the Working Party and the full Committee, stretching over a period of three years.

II. Nature of the Report

3. The Report is concerned with income tax incentives and does not deal with other types of taxes and duties, although it is recognised that they may also influence the flow of investment. Four principal methods of tax treatment of foreign income are considered: exemption, tax credit, deduction, and special rate. An examination of the relative merits of these basic methods as tax incentives for investment in developing countries, together with those of other positive incentive measures such as investment allowances and credits, constitutes the heart of the Report. In addition, there is extensive discussion of the inter-relationship of tax systems in capital exporting countries and developing countries and of the role of

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(1) D.A.G. Fifth Meeting: Statement to the Twenty Governments and the Commission of the European Economic Community.

(2) The Council also accepted a suggestion that a Japanese expert be included in the discussions on this particular problem; consequently there was full Japanese participation in the preparation of the Report.

tax treaties in promoting investment. The Summary and Conclusions of the Report, set forth in paragraphs 188 - 197, are of a general nature, showing the merits and demerits of alternative approaches to the tax treatment of income from private foreign investment in the developing countries, but not making specific recommendations for unilateral or multilateral policy decisions by donor or recipient countries.

4. The Report contains an Annex presenting a comparative analysis of the tax treatment by Member Governments of the income derived from foreign sources. It covers both personal and corporate income in a wide variety of forms as well as official attitudes toward tax incentives and measures in force for the avoidance of double taxation. In addition, there is a section based on the replies to a special group of questions directed to developing O.E.C.D. countries. The Annex is enhanced by a tabular appendix comparing the major effects of existing Member tax policies on profits left and taxes paid by form of organisation.

III. Possible Action by the D.A.C.

5. The Fiscal Committee's Report will be submitted to the Council as the Committee's instructions to undertake the study originated with the Council. The Committee has indicated that it would have no objections to the publication of the Report. Before going to the Council, however, the Report is submitted to the D.A.C. for examination, because the Council's action stemmed from a request initiated in the first instance by the Development Assistance Group. The D.A.C. should consider whether or not it wishes to recommend to the Council that the Report be published. Action on the Report is all the more timely and relevant since the Final Act of the UNCTAD (Annex A.IV.12) and the fourth report of the U.N. ECOSOC on the flow of capital to less-developed areas (E/3905) both refer to fiscal incentives as one of the many types of measures which could be employed to stimulate the international flow of long-term private capital.

6. The D.A.C. should also consider the possibility of placing this subject and the Report on the agenda of the High-level Meeting to be held 22nd - 23rd July, 1965. A resolution might be considered at that time which might restate in general terms the potential contributions which can be made to economic development by private foreign investment and specifically point out the relevance of appropriate fiscal policies in stimulating private capital flows.

7. In the body of the resolution, it would not be appropriate to recommend specific steps to be taken by Member Governments, but the resolution might endorse certain general objectives as does the Report. Thus, the D.A.C. might recommend to Member Governments that, based on the conclusions

of the Report, action should be taken along the following lines:

(a) Elimination of fiscal deterrents to investment in developing countries:

(i) by extending as far as possible to investment made in developing countries the same tax benefits as may be given for investment at home in the form of accelerated depreciation, initial allowances, investment allowances or investment credits and to allow eventual losses from investment made in developing countries to be deducted from income from domestic sources;

(ii) by giving adequate recognition, in their tax treatment of foreigh income arising in developing countries, to taxes paid in such countries;

(b) Consideration of the adoption of "positive" tax incentives appropriate to their circumstances which would make investment in developing countries more attractive than domestic investment or investment in other industrialised countries;

(c) Consideration of what adjustments, if any, may be appropriate in their tax systems in order not to frustrate the tax incentives granted by developing countries;

(d) Pursuit of their efforts to conclude bilateral Conventions for the avoidance of double taxation with developing countries with a view to facilitating private investment in these countries.

8. The resolution might also suggest that the efforts by the D.A.C. Members can be frustrated by off-setting tax policies in less-developed countries and that they should be encouraged through both multilateral and bilateral contacts to give weight in their fiscal operations to the encouragemeht of private foreign investment.

Mr. Irving S. Friedman April 29, 1965

Werner Schick

Comments on "Un Plan en vue de l'accroissement des Investissements dans les Pays en voie de developpement"

See memo of June 1/65 from Leon to de Vries

1. The rationale of the proposal

a) Public international aid is inadequate to close the gap in the standards of living between the developing and the industrial nations. Being subject to congressional approval it has little chance to increase substantially.

b) The flow of private capital should and could fill the gap; it has, however, been constant or even decreasing in the last few years.

c) Efforts to stimulate the flow of private capital should, of course, try to minimize the losses of such investments by establishing insurances or courts of arbitration. In addition to that, however, it should try to create a system which takes into consideration both the interests of the industrial as well as of the developing nations, and thus is likely to prevent troubles from being created.

2. The mechanism of the proposal

"Foreign enterprises in developing countries wishing to transfer wholly or partly their profits to the shareholders abroad deposit the respective amount in local currency with a domestic development bank (existing or to be created). Against this deposit the development bank will ask the central bank for the equivalent amount in foreign currency and will use it to subscribe to new bonds of an international financial institution of the character and standing of the IBRD, denominated in convertible currency. These bonds will be given to the enterprises as the countervalue of the deposits in local currency for distribution to their shareholders as dividends. The subscribing of bonds of the international institution by the development bank is subject to the arrangement of a loan of foreign exchange in the same amount by the international institution to the development bank, for financing investment projects agreed with the international institution."

In other words, the proposal tries to separate the problem of dividend repatriation from the problem of foreign exchange shortage by promoting a distribution of a kind of stock dividend in the form of marketable obligations of a respected international organization willing to relend the funds to the same country.

3. The advantages of the proposal

a) Increased possibility of paying dividends is likely to stimulate private investment.

b) Since dividend payments impose less immediate strain on the balance of payments situation, they offer less justification for nationalization.

c) The dividends paid by foreign companies in underdeveloped countries are an additional source of finance for the international organization.

d) The proposal in no way contravenes existing efforts, but has merely a supplementary character.

e) The proposal is of pressing importance because at the present time, dividend transfers tend to nullify the inflow of private capital.

f) The proposal seems to me realizable in the existing legal framework.

g) The proposal allows a pragmatic approach in a few countries where the necessary framework exists.

4. Comments

The proposal says that the IBRD could be or create the proposed "international financial organization". Because at the moment there is no other international institution whose obligation could be acceptable for private investors in replacing dividend payments, and because the whole plan depends on its acceptability to such an institution, I will concentrate my comment on the plan's probable effects on the IBRD.

a) The new financial source for the Bank is not absolutely of the same quality as the conventional ones. The costs of the funds are the same, i.e. "market interest" but the use is restricted to investment in a particular country.

b) As the shareholders come from various countries with different interest rates it might be difficult to have a uniform "market interest rate," of the "dividend-bonds" whereas it is not clear to me how bonds distributed to shareholders with equal rights could have different interest rates, i.e. be of different quality.

c) Many shareholders might want to sell the bonds received as dividends and could thus bring World Bank bonds under pressure and affect the rating of the IBRD.

d) It is unlikely that the proceeds of the "dividend-bonds" after maturity will be reinvested in World Bank bonds. Thus the refinancing of these bonds could become very difficult, especially if the plan reaches an extent sufficient to contribute substantially to the problems of the less developed countries.

e) As this new source of finance is only obtainable at market interest rates, the corresponding loans cannot be of a soft term character, so that the debt burden of many countries already often excessive, is likely to increase substantially.

5. Summary

The proposal would apply to countries where dividend payments are stopped or difficult. It consists essentially in borrowing from the World Bank (without abandoning the project procedure) to pay the dividends. The dividends will be in the form of marketable IBRD bonds. It is hoped that this proposal would encourage new capital inflows. While one can think of many objections in theory, it might be most useful to examine the proposal applied to a specific case.

WSchick:cc

Invest. Promotion + Protection

April 20, 1965

Dear Johnnie:

We are beginning to do some work on foreign private investment in the developing countries starting with the foreign investments of the United States, the United Kingdom and France.

In our reconnaissance on data and information regarding foreign private investments of France we have met difficulties. In the relatively few French publications on the subject which are available here, there is often no distinction between private and public investment abroad. We would like to get information on French private investments in the developing countries; these would be mostly in the French franc zone. The information we are initially interested in is direct investments, portfolio investments and their earnings.

As we are just beginning this work, we have not yet established the right contacts and it may be that the Institut National de la Statistique et des Études Économiques has made or is making studies on this subject. It would be appreciated if you could have this quickly checked and let us know if there is anything or anyone with whom we could get into direct contact.

Very truly yours,

Andrew M. Kamarck

Mr. John D. Miller, Director
European Office
International Bank for Reconstruction
and Development
4 Avenue d'Iena
Paris 16e, France

amz

April 20, 1965

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Very truly yours,

Andrew M. Kamarck

Mr. John D. Miller, Director
European Office
International Bank for Reconstruction
and Development
66 Avenue d'Iena
Paris 16e, France

1965 APR 21 PM 1:08

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COMMUNICATIONS

Mr. George D. Woods

April 5, 1965

A.M. Kamarck (through Mr. I.S. Friedman)

Comment on IFC Paper "Tariffs and Other Industrial Protection in Relation to Investment Policy"

At a recent Senior Staff Meeting you asked me to send you any brief comments I might have on the June 1959 IFC Memorandum to the Executive Directors on "Tariffs and Other Industrial Protection in Relation to Investment Policy".

I agree with the policy conclusion of the paper that IFC should consider the degree of protection merely as one of the factors that determine its decision to invest in an enterprise. Consequently, only if an enterprise is getting an unduly large amount of protection compared to other enterprises, or if it is getting protection through some arbitrary procedure which completely bars any foreign competition, should this be regarded by IFC as a signal to check whether the efficiency of the enterprise is too low or whether it is unsuited for the country in question.

As far as the discussion in the paper about the level of protection given to the particular industry in industrialized countries is concerned, such data, I feel, are an inadequate guide as to what is acceptable protection for a developing country. The conditions in a developing and in an industrialized country are usually so widely different the policy of an industrialized country is not very applicable to the other country. Such information may, however, be useful as propaganda, or as a negotiating point if an industrialized country complains about the level of protection IFC accepts in the developing countries.

cc: Mr. Rosen

AMK/vhw

FORM NO. 59
(2-55)

CROSS REFERENCE SHEET

COMMUNICATION: Memo

DATED: Dec. 10, 1964

TO: Mr. Lars Lind

FROM: Gregory Votaw

FILED UNDER: INDIA - General

SUMMARY:

Re: Meeting with Mr. John Habberton of Business Council for International Understanding regarding their discussions with the Indian Government concerning the climate for foreign investors.

Investment - Promotion & Protection

64?

September 1, 1963

Mr. Charles W. Stewart
President, Machinery & Allied Products
Institute
1200 18th Street, N.W.
Washington, 36 D.C.

Dear Mr. Stewart:

Mr. Beevor, who has just left for Tokyo asked me to thank you for your letter of August 21, and for the personal copy of the new MAPI book Financing U.S. Exports and Overseas Investment.

He has read the book with great interest and finds it a most useful publication.

Yours very truly,

GS

Secretary

"Investments - Promotion & Protection

MACHINERY and ALLIED PRODUCTS INSTITUTE

1200 EIGHTEENTH STREET, N.W. WASHINGTON 36, D.C. FEderal 8-3430

August 26, 1964

Mr. J. G. Beevor
Vice President
International Finance Corporation
1818 H Street, N. W.
Washington, D. C.

Dear Mr. Beevor:

As you know, we delivered to your office your personal copy of the new MAPI book Financing U. S. Exports and Overseas Investment. We hope that this publication will be a constructive contribution in the field of international trade.

Cordially,

Charles Stewart
President

CWS:s

Please ff

Dear Mr. Stewart

Mr Beevor, who has just left for Tokyo, asked me to thank you for your letter of August 21st and for the personal copy of ~~[illegible]~~, He has ~~[illegible]~~ read the book with great interest and finds it a most useful ~~[illegible]~~ publication.

Yours very truly,

Secretary

Sept. 1

orig. filed — Ind — Bus. Council for Int. Understanding

x Ref. Investment - Promotion + Protection

y Pvt. + Foreign Investment

Mr. George C. Wishart August 13, 1964

Peter Wright

India - U.S. Business Conference

As Mr. Reid has told Mr. Woods, Mr. Charles S. Dennison, Vice-President for Overseas Development, International Minerals and Chemicals Corp., called on us on August 10 to talk about the follow-up to the conference organized in Delhi last April by the Business Council for International Understanding to explore the possibilities of increasing U.S. private investment in India. Mr. Dennison, along with four other members of the BCIU delegation to India, will be returning to Delhi around August 14 to follow up the conclusions reached at the April conference and to discuss with the Finance Minister and senior officials of the Indian Government ways in which U.S. business might be able to help the Indians to meet the conditions required to attract greater investor interest. The three main areas of economic organization on which Mr. Dennison and his colleagues will concentrate are: (a) taxation and the return on investment; (b) distribution and marketing of products in India; and (c) the whole process of approving and programming private industrial projects.

We told Mr. Dennison when Mr. Woods would be in Delhi, and Mr. Dennison said that he hoped he might be able to meet briefly with Mr. Woods while he was there.

If he has not already seen it, I think Mr. Woods would be interested in the Confidential Report made to the Board of Directors of the BCIU by the participants in the April conference. This has been given to us by the BCIU on the understanding that we do not tell the Indians we have it. A copy of this report has been passed on to the Indian Finance Minister on a personal basis by Chester Bowles, but the report has not been generally circulated around the Indian Government.

cc: Mr. M. Rosen —
Mr. E. Reid

EPW
PWright:be

Record Removal Notice

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File Title	Barcode No.
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Document Date	Document Type	
August 3, 1964	Memorandum	

Correspondents / Participants
To: Mr. Fernando Illanes
From: Richard H. Demuth

Subject / Title
Foreign Private Investment

Exception(s)

Additional Comments
Declassification review of this record may be initiated upon request.

The item(s) identified above has/have been removed in accordance with The World Bank Policy on Access to Information or other disclosure policies of the World Bank Group.

Withdrawn by	Date
Kim Brenner-Delp	August 17, 2023

Investment - Protection & Promotion

July 10, 1964

Mr. Albert J. Esgain
Chairman
International Law Committee
The Federal Bar Association
1815 H. Street, N.W.
Washington, D.C. 20006

/ Legal Files

Dear Sir,

Mr. Woods has requested me to reply to your letter of June 29, 1964, with which you enclosed a resolution relating to protection of private foreign investment adopted by the National Council.

Since the resolution is in part at least addressed to the Government of the United States, I consider that it would be inappropriate for the International Bank for Reconstruction and Development, as an international institution, to offer comments. I have no hesitation, on the other hand, in saying that we in the Bank attach the greatest importance to the promotion of private foreign investment, and that we are very much interested in all steps which can be taken to that end.

The resolution mentions the staff report on Multilateral Investment Insurance, published by the Bank in March 1962. More recently the Bank has been active in a related field, namely, that of the settlement of investment disputes between States and foreign investors. Our ideas on this subject have been given the form of a preliminary draft of a Convention which has been discussed during the past six months at a series of regional consultative meetings convened by the Bank and attended by legal experts designated by member countries of the Bank. This document, which for the time being has not been released for publication, is presently under further consideration by the Bank's Executive Directors.

Sincerely yours,

A. Broches
General Counsel

ABroches:lj

Original letter from Mr. Esgain in Legal Files

Mr. Martin M. Rosen January 15, 1964

Dragoslav Avramovic

Paper on Protection

1. The first draft of the interim paper on protection was prepared by Mr. David Holland, who joined the Economic Staff three months ago. Mr. Walstedt produced the tariff statistics; he also suggested the correlation between the height of tariffs and per capita income. I am ultimately responsible for the paper, since I had something to do with the framework of analysis and exposition, with the operational conclusions and with the outline of further work that is needed.

