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by A. Broches

(Translation from the original in Dutch)

Five years have now elapsed since the International Bank for Reconstruction and Development -- known also as the World Bank -- commenced operations. During those years the Bank has granted over 40 loans for projects and programs in 22 countries. Expressed in guilders, those loans total in excess of 4 billion guilders.

I assume that most of you have heard of the World Bank. It might be useful, though, to give you a brief sketch of its principal characteristics. In the first place: the Bank's task is to promote the economic reconstruction and the economic development of the territories of its members. Second: the Bank accomplishes this task by assisting its members by word and deed, both literally and figuratively. I am referring to technical assistance on the one hand and to financial assistance on the other. The financial assistance which the Bank has extended has attracted most of the attention, as is indeed understandable. When, as a result of the Bank's loans, the Colombian farmers are able to purchase more agricultural machinery, when in India large power installations are being constructed, when in South Africa railroad equipment is being renewed and, to stick to our own country, a large number of merchant ships are purchased, then those are immediately visible results of the activities of the Bank. No less important, however, is the assistance which the Bank extends in the form of information and advice to its members. Thus, the Bank has sent missions to

to a number of countries, including Colombia, Turkey and Iraq, to study the economic possibilities in those countries and to give practical suggestions for the planning of programs of economic development. Furthermore, the Bank has in numerous cases assisted its members with advice in connection with more concrete problems, such as for instance the establishment of financial institutions for economic development.

I am now coming to the third point. As its name indicates the Bank grants its financial assistance in the form of loans. The Bank does not make gifts. These loans must be repaid and the Bank only grants a loan after it has satisfied itself that the loan in question can be justified on economic grounds. Political loans -- like gifts -- are excluded.

This leads me to the last -- but certainly not least important -- point in this short summary of the Bank's characteristics: it performs its functions as an international organism. The Bank is an institution which belongs to the 49 governments which are its members. The President and the ~~remaining~~ other members of the management and staff are international officials who in carrying out their functions owe their duty only to the Bank, and are not responsible to any national authority. This international character of the Bank is of great importance, especially as regards its activity in connection with economic development. Action on an international basis has a better chance of success than national action in inducing economically underdeveloped countries to take internal measures which are necessary but politically unpalatable. One could hardly accuse

a cooperative international institution of imperialism or of economic exploitation. Finally, an international institution such as the Bank is a unique means of putting the combined resources of its members to work for the common goal.

As I have told you a few minutes ago, the Bank has until now granted loans totalling over four billion guilders, and I should like to use the time left at my disposal to explain how the Bank obtains the moneys necessary for its operations.

You might look at the Bank as a limited liability company with a capital subscribed to by its 49 members who are, therefore, its shareholders. The United States are the largest shareholder. The Netherlands are the seventh largest. The total capital amounts to more than 30 billion guilders equivalent. Only one fifth of this amount, however, is paid-up; the remaining eighty per cent are subject to call only when needed by the Bank to meet obligations arising out of the Bank's borrowings or guarantees.

The two principal sources of the funds which the Bank uses for making loans are in the first place, its own capital, and in the second place, moneys borrowed by the Bank.

One-tenth of the paid-up capital of the Bank has been paid in gold or dollars and nine-tenths have been paid in the currencies of the various members. This last part may only be loaned with the consent of the member concerned.

Originally only the United States had given this consent and to date the Bank's loans have mainly been made in dollars. Gradually, however, a growing need has arisen for loans in pounds, francs and other European currencies. One of the reasons for this development is that the members of the Bank are in a better position to repay loans in these currencies than dollar loans. At the same time, however, European productive capacity has increased very considerably so that European manufacturers now are in a position to furnish a large part of the installations and equipment needed for projects of economic development. It is therefore an encouraging fact that several European countries have given their consent to the Bank for the use of part or all of their currencies paid into the Bank's capital for loans.

Nevertheless the paid-up portion of the capital of the Bank is not sufficient to permit it to grant all the loans which it feels are justified. The Bank, therefore, supplements its resources by the issuance of its own bonds. To date the Bank has mainly addressed itself to the United States market in which $ 300,000,000 of bonds is now outstanding. One of those dollar issues of the Bank is also being traded, in the form of Netherlands certificates, on the Amsterdam Stock Exchange. A five million pound issue was issued in London in May of this year, while in the beginning of this month a public issue of 50 million Swiss francs was offered in Switzerland, after two issues totalling roughly 45 million Swiss francs had been privately placed in earlier years.

The unpaid portion of the Bank's capital is in effect a guarantee fund for those bonds. This portion amounts to approximately 25 billion guilders and the United States alone are liable for more than nine billion guilders on this account.

I have had to give you a good many figures in the foregoing. I thought it worth while, however, to give you some details of the Bank's financing in view of the fact that the measure in which the Bank is able to obtain funds for its operations ultimately determines the scope of the contribution which the World Bank can make towards raising the standard of living and real income in the territories of its members.

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CONFLICT AVOIDANCE IN INTERNATIONAL LOANS AND MONETARY AGREEMENTS*

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I

INTRODUCTION

Lenders have good reason to take an interest in avoiding the pitfalls set by the conflict of laws. Characteristically, the lender performs his part of the bargain at the outset, while the performance of the debtor is stretched over a long period; loans with terms of 20 to 25 years are no exception. Future changes in applicable law are, thus, more likely to affect the debtor's performance than the lender's, and history affords lenders ample ground for fearing that in times of economic stress, changes in applicable law will work for the relief of debtors.

When the lender advances funds across national, rather than state, boundaries, his concern with the subject of conflict of laws may be expected to be intensified. Fear of the unknown will give him a special interest in avoiding the application of the foreign law to such matters as negotiability, tender, payment, and usury. But international loans involve additional hazards of a kind not normally encountered in domestic contracts, hazards affecting the medium of payment itself. The risks of exchange restrictions, freezing orders, and currency devaluation haunt international lenders; it is one of their occupational characteristics to be suspicious of the actions of all governments in these fields and, at least in capital-exporting countries, to fear the actions of foreign governments more than those of their own.[1] There is, thus,

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[1] This attitude might, on occasion, prove to be a treacherous guide. The classic conflict problems under international loans arose out of gold clauses. A stipulation of American law by an American foreign lender in the twenties would have helped foreign courts to hold applicable the American Joint Resolution of June 5, 1933, 48 STAT. 112, 31 U. S. C. § 463 (1952), which invalidated gold clauses, and would, thus, have contributed to the frustration of the lender's objectives. See also notes 7 and 23, *infra*.

reason to expect that international lenders will not only insist on including stipulations of the applicable law in their contracts, but also on making their own law applicable in preference to other laws.

This article will examine whether this expectation is justified. It will describe the practice of leading markets in regard to stipulations of applicable law in international loans; monetary agreements will be mentioned in passing. It is hoped that this survey will contribute to an understanding of the variety of considerations which international lenders and their counsel have to take into account in dealing with problems of avoiding the conflict of laws.

Descriptions of practice must be put in general terms, and this description does not purport to be complete in scope or detail. What has been attempted is the delineation of trends, to which there are doubtless many exceptions. Little descriptive literature has been found, and the authors have had to rely on their own experience, on examination of such loan agreements and prospectuses as they have been able to find, and upon information supplied by a number of eminent lawyers and financiers who have been good enough to give the authors the benefit of their own first-hand experience.[2]

At the outset, it should be mentioned that the effectiveness of stipulations of applicable law is subject to important limitations, and an awareness of these is necessary for an understanding of current practices.[3] The most important of these limitations is the doctrine that a stipulation of applicable law will not be given effect if the law chosen is found to be inconsistent with the public policy of the forum. This well-known doctrine drastically limits freedom of action and has often prevented enforcement of contracts in accordance with their terms. Another significant limiting factor is of a practical rather than of a juridical nature. A choice by express stipulation of the law of a particular country may turn out to be futile as a practical matter if the contract cannot be enforced in that country. The field of international loans offers many examples of cases where such enforcement is impossible either because the debtor is immune by law (*e.g.*, in loans to foreign governments) or because the debtor cannot be reached by process in the jurisdiction or has no assets which can be reached.

One further preliminary point should be mentioned. There is no likelihood of

[2] Information has been supplied particularly from the United States, the United Kingdom, Canada, France, Switzerland, and the Netherlands. For reasons of professional confidence, it has not been possible in every case to cite documentary materials by name.

[3] Such interesting questions as whether there are legal obstacles to stipulating the law of a country which has no contact with the transaction involved or to stipulating against future changes of the proper law (see, *e.g.*, HERBERT F. GOODRICH, CONFLICT OF LAWS 326 *et seq.* (3d ed. 1949); F. A. MANN, THE LEGAL ASPECT OF MONEY 266 (2d ed. 1953); and Delaume, *L'Autonomie de la Volonté en Droit International Privé*, in 39 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [hereinafter REV.] 321, 336-37 (France 1950)) appear to have little practical application in the field of international loans and monetary agreements. For an attempt to deal with future changes of law, see the provision found in art. VII, §11 of the Indenture of Oct. 1, 1925, between Rudolf Karstadt, A. G., a German company, and American bankers reading in part as follows: ". . . the company . . . hereby agrees to waive . . . the benefit and advantage of any valuation, stay, appraisement and extension law or laws now existing, or which may hereafter be passed either in Germany or in the United States of America. . . ."

any conflict of laws in respect of the capacity or authority of a governmental or corporate borrower to contract a debt or to issue securities. It is generally recognized that these matters are governed by the borrower's personal law—that is, by the law of the borrower itself, if it is a government, or by the law of the corporate domicile of the borrower.[4] There is, therefore, no real problem of avoiding conflicts of law on these matters, and international loans normally deal with them, if at all, not by formal stipulation, but by mere reference to the particular statute or other source of authority under which the borrower purports to act.[5]

There remains for discussion the problem of avoiding conflicts with respect to the validity,[6] interpretation, and performance of the loan contracts. These are the points on which lenders are apprehensive about the future and on which they try to protect themselves by stipulations of applicable law. Since the risks of conflicts, and the means available for meeting them, differ as between types of lenders and types of borrowers, a description of the practice can best proceed on the basis of a classification of international loans into four main categories, depending on the character, private or public, of lender and borrower, as follows:

a. loans by private lenders to private borrowers;
b. loans by private lenders to foreign governments and to international organizations;
c. loans by public lenders to private borrowers; and
d. loans by public lenders to foreign governments and to international organizations.[7]

[4] In Goodman v. Deutsch-Atlantische T. Gesellschaft, 166 Misc. 509, 2 N. Y. S. 2d 80 (Sup. Ct. 1938), a deed of trust on properties of a German cable company securing bonds and coupons sold in New York provided that the obligations undertaken by the borrower were "covered" by German law, although the relations between the parties were generally "governed" by the law of New York. It was held that the reference to German law was limited to such matters as corporate action and authority to enter into the deed of trust and that all other matters were governed by the law of New York. On this problem generally, see REPORT OF THE COMMITTEE FOR THE STUDY OF INTERNATIONAL LOANS [hereinafter L. N. REPORT] (League of Nations Pub. No. C 145, M 93, 1939, II.A, §73).

[5] See, *e.g.*, the following prospectuses concerning bonds issued in the United States: French Mail Steamship Lines 7% External Sinking Fund Gold Bonds of 1924; City of Milan 6½% External Sinking Fund Bonds of 1927; City of Oslo 4½% External Sinking Fund Bonds of 1936. With respect to bonds issued in the Netherlands and Switzerland, see the prospectus for the Emprunt Extérieur de la Ville de Paris 5% of 1932. It is also frequently stipulated in trust indentures, underwriting agreements, and direct loan contracts that the borrower represents that it has taken all the corporate or legislative action required to make its obligations valid and binding upon it.

[6] What is referred to here is the "essential validity" of the contract, as that term is often used, as opposed to the formalities of execution and issue.

[7] This classification, which has been purposely oversimplified for convenience of discussion, omits loans to political subdivisions, government-owned corporations, and autonomous public institutions, bodies, and authorities. These entities differ strikingly in legal status. On the one extreme are territorial governments enjoying a large measure of independence. On the other are entities which, although government-owned, have essentially the legal status of private corporations. Between these two extremes, there is a whole range of institutions possessing governmental attributes in greater or lesser degree. In many instances, their status is not entirely clear under their own law; and foreign jurisdictions will not necessarily adopt the domestic view. An examination of these questions would go beyond the scope of this article. In any event, we believe that the oversimplified classification which we have adopted permits an adequate discussion of the practice.

II

LOANS BY PRIVATE LENDERS TO PRIVATE BORROWERS

The normal transaction in this category is one in which there would be no difficulty in deciding the applicable law by usual and generally recognized principles of the conflict of laws. Whether the transaction takes the form of a loan agreement or a bond issue, the arrangements are usually such as to make the law of the lender's country applicable. The lender's country is usually the place where documents are signed and delivered, where funds are received by the borrower and are to be repaid. The language of that country is usually used, and its fashions in draftsmanship observed. Where a trustee or a bondholders' agent is appointed, it will normally be a national and resident of the lender's country, and the same is true of fiscal agents, paying agents, and registrars. The regulatory requirements of the lender's country, such as registration and listing, will have been complied with. Thus, there is usually every reason to assume that the law of that country will be recognized as governing questions of validity, interpretation, and performance.[8]

It is, therefore, interesting that lenders in the principal financial markets consistently include stipulations of applicable law in their loan agreements with private foreign borrowers and in bonds issued in those markets by private foreign issuers; and that the law designated by stipulation is usually the law of the lender's country or state,[9] which would presumably be applicable even in the absence of a

[8] The following cases, for example, relied on all or most of these factors in holding the law of the lender applicable: Guaranty Trust Co. of New York v. Henwood, 307 U. S. 247 (1939); Bethlehem Steel Co. v. Zurich Central Accident and Liability Insurance Co., and Bethlehem Steel Co. v. Anglo-Continentale Treuhand A. G., 307 U. S. 265 (1939); Hartman v. United States, 65 F. Supp. 397 (Ct. Cl. 1946); Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland, 269 N. Y. 24, 198 N. E. 617 (1935); Trésor Public et Soc. Royal Bank of Canada v. Schumann, Court of Appeal of Paris, May 16, 1951, [1952] Juris-Classeur Periodique [also called La Semaine Juridique, hereinafter J. C. P.] II. 6887; Aachener Kreissparkasse v. Giroverband, Supreme Court of Germany, May 28, 1936, 63 JOURNAL DU DROIT INTERNATIONAL [hereinafter CLUNET] 951 (France 1936); Minerva Ins. Co. v. The Norwegian Government, Supreme Court of Norway, Dec. 8, 1937, 38 BULLETIN DE L'INSTITUT JURIDIQUE INTERNATIONAL [hereinafter B. I. J. I.] 71 (France 1938); Skandia v. National Debt Office, Supreme Court of Sweden, Jan. 30, 1937, 36 B. I. J. I. 327 (France 1937); Amsterdam Stock Exchange Committee v. Ministry of Finance (as translated in German), Supreme Court of Denmark, Jan. 30, 1939, 13 ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT 825 (Germany 1942); Rotterdam Gold Bonds Case, Supreme Court of the Netherlands, Feb. 11, 1938, ANN. DIG. PUB. INT'L L. CASES [hereinafter ANN. DIG.] 1919-42, 26 (1947); Rex v. International Trustee for the Protection of Bondholders A. G., [1937] A. C. 500; British and French Trust Corp. v. New Brunswick Ry. Co., [1937] 4 All E. R. 516, *aff'd on other grounds*, [1939] A. C. 1. *But see* Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Co., [1938] A. C. 224. See also, Vienna Loan of 1902 Case, German Supreme Court, Nov. 14, 1929, 126 Entscheidungen des Reichsgerichts in Zivilsachen [hereinafter R. G. Z.] 196.

[9] Where the loan is secured by a mortgage or similar charge on property located outside the lender's country, it is usual to provide, for obvious reasons, that the security arrangement is to be governed by the law of the situs of the property. See, for example, the following provision (§20.07) of an Indenture, dated Feb. 2, 1950, between Mexican Light and Power Co., Ltd., a Canadian corporation, and National Trust Co., Ltd., of Toronto, as Trustee, which provides as follows:

> "This Indenture and the Bonds and coupons shall be construed in accordance with the laws of the Province of Ontario, Canada, and the laws of Canada applicable therein, and shall be treated in all respects as Ontario contracts, save in respect of the security created or to be created hereby or pursuant hereto upon the immovable properties of the Company and its subsidiaries in

stipulation. Bankers and their legal advisers seem to believe that a contractual choice of law can add something to the protection afforded by the rules of the conflict of laws, even in this relatively well-explored area. The authorities indicate that effect will normally be given to such stipulations[10] subject, of course, to considerations of public policy.[11]

Only one of the leading financial markets, France, does not appear to follow the general practice in this regard. That exception can probably be explained by the unique French doctrine of "international transactions," under which effect is given to the intention of the parties, as expressed in monetary clauses in international transactions, without regard to the principles of the conflict of laws normally applied by French courts in other types of cases.[12]

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the United Mexican States and the receipt of income therefrom, which shall be governed by the laws of that country."

Another interesting provision (art. XX) is found in the Form of Obligation issued by the Liquidation of United Steel Works Corp. (Vereinigte Stahlwerke Aktiengesellschaft) pursuant to a Declaration and an Agreement of Deposit, dated Jan. 1, 1953:

"Except as herein otherwise provided, this Obligation and the rights of the Obligees hereunder shall for all purposes be governed by the laws of the State of New York, United States of America, and shall be construed and enforced in accordance with such laws; provided, that this provision is without prejudice to any mandatory provision of German law applicable either (a) to the creation of mortgages or the foreclosure thereof or other proceedings relative to real estate or fixed property or (b) to any proceedings which may be brought or instituted by the Obligees or either of them in Germany for the enforcement of this Obligation or any one or more of the provisions, covenants or agreements herein contained."

Cf. the following provision of a trust deed between an Austrian corporation and an English company which provides, in part, as follows:

"This Deed and the Bonds shall be construed and have effect as instruments made in England and in accordance with the Laws of England and the [Borrower] hereby submits to the jurisdiction of the High Court of Justice in England as regards all matters and questions arising hereunder or under the Bonds. . . . Provided always that nothing in this clause contained shall hinder or prevent the Trustees from taking proceedings in the Courts of Austria or other countries where the mortgaged premises are situated and from exercising all rights and powers under the Laws for the time being in force in Austria or other countries where the mortgaged premises are situated which they would have been entitled to take or exercise if this clause had not been inserted."

For a rarer exception to the statement in the text, but one which is, nevertheless, useful as illustrating the dangers of generalization in this field, see §14 of the terms and conditions of the bonds in the Prospectus for the 1954 loan issued in Switzerland by International Standard Electric Corp., a New York corporation, where the New York law (the borrower's law) was designated as applicable. Another exception is found in the recent English case, *In re* Helbert Wagg, [1956] 221 L. T. 24, in which the German law of the borrower rather than the English law of the lender was stipulated to be applicable.

[10] See, *e.g.*, Société Antwerpia v. Ville d'Anvers, Supreme Court of Belgium, Feb. 24, 1938, REV. 661 (1938), 66 CLUNET 413 (France 1939); Ver. voor den Effectenhandel v. Bataafsche Petroleum Mij., Supreme Court of the Netherlands, March 13, 1936, Nederlandsche Jurisprudentie No. 281 (1936), 31 REV. 733 (France 1936), 36 B. I. J. I. 315 (France 1936); Amsterdam Stock Exchange Committee v. Government of Finland, Helsingfors City Court, Dec. 23, 1937, 38 B. I. J. I. 280 (France 1938); Rheinisch-Westfaelische Elektrizitaetswerk A.G. v. Anglo-Continentale Treuhand, Swiss Federal Tribunal, July 7, 1942, [1942] Recueil Officiel [hereinafter R. O.] 68. II. 203, 73-76 CLUNET 208 (France 1946-49).

[11] See Bethlehem Steel Co. v. Zurich General Accident and Liability Ins. Co., 307 U. S. 265 (1939). In several cases, public policy has been invoked to deny enforcement of foreign laws abrogating gold clauses. See, *e.g.*, Aachener Kreissparkasse v. Giroverband, Supreme Court of Germany, May 28, 1936, 63 CLUNET 951 (France 1936); Royal Dutch Loan, Supreme Court of the Netherlands, May 13, 1936, 36 B. I. J. I. 304 (France 1936); and Messageries Maritimes Debentures Case Supreme Court of the Netherlands, April 28, 1939, ANN. DIG. 1919-42, 28 (1947).

[12] See, *e.g.*, Etat Français v. Comité de la Bourse d' Amsterdam, Cour de cassation (Ch. civ., sect. civ.), Jan. 21, 1950, [1951] Sirey Jurisprudence 1.1, 39 REV. 609 (France 1950), [1951] Dalloz Juris-

Even where the practice is to stipulate the applicable law, there is diversity in the forms of stipulation actually employed. Despite this diversity, most clauses found in loan agreements and bond issues are precisely drafted and indicate clearly the matters which the parties intend shall be governed by the designated law. A typical American example is as follows:[13]

This Indenture, the Guarantee Agreement, the Debentures issued hereunder and the coupons appertaining thereto and the guarantee endorsed thereon, and all rights arising under any of the same shall be construed and determined in accordance with the laws of [*e.g.*, New York], and the performance of each thereof shall be governed and enforced according to such law.

Comparable clauses can be found in loans negotiated in other markets. For example, the following provision is found in bonds issued in the Netherlands:[14]

This Agreement and all rights and obligations arising thereunder shall be governed by Dutch law. (as translated)

and this in bonds issued in Switzerland:[15]

The loan contract provides that all the rights and obligations of the parties thereto shall, in all respects, be governed by Swiss law. (as translated)

and this in a British trust deed:[16]

The meaning and construction of this Deed and the rights and duties of the parties hereunder shall be determined in accordance with English law.

Not all forms of stipulation are so specific. A common type of clause provides that the loan agreement or the bonds "shall be deemed to be a contract made under the laws of [*e.g.*, the State of New York] and for all purposes, shall be construed in accordance with the laws of [said State],"[17] or "shall be construed and determined

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prudence 749. On this doctrine, see, *e.g.*, among recent publications, ARTHUR NUSSBAUM, MONEY IN THE LAW 267 *et seq.* (2d ed. 1950); HENRI BATIFFOL, TRAITÉ ELEMENTAIRE DE DROIT INTERNATIONAL PRIVÉ 675 (2d ed. 1955); Delaume, *supra* note 3, at 335-37; Lerebours-Pigeonnière, *A Propos du Contrat International*, 78 CLUNET 4 (France 1951).

[13] Bataafsche Petroleum Company Loan 4½% of 1927 (this provision was given effect by the Supreme Court of the Netherlands in the case of Ver. voor den Effectenhandel v. Bataafsche Petroleum Mij., *supra* note 10). See also Rudolph Karstadt A. G., First Mortage 7% Sinking Fund Gold Bonds, 1925 (Indenture, art. XIII, §14, incorporated by reference into the bonds); Rheinelbe Union twenty-year 7% Sinking Fund Mortgage Gold Bonds, 1926; and Banco Nacional (Panama), Guaranteed Sinking Fund 6½% Twenty-year Gold Bonds, Series A 1926 (Indenture, art. XI, §7, incorporated by reference into the bonds).

[14] Naphtachimie, S. A. Paris, 4¼% loan of 1955. See also Compagnie Internationale des Wagons-Lits 4% loan of 1955; and Anglo-American Rhodesian Development Co., Ltd., 4½% loan of 1955.

[15] West Rand Investment Trust, Ltd., Johannesburg, 4½% loan of 1954. See also Compagnie Financière Belge des Pétroles External Loan 4% of 1954; and Istituto Mobiliare Italiano External Loan 4½% of 1955.

[16] Trust Deed between a South African company and an English company.

[17] See, *e.g.*, Trust Indenture, dated October 1, 1948, between the Rio de Janeiro Tramway, Light and Power Co., Ltd., and National Trust Co., Ltd. (art. XIV, §14.05, Law of the Province of Ontario); Indenture between Aluminium Co. of Canada, Ltd., and Aluminium, Ltd., on the one part, and, on the other, Montreal Trust Co. and Hanover Bank, dated May 1, 1952 (art. XIII, §13.04, Law of New York).

in accordance with the laws of [*e.g.*, the State of New York]."[18] Presumably, these provisions are intended to cover both matters of validity and of construction. They may be intended to cover matters of performance as well, but it cannot be said that they would inevitably be so understood.

The case of *British and French Trust Corp. v. New Brunswick Ry Co.*,[19] though not involving a stipulation of law, gives grounds for being cautious on the point. This was a suit by a bondholder in an English court to enforce a gold value clause contained in sterling bonds issued by a Canadian corporation and payable either in England or Canada at the option of the holder. The House of Lords recognized Canadian law to be the "proper law" of the contract but, nevertheless, held that English law, and not Canadian law, applied to the part of the performance that was to be rendered in England and enforced the gold clause notwithstanding a Canadian statutory abrogation of gold clauses.

The fact that stipulations of law may sometimes, because of express limitations of scope or ambiguous language, be inadequate to avoid all conflict-of-laws issues does not necessarily mean that the limitation or ambiguity reflects either the preference of the lender or a lack of skill on the part of the draftsman. Although bankers and their legal advisers generally prefer to include precise stipulations of applicable law in their loan documents, they will not always insist on them in the face of determined resistance by borrowers. The limited or ambiguous provisions that are sometimes found may be explainable as drafting compromises of the kind with which all lawyers are familiar.

Exchange Contracts between Private Parties

The term "monetary agreements" is generally understood to refer to payments agreements, clearing agreements, and similar types of agreement normally entered into between governments. They need not, therefore, be discussed in the category of private lending. However, the term may also be used to cover exchange contracts, particularly arrangements for the present or future sale of one currency against another, which frequently are entered into by private parties. Since exchange contracts and their enforcement have received special treatment in an international agreement, the Articles of Agreement of the International Monetary Fund, some mention must be made of them in relation to the problem of avoiding conflicts of law in the monetary field.

Article VIII, section 2(b), of the Articles of Agreement of the International Monetary Fund provides as follows:

[18] Loan Agreement of February 8, 1945, between The Chase National Bank of the City of New York and the Kingdom of the Netherlands, §9, para. 9.2. *Cf.* an even more limited provision in an Indenture, dated March 1, 1926, relating to the Roman Catholic Church in Bavaria, 25 year Sinking Fund Gold Bonds, Ser. A, art. X, § 3: "This indenture is written in the English language and shall be executed and delivered in the City of New York, State of New York, United States of America."

[19] [1937] 4 All E. R. 516, *aff'd on other grounds*, [1939] A. C. 1. For a critical appraisal of this and related cases, see MANN, *op. cit. supra* note 3, at 264; and NUSSBAUM, *op. cit. supra* note 12, at 420 *et seq.*

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.

This remarkable provision has been officially interpreted by the Executive Directors of the Fund in a decision which states in part as follows:[20]

An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (*ordre public*) of the forum, refuse recognition of the exchange control regulations of the other members which are maintained or imposed consistently with the Fund Agreement.

A discussion of the scope and effect of this provision of the Fund Agreement would carry us beyond the bounds of this article.[21] It is sufficient to note that the provision is, in effect, a stipulation by international agreement that the public policy of the forum shall not override the applicable municipal law, whatever it may be, in a proceeding to enforce an exchange contract. Whatever its scope and effect, it represents an unusual method of avoiding conflicts of law.

III

LOANS BY PRIVATE LENDERS TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

The view has sometimes been advanced that loans by private lenders to foreign governments, as distinguished from loans to private borrowers, are outside the scope of the conflict of laws. It has been suggested that, because of the disparity of status between the parties, such loans should be governed by public international law rather than municipal law.[22] This view has, however, received little support from the courts. Decisions of national tribunals[23] and international tribunals[24] support the application of municipal rather than public international law in this field.

[20] Fund Circular No. 8 (March 15, 1950).

[21] See, *e.g.*, NUSSBAUM, *op. cit. supra* note 12, at 525 *et seq.*; MANN, *op. cit. supra* note 3, at 378 *et seq.*; Meyer, *Recognition of Exchange Controls after the International Monetary Fund Agreement*, 62 YALE L. J. 867 (1953); Gold, *The Fund Agreement in the Courts (I)*, 1 IMF STAFF PAPERS 315 (1951), *(II)*, 2 *id.* at 482 (1952), *(III)*, 3 *id.* at 290 (1953), *The Interpretation by the International Monetary Fund of Its Articles of Agreement*, 3 INT'L & COMP. L. Q. 256 (1954), *Article VIII, Section 2(b) of the Fund Agreement and the Unenforceability of Certain Exchange Contracts: A Note*, 4 IMF STAFF PAPERS 330 (1955); Delaume, *De l'Elimination des Conflits de Lois en Matière Monétaire Réalisée par les Statuts du Fonds Monétaire International et de ses Limites*, 81 CLUNET 332 (France 1954) (with an English translation by the editor); Lachman, *The Articles of Agreement of the International Monetary Fund and the Unenforceability of Certain Exchange Contracts*, in NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 148 (1955); Aufricht, *Das Abkommen des Internationalen Waehrungsfonds und die Unerzwingbarkeit bestimmter Vertraege*, in ZEITSCHRIFT FUER OEFFENTLICHES RECHT 529 (Oesterr ed. 1955).

[22] For references, see 1 E. BORCHARD, STATE INSOLVENCY AND FOREIGN BONDHOLDERS 4 *et seq.*, 64 *et seq.* (1951). See also Schmitthoff, *The International Government Loan*, 19 J. COMP. LEG. & INT'L L. (3d ser.) 179 (1937).

[23] See, *e.g.*, Legal Opinion given by the Supreme Court of Austria, Nov. 26, 1935, in the case of the Austrian Government Loans (League of Nations Loans) of 1923 and 1930, 31 REV. 717 (France 1936),

The Permanent Court of International Justice, in the *Serbian and Brazilian Loan* cases,[25] seems to assume that a special rule of the conflict of laws should be applied in respect of private loans to foreign governments. In these two cases, the debtor governments had issued bonds in France, payable in term of gold francs. The governments contended that French law had been intended to apply, and that under French law, gold clauses had become unenforceable. Consequently, the governments argued that they could discharge their obligations by paying depreciated francs without regard to the gold clause in the bonds. The court rejected this argument in both cases on the ground that, in the absence of express provision to the contrary, it is to be presumed that a sovereign state intends to contract under its own law. Since there was no such express statement, the court held the laws of Serbia and Brazil applicable and both governments bound by the gold clauses in the bonds.[26]

Most national tribunals have refused to follow the *Serbian and Brazilian Loans* cases. In a number of cases arising during the thirties, laws other than those of borrowing governments, and particularly laws of places of issue, have been held applicable by national courts on the basis of the same considerations that would be given weight in cases of loans to private borrowers. For example, in the leading British case, *Rex v. International Trustee for the Protection of Bondholders A.G.*, the House of Lords held that dollar bonds issued in New York by the British Government were subject to the American Joint Resolution of June 5, 1933, and that the gold clause in the bonds was, therefore, unenforceable.[27]

Nevertheless, a decision by the Permanent Court of International Justice is not to be disregarded, and a presumption of the kind suggested in the *Serbian and*

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and judgment of the same court in the same case, July 10, 1936, 64 CLUNET 333 (France 1937); Amsterdam Stock Exchange Committee v. Ministry of Finance (as translated in German), Supreme Court of Denmark, Jan. 30, 1939, 13 ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT 825 (Germany 1942); Amsterdam Stock Exchange Committee v. Government of Finland, Helsingfors City Court, Dec. 30, 1937, 38 B. I. J. I. 280 (France 1938); Minerva Ins. Co. v. Norwegian Government, Supreme Court of Norway, Dec. 8, 1937, 38 B. I. J. I. 71 (France 1938); Skandia v. National Debt Office, Supreme Court of Sweden, Jan. 30, 1937, 36 B. I. J. I. 327 (France 1937); Rex v. International Trustee for the Protection of Bondholders, A. G., [1937] A. C. 500. A French case, decided on jurisdictional grounds only, seems to adopt the same view, Trésor Français v. Hébert, Court of Appeal of Paris, July 20, 1938, 66 CLUNET 104 (France 1939), a view consistent with that prevailing in respect to governmental transactions other than loans. Carathéodory v. Etat Français, French Supreme Court, May 31, 1932, 60 CLUNET 347 (France 1933).

[24] Serbian and Brazilian Loans Cases, P. C. I. J., Ser. A, Nos. 21 and 22 (1929); Tilley v. Bengelloum-Maspero, Mixed Tribunal of Tangiers (App. Div.), May 18, 1935, 31 REV. 131 (France 1936).

[25] *Supra* note 24.

[26] The Court said, Ser. A. No. 20, at 42, No. 21, at 121: "A sovereign state . . . cannot be presumed to have made the substance of its debt and the validity of the obligations accepted by it in respect thereof, subject to any law other than its own." This view also prevailed in certain cases decided by domestic courts. However, it is significant that, in each of these cases, there were other factors supporting the application of the law of the debtor government which, in fact, coincided either with the *lex loci contractus,* Hartmann v. United States, 65 F. Supp. 397 (Ct. Cl. 1946), or the *lex loci solutionis, ibid.,* or the monetary system presumptively intended by the parties, Bonython v. The Commonwealth of Australia, [1951] A. C. 201, or the law governing the principal contract guaranteed by the debtor government. Trésor Public et Soc. Royal Bank of Canada v. Schumann, Court of Appeal of Paris, May 16, 1951, [1952] J. C. P. II. 6887.

[27] [1937] A. C. 500. See also cases cited in note 26 *supra.*

Brazilian Loans cases would certainly cause international lenders to be apprehensive. One might, therefore, expect that in lending to foreign governments, bankers would be particularly desirous of establishing their own law as the law governing the contract. And, in fact, current practice in drafting loan agreements with foreign governments, under loans not involving public issues of bonds, seems to be in accordance with that expectation. Loan contracts of that type between bankers and foreign governments consistently include provisions stipulating that the law of the lender's country shall govern.[28]

Surprisingly enough, however, the practice in bond issues seems to be quite different. Recent issues by foreign governments in the markets of the United States, Canada, the Netherlands, and the United Kingdom contain no stipulations of applicable law.[29] The same is true, except in the Netherlands, of the bond issues floated in those markets by the International Bank for Reconstruction and Development.[30]

The omission of such stipulations is probably not due to any intention on the part of bankers and their legal advisers to distinguish between privately placed loans, on the one hand, and publicly offered bond issues, on the other. A more plausible explanation can perhaps be found in governmental reluctance, presumably based on considerations of prestige rather than of substance, to agree to submit to the laws of another government—a reluctance which may well be stronger in regard to documents that are to be widely published, as in a bond issue, than in regard to those which are to be seen only by a few lending institutions.

So far as the motivations of the lenders are concerned, there is reason to believe that they are governed by two principal considerations in acceding to the desires of governments. In the first place, lenders appear to believe that, notwithstanding the suggestion of the Permanent Court of International Justice, the law of the place of issue will be held applicable because so many of the circumstances of the issue (place of issue, place of payment, medium of payment, nationality and residence of fiscal agents, paying agents and registrars, compliance with local regulatory requirements, etc.) call for the application of that law. Of more importance, probably, is the circumstance that in most of these cases, invocation by the borrowing

[28] See, *e.g.*, Loan Agreement, dated Oct. 31, 1949, between The Chase National Bank of the City of New York and the Republic of France, § 10, para. 10.3; similar stipulations are also, according to the writers' information, found in loans negotiated in other financial centers. For an earlier example, see, Loan Contract between the Republic of Nicaragua and Brown Brothers & Co., etc., dated Oct. 8, 1913, art. XV, reprinted in ROBERT W. DUNN, AMERICAN FOREIGN INVESTMENTS 378 (1926).

[29] For example, no conflict-of-laws provision is found in bonds issued in New York by the Kingdom of the Netherlands, the Italian Republic, and the Kingdom of Norway in 1947, the State of Israel in 1950, the Kingdom of Belgium in 1954, and the Union of South Africa in 1955; or in bonds issued in Canada by the Commonwealth of Australia in 1955; or in bonds issued in the Netherlands by the Union of South Africa and the Kingdom of Belgium in 1955; or in bonds issued in England by the Commonwealth of Australia in 1948-1949.

[30] See, *e.g.*, the following IBRD bond issues: in the United States, 3½% Ten Year Bonds of 1955; in the United Kingdom, 3½% Twenty Year Stock of 1954; and in Canada, 3¼% Ten Year Bonds of 1955. See, however, for the Netherlands, 3½% Twenty Year Bonds of 1955.

government of the doctrine of sovereign immunity would prevent any enforcement in the courts of the lender's country. Lenders, for the most part, do not regard a right to sue in the courts of the borrowing country as a satisfactory remedy. In some countries, and particularly in the United States, they, therefore, tend to feel that the conflict-of-laws problem is overshadowed by the problem of sovereign immunity, which would make any stipulation of applicable law ineffective for practical purposes.

The same reasons presumably explain why, in the cases where stipulations of the lender's law have been included in loans to governments, the form of stipulation employed is sometimes limited in scope or ambiguous. For instance, the provision may consist of nothing more than that the contract or the bonds shall be "construed" in accordance with the law of the place of making or the place of issue,[31] or that "the English text shall prevail."[32]

The practice of the Swiss market is exceptional and may shed some light on the considerations underlying the practice in other markets. Bond issues by foreign governments in the Swiss market generally include a stipulation that the Swiss law shall govern. This stipulation, however, is accompanied by a provision for acceptance of process in Switzerland and submission to Swiss courts.[33] Under Swiss law, such a waiver of immunity by a foreign government is considered irrevocable and enforceable,[34] and the stipulation of Swiss law, thus, rests on a solid legal foundation and has obvious practical significance.