2. Continuing our conversation the other day, you may be interested in the following:

(a) The paper was prepared in response to an urgent request for an examination of the immediate operational issue of the preference to be given to local suppliers in procurement for Bank-financed projects. On the one hand, it has been proposed that a 15% margin of preference be applied across the board; on the other hand, it has been proposed that the preference given by the existing tariff structures should be accepted in toto. Practice has varied from case to case, and it was felt that a study of this question was badly needed. Mr. Woods promised the Board that the issue will be considered by the Economic Department, but indicated that, given our present work-load, not much should be expected in the next two months or so. Nonetheless, it was thought that some interim operational rule was needed, and I was asked to produce a memorandum suggesting such an interim solution.

(b) The paper suggests a compromise of the two opposing viewpoints, and it suffers from the disadvantages which any compromise inevitably entails. But I don't think that, given the present dearth of knowledge, we could have done much else. What we are suggesting is that the preference given by the existing tariffs should be accepted without question so long as the tariff does not exceed, say, 33%; the latter number being chosen by flipping the coin, after considering that Austria, Italy, etc., operate with protection for capital goods of 25% or more. For tariffs exceeding 33%, the borrowing country is asked to supply evidence that there are good economic reasons for such "high" protection.

(c) The paper clearly states that the proposed solution applies to the procurement issue only. The implication is that, as a rule, the beneficiaries would be plants that are already in production, so that no new misallocation of resources due to "high" protection would be involved. On the contrary, procurement orders could in these cases help make the best of a bad job if misallocation did

indeed occur in the past: procurement orders would raise the rate of capacity utilization and thus reduce unit costs, help improve the cash-flow position of the industry concerned and consequently minimize the adverse consequences of the initial error of setting up the plant at all. The proposed 33% guide-line does not apply to decisions about lending for the establishment of new enterprises. The latter is, in my view, the crucial issue for Bank/IFC policy; and on this, we will have to muddle through until the homework is done.

(d) The matter which concerns us in the Economic Department more than anything else is whether one can work out a method for determining the "optimum" level and structure of protection. We already know a fair amount about the comparative advantages developing countries have in producing primary products for export, in view of the work on commodities which we have done over many years. We still have to come to grips with what comparative advantages developing countries have in the production of "light" manufactures for export, given the restrictions applied to such products in international trade. Only after this issue is handled satisfactorily, can we properly handle the problem of import substitution-cum-protection. Because, in my view, one has to start from a general proposition that national income benefits will be maximized if one produces for a large market (international trade) rather than for a small market (national economy). Import substitution is analytically the second-best solution, however much in practice it may be the only solution. The general rule ought to be the principle of "minimum" protection, even though in practice this may mean 100% protection. But as long as we are reasonably certain that we could not raise real income any cheaper way, there is nothing wrong with a 100% protection. In the final analysis, people are better off by being employed at a very low wage than by remaining unemployed. The secret is to find out what wage is the least low. If we can make substantial progress in this general field, we shall be in a position to come up with soundly-based proposals on the protection appropriate for the establishment of new enterprises.

(e) The Economic Department is also concerned that the approach to protection problems should be a broad one. Clearly we cannot confine our attention merely to tariffs. The whole range of protective devices: subsidies, quantitative restrictions, multiple exchange-rates, and so on, must be brought into the picture.

3. Since we are only at the beginning of serious work on protection - to which both IBRD and IFC seem to attach top priority - and since we are still trying to find the best approach to this work and to decide what should be the vital questions to be asked and answered, I should greatly appreciate your personal views on the subject. Furthermore, since we in the Bank intend to work most closely with IFC in finding the answer to the question of "optimum protection", I should be grateful for your suggestions as to how such cooperation could best be organized. We are particularly

interested in learning from your experience and from the experience of the development finance companies and about your current thinking in this field. Perhaps you may wish to appoint a liaison officer for this work; or perhaps our people could move up to your offices for some time to go over the material and talk to people you suggest; or perhaps you may wish to have a member of your staff join Messrs. Holland and Walstedt in our offices. Economic science has so far only highlighted the problems raised by the search for "optimum protection"; it has failed to solve it despite thousands of books on the subject. If the problem can be solved at all, IBRD-IFC have a unique opportunity of doing so. The World Bank Group contains a concentration of people of unrivaled experience in decision-making in this field, and your and TOD files an unequaled wealth of relevant material on costs and profits in the developing countries.

4. Whatever help you may find it possible to extend us will be accepted with deep gratitude.

cc: Messrs. Knapp
Wilson
Cope
Wishart
Stevenson
Alter
Holland
Walstedt
Members of the Economic Department

F. R. MILLIKEN

6/6/63

Refer to:— Mr. George Woods

6/18

For your information.

Hold for Mr. Woods on his return.

Copy already sent him to N.Y. and copy sent down to O. Schmidt.

JWM
7 JUNE.

Inv - Prm & Pat.

KENNECOTT COPPER CORPORATION
161 EAST 42ND STREET
NEW YORK 17, N. Y.

FRANK R. MILLIKEN
PRESIDENT

June 6, 1963.

The Honorable Douglas Dillon
Secretary of the Treasury
Washington 25, D. C.

Re: Tax Credit for Foreign Investments in Underdeveloped Countries.

Dear Mr. Dillon:

We are advised that recent conferences between representatives of the mining industry and the government agencies concerned with the proposed tax credit for foreign investments disclosed that the draft bill being considered excludes the extractive industries from credit eligibility.

The reasons assigned for excluding the extractive industries are that (1) in all probability they would make the investments without the credit, and (2) the allowance of the credit would result in a substantial loss of tax revenue. It further appears that the exclusion concept originated with the Treasury Department because of the impact of the credit on the taxes paid by the petroleum industry.

It is our understanding that the underlying philosophy behind the credit is that it will provide an incentive for the development of the economies of the subject countries by private capital, which should lessen the U. S. Government aid received by them, and reduce the amount of U. S. taxes levied for foreign aid purposes.

Braden Copper Company, our domestic subsidiary conducting mining operations in Chile, is subjected to such high tax rates today by the Chilean Government that there is substantially no incentive left for us to invest there. We are discussing with the Chilean Government measures which would reduce our taxes from the present 83% to about 67%. Even if this is accomplished, it is certainly apparent that with all the hazards there are in copper mining in underdeveloped countries the application of investment credit legislation to Braden would be helpful in bringing about additional investments

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in Chile by the company.

There are many facets to this problem which cannot be covered adequately by letter, and I would like the opportunity to discuss them with you in person. I would be most appreciative if such a conference could be arranged whenever and wherever convenient for you. I will be on a trip west the week of June 10th, but will return to New York the following week.

Very truly yours,

Milliken

Mr. Woods. This came in this afternoon with a BUCK SLIP. I am passing a copy to Dennis Schmidt- but do not to MOSCOSO unless you wish me to. JWW 7 JUNE.

6/10

KENNECOTT COPPER CORPORATION
161 EAST 42ND STREET
NEW YORK 17, N. Y.

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PRESIDENT

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Very truly yours,

INTERNATIONAL BANK FOR
RECONSTRUCTION AND DEVELOPMENT

OFFICE OF THE PRESIDENT

June 5, 1963

Mr. Moscoso:

At Mr. Woods' request, I am enclosing a copy of a letter, with attachment, sent by Mr. Frank Milliken, President of Kennecott Copper Corporation, to Mr. Ralph Dungan, Assistant to the President.

Mr. Woods asked me to say he was sending this to you further to a recent conversation.

G.C. Wishart
Personal Assistant to Mr. Woods

Milliken

June 4, 1963

Dear Frank:

Thank you very much for your courtesy in sending me a copy of the letter to Ralph Dungan.

I am certainly interested in what you discussed with Ralph and hope he is able to help.

Best wishes,

Sincerely,

/s/ George

George D. Woods

Mr. Frank R. Milliken
President
Kennecott Copper Corporation
161 East 42nd Street
New York 17, N.Y.

GCWishart:cml

14 U. of Toronto L. J. 77 (1961)

AN INTERNATIONAL CODE TO PROTECT PRIVATE INVESTMENT—PROPOSALS AND PERSPECTIVES*

A. A. FATOUROS**

THERE is general agreement among capital-exporting and capital-importing countries as to the need for international investment in the economically underdeveloped areas.[1] Increasing amounts of public and private capital are today directed toward these areas,[2] but the existing needs are still far from being satisfied. The availability of public capital, in the form of loans or grants, depends chiefly on considerations of a political character.[3] The provision of private capital, on the other hand, depends on a different set of conditions and considerations. Recent events in a number of countries have brought into focus one particular aspect of the problem, relating to the lack of security for private investments in underdeveloped countries.

Foreign enterprises operating in underdeveloped countries are today subject to a high degree of government control, direct or indirect.[4] The entry

*This article is based on material included in a doctoral dissertation submitted to the School of Law of Columbia University. The author wishes to express his gratitude to Professor Wolfgang Friedmann, Director of International Legal Research, Columbia University, and Mr. Richard C. Pugh, of the New York Bar, for their invaluable help and advice.

**Lecturer in Law, University of Western Ontario.

[1]Economic development being a relative concept, it is difficult to define it in absolute terms. For our present purposes, it is enough to consider as underdeveloped those areas which have a low annual per capita national income; they contain more than two-thirds of the world's population. For some discussion on the criteria of economic development, see N. S. Buchanan and H. S. Ellis, *Approaches to Economic Development* (New York, 1955), pp. 3–22; H. Leibenstein, *Economic Backwardness and Economic Growth* (New York, 1957), pp. 7–14; B. H. Higgins, *Economic Development* (New York, 1959), pp. 3–24.

[2]Cf. United Nations, Department of Economic and Social Affairs, *The International Flow of Private Capital 1956–1958* (New York, 1959), and United Nations, Document E/3369 (March 13, 1960). In addition to the amount of investment, its form and its distribution among industries should also be taken into account. Private foreign investment in underdeveloped countries is today chiefly direct in form (that is, involving a high degree of control by the investor over the enterprise established in the capital-importing country) and heavily concentrated in extractive and other primary producing industries.

[3]Though economic and even moral considerations have to be taken into account in any serious study of the topic; cf., for example, G. Myrdal, *An International Economy* (New York, 1956), pp. 158 *et seq.* See also J. Viner, "Problems of Economic Policy: America's Aims and the Progress of Underdeveloped Countries" in B. F. Hoselitz (ed.), *The Progress of Underdeveloped Areas* (Chicago, 1952), p. 175; H. Stassen, "The Case for Private Investment Abroad" (1954), 32 *Foreign Affairs* 402; G. Myrdal, *Beyond the Welfare State* (New Haven, 1960), pp. 263 *et seq.*

[4]Of course, this is true of most developed countries as well, but it is with the underdeveloped that we are dealing here. For some descriptions, see C. Lewis, *The United States and Foreign Investment Problems* (Washington, D.C., 1948), pp. 141–67; M. Brandon, "Legal Deterrents and Incentives to Private Foreign Investments" (1957), 43 *Grotius Society Transactions* 39; M. Brandon, "Legal Aspects of Private Foreign Investments" (1958), 18 *Federal Bar Journal* 298. And cf. United States Department of Commerce, *Factors Limiting U.S. Investment Abroad*, Part 1 (1953) and Part 2 (1954); [Canadian] Advisory Committee on Overseas Investment, *Report* (1951).

of foreign capital often depends upon the approval of the government of the country of investment and the business activities of aliens or of foreign-owned corporations are in many cases severely limited. The existence of exchange controls makes the repatriation of the foreign investor's capital or earnings difficult or, sometimes, impossible. And the possibility of expropriation, of the taking over of the whole enterprise by the government of the host country, with inadequate or no compensation, is always present. The businessmen of the capital-exporting countries are therefore reluctant to invest in the underdeveloped areas, unless the expected profits are high enough to compensate them for the risks they are taking.[5] The chief underlying cause of the insecurity of private investment is the general political and economic instability which prevails in most underdeveloped countries and is one of the causes as well as one of the effects of their underdevelopment. No over-all solution, therefore, is possible, in the sole context of international investment. There is, however, room for partial improvement in the underdeveloped countries' "investment climate"[6] and there exist several types of measures which the governments of capital-exporting and capital-importing countries may take in order to achieve such improvement.[7]

Capital-importing countries may pass special legislation granting a minimum of legal protection and offering certain inducements to foreign investors.[8] Capital-exporting states may offer to their nationals who invest abroad insurance against some of the non-business risks which they encounter in foreign countries.[9] It is also possible for capital-exporting states to conclude bilateral treaties with capital-importing ones, providing for the

[5]Investment in the petroleum industry is a case in point. Such investment has consistently accounted for about 50 per cent of the average annual increase in United States direct foreign investment; cf. United Nations, Department of Economic Affairs, *The International Flow of Private Capital 1946–1952* (New York, 1954), pp. 12, 33; United Nations, Department of Economic and Social Affairs, *The International Flow of Private Capital 1956–1958, supra* fn. 2, p. 27. The annual earnings of petroleum investment were high; in 1951, they were over 24 per cent of book value, compared to 16 per cent in the case of investment in manufacturing; cf. S. H. Axilrod, "Yield on U.S. Foreign Investment, 1920–1953" (1956), 38 *Review of Economics and Statistics* 331, 333.

[6]This term is generally used to refer to the combination of political, social, and cultural conditions affecting foreign investment in any particular country, to the exclusion, as a rule, of purely economic considerations; cf. M. Brandon, "Legal Deterrents and Incentives to Private Foreign Investments" (1957), 43 *Grotius Society Transactions* 39, 41, and *passim*; A. A. Fatouros, "Legal Security for International Investment" in W. G. Friedmann and R. C. Pugh (eds.), *Legal Aspects of Foreign Investment* (Boston, 1959), p. 699.

[7]For a general survey of such measures, see Fatouros, *supra* fn. 6.

[8]Cf. N. M. Baade, *Gesetzgebung zur Förderung ausländischer Kapitalanlagen* (Frankfurt, 1957); N. M. Littell, "Encouragement and Obstruction to Private Investment in Foreign Investment Laws" (1958), 52 *American Society of International Law Proceedings* 209. For a list of recent measures, see United Nations, Document E/3369 (May 13, 1960), Appendix.

[9]Investment guarantee programmes are now in effect in the United States, the Federal Republic of Germany, and Japan. See United Nations, Document E/3325 (Feb. 26, 1960), pars. 179–86 and, on the American programme, see M. von Neumann Whitman, *The United States Investment Guaranty Program and Private Foreign Investment* (Princeton, 1959).

protection of foreign investors.[10] Finally, a single multilateral convention might be concluded between capital-importing and capital-exporting countries which would assure full protection to the investments made by or in any of its members.

Of the four methods just listed, the first three are today in use by a considerable number of countries; the fourth is still in the proposal stage, despite certain early attempts and the support of influential business circles. The present article is an attempt to review and discuss the several related proposals and to examine their probable effectiveness as well as the chances for their realization.

I

The idea of a multilateral instrument calculated to provide protection to foreign investors is relatively recent.[11] A few uncertain and generally fruitless attempts in this direction were first made during the interwar period by some League of Nations agencies.[12] Immediately after the Second World War, increased consciousness of international economic problems along with a widespread optimistic trend in favour of international organization led to the formation of a movement for the general adoption of such a code. This movement found support among scholars[13] as well as businessmen[14] and was favourably discussed by governments and international agencies, but without any concrete result. After some years of comparative neglect, the idea was recently revived with considerable force.

The chief official attempt at a general multilateral treaty embodying some sort of code for foreign investment was the Charter of the International Trade Organization (I.T.O.),[15] signed at Havana, Cuba, on March 24,

[10]The main treaty programme of this type is that of the United States, on which see R. R. Wilson, *United States Commercial Treaties and International Law* (New Orleans, 1960). The United Kingdom and West Germany have also concluded recently a few similar treaties. Cf. United Nations, Document A/AC.97/5 (Dec. 15, 1959), chap. II, pars. 1–48.

[11]Gustav Lippert's attempt to provide a code of International Financial Law is partly related in scope but differs widely in its motives and objectives; cf. G. Lippert, *Rechtsbuch des internationalen Finanzrechtes* (Graz, 1935).

[12]See, for example, The Draft Convention on the Treatment of Foreigners (1929), League of Nations, Document C. 174. M. 53. 1928. II. 14, on which see J. W. Cutler, "The Treatment of Foreigners in Relation to the Draft Convention and Conference of 1929" (1933), 27 *American Journal of International Law* 224. See also League of Nations, *Report of the Committee for the Study of International Loan Contracts* (Geneva, 1939); League of Nations, Special Joint Committee on Private Foreign Investment, *Conditions of Private Foreign Investment* (Princeton, 1946).

[13]Cf. J. Viner, "Conflicts of Principle in Drafting a Trade Charter" (1947), 25 *Foreign Affairs* 612, 627; P. W. Bidwell and W. Diebold Jr., "The United States and the International Trade Organization" (1949), *International Conciliation*, no. 449, pp. 184, 212.

[14]Cf., for example, International Chamber of Commerce, *Fair Treatment for Foreign Investments: International Code* (I.C.C. Brochure no. 129, 1949); National Foreign Trade Council, *Position of the National Trade Council with Respect to the Havana Charter for an International Trade Organization* (1950), pp. 53–4.

[15]Cf. United Nations Conference on Trade and Employment, *Final Act and Related Documents* (1948), hereinafter cited as *Havana Charter*.

1948, which never became effective. The Charter dealt in part with economic development and, toward that end, laid down certain general rules regarding the treatment and position of foreign investment in the signatory states.[16] The relevant provisions had been included in the Charter at the insistence of influential American business groups, but in their final formulation they bore the imprint of the underdeveloped countries' viewpoint.

The Charter recognized the value of international investment, private as well as public, and the need for allowing opportunities for private investments and for assuring their security.[17] Capital-importing countries undertook in the Charter to avoid "unreasonable or unjustifiable action" injurious to the foreign investors' interests,[18] to "provide reasonable security for existing and future investments,[19] to "give due regard to the desirability of avoiding discrimination as between foreign investments,"[20] and to enter into consultation or negotiations with other governments with the object of concluding bilateral or multilateral agreements relating to such matters.[21] On the other hand, the Charter expressly recognized the right of capital-receiving countries to interfere with foreign investments through screening, restrictions on the ownership of enterprises, and any "other reasonable requirements."[22]

The Charter's provisions on international investment were inadequate. Every positive statement was closely circumscribed by qualifications and exceptions whose extent could not be determined with any precision. The determination of the rights and obligations of the parties depended in major part on the interpretation of such indefinite terms as "reasonable," "appropriate," or "unjustified." The right of capital-importing states to interfere with private foreign investments was stated much more clearly than their corresponding obligations of fair treatment.[23] These provisions of the Charter came under strong attack on the part of American business circles and this was largely responsible for the Charter's ultimate non-ratification by the United States and the other signatory states.[24] The Organization of Trade Co-operation which was set up later to replace the I.T.O. has a much more

[16] *Ibid.*, c. II, especially art. 12 on "International Investment for Economic Development and Reconstruction." From among the numerous accounts and commentaries, see C. Wilcox, *A Charter for World Trade* (New York, 1949), pp. 145–8; Bidwell and Diebold, *supra* note 13, pp. 208–12; G. Bronz, "The International Trade Organization Charter" (1949), 62 *Harvard Law Review* 1089, 1110–12; J. E. S. Fawcett, "The Havana Charter" (1951), 5 *Yearbook of World Affairs* 269, 272–3; R. N. Gardner, *Sterling Dollar Diplomacy* (Oxford, 1956), pp. 365–6.

[17] *Havana Charter*, art. 12(1)(a) and (b).

[18] *Ibid.*, art. 11(1)(b).

[19] *Ibid.*, art. 12(2)(a)(i).

[20] *Ibid.*, art. 12(2)(a)(ii).

[21] *Ibid.*, art. 12(2)(b).

[22] *Ibid.*, art. 12(1)(c).

[23] Cf. Gardner, *op. cit.*, at p. 366; Bidwell and Diebold, *supra* fn. 13, at p. 211.

[24] See, in particular: National Foreign Trade Council, *op. cit. supra* fn. 14, at pp. 5–6, 53–60; National Association of Manufacturers, *The Havana Charter for an International Trade Organization* (1949), pp. 3, 10–11; Committee for Economic Development, *The International Trade Organization and the Reconstruction of World Trade* (1949), pp. 30–2, 37–8. See also the excellent account of business opposition to the International Trade Organization in W. Diebold Jr., *The End of the ITO* (Princeton, 1952), pp. 11–24.

limited jurisdiction and function. In the agreement instituting it,[25] there are no provisions relating to economic development, international investment, and like matters.[26]

Another multilateral international instrument dealing in part with the protection of private international investment is the Economic Agreement of Bogota, signed at the Ninth International Conference of American States, on May 2, 1948.[27] The relevant provisions, which constitute chapter IV of the Agreement (articles 22–7), are rather similar to those in the I.T.O. Charter, though more elaborate and positive. The importance of foreign investment is again emphasized and a general guarantee of "equitable treatment," especially non-discrimination, is given.[28] The desirability of employing foreign skilled personnel is recognized, the signatory states undertaking not to hinder unduly such employment.[29] They also undertake to lighten the tax burden when excessive,[30] and to "impose no unjustifiable restrictions" on the transfer of earnings and capital outside the capital-receiving state.[31] Expropriation of property, when effected in accordance with local legislation and when non-discriminatory, is authorized; it is unequivocally stated, however, that "any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner."[32] These provisions lose much of their importance through the constant use of indefinite terms such as "appropriate," "unjustifiable," "just," or "equitable." Furthermore, several states attached at the time of signature express reservations on the scope and effects of the relevant articles, especially the article dealing with expropriation. The Bogota Agreement, like the I.T.O. Charter, has never become legally effective.[33]

Since that time, no other multilateral conventions dealing with the protection of international investment have been concluded. The subject

[25]The text is in (1953) 32 *United States Department of State Bulletin* 579; cf. G. Bronz, "An International Trade Organization: The Second Attempt" (1956), 69 *Harvard Law Review* 440.

[26]The proponents of American participation in O.T.C. have laid particular emphasis on this point; cf. United States Congress, *Hearings before the House Committee on Ways and Means* (1956), 84th Cong., 2nd sess., pp. 7–8, 41 (statement of Secretary of State Dulles), pp. 397, 407–8 (statement of Mr. S. Rubin), p. 791 (statement of Professor R. Blough).

[27]Economic Agreement of Bogota (1948), Pan American Union, *Law and Treaty Series*, no. 25 (hereinafter cited as *Bogota Agreement*).

[28]*Ibid.*, art. 22.

[29]*Ibid.*, art. 23(3).

[30]*Ibid.*, art. 27.

[31]*Ibid.*, art. 22(4).

[32]*Ibid.*, art. 25.

[33]Several years later, the Economic Conference of the Organization of American States approved the Economic Declaration of Buenos Aires, of September 2, 1957, in which it was stated that the governments of American states should take measures to promote international trade and investment and should intensify their efforts "to expand the flow of public capital to the countries of the American continent . . . and to encourage private investment therein"; cf. (1957) 37 *United States Department of State Bulletin* 540, 541. There was no mention of the need for measures for the protection of foreign investment.

An "Act of Bogota" dealing with measures for social improvement and economic development was adopted on September 13, 1960, by a Special Committee of the Council of the Organization of American States; cf. (1960) 43 *United States Department of State Bulletin* 537. Private foreign investment is mentioned in it only once, in connection with the need for long-term loans on flexible terms.

has been brought up within some international bodies, but the related discussions were either inconclusive, or resulted in general recommendations on state policies leading to the improvement of the investment climate in underdeveloped countries.

In 1947, the Economic and Employment Commission of the Economic and Social Council of the United Nations instructed its Sub-Commission on Economic Development "To commence a study . . . with the view to making recommendations regarding the need for an international code relating to foreign investment which will cover among other things the protection of economic and social interests of the countries in which investments are to be made, as well as the protection of investors, both public and private. . . ."[34] The topic was discussed in the Council's next session[35] and it was mentioned occasionally in the meetings of the Commission and Sub-Commission during the next few months.[36] It was altogether dropped after the signature of the I.T.O. Charter.

A few years later, the United Nations General Assembly adopted in its 1954 session a resolution concerning the encouragement of foreign private investment.[37] The Assembly recognized the useful role of private foreign investment in the development of underdeveloped countries and, noting its present shortage, made various recommendations to capital-importing and capital-exporting states. To the former, it recommended, *inter alia*, the avoidance of discrimination and the facilitation of the importation of capital goods and of the transfer abroad of the investors' earnings.[38] It also recommended to both categories of states the conclusion of agreements for the encouragement of private foreign enterprise.[39]

The question was again raised in a speech of the Prime Minister of the Federation of Malaya before the fourteenth session of the Economic Commission for Africa and the Far East.[40] The investment charter he suggested

[34]United Nations, Document E/255 (Feb. 5, 1947), pp. 12–13.

[35]Cf. United Nations, Economic and Social Council, *Official Records* (2nd year, 4th sess., 56th to 59th meetings, March 6–7, 1947), pp. 33–4, 41, 46, 49–50, 54, 55–6.

[36]Cf. the following United Nations documents: E/CN. 1/47 (Dec. 18, 1947), at pp. 9, 20–1; E/CN. 1/61 (July 1, 1948), at p. 20; E/CN. 1/Sub. 3/4 (Nov. 14, 1947), *passim*.

[37]United Nations General Assembly Resolution 824 (IX) (Dec. 11, 1954), *1954 Yearbook of the United Nations* 135.

[38]Note, however, that, around the same time, certain discussions on the principle of self-determination of states resulted in the adoption of resolutions and other texts stressing the absolute character of the "right of peoples freely to use and exploit their natural wealth and resources." Cf. United Nations General Assembly Resolution 626 (VII) (Dec. 21, 1952). That this emphasis was chiefly directed against the "exploitation" by foreign investors is brought out forcefully in J. N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources" (1956), 50 *American Journal of International Law* 854.

[39]Similar resolutions were taken by the Tenth International Conference of American States, 1954 (Resolutions LXX and LXXI) and by the Contracting Parties to the General Agreement of Trade and Tariffs (Resolution of March 4, 1955).

[40]Cf. the United Nations Economic Commission for Asia and the Far East, *Official Records*, 14th sess. (March, 1958), United Nations, Document E/CN. 11/483 (June 3, 1958), p. 29. And see A. Larson, "Recipients' Rights under an International Investment Code" (1960), 9 *Journal of Public Law* 172, 172–3.

would provide for the equitable treatment of foreign investors and for the protection of their legal rights while at the same time assuring the respect for the sovereignty and national interest of the capital-importing country. The matter came before the United Nations General Assembly and its Second Committee in their 1958 session. The resolution finally adopted, however, while stressing the need for improvement of the underdeveloped countries' investment climate, did not refer directly to the possible formulation of an investment code.[41] It only requested the Secretary-General to consult "qualified persons" concerning the fields of activity where foreign private investment "is needed and sought by underdeveloped countries," its appropriate form and volume, and the type of projects in which foreign investors might be interested.

The Secretary-General's report, submitted early in 1960,[42] followed closely the lines laid down by the resolution. It reviewed the fields of investment in underdeveloped countries and the government policies affecting them and then went on to examine the various forms of investment. It dealt in detail with incentive measures taken by capital-importing as well as capital-exporting countries, such as the provision of basic facilities and of development capital and the national and international measures relating to taxation and exchange control. In dealing with measures for the protection of private foreign investment, the report examines briefly the particular forms which they may take. It is in this connection that the question of an international investment code is discussed. A survey of some of the related proposals is followed by a brief commentary which stresses the difficulties and dangers inherent in the attempt to formulate such a code. The report as a whole is highly informative, but it can by no means be considered as promoting the cause of an international investment code.

Of greater importance, though as yet of dubious effectiveness, are the discussions within the Consultative Assembly of the Council of Europe. A 1957 report of a study group, dealing with the problems of the co-operation between European and African states for the latter's economic development, mentioned the possibility of preparing an Investment Statute "defining the rights and duties of investors and borrowers" and providing for certain other matters.[43] The idea was adopted by the Assembly's Economic Committee[44] and by the Consultative Assembly itself, which recommended to the Committee of Ministers the convocation of a conference of European

[41]United Nations General Assembly Resolution 1318 (XIII) (Dec. 12, 1958), *1958 Yearbook of the United Nations* 145.

[42]"The Promotion of the International Flow of Private Capital," Progress Report by the Secretary-General, United Nations, Document E/3325 (Feb. 26, 1960).

[43]Report of the Study Group for the Development of Africa, Consultative Assembly Document 701 (Sept. 26, 1957). For an analysis, see A. Gaitskell, "Europe and the Economic Development of Africa" (1959), 6 *European Yearbook 1958* 29, 44–9.

[44]Draft Recommendation (with Explanatory Memorandum) Submitted by the Economic Committee, Consultative Assembly Document 798 (April 1, 1958).

and African states to deal with these questions.[45] The Committee of Ministers having deferred its action, the Assembly instructed its Economic Committee to present detailed proposals.[46] The resulting report[47] did not contain a draft text but dealt in some detail with the problems and possible content of an investment code. In its subsequent recommendations,[48] the Assembly admits the possibility that an Investment Statute might not be adopted within a short time. Considering the subject as one eminently suitable for joint European-African discussion, it insists on the convocation of a conference[49] and requests the governments of the Council of Europe's member states to prepare drafts for the proposed statute, on the lines set out in the aforementioned report.

According to this report, the proposed Investment Statute should assume the form of an international convention among a "large enough number" of European and African states. It should lay down general rules, leaving detailed provisions to be worked out in the specific contracts between states and private investors. It should provide for the rights and duties of capital-importing states as well as foreign investors. Its preamble would consist chiefly of a basic statement of principles, including an affirmation of the state's extensive rights with respect to the admission and regulation of foreign investment, a statement on the investors' duties toward the host state,[50] and a stipulation on the part of the contracting states to treat foreign investors equitably, protect them from the effects of future state action, and carry out in good faith their obligations under the convention. The Statute in question would apply to future long-term investments, direct as well as portfolio.[51] It would provide for non-discrimination toward foreign investors, for national treatment with respect to taxation and to civil and legal rights, for freedom of transfer of the foreign investors' earnings,[52] and for due process and fair compensation in the case of any expropriation of property. An annexed protocol would provide for compulsory arbitration in case of dispute; not only the contracting states, but also the nationals concerned,

[45]Consultative Assembly Recommendation 159 (1958) on the Development of Africa. The Committee of Ministers, composed of the foreign ministers of the member states, is the Council of Europe's chief executive organ, in effect the only one with the power to decide and act. The Assembly's competence, as indicated by its name, is of a purely advisory character. Cf. A. H. Robertson, *European Institutions* (London, 1959), pp. 61 *et seq.*

[46]Consultative Assembly Order 124 (Oct. 10, 1958).

[47]Report on an Investment Statute and a Guarantee Fund against Political Risks, Consultative Assembly Document 1027 (Sept. 8, 1959).

[48]Consultative Assembly Recommendation 211 (1959) on the Development of Africa.