Some European countries, like France,[35] have adopted the same view on govern-

[31] See, *e.g.*, in the case of loans, Loan Contract between the Republic of El Salvador and Minor C. Keith, dated June 24, 1922, art. XXIII (h), reprinted in DUNN, *op. cit. supra* note 28, at 247: "This Contract shall be construed in accordance with the laws of the State of New York, United States of America." See also, in the case of bond issues, Argentine Republic Sinking Fund External Conversion Loan 4% Bonds of 1937, due in 1972, containing the same clause as in the loan just cited. There is no doubt that similar examples could be found in loans to private foreign borrowers.

[32] See, *e.g.*, German External Loan 1924 (The Dawes Loan); The German International 5½% Loan (The Young Loan). As to the construction of the latter loan documents and the slight weight attached to the quoted provision by the Swiss Federal Tribunal, see Aktiebolaget Obligationsinteressenter v. The Bank for International Settlements, Swiss Federal Tribunal, May 26, 1936, [1936] R. O. 62 II. 140. See also the Austrian Government Guaranteed Loan 1923-1943; the Austrian Government International Loan 1930; The Loan Contract between the Republic of El Salvador and Minor C. Keith, dated June 24, 1922, art. XXIII (g), reprinted in DUNN, *op. cit. supra* note 28, at 247; "This contract shall be drawn up in the English and Spanish languages, but, in the interpretation of the same, the English text shall govern." The Indenture, dated March 1, 1926, of the Roman Catholic Church in Bavaria, *supra* note 18, art. X, § 1, contains a similar provision giving preference to the English over the German text of the Indenture.

[33] See, *e.g.*, Belgian Congo Guaranteed Loan 4% 1953 (Congo Belge Emprunt Garanti 4% 1953), Kingdom of Belgium External Loan 4% 1952 (Emprunt Extérieur du Royaume de Belgique 4% 1952), and Union of South Africa Loan 4% 1952 (Emprunt de l'Union sud-Africaine 4% 1952). See also IBRD 3½% Twenty Year Bonds of 1955.

[34] K.k. Oesterreichisches Finanzministerium v. Dreyfus, Swiss Federal Tribunal, March 13, 1918, [1918] R. O. 44 I. 49; Etat Yougoslave v. S. A. Sogerfin, Swiss Federal Tribunal, Oct. 7, 1938, [1939] J. C. P. II. 327 (1939). See also 1 P. GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 184 (1953).

[35] See, *e.g.*, Rochaid-Dahdah v. Gouvernement Tunisien, Tribunal Civil Seine, April 10, 1888, 15 CLUNET 670 (France 1888); Ben Aiad v. Bey de Tunis, Tribunal Civil Seine, June 30, 1891, 19 CLUNET 952 (France 1892). Both cases involved waivers of immunity in direct loan contracts between French bankers and the Tunisian Government. The same solution would presumably obtain in the case of governmental bonds, although no case has been found.

mental waivers of immunity. But in the United States, it is far from clear that such a waiver would be held irrevocable;[36] and in England, it appears to be settled that the waiver may be revoked by a foreign sovereign pleading immunity at the time of suit.[37]

Even where under prevailing practice bond issues contain no stipulation of applicable law, attempts are often made to protect by substantive provisions against particularly important risks that may arise under the law of the borrowing government. For example, it is quite common, in governmental as well as in private issues, to include covenants that payments shall be made free of taxes imposed by the laws of the borrower's country.[38] And in Switzerland where lenders are generally resentful of exchange controls and proof-of-ownership requirements, they often insist on elaborate covenants on these points.[39]

[36] See, *e.g.*, De Simone v. Transportes Maritimos de Estado, 199 App. Div. 602, 191 N. Y. S. 864, 867 (1st Dep't 1922) (dictum), *aff'd on rehearing*, 200 App. Div. 82, 192 N. Y. S. 815 (1st Dep't 1922); Lamont v. Travelers Ins. Co., 281 N. Y. 362, 370, 24 N. E. 2d 81 (1939) (dictum), *reversing* 254 App. Div. 511, 5 N. Y. S. 2d 295 (1st Dep't 1938); Fields v. Predionica I Tkanica A. D., 265 App. Div. 132, 37 N. Y. S. 2d 874, 883 (1st Dep't 1942) (dictum), *reversing* 35 N. Y. S. 2d 408 (Sup. Ct. 1942); United States of Mexico v. Schmuck, 293 N. Y. 264, 56 N. E. 2d 577 (1944). *But see* Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N. Y. S. 2d 825 (1st Dep't 1940). See also, *Harvard Draft Convention*, art. 8(c), 26 AM. J. INT'L L. SUPP. 451, 456 (1932). In Frazier v. Hanover Bank, 119 N. Y. S. 2d 319 (Sup. Ct. 1953), *aff'd*, 281 App. Div. 861, 119 N. Y. S. 2d 918 (1st Dep't 1953), the court refused to read a waiver of immunity in a provision of bonds issued in New York by the Peruvian Government providing that the law of New York applied to the construction of the bonds.

Nevertheless, waivers of immunity are not unknown in loans made by American bankers to foreign governments. For example, the loan agreement of Feb. 8, 1945, between The Chase National Bank of the City of New York and the Kingdom of the Netherlands, provides, in part, in § 4, para. 1:

> "The Government hereby irrevocably waives all claim or right to sovereign or other immunity in relation to the enforcement in any jurisdiction of any or all of its obligations and of its warranties and representations under this Agreement, including enforcement of the mortgage of the Security hereunder or in relation to any claims for breach of warranty or misrepresentation by the Government based on or arising out of this Agreement, and irrevocably agrees that the rights of the Manager or of the Banks or of any of them with respect to repayment of all advances under the loan, with interest and commitment charges thereon, and in and to the Security and with respect to all of its other obligations hereunder and of its warranties and representations may, to the extent deemed necessary or desirable by them or any of them, be finally adjudged or determined in any court or courts of the State of New York or of the United States of America having jurisdiction in the State of New York, or in any other court having jurisdiction, even though such adjudication finally determines the rights or claims of the Government; and the Government hereby submits generally and unconditionally to the jurisdiction of said courts and of any of them in respect of such advances under the loan, with interest and commitment charge thereon, the enforcement of the mortgage of such Security, the enforcement and execution of any judgment against it, and all of its other obligations hereunder."

[37] Duff Development Co. v. Government of Kalantan, [1924] A. C. 797; and Kahan v. Pakistan Federation, [1951] 2 K. B. 1003.

[38] A typical provision, in this respect, reads as follows:

> "All payments of principal of and interest on the Bonds shall be exempt from, and shall be paid by the [name of debtor] without deduction on account of, any and all taxes and duties of whatsoever nature, including estate and succession duties, now or hereafter imposed by or within the [name of debtor] or any subdivision or taxing authority thereof, except to the extent of any liability imposed by law when a Bond is beneficially owned by a person residing in or ordinarily a resident of [name of debtor]."

See, *e.g.*, Union of South Africa, External Loan Bonds of December 1, 1955, issued in New York.

[39] A typical provision (as translated) provides that the borrower undertakes to assure the transfer of funds necessary to service the loan: ". . . at any time, without any restrictions and under all circum-

IV

LOANS BY PUBLIC LENDERS TO PRIVATE BORROWERS

Normally, governments do not lend directly to private foreign borrowers. The usual transactions in this category are loans by public lending institutions. But it would seem that in either case the loans would be governed by municipal law and that these loans should, therefore, not differ materially from loans by private lenders to private borrowers in respect of choice of law by stipulation. Nevertheless, stipulations of applicable law seem to be less consistently employed in loans of this type.

For instance, the Export-Import Bank of Washington, a government corporation organized under United States law and wholly owned by the United States Government,[40] does not customarily resort to stipulations of applicable law in its loan agreements with private borrowers. Presumably, these agreements are governed either by American law or by the law of the borrower's country or perhaps, in some respects, by each.

A different practice is adopted by the High Authority of the European Coal and Steel Community in its loans to enterprises within the Community. The European Coal and Steel Community is an international organization created by international agreement and composed of sovereign governments.[41] Its loans to private borrowers, like those of the Export-Import Bank, are presumably subject to the ordinary rules of the conflict-of-laws. Unlike the Export-Import Bank, however, its consistent practice in loans to private borrowers is to make use of stipulations of applicable law. Its standard form of loan contract provides, in article XVII:[42]

> The parties agree that this contract shall be governed by the law of [name of member country in which borrowing enterprise is located]. (as translated)

The inclusion of this stipulation is not necessarily to be attributed to a desire to avoid conflicts of law. The leading motivation may well have been a desire on the part of the High Authority to conform to normal financial patterns in its member countries and to avoid having all its loan contracts governed by the laws of one

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stances, without any discrimination as to nationality or domicile of the holder and without asking presentation of an affidavit or the fulfilment of any other formality." See, *e.g.*, Union of South Africa 4% Bonds of 1952, Prospectus, cl. 6(c). The practical effectiveness of such a provision, like that of other governmental covenants, depends largely upon the willingness of the government to stand by its undertaking. Thus, a transfer clause, similar to that quoted above, in bonds issued in 1939 in Switzerland by the French government did not prevent that government from requiring after the war from the holders affidavits as to their residence or citizenship, despite Swiss protest against this practice. See Frey, *Capital Export from Switzerland*, in INTERNATIONAL BAR ASSOCIATION, 3d CONFERENCE REPORT 237 (1950). The dispute was, however, amicably settled in 1951.

[40] 59 STAT. 526 (1945), as amended, 12 U. S. C. § 635 (1952).

[41] Treaty of July 18, 1952 between Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.

[42] This Article (as translated) reads further:

> "Those questions which shall not be settled by an express provision of this contract, or by such law, shall be solved by the Court of Justice which shall take into account the general principles of law applicable in the six members of the Community. However, controversies or conflict of laws issues relating to the notes executed pursuant to this contract shall be settled pursuant to the Geneva Convention of June 7, 1930."

particular member country, Luxembourg. Moreover, loans by the High Authority to private borrowers are normally secured by mortgages, and the law of the borower's country has the additional advantage of being that of the situs of the mortgaged property.[43]

Another public international organization, the International Bank for Reconstruction and Development, likewise makes loans to private borrowers. However, it is the International Bank's practice, in accordance with a provision of its charter,[44] to require a guarantee of each of its loans by the government of the country in which the project being financed is located, unless that government is itself the borrower. Therefore, the International Bank's loans to private borrowers differ from those made by the Export-Import Bank and the European Coal and Steel Community and are best discussed in the next category of loans.

V

LOANS BY PUBLIC LENDERS TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

This category takes us out of the field of the conflict of laws and into that of public international law. Loan agreements between governments and guarantee agreements between governments, being international agreements, are governed by the rules of law that apply, by custom and international convention, to the relations between sovereign states.[45] Under the law of treaties, a party to an international agreement cannot invoke its own domestic law to escape its international obligations.[46] For this reason, international agreements normally do not give rise to problems of the conflict of laws, and it is, therefore, to be expected that agreements falling into this category will not normally contain stipulations of applicable law.

In this field, the practice of lenders and borrowers is fully in accordance with that expectation. Intergovernmental loans consistently contain no stipulations of applicable law.

[43] Blondeel and Vander Eycken, *Les emprunts de la Communauté Européenne du Charbon et de l'Acier*, in 19 LA REVUE DE LA BANQUE 249, 274 (Belgium 1955).

[44] Art. III, § 4(i), 2 U. N. TREATY SERIES [hereinafter U. N. T. S.] 134, 144 (1947).

[45] As to loans, see, *e.g.*, Loan Agreement between Belgium and France, Sept. 7, 1949, 123 U. N. T. S. 15 (1952); Loan Agreement between Belgium and the United Kingdom, Sept. 7, 1949, 106 U. N. T. S. 61 (1951); Agreement between the United Kingdom, Australia, India, Pakistan, and Ceylon, on the one hand, and, on the other, Burma respecting a loan of £ 6 million to be made by the five Commonwealth governments to Burma, June 28, 1950, 87 U. N. T. S. 153 (1951); and Financial Agreement between the United Kingdom and France, March 27, 1945, 98 U. N. T. S. 227 (1951), with a Supplementary Agreement of April 29, 1946, 98 U. N. T. S. 123 (1951).

As to guarantees, see, *e.g.*, the Greek loans of 1833 and 1893 guaranteed by England, France, and Russia; the Egyptian loan of 1885 guaranteed by Austria, England, France, Germany, Italy, and Russia; and the Austrian Government Guaranteed loan of 1923, guaranteed by a number of powers and issued under the auspices of the League of Nations. See also, Wells, *Guarantees in International Economic Law*, 4 INT'L COMP. L. Q. 426 (1955); Fawcett, *The Legal Character of International Agreements*, 30 BRIT. Y. B. INT'L L. 381 (1953); and 1 BORCHARD, *op. cit. supra* note 22, at 65.

[46] See 5 G. H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 185 (1943); 2 C. C. HYDE, INTERNATIONAL LAW 1454 *et seq.* (2d ed. 1947); 1 L. F. L. OPPENHEIM, INTERNATIONAL LAW 829 *et seq.* (6th ed., Lauterpacht, 1947).

The same is true of monetary agreements, such as payments agreements, clearing agreements, and the like. These are also normally entered into between governments and are, therefore, governed by public international law. They, thus, afford no occasion for avoidance of the conflict of laws and do not normally contain any provision on the subject.[47]

When loans to governments are made not by governments themselves, but by public lending institutions, the determination of the applicable law is more difficult. For instance, the Export-Import Bank of Washington, in its lending operations, sometimes acts as agent of the Government.[48] Since, in these loans, the United States is the contracting party, the contracts are international agreements governed by public international law. When, on the other hand, the Export-Import Bank lends for its own account to foreign governments, it might be argued that the Bank does not enjoy international personality and that its contracts are, therefore, not governed by public international law.[49] Notwithstanding this possible distinction, the Export-Import Bank's loan documents do not include stipulations of applicable law in either class of case.

The International Bank for Reconstruction and Development is an international organization whose members are governments. It was created by international agreement according it full juridical personality in the territories of members and giving it wide international responsibilities in the economic field. As such, it must be considered to possess international personality and to be a subject of international law.[50] As mentioned above, its loans are made either to governments or with the guarantee of governments. Since the lender and the borrower (or, in the case of guarantee agreements, the lender and the guarantor) are both subjects of international law, the relationship should be governed by public international law.[51] The Bank's

[47] For general discussion of agreements of this kind, see, *e.g.*, Hug, *Le droit des paiements internationaux*, 79 RECUEIL DES COURS 515 (France 1951).

[48] Such was the case in respect to the Marshall Plan loans and the loan made in 1954 by the United States Government to the High Authority of the European Coal and Steel Community.

[49] The issue is raised in two articles by Mr. Mann. See Mann, *The Assignability of Treaty Rights*, 30 BRIT. Y. B. INT'L L. 475 (1953); and Mann, *The Law Governing State Contracts*, 21 *id.* at 11 (1944). The following statement appears in 5 UNITED NATIONS, REPERTORY OF PRACTICE 295 (1955) with respect to the registration of treaties and international agreements under art. 102 of the United Nations Charter: "Agreements between States and certain governmental or semigovernmental agencies, such as the Institute of Inter-American Affairs and the Export-Import Bank, were also considered [by the Secretariat] as not subject to registration after consultation with the Governments concerned."

[50] That "international personality" is not an attribute of states alone was recognized by the International Court of Justice in the *Reparations for Injuries* case in which the Court held that the United Nations possesses international personality. [1949] I. C. J. Rep. 174, 178, 179. The international personality of the Bank was explicitly recognized by Switzerland in art. 1 of the Agreement of June 29, 1951 between the Swiss Federal Council and the Bank. See also Wells, *supra* note 45; and Adam, *Les Accords de Prêt de la Banque Internationale pour la Reconstruction et le Développement*, in 55 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 41, 57 (France 1951).

[51] The Regulations adopted by the General Assembly of the United Nations to implement the Charter provision (art. 102) for the registration of treaties and international agreements include among "international agreements" agreements between states and specialized agencies such as the Bank. Loan and Guarantee Agreements between the Bank and member governments are registered or filed by the

loan documents are consistent with this conclusion. They make clear the intention of the parties that the terms and conditions of the contract shall not be frustrated by conflicting domestic law. The Bank's Loan Regulations, which are incorporated by reference into the Bank's loan agreements with member governments, contain the following provision:[52]

> The rights and obligations of the Bank and the Borrower under the Loan Agreement and the Bonds shall be valid and enforceable in accordance with their terms notwithstanding the law of any state, or political subdivision thereof, to the contrary. . . .

Two other international organizations, the International Monetary Fund and the European Payments Union, also engage on a large scale in financial transactions with governments. Their transactions take the form of exchange transactions rather than of loans, and the essential elements of the obligations imposed by the transactions are defined by international agreement and by regulations issued thereunder.[53] There would, therefore, normally be no need for any stipulation of applicable law in regard to these transactions, and neither institution has made a practice of using such provisions.

Loans from governments to public international organizations should, on the analogy of loans from public international organizations to governments, likewise be governed by public international law, and stipulations of applicable domestic law are not to be expected in these transactions. Examples are the loan from the United States Government to the United Nations to finance the construction of the headquarters building[54] and the loan from the United States Government, acting through the Export-Import Bank, to the High Authority of the European Coal and Steel Community.[55] Neither contains any stipulation of applicable domestic law.

Bank with the Secretariat of the United Nations as international agreements and are accepted as such by the Secretariat. See note 50 *supra*.

[52] See Loan Regulations of the Bank No. 3, dated Feb. 15, 1955, art. VII, §7.01. A similar provision is included in Loan Regulations No. 4, dated Feb. 15, 1955, covering loans made, with governmental guarantee, to borrowers other than governments.

[53] The Article of Agreement of the International Monetary Fund are found in 2 U. N. T. S. 39 (1947). The Articles of Agreement of the European Payments Union are found in 77 CLUNET 996 (France 1950).

[54] Loan Agreement of March 23, 1948, 19 U. N. T. S. 43 (1948).

[55] Official Gazette of the Community, May 7, 1954, at 325. For a different view, see however, Blondeel and Vander Eycken, *supra* note 43, at 273-74. In pointing out that "American" law was probably intended, these writers emphasize that: "The United States are the place of contracting, the place where the funds were raised and must be repaid; all other factors such as the language [of the agreement], [its] legal terminology, the currency involved, contribute to point out that it is really the American law which is applicable." *Id.* at 274. But see art. 6 of the Charter of the European Coal and Steel Community, which provides:

> "The Community shall have juridical personality.
>
> "In its international relationships, the Community shall enjoy the juridical capacity necessary to the exercise of its functions and the attainment of its ends.
>
> "In each of the member States, the Community shall enjoy the most extensive juridical capacity which is recognized for legal persons of the nationality of the country in question. Specifically, it may acquire and transfer real and personal property, and may sue and be sued in its own name.
>
> "The Community shall be represented by its institutions, each one of them acting within the framework of its own powers and responsibilities."

46 AM. J. INT'L L. 109-10 (Supp. 1952).

Yet, the fact that a loan is governed by public international law and the law of treaties does not necessarily eliminate all conflicts problems. Unlike international agreements dealing with such traditional subjects as the termination of hostilities, the fixing of boundaries, and the like, intergovernmental loans have to do with the subject matter of private commercial contracts. They, therefore, tend to use words such as the English "tender," "trust," and "delivery" and the French *"payable,"* which, through years of use in commercial practice and in codes, statutes, and court decisions, have acquired technical meanings. It would, therefore, seem quite within the bounds of possibility that the parties to an intergovernmental loan agreement, desiring to avoid disputes as to the meaning of technical terms, might stipulate that the agreement should be interpreted in accordance with the law of one party or the other. No example has been found of such a provision in an intergovernmental agreement. The early loan contracts of the International Bank for Reconstruction and Development, however, contained a provision of this character.[56] The purpose of this provision was occasionally misunderstood by borrowers, and the Bank now does not normally include such a provision in loan documents. The Bank was influenced by the consideration, among others, that since these agreements are entered into in the United States and drafted in English, usage in the United States and other English-speaking countries would, in any case, be looked to as a guide in their interpretation.[57]

Problems may arise that go beyond matters of interpretation. For example, a pledge, mortgage, or other security arrangement may be given to secure a loan provided for by international agreement, and the property charged as security may be situated in territory under the jurisdiction of a government which is not a party to the agreement. If it is desired that the security arrangement should be enforceable by ordinary domestic procedures, it will presumably be necessary to frame the contract so as to permit the security arrangement and its enforcement to be governed by the law of the situs. For example, under a loan from the International Bank for Reconstruction and Development to Iraq,[58] the obligations of the borrower were secured by an assignment of oil royalties due Iraq from a British company. And under the loan from the United States of America to the High

[56] See, *e.g.*, Loan to Crédit National pour faciliter la Réparation des Dommages Causés par la Guerre, guaranteed by the Republic of France, May 9, 1947, art. IX, §2: "The provisions of this Agreement and of the Bonds and of the Guarantee Agreement shall be interpreted in accordance with the law of the State of New York, United States, as in effect at the date of this Agreement." The Guarantee Agreement and the Loan Agreement annexed thereto were registered with the Secretariat of the United Nations on Jan. 13, 1953, under No. 2014.

[57] See, *e.g.*, 5 HACKWORTH, *op. cit. supra* note 46, at 222 *et seq.*; 2 HYDE, *op. cit. supra* note 46, at 1471 *et seq.*; 1 ROUSSEAU, PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC 708 *et seq.* (1944); Delaume, *De l'Application et de l'Interprétation des Traités par les Tribunaux Internes dans les Relations Franco-Américaines,* 80 CLUNET 584, 622 *et seq.* (France 1953) (with an English translation by the editor).

[58] This loan was registered with the Secretary General of the United Nations on Jan. 13, 1953, under No. 2038.

Authority of the European Coal and Steel Community, the borrower's obligations are secured by a pledge of obligations owed by private companies to the High Authority under an indenture of which the trustee is the Bank for International Settlements, a corporation organized under a special charter granted by Swiss law, pursuant to an international convention.[59] Although the documents relating to these two loans contain no affirmative stipulation that the domestic law of a particular country shall govern the security arrangements, they equally do not contain any provision which would expressly preclude application of the appropriate domestic law as determined by ordinary rules of conflicts.

The problem of determining applicable law may arise in yet another way. The International Bank, whose loans often involve repayment in several currencies and in several countries, incorporates in its loan contracts a special provision on exchange restrictions reading as follows:[60]

Exchange Restrictions. Any payment required under the Loan Agreement to be made to the Bank in the currency of any country shall be made in such manner, and in currency acquired in such manner, as shall be permitted under the laws of such country for the purpose of making such payment and effecting the deposit of such currency to the account of the Bank with a depository of the Bank in such country.

This provision suggests that even in loans which are governed by public international law, it may, on occasion, be desirable for the parties to stipulate that any performance to be rendered in a country not a party to the loan contract shall be rendered in accordance with the laws of that country. However, no example has been found of such a stipulation in intergovernmental loans.

Finally, rights under an international agreement may be assigned to private parties. For instance, the International Bank sometimes transfers to private investing institutions all or part of its rights to receive principal and interest due on loans made by it. Such transfers may be made by simple assignment or by transfer, by endorsement or otherwise, of bonds or notes received by the lender from the borrower under the loan contract. In fact, the International Bank has, during the past year, sold and agreed to sell obligations of its borrowers payable in various currencies in an aggregate principal amount equivalent to about $100 million. The loan contracts of the International Bank do not contain provisions purporting to specify the law applicable to the rights of the holders of such obligations after their transfer. The contracts, thus, leave open the provocative question, posed by an eminent writer, of determining the law applicable to treaty rights assigned to private parties.[61]

[59] See 5 MANLEY HUDSON, INTERNATIONAL LEGISLATION 307 (1936).
[60] Loan Regulations Nos. 3 and 4, art. III, §3.06 (Feb. 15, 1955).
[61] See Mann, *supra* note 49.

VI

CONCLUSION

In the field of private international lending, avoidance of conflicts does not pose serious problems for lenders and borrowers. The established practice of stipulating applicable law appears adequate to avoid most conflicts, even in the relatively rare cases where generally accepted rules of the conflict of laws furnish no clear guide. However, it is still too early to come to any definite conclusion as to the attitude which national courts will take towards article VIII, section 2(b), of the Fund Agreement in the field of exchange contracts.

In the field of loans and monetary agreements between governments or between governments and public international organizations enjoying international personality, avoidance of conflicts is at present of little concern to the parties. However, as governments and public international organizations engage more and more in transactions resembling private financial transactions, problems of conflicts of law, or at least analogous problems, are increasingly likely to arise, and, as Sir John Fisher Williams prophesied some thirty years ago,[62] usage will correspondingly tend to be influenced by the norms of private financial practice.

In the field of loans between persons subject to different legal orders, *i.e.*, between private persons on the one side and governments or international organizations on the other, there is no unanimity of view as to the applicable law; and except in a few countries, the practice of avoiding conflicts by stipulation has not developed to the point of furnishing a solution. The confusion created in this field by the gold clause cases of the thirties led the Financial Committee of the League of Nations to suggest as a possible solution an international convention to establish a code of substantive rules applicable to loans from private lenders to governments.[63]

It is to be doubted whether a solution will soon be found along the lines suggested by the Financial Committee of the League. The difficulty of reaching multilateral agreement among parties with diverse interests on substantive issues involving important questions of public policy is apparent; and the fact that nothing has come of the Committee's suggestion fifteen years after it was originally made is sympto-

[62] ". . . quand on a mis de coté des questions, soit d'indépendance, soit de souveraineté, quand on traite les affaires on hommes d'affaires, quand les Etats élaborent les détails de leurs rapports financiers, nous constatons une tendance très apparente, pour ne pas dire une nécessité, d'assimiler leurs opérations à celles des particuliers et des personnes morales dans le champ du droit privé. C'est ainsi que les rapports financiers internationaux, plus peut-être, que toute autre catégorie d'opérations internationales, se classent par catégories juridiques et qu'on peut les régler par des doctrines juridiques bien connues, ou tout au moins les y adapter.

". . . Mais aussitôt que les Etats se recontrent en hommes d'affaires, aussitôt qu'il s'agit d'elaborer les détails de leurs rapports financiers, les juristes, les practiciens, les experts qui s'en chargent vont forcement suivre les routes qui leur sont connues en droit privé, et les obligations financières des gouvernements vont s'exprimer sous des formes qui ressemblent merveilleusement aux obligations, que contractent par exemple les grandes societes anonymes qui exploitent des services d'utilite publique." Williams, *L'Entr'aide Financière Internationale,* 5 RECUEIL DES COURS 8, 143 (France 1924).

[63] L. N. REPORT §83. The International Institute for the Unification of Private Law, at Rome, has prepared a Preliminary Draft Uniform Rules Applicable to International Loans. 20 INSTITUTE PAPERS: INTERNATIONAL LOANS (Doc. 5a(1) (1947)).

matic. If, contrary to the expectations of the writers, a code of substantive rules could be adopted, the conflicts problems would be solved along with the substantive problems "by removing the subject from the field of municipal law into that of international law."[64] But even this would not be a complete solution, for in the minds of most lenders, both these problems are overshadowed by the problem of enforcement. Lenders would continue to feel that, in the absence of changes in their own national law regarding sovereign immunity and in the absence of an international tribunal having jurisdiction, their only real protection is the good faith and credit of the borrowing government.

[64] L. N. REPORT §83.

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MELVIN G. SHIMM, *Editor*
J. FRANCIS PASCHAL, *Associate Editor*

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THEORY AND PRACTICE OF TREATY REGISTRATION

with Particular Reference to Agreements of the International Bank

by

A. BROCHES and SHIRLEY BOSKEY

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Year 1957 - Issue 2-3

"International Legal Aspects of The Operations of

The World Bank"

by Aron Broches

for the Academy of International Law, 1959,
The Hague

Copy of booklet kept in Amelia's bookcase
M WILLIAMS

January 31, 1961

See Professional Staff Meetings book

for text of Mr. Broches'

talk on Lawyers in the Bank

Proceedings of the American Society of International Law at its Fifty-Fifth Annual Meeting held at Washington, D.C., April 27-29, 1961

Third Session

Friday, April 28, 1961, at 10:00 a.m.

PANEL I: ARBITRATION BETWEEN GOVERNMENTS AND FOREIGN PRIVATE FIRMS

Comments by Mr. A. Broches

Mr. A. Broches cited three examples in which the International Bank has been directly involved in settling certain kinds of disputes. He called the Bank's activity quasi-arbitration or conciliation. The parties had come to the Bank not because of an advance agreement but after other methods to settle the dispute had failed and both parties realized the need of a settlement. The first instance arose out of the nationalization of the Suez Canal. The Bank's good offices were requested by the United Arab Republic, France and Great Britain, all members of the Bank. The Bank assisted in the negotiations between the Suez Canal Company and the United Arab Republic and agreed to assume certain limited functions in connection with the settlement. The second instance was Mr. Black's mediation, on an informal basis, in connection with the financial settlement between the United Arab Republic and the United Kingdom. (The agreements concluded in both of these cases were published in the Journal, Vol. 54, pp. 498, 511 (1960).) The third instance was a dispute between the French bondholders and the City of Tokyo arising out of a bond issue made in 1912. The dispute began in 1926, went through the French courts and the Japanese courts in the 1930's and an agreement was reached by the parties in 1939, which was never carried out because of the war. After the war renewed negotiations proved fruitless. Finally, the bondholders and the City of Tokyo requested the President of the International Bank to act as a conciliator and to present a plan of settlement which in fact was a non-binding arbitral award. After briefs were filed and hearings held, Mr. Black gave his opinion and plan of settlement which both parties accepted.

The question next considered was the substance to be included in an arbitration agreement when it is possible to provide for future arbitration in contracts with foreign governments.

Mr. Broches pointed out that the International Bank as a public international institution might be in a better legal position than private persons in insisting on contractual provisions for the enforcement of arbitral awards. However, in its agreements with governments who are members of the Bank, the Bank makes no provision for the enforcement of arbitral awards against those governments. According to Mr. Broches, enforcement is not really a serious problem since governments are very unlikely to refuse to abide by arbitral decisions and, in addition, in the case of the Bank, the self-interest of the members of that institution would lead them to comply, since failure to do so would put them at odds with the entire international community.

PROBLEMS OF PRIVATE FOREIGN INVESTMENT

Text of an address by A. Broches, General Counsel of the International Bank for Reconstruction and Development, at the Third Annual Institute on Corporate Counsel, devoted to Foreign Operations of American Enterprises, organized by the Fordham University School of Law, December 8, 1961.

- o -

I felt greatly honored when I was invited to address you today and very pleased at the prospect of coming back to Fordham Law School as an alumnus. But I did wonder what I could contribute to this Institute which is devoted to the subject of foreign operations of American enterprises. The organization for which I work is neither American nor a business enterprise. The World Bank, an international institution, owned by 73 governments, does engage in foreign operations but of a kind quite different from the operations you engage in.

Yet the operations of the World Bank, and of its affiliates, the International Finance Corporation (IFC) and the International Development Association (IDA), are by no means irrelevant to the theme of this Institute.

The promotion of foreign private investment is high among the objectives of the Bank; and the IFC was created as an affiliate of the Bank which would concentrate entirely on promoting the growth of productive private enterprise, particularly in the less developed areas. IFC's operations are directly relevant to private investors in capital-exporting countries, because IFC, which has a capital of about $100 million, makes risk-type capital available for productive private enterprise in less developed areas. In doing so, it may, and frequently does, invest in association with foreign private capital. In quite a few instances IFC

has associated itself with American industrial and investment capital.

The relevance of most of the World Bank's operations to investors in the United States and other capital-exporting countries may be less direct, but certainly not less important.

The Bank, which has a subscribed capital of more than 20 billion dollars, makes its loans either to member governments or to private or public entities for projects within a member's territories. If the loan is not made directly to the member government, the Bank requires the government's guarantee. In most cases private borrowers which have received loans have been locally owned and locally managed enterprises. But in some cases, particularly in the public utility field, the Bank has made loans to enterprises which were partially or wholly foreign-owned, but which operated in an underdeveloped country.

Another aspect of Bank operations which has some fairly direct relevance to private enterprise is the Bank's sponsorship of and loans to privately-owned and managed development banks in underdeveloped countries. The purpose of these loans is to promote the growth of entrepreneurial activity in the countries concerned and their industrial development. The resources and facilities of these development banks are available to private enterprises operating in the countries concerned, including joint ventures or foreign-owned enterprises.

Thirdly, and least directly relevant though possibly most important, are the Bank's loans designed to strengthen what has come to be known as the infrastructure of the economies of underdeveloped countries, thereby laying the groundwork for economic development in general and for industrial development in particular, including operations of foreign

investors whether or not in conjunction with local private capital or entrepreneurs. The bulk of the Bank's lending has gone for such basic economic needs as transport and electric power. Loans in these categories have amounted to approximately $1,900 million and $1,800 million respectively out of a total of $6,000 million.

IDA, the Bank's soft loan affiliate, with initial contributions by members of nearly $1 billion, has made credits to member countries for such projects as roads, irrigation and flood control, and watersupply, but in addition has recently granted a credit to be reloaned by the recipient government to a privately-owned and managed development bank.

We in the Bank are only too well aware of the tremendous capital requirements of the underdeveloped countries as well as of their nearly unlimited need for technical and managerial skill. We are also fully convinced of the important role that private foreign enterprise can play in meeting both of these needs, especially the latter. It is understandable therefore that we have always taken a very lively interest in the removal of obstacles that stand in the way of private foreign investment. And I would like to devote the main portion of my talk to a discussion of this problem. For a good many years, the problem of the removal of obstacles to private foreign investment, or to put it positively, the promotion of the flow of private foreign investment, through international action, has occupied many minds. These efforts have concentrated on identifying the risks associated with private foreign investment and on the means either to avoid these risks or to compensate investors for losses, should these risks materialize.

All this can be described under the broad heading of "investment climate". It must of course be conceded that some business corporations, some investors, are deterred to a certain extent by the mere fact of having to operate in unfamiliar or different surroundings and expect rather heavy compensation for this exposure to the unknown. Such compensation may be provided as a matter of national policy, both by the national governments of the corporations involved and by the host countries, in the form of tax and other incentives, but I should think that there are definite limits to action in this field, determined by overall political considerations in the capital-exporting as well as the capital-importing countries: Privilege creates envy.

I want to talk about investment climate in a somewhat narrower context: governmental attitudes and actions friendly or unfriendly to private foreign enterprise and the likelihood of effective protection of legal rights. It is clear that in many parts of the less developed world the investment climate, as judged by those elements, is not good. Given this fact the question arises what, if anything, can be done to improve it. According to one school of thought, attitudes are the real crux of the problem, and therefore all that can be done is to attempt to change these attitudes by a process of persuasion and education. Others, without denying the overriding importance of national attitudes as determinant of government action, believe that as a concomitant of the process of education and persuasion, more direct and positive international action can be taken. In the proposals for such action, three approaches may be distinguished.

The first approach is the most direct. It aims at international recognition of certain minimum rules of conduct to be observed by host countries with respect to private foreign investment. Efforts in this direction were made as long ago as the days of the League of Nations. They were renewed at the time of the negotiation of a charter of the proposed International Trade Organization and again in Bogotá (1948) and Buenos Aires (1957). However, it did not prove possible to agree on meaningful international rules. More recently, the question of an investment code was revived in Europe. Principally on the initiative of the German and Swiss Governments, a draft Convention for the protection of private investment has been under discussion in the former O.E.E.C. (now the Organization for Economic Cooperation and Development) for a number of years. The inspiration for this draft came from a private proposal known as the Abs-Shawcross Convention. As a matter of fact, a new round of discussions in the O.E.C.D., of which as you know the United States and Canada are now full members, started early this week.

In a very few articles the draft covers such substantive matters as national treatment for foreign private investment, prohibition of nationalization in violation of an undertaking not to nationalize, or without adequate compensation payable in the investor's currency, and certain obligations with respect to transfer, all this coupled with a provision for compulsory adjudication of disputes, in which the aggrieved investor may proceed directly against the offending government.

The advantage claimed for trying to adopt a convention among supposedly like-minded countries, is that the underdeveloped countries would approach the idea of an investment code more willingly, if they had a

clear demonstration that the capital-exporting countries were prepared, as among themselves, to assume the same obligations that they expect the capital-importing countries to undertake. After having adopted the convention, the O.E.C.D. countries would open it for signature by other countries, that is, by and large, the underdeveloped countries.

The argument advanced - by the United States delegation, among others - against the approach under consideration in the O.E.C.D. is that it would tend to be regarded by the capital-importing countries as a ganging-up by the industrialized countries and that they, i.e., the capital-importing countries, would resent being presented with a convention drafted by others on a take-it-or-leave-it basis. It has further been argued that if the underdeveloped countries were to be permitted to propose amendments, a new round of negotiations would start with no substantially greater hopes for success than the pre-war and I.T.O. (Havana Charter) negotiations.

Whatever the merits of these arguments pro and con, it is a fact that to date no decisive progress has been made in O.E.C.D. with the convention, in large part, although certainly not entirely, due to the unenthusiastic attitude of the United States.

The investment code approach constitutes a direct attack on the investment climate problem by prohibiting, by international agreement, a number of specific actions which make for a bad climate. An alternative approach, somewhat more recent and until now actively promoted only by private individuals and organizations rather than by governments, does not seek directly to remove the causes of the bad investment climate, but would offer an internationally based and operated program of guarantees against

the effects of governmental action harmful to private foreign investment. I am referring to the multitude of proposals for an international investment guarantee or insurance program, nearly all of them contemplating, incidentally, that such a program would be in some way administered by, or associated with the activities of, the World Bank.

In characterizing the investment code proposals and insurance proposals as alternative approaches, I do not mean to suggest that their scope is identical. It clearly is not in one very important respect: the investment code would necessarily apply to existing investments and new investments alike, a feature which represents both its strength and weakness, whereas for obvious practical financial reasons an insurance program would have to be limited to new investments. In another respect as well there is a difference in scope between the two approaches. The proposals for insurance of investments against so-called political risks contemplate protection not merely against the risk of expropriation, the political risk par excellence, the elimination of which is the principal, if not the exclusive, object of the Code, but as well against the risk of inconvertibility and of such calamities as war, revolution, riots and civil commotion, none of which, in the nature of things, can be legislated out of existence or prohibited by an investment code.