[49]See also the subsequent Consultative Assembly Recommendation 223 (1960) on the same subject, where the Assembly's point of view is restated in answer to reservations of the Committee of Ministers with respect to the proposed conference.

[50]It would be made clear that foreign investors have the obligation "to respect national laws and customs, abstain from political interference, integrate activities in the domestic economy, collaborate with nationals of the country concerned and co-operate in the technical field." Consultative Assembly Document 1027, *supra* fn. 47, at p. 11.

[51]With respect to past investments, equitable treatment would be provided and, perhaps, freedom of transfer of earnings and fair compensation in case of dispossession. *Ibid.*, pp. 12–13.

[52]*Ibid.*, pp. 17–18.

would be able to take advantage of the arbitration procedure. Special emphasis is placed, throughout the report, on the duty of the capital-importing state not to alter its own system of regulations affecting foreign investments when such investments have been undertaken because of the system's existence.[53] The report's realistic approach is evident in the proposed provisions for compensation (instead of restitution) in cases of infringement of the convention and for *ad hoc* consultation of the contracting states with respect to each eventual case where the imposition of sanctions is deemed necessary.

The Organization for European Economic Co-operation (O.E.E.C.) has also been studying in recent years the problems involved in the proposals for an international investment code. Two draft conventions were submitted to it in 1958, one by the German government and the other by the Swiss government, and they have been under consideration by the Organization's Committee for Invisible Transactions. The two proposals differ in some important respects and they can be said to complement each other. Neither of them, however, deals with the obligations of foreign investors toward the states of investment. The German proposal is the latest reformulation of a privately proposed draft convention, which will be discussed at a later point.[54] The Swiss proposal is a draft international convention concerning guarantees for the investment of foreign capital. It is relatively brief, consisting of seven articles, and it places special emphasis on the elimination of exchange restrictions. It provides for free transfer of all earnings as well as of amortization payments and of the original capital invested. Requirements with respect to expropriation are limited to the payment of adequate compensation, which the investor would be allowed to repatriate freely. Provisions regarding the establishment of an arbitration tribunal, competent to deal with any disputes arising out of the application or interpretation of the convention, are also included.

Rather more important, though still of a doubtful practical significance up to now, are the proposals of influential private groups, representative of the prospective investors' viewpoints. In 1949, the International Chamber of Commerce published a draft International Code of Fair Treatment for Foreign Investors, to be eventually embodied in a multilateral international instrument.[55] The code strongly condemns discrimination against foreign

[53]This duty would be mentioned both in the preamble and in the main body of the convention. In the preamble, the contracting states would undertake "to afford future investments reasonable protection against worsening of the conditions prevailing at the time the investment is made, when those conditions are laid down by the law and administrative or other regulations and when the deteriorating situation is such as to jeopardize the investment," *Ibid.*, p. 11, and see also p. 16.

[54]Cf. *infra*, pp. 86–8.

[55]International Chamber of Commerce, *Fair Treatment for Foreign Investments: International Code* (I.C.C. Brochure 129, 1949), hereinafter cited as *I.C.C. Code.* The code was based on the proposals of the Committee on the Flow of Capital of the United States Associates of the International Chamber of Commerce; cf. its *Report* (1946). For commentaries, see B. A. Wortley, "Examination of Draft of International Chamber of Commerce Code of Fair Treatment of Foreign Investments" (1952).

investors and prohibits all restrictions on the ownership and personnel of private enterprises, allowing an exception only in the case of "enterprises directly concerned with national defense."[56] Foreign investors are to be granted full freedom in the transfer of their profits, capital, and any other related funds outside the capital-importing state[57] and they are to be fully compensated in the event of their property's expropriation.[58] The code also contains provisions on the adjudication of disputes arising over its application before a proposed international court of arbitration.[59] Though first proposed more than ten years ago and repeatedly mentioned by successive I.C.C. congresses since then,[60] the Code of Fair Treatment has received no official support or recognition as yet.

The recent revival of interest in investment codes is due in major part to the activities of a single private group, namely, the German Society to Advance the Protection of Foreign Investments, to whose initiative should be attributed several of the recent drafts and proposals.[61] In December, 1958, a private group of an international character was set up, the International Association for the Promotion and Protection of Private Foreign Investment (A.P.P.I.), composed of a number of well-known European lawyers and representatives of "a considerable number of industrial, banking and other concerns having international relations and interests in the development of foreign trade and investment."[62] This association seems to have supplanted the German Society, on the international scene.

The German Society's first major move was its proposal for the adoption of a "magna charta" of foreign investment, made at the International Industrial Development Conference held in San Francisco in 1957.[63] The proposal had a favourable reception in business circles and received considerable publicity.[64] Although the original text of a draft convention, as proposed in 1957,[65] has been amended on many important points subsequently,

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International Bar Association, *Third International Conference of the Legal Profession* 241; V. Folsom, "The Code of Fair Treatment for Foreign Investors" in American Society of International Law, *1958 Investment Law Conference* (mimeo.).

[56]*I.C.C. Code*, arts 3–7. [57]*Ibid.*, arts. 9, 10, and 11(c) and (d). Cf. *infra* p. 92.

[58]*Ibid.*, art. 11. Cf. *infra* pp. 93–4. [59]*Ibid.*, arts. 13 and 14. Cf. *infra* p. 96.

[60]Cf. the resolutions of the 16th Congress of the International Chamber of Commerce, March, 1954 (I.C.C. Brochure 193, 1954).

[61]Compare fns. 65, 76, and 89 *infra*.

[62]M. Brandon. "Recent Measures to Improve the International Investment Climate" (1960), 9 *Journal of Public Law* 125. Mr. Brandon is Geneva Secretary of A.P.P.I.

[63]See H. J. Abs, "The Safety of Capital" in *Private Investment: The Key to International Industrial Development* (1958), pp. 69, 76–7. See also H. J. Abs, "The Protection of Duly Acquired Rights in International Dealings as a European Duty" in Society to Advance the Protection of Foreign Investment, *Foundation and Purposes* (1956), p. 51.

[64]On the proposal's extensive press coverage, see A. S. Miller, "Protection of Private Foreign Investment by Multilateral Convention" (1959), 53 *American Journal of International Law* 371, 375, fn. 25.

[65]Society to Advance the Protection of Foreign Investment, *International Convention for the Mutual Protection of Private Property Rights in Foreign Countries* (with Introduction and Comments in English translation, Cologne, 1957), hereinafter cited as *1957 Draft Convention*. For a summary and comments, see Miller, *supra* fn. 64.

it is still worthy of further study, as a clear and able statement of the views of at least a considerable number of prospective foreign investors.

The Draft Convention's chief objective is to provide to foreign investors the most extensive protection possible. Aliens are guaranteed "national treatment" and freedom from any restriction on the acquisition and utilization of property rights with the exception of activities in a few specified fields.[66] The convention limits very strictly the capital-importing state's right to expropriate the aliens' holdings and describes with precision the form and extent of the compensation to be awarded.[67]

Two of the convention's provisions are of special interest at this point. Not only the states parties to the convention but their nationals as well are to be directly entitled to the rights thereunder. The convention's stipulations are to be directly binding on the courts and other government instrumentalities of the party states and they will prevail over national legislation in these states.[68] The investors therefore do not depend on their state's espousal of their claims in order to enforce their rights. The draft convention gives also a list of possible sanctions against states violating its provisions[69] and provides for the creation of an international court of claims.[70] The second interesting novelty is a provision stating that the states party to the convention "undertake to apply the stipulations of the Convention mutatis mutandis in the case of unlawful measures adopted against the property, rights and interests of nationals of the High Contracting Parties by States which are not parties to the Convention."[71] This provision may in all fairness be understood as proposing the formation of a coalition of capital-exporting states with the object of keeping in line the capital-importing states.

Early in 1958, a group of European jurists, under the chairmanship of Lord Shawcross, prepared another draft convention,[72] said to be based on the provisions of the United States F.C.N. treaties.[73] The draft convention provided for the equitable treatment of aliens, the obligation of states to respect their undertakings toward aliens, and the strict limitations imposed on the states' right to expropriate foreign property.[74] It also included provisions on the adjudication of any related disputes.[75]

[66] *1957 Draft Convention*, arts. IV and V. The fields mentioned are public utilities, public transport, utilization of nuclear energy, and production of war material.

[67] *Ibid.*, arts. VI and VII. Cf. *infra* pp. 94–5.

[68] *Ibid.*, art. IX.

[69] *Ibid.*, art. XI(5)(3) and appendix.

[70] *Ibid.*, arts. X and XI. Cf. *infra* p. 97.

[71] *Ibid.*, art. XII.

[72] For a detailed summary, see M. Brandon, "An International Investment Code: Current Plans," 1959 *Journal of Business Law* 7, 12–15.

[73] See *supra* fn. 10. Note, however, that the corresponding provisions in the United States treaties are far more restricted in applicability: cf. the relevant comments on a later draft by S. D. Metzger, "Multilateral Conventions for the Protection of Private Foreign Investment" (1960), 9 *Journal of Public Law* 133, 139–43.

[74] Cf. *infra* p. 95.

[75] Disputes were to be submitted to the International Court of Justice. It was also provided that a state would be entitled to take measures to give effect to that Court's judgment, if the other state failed to comply with it; Brandon, *supra* fn. 72, at pp. 14, 15.

The above draft convention and the one proposed by the German Society to Advance the Protection of Foreign Investment were ultimately combined in a new draft which, after repeated amendments, reached in May, 1959, its present form.[76] This draft is now under consideration by the Organization for European Economic Co-operation[77] and has been extensively discussed among jurists.[78] The proposed convention would provide for the equitable treatment of the property of aliens[79] and for the obligation of states to observe strictly "any undertakings which [they] may have given in relation to investments made by nationals of any other Party."[80] Expropriation of foreign property is to be allowed only under certain conditions.[81] Disputes relating to the convention are to be submitted to an arbitration tribunal,[82] to which nationals of the states party to it may also have access.[83] The draft convention provides for measures to be taken by states, individually or collectively, in cases of breach of the convention[84] or of non-compliance with the tribunal's award.[85] It is to be noted that the 1957 Draft Convention's provision on measures to be taken against states not party to the convention[86] has been dropped. The new draft's authors, however, seem still to favour the initial adoption of the convention by a limited number of (chiefly capital-exporting) states, probably those of Western Europe.[87]

This last point of view is expressed openly in a slightly earlier study by another European group, the European League for Economic Co-operation,[88] prepared on the initiative of the group's German National Commit-

[76]The text of this draft, hereinafter cited as *1959 Draft Convention*, with a comment by its authors is printed in (1960) 9 *Journal of Public Law* 116.

[77]Cf. *supra*, p. 85.

[78]Cf. especially, H. Shawcross, "The Promotion of International Investment" (1960), 8 *NATO Letter*, no. 2, p. 19; Metzger, *supra* fn. 73; G. Schwarzenberger, "The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary" (1960), 9 *Journal of Public Law* 147.

[79]*1959 Draft Convention*, art. I.

[80]*Ibid.*, art. II. This provision is meant to cover the cases of contractual commitments of states to aliens; cf. Comment by the draft convention's authors (1960), 9 *Journal of Public Law* 119, 120–1.

[81]*1959 Draft Convention*, art. III.

[82]*Ibid.*, art. VII(1). Detailed provisions are included in an annex attached to the convention.

[83]*Ibid.*, art. VII(2). Such access will depend on an optional declaration to be made by any state party.

[84]*Ibid.*, art. IV. The parties to the convention undertake not to "recognize or enforce within their territories any measures conflicting with the principles of this Convention. . . ."

[85]*Ibid.*, art. VIII. States "shall be entitled . . . to take such measures as are strictly required to give effect to" the award. Note the absence of a binding obligation.

[86]Cf. *supra* fn. 71.

[87]The draft convention's submission to the O.E.E.C. is indicative of such a point of view; cf. also Shawcross, *supra* fn. 78, at p. 22. It is needless to stress the fact that Western European states are economically developed and that most of them are capital-exporting.

[88]European League for Economic Co-operation, *Common Protection for Private International Investments* (1958). The E.L.E.C. is one of the private groups associated with the European Movement and seems to represent the views of industrial and banking circles.

tee.[89] Without presenting any draft text, this study goes further than any other proposal in upholding measures intended to "protect" foreign investors to the utmost extent. Its central proposal is the formulation and implementation by the six European Common Market countries of a common policy with respect to private foreign investments. It is suggested that a "Solidarity Convention" should be concluded among these countries, binding them to concerted action with respect to foreign investments. This proposal might be construed as an effort to achieve European unity in an additional field of economic policy, were it not for the study's emphasis on the extension of the convention "as soon as possible to include all the great net capital-exporting countries and even, if feasible, the great international financial organizations" (for example, the World Bank and the I.F.C.).[90] It is frankly stated that this convention "should first and foremost be an instrument of pressure for inducing third countries" to accept a Charter of Fair Treatment for Foreign Investments.[91] Such a charter would provide for the national treatment of foreign investors, full indemnification in case of expropriation,[92] freedom of transfer for earnings and part of capital, virtual exemption from any requirements for the employment of local nationals,[93] and a high degree of respect for existing concessions.[94] Provision for an arbitration procedure to be followed in cases of disputes is to be made by a special protocol annexed to the charter.[95]

The report is remarkable for the detailed exposition of possible methods to be used in assuring the charter's implementation. The states party to the Solidarity Convention will undertake to act in concert against any state not acting in accordance with the convention, whether or not itself a party to the convention or the charter.[96] The measures to be taken may be official, such as the refusal to accord loans to the state at fault or to give commercial or investment guarantees to new investments in that state.[97]

[89]The original suggestions came from Dr. Hermann Abs, a director of the Deutsche Bank, chairman of the European League's German Committee, and president of the Society to Advance the Protection of Foreign Investment.

[90]E.L.E.C., *op. cit. supra* fn. 88, at p. 17, and cf. *ibid.*, at p. 27.

[91]*Ibid.*, at p. 17.

[92]*Ibid.*, at p. 19; and cf. *infra* p. 94.

[93]The business concerns involved "would never be refused permission to import (at least temporarily) the technicians they required." *Ibid.* But see also *infra* fn. 101.

[94]The state of investment should not make any change in the act of concession or in the state regulations under which a foreign enterprise is operating (for example, with respect to wage or price determination) "without authorising corresponding alterations in the schedule of charges for the products or services provided by the concern, so that its profit-making capacity would not be compromised." *Ibid.*, p. 19.

[95]*Ibid.*, pp. 16, 20, 25–6.

[96]It is even assumed in the study that in most cases the state "at fault" will not be a party to these instruments. Note, for example, the language used in this connection: the members of the Solidarity Convention will undertake to take measures against "any country which is at fault, even if that country is itself a signatory of the Solidarity Convention." *Ibid.*, p. 16.

[97]*Ibid.*, p. 25. These measures are to be taken in the case of non-execution of an arbitral award; it is not clear whether they could be taken in the case of a refusal to

But measures may be taken by private persons as well, namely, foreign investors who would be induced to conclude contracts with their governments "not to invest in a country black-listed for interfering with foreign capital after the entry in force of the Solidarity Convention."[98] The ways in which investors may be induced to enter into such contracts are also examined. They may consist in the offering of protection under the convention or in persuading banks "to sign a gentlemen's agreement whereby they would make it more difficult to obtain credit for operations based on an investment made in violation of the rules it is hoped to lay down."[99]

The European League's study favours the conclusion of special agreements between foreign investors and the government of the country of investment, if only in order to make evident any future violation of certain standard provisions which would be included in such agreements.[100] It also admits, with certain qualifications, the desirability of associating local interests with the investment, through their participation in ownership or management. The investor's obligations to respect the local laws and to contribute to the development of the host country are also mentioned, though placed on a moral rather than a legal basis.[101]

A few other private groups have also been considering the problem of an international investment code. In the United Kingdom, a group of members of Parliament prepared a detailed report on the matter.[102] The report favours the conclusion of an international convention which would lay down certain "objectives and procedures," without providing a strict "Code of rules."[103] Particular emphasis is laid on the necessity of a wide membership and the participation of underdeveloped countries. In fact, the report envisages the creation of a special international agency, possibly connected with one of the international organizations now in existence.[104] The report stresses the need for including in any international convention of this sort provisions concerning the rights, as well as the duties, of capital-importing countries.[105] The foreign investors' views are not accepted in their

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submit to arbitration. It is, however, expressly stated that collective action of some sort, on the part of the states signatory to the Solidarity Convention, will be taken against any country violating the principles of the charter, "whether that country has adhered to the Charter or not." *Ibid.*, p. 16.

[98] *Ibid.*, pp. 22–3. In cases of special need, the government of the capital-exporting state might grant to individual investors exemption from this prohibition.

[99] *Ibid.*, p.23, and cf. *ibid.*, p. 25.

[100] *Ibid.*, p. 22. The study also suggests, however, that the investor may undertake not to repatriate his investment for a specified number of years. *Ibid.*, p. 23.

[101] *Ibid.*, pp. 13–14.

[102] Parliamentary Group for World Government. *A World Investment Convention? Report of an All-Party Commission on a World Investment Code* (1959). No draft text is proposed in this report.

[103] *Ibid.*, pp. 14–15.

[104] The World Bank is considered as the most appropriate of the United Nations agencies in this connection: *ibid.*, p. 16.

[105] *Ibid.*, pp. 6, 17–19. The agency's permanent seat would be in one of the underdeveloped areas. The governing body may include representatives not only of governments but also of public and private interests.

entirety. Thus, the report disapproves of requirements for majority participation of nationals in the ownership of enterprises,[106] but it strongly favours requirements for minority participation.[107] Exchange restrictions or requirements for the employment of local nationals are treated in the same vein. The possibility of the conclusion of special agreements between foreign investors and the governments of capital-importing states is generally favoured. It is stated in this connection that such agreements should be respected or "fair compensation should be paid if they are revoked."[108] The report further provides for the establishment of an arbitration tribunal, but it does not favour the provision of sanctions to be applied in the case of non-compliance with the award.[109] Though undoubtedly too brief and therefore lacking in precision with respect to concrete arrangements, the report in question constitutes one of the few balanced and unbiased contributions in this field.

A number of international private groups have expressed in general terms their support of the adoption of an international investment code, stating, on occasion, certain general principles whose inclusion in the code they favour. Such support is expressed in a resolution proposed at the 1958 Conference of the International Bar Association,[110] a resolution adopted by the 1958 Conference of the Inter-Parliamenary Union,[111] and the first resolution of the International Association for the Promotion and Protection of Private Foreign Investments.[112] The idea has also found support in the statements of several jurists, both in Europe and in the United States.[113] The reports and studies on the international law of state responsibility by the Harvard Law School[114] and by the International Law Commission[115] should also be mentioned here, for they are relevant, even though they are not directly related to the question of an investment code of the type here discussed.

[106]Cf. *ibid.*, pp. 10–12, 15.
[107]*Ibid.*, p. 13.
[108]*Ibid.*, p. 12.
[109]Cf. *ibid.*, pp. 18–20.
[110]International Bar Association, *Seventh Conference Report* (1958), p. 484.
[111]As reported by M. Brandon, "An International Investment Code: Current Plans," 1959 *Journal of Business Law* 7, 16–17.
[112]Cf. M. Brandon, "Recent Measures to Improve the International Investment Climate" (1960), 9 *Journal of Public Law* 125, 126.
[113]Cf., for example, Mr. C. S. Rhyne's address, cited by Brandon, *supra* fn. 111, at p. 15; Mr. L. Hjerner's remarks at the I.L.A. conference, in International Law Association, *Report of the Forty-eighth Conference* (1958), pp. 167–70; G. W. Haight, "Activities of the International Chamber of Commerce and Other Business Groups" (1960), 54 *American Society of International Law Proceedings* 200, 203–5.
[114]Cf. the excerpts from the latest draft of the Draft Convention on International Responsibility of States for Injuries to Aliens, reported and discussed in (1960) 54 *American Society of International Law Proceedings* 102 *et seq.*
[115]Cf. the successive reports of the Commission's Special Rapporteur, Dr. Garcia-Amador, in 1956–II *Yearbook of the International Law Commission* 173, 1957–II *Yearbook of the International Law Commission* 104, and 1958–II *Yearbook of the International Law Commission* 47, and the related discussions among the members of the Commission, in 1956–I *Yearbook of the International Law Commission* 228 and 1957–I *Yearbook of the International Law Commission* 154.

II

Before attempting a general evaluation of the proposals for a code of international investment, it would be useful to discuss and compare in some detail the provisions of the proposed codes with respect to certain important topics, namely, the questions of exchange control, expropriation of foreign-owned property, and the settlement of disputes.

With respect to exchange restrictions, the Economic Agreement of Bogota in 1948 provided for the obligation of the signatory states to "impose no unjustifiable restrictions upon the transfer of [foreign] capital and the earnings thereof."[116] Since the term "unjustifiable" is given no definition, the undertaking seems to have been purely academic. Most of the later proposals regarding foreign investment provide for complete freedom of transfer of the earnings and interest on foreign investment as well as of the original capital invested. The I.C.C. Code of Fair Treatment provides that capital-importing states should allow freedom of transfer of current payments arising out of the aliens' investments, including interest, dividends, and profits. Similar freedom is to be allowed with respect to payments of principal and other transfers of invested capital as well as all other payments "necessary for the upkeep and renewal of assets" in capital-receiving states.[117] Freedom of transfer is also accorded to all payments arising out of public loans or loans guaranteed by public authority.[118] No restrictions or limitations on the investors' freedom of transfer are recognized except those which "may be authorized under the agreement of the International Monetary Fund."[119]

The relevant provisions of the 1957 Draft Convention for the Mutual Protection of Private Property Rights were less elaborate but similarly far-reaching. It was provided that "the transfer of capital, returns on capital investments, and compensation payments granted for expropriation . . . are guaranteed in every case."[120] This general statement was in no way qualified and no possible exceptions were mentioned. The matter is not touched upon in the latest draft of this convention, except perhaps, to the extent that it may be included in the general provision on "fair and equitable treatment" of the property of foreign nationals.[121] On the other hand, the draft convention which was recently submitted by the Swiss government to the O.E.E.C. provides in detail for the free transfer to the foreign investor's country of residence of all earnings, amortization payments, and incidental expenses of the enterprise as well as of any sum arising out of the total or partial realization of such investment.

A similar but somewhat qualified rule is found in the report of the European League for Economic Co-operation. It is stated there that

[116] *Bogota Agreement*, art. 22(4).
[117] *I.C.C. Code*, art. 9.
[118] *Ibid.*, art. 10.
[119] *Ibid.*, art. 9(1).
[120] *1957 Draft Convention*, art. IV(5); and compare art. IV(3)(e).
[121] Cf. *1959 Draft Convention*, art. I. Freedom of transfer is stipulated only in the case of compensation for expropriated property; cf. *infra* fn. 142.

"freedom of transfer in a stipulated currency would always be assured" for the earnings of foreign investments, the salary of foreign personnel, and "the normal redemptions of capital or of loans."[122] The addition of the word "normal" should be considered as limiting the right of foreign investors to transfer abroad the original capital invested.

The report of the Economic Committee of the Council of Europe Consultative Assembly admits expressly the possibility of "reasonable limitations" on the repatriation of capital, while providing for the free transfer of earnings and interest under normal conditions; under "exceptional conditions" limitations might be allowed even as to current payments.[123] The views of the British all-party commission's report on a world investment convention are similar in their general effect, though they make no distinction between capital and earnings. Free transfer abroad is to be provided for, "subject to the possibility of exchange control on reasonable balance-of-payments grounds," and to any agreement with the capital-importing country's government with regard to "the rate of withdrawal of capital or limitations of dividends."[124]

Particular emphasis is generally laid on the problems arising out of measures of expropriation affecting foreign investments. An exception in this respect is the I.T.O. Charter whose provisions on the matter were vague and of limited effect. Each state member undertook to take no "unreasonable or unjustifiable action . . . injurious to the rights or interests of nationals of other Members in the enterprise, skills, capital, arts or technology which they have supplied."[125] No other related provision is to be found, except for a general commitment of the member states "to provide . . . adequate security for existing and future investments,"[126] subject to the charter's provisions on the rights of capital-importing states.[127]

The Bogota Economic Agreement was more explicit. Not only did it state in strong and clear terms the rule of national treatment in matters of expropriation, in accordance with the constitutional and legislative rules in effect in each state, but it also adopted certain absolute standards by stating the need for "fair compensation in a prompt, adequate and effective manner."[128] However, no less than eight out of a total of twenty-one signatory states attached express reservations to the agreement's provision on expropriation.

Some of the proposed codes provide strict conditions for the exercise of the state's power of expropriation with regard to foreign investment. According to the I.C.C. Code of Fair Treatment, expropriations of alien property are to be effected in accordance with certain "principles." The purpose and conditions of any expropriation has to be stated explicitly in the relevant

[122]E.L.E.C., *op. cit. supra* fn. 88, at p. 19.
[123]Consultative Assembly Document 1027, *supra* fn. 47, at pp. 17–18.
[124]Parliamentary Group for World Government, *op. cit. supra* fn. 102, at p. 13.
[125]*Havana Charter*, art. 11(1)(b).
[126]*Ibid.*, art. 12(2)(a)(i).
[127]See *supra* fn. 22.
[128]*Bogota Agreement*, art. 25.

national legislation[129] and the appropriate legal procedures must be followed.[130] The compensation to be paid to the alien should be determined prior to the expropriation and should be paid in cash or in "readily marketable securities," freely transferable to the alien's currency.[131] It is also provided that compensation should be "fair . . . according to international law."[132]

Most of the other proposals lay greater stress on the form and measure of compensation. Indeed, some of them raise only the question of compensation. This is true, for instance, of the Swiss proposal to the O.E.E.C. which provides for the payment of adequate compensation, to be assessed prior to the taking and to be freely transferable outside the expropriating state. The European League's study also provides for the award of "just compensation" which "must cover the principal, appreciation and outstanding dividends and interest. It must be made payable in a transferable currency, with a gold clause, and be remitted to the investor within a fixed peoriod."[133]

The Council of Europe's report explicitly recognizes that it would be vain to demand guarantees against "dispossession." The proposed convention would stipulate that any expropriation to be effected would follow the legal procedure provided for in the expropriating state and that fair compensation would be forthcoming.[134] The British parliamentary group's study, as well, completely ignores the matter of conditions and concentrates on the need for fair compensation. This study is the only one to admit that, while compensation would normally be "adequate, effective and prompt," the expropriating country's capacity to pay should also be taken into account.[135]

The 1957 Draft Convention of the German Society to Advance the Protection of Foreign Investments dealt in great detail with the problem of expropriation. The convention made, in this connection, a distinction between foreign investors and other categories of alien property owners. The property of foreign investors was not to be expropriated for at least thirty years after investment.[136] A sole exception was allowed in the situation of a national emergency. It was further stated, however, that expropriation is permissible only when such an emergency cannot be met through temporary restrictive measures, and that nationalization cannot by itself be considered as constituting a national emergency. The property of other aliens could be expropriated only when the "predominance of public interests demands such action."[137] The modalities of the compensation to be paid were dealt with in some detail. The alien would be granted "substitution and/or compensation

[129] *I.C.C. Code*, art. 11(b).
[130] *Ibid.*, art. 11(a).
[131] *Ibid.*, art. 11(c) and (d).
[132] *Ibid.*, art. 11(a).
[133] E.L.E.C., *op. cit. supra* fn. 88, at p. 19.
[134] Consultative Assembly Document 1027, *supra* fn. 47, at p. 18.
[135] Parliamentary Group for World Government, *op. cit. supra* fn. 102, at pp. 13–14.
[136] *1957 Draft Convention*, art. VI(1).
[137] *Ibid.*, art. VI(2). According to the comments to the convention, "the words used . . . are designed to stress the exceptional character of expropriation." *Ibid.*, pp. 54–5.

equivalent to the value of the expropriated property," at his own choice.[138] The amount and form of compensation would be determined prior to the taking and final payment should be made "as soon as practicable."[139] Such payment should be in cash or in "bonds listed on the Stock Exchange . . . secured against loss of substance and [carrying] commensurate interest, amortization and guarantees."[140]

The draft convention prepared under the chairmanship of Lord Shawcross formulated in a somewhat different manner the conditions for the legality of expropriations. Measures depriving aliens of their property had to be taken only for the public benefit, under due process of law, without discrimination and with no violation of any "specific engagement" toward the alien. No taking would be lawful if it were not accompanied by "just and effective" compensation, representing the full value of the expropriated property and paid in transferable form and without undue delay. Provision for the determination and payment of such compensation would have to be made at or prior to the time of taking.[141]

The 1959 Draft Convention, which combines the two earlier proposals, follows, in the matter of expropriation, the Shawcross draft. One of the conditions for the lawfulness of expropriation, namely, the requirement of public interest, has been dropped, but the other conditions, as well as the provisions on compensation, remain in substance the same as in the Shawcross draft.[142] Like that draft, too, the 1959 Draft Convention refers explicitly to indirect as well as direct measures of expropriation. The former would presumably include any regulatory government action which affects foreign investors but falls short of an outright taking.[143]

The real importance of any legal document depends in great part on the manner in which it is to be applied and the quality of the procedure which is to be followed whenever any dispute as to the facts or as to the meaning of its provisions arises. In recognition of this fact, all proposals for an investment code include provisions on procedures for the settlement of related disputes.

The I.T.O. Charter and the Bogota Economic Agreement are partial exceptions to this general statement. Neither of them contained special provisions on the judicial settlement of investment disputes. Both of them stressed the role of diplomatic rather than strictly judicial methods. The Bogota Agreement, however, in addition to a provision on consultation between governments and possible submission of disputes to the Council of

[138]*Ibid.*, art. VII(1). Compensation is also to be granted in the case of restrictions on alien property; cf. *ibid.*, art. VII(2).
[139]*Ibid.*, art. VII(3).
[140]*Ibid.*
[141]Cf. Brandon, *supra* fn. 111, at p. 13.
[142]*1959 Draft Convention*, art. III. Cf. the cogent criticism of these provisions by Metzger, *supra* fn. 73, at pp. 139–43; and Schwarzenberger, *supra* fn. 78, at pp. 156–60.
[143]On the virtual impossibility of defining with precision the meaning of "indirect" expropriation, see Metzger, *supra* fn. 73, at p. 157.

the Organization of American States,[144] also referred to the "Inter-American Peace System," established by the American Treaty of Pacific Settlement ("Act of Bogota") of April 30, 1948. This instrument provided in great detail for procedures of consultation, arbitration, and recourse to the International Court of Justice.

Some of the other proposals go so far as to suggest the creation of a special judicial body, which would have jurisdiction to deal with any dispute arising in connection with foreign investments.[145] As early as 1939, the League of Nations Committee for the Study of International Loan Contracts suggested the creation of an international loan tribunal to deal with disputes between states and bondholders.[146] In 1949, the I.C.C. Code of Fair Treatment provided for the creation of an international court of arbitration to which any differences which might arise between the states party to the proposed code and which were not settled "within a short and reasonable period by direct negotiation or by any other form of conciliation" were to be referred.[147] The determination of the details of the working and composition of this court were left to the negotiating governments.[148] It was not made clear whether the court would be a permanent judicial body, similar to the International Court of Justice, or would in fact constitute but a blueprint for a series of *ad hoc* tribunals, on the model of the Hague Court of Arbitration.