Early this year the Bank decided to study the merits of the idea of multilateral investment insurance, and last July a formal request for a study of the problem was addressed to the Bank by a group of countries, including the United States, which composed the Development Assistance Group of the then O.E.E.C. (This group has now become the Development Assistance Committee of the O.E.C.D.). In undertaking this study the

Bank had the benefit of a number of private proposals for such a program and of the experience gathered in the operation of three national programs for investment guarantees, that of the United States, the oldest and largest program of its kind, and the more recent German and Japanese programs. We also hope to have the benefit of the views of industrial and financial circles from a wide group of countries, to whom a questionnaire has been addressed by the International Chamber of Commerce and the World Bank jointly. The replies to this questionnaire are due in two weeks. We hope to have our report available in the early part of next year. We were not asked to make specific recommendations and I am not sure whether we shall.

Since our study has not been completed, I cannot tell you what our report will say, but I would like to give you a sample of some of the more difficult questions that have come up in our consideration of the problem.

The first and most important question is naturally to what extent a multilateral program would be effective in stimulating additional private investment in the underdeveloped countries. A preliminary general comment may be appropriate. The degree to which the political risk (in the broad sense of the term) is going to be a deterrent to an investor depends not only on the investor's estimate of the likelihood that the risk will materialize but, among other factors, also on the freedom of choice which the investor has to go or not to go abroad. Companies that have to invest in underdeveloped areas either to obtain products or raw materials, or to win or retain essential markets for their products, might not take the same view of the political risk as companies which have alternative investment possibilities, either by expanding their operations at home or by

investing in other developed areas. But if this justifies the conclusion that a certain volume of foreign investment is likely to go forward in any event, it leaves open the question of the incentive effect of a multilateral program on the remaining investment potential. One might hope to find a clue to the answer to this difficult question in the results of the operations of the three national investment guarantee programs, those of the United States, Germany and Japan. The U.S. program has been in operation for more than 10 years and guarantees issued as of the end of June 1961 aggregated some $600 million. However, an analysis of the investments guaranteed under that program fails to give any indication of the extent to which the program has induced investments which would not have been made had the program not been in operation; and persons familiar with the program are not prepared to give a judgment on this question, except to say that the program undoubtedly resulted in some additional investment. Any multilateral investment insurance program would have to be backed by guarantee commitments by governments in one form or another, running into substantial amounts. It is clear that in view of the shortage of governmental funds available for foreign economic development aid, governments will wish to consider carefully the likely results of an insurance or guarantee program before embarking on one.

A second important question is whether both capital-exporting and capital-importing countries should share in the financial liabilities entailed in such a program and if so, in what proportion these liabilities should be undertaken. Most proponents of a multilateral program feel that it would be essential to have the underdeveloped countries associated in the program, and that they should bear some proportion of the financial

risk. The feeling of "belonging to a club", together with the practical consideration that membership entails an obligation to contribute to the compensation of an injured investor would, it is argued by some, tend to restrain participating countries from taking action which would give rise to a claim. Moreover, it can be argued that such action would bring the offending country into disfavor with the community of capital-exporting as well as capital-importing countries, in contrast to the situation under a bilateral guarantee program where only one other country would be involved. This would support the conclusion that a multilateral program would do more than a series of bilateral programs to bring about an improvement in the investment climate.

One plan goes so far as to put one-half of the financial risk on the underdeveloped countries as a group, believing that the financial stake which these countries thus acquire in the conduct of the other members of the group will maximize the stimulus towards responsible behaviour. As against this, it can be argued, and with considerable justification, that it is as unrealistic politically to expect this degree of financial participation, as it would be unrealistic financially to accept it even if it were obtainable. A question that may not have been given enough emphasis by most proponents of multilateral insurance plans is the degree of solidarity that can be expected from the countries participating in a multilateral program. Most plans contemplate that each country would have a fixed share in the liabilities of the program. Would the capital-exporting countries be prepared to share losses in those proportions without regard to the amount of investment originating in their countries which is insured by the program? And would a capital-importing country which is friendly

to foreign capital be willing to undertake an obligation to share in liabilities for losses occasioned by another capital-importing country which might behave as Cuba did?

Another question concerns the nature of protection offered and the problems this may raise for the settlement of claims. By way of illustration I shall take the case of expropriation. Most proposals contemplate, and understandably so, that coverage should not be limited to cases of outright seizure but should extend as well to various forms of what is sometimes called "creeping" expropriation. As a practical matter it is not likely to be possible to define "creeping" expropriation in exhaustive detail, thus leaving an area of uncertainty and possible dispute. In case of a claim made under such coverage the institution administering the program may find itself in a difficult position in trying to decide whether the claim is justified or in taking a position in arbitration with the investor, if the investor did not accept the administrative decision. The institution would wish to be fair to the insured investor, while at the same time protecting its assets against unjustified claims. To this dilemma, which is one faced by any casualty insurance institution would, however, be added a wish to be fair to the host country as well, since payment of a claim would tend to reflect unfavorably on the host country's reputation.

This kind of problem is avoided in an alternative proposal, which would insure the investor not against the loss occasioned by expropriatory action but against the host country's refusal to arbitrate a claim brought against it by the investor on account of such action, or against the host country's failure to comply with the arbitrators' award. Presumably this alternative would call for a charter provision under which such insurance

would only be written if the host country agreed in advance to submit to arbitration. While this alternative would place the institution in a more comfortable position, it has the disadvantage from the investor's point of view that, unless his claim were disposed of by direct settlement with the host country, his recovery would depend on whether the arbitral tribunal holds that the host country's behaviour violates either its own law or international law. And the procedure would be time consuming.

Before leaving the subject of investment insurance, I want to say that while many people expect of a multilateral insurance program a favorable influence on the investment climate, hopefully culminating in a tacit acceptance of an unwritten investment code, there is another body of opinion, which holds that so far from improving the investment climate, an insurance program would tend to encourage expropriatory action by the underdeveloped countries, since they could rely on the fact that any losses suffered by private investors would be covered by the insurance institution. Thus, so the argument runs, investment code and investment insurance are not alternatives, but the former is a conditio sine qua non for the latter. Accordingly, it has been proposed that the charter of a multilateral investment insurance institution should include some basic investment protection rules. This, in turn, raises the question for those who are in favor of investment insurance as such, whether the injection of the code issue is not going to endanger the chances of getting agreement on an insurance program.

I have discussed two approaches to the investment climate problem, an investment code and an insurance program, one seeking to prevent and the other seeking to compensate for losses suffered by private investors as a result of actions of host governments. I should now like to take a

few more minutes of your time to mention a third approach, suggested by the President of the World Bank in his annual address to the Board of Governors of the Bank in Vienna last September. Mr. Black said:

> "Another subject that is frequently mentioned in this connection is the settlement of disputes between governments and private investors. As most of you know, the Bank as an institution, and the President of the Bank in his personal capacity, have on several occasions been approached by member governments to assist in the settlement of financial disputes involving private parties. We have, indeed, succeeded in facilitating settlements in some issues of this kind but the Bank is not really equipped to handle this sort of business in the course of its regular routine.
>
> "At the same time, our experience has confirmed my belief that a very useful contribution could be made by some sort of special forum for the conciliation or arbitration of these disputes. The results of an inquiry made by the Secretary-General of the United Nations show that this belief is widely shared. The fact that governments and private interests have turned to the Bank to provide this assistance indicates the lack of any other specific machinery for conciliation and arbitration which is regarded as adequate by investors and governments alike. I therefore intend to explore with other institutions, and with our member governments, whether something might not be done to promote the establishment of machinery of this kind."

The suggestion speaks for itself, but I would like to take this opportunity to make two points clear. The first is that Mr. Black's statement should not be regarded as suggesting in any sense that existing arbitral institutions such as the Court of the International Chamber of Commerce, the American Arbitration Association or the Inter-American Commercial Arbitration Commission are unsuitable for the arbitration of disputes to to which one of the parties is a government. These bodies have dealt with many such disputes and, whenever the occasion arises, the Bank urges governments which come to it for advice to submit disputes, particularly commercial disputes, to these or similar institutions. But the fact remains that there are situations in which governments feel unable to accept arbitration under the auspices of what are essentially private institutions. It is for those cases that the proposed arbitral machinery would be designed.

The second point is this. The proposal to establish machinery for the conciliation and arbitration of investment disputes is neither a substitute for, nor in conflict with, either of the other two types of proposals, since both the code proposals and the insurance or guarantee proposals would necessarily include arbitration arrangements.

However, the arbitration proposal is one that can be implemented independently of the progress of the other two more ambitious schemes.

Our explorations are in a very early stage, so that I cannot add much to Mr. Black's statement. But, and here I am expressing my personal view, I would like to point out the importance of proceeding with a proposal which may be of modest scope, but should be non-controversial and thus capable of reasonably prompt realization, as a first step on the road

to better relations between investors and capital-importing countries and to an increased flow of private investment to further the cause of economic development.

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INTERNATIONAL INVESTMENT GUARANTIES: POSSIBILITIES AND PROBLEMS

By Aron Broches

General Counsel, International Bank for Reconstruction and Development

You have just heard a description of the U. S. investment guaranty program. I need not therefore take time to explain the general background of investment guaranties and the objectives sought to be achieved thereby. The U. S. program is the oldest and by far the largest of the national investment guaranty or investment insurance programs now in operation. For some years there has been in operation a German program and, more recently, a Japanese program was started. In addition, a number of European governments are reported to be considering the institution of national programs for investment insurance.

However, within the past few years a number of private individuals and organizations have proposed that investment insurance be placed on a multilateral rather than on a national or bilateral basis. These proposals have recently been studied by two organizations, one public and the other private. The public organization is the World Bank, which in March of this year published a staff report entitled *Multilateral Investment Insurance*. This report was prepared at the request of the Development As-

sistance Committee of the Organization for Economic Co-operation and Development. The private group is the International Chamber of Commerce, which has had the subject under study for some time and is expected to issue its report shortly. The two institutions joined in drafting a questionnaire addressed to the business and financial communities in a number of countries, designed to elucidate such questions as the likely incentive effect of a multilateral insurance program, the types of risks to be covered and a number of other issues. The answers to this joint questionnaire have been analyzed by the staff of the World Bank, and the analysis appears in the World Bank Report to which I just referred, and which is available upon request from the publications office of the Bank.

While the principal proposals for multilateral investment insurance differ from one another in detail they have certain features in common. (Incidentally, the Bank Report also contains a comparative summary of some twelve of these proposals). For instance, all of these proposals would call for an international organization, with membership drawn from both capital-importing and capital-exporting countries, which would insure private foreign investments in the less developed countries against certain risks. As a minimum, protection would be available against loss resulting from expropriation or nationalization without adequate compensation (political risk); inability to transfer profits or to repatriate capital (transfer risk); and international war (calamity risk). Some proposals would extend to loss resulting from government action which falls short of outright seizure but which nevertheless substantially deprives an investor of the control or the benefit of his investment (sometimes described as "creeping expropriation"), and some would protect against loss from revolution or insurrection. Protection would not be available against normal business risks—devaluation is regarded as a business risk, and rightly so in my opinion—or against any risk for which insurance coverage could be purchased from private sources. Under most proposals only a percentage of the loss would be insured, with the investor a self-insurer for the balance. Only new investments would be insured (but "new investments" might cover reinvested earnings), and investments would be insured for a term of years and upon payment of an annual premium.

It would be a condition of participation under some, but not all, proposals that countries accept certain minimum rules of good conduct vis-a-vis foreign investments made in their territories (*e.g.*, non-discriminatory treatment, no expropriation except for a public purpose and against full compensation promptly paid and freely transferable, no breach of contractual undertakings, et cetera).

The proposals also differ in their provisions concerning the circumstances which would give rise to a claim for compensation. Most proposals contemplate that the investor would be insured against loss arising from the occurrence of a specified event which deprived him of effective control of his property or the receipts of earnings; compensation would be paid under the policy of insurance upon the investor's establishing that the event had taken place and had resulted in loss. Under an alternative

proposal, the investor would instead be insured against the refusal of the country of investment to arbitrate an investment dispute or to abide by an arbitral award in his favor, in violation of a previous undertaking to do so.

Finally, most of the proposals contemplate that such a multilateral investment insurance program would be administered by the World Bank or by a separate agency affiliated with the World Bank.

Within the time at my disposal I cannot do more than touch on a few of the important issues which arise in connection with nearly every phase of these proposals which I have summarized for you. And since we have just heard a presentation concerning a national program, I thought I might focus on some of the possible advantages and disadvantages of a multilateral program as compared to the national approach.

The proponents of the multilateral approach claim that it would remove a number of significant shortcomings of the present situation. Some of the proponents believe that in a multilateral program it would be possible to improve the scope of coverage. Frankly, I do not know on what this expectation is based. One could argue on the contrary that, with a multitude of national systems, there might be a tendency towards competition among national schemes which, although undesirable in many ways, would have the advantage for investors that it might result in a competitive improvement of coverage. And it would seem clear that in a multilateral program there would be no room for "all-risk guaranties" which a government administering its own program might issue in exceptional cases where the national interest justifies such action.

Another advantage claimed for a multilateral program is that it would make insurance protection more widely available and would thereby encourage an increased volume of private foreign investment. There is no doubt that a number of smaller capital-exporting countries may find it difficult, if not impossible, to establish national investment insurance programs and that the establishment of a multilateral program might encourage investments by nationals of these countries.

It may also be said that a multilateral program, *if* it would substantially replace national programs, and *if* no new national programs were established (but these assumptions are open to question), would lead to administrative simplification for both capital-exporting and capital-importing countries. There would be only one administering institution and the charter of that institution could cover all aspects of the program, thus removing the necessity of negotiating a network of bilateral agreements between the different national institutions and the capital-importing countries.

And it should also be mentioned that multilateral program would be particularly appropriate for the insurance of the increasing number of investments made by international consortia or other groupings of mixed nationality. It would overcome the present difficulties flowing from the fact that some of the participating national groups may be able to take out insurance, whereas others are unable to obtain such coverage, and it would also make possible a desirable degree of uniformity.

A further advantage assigned to a multilateral program in contrast to independent national programs is that liability for losses would be spread among a number of countries, and that the participation of the capital-importing countries in the program would in itself tend to reduce the likelihood of loss. But both of these points raise some difficult questions.

The first question which arises is whether both capital-exporting and capital-importing countries should share in the financial liabilities entailed in a multilateral insurance program and, if so, in what proportion these liabilities should be undertaken. Most proponents of a multilateral program feel that it would be essential not only to have the underdeveloped countries associated in the program, but also to have them bear some proportion of the financial risk. The feeling of "belonging to a club," together with the practical consideration that membership entails an obligation to contribute to the compensation of an injured investor would, it is argued by some, tend to restrain participating countries from taking action which would give rise to a claim. Moreover, it can be argued that such action would bring the offending country into disfavor with the community of capital-exporting as well as capital-importing countries, in contrast to the situation under a bilateral guaranty program, where only one other country would be involved. This would support the conclusion that a multilateral program would do more than a series of bilateral programs to bring about an improvement in the investment climate.

One plan goes so far as to put one half of the financial risk on the underdeveloped countries as a group, believing that the financial stake which these countries thus acquire in the conduct of the other members of the group will maximize the stimulus towards responsible behavior. As against this it can be argued, and with considerable justification, that it is as unrealistic politically to expect this degree of financial participation as it would be unrealistic financially to accept it, even if it were obtainable.

A question that may not have been given enough emphasis by most proponents of multilateral insurance plans is the degree of solidarity that can be expected from the countries participating in a multilateral program. Most plans contemplate that each country would have a fixed share in the liabilities of the program. Would the capital-exporting countries be prepared to share losses in those proportions without regard to the amount of investment originating in their countries which is insured by the program? And would a capital-importing country which is friendly to foreign capital be willing to undertake an obligation to share liabilities for losses occasioned by another capital-importing country which might behave as Cuba did?

I want to discuss one more aspect of the comparison of the potentialities of national programs *versus* a multilateral program.

There is a considerable body of investor opinion which holds that not only national but even multilateral investment insurance programs bear in them a considerable danger of increasing rather than decreasing the risk of politically motivated interference with property rights by some

of the capital-importing countries. And they base this danger on the fact that a capital-importing country would feel less restraint from interfering with these rights if it knew that the investor affected by its measures would somehow be compensated. Therefore, while admitting that what might be called the "deterrent effect" of an insurance program would be greater in the case of a multilateral program than in that of a series of national programs, they feel strongly that such a program could only have the beneficial effects desired, if it were coupled with an understanding by the capital-importing countries to abide by the rules of good conduct, such as non-discriminatory treatment, no nationalization without adequate compensation or in violation of an undertaking not to nationalize, et cetera, to which I referred earlier. The same investors also feel that only an insurance program coupled with the acceptance of these rules would reduce the likelihood of loss to the extent necessary to make such a program financially practicable.

Attempts to find a formulation in an international agreement of these simple rules of conduct have been going on for a considerable time and are presently being carried on within the framework of the Organization for Economic Co-operation and Development. But no decisive progress has been made to date. There is a considerable measure of disagreement about the desirability and practicability of attempts to establish a convention for the protection of foreign investments in isolation. Until now the United States, for instance, has shown quite strong opposition to the idea, and there is doubt whether many of the capital-importing countries would be willing to subscribe to a meaningful agreement. But it is certainly possible that countries, which are reluctant to undertake meaningful obligations concerning the treatment of foreign investment in the isolated context of an investment protection code, might be prepared to do so within the framework of an integrated insurance-cum-code program. If part of the price of participation in an insurance program were to be the acceptance of certain minimum rules of good conduct, perhaps this price would be paid. On the other hand, the possibility certainly exists that, far from facilitating agreement, the result of coupling the insurance scheme with a proposal for an investment code would be the realization of neither. On this point, as on many other features of the proposals, it is extremely difficult to come to firm conclusions. Unfortunately this difficulty and this uncertainty are not limited to matters of detail and implementation, but extend to the most basic question of all, to which I shall now turn.

The proposals for establishment of a multilateral program proceed from the premise that insurance against the non-commercial risks of private overseas investment is an effective technique for stimulating that investment. Presumably, before creating new international machinery, expending the very substantial effort involved in establishing an international program, and undertaking the financial and other obligations which would attach to participation in the program, governments would wish to be satisfied as to the validity of that premise. In its recent study the World

Bank paid particular attention to this crucial question. I regret having to confess that the diligence with which we have searched for an answer has not been rewarded by success. The principal obstacle to an assessment of the incentive effect of the availability of insurance on private foreign investment is the variety of considerations which influence investment decisions.

The degree to which the political risk (in the broad sense of the term) is going to be a deterrent to an investor depends not only on the investor's estimate of the likelihood that the risk will materialize, but, among other factors, also on the freedom of choice which the investor has to go or not to go abroad. Companies that have to invest in underdeveloped areas either to obtain products or raw materials, or to win or retain essential markets for their products, might not take the same view of the political risk as companies which have alternative investment possibilities, either by expanding their operations at home or by investing in other developed areas. But if this justifies the conclusion that a certain volume of foreign investment is likely to go forward in any event, it leaves open the question of the incentive effect of a multilateral program on the remaining investment potential. It would seem that commercial and economic considerations would primarily guide the decision. Where the investor hesitates solely because of uncertainty as to the non-commercial risks of the operation, the availability of insurance against those risks might tip the scale in favor of the investment. But where the political uncertainty is great, the possibility of obtaining compensation, through insurance, for the loss of an investment is likely to be thought a poor substitute for a continuing enterprise.

One might hope to find a clue to the answer to this difficult question in the results of the operations of the three national investment guaranty programs—those of the United States, Germany and Japan. The U. S. program has been in operation for more than ten years and guaranties issued as of the end of June, 1961, aggregated some $600 million. However, an analysis of the investments guarantied under that program fails to give any indication of the extent to which the program has induced investments which would not have been made had the program not been in operation; and persons familiar with the program are not prepared to give a judgment on this question, except to say that the program undoubtedly resulted in some additional investment. And the replies to the World Bank/ICC questionnaire afford no basis for any more precise judgment. The Bank's report puts it in these words:

> Some additional investment would surely be stimulated by the availability of new or expanded insurance facilities, assuming sufficiently broad membership in the program—but it is not possible to translate that statement into quantitative terms. Without an estimate of the amount of additional investment which would be induced, there is no basis on which to judge whether financial commitments on the scale demanded by an international program would be justified.

In these circumstances the Bank has not found it possible to establish a position for or against the creation of an international investment in-

surance program. Its report seeks only to identify and focus attention upon the principal issues which are inherent in the concept of a multilateral scheme and which the Bank believes that governments would find relevant in considering whether to create such a system. On a few, a very few, of these issues I have commented in this presentation. For the remainder I must refer you to the report itself which, as I stated earlier, may be obtained from the Bank upon request.

There is one final point that I want to mention. As I stated earlier, most of the proposals for multilateral investment insurance contemplate that a program of this character would be administered by or in close conjunction with the Bank. The report itself does not discuss this suggestion and, in the preface to the report, the Bank's President, Mr. Black, states as his view that it would be premature to discuss at this time the problem of administration. Mr. Black does sound a note of caution, however, in pointing out that any proposal for Bank administration would be likely to raise for the Bank a number of difficult issues having to do principally with the compatibility of that responsibility with the other and primary functions of the Bank as a development institution.

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THE PRESENT NEED FOR A PERMANENT ARBITRAL TRIBUNAL

Address by A. Broches,

General Counsel of the International Bank for Reconstruction and Development, at the "Institute on Permanent International Courts" organized by the Minnesota State Bar Association

June 13, 1962

It is my understanding that my paper is to deal with the need for a Permanent Arbitral Tribunal in the context of a specific problem, that of the Settlement of Disputes between Governments and Private Foreign Investors.

This problem is one in which the World Bank has recently taken an active interest, because of its belief that a solution would encourage an increased international flow of private capital to the less developed areas of the world.

In September of last year, Mr. Eugene R. Black, the President of the Bank, said the following in his address to the Board of Governors of the Bank at their Annual Meeting in Vienna :

> "As most of you know, the Bank as an institution and the President of the Bank in his personal capacity, have on several occasions been approached by member governments to assist in the settlement of financial disputes involving private parties. We have, indeed, succeeded in facilitating

> settlements in some issues of this kind but the Bank is not really equipped to handle this sort of business in the course of its regular routine.
>
> At the same time, our experience has confirmed my belief that a very useful contribution could be made by some sort of special forum for the conciliation or arbitration of these disputes. The results of an inquiry made by the Secretary-General of the United Nations show that this belief is widely shared. The fact that governments and private interests have turned to the Bank to provide this assistance indicates the lack of any other specific machinery for conciliation and arbitration which is regarded as adequate by investors and governments alike. I therefore intend to explore with other institutions, and with our member governments, whether something might not be done to promote the establishment of machinery of this kind."

These explorations are now in progress but no conclusions have as yet been reached. What I am going to say to you this afternoon should therefore not be taken as representing the views of the Bank.

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I think it may be useful by way of further introduction to our subject to make a few general observations about different methods for the settlement of international disputes. Terminology in this field is not very precise and may sometimes even be misleading.

For our purposes I would distinguish, first, conciliation, second, arbitration and, third, proceedings before a court of justice.

The difference between conciliation and arbitration can be briefly stated in these terms : conciliation recommends, arbitration decides. The ultimate objective in both cases is to resolve the dispute. But conciliation seeks to achieve this objective by reconciling the conflicting

points of view of the parties and helping them to reach agreement, whereas in arbitration the parties agree to be bound by the decision of the arbitral tribunal.

The distinction between ~~conciliation~~ arbitration and judicial proceedings is less clear. (I must remind you that we are dealing with the international, not the domestic, scene). The two proceedings have some very important features in common : both envisage a binding decision and both envisage a decision reached "on the basis of respect for law" (Article 37 of the Hague Convention of 1907). It is true that arbitrators may be authorized by the parties to decide a case ex aequo et bono, without being limited by rules of law, but this same authority may be conferred on the International Court of Justice by the parties under Article 38 (2) of the Statute of the Court. The principal difference between arbitral and judicial proceedings appears to be that arbitration contemplates a decision of a dispute between two or more parties "by judges of their own choice" (in the words of the Hague Convention), or appointed pursuant to some method agreed upon between the parties, whereas judicial proceedings are held before a standing tribunal the members of which have been appointed by the government or governments which created the tribunal, rather than by the parties to the specific dispute. Another possible distinction is that just as the composition of an arbitral tribunal, unlike that of a court of justice, is within the control of the parties to the dispute, the arbitral procedure can generally be controlled by the parties, something that is not generally true, or is less true, of judicial proceedings. Finally, States have tended to regard resort to arbitration as less of a

restriction on sovereignty than acceptance of the jurisdiction of a court of justice. But here we deal with words rather than substance. It is possible to think of an arbitral tribunal with compulsory jurisdiction and of a forum which is styled "court of justice", the jurisdiction of which would be based entirely on consent in each specific case brought before it.

And to end this dissertation on definition and terminology with a term that comes close to the title of this paper, the Permanent Court of Arbitration at The Hague is permanent in the sense that it is available, or accessible, on a continuing basis, but notwithstanding its name it is neither a court, nor an arbitral tribunal, but rather a mechanism for the constitution of ad hoc arbitral tribunals composed of arbitrators selected from a list of persons designated by the States which are parties to the Hague Conventions of 1899 and 1907.

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What is the present state of affairs with respect to the settlement of investment disputes between States and foreign private parties ?

In the absence of an agreement to the contrary between the foreign investor and the host State, the investment generally is subject to the laws of that State (local law) and the redress of grievances which the investor may seek by direct access is equally determined by local law.

If the investor feels aggrieved by actions of the host State he may invoke the diplomatic protection of his national State or he may request his national State to espouse his case and bring a claim before

an international tribunal. However, in some countries the foreign investor may, as a condition of entry, be required to waive diplomatic protection and even if the national State is willing to espouse the investor's case, it may find that the host State is unwilling to submit to the jurisdiction of an international tribunal. But even in the absence of these obstacles the present situation is unsatisfactory. The necessity of espousal of the investor's case by his national State before an international claim can be lodged introduces a political element. An investor may well find that his government refuses to espouse a meritorious case because it fears that to do so would be regarded as an unfriendly act by the host State. And such considerations are even more likely to cause the national government to refrain from acting, if the merits of the investor's case are not wholly clear in its view, thus withholding from the investor an opportunity to have the merits of his claim tested by an impartial tribunal.

In an attempt to overcome these difficulties some investors, including in particular large corporations in the field of extractive industry, have negotiated agreements with host States providing for international conciliation and/or arbitration of disputes. But the binding character of an undertaking by a State to have recourse to such international proceedings is sometimes denied. For example, when the Mossadegh government in Iran expropriated the properties and cancelled the concession of the Anglo-Iranian Oil Company, it regarded itself as no longer bound by the arbitration clause in the concession agreement.

But even where the binding character of the arbitration clause is not being denied, its implementation may run into difficulties.

Undertakings to have recourse to arbitration are frequently couched in general, sometimes even in vague, terms. The scope of the undertaking may not be clear or no procedure may have been prescribed for the appointment of arbitrators, or the procedure prescribed may be inadequate in not making provision for the contingency that a party refuses to participate in the appointment process or for the event that the parties fail to reach agreement on an appointment where agreement is required. Further complications may arise at every point of the arbitration procedure, unless exhaustive provision has been made in the arbitration clause. Thus there are many ways in which undertakings to arbitrate can be frustrated either by the unwillingness of one of the parties or by a bona fide difference of opinion between the parties as to what had been agreed.

Not infrequently attempts by parties to agree on a procedure for the settlement of an existing dispute have been frustrated or complicated by the lack of international machinery specifically designed to deal with disputes between States and foreign private parties. As you know, only States may be parties in contentious proceedings before the International Court of Justice. The Permanent Court of Arbitration, existing pursuant to the Hague Conventions of 1899 and 1907, was equally designed to deal with disputes between States. I must mention, however, that the offices and staff of the Permanent Court of Arbitration may be made available, at the request of a State which is a party to one of the Hague Conventions, for arbitration or conciliation proceedings between that State and a private party. And a few months ago, the Administrative Council of the Permanent Court of Arbitration formulated rules of procedure which parties to such proceedings might adopt.

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Having outlined some of the principal problems which arise in connection with the settlement of investment disputes, I shall now try to indicate the lines along which, in my opinion, a solution could and should be sought.

By way of preliminary comment I want to stress that in looking for a solution we are subject to limitations imposed by requirements of reasonableness as well as realism. For example, it would be both unreasonable and unrealistic to advocate a compulsory international jurisdiction for disputes between States and foreign investors which would be available without the prior exhaustion of local remedies. This would in effect amount to extra-territorial status for all foreign investment. It would not, on the other hand, be unreasonable for an investor to expect to have access to a compulsory international jurisdiction in a quasi-appellate proceeding for the adjudication of claims of denial of justice or other violations of the international law standard. Such an expectation would not be unreasonable but, I am afraid, unrealistic at least until such time as States have reached a meaningful agreement on what that standard implies. An attempt to formulate such an agreement among Western countries is under way in the O.E.C.D., the Organization for Economic Cooperation and Development in Paris, which is studying a Draft Convention on the Protection of Foreign Property. But no decisive progress has been made.

In other words, we are forced to admit that at the present time any arrangement for the settlement of investment disputes by an international jurisdiction must be based on the consent of the parties.

But granting this important limitation there is much that could and should be attempted.

States might by international agreement establish an institution which could offer the services of a panel of qualified persons willing to act as conciliators or arbitrators in specific investment disputes. The institution might be called the International Conciliation and Arbitration Center. The panel might be composed of persons designated by the respective States which are parties to the international agreement setting up the Center. The selection, from the panel, of persons to act as conciliators or arbitrators in any specific case would be left in the first instance to the parties to the dispute.

You will note that the institution suggested by me would engage in conciliation as well as arbitration. As I stated earlier in this paper, conciliation has as its object a reconciliation of the conflicting views of the parties. The conciliator may make recommendations to the parties for a settlement, but the parties are not bound to accept these recommendations.

This may not sound like a very effective method of dispute settlemer as compared to arbitration, but our experience in the World Bank has taught us differently. In many instances the principal obstacle to a settlement is the unwillingness of parties to confront each other and to meet with a serious will to seek agreement. The nationalization of the

Suez canal is an example of a serious dispute involving large amounts of money which was settled through the good offices of the World Bank. The Egyptioan Government was as interested in settling this case as were the shareholders of the Suez Canal Company. But relations between the two parties were so bad that there could be no question of direct negotiation. The Government of Egypt was unwilling to have the dispute decided by international arbitration but it was happy to seek the offices of the World Bank as a mediator or conciliator. And after a great deal of arduous work by all sides a mutually acceptable agreement was worked out.

It is my firm view that in order to improve the chances of adoption of an international agreement setting up machinery for dispute settlement, and to assure the effectiveness of that machinery once it has been established, it should be equipped to deal with conciliation as well as arbitration.

You will also note that I envisage arbitral tribunals composed on an ad hoc basis, rather than a standing tribunal with a fixed membership. It is sometimes argued in favor of the latter that it would permit the gradual development of a body of case law by a group, in essence a court, which would have continuity. But this advantage would be outweighed by far by the political complications involved in determining the composition of such a tribunal. In my own view these complications might well prove an insurmountable obstacle.

I now return to the proposed international agreement. Adherence to that agreement would not of itself obligate any State to submit itself to the jurisdiction of the Center. Use of the Center would be entirely voluntary. But the international agreement would provide that once a

State had voluntarily agreed to submit a specific dispute or a group of disputes to the jurisdiction of the Center, that undertaking would be a binding international undertaking. Accordingly, the international agreement would also provide appropriate safeguards against frustration of an undertaking to arbitrate by reason of failure of one of the parties to designate arbitrators or otherwise cooperate in the proceedings.

Summarizing the foregoing, the Center would provide machinery for conciliation and arbitration, based on consent. This machinery would be available to a private party as a claimant against a foreign State without the necessity of espousal of its case by its national State. Conversely, a State would have access to it as a claimant against a foreign private party. It would probably be reasonable to provide further that to the extent that a private party is able to assert its rights in proceedings against a foreign State under the auspices of the Center, its national State should be barred from bringing an international claim on its behalf.

The awards of arbitral tribunals created under the auspices of the Center would be final and binding and the international agreement establishing the Center might obligate all Contracting States to give to these awards the most favorable treatment they give to foreign arbitral awards, whether under their internal law, or pursuant to the Genera Convention of 1927 or the New York Convention of 1958 dealing with foreign arbitral awards.

An agreement along the foregoing lines would admittedly have only limited scope. It would provide machinery but it would not make use of that

machinery compulsory. Nor would it lay down substantive rules of law regarding the treatment of foreign investment. But I doubt whether it would be useful to try for a more far-reaching agreement at this time; to do so might run into serious objections from the side of the capital exporting countries as well as from that of the capital importing countries. It is no secret that the Western countries, including notably the United States, have hitherto not shown great willingness to submit themselves to an international jurisdiction. Yet we must realize that if we are to establish international rules for dispute settlement, they will have to apply to capital exporting and capital importing countries alike. It may well be that in the industrialized countries of the West the likelihood is small that a foreign investor would have reason to complain of action taken by the host State to the detriment of his investment against which he would have no adequate local remedy. But this does not mean that h these countries should be any less willing than the capital importing countries to have their actions reviewed by an international jurisdiction.

The limited scope of the suggestions I have outlined to you takes account of these facts of present-day international life. Yet I am confident that the realization of these suggestions would constitute an important step toward the removal of what is one of the impediments to the flow of international capital, in which all of us, capital exporters and capital importers, are equally interested.

MULTILATERAL INVESTMENT INSURANCE

Address by A. Broches,

General Counsel of the International Bank for Reconstruction and Development, at the Federal Bar Association's annual convention

September 7, 1962

Protection of private foreign investment is by no means a new subject. It has been discussed over the past half century at the very least. But over the years there has been an important change of emphasis. Whereas protection of private foreign investment used to be discussed as a problem interesting principally, if not exclusively, the investor, it has come to be regarded as an element in the much larger problem of the promotion of economic development in the less developed countries. In contemporary discussion, protection of private foreign investment is no longer considered an end in itself but rather a means to increase the flow of private capital abroad, with the ultimate aim of improving economic conditions in the underdeveloped world.

It is within this larger framework that the question of investment guarantees or investment insurance is relevant. For neither the existing national investment guarantee programs nor proposed multilateral programs of this kind have as their purpose the protection of the investor for his own sake. The justification for committing public funds for such programs is sought in the need to encourage

private capital to move to the developing countries to assist and advance their economic development.

The United States guarantee program is the oldest and by far largest of the national investment guarantee or investment insurance programs now in operation. For some years there has been in operation a German program and, more recently, a Japanese program was started. In addition, a number of European governments are reported to be considering the institution of national programs of investment insurance.

However, within the past few years a number of private individuals and organizations have proposed that investment insurance be placed on a multilateral rather than on a national or bilateral basis.

These proposals, and the idea of multilateral investment insurance in general, have recently been studied by the World Bank, which in March of this year published a staff report entitled Multilateral Investment Insurance. This report was prepared at the request of the Development Assistance Committee of the Organization for Economic Cooperation and Development.

While the principal proposals for multilateral investment insurance differ from one ano her in detail they have certain features in common. For instance, all of these proposals would call for an international organization with membership drawn from both capital-importing and capital-exporting countries, which would insure private foreign investment in the less developed countries against certain risks. As a minimum, protection would be available against loss resulting from

expropriation or nationalization without adequate compensation (political risk); inability to transfer profits or to repatriate capital (transfer risk); and international war (calamity risk). Some proposals would extend to loss resulting from so-called "creeping expropriation", and some would protect against loss from revolution or insurrection. Protection would not be available against normal business risks.

Under most proposals only a percentage of the loss would be insured, with the investor a self-insurer for the balance. Only new investments would be insured (but "new investments" might cover reinvested earnings).

The proposals also differ in their provisions concerning the circumstances which would give rise to a claim for compensation. Most proposals contemplate that the investor would be insured against loss arising from the occurrence of a specified event which deprived him of effective control of his property or the receipt of earnings. Under an alternative proposal, the investor would instead be insured against the refusal of the country of investment to arbitrate an investment dispute or to abide by an arbitral award in his favor, in violation of a previous undertaking to do so.

The proponents of the multilateral approach claim that it would have a number of advantages. One advantage claimed for a multilateral program is that it would make insurance protection more widely available and would thereby encourage an increased volume of private foreign investment. There is no doubt that a number of smaller capital-exporting

countries may find it difficult if not impossible to establish national investment insurance programs and that the establishment of a multilateral program might encourage investments by nationals of these countries.

It may also be said that a multilateral program, if it would substantially replace national programs, and if no new national programs were established (but these assumptions are open to question), would lead to administrative simplification for both capital-exporting and capital-importing countries. There would be only one administering institution and the charter of that institution could cover all aspects of the program, thus removing the necessity of negotiating a network of bilateral agreements between the different national institutions and the capital-importing countries.

And it should also be mentioned that a multilateral program would be particularly appropriate for the insurance of the increasing number of investments made by international consortia or other groupings of mixed nationality. It would overcome the present difficulties flowing from the fact that some of the participating national groups may be able to take out insurance whereas others are unable to obtain such coverage and it would also make possible a desirable degree of uniformity.

A further advantage assigned to a multilateral program in contrast to independent national programs, is that liability for losses would be spread among a number of countries, and that the participation of the capital-importing countries in the program would in itself tend to reduce the likelihood of loss. But both of these points raise some difficult questions.

The first question which arises is whether both capital-exporting and capital-importing countries should share in the financial liabilities entailed in a multilateral insurance program and if so, in what proportion these liabilities should be undertaken. Most proponents of a multilateral program feel that it would be essential not only to have the underdeveloped countries associated in the program, but also to have them bear some proportion of the financial risk. This would tend to restrain participating countries from taking action which would give rise to a claim. Moreover, it can be argued that such action would bring the offending country into disfavor with the community of capital-importing as well as capital-exporting countries, in contrast to the situation under a bilateral guarantee program where only one other country would be involved. This would support the conclusion that a multilateral program would do more than a series of bilateral programs to bring about an improvement in the investment climate.

One plan goes so far as to put one-half of the financial risk on the underdeveloped countries as a group, believing that the financial stake which these countries thus acquire in the conduct of the other members of the group will maximize the stimulus towards responsible behavior. As against this, it can be argued, and with considerable justification, that it is as unrealistic politically to expect this degree of financial participation, as it would be unrealistic financially to accept it even if it were obtainable.

A question that may not have been given enough empahsis by most proponents of multilateral insurance plans is the degree of

solidarity that can be expected from the countries participating in a multilateral program. Most plans contemplate that each country would have a fixed share in the liabilities of the program. Would the capital-exporting countries be prepared to share losses in those proportions without regard to the amount of investment originating in their countries which is insured by the program? And would a capital-importing country which is friendly to foreign capital be willing to undertake an obligation to share in liabilities for losses occasioned by another capital-importing country which might behave as Cuba did?

I want to discuss one more aspect of the comparison of the potentialities of national programs versus a multilateral program.

There is a considerable body of investor opinion which holds that investment insurance programs bear in them a considerable danger of increasing rather than decreasing the risk of politically motivated interference with property rights by some of the capital-importing countries. And they base this danger on the fact that a capital-importing country would feel less restraint to interfere with these rights if it knew that the investor affected by its measures would somehow be compensated. Therefore, they feel strongly that such a program could only have the beneficial effects desired, if it were coupled with an udertaking by the capital-importing countries to abide by rules of good conduct, such as nondiscriminatory treatment, and prohibition of nationalization without adequate compensation or in violation of an undertaking not to nationalize. The same investors also feel that only an insurance program coupled with the acceptance of these rules would reduce the likelihood of loss to the extent necessary to make such a program financially practicable.

Attempts to find a formulation in an international agreement of these simple rules of conduct have been going on for a considerable time and are presently being carried on within the framework of the OECD. But no decisive progress has been made to date.

It is possible that countries which might be reluctant to undertake meaningful obligations concerning the treatment of foreign investment in the isolated context of an investment protection code would be prepared to do so within the framework of an integrated insurance-cum-code program. On the other hand, the possibility certainly exists that, so far from facilitating agreement, the result of coupling the insurance scheme with a proposal for an investment code would be the realization of neither.

On this point, as on many other features of the proposals, it is extremely difficult to come to firm conclusions. Unfortunately this difficulty and this uncertainty are not limited to matters of detail and implementation but extend to the most basic question of all to which I shall now turn.

The proposals for establishment of a multilateral program proceed from the premise that insurance against the non-commercial risk of private overseas investment is an effective technique for stimulating that investment. But it is difficult to satisfy oneself as to the validity of that premise.

The degree to which the political risk (in the broad sense of the term) is going to be a deterrent to an investor depends not only on his estimate of the likelihood that the risk will materialize but, among other factors, also on the freedom of choice which the investor has to go or not to go abroad. Companies that have to invest in underdeveloped areas

either to obtain products or raw materials, or to win or retain essential markets for their products, might not take the same view of the political risk as companies which have alternative investment possibilities, either by expanding their operations at home or by investing in other developed areas. But if this justifies the conclusion that a certain volume of foreign investment is likely to go forward in any event, it leaves open the question of the incentive effect of a multilateral program on the remaining investment potential. It would seem that commercial and economic considerations would primarily guide the decision. Where the investor hesitates solely because of uncertainty as to the non-commercial risks of the operation, the availability of insurance against those risks might tip the scale in favor of the investors. But where the political uncertainty is great, the possibility of obtaining compensation, through insurance, for the loss of an investment is likely to be thought a poor substitute for a continuing enterprise.

One might hope to find a clue to the answer to this difficult question in the results of the operations of the United States program which has been in operation for more than 10 years. However, an analysis of the investments guaranteed under that program until June 1961 failed to give any indication of the extent to which the program had induced investments which would not have been made had the program not been in operation; and persons familiar with the program were not prepared to give a judgment on this question, except to say that the program undoubtedly resulted in some additional investment. And the replies to a joint World Bank/ICC questionnaire afford no basis for any more precise judgment.

The Bank's report puts it in these words:

"Some additional investment would surely be stimulated by the availability of new or expanded insurance facilities, assuming sufficiently broad membership in the program -- but it is not possible to translate that statement into quantitative terms. Without an estimate of the amount of additional investment which would be induced, there is no basis on which to judge whether financial commitments on the scale demanded by an international program would be justified."

In these circumstances the Bank has not found it possible to establish a position for or against the creation of an international investment insurance program. Its report seeks only to identify and focus attention upon the principal issues which are inherent in the concept of a multilateral scheme and which the Bank believed that Governments would find relevant in considering whether to create such a system.

There is one final point that I want to mention. Most of the private proposals for multilateral investment insurance contemplate that a program of this character would be administered by or in close conjunction with the World Bank. In the Preface to the report the Bank's President, Mr. Black, states as his view that it would be premature to discuss at this time the problem of administration. Mr. Black does sound a note of caution, however, in pointing out that any proposal for Bank administration would be likely to raise for the Bank a number of difficult issues having to do principally with the compatibility of that responsibility with the other and primary functions of the Bank as a development institution.

INTERNATIONAL INVESTMENT GUARANTIES: POSSIBILITIES AND PROBLEMS

By Aron Broches

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problems involve the attachment of a guaranty to what is, in one form or another, a security issued by a foreign government or governmental subsidiary. Such obligations may carry a relatively high rate of interest. If they were to circulate legally in the United States, and were to carry a United States Government guaranty, they would obviously enable a foreign government to compete on more favorable terms within the United States with securities directly issued by the United States Government, which would ordinarily carry a much lower rate of interest.

Finally, the authority granted under the Act to issue guaranties to wholly-owned foreign subsidiaries raises the entire problem of "tax haven" corporations. On this problem it is likely that some light will be shed within the fairly near future by Congressional action or inaction on the present tax bill.

This brief discussion is sufficient to point out that the rôle of the administrator of the guaranty program of the United States is by no means a simple or an easy one. Nevertheless, the guaranty technique seems to have been sufficiently proved so that little doubt remains—as did exist some years ago—of its usefulness. A good many of the problems which have been described are the growing pains of a program which, after a long period of relative dormancy, has begun in recent months to reach substantial and important proportions. Answers to all of these problems are not as yet available. It may be hoped that the dialogue between interested persons within and outside the Government will develop such answers.

INTERNATIONAL INVESTMENT GUARANTIES: POSSIBILITIES AND PROBLEMS

By Aron Broches

General Counsel, International Bank for Reconstruction and Development

You have just heard a description of the U. S. investment guaranty program. I need not therefore take time to explain the general background of investment guaranties and the objectives sought to be achieved thereby. The U. S. program is the oldest and by far the largest of the national investment guaranty or investment insurance programs now in operation. For some years there has been in operation a German program and, more recently, a Japanese program was started. In addition, a number of European governments are reported to be considering the institution of national programs for investment insurance.

However, within the past few years a number of private individuals and organizations have proposed that investment insurance be placed on a multilateral rather than on a national or bilateral basis. These proposals have recently been studied by two organizations, one public and the other private. The public organization is the World Bank, which in March of this year published a staff report entitled *Multilateral Investment Insurance*. This report was prepared at the request of the Development As-

sistance Committee of the Organization for Economic Co-operation and Development. The private group is the International Chamber of Commerce, which has had the subject under study for some time and is expected to issue its report shortly. The two institutions joined in drafting a questionnaire addressed to the business and financial communities in a number of countries, designed to elucidate such questions as the likely incentive effect of a multilateral insurance program, the types of risks to be covered and a number of other issues. The answers to this joint questionnaire have been analyzed by the staff of the World Bank, and the analysis appears in the World Bank Report to which I just referred, and which is available upon request from the publications office of the Bank.

While the principal proposals for multilateral investment insurance differ from one another in detail they have certain features in common. (Incidentally, the Bank Report also contains a comparative summary of some twelve of these proposals). For instance, all of these proposals would call for an international organization, with membership drawn from both capital-importing and capital-exporting countries, which would insure private foreign investments in the less developed countries against certain risks. As a minimum, protection would be available against loss resulting from expropriation or nationalization without adequate compensation (political risk); inability to transfer profits or to repatriate capital (transfer risk); and international war (calamity risk). Some proposals would extend to loss resulting from government action which falls short of outright seizure but which nevertheless substantially deprives an investor of the control or the benefit of his investment (sometimes described as "creeping expropriation"), and some would protect against loss from revolution or insurrection. Protection would not be available against normal business risks—devaluation is regarded as a business risk, and rightly so in my opinion—or against any risk for which insurance coverage could be purchased from private sources. Under most proposals only a percentage of the loss would be insured, with the investor a self-insurer for the balance. Only new investments would be insured (but "new investments" might cover reinvested earnings), and investments would be insured for a term of years and upon payment of an annual premium.

It would be a condition of participation under some, but not all, proposals that countries accept certain minimum rules of good conduct vis-a-vis foreign investments made in their territories (*e.g.*, non-discriminatory treatment, no expropriation except for a public purpose and against full compensation promptly paid and freely transferable, no breach of contractual undertakings, et cetera).

The proposals also differ in their provisions concerning the circumstances which would give rise to a claim for compensation. Most proposals contemplate that the investor would be insured against loss arising from the occurrence of a specified event which deprived him of effective control of his property or the receipts of earnings; compensation would be paid under the policy of insurance upon the investor's establishing that the event had taken place and had resulted in loss. Under an alternative

proposal, the investor would instead be insured against the refusal of the country of investment to arbitrate an investment dispute or to abide by an arbitral award in his favor, in violation of a previous undertaking to do so.

Finally, most of the proposals contemplate that such a multilateral investment insurance program would be administered by the World Bank or by a separate agency affiliated with the World Bank.

Within the time at my disposal I cannot do more than touch on a few of the important issues which arise in connection with nearly every phase of these proposals which I have summarized for you. And since we have just heard a presentation concerning a national program, I thought I might focus on some of the possible advantages and disadvantages of a multilateral program as compared to the national approach.

The proponents of the multilateral approach claim that it would remove a number of significant shortcomings of the present situation. Some of the proponents believe that in a multilateral program it would be possible to improve the scope of coverage. Frankly, I do not know on what this expectation is based. One could argue on the contrary that, with a multitude of national systems, there might be a tendency towards competition among national schemes which, although undesirable in many ways, would have the advantage for investors that it might result in a competitive improvement of coverage. And it would seem clear that in a multilateral program there would be no room for "all-risk guaranties" which a government administering its own program might issue in exceptional cases where the national interest justifies such action.

Another advantage claimed for a multilateral program is that it would make insurance protection more widely available and would thereby encourage an increased volume of private foreign investment. There is no doubt that a number of smaller capital-exporting countries may find it difficult, if not impossible, to establish national investment insurance programs and that the establishment of a multilateral program might encourage investments by nationals of these countries.

It may also be said that a multilateral program, *if* it would substantially replace national programs, and *if* no new national programs were established (but these assumptions are open to question), would lead to administrative simplification for both capital-exporting and capital-importing countries. There would be only one administering institution and the charter of that institution could cover all aspects of the program, thus removing the necessity of negotiating a network of bilateral agreements between the different national institutions and the capital-importing countries.

And it should also be mentioned that multilateral program would be particularly appropriate for the insurance of the increasing number of investments made by international consortia or other groupings of mixed nationality. It would overcome the present difficulties flowing from the fact that some of the participating national groups may be able to take out insurance, whereas others are unable to obtain such coverage, and it would also make possible a desirable degree of uniformity.

A further advantage assigned to a multilateral program in contrast to independent national programs is that liability for losses would be spread among a number of countries, and that the participation of the capital-importing countries in the program would in itself tend to reduce the likelihood of loss. But both of these points raise some difficult questions.

The first question which arises is whether both capital-exporting and capital-importing countries should share in the financial liabilities entailed in a multilateral insurance program and, if so, in what proportion these liabilities should be undertaken. Most proponents of a multilateral program feel that it would be essential not only to have the underdeveloped countries associated in the program, but also to have them bear some proportion of the financial risk. The feeling of "belonging to a club," together with the practical consideration that membership entails an obligation to contribute to the compensation of an injured investor would, it is argued by some, tend to restrain participating countries from taking action which would give rise to a claim. Moreover, it can be argued that such action would bring the offending country into disfavor with the community of capital-exporting as well as capital-importing countries, in contrast to the situation under a bilateral guaranty program, where only one other country would be involved. This would support the conclusion that a multilateral program would do more than a series of bilateral programs to bring about an improvement in the investment climate.

One plan goes so far as to put one half of the financial risk on the underdeveloped countries as a group, believing that the financial stake which these countries thus acquire in the conduct of the other members of the group will maximize the stimulus towards responsible behavior. As against this it can be argued, and with considerable justification, that it is as unrealistic politically to expect this degree of financial participation as it would be unrealistic financially to accept it, even if it were obtainable.

A question that may not have been given enough emphasis by most proponents of multilateral insurance plans is the degree of solidarity that can be expected from the countries participating in a multilateral program. Most plans contemplate that each country would have a fixed share in the liabilities of the program. Would the capital-exporting countries be prepared to share losses in those proportions without regard to the amount of investment originating in their countries which is insured by the program? And would a capital-importing country which is friendly to foreign capital be willing to undertake an obligation to share liabilities for losses occasioned by another capital-importing country which might behave as Cuba did?

I want to discuss one more aspect of the comparison of the potentialities of national programs *versus* a multilateral program.

There is a considerable body of investor opinion which holds that not only national but even multilateral investment insurance programs bear in them a considerable danger of increasing rather than decreasing the risk of politically motivated interference with property rights by some

of the capital-importing countries. And they base this danger on the fact that a capital-importing country would feel less restraint from interfering with these rights if it knew that the investor affected by its measures would somehow be compensated. Therefore, while admitting that what might be called the "deterrent effect" of an insurance program would be greater in the case of a multilateral program than in that of a series of national programs, they feel strongly that such a program could only have the beneficial effects desired, if it were coupled with an understanding by the capital-importing countries to abide by the rules of good conduct, such as non-discriminatory treatment, no nationalization without adequate compensation or in violation of an undertaking not to nationalize, et cetera, to which I referred earlier. The same investors also feel that only an insurance program coupled with the acceptance of these rules would reduce the likelihood of loss to the extent necessary to make such a program financially practicable.

Attempts to find a formulation in an international agreement of these simple rules of conduct have been going on for a considerable time and are presently being carried on within the framework of the Organization for Economic Co-operation and Development. But no decisive progress has been made to date. There is a considerable measure of disagreement about the desirability and practicability of attempts to establish a convention for the protection of foreign investments in isolation. Until now the United States, for instance, has shown quite strong opposition to the idea, and there is doubt whether many of the capital-importing countries would be willing to subscribe to a meaningful agreement. But it is certainly possible that countries, which are reluctant to undertake meaningful obligations concerning the treatment of foreign investment in the isolated context of an investment protection code, might be prepared to do so within the framework of an integrated insurance-cum-code program. If part of the price of participation in an insurance program were to be the acceptance of certain minimum rules of good conduct, perhaps this price would be paid. On the other hand, the possibility certainly exists that, far from facilitating agreement, the result of coupling the insurance scheme with a proposal for an investment code would be the realization of neither. On this point, as on many other features of the proposals, it is extremely difficult to come to firm conclusions. Unfortunately this difficulty and this uncertainty are not limited to matters of detail and implementation, but extend to the most basic question of all, to which I shall now turn.

The proposals for establishment of a multilateral program proceed from the premise that insurance against the non-commercial risks of private overseas investment is an effective technique for stimulating that investment. Presumably, before creating new international machinery, expending the very substantial effort involved in establishing an international program, and undertaking the financial and other obligations which would attach to participation in the program, governments would wish to be satisfied as to the validity of that premise. In its recent study the World

Bank paid particular attention to this crucial question. I regret having to confess that the diligence with which we have searched for an answer has not been rewarded by success. The principal obstacle to an assessment of the incentive effect of the availability of insurance on private foreign investment is the variety of considerations which influence investment decisions.

The degree to which the political risk (in the broad sense of the term) is going to be a deterrent to an investor depends not only on the investor's estimate of the likelihood that the risk will materialize, but, among other factors, also on the freedom of choice which the investor has to go or not to go abroad. Companies that have to invest in underdeveloped areas either to obtain products or raw materials, or to win or retain essential markets for their products, might not take the same view of the political risk as companies which have alternative investment possibilities, either by expanding their operations at home or by investing in other developed areas. But if this justifies the conclusion that a certain volume of foreign investment is likely to go forward in any event, it leaves open the question of the incentive effect of a multilateral program on the remaining investment potential. It would seem that commercial and economic considerations would primarily guide the decision. Where the investor hesitates solely because of uncertainty as to the non-commercial risks of the operation, the availability of insurance against those risks might tip the scale in favor of the investment. But where the political uncertainty is great, the possibility of obtaining compensation, through insurance, for the loss of an investment is likely to be thought a poor substitute for a continuing enterprise.

One might hope to find a clue to the answer to this difficult question in the results of the operations of the three national investment guaranty programs—those of the United States, Germany and Japan. The U. S. program has been in operation for more than ten years and guaranties issued as of the end of June, 1961, aggregated some $600 million. However, an analysis of the investments guarantied under that program fails to give any indication of the extent to which the program has induced investments which would not have been made had the program not been in operation; and persons familiar with the program are not prepared to give a judgment on this question, except to say that the program undoubtedly resulted in some additional investment. And the replies to the World Bank/ICC questionnaire afford no basis for any more precise judgment. The Bank's report puts it in these words:

> Some additional investment would surely be stimulated by the availability of new or expanded insurance facilities, assuming sufficiently broad membership in the program—but it is not possible to translate that statement into quantitative terms. Without an estimate of the amount of additional investment which would be induced, there is no basis on which to judge whether financial commitments on the scale demanded by an international program would be justified.

In these circumstances the Bank has not found it possible to establish a position for or against the creation of an international investment in-

surance program. Its report seeks only to identify and focus attention upon the principal issues which are inherent in the concept of a multilateral scheme and which the Bank believes that governments would find relevant in considering whether to create such a system. On a few, a very few, of these issues I have commented in this presentation. For the remainder I must refer you to the report itself which, as I stated earlier, may be obtained from the Bank upon request.

There is one final point that I want to mention. As I stated earlier, most of the proposals for multilateral investment insurance contemplate that a program of this character would be administered by or in close conjunction with the Bank. The report itself does not discuss this suggestion and, in the preface to the report, the Bank's President, Mr. Black, states as his view that it would be premature to discuss at this time the problem of administration. Mr. Black does sound a note of caution, however, in pointing out that any proposal for Bank administration would be likely to raise for the Bank a number of difficult issues having to do principally with the compatibility of that responsibility with the other and primary functions of the Bank as a development institution.

The CHAIRMAN asked Messrs. Rubin and Broches if they would comment on each other's remarks.

Mr. RUBIN thought that Mr. Broches' remarks dealt primarily with expropriation, while other risks were less emphasized.

Mr. BROCHES indicated that the apparent emphasis on the expropriation risk arose from the fact that he was trying to compare the relative advantages and disadvantages of national and multilateral guaranty systems. There was not much difference between the two systems with respect to other risks.

He asked Mr. Rubin whether the Agency for International Development considered the effect of investments which the Agency was asked to guaranty on the United States competitive position and balance of payments.

Mr. RUBIN pointed out that the statutory authorization of investment guaranties contained no such criteria, and indicated that the consideration of the effect of the guaranty on United States balance of payments did not influence the specific risk guaranty. All-risk guaranty, however, was very similar to a loan, and subject therefore to similar considerations.

Mr. MARTIN DOMKE wondered whether the stress on compulsory arbitration would prove a disservice to arbitration.

Mr. RUBIN said that in guarantying the investment, the United States did not undertake under all circumstances to espouse the claim of its citizens, and the United States could determine the justification for the measures undertaken by the recipient country. Hence, though arbitrating it be compulsory, it is not automatic.

The CHAIRMAN pointed out that there was no *requirement* that the United States arbitrate.

Mr. SIMON J. NUSBAUM asked whether the Agency for International Development or the State Department had testified, or would testify, on the tax bill pending before Congress, and if not, what their position was on that bill.

Mr. RUBIN answered that the Administration position was presented by the Treasury Department, which had consulted with the Agency for International Development.

Mr. NUSBAUM asked Mr. Broches whether the difference between the terms "underdeveloped" country and one "in the process of development" had been spelled out in any official or legal document.

Mr. BROCHES indicated that the two terms had the same meaning, that there was no precise criterion on which to base a distinction between "developed" and "underdeveloped" countries, but that no difficulty was encountered in practice in determining whether a given country fell into one category or the other.

Mr. NICHOLAS R. DOMAN asked how bilateral agreements were reached between the Agency for International Development and foreign countries.

Mr. RUBIN answered that negotiations were carried on a whole variety of levels, like any other negotiations, and the agreements contained certain basic ingredients: the consent of the recipient country that the investment guaranty be applicable, that the investment guarantied be acceptable to such country, and for United States subrogation.

Mr. FRANK W. SWACKER inquired about the peculiarities and ramifications of subrogation.

Mr. RUBIN replied that the subrogation of the United States was subject to two agreements—between the United States and the insured, and between the United States and the foreign governments. The Calvo Clause and United States subrogation to title posed the basic problems for agreements with foreign countries.

Mr. EARL A. SNYDER pointed out that arbitration might take years, and that this difficulty for the investor could be obviated by the insurer's part payment at the beginning of the arbitration.

Mr. BROCHES said that this was a practical question on which he had no preconceived view.

Mr. A. A. FATOUROS asked to what extent would a multilateral scheme of investment guaranties be insulated from international politics (for instance, in the case of retaliatory measures affecting aliens of a particular nationality) and from the effects of competition between capital-exporting states.

Mr. BROCHES thought that the question cast justifiable doubt on whether countries would be willing to institute a multilateral scheme, but that once a multilateral program had been established, its administration could largely be insulated from politics.

Mr. RICHARD M. BOESEN asked about the length of time required to process applications and to pay losses.

Mr. RUBIN replied that the time required to process applications depended on the ability of a limited staff to cope with a large number of

FIFTH SESSION OF THE U.N. ECONOMIC COMMISSION
FOR AFRICA

Statement by A. Broches made on
February 27, 1963

Mr. Chairman, distinguished delegates,

The time of the Commission is precious, and it is for that reason that I have not asked to participate in the general discussion on the Economic and Social Situation and Trends in Africa, - a discussion to which many of the delegates made important contributions. I have asked for the floor at this time because I believe, Sir, that the Commission may wish to hear some comments by the representative of the International Bank on the proposal for the creation of an African Development Bank. But I hope that you will permit me a few general observations by way of background.

There is no need to assure you of the interest of the World Bank in the economic development and the well-being of Africa. There is ample evidence of this interest to be found in the loans and credits made by the Bank and IDA for important projects in Africa, - in the fields of transport, power, mining, agriculture and, most recently, education -, and in the many studies, surveys and other forms of technical assistance and advice rendered to many parts of Africa. I need not take the Commission's time to list these various activities in detail. I may refer to the documentation presented to this meeting and to the Annual Reports and other publications of the Bank and its affiliates. I should like to add only that the accelerated attainment

of independence by African States during the past few years has, if anything, quickened our interest in Africa. We first established the post of Special Representative for Africa and since your last session the Bank has in April 1962 established an African Department, headed by M. Pierre Moussa.

Of the 32 African States represented at this session of the Economic Commission for Africa, 14 are members of the Bank and of its two affiliates, the International Development Association and the International Finance Corporation. The other 18 States have all applied for membership in the Bank, and in most cases also for membership in one or both of the Bank's affiliates. The Boards of Governors of the institutions have already approved the applications of 10 of these 18, and we hope that those States will soon have completed the formalities required to perfect their membership. The remaining eight States are still discussing the conditions of their membership with the International Monetary Fund and, as you know, membership in the Fund is a constitutional prerequisite for membership in the Bank and its affiliates. It is our hope and desire that the day may not be far off when all African States represented here will be members of the Bank, IDA and IFC, so that we may place at their disposal the broad range of services, both advisory and financial, which these institutions are in a position to provide.

Mr. Chairman, let me now turn to the African Development Bank. We have before us the Progress Report E/CN.14/204 and the interesting addendum of February 23, 1963 setting forth, among other things, the positions adopted by the Committee of Nine on a number of issues of principle; and we in the Bank have had the benefit of an exchange of views

with one of the teams which conducted the non-African consultations. It is against this background that I shall make a few observations.

Let me say first that we in the Bank think the conception of an African Development Bank a most interesting one. But it would not be proper for us to seek to influence in any way the decision whether or not to create the bank or the determination of its structure and scope of activities. These are essentially political decisions, which must and can be taken only by the African States themselves. However, once these decisions have been taken, and if the bank is established, the World Bank and its affiliates will be anxious to do what they can, within the limits of their own charters and policies, to help the African Development Bank get started and to work closely and constructively with it thereafter. I can assure the Commission of our goodwill. We have already given tangible evidence of this goodwill by arranging a leave of absence for one of the high officials of the International Finance Corporation, the distinguished banker Dr. El-Emary, in order to enable him to assist the Committee of Nine, - a matter referred to earlier today by the representative of Liberia.

It is our experience that the mere creation of new financial institutions is not necessarily going to lead to a substantial increase in the volume of development finance available. This would seem to be particularly true of a new institution created by States which, in the nature of things, are not in a position to put up large amounts of capital and which will find it difficult to part with the services of the limited number of experienced staff from among whom the staff of the newly created institution would have to be recruited. Nevertheless, if the African

States want their own bank, and the discussion here has made it clear that they want it, and if they are willing, as I think they are, to make the sacrifices in terms of money and manpower required to bring about its realization, the institution could, I think, perform an important service. The Progress Report before us speaks of the attainment of African solidarity. Hopefully, this solidarity would become meaningful in the context of economic and social development in the form of increasingly close economic co-operation. I may add, Sir, that I have just witnessed an encouraging example of such co-operation at Niamey where ten days ago the riparian States of the River Basin met in conference to consider measures of co-operation in the exploitation of the economic resources of that basin.

The size of the capital of the proposed Bank would permit only a modest level of lending out of its own resources, but the volume of lending operations should not be regarded as the principal test of success or failure. In the early years of operations at least, the African Development Bank could probably make its greatest contribution by concentrating on making or organizing competent studies of projects which it could propose for bilateral or multilateral financing, and for which it might itself provide some part of the funds required. In this way it could promote the flow of international capital for the financing of African economic and social development.

Until a decision has been taken to establish the African Development Bank and until we have had an opportunity to study its charter and organization, you will appreciate, Mr. Chairman, that it is difficult for me to be very specific as to what support the World Bank and its

affiliates might provide. But I can say that we would be willing in principle, if we were requested to do so, to make available to the proposed African Development Bank a few members of our own staff, and to train in our own institutions staff members or prospective staff members of the African Development Bank. I may also point to the courses of our Economic Development Institute, given both in English and in French, and to a special course concentrating on project appraisal. In these ways we could pass on to the new institution the experience which we have gathered in the sixteen years of our existence.

I can also see room for financial cooperation with the African Development Bank. There might be soundly conceived high priority projects, especially multi-national projects, prepared by the African Development Bank but which require funds in excess of what the African Development Bank would be able to provide from its own resources. We might be able to assist in such a situation by recommending the project to others, or possibly by participating in the financing ourselves. Over the years we have acquired a fairly wide experience in such joint operations, and in putting together financing from a variety of sources, both public and private.

As the distinguished representative of Ghana has just pointed out, the charter of the International Bank would not permit the Bank to make loans to the African Development Bank. But this is in no sense an obstacle to financial co-operation between the two institutions. The participation of the International Bank, and of IDA, in projects sponsored, and in part financed, by the African Development Bank could conveniently take the form of loan and credit transactions between

the International Bank and IDA and their African members in whose territories these projects are located. And in this connection I again express the hope that all African States will soon be members of the Bank and IDA. I would also like to assure the distinguished representative of Sierra Leone that our institutions will be able to develop suitable techniques for lending for multi-national or sub-regional projects.

These, Mr. Chairman, are the few observations that I thought I might usefully make at this time.

In concluding, Sir, I want to express to you and to the distinguished delegates here assembled the best wishes of the President and the Executive Directors of the International Bank for the success of this Fifth Session of the Economic Commission for Africa.

Thank you, Mr. Chairman.

BANCO INTERNACIONAL DE
RECONSTRUCCION Y FOMENTO

1818 H STREET, N. W., WASHINGTON 25, D. C. TELÉFONO: EXECUTIVE 3-6360

BANCO MUNDIAL

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Washington, 27 de junio de 1963

Estimados amigos:

Nos permitimos acompañar una información y el texto de un importante discurso preparado para pronunciar, en Atenas, Grecia el próximo 2 de julio po el Doctor A. Broches, Consejero Jurídico General del Banco Mundial, sobre el importante tema de la conciliación y el arbitraje en disputas que surjan sobre inversiones internacionales de capital. El Doctor Broches hablará ante la Primera Conferencia Mundial para la Paz Mundial mediante el Derecho.

El Banco Mundial está profundamente interesado en este asunto, y su Junta de Directores Ejecutivos está estudiando propuestas para llegar a la constitución, mediante acuerdos intergubernamentales, de un mecanismo que pueda mediar en dichas disputas, sobre la base de una adhesión completamente voluntaria.

La trascendencia de esta iniciativa para los países en desarrollo es evidente, y hemos considerado que sería del más alto interés para los lectores de su periódico conocer el punto de vista que, en la materia, sostiene el Banco Mundial.

Agradecidos de la acogida que dispense a esta información y discurso quedamos atentos servidores y amigos,

Jorge Bravo
Oficina de Información
Banco Mundial

BANCO INTERNACIONAL DE
RECONSTRUCCION Y FOMENTO

1818 H STREET, N. W., WASHINGTON 25, D. C. TELÉFONO: EXECUTIVE 3-6360

BANCO MUNDIAL

Para publicar en los periódicos del
miércoles 3 de julio de 1963 o después

Conciliación y Arbitraje en Disputas sobre Inversiones
Internacionales de Capital

El Banco Internacional de Reconstrucción y Fomento, (Banco Mundial), está estudiando propuestas para el establecimiento de un mecanismo de conciliación y arbitraje para solucionar disputas que surjan de inversiones internacionales, según ha informado el Consejero Jurídico General de esa institución.

El Dr. A. Broches habló en la sesión del martes de la Primera Conferencia Mundial Sobre La Paz Mundial Mediante El Derecho, que se reune en Atenas, Grecia, desde el 30 de junio hasta el 6 de julio. A esta reunión asisten las más altas autoridades en Derecho en representación de más de un centenar de países.

El Dr. Broches fue invitado a hablar sobre inversión internacional de capitales, y en su intervención dijo que el Banco Mundial concede la mayor importancia a los esfuerzos que se realizan para llegar al establecimiento de un cuerpo jurídico que rija un sistema de conciliación y arbitraje en las disputas que surjan entre estados importadores de capital y nacionales de estados exportadoras de capital. Expresó que dicho mecanismo institucional que sería completamente voluntario, estaría a la disposición tanto de las naciones importadoras de capital como de los inversionistas. Citó el Doctor Broches las palabras del Presidente del Banco Mundial, señor George Woods, ante el Consejo Económico y Social de las Naciones Unidas en abril de 1963, subrayando que el esfuerzo para llegar a la constitución del mecanismo propugnado, "merece el apoyo tanto de las naciones importadoras de capital como el de las exportadoras de capital, y parece suficientemente prometedor para justificar mayor estudio constructivo e investigación a fin de llegar a un acuerdo viable."

El siguiente es el texto completo del discurso preparado por el Doctor Broches:

Es para mí un gran honor el haber sido invitado a participar en esta Primera Conferencia Mundial sobre la Paz Mundial mediante el Derecho y el dirigirme a esta distinguida concurrencia para tratar del tema de la inversión internacional de capitales. Me place aceptar esta distinción como una señal de reconocimiento del papel que el Banco Internacional de Reconstrucción y Fomento - el Banco Mundial - desempeña en el campo de la inversión internacional de capitales.

La importancia del Banco Mundial no reside en el hecho de que éste disponga de mayores recursos que otras instituciones de inversión ni en que sea un banco de tipo internacional en vez de nacional. Su rasgo más característico y su mérito principal estriban, por el contrario, en que no es en realidad un banco sino una institución cuya función se extiende más allá de la simple provisión de fondos para proyectos específicos, al proceso mismo de desarrollo económico y en que enfoca dicho proceso desde un ángulo profesional y apolítico.

Desde luego, gran parte de las actividades del Banco Mundial consiste en proporcionar financiamiento tanto de sus fondos propios como de fondos que toma a préstamo en los mercados de capital, alentando al capital privado a participar en sus operaciones y organizando y coordinando los esfuerzos de las fuentes de fondos públicos, tanto nacionales como internacionales, con el fin de satisfacer las necesidades que en el campo del desarrollo económico tienen sus países miembros de las zonas menos desarrolladas del mundo. Sin embargo, muchos de los esfuerzos y recursos del Banco Mundial se dedican a proporcionar asistencia técnica y asesoramiento encaminados a fomentar aquellas condiciones que llevan a un crecimiento económico rápido, es decir, a la creación de un clima favorable a la inversión de capital en el sentido más amplio de esta frase. Para lograr este objetivo es indispensable contar con sólidas bases, tanto técnicas como administrativas, pero no menos indispensable es que se establezca firmemente la primacía del Derecho.

En el pasado pudiera haber habido, efectivamente, cierta justificación en considerar la inversión internacional como un asunto de interés principalmente para los países exportadores de capital y para los ciudadanos de dichos países. Hoy en día, sin embargo, se reconoce generalmente que la inversión internacional constituye un factor de importancia fundamental para el desarrollo económico de las regiones menos desarrolladas del mundo, ya que se ha convertido en uno de los rasgos característicos más importantes de la cooperación entre las naciones más ricas y las más pobres, siendo su fomento una cuestión de urgente interés tanto para los países importadores de capital como para los exportadores. Esto es aún más cierto en cuanto a la inversión extranjera privada que, de efectuarse con prudencia, puede contribuir grandemente al desarrollo de las economías de los países que la reciben.

Es lamentable, sin embargo, que en la actualidad el movimiento de capital privado no se desplace en volumen suficiente hacia las zonas que necesitan capital. Y no cabe duda de que una de las razones más graves que impide el movimiento de capital privado es el temor de los inversionistas de que sus inversiones se vean expuestas a riesgos de tipo político, tales como expropriación directa sin compensación adecuada, ingerencia gubernamental que, sin llegar a la expropriación, de hecho prive al inversionista del control de su inversión o de los beneficios que la misma reporte, y violación por parte del gobierno

en cuestión de las obligaciones contractuales que sirvieron de base para efectuar la inversión.

Ante este hecho, nos hemos preguntado si el Banco, con su reputación de integridad y su posición de imparcialidad, no podría ayudar a superar ese impedimento a la inversión privada internacional. En diversas ocasiones tanto gobiernos como inversionistas extranjeros se han acercado a nosotros solicitando nuestra ayuda para solucionar disputas que habían surgido entre ellos, respecto a inversiones, o para cerciorarse de que podrían contar con nuestra ayuda en caso de que en el futuro surgiera alguna diferencia entre ellos. Hechos tales como la promulgación por Ghana de legislación en materia de inversión extranjera que prevé la solución de ciertas disputas relativas a inversiones por intermedio del Banco Mundial nos ha alentado aún más a continuar dirigiendo nuestros esfuerzos en esa dirección.

Basándonos en nuestra propia experiencia y en el juicio que hemos formado sobre la posibilidad de obtener amplio apoyo en estos momentos, hemos llegado a la conclusión que el enfoque más prometedor consistiría en atacar el problema del clima desfavorable a la inversión de capital desde el punto de vista procesal, creando un mecanismo internacional que, siendo de carácter voluntario, estaría disponible para la conciliación y el arbitraje de las disputas relativas a inversiones. Es posible que haya quien considere aconsejable ir más allá de esta medida, tratando de llegar a una definición sustantiva del régimen legal de la propiedad extranjera. No tengo la menor duda que se precisa un verdadero entendimiento entre los países exportadores e importadores de capital sobre esta cuestión. Y me parece que el documento sobre la Protección de la Propiedad Extranjera preparado en el seno de la Organización de Cooperación y Desarrollo Económicos podría constituir un punto de partida adecuado para las conversaciones que celebren esos dos grupos de países.

Pero mientras se celebran dichas conversaciones es preciso, a nuestro juicio, continuar efectuando paralelamente esfuerzos de alcance más limitado, tales como las propuestas que los Directores Ejecutivos del Banco Mundial estudian en la actualidad. En ellas se contempla el establecimiento, mediante medidas intergubernamentales, de instituciones destinadas a solucionar mediante la conciliación y el arbitraje las disputas relativas a inversiones que surjan entre estados participantes y nacionales de otros estados participantes. Dicho mecanismo institucional estaría vinculado de alguna forma al Banco Mundial; pero éste, desde luego, no tomaría parte en las labores de conciliación y arbitraje. Esa tarea estaría a cargo de las comisiones de conciliación y tribunales de arbitraje creados al amparo de disposiciones que dejarían la composición de dichos organismos y los principios de Derecho que los mismo aplicarían, en primer lugar, al arbitrio de las mismas partes litigantes.