Some of the arguments for the creation of a special judicial body are stated in the report of the British Parliamentary Group for World Government.[149] The report admits that it would be simpler to refer all related disputes to one of the already existing bodies, such as the International Court of Justice. It points out, however, that in such a case and in view of the statutes of these bodies, no individual investor would be allowed to bring his case before the court. This result the report considers inadvisable in so far as investment disputes are concerned. The creation of a new judicial body is therefore proposed, which would specialize in the problems of international investment. Its permanent seat would be in one of the underdeveloped countries and it might even hold sessions in several countries, somewhat in the manner of the British High Court on circuit.

The majority of the investment codes do not seem to favour the creation of a special international tribunal. The evolution of the proposals of the German Society to Advance the Protection of Foreign Investments provides an interesting illustration of a change of opinion on this point. The 1957

[144]*Bogota Agreement*, art. 38.

[145]For a survey of suggestions and attempts, see L. Sohn, "Proposals for the Establishment of a System of International Tribunals" in M. Domke (ed.), *International Trade Arbitration* (New York, 1958) p. 63. Individual scholars have also suggested the creation of such courts; cf., for example, E. D. Re, "Nationalization and the Investment of Capital Abroad" (1953), 42 *Georgetown Law Journal* 44, 56–8; K. S. Carlston, *Law and Structures of Social Action* (New York, 1956), pp. 168–71.

[146]League of Nations, Committee for the Study of International Loan Contracts, *Report* (1939).

[147]*I.C.C. Code*, art. 13.

[148]*Ibid.*, art. 14.

[149]*Supra* fn. 102, at pp. 18–19.

Draft Convention provided for the creation of an international court to deal with the legal disputes arising over the application of the convention.[150] The court was to be a permanent one, composed of members appointed for a specified period of time by the states party to the convention. Its competence would not depend on the previous exhaustion of local remedies. The court was to determine the unlawful character of measures in contravention of the convention and could order the imposition of a number of sanctions.[151] The convention also provided for the creation of arbitration committees to decide problems of compensation or substitution arising under the terms of the convention.[152] These committees would be special *ad hoc* bodies competent to deal with the economic matters arising in connection with expropriations and other measures. Lack of prompt compliance with their decisions would constitute an unlawful act against which the international court might apply the sanctions at its disposal.[153]

The Shawcross draft's provisions on the settlement of disputes were rather inadequate. Any disputes not settled by diplomatic means were to be submitted to the International Court of Justice.[154] The 1959 Draft Convention went further than that but stopped short of the 1957 Draft's proposals. In an annex to the convention, a detailed procedure is set out for the formation of special arbitration tribunals to deal with each particular dispute.[155] If the parties to a dispute do not agree to submit it to arbitration, the dispute may be brought to the International Court of Justice.

The proposals of the European League for Economic Co-operation follow roughly similar lines.[156] The creation of a special permanent tribunal is expressly rejected, on the grounds that it would deprive the proceedings of the necessary flexibility. It is then proposed that a list of arbitrators be drawn up composed of experts in financial and economic as well as legal matters. Alternatively, the arbitrators could be named in advance in each investment contract to be concluded between a foreign investor and the host country's government.

It is to be noted that most of the recent proposals provide for the possibility of recourse of private parties to the court or the arbitration tribunal to be created.[157] In one case, this consideration is treated as the determining factor in the choice between a special tribunal and the existing ones.[158] In other cases, the necessity for such recourse is stressed,[159] or it is taken as

[150] *1957 Draft Convention*, art. x(1); and cf. the comments to it, *ibid.*, pp. 59–61.
[151] *Ibid.*, art. xi; and cf. *infra* p. 98.
[152] *Ibid.*, art. x(2), and comments to it at pp. 59–61.
[153] Cf. *infra* pp. 98.
[154] Cf. Brandon, *supra* fn. 111, at pp. 13–14.
[155] *1959 Draft Convention*, art. vii and Annex.
[156] E.L.E.C., *op. cit. supra* fn. 88, at pp. 25–7.
[157] Such provision is not to be found in the I.T.O. Charter, the Bogota Economic Agreement, the I.C.C. Code of Fair Treatment, and the draft convention proposed to the O.E.E.C. by the Swiss government.
[158] Cf. *supra* p. 96 and fn. 149.
[159] Cf. Council of Europe Consultative Assembly Document 1027, *supra* fn. 47, at p. 19.

granted.[160] This need was emphasized in the 1957 Draft Convention which provided that private individuals as well as states would be entitled to the rights under it.[161] In the accompanying commentary, it was stated, somewhat cryptically, that "this individualization of rights under the Convention will do much to strengthen private responsibility."[162] It would also eliminate the individual's dependence upon the espousal of his claim by the state of his nationality. These provisions were included in a significantly modified form in the 1959 Draft Convention on Investments Abroad.[163] The right of individuals to have recourse to the arbitral tribunals to be instituted under the convention is now made contingent upon an "optional clause." Any state party to the convention may file a declaration to the effect that it accepts the tribunal's jurisdiction "in respect of claims by nationals of one or more parties."[164]

Closely related to the topic of settlement of disputes is the question of sanctions which may be imposed against a state violating the investment code and refusing to abide by an arbitral award. Some of the proposals place great emphasis on this point. The relevant provisions of the European League for Economic Co-operation study have already been noted.[165] Similar provisions were included in the 1957 Draft Convention for the Mutual Protection of Private Property Rights in Foreign Countries. Its article XI provided for the procedure to be followed and the measures to be taken against a state acting in violation of its obligations under the convention. Once the unlawfulness of the state measures involved was established by a court decision, the state at fault would be asked to revoke them within a fixed period of time. If it failed to comply, its conduct would be publicly condemned by the court. The other states party to the convention would refuse to recognize within their territories the measures in question and would make available, for the satisfaction of the judgment, any property of the state at fault which they might have in their power.[166] A list of possible additional economic sanctions is provided in an appendix. Their application and their nature and extent would depend on the character and the degree of unlawfulness of the state measures involved. Such sanctions would include refusal of public or private loans to the state at fault, denial of investment guarantees to foreign investors operating in it, and recommendations to private or public banks in the capital-exporting states to refuse credits to enterprises intending to invest in the state at fault. Any inter-governmental agreements which would not conform to the convention's standard, agree-

[160]Cf. E.L.E.C., *op. cit. supra* fn. 88, at pp. 20, 26.
[161]*1957 Draft Convention*, art IX; cf. *supra* p. 86. [162]*Ibid.*, at p. 59.
[163]*1959 Draft Convention*, art. VII(2). The Shawcross draft did not provide for the direct access of private parties to international judicial proceedings; cf. Brandon, *supra* fn. 111, at pp. 13–14.
[164]Cf. the authors' comments, 9 *Journal of Public Law* 119, 121, and Professor Schwarzenberger's critical observations, *supra* fn. 78, at pp. 162–3.
[165]*Supra*, pp. 89–90.
[166]*1957 Draft Convention*, art. XI(2) and (4). The commentary to the convention, *ibid.* p. 64, made clear that private property of the nationals of the state at fault and property enjoying diplomatic immunity would be excluded from such measures.

ments for global compensation, for example, would be declared ineffective.[167] There are no such elaborate provisions in the 1959 Draft Convention on Investment Abroad. It contains only a general clause to the effect that when a state fails to comply with an award against it, the other states party to the convention "shall be entitled, individually or collectively, to take such measures as are strictly required to give effect to that judgment or award."[168]

No specific provisions on sanctions are included in the other proposed codes. In some of them the advisability of such provisions is expressly denied. Thus, the report of the British Parliamentary Group for World Government states that "no sanctions, in any normal sense of the word, are likely to be generally acceptable at the present time. . . ."[169] The only possible measure would be the publication of the arbitration tribunal's award and the consequent exposure of the states at fault before world public opinion. In discussing the question of sanctions, the Council of Europe report also reaches the conclusion that it is not possible to determine them beforehand with any precision. The states party to the proposed convention would consult in each particular instance and decide on the appropriate steps which they would take.[170] The only general measures which are provided for are the refusal of all states members to recognize any acts contrary to the purposes of the convention and the obligation of the party at fault to pay full compensation.[171]

III

The problems relating to the formulation and adoption of an international investment code have received lately a good deal of attention. Here, it is only possible to indicate the outlines of the related arguments. The proponents of an investment code point out that it is the simplest as well as the most effective means to assure the protection of private foreign investment. They generally admit the difficulties involved in assuring the compliance of states with the code's provisions, but they tend to assume that the existence of the code, in the form of a multilateral convention, will in most cases be sufficient to prevent any breach of its provisions. In some proposals, an effort has been made to provide sanctions for non-compliance, through direct or indirect action of the states concerned. The effectiveness of such sanctions depends on the capital-importing countries' continuing need for foreign capital and on the possibility of concerted action on the part of capital-exporting states.

The idea of an investment code is partly founded on the assumption that the commercial and financial interests of capital-exporting and capital-importing countries are largely identical.[172] Though an ultimate identity of interests, in the long run, may perhaps be presumed, it is certainly not true

[167] *Ibid.*, art. XI(7).
[168] *1959 Draft Convention*, art. VIII.
[169] *Supra* fn. 102, at p. 19.
[170] Consultative Assembly Document 1027, *supra* fn. 47, at p. 19.
[171] *Ibid.* at p. 18.
[172] For a critique of this assumption, see A. S. Miller, "Protection of Private Foreign Investment by Multilateral Convention" (1959), 53 *American Journal of International Law* 371, 375–6.

that, with regard to the various countries' immediate interests, no divergencies exist. Such divergencies are manifested not only in the commercial policies of developed and underdeveloped countries[173] but also in their conception of international relations and even of certain issues in international law. Matters regarding the taking of private property owned by aliens are well-known illustrations of such issues. It is difficult to see how the underdeveloped countries can be induced to accept the capital-exporting countries' views with respect to these questions. Their undeniable need for capital is unlikely to constitute by itself sufficient inducement, particularly when the present world political situation is taken into account. Underdeveloped countries depend only in part on private direct foreign investment and the lack of an investment code does not necessarily affect the existing other sources of capital, such as capital provided by governments or international financial agencies. The exercise of direct or indirect pressure on the part of capital-exporting states, by means, for instance, of the refusal to give public loans or grants, or the imposition of restrictions on export credits, seems improbable, under present conditions. Capital-exporting countries are not prepared today to jeopardize the political allegiance of underdeveloped countries in order to achieve their reluctant adhesion to a charter of doubtful effectiveness.[174]

Apart from considerations of this order, the general adoption of an effective investment code appears unlikely for several reasons. A code's provisions, if they are to afford some protection to foreign investors, would have to limit to some extent the sovereignty of all states participating in it. It seems certain that many states, including several capital-exporting ones, would not be prepared to undertake far-reaching commitments in this connection.[175] Their reluctance should in part be attributed to a desire not to commit themselves with regard to matters of domestic economic policy. In some cases, a state's federal system of government may make difficult the acceptance of such commitments. More generally, capital-exporting states usually prefer to retain a high degree of freedom of movement in their domestic and international policies. They tend, therefore, to favour specific commitments of limited extent, and not general and extensive undertakings. There is, then, no real paradox in the capital-importing states' willingness to grant to individual foreign investors certain rights or privileges which they refuse to give to investors as a whole.

[173]Cf., for example, G. Myrdal, *An International Economy* (New York, 1956), pp. 222 *et seq.*

[174]Such considerations are operative with particular regard to the proposals involving the creation of a coalition of capital-exporting states, attempting to impose a charter of treatment of foreign investors on the capital-importing states. Cf. *supra* pp. 87, 88. It is interesting to note that the only state where the agitation for an international investment code has received some official support is the Federal Republic of Germany, whose international political responsibilities at this moment can hardly be compared to those of the United States or the United Kingdom.

[175]On the probable attitude of the United States and some other economically developed states in this connection, see S. J. Rubin, *Private Foreign Investment* (Baltimore, 1956), pp. 20, 81; J. G. Fulton, address in (1958) 52 *American Society of International Law Proceedings* 200, 204; Metzger, *supra* fn. 73, at pp. 138, 145.

Certain additional considerations obtain in the particular case of capital-importing countries. First, capital-exporting states cannot give any assurance that substantial amounts of new foreign private capital will be invested, since their governments have a limited degree of control over the disposition of the funds of private citizens. Even if legal obstacles are removed, economic reasons may well prevent foreign investments in some or all underdeveloped countries. Thus, capital-importing states would have to accept certain definite obligations without any corresponding undertakings on the part of the capital-exporting states.[176] It may be argued at this point that, if no investment is made, the capital-importing countries' obligations would remain without object and, therefore, ineffective. There exists, however, a variety of possible levels and forms of investment. A capital-importing country would adhere to an investment code only in order to assure itself a high level of foreign investment. It would object to having to apply its obligations under the code to a limited number of foreign investors perhaps in fields of little importance to its economic development.

Most of the proposed draft codes are one-sided in another way, too. They provide for the protection of the investors' interests without attempting to safeguard the host state's interests. There is no convincing justification for this bias. It is sometimes said that nowadays it is the foreign investor rather than the host state that is in need of protection.[177] The statement's validity is doubtful, but, even assuming its truth, it does not follow that provisions regarding the investors' duties toward the host state as well as the duties of capital-exporting states toward the capital-importing countries should not be included in a comprehensive investment code. If such duties are well determined and there is no possible dispute about them their inclusion in the code certainly would do no harm. If, on the other hand, they are not well settled, they evidently should be examined and better determined in the interests of both the investors and the capital-importing states. Though ultimately intended to provide assurance to foreign investors, an investment code should not be a one-sided instrument. It should attempt to regulate comprehensively the whole relationship between host state and foreign investors.[178] Otherwise, such a code might be construed as limiting the former's powers without restricting the latter's freedom of action.

Assuming that, in spite of the difficulties we have mentioned, the formulation and adoption of an investment code might still be possible, it is highly improbable, in view of present-day conditions, that such a code, if adopted,

[176]See *contra* Shawcross, *supra* fn. 78, at p. 21, who argues "that the *quid pro quo* for the borrowing states' undertakings is in fact, in the English vernacular, the provision of the 'quids', that the capital importing countries, in return for agreeing to abide by the generally recognized procedure of International Law, will receive more private investment . . . than would otherwise be the case." But how certain is that effect?

[177]Cf., for example, *I.C.C. Code*, Introductory Report, par. 19; J. N. Hyde, Book Review (1957), 66 *Yale Law Journal* 813, 816.

[178]For a powerful statement in support of this view, see A. Larson, "Recipients' Rights under an International Investment Code" (1960), 9 *Journal of Public Law* 172. Note that some of the proposed codes discussed *supra* have attempted to do this, with varying degrees of success. And see also Shawcross, *supra* fn. 78, at p. 21.

would be effective to any significant extent. The multilateral convention is difficult to administer when dealing with matters where particular situations and exceptional cases are of importance. An international investment convention among many states would have to be couched in general terms, because many varieties of political and economic structures and innumerable kinds of investment would be affected by it. Qualifications and exceptions would have to be added, each one of them quite necessary to the state or states immediately concerned. The end result is bound to be a cumbersome and vague instrument open to a variety of interpretations. The precedents of the Havana Charter and the Bogota Economic Agreement are instructive in this connection. And it should be noted that the political power of underdeveloped countries as a whole has greatly increased since the first postwar years, while the capital-exporting countries are in no way in a stronger position now than they were then.

As long as there exists a divergence between the interests of capital-exporting and capital-importing states, the positive contribution of an investment code is bound to be very limited. But its negative impact may be far more serious. The preliminary negotiations and discussions and the international conference that would presumably follow would tend to intensify rather than reduce the existing differences of opinion and might lead to the adoption of extreme and rigid positions.[179] Capital-importing countries might then be unwilling to grant exemptions or privileges to individual foreign investors, for they would fear that such action might be used as an argument against their official position.