El uso de dicho mecanismo de conciliación y arbitraje sería completamente voluntario. Ningún gobierno ni ningún inversionista se vería obligado a recurrir a la conciliación o al arbitraje sin su consentimiento previo. Pero, una vez dado el consentimiento, quedarían obligados a cumplir con su compromiso y, en el caso de arbitraje, a acatar el laudo arbitral. Para que este plan tenga plena efectividad, sería preciso incorporarlo a una convención internacional. Esa convención habría de incluir las disposiciones necesarias para impedir que se frustren las promesas de someter disputas a conciliación o arbitraje, por ejemplo

por la negativa de una de las partes a cooperar en las actuaciones. La convención también debería disponer que los laudos arbitrales sean ejecutorios en todos los países participantes. Las disposiciones relativas a la ejecutoriedad del laudo en las jurisdicciones locales revestirían especial importancia para países importadores de capital. Esos países pueden, al igual que los inversionistas, iniciar actuaciones arbitrales, pero contrario al caso de los gobiernos, es preciso, para que la obligación del inversionista extranjero puede llevarse a efecto, que la ley local lo obligue a acatarlo.

Las mencionadas propuestas prevén que, siempre y cuando el país anfitrión consienta, el inversionista tendrá acceso directo al mecanismo de conciliación y arbitraje sin que para ello tenga que intervenir el gobierno de su país, recalcando así la creciente tendencia a reconocer al individuo como sujeto de Derecho Internacional. Paralelamente con dicho reconocimiento, parece aconsejable disponer que, una vez que un inversionista y un gobierno han acordado someter una disputa a arbitraje, debe considerarse que el inversionista ha renunciado al derecho de solicitar la protección del gobierno de su país y que dicho gobierno a su vez no tendrá derecho a intervenir en el caso. Tal extensión del Derecho Internacional actual tendría el gran mérito de coadyuvar a retirar tales disputas del ámbito político intergubernamental.

Con el fin de evitar malos entendidos desearía subrayar que ninguna de las obligaciones de una convención internacional de esa naturaleza tendría aplicación sin que el gobierno y el inversionista extranjero en cuestión hubieran acordado voluntariamente recurrir al mecanismo establecido por la convención para la conciliación o el arbitraje. Y los países que se adhieran a la convención no quedarían obligados, por virtud de ese solo hecho a recurrir a dicho mecanismo en ningún caso específico.

Estos son, pues, algunos de los puntos más importantes de las propuestas que el Banco Mundial está considerando en la actualidad. En un discurso pronunciado ante el Consejo Económico y Social de las Naciones Unidas en abril de este año, el Sr. George Woods, Presidente del Banco Mundial, dijo que, en su opinión el enfoque mencionado "merece el apoyo tanto de las naciones importadoras de capital como el de las exportadoras de capital, y parece suficientemente prometedor para justificar mayor estudio constructivo e investigación a fin de llegar a un acuerdo viable". Las propuestas mencionadas son modestas en cuanto a que se limitan a procedimiento y a que son de carácter opcional. Pero no me cabe duda de que su adopción constituiría un significativo paso adelante hacia el establecimiento de la primacía del Derecho en el campo de la inversión internacional.

FOR IMMEDIATE RELEASE

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INTERNATIONAL BANK FOR
RECONSTRUCTION AND DEVELOPMENT

WORLD BANK

1818 H STREET, N.W., WASHINGTON 25, D. C. TELEPHONE: EXECUTIVE 3-6360

Address by A. Broches,
General Counsel of the World Bank,
to the
World Conference on World Peace through Law,
June 30-July 6, 1963, Athens, Greece

"Conciliation and Arbitration of Investment Disputes"

FOR RELEASE TO A.M. PAPERS, JULY 3, 1963

I feel greatly honored to have been invited to attend the World Conference on World Peace through Law and to address this distinguished gathering on the subject of international investment. I accept this honor as a recognition of the role played in the field of international investment by the International Bank for Reconstruction and Development -- the World Bank.

The importance of the World Bank lies not in the circumstance that it has larger funds at its disposal than other investment institutions, or even in the fact that it is an international rather than a national bank. Its principal characteristic and merit is that it is not really a bank, but an institution concerned with the process of economic development rather than with the mere provision of funds for particular projects, and that its approach to the problem of economic development is professional and non-political.

The World Bank's activities consist necessarily in large part of the provision of finance, out of its own capital, out of funds it borrows in the financial markets, by encouraging private capital to participate with it, and

by organizing and coordinating the efforts of national and international sources of public finance to meet the development needs of its member countries in the less developed areas of the world. But much of the energy and resources of the World Bank are devoted to technical assistance and advice directed towards the promotion of conditions conducive to rapid economic growth -- to creation of a favorable investment climate in the broadest sense of the term. To this end, sound technical and administrative foundations are essential, but no less indispensable is the firm establishment of the Rule of Law.

In days past there may have been some justification for regarding international investment as a subject of interest chiefly to the capital-exporting nations and their citizens. Today it is universally recognized as a factor of crucial importance in the economic development of the less developed parts of the world. International investment has become one of the major features of the partnership between the richer and the poorer nations and its promotion a matter of urgent concern to capital-importing and capital-exporting countries alike. This is particularly true of private foreign investment which, if wisely conducted, can make great contributions to the development of the economies of the recipient countries.

Unfortunately, however, private capital is not now moving in sufficient volume to areas in need of capital. And there is no room for doubt that one of the most serious impediments to the flow of private capital is the fear of investors that their investment will be exposed to political risks, such as outright expropriation without adequate compensation, governmental interference short of expropriation which substantially deprives the investor of the control or the benefits of his investment, and non-observance by the host

government of contractual undertakings on the basis of which the investment was made.

Knowing this, we have been led to wonder whether the Bank, because of its reputation for integrity and its position of impartiality, could not help in removing this obstacle to international private investment. On a number of occasions we have been approached by governments and foreign investors who sought our assistance in settling investment disputes that had arisen between them, or wanted to assure themselves that our assistance would be available in the event that differences between them should arise in the future. And we have been further encouraged to bend our efforts in this direction by such events as the recent enactment by Ghana of foreign investment legislation which contemplates the settlement of certain investment disputes "through the agency of" the World Bank.

On the basis of our own experience and of our assessment of the possibility of securing widespread agreement at the present time, we have concluded that the most promising approach would be to attack the problem of the unfavorable investment climate from the procedural angle, by creating international machinery which would be available on a voluntary basis for the conciliation and arbitration of investment disputes. Some may think it desirable to go beyond this and attempt to achieve a substantive definition of the status of foreign property. There is no doubt in my mind that there is need for a meaningful understanding between capital-exporting and capital-importing nations on these matters. And it seems to me that the draft on Protection of Foreign Property, prepared in the Organization for Economic Cooperation and Development, might constitute a useful starting point for discussions between these two groups of countries.

But while this dialogue proceeds, there is need, we think, to pursue a parallel effort of more limited scope, represented by the proposals now being studied by the Executive Directors of the World Bank. These proposals contemplate the establishment by intergovernmental action of institutional facilities for the settlement through conciliation and arbitration of investment disputes between participating states and the nationals of other participating states. The institutional facilities would be linked in some way to the World Bank, but the Bank would not, of course, itself engage in conciliation or arbitration. This would be the task of Conciliation Commissions and Arbitral Tribunals established in accordance with rules which would leave the composition of these bodies, and the rules of law to be applied by them, to be determined primarily by the parties.

Use of these facilities for conciliation and arbitration would be entirely voluntary. No government and no investor would ever be under an obligation to go to conciliation or arbitration without having consented to do so. But once having consented they would be bound to carry out their undertaking and, in the case of arbitration, to abide by the award. For this scheme to be fully effective, it should be embodied in an international convention. Such a convention ought to contain the necessary provisions to prevent undertakings to submit to conciliation or arbitration from being frustrated, for instance by the refusal of one party to cooperate in the proceedings. The convention should also make arbitral awards enforceable in the territories of all participating states. Provision for the enforceability of the award in local jurisdictions may be especially important for host governments. They, as well as investors, may initiate arbitral proceedings and the obligation of the foreign investor to carry out the award,

unlike that of the government, needs to be transformed into local law to be effective.

These proposals contemplate that, given the consent of the host government, the investor would have direct access to the conciliation and arbitration facilities, without the intervention of his national government, thus giving further emphasis to the growing recognition of the individual as a subject of international law. As a concomitant of that recognition, it would seem desirable to provide that, once an investor and a host government have agreed to submit a dispute to arbitration, the investor should be deemed to have waived the right to seek the protection of his national government and his government would not be entitled to take up his case. This development of existing international law would have the great merit of helping to remove investment disputes from the intergovernmental political sphere.

In order to avoid misunderstanding I want to stress that none of the obligations of such an international convention would apply except where a government and a foreign investor had voluntarily agreed to use the facilities established by the convention for conciliation or arbitration, as the case may be. And the states which become parties to the convention would not by that fact alone be obliged to make use of the facilities in any specific case.

These, then, are some of the highlights of the proposals which are presently being studied in the World Bank. In addressing the Economic and Social Council of the United Nations in April of this year, Mr. George Woods, the President of the World Bank, said that this approach in his opinion "deserves the support of both capital-importing and capital-exporting nations and seems sufficiently promising to justify further constructive study and investigation in an attempt to reach a workable agreement." The proposals are modest

in the sense of being limited to procedure and because of their optional nature. But I have no doubt that their adoption would constitute a significant step forward towards the establishment of the Rule of Law in international investment.

Settlement of Investment Disputes

Address by A. BROCHES
General Counsel of the
International Bank for
Reconstruction and Development

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to the
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Règlement des Différends Relatifs aux Investissements

Discours prononcé par
M. A. BROCHES
Conseiller Juridique
de la Banque Internationale
pour la Reconstruction et le
Développement

Règlement des Différends Relatifs aux Investissements

Discours prononcé par
M. A. BROCHES
Conseiller Juridique
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Développement

à la
CONFERENCE MONDIALE DE LA PAIX MONDIALE
PAR LA PRIMAUTE DU DROIT
30 juin—6 juillet 1963
Athènes, Grèce

C'est pour moi un grand honneur d'avoir été invité à participer à la Conférence Mondiale de la Paix Mondiale par la Primauté du Droit et de traiter des investissements internationaux devant une audience aussi distinguée. A mon avis, cet honneur est un hommage rendu au rôle joué dans le domaine des investissements internationaux par la Banque Internationale pour la Reconstruction et le Développement, la Banque Mondiale.

L'importance de la Banque Mondiale ne dérive point du fait qu'elle dispose de ressources plus importantes que les autres institutions d'investissement. Elle ne tient pas non plus au fait qu'elle n'est pas une banque nationale mais une banque internationale. Ses caractéristiques et son utilité essentielles sont qu'elle n'est pas réellement une banque mais une institution s'intéressant davantage au processus du développement économique qu'au simple apport de fonds pour la mise en œuvre de certains projets, et qu'elle aborde le problème du développement économique sur une base technique et apolitique.

Naturellement, l'activité de la Banque Mondiale consiste, dans une large mesure, à réaliser

des opérations de financement au moyen de ses propres ressources et de celles qu'elle emprunte sur les marchés financiers; à encourager les capitaux privés à y participer; à organiser et à coordonner les efforts des sources nationales et internationales de financement public pour pourvoir aux besoins des pays membres situés dans les régions en cours de développement. Mais une grande partie de l'activité et des ressources de la Banque Mondiale est consacrée à l'assistance technique et l'octroi de conseils visant à créer les conditions favorables au développement économique rapide, c'est-à-dire à la création d'un climat favorable aux investissements, au sens le plus large du terme. A cette fin, des bases administratives et techniques saines sont essentielles; mais la ferme reconnaissance de la primauté du Droit est non moins indispensable.

Dans le passé, il était peut-être justifié dans une certaine mesure, de considérer que les investissements internationaux étaient une question intéressant surtout les pays exportateurs de capitaux et leurs ressortissants. Aujourd'hui, il est universellement admis que cette question est d'une importance capitale pour le développement économique des pays en cours de développement. Les investissements internationaux sont devenus un des traits principaux de la coopération entre nations riches et nations pauvres, et le développement de ces investissements est une question d'un intérêt urgent pour les pays importateurs aussi bien que pour les pays exportateurs de capitaux. Ceci est particulièrement vrai des investissements étrangers privés qui, s'ils sont judicieusement réalisés, peuvent apporter une contribution importante au développement de l'économie des pays qui en bénéficent.

Malheureusement cependant, le flux de capitaux privés vers les régions qui en ont besoin n'a pas l'importance voulue. Et il ne fait aucun doute qu'un des obstacles les plus sérieux au mouvement des capitaux privés est la crainte de l'investisseur que ses capitaux ne soient exposés à des risques politiques tels que l'expropriation pure et simple sans indemnité équitable, les interventions gouvernementales assimilables à l'expropriation qui privent l'investisseur du contrôle ou des bénéfices de ses investissements, et la non-observance par le gouvernement importateur de capitaux des engagements contractuels sur la foi desquels les investissements ont été réalisés.

Tenant compte de ceci, nous avons été conduits à nous demander si la Banque, en raison de sa réputation d'intégrité et de sa position d'impartialité ne pourrait pas aider à écarter cet obstacle aux investissements privés internationaux. A plusieurs reprises, des gouvernements et des investisseurs étrangers se sont adressés à nous soit pour obtenir notre assistance en vue de trancher les différends relatifs aux investissements survenus entre eux, soit pour obtenir que notre assistance serait disponible au cas où de tels conflits surgiraient entre eux à l'avenir. En outre, nous avons également été encouragés dans cette voie par des faits tels que la promulgation récente par le Ghana d'une législation régissant les investissements étrangers, laquelle prévoit le règlement de certains conflits relatifs aux investissements par l'intermédiaire de la Banque Mondiale.

Sur la base de notre propre expérience et de l'évaluation des possibilités d'obtenir, à l'heure actuelle, un accord général, nous avons conclu que l'approche la plus prometteuse serait d'aborder le problème du climat défavorable aux investissements sous l'angle de la procédure, en créant un mécanisme international qui serait disponible à la requête des intéressés pour la conciliation et l'arbitrage des litiges relatifs aux investissements. Certains penseront peut-être qu'il serait souhaitable d'aller plus loin et d'essayer de formuler une définition du statut des biens étrangers. Je suis persuadé qu'un accord substantiel sur ces questions est nécessaire entre les pays exportateurs et importateurs de capitaux. Et il me semble que le projet de Convention sur la Protection des Biens Etrangers préparé au sein de l'Organisation de Développement et de Coopération Economiques pourrait constituer un

point de départ utile aux discussions entre ces deux groupes de pays.

Mais pendant que ces conversations se déroulent, il est aussi nécessaire à notre avis d'accomplir un effort parallèle d'une portée plus limitée tel que le projet que les administrateurs de la Banque Mondiale étudient actuellement. Ce projet envisage l'établissement, par voie d'action intergouvernementale, de facilités institutionnelles pour la conciliation et l'arbitrage des litiges relatifs aux investissements, entre les Etats participants et les nationaux d'autres Etats participants. Les facilités institutionnelles seraient en quelque sorte rattachées à la Banque Mondiale, mais la Banque elle-même n'assumerait pas la tâche de conciliation et d'arbitrage. Celle-ci reviendrait aux Commissions de Conciliation et aux Tribunaux Arbitraux institués conformément à des règlements qui laisseraient en premier lieu aux parties le choix de déterminer la composition de ces juridictions et les règles de droit que celles-ci devraient appliquer.

Le recours à ces mécanismes de conciliation et d'arbitrage serait entièrement volontaire. Aucun gouvernement ni investisseur ne serait obligé de recourir à la juridiction de conciliation et d'arbitrage sans y avoir consenti. Mais une fois qu'il s'y serait décidé, il serait obligé d'exécuter ses engagements et dans les cas d'arbitrage, d'exécuter la sentence. Pour que cette procédure soit complètement efficace, il faudrait qu'elle fût insérée dans une convention internationale. Une telle convention devrait aussi contenir des clauses destinées à empêcher que les engagements de recourir à la juridiction de conciliation ou d'arbitrage ne soient contrecarrés, par exemple, par le refus d'une partie de participer au déroulement de la procédure. Cette convention devrait aussi rendre les sentences arbitrales exécutoires dans les territoires des pays qui y auraient adhéré. La clause relative à l'exécution des sentences dans les juridictions locales peut être particulièrement importante pour les gouvernements importateurs de capitaux. Ces gouvernements, au

même titre que les investisseurs, ont qualité pour mettre en œuvre la procédure d'arbitrage et l'obligation de l'investisseur étranger d'exécuter la sentence, à la différence de celle du gouvernement, doit être transformée en droit local pour devenir effective.

Ce projet prévoit aussi qu'avec l'accord du gouvernement importateur de capitaux, l'investisseur aura directement accès aux juridictions de conciliation et d'arbitrage sans l'intervention de son propre gouvernement, ce qui accentuerait ainsi la tendance de plus en plus fréquente selon laquelle l'individu est considéré comme un sujet de droit international. Parallèlement, en quelque sorte à titre de corollaire, il serait souhaitable de prévoir que lorsque l'investisseur et un gouvernement seraient convenus de soumettre un litige à l'arbitrage, l'investisseur serait réputé avoir renoncé au droit de recourir à la protection de son propre gouvernement, lequel ne serait pas habilité à prendre fait et cause pour l'investisseur. Ce développement du droit international actuel aurait le grand avantage de permettre d'écarter les conflits relatifs aux investissements de la sphère politique intergouvernementale.

Pour prévenir tout malentendu, je tiens à souligner qu'aucune des obligations résultant d'une telle convention internationale ne serait mise en application sans qu'un gouvernement et un investisseur étranger ne fussent librement convenus de recourir aux juridictions établies par la convention pour la conciliation ou l'arbitrage, selon le cas. Et les Etats qui souscriraient à la Convention ne seraient pas ipso facto obligés de recourir à ces juridictions dans aucun cas particulier.

Tels sont les traits principaux des projets qui sont en cours d'examen à la Banque Mondiale. S'adressant au Conseil Economique et Social des Nations Unies au mois d'avril dernier, M. George Woods, le Président de la Banque Mondiale, a déclaré qu'à son avis cette approche "méritait l'appui à la fois des pays exportateurs et im-

portateurs de capitaux, et qu'elle paraissait suffisamment prometteuse pour justifier des études constructives et des recherches dans le souci d'arriver à un accord efficace". Ce projet est modeste en ce sens qu'il ne vise que l'organisation de la procédure et que le recours aux dispositions envisagées est de nature facultative. Mais je ne doute pas que son adoption constituerait un progrès sensible vers la reconnaissance de la primauté du Droit en matière d'investissements internationaux.

Arreglo de las Disputas Relativas a Inversiones

Discurso pronunciado por el
DOCTOR A. BROCHES
Consejero Jurídico General
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ante la
CONFERENCIA MUNDIAL PARA LA
PAZ MUNDIAL MEDIANTE EL DERECHO
30 de junio—6 de julio de 1963
Atenas, Grecia

Es para mí un gran honor el haber sido invitado a participar en esta Primera Conferencia Mundial para la Paz Mundial mediante el Derecho y el dirigirme a esta distinguida concurrencia para tratar del tema de la inversión internacional de capitales. Me place aceptar esta distinción como una señal de reconocimiento del papel que el Banco Internacional de Reconstrucción y Fomento—el Banco Mundial—desempeña en el campo de la inversión internacional de capitales.

La importancia del Banco Mundial no reside en el hecho de que éste disponga de mayores recursos que otras instituciones de inversión ni en que sea un banco de tipo internacional en vez de nacional. Su rasgo más característico y su mérito principal estriban, por el contrario, en que no es en realidad un banco sino una institución cuya función se extiende más allá de la simple provisión de fondos para proyectos específicos, al proceso mismo de desarrollo económico y en que enfoca dicho proceso desde un ángulo profesional y apolítico.

Desde luego, gran parte de las actividades del Banco Mundial consiste en proporcionar financia-

miento tanto de sus fondos propios como de fondos que toma a préstamo en los mercados de capital, alentando al capital privado a participar en sus operaciones y organizando y coordinando los esfuerzos de las fuentes de fondos públicos, tanto nacionales como internacionales, con el fin de satisfacer las necesidades que en el campo del desarrollo económico tienen sus países miembros de las zonas menos desarrolladas del mundo. Sin embargo, muchos de los esfuerzos y recursos del Banco Mundial se dedican a proporcionar asistencia técnica y asesoramiento encaminados a fomentar aquellas condiciones que llevan a un crecimiento económico rápido, es decir, a la creación de un clima favorable a la inversión de capital en el sentido más amplio de esta frase. Para lograr este objetivo es indispensable contar con sólidas bases, tanto técnicas como administrativas, pero no menos indispensable es que se establezca firmemente la primacía del Derecho.

En el pasado pudiera haber habido, efectivamente, cierta justificación en considerar la inversión internacional como un asunto de interés principalmente para los países exportadores de capital y para los ciudadanos de dichos países. Hoy en día, sin embargo, se reconoce generalmente que la inversión internacional constituye un factor de importancia fundamental para el desarrollo económico de las regiones menos desarrolladas del mundo, ya que se ha convertido en uno de los rasgos característicos más importantes de la cooperación entre las naciones más ricas y las más pobres, siendo su fomento una cuestión de urgente interés tanto para los países importadores de capital como para los exportadores. Esto es aun más cierto en cuanto a la inversión extranjera privada que, de efectuarse con prudencia, puede contribuir grandemente al desarrollo de las economías de los países que la reciben.

Es lamentable, sin embargo, que en la actualidad el movimiento de capital privado no se desplace en volumen suficiente hacia las zonas que necesitan capital. Y no cabe duda de que una de las razones más graves que impide el movimiento de capital privado es el temor de los inversionistas de que sus inversiones se vean

expuestas a riesgos de tipo político, tales como expropriación directa sin compensación adecuada, ingerencia gubernamental que, sin llegar a la expropriación, de hecho prive al inversionista del control de su inversión o de los beneficios que la misma reporte, y violación por parte del gobierno en cuestión de las obligaciones contractuales que sirvieron de base para efectuar la inversión.

Ante este hecho, nos hemos preguntado si el Banco, con su reputación de integridad y su posición de imparcialidad, no podría ayudar a superar ese impedimento a la inversión privada internacional. En diversas ocasiones tanto gobiernos como inversionistas extranjeros se han acercado a nosotros solicitando nuestra ayuda para solucionar disputas que habían surgido entre ellos, respecto a inversiones, o para cerciorarse de que podrían contar con nuestra ayuda en caso de que en el futuro surgiera alguna diferencia entre ellos. Hechos tales como la promulgación por Ghana de legislación en materia de inversión extranjera que prevé la solución de ciertas disputas relativas a inversiones por intermedio del Banco Mundial nos ha alentado aun más a continuar dirigiendo nuestros esfuerzos en esa dirección.

Basándonos en nuestra propia experiencia y en el juicio que hemos formado sobre la posibilidad de obtener amplio apoyo en estos momentos, hemos llegado a la conclusión que el enfoque más prometedor consistiría en atacar el problema del clima desfavorable a la inversión de capital desde el punto de vista procesal, creando un mecanismo internacional que, siendo de carácter voluntario, estaría disponible para la conciliación y el arbitraje de las disputas relativas a inversiones. Es posible que haya quien considere aconsejable ir más allá de esta medida, tratando de llegar a una definición sustantiva del régimen legal de la propiedad extranjera. No tengo la menor duda que se precisa un verdadero entendimiento entre los países exportadores e importadores de capital sobre esta cuestión. Y me parece que el documento sobre la Protección de la Propiedad Extran-

jera preparado en el seno de la Organización de Cooperación y Desarrollo Económicos podría constituir un punto de partida adecuado para las conversaciones que celebren esos dos grupos de países.

Pero mientras se celebran dichas conversaciones es preciso, a nuestro juicio, continuar efectuando paralelamente esfuerzos de alcance más limitado, tales como las propuestas que los Directores Ejecutivos del Banco Mundial estudian en la actualidad. En ellas se contempla el establecimiento, por medidas intergubernamentales, de instituciones destinadas a solucionar mediante la conciliación y el arbitraje las disputas relativas a inversiones que surjan entre estados participantes y nacionales de otros estados participantes. Dicho mecanismo institucional estaría vinculado de alguna forma al Banco Mundial; pero éste, desde luego, no tomaría parte en las labores de conciliación y arbitraje. Esa tarea estaría a cargo de las comisiones de conciliación y tribunales de arbitraje creados al amparo de disposiciones que dejarían la composición de dichos organismos y los principios de Derecho que los mismo aplicarían, en primer lugar, al arbitrio de las mismas partes litigantes.

El uso de dicho mecanismo de conciliación y arbitraje sería completamente voluntario. Ningún gobierno ni ningún inversionista se vería obligado a recurrir a la conciliación o al arbitraje sin su consentimiento previo. Pero, una vez dado el consentimiento, quedarían obligados a cumplir con su compromiso y, en el caso de arbitraje, a acatar el laudo arbitral. Para que este plan tenga plena efectividad, sería preciso incorporarlo a una convención internacional. Esa convención habría de incluir las disposiciones necesarias para impedir que se frustren las promesas de someter disputas a conciliación o arbitraje, por ejemplo por la negativa de una de las partes a cooperar en las actuaciones. La convención también debería disponer que los laudos arbitrales sean ejecutorios en todos los países participantes. Las disposiciones relativas a la ejecutoriedad del laudo en las jurisdicciones locales revestirían

especial importancia para países importadores de capital. Esos países pueden, al igual que los inversionistas, iniciar actuaciones arbitrales, pero contrario al caso de los gobiernos, es preciso, para que la obligación del inversionista extranjero puede llevarse a efecto, que la ley local lo obligue a acatarlo.

Las mencionadas propuestas prevén que, siempre y cuando el país anfitrión consienta, el inversionista tendrá acceso directo al mecanismo de conciliación y arbitraje sin que para ello tenga que intervenir el gobierno de su país, recalcando así la creciente tendencia a reconocer al individuo como sujeto de Derecho Internacional. Paralelamente con dicho reconocimiento, parece aconsejable disponer que, una vez que un inversionista y un gobierno han acordado someter una disputa a arbitraje, debe considerarse que el inversionista ha renunciado al derecho de solicitar la protección del gobierno de su país y que dicho gobierno a su vez no tendrá derecho a intervenir en el caso. Tal extensión del Derecho Internacional actual tendría el gran mérito de coadyuvar a retirar tales disputas del ámbito político intergubernamental.

Con el fin de evitar malos entendidos desearía subrayar que ninguna de las obligaciones de una convención internacional de esa naturaleza tendría aplicación sin que el gobierno y el inversionista extranjero en cuestión hubieran acordado voluntariamente recurrir al mecanismo establecido por la convención para la conciliación o el arbitraje. Y los países que se adhieran a la convención no quedarían obligados, por virtud de ese solo hecho, a recurrir a dicho mecanismo en ningún caso específico.

Estos son, pues, algunos de los puntos más importantes de las propuestas que el Banco Mundial está considerando en la actualidad. En un discurso pronunciado ante el Consejo Económico y Social de las Naciones Unidas en abril de este año, el Sr. George Woods, Presidente del Banco Mundial, dijo que, en su opinión el enfoque men-

cionado "merece el apoyo tanto de las naciones importadoras de capital como el de las exportadoras de capital, y parece suficientemente prometedor para justificar mayor estudio constructivo e investigación a fin de llegar a un acuerdo viable". Las propuestas mencionadas son modestas en cuanto a que se limitan a procedimiento y a que son de carácter opcional. Pero no me cabe duda de que su adopción constituiría un significativo paso adelante hacia el establecimiento de la primacía del Derecho en el campo de la inversión internacional.

Used as basis of speech by Mr Broches, August 15, with some changes.

Banff Speech - Revised Draft August 8, 1963

Draft by John Crome

FINANCING THE UNDERDEVELOPED COUNTRIES

Not long ago, people writing about the problems of economic development tended very often to sum up their conclusions by setting up a nice round figure of so many billions of dollars a year as a target for aid, and then issuing a stirring call - couched in emotional rather than logical terms - for the hitting of this target by some specified and not-far-distant date. Discussions of this kind did credit to the good feelings of their proponents, but they were generally somewhat remote from reality.

Today, simple targets of this kind are still sometimes put forward for assistance to the developing countries, and (as before) they usually show a large shortfall between present efforts and the suggested objectives. But most people now recognize that the process of economic development is immensely more complex than such proposals suggest. If there is one lesson that we at the World Bank have recognized in the course of some seventeen years of operations, it is that the problems of development cannot usefully be discussed in terms of money alone.

Economic development is the end-product of a whole range of necessary contributing factors. They include, to name a few at random, the attitudes, adaptability and training possessed by a country's people, the natural resources and environment with which the country is endowed, the opportunities open to it for trade with the rest of the world, and the intelligence of the policies pursued by its government. Any one of these factors, if unfavorable, may wreck a

poor country's chances of hoisting itself onto the road to economic independence and prosperity. Each is a necessary, but not a sufficient, condition of progress. Finance is just one more of these necessary conditions. It is more easily understood than the rest, because it deals with measurable quantities. It is also more willingly recognized than others, because people are usually ready to admit their poverty, but are less happy to acknowledge shortcomings in their policies, their institutions and their habits.

Having, I hope, relegated finance to a properly auxiliary role in the process of economic development, let me go on to say that it is still a fairly complicated subject. Money for development comes in many shapes and forms -- some genuinely valuable, some much less so. In judging its value, we have to look at the nature of the borrower and of the lender, at the uses to which the finance is put, and at the terms -- both financial and otherwise -- on which the finance is supplied.

I ought to make it clear, before going further, that I am restricting my remarks today to the external financing of economic development. I do so partly because of the title prescribed for this talk, and partly to reduce my subject to manageable proportions. But we should not forget that the developing countries must themselves provide the bulk of the finance they require for their development. Only a part of the funds needed will consist of foreign exchange: the greater proportion will be in their own currency. The adequacy of these funds will depend less upon foreign aid than upon taxation methods and other measures they take to encourage savings. Similarly, even where foreign exchange resources are concerned, almost all of the developing countries still earn far more through their exports than through the loans or grants provided by the

assistance programs of friendly countries. Successful efforts to increase those exports could have an enormous effect on their prosperity.

For the purpose of this discussion, however, I want to limit myself to the question of development finance provided by loans, grants and also investments from outside sources -- that is, on the whole, to "foreign aid" in its most generally recognized form.

No one knows with any certainty how much aid is being given at the moment. Partly, this is because the statistics are incomplete. More importantly, however, it is because there is considerable disagreement about what does and does not constitute aid. It is perfectly clear that the outright fight of large sums of money which can be spent anywhere in the world would constitute aid by any definition. At the other extreme, no one, I imagine, will include under "aid" the kind of financing provided by an ordinary three months' bill of exchange, covering a particular shipment of goods and discounted by the purchaser's banker. The dividing line lies at some unclearly defined point between these two cases. By whatever definition you adopt, however, public and private external assistance for the development of the poorer countries is now running at a rate equivalent to a good many billions of dollars a year. Much of this aid is immensely valuable; some is worthless, except possibly, for the purpose of bolstering the reputation of those who extend or receive it; some is actively harmful. In this situation, it makes little sense to issue clarion calls for a blanket increase in the flow of aid to the developing countries. Capital for development is needed -- but it has got to be provided to the right people, for the right purposes, and on the right terms.

* * * *

A first important consideration in the financing of economic development is the nature of the borrower, and of the lender. Foreign aid and other finance for development flows through a surprising variety of channels. In strong contrast to the situation a century ago, when private investors bore the main burden of financing development overseas, the greater part of foreign assistance now passes directly from one government to another. A further large proportion is passed through international organizations, which may draw their funds from member governments or from the private market, and which may in turn lend both to governments and to private borrowers. Some governments of developing countries have themselves still been able to borrow abroad in the private market, although for them this source of funds has almost dried up by comparison with prewar years. A little money flows into these countries in the shape of foreign portfolio investment; much more is invested or reinvested by foreign companies in their local subsidiaries, which may or may not be joint ventures with interests in the countries concerned. Finally, suppliers' credits are frequently available to both private and public purchasers of an industrialized nation's products.

None of these routes for development finance is inherently unsatisfactory; all of them, however, have their disadvantages as well as advantages. There is to some extent a natural division of labor here. For example, private investors are most interested in financing industrial projects that generally fare best with the minimum of government intervention; they are less often attracted to the so-called "infrastructure" projects -- roads, power stations, and the like -- for which development loans from public sources are well suited.

Unfortunately, it is only seldom that an entirely satisfactory balance is struck. Most developing countries have to make do with an unduly heavy dependence on aid from a single source, and they pay for this, partly by experiencing its particular disadvantages in exaggerated form, partly by being uncomfortably vulnerable in the event of that single source of funds drying up. There is an obvious parallel here to that other familiar problem of the underdeveloped countries -- extreme dependence on the export earnings of just one or two primary products.

Today the most obvious imbalance in the financing of development is between the flow of public aid and that of private investment. Aid from governments is extended because of concern for the needs of the developing countries, or because it is hoped that assistance will earn a political or commercial return. The international organizations provide assistance because that is what they were set up to do. But the private investor wants simply to earn a worthwhile financial return on his money -- and he goes only where he thinks he will be made welcome. At present, he is clearly taking much less interest than he might in investment in the developing countries, and in consequence these countries are losing the benefit not only of his very considerable capital resources, but also of his organizing ability, his technical skill, and his enterprise. This is a major tragedy.

A certain amount can be done by the developing countries to attract the private foreign investor by means of such devices as tax concessions for new industries, and special protective tariffs and quotas against competing imports. Concessions of this kind, however, are mostly aimed at increasing the potential

returns on an investment -- and on the whole, it is not any lack of profit opportunities that deters the investor from going into the less developed countries. Many people believe that a much more powerful inducement to private capital would be provided if means could be found to overcome the often-justified fears of the foreign investor that his investment in an underdeveloped country will be threatened by expropriation without fair compensation, or by other arbitrary action by the government of the country concerned.

A number of possible solutions have been put forward. One approach is represented by current efforts to draw up a Convention setting out basic principles for the protection of foreign-owned property. The idea is that countries would accept the Convention, and in case of its rules being violated, would agree to submit to the ruling of an international tribunal. This solution, while clear-cut, is not easily reconciled with the prickly nationalism of some of the underdeveloped countries. A second proposal, to which we devoted some study at the World Bank a year or so ago, calls for the establishment of a multilateral insurance scheme for foreign investment. Here, again, there are some severe difficulties. At present, our attention at the Bank is concentrated on a third possible approach to the problem. The suggestion, now under study by the Executive Directors of the Bank, is that we should establish facilities which would be available to foreign investors and host governments wishing to bring investment disputes to conciliation or arbitration.

It is proposed that the Bank might sponsor the establishment of a Center or Secretariat for Conciliation and Arbitration, under whose auspices conciliation panels or arbitration tribunals would be set up when necessary. Resort to these facilities would be entirely voluntary, and they would be made available only

when both the government and the foreign investor concerned in a dispute had consented. But once consent had been given, the parties to the dispute would be bound to carry out their undertaking and, if arbitration were involved, to abide by the arbitrators' award. This whole approach is more modest than that involved in either the proposed Convention on the treatment of foreign investments or the multilateral investment scheme. But it also involves considerably fewer difficulties. We have high hopes that it may soon be possible to reach a workable agreement establishing the Conciliation and Arbitration Center, and that the Center will have a measurable effect in encouraging the private investor to venture into the developing countries.

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Perhaps the most obvious consideration in assessing the present flow of financial assistance to these countries is the use to which the money is put. In spite of being so obvious, it has on occasion received scant attention.

At present, most development assistance is provided in the shape of loans, which eventually must be repaid. Private equity investment, if it is successful, will involve the payment of dividends overseas. Foreign assistance of all kinds, even including grant aid, can only be put to work if it is combined with local funds and local efforts which might have been devoted to other uses. Thus unless the foreign assistance is devoted to purposes which are worthwhile, the developing country may assume a debt burden for the future and will certainly forego alternative and more valuable action for the present time, without getting a reward in development achieved that will compensate for the sacrifices involved.

It is easy enough to grasp this fact, when a developing country's government sensibly chooses to put aid funds to work building a new school, instead of -- say -- squandering the proceeds on a handsome classical facade for the Ministry of the Interior. But it is less easy to distinguish between the merits of a port project and a scheme to build a new road, or to pass judgment between alternative proposals for a hospital and a plant to produce fertilizer.

Judgments of this kind should not be made on the spur of the moment or at the prompting of emotion. If they are to be made correctly, they have to be based on painstaking assessments not only of the worth of the projects themselves, but also of their priority as compared with other projects whose merits may appear on the face of it to be equal. They cannot be made in isolation. Power stations are worthless without consumers; factories must have markets; roads are of no value unless they carry traffic; imported machines must be kept supplied with spare parts; and universities must be supplied with qualified secondary school graduates. Although in the long run the operation of supply and demand is likely to put right imbalances of this kind, a poor country cannot afford the waste of time and resources involved in the meanwhile. It has to work out some order of priorities for development -- in other words, it has to plan.

"Planning" is a word that still sometimes evokes a violent response, particularly in the United States, where people tend to identify it with the practices and policies of the totalitarian states. However, I am not talking about the kind of centralized planning that dictates every aspect of a country's economic activity: quite apart from its political significance, planning of this kind is far beyond the administrative capacity of most developing countries.

The sort of planning that seems essential is what has been called "indicative" planning, which attempts to chart the approximate course of a country's economy, rather than leaving it to drift entirely at the mercy of circumstances. No underdeveloped country, faced with almost unlimited claims upon very limited resources, can avoid making some decisions about which claims are to be satisfied and which left unsatisfied. And since these claims must be made, it is obviously desirable that they be made on a rational basis. No one will expect the decisions to be perfect: economic priorities will not always coincide with political or social priorities, and mistakes will be made. But if anything like full value is to be obtained from foreign assistance, and from a country's own resources, some degree of planning is necessary. In its absence, development funds will continue, as so often in the past, to be of much less value to their users than they should have been.

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There is a third important aspect of financial assistance to economic development -- the terms, financial and otherwise, on which the assistance is offered.

The financial terms attached to development capital today are often of bewildering variety. Some assistance is given in the form of direct grants. Some of the capital inflow takes the shape of equity investment. For the rest, interest rates vary from less than one percent to around eight percent; years of grace before repayments start from almost nothing to ten years; periods of repayment from two or three years to as much as fifty years; and the currency for repayment, while generally the currency borrowed, is sometimes

the borrower's own. From the point of view of the hard-up borrower, the longer the payment and grace periods, and the lower the interest rate, the better. From the lender's point of view, the reverse is obviously true -- always provided that the terms he sets are not so stiff that the borrower subsequently is unable to keep to his side of the bargain.

A fairly clear dividing line can be drawn between those forms of assistance which are provided on purely business terms, and those which represent some sacrifice on the part of the provider. At present there is an unmistakeable tendency to provide aid on financial terms that imply some degree of subsidy to the borrower -- as when a lending government extends aid on easier terms than it must itself pay to finance that lending -- but this tendency is to some extent balanced by attaching increasingly stringent non-financial conditions to the loan. An example here is the present policy of the U.S. Agency for International Development, which offers most generous terms of repayment, but now requires that loans be spent on American goods. The Russians, of course, have always tied their aid in the same way. The financial terms offered by the World Bank are related to our own borrowing costs, and work out at about the same interest rate as most first-class foreign borrowers would be required to pay in the U.S. market -- that is, a rate slightly higher than is asked of Canadian borrowers in New York. On the other hand, the Bank's affiliate, the International Development Association, lends on terms far easier than could ever be obtained in the open market.

Why should subsidized terms be offered to a developing country -- and what limits should be put on the subsidy?

It seems unnecessary for me to argue before this audience the general case for assistance to the developing countries. Whether the case be put in terms of altruism, enlightened self-interest, or a combination of the two, it appears to me pretty convincing. But it does still seem to be necessary to underline the fact that for many of the developing countries, our assistance will be ineffective unless the financial aid given is fairly generous in its terms as well as its scale.

The facts of the matter are fairly well known. There are a good many developing countries that can afford to borrow on the usual market terms for both interest and period of repayment. There are, however, an increasing number of others which, although they have the absorptive capacity to put borrowed funds to good use, have not got the earning capacity to repay loans offered on conventional terms.

Some of the nations in this plight have been improvident in the past. Some, certainly have been tempted to borrow on terms that were obviously unsuitable: Brazil, for instance, saddled itself some years ago with an immense load of short-term suppliers' credits that could not possibly be repaid on schedule out of earnings on the projects financed. To a great extent, though, the countries which now find themselves unable to borrow safely as much as they can use are in this position for reasons over which they have little control. They are in trouble partly because of their own past success in getting the process of development under way, and partly because of the persistent sluggishness in the growth of their export earnings (most of which are derived from the sale of primary products that for a number of years have been in oversupply throughout the world).

The result is summed up in some figures that the World Bank's economists drew together not long ago: over the previous six years, the average experience of countries representing most of the underdeveloped world was for their export earnings to have risen by just about 15% altogether, while their total external debt had more than doubled. Since for years to come they will continue to need large imports of capital goods and other equipment and services, this tendency for their debt burden to grow much faster than their capacity to repay the debt cannot continue without eventually bringing the whole process of development to a halt.

The emergence of this situation was recognized fairly early by the United States, which for a number of years has been making "soft" loans. More general concern about the growing burden of debt service carried by many developing countries led to the establishment, in 1960, of the International Development Association as an affiliate of the World Bank. Equipped with initial resources in convertible currencies equivalent to about $760 million, the Association has set very lenient terms for its lending, designed to put the minimum burden on the borrower's balance of payments. Other lenders have not so far managed to match these terms, although it is fair to say that in the last year or two there has been some reduction in the interest rates charged, and also some lengthening of repayment periods. This process could well go a good deal further, even recognizing that some of the lending countries may find it difficult to offer more generous terms if their own balances of payments are not very healthy.

Although I do believe that a number of the developing countries need and deserve some element of subsidy in the loans they receive, I want to emphasize that they should need no subsidy to justify individual projects. If a project cannot be justified when it is financed by a loan at 6%, it still cannot be justified when it is financed at 2%, or some such subsidized rate of interest, even if it then returns a nominal profit. A developing country is much too poor to have any business undertaking projects that are only marginally profitable -- or at least, if it undertakes such projects, it should face the fact that it is doing so for non-economic reasons. As a general rule of thumb, it is fair to say that in these countries no development project should be undertaken unless it returns direct or indirect benefits of at least 10% annually on its cost. It is also obviously wrong to give artificially cheap loans to enterprises which are in competition with others that do not get similar assistance. A firm that has to rely on the private market for funds, borrowing at short term at perhaps 12% per annum, cannot hope to compete with another company employing funds costing it 2% per annum and repayable over 30 years or so.

To make sure that the special terms of its lending do not give subsidies of this kind, the International Development Association makes all of its loans to governments in the first instance. If the funds are to be re-lent to other agencies that will carry out the projects financed, we insist that the final loans be made on the terms normal and customary in the countries concerned - in other words, on terms that carry no special subsidy.

Thus far, in speaking of the terms of lending, I have mentioned only the formal financial terms on which most loans are offered. I have left out of

account the terms of private equity investments, which will earn a return varying with the success of the investment, and also commodity loans, which although frequently repayable in local currencies, present some problems of their own, particularly through the discouraging effect they can have on the normal trade in those and competing commodities. Most important, I have left out of account, and must now discuss, the question of the non-financial conditions so often attached to loans -- the kind of conditions we generally call "strings".

I would not want you to think that I believe all "strings" on loans are automatically undesirable. Much of my own work is concerned with attaching such strings, as firmly as I can, to the lending of the World Bank and the International Development Association. But there is a clear distinction between strings that are intended primarily to serve the interests of the borrower and those intended to serve the selfish interests of the lender.

When we at the World Bank attach conditions to our lending, we do so either because we think that they will make the borrower take steps that are in his own interest, or because we wish to insure that our loan will be repaid. As far as repayment is concerned, our conditions are usually quite straightforward; an example is the pledge we often ask of our borrowers that they will not mortgage their properties to a later lender, and so weaken our own position. In the borrower's interest, as well as our own, we also set conditions designed to make sure that a proper organization is set up to carry out a project, and that the project is properly administered when it is finished. Typical examples might be an agreement to employ consultants to devise a more efficient accounting

system; a requirement that rates charged by the borrower for its services be raised to a fully economic level; or insistence that in order to obtain Bank funds for one scheme, plans for another and more grandiose project be put aside for a while. Conditions of this kind sometimes makes us unpopular, but being an international organization we have the advantage of being known to have no ulterior motives, and of being free ourselves from pressures that might force us to relax our standards.

It is of course open to other lenders to set conditions of this kind, often from the purest of motives. But the benevolence of their intentions tends to be doubted. It has to be faced that most of the finance provided from external sources for economic development is offered for commercial or political reasons. This being so, the interests of the lender and the borrower are at variance, and sometimes are diametrically opposed.

There is little problem here with private lending and investment. Borrowing in the private market overseas is a purely business matter, and (as I have argued already) the developing countries usually have too much, rather than too little, control over foreign direct investment. Lending by governments, however, is often distorted by serious pressures. These pressures tend to have the effect of directing assistance to countries whose needs are less great than the needs of others, of encouraging concentration upon projects that are not of the highest priority, and of making the execution of those projects less efficient and more expensive than it should be.

Of course, we must recognize the political facts of life. As long as the Cold War is with us, certain countries are going to get -- and need -- more aid then they might deserve on grounds of pure economic equity. Nevertheless,

political influences are generally given more weight then they should be. The results are only too familiar. A developing country which is regarded as safely friendly is sometimes neglected in favor of another whose nonalignment looks shaky. Projects are financed, not because they are of high priority, but because they are the pet scheme of politicians whose position the lenders wish to bolster, or whose friendship they wish to win. To avoid giving offence, conditions required to make a project a success are not attached to a loan, or are left unenforced. For reasons quite unconnected with economic need, offers of assistance are made which allow governments to postpone necessary reforms. Other offers are withdrawn, or kept in a state of suspense, making it impossible for the developing country to plan ahead rationally.

Commercial motives also distort lending. The dangers of excessive reliance on short-term commercial credits are fairly generally recognized now. But a good deal of pressure from both foreign and domestic private interests is still exerted both upon the governments of underdeveloped countries, to persuade them to buy unsuitable equipment from overseas, and upon the governments of the industrialized countries, to induce them to provide or guarantee the necessary financing.

It is unfortunately true that an increasing share of the financial assistance offered to the underdeveloped countries is tied to purchases in the lending country. I fully appreciate the motives behind, for instance, the present U.S. attempts to ensure that as much as possible of American financial aid is spent on purchases from American companies. One cannot lightly shrug off the balance of payments implications of a large aid program. However, one cannot forget, either, that tied aid often prevents the developing countries from buying in the most suitable and economic market, and that a tied program of aid is extremely vulnerable to commercial pressures.

There are no simple solutions to these difficulties -- or at least, there are none that I have heard of. Many of us believe, not solely for reasons of professional pride, that the objectivity, independence and past record of the international organizations qualifies them to handle a greater part of the business of financing economic development than at present. But we must recognize that national feelings, considerations of foreign policy, and other factors are likely to keep a large proportion of the aid effort on a bilateral basis. This being so, the best we can do is to point out the dangers inherent in bilateral aid, and hope that those responsible for administering it, both in the lending and the recipient countries, will try to remember that only one consideration should be uppermost in their minds -- the true welfare of the people the aid is intended to help.

I was asked to talk today about financing economic development, and I have tried not to stray too far from my subject. But I cannot finish without repeating my earlier warning about the relative place of finance in the process of development. There is still a tendency to think that money is the key to economic progress. It is not; it is only one element among many. For a very few countries, it is the element that at present is most effectively limiting their development. For the majority, however, development is hampered more seriously by shortages of skills, by lack of planning and preparation, by institutional factors, by population growth, by unstable export prices or barriers to trade, and -- not least -- by inappropriate policies. The difficulties involved in financing economic development are real and important. But they are only a part of the whole complex of the problems and challenges involved in helping the underdeveloped countries to escape from their present poverty.

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Copy sent to Paris
10/10/63

Address by A. Broches
General Counsel of the World Bank
to the
"Western Canada Conference on World Development"
August 12 - 16, 1963, Banff, Canada

August 14, 1963

Not long ago, people writing about the problems of economic development tended very often to sum up their conclusions by setting up a nice round figure of so many billions of dollars a year as a target for aid, and then issuing a call -- couched in emotional rather than logical terms -- for the hitting of this target by some specified and not-far-distant date. Too often, these discussions took little account of the likelihood that these vast sums could be raised, and were even less concerned with the capacity of the prospective recipients to put them to good use.

Today, simple and unrealistic targets of this kind are still sometimes put forward, but most people now recognize that the process of economic development is immensely more complex than such proposals suggest. If there is one lesson that we at the World Bank have learned in the course of some seventeen years of operations, it is that the problems of development cannot usefully be discussed in terms of money alone.

Economic development is the end-product of a whole range of necessary contributing factors. They include, to name a few at random, the attitudes, adaptability and training possessed by a country's people, the natural resources and environment with which the country is endowed, the opportunities open to it for trade with the rest of the world, and the intelligence of the policies pursued by its government. Any one of these factors, if unfavorable, may wreck a poor country's chances of hoisting itself onto the road to economic

independence and prosperity. Each is a necessary, but not a sufficient, condition of progress. Finance is just one more of these necessary conditions. It is more easily understood than the rest, because it deals with measurable quantities. It is also more willingly recognized than others, because people are usually ready to admit their poverty, but are less happy to acknowledge shortcomings in their policies, their institutions and their habits.

Having, I hope, relegated finance to a properly auxiliary role in the process of economic development, let me go on to say that it is still a most complicated subject.

I ought to make it clear, before going further, that in order to reduce my subject to manageable proportions I am restricting my remarks today to the external financing of economic development. We should not forget, however, that the developing countries must themselves provide the bulk of the finance they require for their development. The adequacy of these funds will depend less upon foreign aid than upon domestic savings, both public and private, and these in turn largely depend on intelligent government policy in the political, economic and monetary fields. Speaking quantitively, foreign aid can be no more than a marginal factor in development. To be sure, it may be essential as a source of funds with which to finance the external costs of development programs. But we must realize that almost all of the developing countries still earn far more through their exports than through the loans or grants provided by the assistance programs of friendly countries. And in some cases, movements in the prices of their principal exports will have a greater impact on their balance of payments than the year-to-year variations in the amount of foreign aid received.

No one knows with any certainty how much aid is being given at the moment. Partly, this is because the statistics are incomplete. More importantly, however, it is because there is considerable disagreement about what does and does not constitute aid. It is perfectly clear that the outright gift of large sums of money which can be spent anywhere in the world would constitute aid by any definition. At the other extreme, no one, I imagine, will include under "aid" the kind of financing provided by an ordinary three months' bill of exchange, covering a particular shipment of goods and discounted by the purchaser's banker. The dividing line lies at some unclearly defined point between these two cases. By whatever definition you adopt, however, public and private external assistance for the development of the poorer countries is now running at a rate equivalent to a good many billions a year. Much of this aid is immensely valuable, some is worthless; some is actively harmful. Capital for development is needed -- but it must be provided to the right people, for the right purposes, and on the right terms.

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A first important consideration in the financing of economic development is the nature of the recipient, and of the provider. Foreign aid and other finance for development flows through a surprising variety of channels. In strong contrast to the situation a century ago, when private investors assumed the main burden of financing development overseas, the greater part of foreign assistance now passes directly from one government to another. A further large proportion is passed through international organizations, which may draw their funds from member governments or from the private market, and which may in turn lend both to governments and to private borrowers. Some governments of

developing countries are themselves able to borrow in foreign capital markets but the amounts are small. A little money flows into these countries in the shape of foreign portfolio investment; much more is invested or reinvested by foreign companies in their local subsidiaries, which may or may not be joint ventures with interests in the countries concerned. Finally, suppliers' credits are frequently available to both private and public purchasers of an industrialized nation's products.

There is room for all of these types of development finance. To some extent one finds a natural division of labor. For example, private investors are most interested in financing industrial and mining projects; they are less often attracted to the so-called "infrastructure" projects -- roads, power stations, and the like -- for which development loans from public sources are well suited.

Unfortunately, it is only seldom that an entirely satisfactory balance is struck. Most developing countries have to make do with an unduly heavy dependence on aid of a single type or from a single source.

Today the most obvious inbalance in the financing of development is between the flow of public aid and that of private investment. Aid from governments is extended because of concern for the needs of the developing countries, or because it is hoped that assistance will earn a political or commercial return. The international organizations provide assistance because that is what they were set up to do. But the private investor wants simply to earn a worthwhile financial return on his money -- and he goes only where he thinks he will be made welcome. At present, he is clearly taking much less interest than he might in investment in the developing countries, and in consequence these

countries are losing the benefit not only of his very considerable capital resources, but also of his organizing ability, his technical skill, and his enterprise.

A certain amount can be done by the developing countries to attract the private foreign investor by means of such devices as tax concessions for new industries, and special protective tariffs and quotas against competing imports. Concessions of this kind, however, are mostly aimed at increasing the potential returns on an investment -- and on the whole, it is not any lack of profit opportunities that deters the investor from going into the less developed countries. Many people believe that a much more powerful inducement to private capital would be provided if means could be found to overcome the often-justified fears of the foreign investor that his investment in an underdeveloped country will be threatened by expropriation without fair compensation, or by other arbitrary action by the government of the country concerned.

A number of possible solutions have been put forward. One approach is represented by current efforts to draw up a convention setting out basic principles for the protection of foreign-owned property. The idea is that countries would accept the convention, and in case of its rules being violated, would agree to submit to the ruling of an international tribunal. This solution, while clear-cut, is not easily reconciled with the prickly nationalism of some of the underdeveloped countries. A second proposal, to which we devoted some study at the World Bank a year or so ago, calls for the establishment of a multilateral insurance scheme for foreign investment. Here, again, there are some severe difficulties. At present, our attention at the Bank is

concentrated on a third possible approach to the problem. The suggestion, now under study by the Executive Directors of the Bank, is that we should establish facilities which would be available to foreign investors and host governments wishing to bring investment disputes to conciliation or arbitration.

It is proposed that the Bank might sponsor the establishment of a center or secretariat for conciliation and arbitration, under whose auspices conciliation panels or arbitration tribunals would be set up when necessary. Resort to these facilities would be entirely voluntary, and they would be used only when both the government and the foreign investor concerned in a dispute had consented. But once consent had been given, the parties to the dispute would be bound to carry out their undertaking and, if arbitration were involved, to abide by the arbitrators' award. This whole approach is more modest than that involved in either the proposed convention on the treatment of foreign investments or the multilateral investment scheme. But it also involves considerably fewer difficulties. We have high hopes that it may soon be possible to reach a workable agreement establishing the conciliation and arbitration center, and that the center will have a measurable effect in encouraging the private investor to venture into the developing countries.

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Perhaps the most obvious consideration in assessing the present flow of financial assistance to these countries is the use to which the money is put. In spite of being so obvious, it has on occasion received scant attention.

At present, most development assistance is provided in the shape of loans, which eventually must be repaid. Private equity investment, if it is

successful, will involve the payment of dividends overseas. Foreign assistance of all kinds, even including grant aid, can only be put to work if it is combined with local funds and local efforts. Unless the foreign assistance is devoted to purposes which are worthwhile, the developing country, if it has borrowed abroad, may assume a debt burden for the future and in any event is foregoing alternative uses of its resources for the present time, without getting a reward in development achieved that will compensate for the sacrifices involved.

It is easy enough to grasp this fact, when a developing country's government sensibly chooses to put aid funds to work building a new school, instead of -- say -- squandering the proceeds on a handsome classical facade for the Ministry of the Interior. But it is less easy to distinguish between the merits of a port project and a scheme to build a new road, or to pass judgment between alternative proposals for a hospital and a plant to produce fertilizer.

Judgments of this kind should not be made on the spur of the moment or at the prompting of emotion. If they are to be made correctly, they have to be based on painstaking assessments not only of the worth of the projects themselves, but also of their priority as compared with other projects whose merits may appear on the face of it to be equal. They cannot be made in isolation. Power stations are worthless without consumers; factories must have markets; roads are of no value unless they carry traffic; imported machines must be kept supplied with spare parts; and universities must be supplied with qualified secondary school graduates. Although in the long run the operation of supply and demand is likely to put right imbalances of this kind, a poor country cannot afford the waste of time and resources

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"Planning" is a word that sill sometimes evokes a violent response, particularly in the United States, where people tend to identify it with the practices and policies of the totalitarian states. However, I am not talking about the kind of centralized planning that dictates every aspect of a country's economic activity: quite apart from its political significance, planning of this kind is far beyond the administrative capacity of most developing countries. The sort of planning that seems essential is what has been called "indicative" planning, which attempts to chart the approximate course of a country's economy, rather than leaving it to drift entirely at the mercy of circumstances. No underdeveloped country, faced with almost unlimited claims upon very limited resources, can avoid making some decisions about which claims are to be satisfied and which left unsatisfied. And since these claims must be made, it is obviously desirable that they be made on a rational basis. No one will expect the decisions to be perfect: economic priorities will not always coincide with political or social priorities, and mistakes will be made. But if anything like full value is to be obtained from foreign assistance, and from a country's own resources, some degree of planning is necessary. In its absence, development funds will continue, as so often in the past, to be of much less value to their users than they should have been.

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A fairly clear dividing line can be drawn between those forms of assistance which are provided on purely business terms, and those which represent some sacrifice on the part of the provider. At present there is an unmistakable tendency to provide aid on financial terms that imply some degree of subsidy to the borrower -- as when a lending government extends aid on easier terms than it must itself pay to finance that lending -- but this tendency is to some extent balanced by attaching increasingly stringent non-financial conditions to the loan. An example here is the present policy of the U.S. Agency for International Development, which offers most generous terms of repayment, but now requires that loans be spent on American goods. The Russians, of course, have always tied their aid in the same way. The financial terms offered by the World Bank are related to our own borrowing costs, and work out at about the same interest rate as most first-class

foreign borrowers have been required to pay in the U.S. market -- that is, a rate slightly higher than that for Canadian borrowings in New York. On the other hand, the Bank's affiliate, the International Development Association, lends on terms far easier than could ever be obtained in the open market.

Why should subsidized terms be offered to a developing country -- and what limits should be put on the subsidy?

It seems unnecessary for me to argue before this audience the general case for assistance to the developing countries. Whether the case be put in terms of altruism, enlightened self-interest, or a combination of the two, it appears to me pretty convincing. But it does still seem to be necessary to underline the fact that for many of the developing countries, our assistance will be ineffective unless the financial aid given is fairly generous in its terms as well as its scale.

The facts of the matter are fairly well known. There are a good many developing countries that can afford to borrow on the usual market terms for both interest and period of repayment. There are, however, an increasing number of others which, although they have the absorptive capacity to put borrowed funds to good use, haven't the earning capacity in foreign exchange to repay loans offered on conventional terms.

Some of the nations in this plight have been improvident in the past. Some, certainly, have been tempted to borrow on terms that were obviously unsuitable: Brazil and Turkey, for instance, saddled themselves with an immense load of short-term suppliers' credits that could not possibly be repaid on schedule out of earnings on the projects financed. To a great extent, though, the countries which now find themselves unable to borrow safely as

much as they can use are in this position in large part for reasons over which they have little control. True, their domestic economic and financial policies may not always have been sound. But their present troubles, that is, the imbalance between their absorptive capacity and their capacity to service foreign debt are a result of their own past success in getting the process of development under way; and these difficulties are only too often aggravated by the persistent sluggishness in the growth of their export earnings (most of which are derived from the sale of primary products that for a number of years have been in oversupply throughout the world).

The result is summed up in some figures that the World Bank's economists drew together not long ago: over the previous six years, the average experience of countries representing most of the underdeveloped world was that their export earnings had risen by just about 15 percent altogether, while their total external debt had more than doubled. Since for years to come they will continue to need large imports of capital goods and other equipment and services, this tendency for their debt burden to grow much faster than their capacity to repay the debt cannot continue without eventually bringing the whole process of development to a halt.

The emergence of this situation was recognized fairly early by the United States, which for a number of years has been making "soft" loans. More general concern about the growing burden of debt service carried by many developing countries led to the establishment, in 1960, of the International Development Association as an affiliate of the World Bank. Equipped with initial resources in convertible currencies equivalent to about $760 million, the Association has set very lenient terms for its

lending, designed to put the minimum burden on the borrower's balance of payments. These resources are now nearly fully committed and we hope that current discussions among governments concerning their replenishment will soon lead to a substantial addition to IDA's available funds.

Other lenders have not so far managed to match the lenient terms on which IDA lends, although it is fair to say that in the last year or two there has been some reduction in the interest rates charged, and also some lengthening of repayment periods. This process could well go a good deal further, even recognizing that some of the lending countries may find it difficult to offer more generous terms if their own balances of payments are not very healthy.

Although I do believe that a number of the developing countries need and deserve some element of subsidy in the loans they receive in order to relieve the pressure on their balance of payments, I want to emphasize that they should need no subsidy to justify individual projects. A developing country is much too poor to have any business undertaking projects that are only marginally profitable -- or at least, if it undertakes such projects, it should face the fact that it is doing so for non-economic reasons. As a general rule of thumb, it is fair to say that in these countries no development project should be undertaken unless it returns direct or indirect benefits of at least 10 percent annually on its cost. Capital being such a scarce commodity has a high cost. This cost cannot be avoided by a subsidized rate of interest. If a project cannot be justified when it is financed with 6 percent money, the answer is not to finance it with 2 percent money, but to devote the funds to a better alternative use.

To make sure that the special terms of IDA's lending serve their purpose, that of alleviating balance of payments problems, the Association makes all of its loans to governments in the first instance. If the funds are to be re-lent to other agencies or private enterprises that will carry out the projects financed, we insist that the final loans be made on the terms normal and customary in the countries concerned -- in other words, on terms that give no special subsidy or windfall profits.

Thus far, in speaking of the terms of lending, I have mentioned only the formal financial terms on which most loans are offered.

Equally important, in the case of loans to the underdeveloped countries, are the terms, or the strings if you will, which are attached to loan transactions not so much in order to assure the safety of the lender's investment -- although that is obviously a matter of legitimate concern -- as to ensure that the borrowed funds will be used to best advantage, will yield the maximum benefit to the borrowing country. The World Bank has been a pioneer in this field. Our concern with the borrower's welfare begins long before a loan is granted. In discussions with the borrower and through independent investigations we seek to convince ourselves that the project for which financing is sought has a high priority in the borrower's development program. Frequently, we give the borrower technical assistance in the drawing up of such a program and in the identification of high priority projects. We want to assure ourselves that the project is properly designed and that the execution will be supervised by competent consulting engineers. These matters are covered by the loan agreement as is the question of procurement. Procedures for procurement are agreed with the borrower

and they nearly always provide for wide international competition so that the borrower has the opportunity to get the best value for his money. The question of management is a difficult one in most underdeveloped countries and receives close attention from the World Bank which sometimes helps the borrower to find foreign personnel to help in the initial stages of the project's operation. When a project is revenue producing, such as a power plant, we generally insist on rates being charged which are not only sufficient to cover financial and other expenses, including depreciation and other reserves, but which will leave a surplus to be used to finance further expansion. Sometimes we find it necessary to restrict the borrower's freedom to undertake additional projects until such time as the project which we are financing has been completed and is properly operating. These are just a few examples of the non-financial terms of our loan agreements. They are coupled with close supervision of compliance with the agreements over the entire term of the loans. This may seem to add up to a pretty paternalistic system. But we feel that, as custodians of the funds of our member governments and our bondholders we have the right to insist on these matters and that as a development institution we have the duty to do so. From time to time we may be unpopular with borrowers, but, being international, our motives are never questioned.

It is of course open to other lenders to set conditions of this kind. But the benevolence of their intentions tends to be doubted. It has to be faced that much of the finance provided from external sources for economic development is offered for commercial or political reasons. Lending by governments is often distorted by serious pressures. These pressures tend

to have the effect of directing assistance to countries whose needs are less great than the needs of others, of encouraging concentration upon projects that are not of the highest priority, and of making the execution of those projects less efficient and more expensive than it should be.

Of course, we must recognize the political facts of life. As long as the cold war is with us, certain countries are going to get -- and need -- more aid than they might deserve on grounds of pure economic equity.

But when political rather than economic considerations guide decisions on foreign aid, the results are only too familiar. A developing country which is regarded as safely friendly is sometimes neglected in favor of another whose nonalignment looks shaky. Projects are financed, not because they are of high priority, but because they are the pet scheme of politicians whose position the lenders wish to bolster, or whose friendship they wish to win. To avoid giving offense, conditions required to make a project a success are not attached to a loan, or are left unenforced. For reasons quite unconnected with economic need, offers of assistance are made which allow governments to postpone necessary reforms. Other offers are withdrawn, or kept in a state of suspense, making it impossible for the developing country to plan ahead rationally.

Commercial motives also distort lending. The dangers of excessive reliance on short-term commercial credits are fairly generally recognized now. But a good deal of pressure from both foreign and domestic private interests is still exerted both upon the governments of underdeveloped countries, to persuade them to buy unsuitable equipment from overseas, and upon the governments of the industrialized countries, to induce them to provide or guarantee the necessary financing.

It is unfortunately true that an increasing share of the financial assistance offered to the underdeveloped countries is tied to purchases in the lending country. I fully appreciate the motives behind, for instance, the present U.S. attempts to ensure that as much as possible of American financial aid is spend on purchases from American companies. One cannot lightly shrug off the balance of payments implications of a large aid program. However, one cannot forget, either, that tied aid often prevents the developing countries from buying in the most suitable and economic market, and that a tied program of aid is extremely vulnerable to commercial pressures.

There are no simple solutions to these difficulties -- or at least, there are none that I have heard of. Many of us believe, not solely for reasons of professional pride, that the objectivity, independence and past record of the international organizations qualifies them to handle a greater part of the business of financing economic development than at present. But we must recognize that national feelings, considerations of foreign policy, and other factors are likely to keep a large proportion of the aid effort on a bilateral basis. This being so, the best we can do is to point out the dangers inherent in bilateral aid, and hope that those responsible for administering it, both in the lending and recipient countries, will try to remember that only one consideration should be uppermost in their minds -- the true welfare of the people the aid is intended to help.

I was asked to talk today about financing economic development, and I have tried not to stray too far from my subject. But I cannot finish without repeating my earlier warning about the relative place of finance in the process of development. There is still a tendency to think that money

is the key to economic progress. It is not: it is only one element among many. For a very few countries, it is the element that at present is most effectively limiting their development. For the majority, however, development is hampered more seriously by shortages of skills, by lack of planning and preparation, by institutional factors, by population growth, by unstable export prices or barriers to trade, and -- not least -- by inappropriate policies. The difficulties involved in financing economic development are real and important. But they are only a part of the whole complex of the problems and challenges involved in helping the underdeveloped countries to escape from their present poverty.

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Doc. COM/WH/6 - English
February 3, 1964

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

CONSULTATIVE MEETING OF LEGAL EXPERTS ON SETTLEMENT OF INVESTMENT DISPUTES

Santiago de Chile, 3 - 8 February 1964

Text of address delivered by the Chairman, Mr. A. Broches, General Counsel of the International Bank for Reconstruction and Development, at the opening session on Monday, 3 February 1964, at 3:30 p.m.

Distinguished Delegates:

On behalf of Mr. Woods, President of the International Bank for Reconstruction and Development, I welcome you to this meeting.

This is the second of four consultative meetings of legal experts, called by the World Bank to discuss informally the draft of an international convention on settlement of investment disputes which you have had an opportunity to study. The first, attended by countries of the African continent, was held in Addis-Ababa last December. The third will be held in Geneva at the end of this month, and the fourth in Bangkok in April. I am pleased to tell you that the Addis-Ababa meeting was a success. Almost all of the African nations invited sent delegates, several of the most important countries expressed support and no country was opposed to the basic features of our proposals. The discussions were constructive, and the arguments and comments made will be very useful to us in studying more deeply these new problems of international law. The headquarters of the regional economic commissions of the United Nations were put at our disposal for the other three meetings. For this meeting, ECLA has given us its firm and valuable support, and we very much appreciate its effective help in all administrative aspects of the meeting.

I am very pleased and honored that so many nations of this hemisphere have sent such eminent jurists to this meeting. I see in this the recognition, by the Governments you represent, of the importance of the matters we will study here.

The countries of this hemisphere were born to political independence less than two centuries ago, some even in very recent times. However, their economic vicissitudes have been of such a nature, that their representatives will bring to this meeting ideas which will be of great value for our study. The experience of some countries in the field of foreign investment has not been pleasant. However, all this is past history. We no longer have to fear International law as a tool of the strong against the weak.

Under the influence of the past certain juridical traditions have developed in this hemisphere which may have been justified in that period. I suggest that the time has come to reappraise these traditions in the

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light of today's urgent needs for the betterment of human life in an atmosphere of growing cooperation among independent nations.

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It may possibly strike some of you as somewhat unusual that the World Bank should take the initiative in promoting an international agreement in a field which might not be regarded as falling directly within its sphere of activity and that it is willing and eager to play such an active part in seeking to bring the proposals now before you to reality.

There is a brief answer to this, namely that the Bank is not merely a financing mechanism but that it is, above all, a development institution. We are concerned with the entire process of economic development rather than with the mere provision of funds for particular projects, and our approach to the problem of economic development is professional and non-political.

The Bank's activities consist necessarily in large part of the provision of finance. But much of the energy and resources of the World Bank are devoted to technical asistance and advice directed toward the promotion of conditions conducive to rapid economic growth - to creation of a favorable investment climate in the broadest sense of the term. To this end, sound technical and administrative foundations are essential, but no less indispensable is the firm establishment of the Rule of Law.

In days past there may have been some justification for regarding international investment as a subject of interest chiefly to the capital-exporting nations and their citizens. Today it is universally recongnised as a factor of crucial importance in the economic development of the less developed parts of the world. International investment has become one of the major features of the partnership between the richer and the poorer nations and its promotion a matter of urgent concern to capital-importing and capital exporting countries alike. This is particularly true of private foreign investment which, if wisely conducted, can make great contributions to the development of the economies of the recipient countries.

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Unfortunately, however, private capital is not now moving in sufficient volume to areas in need of capital. And there is no room for doubt that one of the most serious impediments to the flow of private capital is the fear of investors that their investment will be exposed to political risks such as outright expropriation without adequate compensation, government interference, short of expropriation, which substantially deprives the investor of the control or the benefits of his investment, and non-observance by the host government of contractual undertakings on the basis of which the investment was made.

Knowing this, we have been led to wonder whether the Bank, because of its reputation for integrity and its position of impartiality, could not help in removing this obstacle to international private investment. On a number of occasions we have been approached by governments, including governments of this hemisphere, and foreign investors who sought our assistance in settling investment disputes that had arisen between them, or wanted to assure themselves that our assistance would be available in the event that differences between them should arise in the future. On the basis of our own experience and of our assessment of the possibility of securing widespread support at the present time, we have concluded that the most promising approach would be to attack the problem of the unfavorable investment climate from the procedural angle, by creating international machinery which would be available on a voluntary basis for the conciliation and arbitration of investment disputes. Some may think it desirable to go beyond this and attempt to achieve a substantive definition of the status of foreign property. There is no doubt in my mind that there is need for a meaningful understanding between capital-exporting and capital-importing nations on these matters, and the Bank follows with great interest the studies made in this field.

But while those studies proceed, there is need, we think, to pursue a parallel effort of more limited scope, represented by the proposals to be discussed at this meeting.

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Now what are the principal features of these proposals? To what extent do they deal only with form and to what extent do they go into substance? How much of them is no more than a reflection of current law and practice and how far do they constitute a step forward in the development of international law? And, finally, why is an international convention required to achieve our objectives?

We shall be dealing with all these questions during the coming week. The answers to some of them, or at least my answers to some of them, you will find in the Working Paper which you have been studying for some time.

I shall not attempt to restate or summarize that document in this opening address but I do want to dwell on a few of the principal features of the Convention.

The Convention would make available facilities to which States and foreign investors could have access on a voluntary basis for the settlement of investment disputes between them. The method of settlement selected might be conciliation, arbitration, or conciliation followed by arbitration in case the conciliation effort should fail. The initiative for such proceedings might come from a State as well as from an investor. The Convention would set up a mechanism for the selection of conciliators and arbitrators and for the conduct of proceedings. It is my belief that these institutional facilities and procedures are better suited to the types of disputes with which we are dealing - disputes between a State and a foreign investor - than those offered by other existing or proposed institutions. However, taken by themselves, they could be put into effect by corporate action by the Bank and would not require the conclusion of any inter-governmental agreement.

But in my opinion, the institutional facilities, however useful, are secondary to other parts of the proposals, and those do required to be embodied in a Convention.

What are they?

In the first place, a recognition of the principle that a non-State party, an investor, may have direct access to a State party before an international forum. By direct access I mean that the investor will act in his own name and will not require the espousal of his cause by his

/national government.

national government. By signing the Convention States would admit this principle; but only the principle. No signatory State would be compelled to resort to the facilities provided by the Convention, or to agree to do so, and no foreign investor could in fact initiate proceedings against a signatory State unless that State and the investor had specifically so agreed. However, once they had so agreed, both parties would be irrevocably bound to carry out their undertaking and the Convention establishes rules designed to prevent frustration of the undertaking and to insure its implementation.

Secondly, there is the question of local remedies, which in my opinion does not really raise any major issue of principle. On the one hand acceptance of the possibility of adjudication by an international forum of a dispute between a State and a foreign investor implies a recognition that local courts are not necessarily to be the final forum for the settlement of such disputes. On the other hand such acceptance does not imply that local remedies cannot play a major role. At the time when parties consent to arbitration under the Convention they are free to stipulate either that local remedies may be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute can be submitted for arbitration under the Convention. It is only if the parties have not made either stipulation that the Convention provides that arbitration will be in lieu of local remedies.

A third feature is, in my opinion, of much greater importance. In traditional international law a wrong done to a national of one State for which another State is internationally responsible is actionable not by the injured national but by his State. Indeed, the classical view is that the State has been injured in the person of its national, and that the State seeking redress for the injury done to its national is pursuing its own claim. Practice has progressed beyond this point and there are a number of instances in which provision is made for settlement of investment disputes by direct conciliation or arbitration between the host State and the foreign investor. Examples may be found in a number of concession and cooperation agreements of recent years. But what is lacking is recognition of the internationally binding character of such arrangements, and the

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Convention is designed to fill this gap. Thus the Convention would be in harmony with the growing recognition of the individual as a subject of International Law.

Admittedly, an agreement by a State to submit to international arbitration is in some sense a curtailment or impairment of its sovereignty. However, one of the essential attributes of sovereignty is the capacity, in the very exercise of that sovereignty, to accept limitations on it, and this is of course what every State does each time it enters into an international agreement. What the proposed Convention would do would be to give internationally binding effect to the limitation of sovereignty inherent in an agreement by a State pursuant to the Convention to submit a dispute with a foreign investor to arbitration. But, as a corollary of the principle under which an investor may have direct and effective access to a foreign State without the intervention of his national State, the Convention introduces an important innovation, namely that the investor's national State would no longer be able to espouse the claim of its national. A host State would therefore not be faced with the likelihood of having to deal with a multiplicity of claims and claimants. The Convention would offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and would insulate such disputes from the realm of politics and diplomacy. I am convinced that this will serve the best interests of investors, host States and the cause of international cooperation generally. It would be unrealistic not to recognise that local remedies will sometimes be unsatisfactory from the standpoint of the investor. In such a case the investor would be left to claim the protection of his own government, thus transforming the controversy into a dispute between States, a result which would, more often than not, be distasteful or embarrassing not only for the investor himself but even more so for the States concerned.