An alternative course might perhaps still be open. It has been suggested recently[180] that the staff of one of the international financial agencies dealing with international investment could draft a set of principles laying down the obligations as well as the rights of foreign investors in underdeveloped countries. Compliance with this charter would be required of all firms and governments seeking the institution's aid. In this manner, the disadvantages of negotiations between government representatives might be in part eliminated. The difficulties, however, which are inherent in the formulation of a widely acceptable set of principles would still persist. The advantage of this scheme lies in its institutional setting, which makes possible the application of such principles in a flexible and sophisticated manner and provides a number of ways for the settlement of disputes. From this standpoint, the proposal presents certain similarities with some other suggestions which stress the institutions charged with applying the charter rather than the charter itself.[181]

[179]Cf., in agreement, Fulton, *supra* fn. 175, at p. 202; R. N. Gardner, "International Measures for the Promotion and Protection of Foreign Investment" (1959), 53 *American Society International Law Proceedings* 255, 259–62; Metzger, *supra* fn. 73, at pp. 145–6.

[180]See Gardner, *supra* fn. 179, pp. 265–6; R. N. Gardner, "New Directions in U.S. Foreign Economic Policy," 1959 *Headline Series* no. 133, at p. 42.

[181]Cf., for example, the proposals of the Parliamentary Group for World Government, *supra* p. 90, and Carlston, *op. cit. supra* fn. 145, at pp. 168–71.

C
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Investment: Promotion of Private Foreign Investment

OFFICE MEMORANDUM

To: Mr. H. B. Ripman

Date: August 21, 1961

From: P. J. Squire

Subject: Visit to Austria, Switzerland and France

After your duties at the Annual Meeting have been completed, you should proceed to Paris and Geneva, timing your visits to coincide with those of Mr. Demuth, in order to make the acquaintance of officials in the UNESCO office in Paris, and in the ILO office in Geneva, who deal with problems concerning technical and vocational education, and the employment of consultants in these fields. While in Paris you should also visit the offices of MIFERMA, COMILOG and SOPEG in order to discuss any current problems in connection with these projects. While in Geneva you should call on WHO in order to become acquainted with officials responsible for water supply projects.

Finally, you should take the opportunity of being in Austria to discuss present and any prospective problem projects with IVK, and to ascertain what progress they have made with their organization and staffing. You should, if you think it advisable, also visit some of the projects financed under to IVK loan.

Cleared with and cc to: Mr. Collier
Mr. Williams

cc to: Mr. Demuth
Mr. Aldewereld
Mr. Squire
Miss Van Gasse
Operational Files
Division Files

HBRipman:mec

August 16, 1961

Mr. John A. Neumark, Chairman
Financing International Development
Room 2806
120 Wall Street
New York 5, New York

Dear Mr. Neumark:

Just a line to acknowledge your letter of August 10 and to tell you that I would be glad to discuss your publication venture with you. I expect to be in Washington at the time of your proposed visit, August 21 to 23. Might I suggest that you call my office, DUdley 1-2171, for an appointment when you arrive.

Sincerely yours,

Richard H. Demuth
Director
Technical Assistance and Planning Staff

RHD:tf

FINANCING INTERNATIONAL DEVELOPMENT

120 WALL STREET ROOM 2806 NEW YORK 5, N. Y. TEL. HANOVER 2-2020

August 10, 1961

Mr. Richard H. Demuth
International Bank for Reconstruction and Development
1818 H Street N.W.
Washington 25, D.C.

Rec'd: Aug 16/61

Dear Mr. Demuth:

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I would like to speak with you when I come to Washington to discuss the project with Mr. Rosen later this month. I will telephone your office in the near future.

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John A. Neumark

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WALL STREET 1955
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FINANCING INTERNATIONAL DEVELOPMENT is being designed for a professional business and government audience. The staff will be working in consultation with a "steering committee" made up of six members of the Board of Advisors with experience in the various areas of the field under discussion. Foundation and industry financial sponsorship is being sought.

Members of the staff have previously published a number of educational-vocational books under the auspices of the Yale Daily News. They were all well received and supported.

The chairman of this new symposium was editor of Wall Street 1955, a collection of articles discussing various facets of the world of finance. The publication was distributed free of charge to 10,000 students at Harvard, Yale and Princeton. Among its distinguished editorial contributors were Bernard M. Baruch, George M. Humphrey, William McC. Martin, and John H. Whitney. Wall Street's leading firms helped finance the venture.

A second edition, entitled Insurance World 1957, was a similar treatment published in two volumes - property and life - and distributed gratuitously to 300,000 undergraduates around the country. The industry's leading figures and organizations contributed editorially and financially.

Wall Street 1955 was republished in June 1960 in book form - 200 pages in length - as Wall Street 20th Century. The contributions of investment firms financed its distribution - under the sponsorship of the Investment Association of New York - to 40,000 selected members of the financial and educational communities.

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Christian Sonne
Adlai Stevenson
Ralph Straus
Charles Taft
Juan Trippe
Siegmund Warburg
Thomas Watson, Jr.
George Woods
David Zellerbach

*The majority of persons on this list have not as yet been contacted.

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Raymond Vernon	Harvard Business School

*Several persons on this list have not as yet been contacted.

CIRCULATION

CORPORATIONS - Key Officials, Executives in Charge of International Operations

INVESTMENT BANKING FIRMS - Partnership

BROKERAGE FIRMS (large) - Partnership

COMMERCIAL BANKS, EUROPEAN AND AMERICAN - Key Officials, International Officers

LAW FIRMS - Partners in International Field

ENGINEERING FIRMS - Officials in International Field

ACCOUNTING FIRMS - Partners in International Field

INSURANCE COMPANIES - Key Officials

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PRIVATE DEVELOPMENT FINANCE FIRMS (e.g. IBEC, DELTEC) Key Staff, Officials

FINANCE MINISTRY IN LESSER DEVELOPED NATIONS - Key Staff, Officials

DEVELOPMENT BANKS - Officials Overseas

INTERNATIONAL ORGANIZATIONS (e.g. IBRD, IDA, IMF, IFC)- Key Staff, Officials

U.S. GOVERNMENT AGENCIES (e.g. ICA, DLF, Ex-Im, USIS)- Key Staff, Officials

UNITED NATIONS AND EMBASSIES IN U.S. - Key Officials

FOREIGN (ECONOMIC) AFFAIRS ORGANIZATIONS (e.g. FPA, CED)- Key Staff,Officials

PROFESSORS OF INTERNATIONAL FINANCE, DEVELOPMENT ECONOMICS - U.S., Foreign

LAW, BUSINESS & PUBLIC AFFAIRS SCHOOL PROFESSORS - Teaching in Internatl Field

GRADUATE STUDENTS IN INTERNAT'L FINANCE, DEVELOPMENT ECONOMICS-U.S.,Foreign

COLLEGE PLACEMENT OFFICES AND LIBRARIES - Single Copy

PUBLIC LIBRARIES - Single Copy

ARMY AND USIS POSTS AND EMBASSY LIBRARIES - The World Over

MEMBERS OF CONGRESS, THE HOUSE, STATE, DEFENSE, TREASURY DEPTS. - Officials

SPECIAL DIGNITARY LIST OF INFLUENTIALS (e.g. all Heads of State)

(40,000 copies approx.)

OBJECTIVES

1. To investigate directly the potential and need for private investment in underdeveloped nations.

2. To aid in stimulating increased interest and heightened activity in financing sound projects in these "backward" areas.

3. To penetrate the multi-dimensional problems that surround national development from the receiving countries' points of view; especially as they directly affect investment considerations.

4. To explore new means (institutional and procedural) of countering major obstacles to the international flow of investment funds into less developed areas. To suggest some specific programs and approaches.

METHODOLOGY

5. To illustrate the actual decision-making and operational problems which surround the consideration and implementation of a direct or indirect investment in these regions. The case study approach will be employed commonly.

SLANT

6. The unique role that private capital can play in this development process.

THE NEED

THE NEED FOR EXTERNAL CAPITAL

Economic development requirements suggest that the flow of public and private capital into projects in underdeveloped nations is too meagre to meet their growing need for external economic stimulation. There persists a dangerous gap between rising aspirations prevalent in poorer nations and local abilities to satisfy these growing demands.

PROFIT POTENTIAL

Despite the above fact profit potential is more than commensurate with high risk-taking in many instances. Furthermore, new and more imaginative ways of dealing with the inherent risks are steadily being developed.

A COMMUNICATIONS TOOL

There exist in both capital rich and capital poor nations broad misconceptions and misunderstandings as to the nature of the requirements and the potential for introduction of private capital. The proposed book is designed, therefore, to serve as an authoritative and highly readable communications medium.

A MOTIVATIONAL TOOL

In view of the general inexperience, lethargy and fear which shroud this area, the book is designed to serve further as a motivational vehicle by stimulating greater imagination and activity among potential investors.

APPROACH TO CHALLENGE AND OPPORTUNITY

There is, in addition, a need to concern greater numbers of well-trained and capable men with the problem of opening up new avenues for approaching the broad challenge and opportunity that does in fact exist.

CASE STUDIES

Finally, even men now involved in the process may find food for thought in provocative, forward-looking case studies which relate the developmental, financing and special local considerations to realistic projects under discussion.

THE EDITORIAL APPROACH

THE TYPE OF ARTICLES SOUGHT

It is our intention to describe graphically the need and potential for an increased flow of private and public capital into under-developed nations. The publication staff will endeavor to obtain forward-looking, controversial discussions which will embody the dynamics, uncertainties and challenges in this field.

THE CASE STUDY APPROACH

The editors plan to rely upon men with direct field and operating experience to give provocative substance to the projections, trends, and problems they have analyzed. Further, it is contemplated that case studies (Part III) involving real decision-making and bargaining situations will lend authenticity to the subject matter. In essence, the aim is to get thinking, well-versed men to speak frankly, forcefully and persuasively.

LAYING THE CONCEPTUAL BACKGROUND

In addition to the above, the publications will contain the observations of the leading thinkers in the field. These well-known authorities will attempt to give a portrayal of economic development financing facts and theories in a multi-dimensional setting, involving as it does considerations of a political, sociological, psychological, economic, and financial nature. (Parts I and II are thus designed to provide the conceptual foundations for the case studies in Part III.)

THE RECEIVING NATION'S VIEWPOINT

Finally, it is hoped that the editors will obtain articles representative of the receiving nation's point of view (Part IV). We feel that the thought-provoking comment of this sort will reflect vividly upon the adequacy of our trade, aid and investment programs. Part V is designed to make our financing requirements and standards more explicable to seekers of capital in lesser developed lands.

GOALS IN EDITING AND DESIGNING THE BOOK

All articles will be conceptualized and edited in cooperation with our Board of Advisors. It is our conscious intent to so structure the outline of each requested article that the collection will provide a logical and connected flow of ideas and concepts. Editing by experts should help lend weight to the requirements for originality and professionality.

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John A. Neumark, Chairman
Financing International Development
Room 2806
120 Wall Street
New York 5, New York
Telephone: HAnover 2 - 2020

FORM No. 75
(2-60)

INTERNATIONAL BANK FOR
RECONSTRUCTION AND DEVELOPMENT

ROUTING SLIP	Date June 22, 1961

NAME	ROOM NO.
Mr. Knapp	1212
~~Mr. William Iliff~~	
~~Mr. Stark~~	
Files	8A4

	To Handle		Note and File
	Appropriate Disposition		Note and Return
	Approval		Prepare Reply
	Comment		Per Our Conversation
	Full Report		Recommendation
	Information		Signature
	Initial		Send On

REMARKS

Attached in accordance with your request is a note on Senator Javits' "Peace by Investment Corporation" bill.

From Richard H. Demuth

FORM NO. 57
(5-48)

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

OFFICE MEMORANDUM

TO: Richard H. Demuth DATE: June 22, 1961

FROM: Shirley Boskey SB

SUBJECT: Bill to Create a "Peace by Investment Corporation"

Mr. Knapp asked you for an analysis of Senator Javits' bill, S.1965 (87th Cong., 1st sess.), to create a "Peace by Investment Corporation".

It would be the purpose of the proposed Corporation to encourage an increased flow of private capital into the less developed countries. To that end, it could (a) finance the establishment or expansion of industrial, mining, construction or agricultural activities through loans to, or the purchase of securities and obligations of, governments or public agencies of the less developed countries or private or "semiprivate" companies doing business wholly or mainly in those countries; (b) purchase ~~of~~ minority stock interests in U.S. companies which invest in the less developed countries; and (c) offer investment insurance, both on an all-risk and loss-for-specified-causes basis. (The insurance provisions of the bill are confusingly drafted and it is not at all clear who would be eligible for each of the types of insurance.)

The Corporation would start out by being an agency of the United States, but it is the intention that it be transformed into a private entity within six years. This would be accomplished in the following manner.

Initial funds for the Corporation's operations would come from $100 million of Class A shares, subscribed by the United States, and from obligations issued by the Corporation. These obligations could be issued only during the Corporation's first six years, in amounts not to exceed $125 million in any one year; the total amount outstanding at any one time could not exceed $600 million.

What is intended to be the permanent capital of the Corporation would be raised through the sale to the public of Class B shares, at a price to net the Corporation $5. These shares would be non-voting but could earn dividends. There is language in the bill open to the inference that Class B shares would be offered to investors in the less developed countries, as well as in the United States. In any case, there is no express provision limiting sales to United States citizens. An aggregate of three billion shares could ultimately be offered (and thus $15 billion of capital could be raised), but not more than 1.5 billion shares in the aggregate or more than 500 million shares in any one year could be sold while the Corporation remained a United States agency.

A portion of the proceeds of the sale of Class B stock would be set aside to retire the Class A stock and any obligations of the Corporation. The Class A stock would have to be retired in six years or less. Upon retirement in full of the Class A stock and a sufficient amount (as determined by the Secretary of the Treasury) of the obligations, the Congress would be asked to enact further legislation appropriate to transform the Corporation from an agency of the United States into a privately owned and managed entity, including provision for transfer to owners of Class B stock of the voting power originally vested in the Class A stock.

While the Corporation remained a public entity it would be managed by a 15-member Board of Directors, comprised of five persons appointed from private life by the President of the United States, subject to Senate confirmation; the Secretaries of State, Treasury, Commerce and Labor, ex officio; four members appointed by the President from agencies concerned with international economic development; and a President and Executive Vice-President appointed either from private life or government service. Provision is made for appointment of an advisory committee to the Board, composed of individuals drawn from private and public life outside the United States.

This proposal of Senator Javits is not new. It follows very closely a bill (S.1743, 86th Cong., 1st sess.) which he introduced in the last Congress to create "a World Development Corporation". (In fact one section of the current bill inadvertently retains a reference to the "World Development Corporation".) No Congressional action was taken on the earlier bill and the Senate Foreign Relations Committee, to which S.1965 has been referred, has at present no plan to schedule hearings on this bill.

FORM NO. 89
(2-57)

INTERNATIONAL BANK FOR
RECONSTRUCTION AND DEVELOPMENT

ROUTING SLIP	Date June 12

OFFICE OF THE PRESIDENT

NAME	ROOM NO.
~~Mr. Demuth~~ Mrs. Bosley	506

	Action		Note and File
	Approval		Note and Return
	Comment		Prepare Reply
	Full Report		Previous Papers
	Information		Recommendation
	Initial		Signature

Remarks

Would you ask one of your people to prepare a brief memorandum analyzing the proposal contained in the attached Bill?

J. Burke Knapp

Pls. do.