A fourth feature of our proposals is that awards of arbitral tribunals rendered pursuant to the Convention would be recognised by, and enforceable in, all Contracting States regardless whether a State in which recognition was sought was a party to the dispute in question. Thus, in the case of an award against the State party to the arbitral proceedings, one may assume that the State, which has undertaken a solemn international obligation to comply with the award, will do so. Therefore I consider the question of

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enforcement as somewhat academic. But I want to make clear that where, as in most countries, the law on Immunity of foreign State, from execution would prevent such enforcement, the Convention would leave that law unaffected. All the Convention does is to place an arbitral award rendered pursuant to it on the same footing as a final judgment of the national courts. If such judgment can be enforced under domestic law, so can the award. If the judgment cannot so be enforced against a foreign State, neither can the award.

There is a fifth feature, about which I can be very brief, but I want you to bear it in mind. The Convention does not lay down standards for the treatment by States of the property of aliens; nor does it prescribe standards for the conduct of foreign investors in their relations with host States. Accordingly, the Convention is not concerned with the merits of investment disputes but with the procedure for settling them.
Gentlemen, I have explained why the Bank has taken it upon itself to initiate and promote the discussion of the proposed Convention. I repeat at this point that the Bank believes that private investment can make a valuable contribution to economic development. But we are neither blind partisans of the cause of the private investor, nor do we want to impose our views on others. At the last Annual Meeting of the Bank, President Woods said:

> " It is not the business of the Bank, nor of its President, to tell the developing nations within the Bank's membership that they must accept private capital from abroad as a partner in their development efforts or what kind of price it is reasonable for them to pay in order to achieve such a partnership."

Nor do we either expect or think it desirable that whenever a foreign investor feels aggrieved by a host State or whenever a host State feels that a foreign investor does not live up to its obligations, such a dispute should necessarily be dealt with by the facilities established under the Convention rather than by the regular national judicial or administrative channels. Nevertheless, we do want to emphasize that there may be instances in which recourse to an international forum will be in the interest of the host State as well as of the investor.

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There are two further points that I want to stress in this connection. First, that the Convention is designed to deal with claims by host States against investors, as well as with claims by investors against host States. In fact, some provisions, such as those for the enforcement of arbitral awards are of special importance in those cases in which a State takes the initiative in a proceeding against an investor and is successful in its claim.

The second point I want to emphasize is that the Convention deals with conciliation as well as arbitration. Since arbitration poses complex legal problems, and conciliation is a so much simpler procedure, attention tends to be concentrated on arbitration. This does not mean, however, that we attach less importance to conciliation than to arbitration. Our own experience with conciliation has made us appreciate the value of this method, and it may well be that when the Convention comes into being, the conciliation activities under the auspices of the Center will prove to be more important than arbitral proceedings.

In conclusion I would like to point out that the Convention leaves States and investors free to establish their mutual relations on whatever basis they deem proper. I would also like to emphasize again that by becoming a party to the Convention, no State is under any obligation to submit any dispute either to conciliation or arbitration. The true significance of the Convention lies in the fact that it insures that if the parties agree to have recourse to an international forum, their agreement will be given full effect. In our opinion this would create an element of confidence which would in turn contribute to a healthier investment climate. The fact that this may be only a modest contribution should not lessen our enthusiasm.

I like to think of all of us who are so deeply concerned with the problems of development as realists. We have our ideals, but we know that there is no quick road to success. It is that knowledge which should find us prepared to explore every avenue and to examine every new idea, with an open mind, and with the sole concern to find out whether it is capable of making some contribution to the achievement of our common goals.

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As a distinguished South American lawyer recently wrote me:

> " I welcome the World Bank's initiative in studying these problems and in particular in developing new forms of law for the solution of the grievous problems of man in these underdeveloped areas. For too long we lawyers have defended a legal order which is showing itself unable to give expression to the new forms of human development. It is time for us men of the law to play our role in formulating new rules which will modify the traditional concepts which have prevailed this far particularly in the field of international trade and investment."

It is in this spirit, gentlemen, that I hope we shall together study the proposals which have been placed before you.

ARBITRATION MEETING, Santiago, Chile

February 7, 1964

Mr. Broches's Closing Statement for Press

Las sesiones de la reunión consultiva de juristas para estudiar el proyecto de Convenio sobre conciliación y arbitraje de disputas relativas a inversiones entre los Estados y los nacionales de otros Estados, preparado por el Banco Mundial, se han desenvuelto en un plano doctrinal muy elevado. Los juristas de este hemisferio que acudieron a la reunión han aportado comentarios y sugestiones a nuestro proyecto que nos serán de suma utilidad cuando nos llegue el momento de sintetizar los aportes de las cuatro reuniones regionales. La experiencia de los países de este hemisferio en materia de inversiones ha sido intensa, a pesar de que su vida política, en muchos casos, se inició no hace mucho tiempo. Es por esto que el consejo y apoyo que se nos ha ofrecido serán de gran valor para nuestro estudio.

Comprendo que algunos países, tanto exportadores como receptores de inversiones, tendrían que estudiar la posibilidad de modificar su legislación interna para darle eficacia a algunos de los preceptos del proyecto de Convenio que estamos estudiando. Sobre esto hay que recalcar que la Regla de Derecho debe modernizarse y adaptarse a las necesidades de la vida moderna, y no debe ser camisa de fuerza que limite el desarrollo de los países y de los mercados internacionales.

Agradezco la comprensión de los señores delegados al enfocar los problemas legales planteados en nuestro proyecto, tomando en consideración las dificultades de sus sistemas legales nacionales, pero analizándolas

con criterio amplio y a la luz de algunos de los objetivos primordiales del Banco Mundial: el fomento de las inversiones privadas en el campo internacional, y la promoción del crecimiento equilibrado del comercio entre las naciones asociadas al mismo.

Me siento muy satisfecho de mi estancia en este bello país, donde he tenido ocasión, no sólo de encontrar la tranquilidad necesaria para desarrollar las tesis que les desea ofrecer el Banco a sus países asociados en la ardua materia de la conciliación y el arbitraje, sino también de disfrutar de la hospitalidad generosa del Gobierno de Chile y de mis colegas chilenos, y de la ayuda eficaz de la CEPAL. De aquí partimos para Ginebra a la tercera reunión de juristas. En abril se celebrará la cuarta, y la última, en Bangkok.

Con los aportes de las reuniones nos tocará redactar un nuevo proyecto que ofreceremos a los Directores Ejecutivos del Banco Mundial como documento definitivo de su personal.

ARBITRATION MEETING, SANTIAGO, CHILE

February 7, 1964

Mr. Broches's Television Interview

Question 1. La Reunión de Juristas del Banco Mundial tiene un propósito: buscar un instrumento internacionalmente legal para proteger las inversiones extranjeras en los países en desarrollo. ¿Por qué esta urgencia? ¿Tiene el Banco Mundial algún estudio que indique la inminencia de nacionalizaciones en las regiones en desarrollo?

Answer. El desarrollo de los países menos desarrollados es una de las inquietudes más urgentes del momento económico actual. El Banco Mundial es un banco de desarrollo, pero no sólo presta dinero para el desarrollo de los países asociados, sino que, de acuerdo con los preceptos estatutarios redactados en la Conferencia Monetaria de Bretton Woods, debe buscar el fomento de las inversiones privadas en el campo internacional, y la promoción del crecimiento equilibrado del comercio entre las naciones asociadas al mismo. En este momento de la historia no se puede dejar para mañana lo que se puede hacer hoy. Sobre las nacionalizaciones en los países sub-desarrollados, los hechos hablan por sí solos. En mi discurso de apertura señalé que: "Por desgracia, el capital privado no fluye hoy en día en volumen suficiente a las regiones que lo necesitan. Y no se debe dudar que uno de los obstáculos más serios a la corriente de capital privado es el temor, por parte de los inversionistas, que su inversión quede expuesta a riesgos políticos tales como: la expropiación sin compensación adecuada; la interferencia gubernamental que no llega a

ser expropiación pero que en el fondo priva al inversionista del control de su inversión o de sus beneficios; y la inobservancia por parte del gobierno anfitrión de los compromisos contractuales que sirvieron de fundamento a la inversión".

Creo que nuestro proyecto puede ayudar a que se aplaque ese temor.

Question 2. Dentro de la inquietud de los inversionistas extranjeros para la región latinoamericana, ¿en qué lugar está Chile? ¿Es Chile un lugar seguro para el inversionista extranjero?

Answer. No soy economista, sólo soy abogado, ni he estudiado la situación particular de Chile. Sin embargo, como impresión de un lego en la materia, pudiera decir que no creo que Chile ocupe un lugar muy diferente del de los países más adelantados de la América Latina. En los pocos días que he estado en Santiago he notado actividad y entusiasmo en los círculos de mi profesión. En todo caso no creo que haya desaliento.

Question 3. Dos de las regiones con más urgente necesidad de inversión son Africa y América Latina. ¿Cuál de esas regiones recibe mayor atención ahora? ¿Por qué una región recibe más atención que otra?

Answer. Tanto el Africa como la América Latina reciben toda la atención que puede brindarles nuestro banco, del cual son sus países, miembros asociados. Claro que nuestro banco no puede hacerlo todo, y no faltan países a quienes no les interesa recibir consejos.

Question 4. ¿Existe algún plan general del Banco Mundial para mejorar las inversiones en Latinoamérica?

Answer. Los planes del Banco Mundial son de orden mundial. Creemos que el proyecto de convenio de conciliación y arbitraje sobre disputas relativas a inversiones, que ofreceremos, espero yo, en días no lejanos, a nuestros países asociados, que ya pasan de la centena, servirá para dar confianza al inversionista; y es de todos sabido que el capital privado extranjero podría ayudar grandemente al esfuerzo de desarrollo de esos países.

Question 5. ¿Cuáles son las conclusiones de la actual reunión de Juristas del Banco Mundial?

Answer. La reunión que acaba de terminarse ha sido una reunión consultiva. No se ha llegado a ninguna conclusión. Se le ha pedido consejo a los juristas del mundo entero en la elaboración del proyecto que hemos preparado. Hemos oído ya, en el mes de diciembre, los consejos y comentarios de los juristas africanos, y acabamos de escuchar la docta palabra de los juristas de este hemisferio. Ahora vamos a Ginebra, y en abril a Bangkok.

Question 6. El Ministro chileno Pinto Lagarrigue, ha asegurado que el Banco Mundial ha exigido a Chile un aumento del ahorro interno para financiar préstamos de ayuda, ¿porqué esta exigencia?

Answer. No sé si eso es cierto. Además, como dije anteriormente, no soy economista, pero es principio de lógica que para esperar ayuda, es

necesario ayudarse a sí mismo. "La economía es riqueza" rezaba el lema de las antiguas monedas chilenas. Nuestro Banco espera que los países asociados movilicen sus fuentes de riqueza, y una de las principales es el ahorro.

Doc. COM/EU/5 - ENGLISH
17 February 1964

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

CONSULTATIVE MEETING OF LEGAL EXPERTS ON SETTLEMENT OF INVESTMENT DISPUTES

Geneva, 17 - 21 February 1964

Text of address delivered by the Chairman, Mr. A. Broches, General Counsel of the International Bank for Reconstruction and Development, at the opening session on Monday, 17 February 1964, at 15.00.

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Mr. Velebit, Distinguished Delegates, Ladies and Gentlemen:

On behalf of Mr. Woods, President of the International Bank for Reconstruction and Development, I welcome you to this meeting.

This is the third of four consultative meetings of legal experts, called by the World Bank to discuss informally the draft of an international convention on settlement of investment disputes, which you have had an opportunity to study. The first, attended by countries of the African continent, was held in Addis Ababa last December. The second was held earlier this month in Santiago de Chile and was attended by countries of the Western Hemisphere. The last one will be held in Bangkok in April.

The discussions at Addis Ababa and Santiago were constructive and the arguments and comments made at these meetings will be very useful to us in our further work on the Draft before you. At the African meeting most countries represented expressed support for the proposal and none raised objections of principle as to the basic features of the draft convention. The consensus seemed to be that a convention of this type would be useful and that the draft had taken account of the legitimate interests of capital importing countries as well as of investors. At the Santiago meeting several delegates expressed their governments' reservations concerning certain innovations which the Convention sought to introduce into traditional international law as understood among Latin American nations. They did not conceal their uneasiness about what they regarded as a serious limitation on their countries' sovereignty which use of the facilities of the proposed Centre might entail. Other Latin American delegates, however, welcomed the proposal, emphasizing the optional nature of the Convention. In their view the Convention should be acceptable to Latin American countries even though many of them might not be able to make full use of the arbitration facilities (as distinguished from facilities for conciliation) without changes in their legal system. Finally, several Latin American delegates urged that the time had come for Latin America to re-examine traditional concepts in the field of foreign investment. The delegates of Canada and the United States expressed support for the proposals.

I shall not attempt to report here in detail on the views and comments expressed at those meetings, although during our discussion of the Working Paper there will be occasion to refer from time to time to what was said in Addis Ababa and Santiago. For the moment I will just say that on balance we have been greatly encouraged by the reception of our proposals at these two meetings.

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It may possibly strike some of you as somewhat unusual that the World Bank should take the initiative in promoting an international agreement in a field which might not be regarded as falling directly within its sphere of activity and that it is willing and eager to play such an active part in seeking to bring the proposals now before you to reality.

There is a brief answer to this, namely that the Bank is not merely a financing mechanism but that it is, above all, a development institution. We are concerned with the entire process of economic development rather than with the mere provision of funds for particular projects, and our approach to the problem of economic development is professional and non-political.

The Bank's activities consist necessarily in large part of the provision of finance. But much of the energy and resources of the World Bank are devoted to technical assistance and advice directed toward the promotion of conditions conducive to rapid economic growth - to creation of a favourable investment climate in the broadest sense of the term. To this end, sound technical and administrative foundations are essential, but no less indispensable is the firm establishment of the Rule of Law.

To-day international investment is universally recognised as a factor of crucial importance in the economic development of the less developed parts of the world. International investment has become one of the major features of the partnership between the richer and the poorer nations and its promotion a matter of urgent concern to capital-importing and capital-exporting countries alike. This is particularly true of private foreign investment which, if wisely conducted, can make great contributions to the development of the economies of the recipient countries. Unfortunately, however, private capital is not now moving in sufficient volume to areas in need of capital. And there is no room

for doubt that one of the most serious impediments to the flow of private capital is the fear of investors that their investment will be exposed to political risks such as outright expropriation without adequate compensation, government interference, short of expropriation, which substantially deprives the investor of the control or the benefits of his investment, and non-observance by the host government of contractual undertakings on the basis of which the investment was made.

Knowing this, we have been led to wonder whether the Bank, because of its reputation for integrity and its position of impartiality, could not help in removing this obstacle to international private investment. On a number of occasions we have been approached by governments of capital importing countries and foreign investors who sought our assistance in settling investment disputes that had arisen between them, or wanted to assure themselves that our assistance would be available in the event that differences between them should arise in the future. On the basis of our own experience and of our assessment of the possibility of securing widespread support at the present time, we have concluded that the most promising approach would be to attack the problem of the unfavourable investment climate from the procedural angle, by creating international machinery which would be available on a voluntary basis for the conciliation and arbitration of investment disputes. Some may think it desirable to go beyond this and attempt to achieve a substantive definition of the status of foreign property. There is no doubt in my mind that there is need for a meaningful understanding between capital-exporting and capital-importing nations on these matters. And it seems to me that the draft on Protection of Foreign Property, prepared in the Organization for Economic Co-operation and Development, might constitute a useful starting point for discussions between these two groups of countries.

But while this dialogue proceeds, there is need, we think, to pursue without delay an objective of more limited scope, but capable of earlier realization, represented by the proposals to be discussed at this meeting.

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Now what are the principal features of these proposals? To what extent do they deal only with form and to what extent do they go into substance? How much

of them is no more than a reflection of current law and practice and how far do they constitute a step forward in the development of international law? And, finally, why is an international convention required to achieve our objectives?

We shall be dealing with all these questions during the coming week. The answers to some of them or at least my answers to some of them, you will find in the Working Paper which you have been studying for some time.

I shall not attempt to restate or summarize that document in this opening address but I do want to dwell on a few of the principal features of the Convention.

The Convention would make available facilities to which States and foreign investors could have access on a voluntary basis for the settlement of investment disputes between them. The method of settlement selected might be conciliation, arbitration, or conciliation followed by arbitration in case the conciliation effort should fail. The initiative for such proceedings might come from a State as well as from an investor. The Convention would set up a mechanism for the selection of conciliators and arbitrators and for the conduct of proceedings. It is my belief that these institutional facilities and procedures are better suited to the types of disputes with which we are dealing - disputes between a State and a foreign investor - than those offered by other existing or proposed institutions. However, taken by themselves, they could be put into effect by corporate action by the Bank and would not require the conclusion of any inter-governmental agreement.

But in my opinion, the institutional facilities, however useful, are secondary to other parts of the proposals, and those do require to be embodied in a Convention.

What are they?

In the first place, a recognition of the principle that a non-State party, an investor, may have direct access to a State party before an international forum. By direct access I mean that the investor will act in his own name and will not require the espousal of his cause by his national government. By signing the Convention, States would admit this principle; but only the principle. No signatory State would be compelled to resort to the facilities provided by the Convention, or to agree to do so, and no foreign investor could in fact initiate

proceedings against a signatory State unless that State and the investor had specifically so agreed. However, once they had so agreed, both parties would be irrevocably bound to carry out their undertaking and the Convention establishes rules designed to prevent frustration of the undertaking and to insure its implementation.

Secondly, there is the question of local remedies, which in my opinion does not really raise any major issue of principle. On the one hand acceptance of the possibility of adjudication by an international forum of a dispute between a State and a foreign investor implies a recognition that local courts are not necessarily to be the final forum for the settlement of such disputes. On the other hand such acceptance does not imply that local remedies cannot play a major role. At the time when parties consent to arbitration under the Convention they are free to stipulate either that local remedies may be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute can be submitted for arbitration under the Convention. It is only if the parties have not made either stipulation that the Convention provides that arbitration will be in lieu of local remedies.

A third feature is, in my opinion, of much greater importance. In traditional international law a wrong done to a national of one State for which another State is internationally responsible is actionable not by the injured national but by his State. Indeed, the classical view is that the State has been injured in the person of its national, and that the State seeking redress for the injury done to its national is pursuing its own claim. Practice has progressed beyond this point and there are a number of instances in which provision is made for settlement of investment disputes by direct conciliation or arbitration between the host State and the foreign investor. Examples may be found in a number of concession and co-operation agreements of recent years. But what is lacking is recognition of the internationally binding character of such arrangements, and the Convention is designed to fill this gap. Thus the Convention would be in harmony with the growing recognition of the individual as a subject of International Law.

Admittedly, an agreement by a State to submit to international arbitration is in some sense a curtailment or impairment of its sovereignty. However, one of the essential attributes of sovereignty is the capacity, in the very exercise of that sovereignty, to accept limitations on it, and this is of course what every State does each time it enters into an international agreement. What the proposed Convention would do would be to give internationally binding effect to the limitation of sovereignty inherent in an agreement by a State pursuant to the Convention to submit a dispute with a foreign investor to arbitration. But, as a corollary of the principle under which an investor may have direct and effective access to a foreign State without the intervention of his national State, the Convention introduces an important innovation, namely that the investor's national State would no longer be able to espouse the claim of its national. A host State would therefore not be faced with the likelihood of having to deal with a multiplicity of claims and claimants. The Convention would offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and would insulate such disputes from the realm of politics and diplomacy. I am convinced that this will serve the best interests of investors, their national States, the host States and the cause of international co-operation generally. As we know, local remedies will sometimes be unsatisfactory from the standpoint of the investor. In such a case the investor would be left to claim the protection of his own government, thus transforming the controversy into a dispute between States, a result which would, more often than not, be distasteful or embarrassing not only for the investor himself but even more so for the States concerned.

A fourth feature of our proposals is that awards of arbitral tribunals rendered pursuant to the Convention would be recognized by, and enforceable in, all Contracting States regardless of whether a State in which recognition was sought was a party to the dispute in question. Thus, in the case of an award against an investor, the State party to the arbitration proceeding would be able to enforce the award against the unsuccessful party in any Contracting State as if it were a final judgement of that State. In the case of an award against the State party to the arbitral proceedings, one may assume that the State, which, by becoming a party to the Convention, has undertaken a solemn international

obligation to comply with the award, will do so. Therefore I consider the question of enforcement against a State as somewhat academic. Moreover, I want to make clear that where, as in many countries, the law on immunity of foreign States from execution would prevent such enforcement, the Convention would leave that law unaffected. All the Convention does is to place an arbitral award rendered pursuant to it on the same footing as a final judgement of the national courts. If such judgement can be enforced under domestic law, so can the award. If the judgement cannot so be enforced against a foreign State, neither can the award.

There is a fifth feature, about which I can be very brief, but I want you to bear it in mind. The Convention does not lay down standards for the treatment by States of the property of aliens; nor does it prescribe standards for the conduct of foreign investors in their relations with host States. Accordingly, the Convention is not concerned with the merits of investment disputes but with the procedure for settling them. If through bilateral or multilateral arrangements capital-exporting and capital-importing countries can reach agreement on the substantive rules to be applied to foreign investment, any controversy between an investor and a host State could, if the parties so agreed, be settled through the facilities of the Centre.

Ladies and Gentlemen, I have explained why the Bank has taken it upon itself to initiate and promote the discussion of the proposed Convention. I repeat at this point that the Bank believes that private investment can make a valuable contribution to economic development. But we are neither blind partisans of the cause of the private investor, nor do we want to impose our views on others. At the last Annual Meeting of the Bank, President Woods said:

> "It is not the business of the Bank, nor of its President, to tell the developing nations within the Bank's membership that they must accept private capital from abroad as a partner in their development efforts or what kind of price it is reasonable for them to pay in order to achieve such a partnership."

Nor do we either expect or think it desirable that whenever a foreign investor feels aggrieved by a host State or whenever a host State feels that a foreign investor does not live up to its obligations, such a dispute should necessarily be dealt with by the facilities established under the Convention rather than by

the regular national judicial or administrative channels. Nevertheless, we do want to emphasize that there may be instances in which recourse to an international forum will be in the interest of the host State as well as of the investor. There are two further points that I want to stress in this connexion. First, that the Convention is designed to deal with claims by host States against investors, as well as with claims by investors against host States. In fact, some provisions, such as those for the enforcement of arbitral awards would seem to me to be of special importance in those cases in which a State takes the initiative in a proceeding against an investor and is successful in its claim.

The second point I want to emphasize is that the Convention deals with conciliation as well as arbitration. Since arbitration poses complex legal problems, and conciliation is a so much simpler procedure, attention tends to be concentrated on arbitration. This does not mean, however, that we attach less importance to conciliation than to arbitration. Our own experience with conciliation has made us appreciate the value of this method, and it may well be that when the Convention comes into being, the conciliation activities under the auspices of the Centre will prove to be more important than arbitral proceedings.

In conclusion I would like to point out that the Convention leaves States and investors free to establish their mutual relations on whatever basis they deem proper. I would also like to emphasize again that by becoming a party to the Convention, no State is under any obligation to submit any dispute either to conciliation or arbitration. The true significance of the Convention lies in the fact that it insures that if the parties agree to have recourse to an international forum, their agreement will be given full effect. In our opinion this would create an element of confidence which would in turn contribute to a healthier investment climate. The fact that this may be only a modest contribution should not lessen our enthusiasm.

At this meeting we shall be able to draw on the experience and wisdom of legal experts from a group of countries which includes both traditional exporters of capital and countries which are rapidly progressing on the road of economic development. European jurists have been particularly imaginative in creating new forms of international economic co-operation and I look forward to an interesting and lively discussion.

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INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

CONSULTATIVE MEETING OF LEGAL EXPERTS ON SETTLEMENT OF INVESTMENT DISPUTES

Bangkok, 27 April - 2 May 1964

Text of address delivered by the Chairman, Mr. A. Broches, General Counsel of the International Bank for Reconstruction and Development at the opening session on Monday, 27 April 1964.

Mr. Minister, Mr. Executive Secretary, Distinguished Delegates:

On behalf of the President of the International Bank for Reconstruction and Development, George D. Woods, I welcome you to this meeting.

To His Excellency the Minister of Finance of Thailand I wish to express my thanks for his cordial words of greeting. The Minister is an old friend of the Bank and former Chairman of its Board of Governors. I am particularly happy that this meeting takes place in the lovely capital of Thailand, a country with which the Bank has maintained friendly and fruitful relations over many years.

To U Nyun I wish to express our gratitude for his words of encouragement and for the hospitality which he has extended to us at the Commission's headquarters. The fact that we are meeting here is further evidence of the good relations and the spirit of co-operation which exist between ECAFE and the Bank in their common effort to promote economic and social development and well-being in this part of the world.

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This is the last of four consultative meetings of legal experts convened by the World Bank to discuss informally a draft Convention on settlement of investment disputes which you have had an opportunity to study. The first meeting, attended by experts from member countries in Africa, was held last December in Addis Ababa. The second took place in Santiago de Chile at the beginning of February and was attended by experts from the Western Hemisphere. The third, attended by European experts, was held in Geneva in the latter part of February.

The discussions at these meetings were constructive and the comments and opinions expressed will be most useful to us in our further work on the text before you.

At the African meeting most of the countries represented showed great interest in the proposals and there were no objections on grounds of principle to the essential features of the draft. There appeared to be a consensus that a Convention of this nature would be useful and that the draft had taken account of the legitimate interests of the capital importing countries as well as those of investors.

At the Santiago meeting a number of Latin American participants expressed their governments' reservations concerning certain innovations which the draft seeks to introduce into traditional international law as understood in Latin America. They did not conceal their uneasiness about what they regarded as a serious limitation on their countries' sovereignty which recourse to the facilities of the proposed Center might entail. However, other Latin American delegates, as well as those of Canada, the United States, Jamaica and Trinidad, welcomed the proposals emphasizing the optional nature of the Convention. These delegates felt that the draft should be acceptable even

though many of them might not be able, without changes in their legal systems, to make full use of the facilities for arbitration as distinct from conciliation. Finally, a number of Latin American experts urged that the time had come for their countries to re-examine their traditional attitude toward foreign investment.

At the Geneva meeting there was general support for the proposed Convention, based on the belief that it would encourage the flow of capital to the developing nations. At the same time several delegates stressed that the Convention would achieve that purpose only if a sufficient number of developing countries found the Convention acceptable.

I shall not attempt in this opening statement to report in greater detail the views expressed at those meetings. I shall, however, have occasion to refer to them from time to time in the course of our discussion of the provisions of the draft Convention. For the moment I need only say that on balance we have been greatly encouraged by the way in which our proposals have been received at those meetings.

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It is a source of great satisfaction to me that so many governments have responded to our invitation and have designated such eminent representatives to attend this meeting.

The experts gathered here represent a wider variety of cultural, social and economic systems than it has been our privilege to encounter at any previous meeting. Both ancient and comparatively young States are represented here. Some have but recently regained their independence; others, while they have not known the special problems which beset such a transition, have nevertheless had to face development problems of comparable complexity. We believe that the variety of experience you will bring to this meeting will not only make the discussion especially interesting, but also be uniquely helpful in guiding our efforts to resolve the problems which we shall consider here.

It may possibly strike some of you as somewhat unusual that the World Bank should take the initiative in promoting an international agreement in a field which might not be regarded as falling directly within its sphere of activity and that it is willing and eager to play such an active part in seeking to bring the proposals now before you to reality.

There is a brief answer to this, namely that the Bank is not merely a financing mechanism but that it is, above all, a development institution. We are concerned with the entire process of economic development rather than with the mere provision of funds for particular projects, and our approach to the problem of economic development is professional and non-political.

The Bank's activities consist necessarily in large part of the provision of finance, out of its own capital, out of funds it borrows in the financial markets, by encouraging private capital to participate with it, and by

organizing and co-ordinating the efforts of national and international sources of public finance to meet the developmental needs of its member countries in the less developed areas of the world. But much of the energy and resources of the World Bank are devoted to technical assistance and advice directed toward the promotion of conditions conducive to rapid economic growth -- to creation of a favorable investment climate in the broadest sense of the term. To this end, sound technical and administrative foundations are essential, but no less indispensable is the firm establishment of the Rule of Law.

In days past there may have been some justification for regarding international investment as a subject of interest chiefly to the capital-exporting nations and their citizens. Today it is universally recognized as a factor of crucial importance in the economic development of the less developed parts of the world. International investment has become one of the major features of the partnership between the richer and the poorer nations and its promotion a matter of urgent concern to capital-importing and capital-exporting countries alike. This is particularly true of private foreign investment which, if wisely conducted, can make great contributions to the development of the economies of the recipient countries.

Unfortunately, however, private capital is not now moving in sufficient volume to areas in need of capital. And there is no room for doubt that one of the most serious impediments to the flow of private capital is the fear of the private investor that this investment will be exposed to the political risk of unilateral action for which no remedy is available to him such as outright expropriation, government interference which falls short of expropriation but which substantially deprives the investor of the control or the benefits of his investment, and non-observance by the host government of contractual undertakings on the basis of which the investment was made.

Knowing this, we have been led to wonder whether the Bank, because of its reputation for integrity and its position of impartiality, could not help in removing this obstacle to international private investment. On a number of occasions we have been approached by governments and foreign investors who sought our assistance in settling investment disputes that had arisen between them, or wanted to assure themselves that our assistance would be available in the event that differences between them should arise in the future. We have been further encouraged to bend our efforts in this direction by such events as the recent enactment by Ghana of foreign investment legislation which contemplates the settlement of certain investment disputes "through the agency of" the World Bank. And at the Bank's last Annual Meeting the Moroccan delegate referred to the fact that Morocco and a group of French investors had entrusted to the President of the Bank the appointment of the President of an arbitral tribunal to settle disputes that might arise under a series of long-term contracts.

On the basis of our own experience and our assessment of the possibility of securing widespread agreement at the present time, we have concluded that the most promising approach would be to attack the problem of the unfavorable investment climate from the procedural angle, by creating international

machinery which would be available on a voluntary basis for the conciliation and arbitration of investment disputes in accordance with rules known and accepted in advance by both parties. Some may think it desirable to go beyond this and attempt to achieve a substantive definition of the status of foreign property and of the reciprocal rights and obligations of States and investors. There is no doubt in my mind that there is need for a meaningful understanding between capital-exporting and capital-importing nations on these matters and the Bank follows with great interest the studies made in this field.

But while these studies proceed, there is need, we think, to pursue a parallel effort of more limited scope, represented by the proposals to be discussed at this meeting.

Now what are the principal features of these proposals? To what extent do they deal only with form and to what extent do they go into substance? How much of them is no more than a reflection of current law and practice and how far do they constitute a step forward in the development of international law? And, finally, why is an international convention required to achieve the Bank's objectives?

We shall be dealing with all these questions during the coming week. The answers to some of them, or at least my answers to some of them, you will find in the Working Paper which you have been studying for some time.

I shall not attempt to restate or summarize that document in this opening address but I do want to dwell on a few of the principal features of the Convention.

The Convention would make available facilities to which States and foreign investors could have access on a voluntary basis for the settlement of investment disputes between them. The method of settlement selected might be conciliation, arbitration, or conciliation followed by arbitration in case the conciliation effort should fail. The initiative for such proceedings might come from a State as well as from an investor. The Convention would set up a mechanism for the selection of conciliators and arbitrators and for the conduct of proceedings. While this mechanism would be linked with the Bank, that link would be of a purely administrative nature and the Bank would not be involved in the actual proceedings nor could it influence their outcome in any way. It is my belief that these institutional facilities and procedures are better suited to the types of disputes with which we are dealing -- disputes between a State on the one hand and a foreign investor on the other -- than those offered by other existing or proposed institutions. However, taken by themselves, they could be put into effect by corporate action by the Bank and would not require the conclusion of any inter-governmental agreement.

But in my opinion, the institutional facilities, however useful, are secondary to other parts of the proposals, and those do require to be embodied in a Convention.

What are they?

In the first place, a recognition of the principle that a non-State party, an investor, may have direct access to a State party before an international forum. By direct access I mean that the investor will act in his own name and will not require the espousal of his cause by his national government. By signing the Convention, States would admit this principle; but only the principle. No signatory State would be compelled to resort to the facilities provided by the Convention, or to agree to do so, and no foreign investor could in fact initiate proceedings against a signatory State unless that State and the investor had specifically so agreed. However, once they had so agreed, both parties would be irrevocably bound to carry out their undertaking and the Convention establishes rules designed to prevent frustration of the undertaking and to insure its implementation.

Secondly, there is the question of local remedies, which in my opinion does not really raise any major issue of principle. On the one hand acceptance of the possibility of adjudication by an international forum of a dispute between a State and a foreign investor implies a recognition that local courts are not necessarily to be the final forum for the settlement of such disputes. On the other hand such acceptance does not imply that local remedies cannot play a major role. At the time when parties consent to arbitration under the Convention, they are free to stipulate either that local remedies may be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute can be submitted for arbitration under the Convention. It is only if the parties have not made either stipulation that the Convention provides that arbitration will be in lieu of local remedies.

A third feature is, in my opinion, of much greater importance. In traditional international law a wrong done to a national of one State for which another State is internationally responsible is actionable not by the injured national but by his State. Indeed, the classical view is that the State has been injured in the person of its national, and that the State seeking redress for the injury done to its national is pursuing its own claim. Practice has progressed beyond this point and there are a number of instances in which provision is made for settlement of investment disputes by direct conciliation or arbitration between the host State and the foreign investor. Examples may be found in a number of concession and cooperation agreements of recent years. But what is lacking is recognition of the internationally binding character of such arrangements, and the Convention is designed to fill this gap. Thus the Convention would be in harmony with the growing recognition of the individual as a subject of international law.

Admittedly, an agreement by a State to submit to international arbitration is in some sense a curtailment or impairment of its sovereignty. However, one of the essential attributes of sovereignty is the capacity, in the very exercise of that sovereignty, to accept limitations on it, and this is of course what every State does each time it enters into an international agreement. What the proposed Convention would do would be to give internationally binding effect to the limitation of sovereignty inherent in an

agreement by a State pursuant to the Convention to submit a dispute with a foreign investor to arbitration. But, as a corollary of the principle under which an investor may have direct and effective access to a foreign State without the intervention of his national State, the Convention introduces an important innovation, namely that the investor's national State would no longer be able to espouse the claim of its national. A host State would therefore not be faced with the likelihood of having to deal with a multiplicity of claims and claimants or be subject to diplomatic pressure or intervention. The Convention would offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and would insulate such disputes from the realm of politics and diplomacy. I am convinced that this will serve the best interests of investors, host States and the cause of international cooperation generally. It would be unrealistic not to recognize that local remedies will sometimes be unsatisfactory from the standpoint of the investor. In such a case the investor would be left to claim the protection of his own government, thus transforming the controversy into a dispute between States, a result which would, more often than not, be distasteful or embarrassing not only for the investor himself but even more so for the States concerned.

A fourth feature of our proposals is that awards of arbitral tribunals rendered pursuant to the Convention would be recognized by, and enforceable in, all Contracting States regardless whether a State in which recognition was sought was a party to the dispute in question. Thus, in the case of an award against an investor, the State party to the arbitration proceeding would be able to enforce the award against the unsuccessful party in any Contracting State as if it were a final judgment of that State. In the case of an award against the State party to the arbitral proceedings, one may assume that the State, which has undertaken a solemn international obligation to comply with the award, would do so. Therefore I consider the question of enforcement as somewhat academic. But I want to make clear that where, as in most countries, the law on State immunity from execution would prevent such enforcement, the Convention would leave that law unaffected. All the Convention does is to place an arbitral award rendered pursuant to it on the same footing as a final judgment of the national courts. If such judgment can be enforced under domestic law, so can the award. If the judgment cannot so be enforced against a State, neither can the award.

There is a fifth feature, about which I can be very brief, but I want you to bear it in mind. The Convention does not lay down standards for the treatment by States of the property of aliens; nor does it prescribe standards for the conduct of foreign investors in their relations with host States. Accordingly, the Convention is not concerned with the merits of investment disputes but with the procedure for settling them.

Gentlemen, I have explained why the Bank has taken it upon itself to initiate and promote the discussion of the proposed Convention. I repeat at this point that the Bank believes that private investment can make a valuable contribution to economic development. But we are neither blind partisans of the cause of the private investor, nor do we want to impose our views on others. At the last Annual Meeting of the Bank, President Woods said:

> "It is not the business of the Bank, nor of its President, to tell the developing nations within the Bank's membership that they must accept private capital from abroad as a partner in their development efforts or what kind of price it is reasonable for them to pay in order to achieve such a partnership."

Nor do we either expect or think it desirable that whenever a foreign investor feels aggrieved by a host State or whenever a host State feels that a foreign investor does not live up to its obligations, such a dispute should necessarily be dealt with by the facilities established under the Convention rather than by the regular national judicial or administrative channels. There is no intention to supersede national jurisdiction generally. We do want to emphasize, however, that there may be instances in which recourse to an international forum will be in the interest of the host State as well as of the investor.

There are two further points that I want to stress in this connection: first, that the Convention is designed to deal with claims by host States against investors, as well as with claims by investors against host States; second, that the Convention deals with conciliation as well as arbitration. Since arbitration poses complex legal problems, and conciliation is a so much simpler procedure, attention tends to be concentrated on arbitration. This does not mean, however, that we attach less importance to conciliation than to arbitration. Our own experience with conciliation has made us appreciate the value of this method, and it may well be that when the Convention comes into being, the conciliation activities under the auspices of the Center will prove to be more important than arbitral proceedings.