From

FORM NO. 76A (2-61) INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

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Ref memo on this

87TH CONGRESS
1ST SESSION

S. 1965

IN THE SENATE OF THE UNITED STATES

MAY 25, 1961

Mr. JAVITS (for himself, Mr. BEALL, Mr. HARTKE, and Mr. SMATHERS) introduced the following bill; which was read twice and referred to the Committee on Foreign Relations

A BILL

To establish a Peace by Investment Corporation, and for other related purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

GENERAL PURPOSES

SECTION 1. The recent establishment of the "Peace Corps" reflects growing realization that governments and diplomatic relations alone cannot bring enduring peace, without the consolidation and expansion of people-to-people relationships. Economic relationships are fundamental to human relationships, and private economic endeavors are inseparable from systems of human freedom. This measure is designed to establish and expand people-to-people relationships in the

economic field; to encourage an expanded flow of private capital investment from the United States into economically sound enterprises in underdeveloped areas of the world in the interest of world peace through mutual economic progress; to enlarge the number of private investors participating in this flow of capital so as to forge more direct links among the peoples of the world; to reduce gradually thereby the need for United States public investment and grants overseas; to help redirect the total flow of capital from the United States so that increasing portions of this total flow go to the underdeveloped areas, and thus be in better harmony with the domestic economic needs of the United States and the effective management of its international balance-of-payments problems.

PEACE BY INVESTMENT CORPORATION: BASIC FUNCTIONS

SEC. 2. There is hereby established a Peace by Investment Corporation (hereinafter referred to as the Corporation) with the following basic functions in accord with the purposes of this Act:

(1) As an equity investment agency, to purchase the securities and obligations of, or make loans to (a) any underdeveloped country or political subdivisions thereof, (b) any public agency or instrumentality of any such country, or (c) any private or semiprivate firm, corporation, or association doing or intending to do business wholly or mainly

in any such country or countries for the purpose of financing or assisting in financing any undertaking to expand such industrial, mining, construction, or agricultural activity in such country or countries as will, in the judgment of the Corporation, further the purposes of this Act;

(2) As an investment trust, to purchase minor stock interests in enterprises in the United States already in being under effective management and engaged substantially in investment in underdeveloped countries, to the extent that such purchases are clearly desirable in conducting the financial functions of the Corporation on a sound and prudent basis;

(3) To establish an insurance system, on an actuarially sound basis including such premiums as are required, designed to protect all or part of the outstanding investments under paragraph (1) of this section against loss arising from any cause, including but not limited to political or military events;

(4) To establish a second insurance system (distinct from that pursuant to paragraph (3) of this section), on an actuarially sound basis including such premiums as are required, designed to protect against loss for specified causes, not including mismanagement, all or part of the outstanding investments of private investors (other than the Corporation) in any undertaking eligible for financial assistance under paragraph (1) of this section).

BASIC CRITERIA FOR INVESTMENT PROGRAM

SEC. 3. In carrying forward the investment program pursuant to paragraph (1) of section 2 of this Act, the Corporation shall be guided by these basic criteria, and shall make appropriate findings accordingly:

(1) That each specific investment is in furtherance of an undertaking which is economically sound, actually or potentially profitable, and consistent with the sound long-range economic development of the country in which it is located;

(2) That the country in which the undertaking is located shall have had full information with respect to it and opportunity to express a judgment as to its desirability;

(3) That the investment is not in competition with nor duplicative of other private investment programs or other public programs of the United States or of international agencies which give reasonable promise of accomplishing comparable results in accord with the purposes of this Act;

(4) That each investment, taking into account the country in which it is located, is in accord with the general international economic and political policies of the United States;

(5) That the investment program in general is consistent with the short-range and long-range policy of the United States to maintain maximum employment, production, and purchasing power within the domestic economy;

(6) That the investment program in general is consistent with the short-range and long-range need of the United States to maintain a satisfactory balance of payments position;

(7) That the investment program in general, and in its specific applications, is mutually beneficial to the country to which the investment flows and country from which it emanates, taking into account not only purely economic considerations but also consideration of human improvement under free institutions.

BASIC FINANCING OF PEACE BY INVESTMENT CORPORATION

SEC. 4. (a) The Corporation shall have a capital stock consisting in part of one hundred shares of par value of $1,000,000 per share of class A stock, which shall be the only stock of the Corporation having voting power so long as any of it is outstanding. This class A stock shall be subscribed to by the United States Government. The Secretary of the Treasury shall use the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended, for the purpose of such subscriptions, and the purposes for which securities may be issued under such Act are extended to include such subscription. Payment under this paragraph to the Corporation for the subscription of the United States and repayments thereof shall be treated as public debt transactions of the United States. Certificates

evidencing stock ownership by the United States shall be issued by the Corporation to the President of the United States or to such other person or persons as he may designate from time to time. Neither the provisions of the Securities Act of 1933, as amended, nor the provisions of the Securities Exchange Act of 1934, as amended, shall apply to the Corporation or to the original issue of its securities while class A stock is outstanding.

(b) The Corporation is authorized to increase its capital stock by offering for public sale three billion shares of class B stock at par value of $5 per share. This stock shall be placed on public sale to net the Corporation $5 per share, with an override not exceeding 30 cents per share to cover distribution costs: *Provided,* That not more than one billion five hundred million shares of this class B stock in the aggregate, nor more than five hundred million shares in any one year, shall be sold so long as the Corporation remains an agency of the United States as provided in section 5 (a) of this Act. The Corporation, with approval of the Secretary of the Treasury, shall by regulation determine the maximum amount of such class B stock which may be held at any time by any individual, and the maximum amount which may be held at any time by business enterprises and other organizations of various types and sizes.

(c) The Corporation is authorized to issue from time

to time, for purchase by the Secretary of the Treasury, its notes, debentures, bonds, or other obligations: *Provided,* That the issue of such obligations shall not exceed $125,000,000 in any one year, nor shall the aggregate amount of such obligations outstanding at any one time exceed $600,000,000, nor shall any such obligations be issued more than six years from the date of the first issue, nor shall any such obligations be issued except so long as the Corporation remains an agency of the United States as provided in section 5(a) of this Act. Such obligations shall have such varied maturities, not in excess of twenty years, as may be determined by the Corporation with the approval of the Secretary of the Treasury, with periodic retirement of each obligation commencing in the first year subsequent to its original issue: *Provided,* That any such obligations may be retired at the option of the Corporation before maturity in such manner as may be stipulated therein. Each obligation purchased by the Secretary of the Treasury shall, so long as the Corporation remains an agency of the United States, bear interest at a rate determined by the current average rate on outstanding marketable obligations of the United States as of the last day of the month preceding the issuance of such obligation; and when the Corporation is no longer an agency of the United States, as provided in section 6 of this Act, each such obligation shall bear interest at the rate of 4 per

centum per annum. The Secretary of the Treasury is authorized for the purpose of this subsection to use as a public-debt transaction the proceeds of any securities issued after July 31, 1945, under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under that Act are extended to include such purpose. Payment by the Treasury under this subsection of the purchase price of such obligations of the Corporation and repayment thereof by the Corporation shall be treated as public-debt transactions of the United States.

(d) One -fifth of the proceeds of the sale of class B stock issued under subsection (b) of this section shall be set aside by the Corporation in a special fund to be established by the Corporation. This special fund shall be utilized (1) to retire fully, within a period of six years or less from the initial issuance of such class B stock, the class A stock of the Corporation issued under subsection (a) of this section, and (2) to retire fully the obligations issued under subsection (c) of this section in accord with the terms of retirement contained in such obligations. This special fund shall be invested or reinvested by the Corporation in interest-bearing obligations of the United States or in obligations guaranteed as to interest and principal by the United States: *Provided,* That when the class A stock of the Corporation and the obligations issued under subsection (c) of this

section shall have been retired in full, any balance remaining in this special fund shall be merged with other funds of the Corporation obtained through the sale of class B stock and shall thereupon be available for the general purposes of this Act.

(e) Except as otherwise provided in this section, all funds available to the Corporation pursuant to this section, and as earnings from its operations, shall be available for its general purposes under this Act.

INITIAL MANAGEMENT OF PEACE BY INVESTMENT CORPORATION

SEC. 5. (a) Until the conditions set forth in Section 6 of this Act are fully met, the Corporation shall be an independent agency of the United States.

(b) The management of the Corporation during its existence as an agency of the United States shall consist of a Board of Directors (herein referred to as the Board), composed of (1) five members appointed from private life by the President with the advice and consent of the Senate, who shall collectively possess broad experience in various areas of economic endeavor; (2) the Secretary of State, the Secretary of the Treasury, the Secretary of Commerce, and the Secretary of Labor, to serve ex officio; (3) four members to be appointed by the President from various United States

agencies concerned with international economic development; and (4) a President and Executive Vice President of the Corporation, as set forth below, who may be appointed from private life or from public service. All members, except those serving ex officio, shall serve at the pleasure of the President.

(c) The Board shall elect a Chairman from among its members. Any vacancy in the Board shall not affect its powers, but shall be filled in the same manner as the original appointment. A majority of the Directors shall constitute a quorum, and action shall be taken only by a majority vote of those present.

(d) The Board shall designate an executive committee of seven members, not more than two of whom (exclusive of the President and Executive Vice President of the Corporation) shall be members appointed from private life. The executive committee shall perform the functions and exercise the powers of the Board at such times and to such extent as shall be provided in the bylaws of the Corporation.

(e) Members of the Board appointed from private life shall receive $ per diem when engaged in the actual performance of their duties, plus reimbursement for necessary travel, subsistence, and other expenses incurred by them in the performance of such duties.

(f) There shall be a President of the Corporation, to be appointed by the President by and with the advice and consent of the Senate, who shall receive a salary at the rate of $ per annum, and who shall serve as chief executive officer of the Corporation, as a member of the executive committee, and as a member of the Board. The President of the Corporation shall, in accordance with the bylaws, appoint such officers and employees as may be necessary for the conduct of the business of the Corporation, define their duties, and fix their compensation.

(g) There shall be an Executive Vice President of the Corporation, to be appointed by the President by and with the advice and consent of the Senate, who shall receive a salary at the rate of $ per annum. The Executive Vice President shall serve as President of the Corporation during the absence or disability of the President thereof or in the event of a vacancy in such office.

(h) No director, officer, attorney, agent, or employee of the Corporation shall in any manner, directly or indirectly, participate in the deliberation upon or the determination of any question affecting his personal interests, or the interests of any government, corporation, partnership, or association in which he is directly or indirectly personally interested.

(i) The President may also appoint an advisory com-

mittee to the Board, composed of individuals drawn from private and public life outside of the United States, who need not be citizens or residents of the United States.

TRANSFER OF PEACE BY INVESTMENT CORPORATION TO PRIVATE OWNERSHIP AND MANAGEMENT

SEC. 6. (a) When the class A stock of the Corporation has been retired in full within the period of six years or less provided in section 4(d) of this Act, the Board shall transmit to the President of the United States, for submission to the Congress, recommendations for such legislation as may be necessary to provide for the orderly transition of the Corporation from an agency of the United States to a corporation under private ownership and management, including (1) appropriate provision for transfer to the owners of the outstanding class B stock of the Corporation the assets and liabilities of the Corporation, (2) appropriate provision for vesting in such owners of class B stock the exclusive voting power of the Corporation originally vested in the owners of class A stock, with each owner of class B stock being thereupon entitled to one vote per share, and (3) such additional provisions as may be necessary to protect any outstanding investments in the Corporation by the United States: *Provided*, That the Secretary of the Treasury, with the approval of the President, may defer submission to the Congress for the purpose of the transition pursuant

to this section if he finds that an insufficient portion of the obligations purchased by the Secretary of the Treasury pursuant to section 4 (c) of this Act have been retired to justify the transfer of the Corporation from public to private ownership and management.

(b) In connection with such transfer, a complete and final accounting shall be made by the Corporation and the Government, at which time the Government shall receive reasonable compensation for all Government services rendered the Corporation.

GENERAL CORPORATE POWERS AND DUTIES

SEC. 7. (a) For the purpose of carrying out its functions under this Act the Corporation shall have succession in its corporate name; may adopt and use a corporate seal, which shall be judicially noticed; may sue and be sued in its corporate name; may adopt, amend, and repeal bylaws, rules, and regulations governing the manner in which its business may be conducted and the powers vested in it may be exercised; may make and carry out such contracts and agreements as are necessary and advisable in the conduct of its business, and may purchase, discount, rediscount, sell, and negotiate (with or without its endorsement or guarantee) and guarantee notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers, and other evidences of indebtedness in carrying out

its functions under this Act; may appoint and fix the compensation of such officers and employees as may be necessary for the conduct of its business, without regard to the civil service laws or the Classification Act of 1949, define their authority and duties, delegate to them such powers vested in the Corporation as may be necessary, require bonds of such of them as may be desirable, and fix the penalties and pay the premiums of such bonds; may assign or sell at public or private sale, or otherwise dispose of for cash or credit, upon such terms and conditions as shall be determined reasonable, any evidence of debt, contract, claim, personal property, or security held by the Corporation in connection with the payment of loans or other obligations, and collect or compromise all obligations held by the Corporation; may set up or engage such subsidiary agencies in the United States or in underdeveloped countries as will facilitate the business of the Corporation and may enable such subsidiary agencies to sell class B stock or to sell their own stock for the purpose of buying class B stock; may acquire by purchase, lease, or donations such real property or any interest therein, and may sell, lease, or otherwise dispose of such real property, as may be necessary for the conduct of its business; shall determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid,

subject to the provisions of this Act, and provisions of law specifically applicable to Government corporations; may pay dividends on class B stock out of profits or other earnings; shall be entitled to the use of the United States mails in the same manner and upon the same conditions as may be applicable to the executive departments of the United States Government until such time as it ceases to be an agency of the United States; and shall be subject to Federal taxation from the time that it ceases to be an agency of the United States. The foregoing enumeration of powers shall not be deemed to exclude other lawful powers necessary to the purposes of the Corporation.

(b) Notwithstanding the provisions of section 955 of title 18, United States Code, any person, including any individual, partnership, corporation, or association, may upon proper authorization act for or participate with the Corporation in any operation or transaction engaged in by the Corporation.

(c) Section 101 of the Government Corporation Control Act, as amended (31 U.S.C. 846), is amended by inserting after "Saint Lawrence Seaway Development Corporation" the words "World Development Corporation".

PENAL PROVISIONS

SEC. 8. (a) All general penal statutes relating to the larceny, embezzlement, or conversion of public moneys or

property of the United States shall apply to the moneys and property of the Corporation.

(b) Any person who, with intent to defraud the Corporation, or to deceive any director, officer, or employee of the Corporation or any officer or employee of the United States, makes false entry in any book of the Corporation, or makes false report or statement for the Corporation, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both.

(c) Any person who shall receive any compensation, rebate, or reward, or shall enter into any conspiracy, collusion, or agreement, express or implied, with intent to defraud the Corporation or wrongfully and unlawfully to defeat its purposes, shall, on conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both.

REPORTS AND STUDIES

SEC. 9. The Corporation shall submit to the President for transmission to the Congress at the beginning of each regular session, a complete and detailed annual report of its operations under this Act.

SEC. 10. The Corporation, immediately upon its establishment, shall commence studies of additional measures, including tax measures, which would further promote the flow of private capital from the United States to under-

developed areas of the world and be consistent with the economic and financial policies of the United States. Such studies shall be amplified in the light of the experience of the Corporation. As soon as practicable, and not later than three years after the establishment of the Corporation, it shall prepare for transmission to the Congress the initial results of such studies, including legislative recommendations.

CITATION

SEC. 11. This Act may be cited as the "Peace by Investment Corporation Act of ".

87TH CONGRESS
1ST SESSION

S. 1965

A BILL

To establish a Peace by Investment Corporation, and for other related purposes.

By Mr. JAVITS, Mr. BEALL, Mr. HARTKE, and Mr. SMATHERS

MAY 25, 1961

Read twice and referred to the Committee on Foreign Relations