In conclusion I would like to point out that the Convention leaves States and investors free to establish their mutual relations on whatever basis they deem proper. I would also like to emphasize again that by becoming a party to the Convention, no State is under any obligation to submit any dispute either to conciliation or arbitration. The true significance of the Convention lies in the fact that it insures that if the parties agree to have recourse to an international forum, their agreement will be given full effect. In our opinion this would create an element of confidence which would in turn contribute to a healthier investment climate. The fact that this may be only a modest contribution should not lessen our enthusiasm.

I like to think of all of us who are so deeply concerned with the problems of development as realists. We have our ideals, but we know that there is no quick road to success. It is that knowledge which should find us prepared to explore every avenue and to examine every new idea, with an open mind, and with the sole concern to find out whether it is capable of making some contribution to the achievement of our common goals. It is in this spirit, gentlemen, that I hope we shall together study the proposals which have been placed before you.

Speeches

COM/AS/5-ENGLISH
27 April 1964

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

CONSULTATIVE MEETING OF LEGAL EXPERTS ON SETTLEMENT OF INVESTMENT DISPUTES

Bangkok, 27 April - 2 May 1964

Text of address delivered by the Chairman, Mr. A. Broches, General Counsel of the International Bank for Reconstruction and Development at the opening session on Monday, 27 April 1964.

Mr. Minister, Mr. Executive Secretary, Distinguished Delegates:

On behalf of the President of the International Bank for Reconstruction and Development, George D. Woods, I welcome you to this meeting.

To His Excellency the Minister of Finance of Thailand I wish to express my thanks for his cordial words of greeting. The Minister is an old friend of the Bank and former Chairman of its Board of Governors. I am particularly happy that this meeting takes place in the lovely capital of Thailand, a country with which the Bank has maintained friendly and fruitful relations over many years.

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This is the last of four consultative meetings of legal experts convened by the World Bank to discuss informally a draft Convention on settlement of investment disputes which you have had an opportunity to study. The first meeting, attended by experts from member countries in Africa was held last December in Addis Ababa. The second took place in Santiago de Chile at the beginning of February and was attended by experts from the Western Hemisphere. The third, attended by European experts was held in Geneva in the latter part of February.

The discussions at these meetings were constructive and the comments and opinions expressed will be most useful to us in our further work on the text before you.

At the African meeting most of the countries represented showed great interest in the proposals and there were no objections on grounds of principle to the essential features of the draft. There appeared to be a consensus that a Convention of this nature would be useful and that the draft had taken account of the legitimate interests of the capital importing countries as well as those of investors.

/At the

At the Santiago meeting a number of Latin American participants expressed their governments' reservations concerning certain innovations which the draft seeks to introduce into traditional international law as understood in Latin America. They did not conceal their uneasiness about what they regarded as a serious limitation on their countries' sovereignty which recourse to the facilities of the proposed Center might entail. However, other Latin American delegates, as well as those of Canada, the United States, Jamaica and Trinidad, welcomed the proposals emphasizing the optional nature of the Convention. These delegates felt that the draft should be acceptable even though many of them might not be able, without changes in their legal systems, to make full use of the facilities for arbitration as distinct from conciliation. Finally, a number of Latin American experts urged that the time had come for their countries to re-examine their traditional attitude towards foreign investment.

At the Geneva meeting there was general support for the proposed Convention, based on the belief that it would encourage the flow of capital to the developing nations. At the same time several delegates stressed that the Convention would achieve that purpose only if a sufficient number of developing countries found the Convention acceptable.

I shall not attempt in this opening statement to report in greater detail the views expressed at those meetings. I shall, however, have occasion to refer to them from time to time in the course of our discussion of the provisions of the draft Convention. For the moment I need only say that on balance we have been greatly encouraged by the way in which our proposals have been received at those meetings.

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It is a source of great satisfaction to me that so many governments have responded to our invitation and have designated such eminent representatives to attend this meeting.

The experts gathered here represent a wider variety of cultural, social and economic systems than it has been our privilege to encounter at any previous meeting. Both ancient and comparatively young States are represented here. Some have but recently regained their independence; others, while they have not known the special problems which beset such a transition, have nevertheless had to face development problems of comparable complexity. We believe that the variety of experience you will bring to this meeting will not only make the discussion especially interesting, but also be uniquely helpful in guiding our efforts to resolve the problems which we shall consider here.

/It may

It may possibly strike some of you as somewhat unusual that the World Bank should take the initiative in promoting an international agreement in a field which might not be regarded as falling directly within its sphere of activity and that it is willing and eager to play such an active part in seeking to bring the proposals now before you to reality.

There is a brief answer to this, namely that the Bank is not merely a financing mechanism but that it is, above all, a development institution. We are concerned with the entire process of economic development rather than with the mere provision of funds for particular projects, and our approach to the problem of economic development is professional and non-political.

The Bank's activities consist necessarily in large part of the provision of finance, out of its own capital, out of funds it borrows in the financial markets, by encouraging private capital to participate with it, and by organizing and co-ordinating the efforts of national and international sources of public finance to meet the developmental needs of its member countries in the less developed areas of the world. But much of the energy and resources of the World Bank are devoted to technical assistance and advice directed toward the promotion of conditions conducive to rapid economic growth - to creation of a favourable investment climate in the broadest sense of the term. To this end, sound technical and administrative foundations are essential, but no less indispensable is the firm establishment of the Rule of Law.

In days past there may have been some justification for regarding international investment as a subject of interest chiefly to the capital-exporting nations and their citizens. Today it is universally recognized as a factor of crucial importance in the economic development of the less developed parts of the World. International investment has become one of the major features of the partnership between the richer and the poorer nations and its promotion a matter of urgent concern to capital-importing and capital-exporting countries alike. This is particularly true of private foreign investment which, if wisely conducted, can make great contributions to the development of the economies of the recipient countries.

/Unfortunately

Unfortunately, however, private capital is not now moving in sufficient volume to areas in need of capital. And there is no room for doubt that one of the most serious impediments to the flow of private capital is the fear of the private investor that his investment will be exposed to the political risk of unilateral action for which no remedy is available to him such as outright expropriation, government interference which falls short of expropriation but which substantially deprives the investor of the control or the benefits of his investment, and non-observance by the host government of contractual undertakings on the basis of which the investment was made.

Knowing this, we have been led to wonder whether the Bank, because of its reputation for integrity and its position of impartiality, could not help in removing this obstacle to international private investment. On a number of occasions we have been approached by governments and foreign investors who sought our assistance in settling investment disputes that had arisen between them, or wanted to assure themselves that our assistance would be available in the event that differences between them should arise in the future. We have been further encouraged to bend our efforts in this direction by such events as the recent enactment by Ghana of foreign investment legislation which contemplates the settlement of certain investment disputes "through the agency of" the World Bank. And at the Bank's last Annual Meeting the Moroccan delegate referred to the fact that Morocco and a group of French investors had entrusted to the President of the Bank the appointment of the President of an arbitral tribunal to settle disputes that might arise under a series of long-term contracts.

On the basis of our own experience and our assessment of the possibility of securing widespread agreement at the present time, we have concluded that the most promising approach would be to attack the problem of the unfavourable investment climate from the procedural angle, by creating international machinery which would be available on a voluntary basis for the conciliation and arbitration of investment disputes in accordance with rules known and accepted in advance by both parties. Some may think it desirable to go beyond this and attempt to achieve a substantive definition of the status of foreign property

/and of

and of the reciprocal rights and obligations of States and investors. There is no doubt in my mind that there is need for a meaningful understanding between capital-exporting and capital-importing nations on these matters and the Bank follows with great interest the studies made in this field.

But while these studies proceed, there is need, we think, to pursue a parallel effort of more limited scope, represented by the proposals to be discussed at this meeting.

Now what are the principal features of these proposals ? To what extent do they deal only with form and to what extent do they go into substance? How much of them is no more than a reflection of current law and practice and how far do they constitute a step forward in the development of international law? And, finally, why is an international convention required to achieve the Bank's objectives?

We shall be dealing with all these questions during the coming week. The answers to some of them, or at least my answers to some of them, you will find in the Working Paper which you have been studying for some time.

I shall not attempt to restate or summarize that document in this opening address but I do want to dwell on a few of the principal features of the Convention.

The Convention would make available facilities to which States and foreign investors could have access on a voluntary basis for the settlement of investment disputes between them. The method of settlement selected might be conciliation, arbitration, or conciliation followed by arbitration in case the conciliation effort should fail. The initiative for such proceedings might come from a State as well as from an investor. The Convention would set up a mechanism for the selection of conciliators and arbitrators and for the conduct of proceedings. While this mechanism would be linked with the Bank, that link would be of a purely administrative nature and the Bank would not be involved in the actual proceedings nor could it influence their outcome in any way. It is my belief that these institutional facilities and procedures are better suited to the types of disputes with which we are dealing - disputes between a State on the one hand and a foreign investor on the other - than those

/offered

offered by other existing or proposed institutions. However, taken by themselves, they could be put into effect by corporate action by the Bank and would not require the conclusion of any inter-governmental agreement.

But in my opinion, the institutional facilities, however useful, are secondary to other parts of the proposals, and those do require to be embodied in a Convention.

What are they?

In the first place, a recognition of the principle that a non-State party, an investor, may have direct access to a State party before an international forum. By direct access I mean that the investor will act in his own name and will not require the espousal of his cause by his national government. By signing the Convention States would admit this principle; but only the principle. No signatory State would be compelled to resort to the facilities provided by the Convention, or to agree to do so, and no foreign investor could in fact initiate proceedings against a signatory State unless that State and the investor had specifically so agreed. However, once they had so agreed, both parties would be irrevocably bound to carry out their undertaking and the Convention establishes rules designed to prevent frustration of the undertaking and to insure its implementation.

Secondly, there is the question of local remedies, which in my opinion does not really raise any major issue of principle. On the one hand acceptance of the possibility of adjudication by an international forum of a dispute between a State and a foreign investor implies a recognition that local courts are not necessarily to be the final forum for the settlement of such disputes. On the other hand such acceptance does not imply that local remedies cannot play a major role. At the time when parties consent to arbitration under the Convention, they are free to stipulate either that local remedies may be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute can be submitted for arbitration under the Convention. It is only if the parties have not made either stipulation that the Convention provides that arbitration will be in lieu of local remedies.

/A third

A third feature is, in my opinion, of much greater importance. In traditional international law a wrong done to a national of one State for which another State is internationally responsible is actionable not by the injured national but by his State. Indeed, the classical view is that the State has been injured in the person of its national, and that the State seeking redress for the injury done to its national is pursuing its own claim. Practice has progressed beyond this point and there are a number of instances in which provision is made for settlement of investment disputes by direct conciliation or arbitration between the host State and the foreign investor. Examples may be found in a number of concession and cooperation agreements of recent years. But what is lacking is recognition of the internationally binding character of such arrangements, and the Convention is designed to fill this gap. Thus the Convention would be in harmony with the growing recognition of the individual as a subject of international law.

Admittedly, an agreement by a State to submit to international arbitration is in some sense a curtailment or impairment of its sovereignty. However, one of the essential attributes of sovereignty is the capacity, in the very exercise of that sovereignty, to accept limitations on it, and this is of course what every State does each time it enters into an international agreement. What the proposed Convention would do would be to give internationally binding effect to the limitation of sovereignty inherent in an agreement by a State pursuant to the Convention to submit a dispute with a foreign investor to arbitration. But, as a corollary of the principle under which an investor may have direct an effective access to a foreign State without the intervention of his national State, the Convention introduces an important innovation, namely that the investor's national State would no longer be able to espouse the claim of its national. A host State would therefore not be faced with the likelihood of having to deal with a multiplicity of claims and claimants or be subject to diplomatic pressure or intervention. The Convention would offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and would insulate such disputes from the realm of politics and diplomacy. I am

/convinced

convinced that this will serve the best interests of investors, host States and the cause of international cooperation generally. It would be unrealistic not to recognise that local remedies will sometimes be unsatisfactory from the standpoint of the investor. In such a case the investor would be left to claim the protection of his own government, thus transforming the controversy into a dispute between States, a result which would, more often than not, be distasteful or embarrassing not only for the investor himself but even more so for the States concerned.

A fourth feature of our proposals is that awards of arbitral tribunals rendered pursuant to the Convention would be recognised by, and enforceable in, all Contracting States regardless whether a State in which recognition was sought was a party to the dispute in question. Thus, in the case of an award against an investor, the State party to the arbitration proceeding would be able to enforce the award against the unsuccessful party in any Contracting State as if it were a final judgment of that State. In the case of an award against the State party to the arbitral proceedings, one may assume that the State, which has undertaken a solemn international obligation to comply with the award, would do so. Therefore I consider the question of enforcement as somewhat academic. But I want to make clear that where, as in most countries, the law on State immunity from execution would prevent such enforcement, the Convention would leave that law unaffected. All the Convention does is to place an arbitral award rendered pursuant to it on the same footing as a final judgment of the national courts. If such judgment can be enforced under domestic law, so can the award. If the judgment cannot so be enforced against a State, neither can the award.

There is a fifth feature, about which I can be very brief, but I want you to bear it in mind. The Convention does not lay down standards for the treatment by States of the property of aliens; nor does it prescribe standards for the conduct of foreign investors in their relations with host States. Accordingly, the Convention is not concerned with the merits of investment disputes but with the procedure for settling them.

/Gentlemen,

Gentlemen, I have explained why the Bank has taken it upon itself to initiate and promote the discussion of the proposed Convention. I repeat at this point that the Bank believes that private investment can make a valuable contribution to economic development. But we are neither blind partisans of the cause of the private investor, nor do we want to impose our views on others. At the last Annual Meeting of the Bank, President Woods said

> "It is not the business of the Bank, nor of its President, to tell the developing nations within the Bank's membership that they must accept private capital from abroad as a partner in their development efforts or what kind of price it is reasonable for them to pay in order to achieve such a partnership."

Nor do we either expect or think it desirable that whenever a foreign investor feels aggrieved by a host State or whenever a host State feels that a foreign investor does not live up to its obligations, such a dispute should necessarily be dealt with by the facilities established under the Convention rather than by the regular national judicial or administrative channels. There is no intention to supersede national jurisdiction generally. We do want to emphasize, however, that there may be instances in which recourse to an international forum will be in the interest of the host State as well as of the investor.

There are two further points that I want to stress in this connexion: first, that the Convention is designed to deal with claims by host States against investors, as well as with claims by investors against host States; second, that the Convention deals with conciliation as well as arbitration. Since arbitration poses complex legal problems, and conciliation is a so much simpler procedure, attention tends to be concentrated on arbitration. This does not mean, however, that we attach less importance to conciliation than to arbitration. Our own experience with conciliation has made us appreciate the value of this method, and it may well be that when the Convention comes into being, the conciliation activities under the auspices of the Center will prove to be more important than arbitral proceedings.

In conclusion I would like to point out that the Convention leaves States and investors free to establish their mutual relations on whatever basis they deem proper. I would also like to emphasize again that by becoming a party

/to the

to the Convention, no State is under any obligation to submit any dispute either to conciliation or arbitration. The true significance of the Convention lies in the fact that it insures that if the parties agree to have recourse to an international forum, their agreement will be given full effect. In our opinion this would create an element of confidence which would in turn contribute to a healthier investment climate. The fact that this may be only a modest contribution should not lessen our enthusiasm.

I like to think of all of us who are so deeply concerned with the problems of development as realists. We have our ideals, but we know that there is no quick road to success. It is that knowledge which should find us prepared to explore every avenue and to examine every new idea, with an open mind, and with the sole concern to find out whether it is capable of making some contribution to the achievement of our common goals. It is in this spirit, gentlemen, that I hope we shall together study the proposals which have been placed before you.

Articles and Speeches by A. Broches

Date		Language(s)
1939 -	Het Ondeugdelijke Octrooi in de Inbreukprocedure	Dutch
1943 -	The Contribution of Holland to the Sciences - LAW	English
1951 -	July - Radio Broadcast original in Dutch	English translation
1957 -	Theory and Practice of Treaty Registration with Particular Reference to Agreements of International Bank, by Broches and Boskey. In Netherlands International Law Review	English
1959 -	International Legal Aspects of the Operations of the World Bank, in Academy of International Law publication (Extract of the "Recueil des Cours" 1959)	English
1961 -	January 31 - Address to the Professional Staff of IBRD	English
1961 -	April 28 - Comments at American Society of International Law Annual Meeting on Arbitration Between Governments and Foreign Private Firms	English
1961 -	December 8 - "Problems of Private Foreign Investment" Address at Third Annual Institute on Corporate Counsel organized by Fordham University Law School	English
1961 -	December 9 - "Choice of Law Provisions in Contracts with Governments" at Parker School of Foreign and Comparative Law	English
1962 -	March 1-3 - "The Role of the IBRD, IFC and IDA" - Panel on The Public Sources of Funds at Conference on Legal Problems of International Financing at Yale Law School	English
1962 -	March 10 - "The Common Market and the United States" Potomac Branch of Holland Society of New York	English
1962 -	April 27 - "International Investment Guaranties: Possibilities and Problems" - from Proceedings of American Society of International Law	English
1962 -	June 13 - "The Present Need for a Permanent Arbitral Tribunal" - at the Institute on Permanent International Courts organized by the Minnesota State Bar Association	English
1962 -	September 7 - "Multilateral Investment Insurance" at the Federal Bar Association's annual convention	English
1963 -	February 27 - Statement at Fifth Session of the U.N. Economic Commission for Africa	English
1963 -	August 12-16 - "Financing Economic Development" at Western Canada Conference on World Development, Banff, Canada	English

1963 -	June 30-July 6 - "Settlement of Investment Disputes" to World Conference on World Peace Through Law, Athens, Greece	English, French and Spanish
1964 -	February 3 - Opening Statement at Consultative Meeting in Santiago, Chile	Spanish + English
1964 -	April 27 - Opening statement at Consultative Meeting in Bangkok, Thailand	English
1964 -	December - Remarks at farewell dinner for Pierre Moussa	English
1965 -	February 3 - "Les efforts de la Banque Mondiale en vue de favoriser les investissements privés dans les pays en développement" to the Patronat in Paris	French
1965 -	February 5 - "Comment favoriser les investissements privés outre-mer?" at Société de Géographie Economique, Paris	French
1965 -	February 9 - "Bemuhungen der Weltbank zur Unterstutzung der Investierung von Privatkapitalien in Entwicklungslandern" Zurich, Switzerland	German
1965 -	February 12 - same as above - before Kreditanstalt fur Wiederaufbau in Frankfurt, Germany	German
1965 -	April 22 - "Development of International Law by the IBRD", paper presented to Annual Meeting of the American Society of International Law Panel on Development of Rules Relating to International Trade and Investment	English
1965 -	May 17 - "The Convention on the Settlement of Investment Disputes", speech to National Association of Manufacturers	English
1965 - May 27 -	"The Convention on the Settlement of Investment Disputes" to American Bar Association Section of International and Comparative Law, San Juan, Puerto Rico	English & Spanish See Nov. 1-6, 1965
1965 -	June - "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" reprint from Record of the Association of the Bar of the City of New York - by The Committee on International Law	English
1965 -	September 3 - Paper on the Legal Department of IBRD for Conference on Law and International Organizations sponsored by American Society of International Law at Bellagio, Italy; also Apr. 22, 1965 speech offered as discussion paper on "How can & do orgs develop law & institutions through new treaties	English
1965 -	September 17 - Report of Rapporteur on Transnational Trade and Investment at World Conference on World Peace Through Law, Washington, D.C.	English

** 1965 -	November 1-6 - "El Convenio sobre Arreglo de Diferencias Relativas a Inversiones", paper presented to Institute on Legal and Institutional Aspects of Private Foreign Investment in Latin America, Rio de Janeiro, Brazil	Spanish
1966	Spring issue of THE LAMP, "Putting Law Before Politics" on the Convention	English
1966	Article for The Columbia Journal of Transnational Law on the Convention - some observations on jurisdiction	English
1967	January - "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure" for Domke symposium.	English
1967	April 4 - "Le Financement du Développement Economique, Aspects politiques, juridiques et économiques", to the Royal Institute of International Affairs, Brussels	Dutch and French
1967	May 18 - remarks about Convention to ICC Congress in Montreal, Canada. (Do not have copy)	English
1967	May 22 - Report and remarks before Colloque Juridique International sur Les Investissements et le Développement Economique des Pays du Tiers-Monde organisé par l'Association pour le Développement du Droit Mondial, Paris	French

** Substantially the same paper was published in "Analisis" in October 1964 and Boletim do Instituto de Direito da Eletricidade of May 1966, both in Spanish; English translation -- see speech May 27, 1965.

(X)

Doc. COM/AF/6 - FRANCAIS
16 décembre 1963

(Traduction provisoire)

BANQUE INTERNATIONALE POUR LA RECONSTRUCTION ET LE DEVELOPPEMENT

REUNION CONSULTATIVE D'EXPERTS JURIDIQUES SUR LE REGLEMENT DES DIFFERENDS RELATIFS AUX INVESTISSEMENTS

Addis-Abéba, 16 - 20 décembre 1963

Texte du discours prononcé par le Président, Monsieur A. Broches, Conseiller juridique de la Banque internationale pour la réconstruction et le développement, à la session d'ouverture, lundi, le 16 décembre 1963, à 15 h.00.

63-4534

Monsieur Gardiner, Monsieur N'Liba, Messieurs les délégués, Messieurs les observateurs,

Messieurs:

Au nom de Monsieur George Woods, Président de la Banque mondiale, j'ai le plaisir de vous souhaiter la bienvenue à la présente réunion.

Je voudrais remercier Monsieur Gardiner pour ses paroles de bienvenue et d'encouragement, ainsi que pour l'hospitalité qu'il nous offre dans ce magnifique bâtiment d'Africa Hall, neuf il est vrai, mais déjà historique.

Le fait que cette réunion se déroule au siège de la CEA atteste une fois de plus des excellentes relations et de l'esprit de coopération qui existent entre la Commission économique pour l'Afrique et la Banque dans leurs efforts conjugués en vue de promouvoir le développement économique et social et le bien-être dans les pays africains. La Banque se félicite de pouvoir jouer un rôle, même modeste, dans les travaux préparatoires visant à créer une Banque africaine pour le développement et, personnellement, je suis très honoré de noter ici aujourd'hui la présence des membres du Comité des Neuf.

☆☆☆☆☆

La Banque a organisé la présente réunion pour permettre aux experts juridiques désignés par les gouvernements africains de discuter de manière officieuse un projet préliminaire de Convention pour le règlement des différends relatifs aux investissements. Dans les mois à venir, des rencontres analogues réuniront des experts juridiques des pays de l'hémisphère occidental, d'Europe et d'Asie.

Je suis très heureux de constater que tant de gouvernements ont répondu à l'appel de la Banque et qu'ils ont envoyé des représentants aussi éminents, donnant ainsi la preuve de l'importance qu'ils attachent au thème de notre réunion.

Que la première des quatre réunions régionales se déroule en Afrique me paraît entièrement justifié. Il est indispensable et urgent que les pays africains encouragent l'afflux de capitaux et de techniques étrangers; ils

ont d'ailleurs démontré au cours de ces dernières années qu'ils étaient conscients de cette nécessité et prêts à créer une atmosphère favorable à la coopération financière et économique.

En outre, nombre de pays représentés ici n'ont franchi la période de transition qui mène à l'indépendence que tout récemment. L'expérience unique qu'ils ont acquise quant aux problèmes qui accompagnent cette transition permettra peut-être aux représentants de ces pays de nous faire voir sous un angle nouveau les questions à débattre ici.

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D'aucuns jugeront peut-être paradoxal que la Banque mondiale prenne l'initiative d'encourager la conclusion d'un accord international dans un domaine qui ne relève pas directement de sa compétence et qu'elle veuille participer si activement aux efforts visant à concrétiser les propositions dont vous êtes saisis.

La réponse en est simple: la Banque n'est pas purement un organisme de financement mais, avant tout, une institution pour le développement. Elle s'intéresse davantage au processus du développement économique dans son ensemble qu'au simple apport de fonds pour la mise en oeuvre de certains projets et elle aborde le problème du développement économique sur une base technique et apolitique.

Naturellement, les activités de la Banque consistent, dans une large mesure, à réaliser les opérations de financement au moyen de ses propres ressources et de celles qu'elle emprunte sur les marchés financiers, à encourager les capitaux privés à y participer, à organiser et à coordonner les efforts des sources nationales et internationales de financement public pour pourvoir aux besoins des pays membres situés dans les régions en voie de développement. Mais une large part de l'énergie et des ressources de la Banque mondiale est consacrée à l'assistance technique et à l'octroi de conseils visant à créer les conditions favorables au développement économique rapide, c'est à dire à la création d'un climat favorable aux investissements au sens le plus large du terme. A cette fin, des bases administratives et techniques saines sont essentielles; mais la ferme reconnaissance de la primauté du droit est non moins indispensable

Dans le passé, il était peut-être justifié, dans une certaine mesure, de considérer que les investissements internationaux étaient une question intéressant surtout les pays exportateurs de capitaux et leurs ressortissants. Aujourd'hui, il est universellement admis que cette question est d'une importance primordiale pour le développement économique des pays en voie de développement. Les investissements internationaux sont devenus l'un des traits principaux de la coopération entre nations riches et nations pauvres et le développement de ces investissements revêt un caractère d'urgence tant pour les pays importateurs que pour les pays exportateurs de capitaux. Ceci est particulièrement vrai des investissements étrangers privés qui, si bien compris, peuvent contribuer considérablement au développement de l'économie des pays hôtes.

Malheureusement, le flux de capitaux privés vers les régions qui en ont besoin n'a pas l'ampleur voulue et il ne fait aucun doute qu'un des obstacles les plus sérieux au mouvement des capitaux privés est la crainte de l'investisseur de les voir exposés à des risques politiques tels que l'expropriation pure et simple sans indemnisation équitable, les interventions gouvernementales assimilables à l'expropriation qui privent l'investisseur du contrôle ou des bénéfices de ses investissements, ainsi que la non-observation par le gouvernement importateur de capitaux des engagements contractuels sur la foi desquels les investissements ont été réalisés.

Tenant compte de ceci, nous avons été conduits à nous demander si la Banque, en raison de sa réputation d'intégrité et de sa position d'impartialité, ne pourrait contribuer à écarter cet obstacle aux investissements privés internationaux. A plusieurs reprises, des gouvernements et des investisseurs étrangers se sont adressés à nous, soit pour obtenir notre assistance en vue de trancher leurs différends relatifs aux investissements, soit pour s'assurer notre assistance dans l'éventualité de tels conflits. En outre, nous avons également été encouragés dans cette voie par des faits tels que la promulgation récente par le Ghana d'une législation régissant les investissements étrangers et prévoyant le règlement par la Banque mondiale de certains conflits relatifs aux investissements. En outre, à la dernière Assemblée annuelle de la Banque, le délégué du Maroc a fait observer que son pays et un groupe d'investisseurs français avaient

invité le Président de la Banque à désigner le Président d'un tribunal d'arbitrage chargé de trancher les différends susceptibles de se produire dans le cadre de contrats à long terme.

Sur la base de notre propre expérience et de l'évaluation des possibilités d'obtenir, à l'heure actuelle, un accord général, nous avons conclu que la méthode la plus judicieuse serait d'aborder le problème du climat défavorable aux investissements sous l'angle de la procédure, en créant un mécanisme international qui serait disponible à la requête des intéressés pour la conciliation et l'arbitrage des litiges relatifs aux investissements. D'aucuns penseront peut-être qu'il serait souhaitable d'aller plus loin et d'essayer de formuler une définition du statut des biens étrangers. Je suis persuadé qu'un accord substantiel sur ces questions est nécessaire entre les pays exportateurs et importateurs de capitaux. Et il me semble que le projet de Convention sur la protection des biens étrangers, préparé au sein de l'Organisation de développement et de coopération économiques pourrait constituer un point de départ utile aux discussions entre ces deux groupes de pays.

Mais, pendant que ce dialogue se déroule, il est aussi nécessaire, à notre avis, de poursuivre un effort parallèle d'une portée plus limitée, tel que les propositions dont nous sommes saisis.

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Quelles sont donc les caractéristiques de ces propositions? Dans quelle mesure traitent-elles de la forme seulement et dans quelle mesure entrent-elles dans le fond du problème? Quelles sont celles qui n'offrent qu'un simple reflet du droit et de la coutume courants et dans quelle mesure constituent-elles un pas en avant dans l'évolution du droit international? Et, enfin, pourquoi est-il nécessaire d'établir une convention internationale pour atteindre les objectifs de la Banque?

Nous traiterons toutes ces questions au cours de la semaine qui vient. Vous trouverez les réponses à certaines d'entre elles, ou du moins mes réponses à certaines d'entre elles, dans le document de travail qui est entre vos mains depuis quelque temps.

Je n'ai pas l'intention de reprendre ou de résumer ce document dans mon discours d'ouverture mais je m'arrêterai à quelques-uns des points essentiels de la Convention.

Celle-ci fournirait des services auxquels les Etats et les investisseurs étrangers pourraient avoir recours volontairement pour le règlement des différends relatifs aux investissements surgissant entre eux. La méthode de règlement choisie serait la conciliation, l'arbitrage ou la conciliation suivie d'arbitrage, là où les efforts de conciliation n'auraient pas abouti. L'initiative du recours à cette procédure pourrait être prise aussi bien par un Etat que par un investisseur. La Convention établirait un mécanisme en vue d'arrêter la liste des conciliateurs et des arbitres et la procédure à suivre. A mon avis, ces facilités institutionelles et ces procédures conviennent mieux au genre de litiges dont nous nous occupons - entre un Etat d'une part et un investisseur étranger de l'autre - que celles prévues par d'autres instances existant déjà ou en voie de création. Néanmoins, en soi, elles pourraient être mises en oeuvre au moyen d'une action administrative de la Banque et ne nécessiteraient pas la conclusion d'un accord intergouvernemental.

Cependant, j'estime que les facilités institutionelles, pour utiles qu'elles soient, sont secondaires par rapport aux autres points des propositions qui, eux, doivent figurer dans une convention.

De quels points s'agit-il?

En premier lieu, la reconnaissance du principe qu'une partie non-gouvernementale - un investisseur - peut recourir directement contre une partie gouvernementale devant un tribunal international. Par recours direct, j'entends que l'investisseur agira en son propre nom et n'aura pas besoin d'être subrogé par son gouvernement. En signant la Convention, les Etats admettraient ce principe sans plus. Aucun Etat signataire ne sera tenu de recourir aux facilités prévues par la Convention ou de s'engager à ce faire et aucun investisseur étranger ne pourra en fait intenter une action contre un Etat signataire en l'absence d'un accord préalable entre les deux parties. Cependant, une fois cet accord intervenu, les deux parties seront irrévocablement tenues de respecter leurs engagements et la Convention prévoit une procédure destinée à prévenir que ceux-ci ne soient contrecarrés et à assurer leur exécution.

Deuxièmement, la question des recours locaux ne pose pas, à mon sens, un véritable problème de principe. D'une part, l'acceptation de voir éventuellement régler un différend entre un Etat et un investisseur étranger par un tribunal international implique la reconnaissance que les tribunaux locaux ne sont pas nécessairement les seuls habilités à trancher de tels litiges. Par ailleurs, il ne s'ensuit pas nécessairement que les instances locales ne puissent jouer un rôle essentiel. Dès lors que les parties consentent à recourir à l'arbitrage aux termes de la Convention, elles sont libres de stipuler que les instances locales peuvent se substituer au tribunal d'arbitrage ou que tous les recours à celles-ci soient épuisés avant de soumettre le différend à l'arbitrage prévu par la Convention. C'est uniquement à défaut d'un accord des parties dans ce sens que la Convention prévoit une procédure d'arbitrage en lieu et place d'un recours local.

Il est un troisième point qui me paraît encore plus important. Dans le droit international classique, un tort causé à un ressortissant d'un Etat dont un autre Etat est responsable sur le plan international, est exposé à des poursuites judiciaires non pas de la part du ressortissant intéressé mais de son gouvernement. En fait, il est généralement admis que l'Etat a été lésé dans la personne de son ressortissant et que l'Etat qui cherche à faire redresser les torts causés à son ressortissant dépose plainte lui-même. La pratique va plus loin et il existe de nombreux cas où des dispositions ont été prises pour régler des litiges relatifs aux investissements par voie de conciliation ou d'arbitrage directs entre l'Etat hôte et l'investisseur étranger. On en trouvera des exemples dans plusieurs concessions et accords de coopération intervenus ces dernières années. Cependant, ce qui fait défaut, c'est la reconnaissance du caractère exécutoire de tels accords sur le plan international et la Convention a précisément pour but de combler cette lacune.

Il est admis que, lorsqu'un Etat accepte de se soumettre à un arbitrage international, il consent, dans une certaine mesure, à affaiblir ou à limiter sa souveraineté. Néanmoins, l'un des attributs de l'exercice même de la souveraineté suppose que l'on accepte de la limiter; c'est exactement ce que fait tout Etat chaque fois qu'il adhère à un accord international. Le rôle de la Convention envisagée serait de donner un effet exécutoire sur le plan international à la limitation de la souveraineté d'un Etat qui, aux termes de

la Convention, accepte de soumettre à l'arbitrage un litige qui l'oppose à un investisseur étranger. Toutefois, comme corollaire au principe qui autorise un investisseur à se retourner directement et effectivement contre un Etat étranger sans l'intervention de son propre gouvernement, la Convention introduit une innovation importante, à savoir que le gouvernement de l'investisseur ne sera plus en mesure de subroger la plainte de son ressortissant. Ainsi, l'Etat hôte ne se verra pas dans l'obligation d'avoir à faire face à une multiplicité de plaintes et de défendeurs. La Convention offrira le moyen de régler directement, sur le plan juridique, les litiges relatifs aux investissements entre un Etat et un investisseur étranger et permettra d'écarter de tels différends de la sphère politique et diplomatique. Je suis convaincu que cela servira les intérêts des investisseurs, des Etats hôtes et la cause de la coopération internationale en général. Il serait peu réaliste de ne pas reconnaître que les recours locaux ne sont pas toujours satisfaisants du point de vue de l'investisseur qui se trouve alors dans l'obligation de recourir à la protection de son propre gouvernement, transformant ainsi la controverse en un litige entre Etats, ce qui entraînera, le plus souvent, une situation pénible ou embarrassante, non seulement pour l'investisseur mais surtout pour les Etats en cause.

Un quatrième point de nos propositions prévoit que les sentences arbitrales prononcées aux termes de la Convention seront reconnues et auront force exécutoire dans tous les Etats contractants, que l'Etat invité à reconnaître la sentence soit ou non partie au litige en question. Ainsi, dans le cas d'une sentence contre un investisseur, l'Etat partie à la procédure d'arbitrage sera en mesure d'appliquer la sentence contre la partie déboutée dans tout Etat contractant, à l'instar d'un jugement définitif dudit Etat. Dans le cas d'un jugement défavorable à l'Etat partie à la procédure arbitrale, on peut supposer que, s'étant solennellement engagé sur le plan international à se conformer à la sentence, cet Etat honorera ses obligations. C'est pourquoi j'estime que la question de l'exécution est tant soit peu académique. Je voudrais cependant souligner que la Convention ne touche pas à la loi qui, dans la plupart des pays, consacre l'inviolabilité de l'Etat en matière d'exécution et le soustrait à l'application de la sentence. La Convention ne fait que placer une sentence arbitrale prononcée aux termes de

ses dispositions sur le même pied que le jugement définitif des tribunaux nationaux. Si un tel jugement peut être appliqué conformément à la législation nationale, il en est de même pour la sentence arbitrale. Si le jugement ne peut être appliqué contre un Etat, la sentence arbitrale ne saurait l'être non plus.

Il est un cinquième point sur lequel je ne m'apesentirai pas, mais qui mérite néanmoins votre attention. La Convention ne formule pas de normes sur la façon dont les Etats doivent traiter les biens étrangers, pas plus qu'elle ne préjuge l'attitude des investisseurs étrangers dans leurs relations avec l'Etat bénéficiaire. De même, la Convention ne s'occupe pas du bien-fondé des litiges en matière d'investissements mais de la procédure à suivre pour les trancher.

Messieurs, je vous ai exposé les raisons qui ont amené la Banque à organiser et à encourager la discussion de la Convention envisagée. A ce stade, je répéterai que la Banque est persuadée que les investissements privés peuvent apporter une contribution précieuse au développement économique. Cela ne signifie néanmoins pas que nous soyons des partisans aveugles de la cause de l'investisseur privé, pas plus que nous ne désirons imposer nos vues à autrui. A la dernière Assemblée annuelle de la Banque, le Président, Monsieur Woods, a déclaré :

> " Il n'appartient pas à la Banque, ni à son Président, de dire aux pays membres en voie de développement s'ils doivent accepter les fonds privés provenant de l'étranger comme une partie intégrante de leurs efforts de développement, ni de leur indiquer le prix qu'il serait raisonnable de payer à cette fin."

Nous ne nous attendons pas non plus et nous ne jugeons pas souhaitable que chaque fois qu'un investisseur étranger s'estime lésé par un Etat hôte, ou chaque fois qu'un Etat hôte juge qu'un investisseur étranger ne respecte pas ses obligations, un tel différend soit nécessairement porté devant les instances créées par la Convention plutôt que par les voies judiciaires ou administratives nationales ordinaires. Loin de nous l'intention de remplacer de manière générale la juridiction nationale. Nous tenons toutefois à souligner que, dans certains cas, le recours à un tribunal international servira les intérêts et de l'Etat hôte et de l'investisseur.

A cet égard, il me reste encore deux points à souligner. Tout d'abord, la Convention est conçue pour traiter aussi bien des plaintes des Etats hôtes contre les investisseurs que de celles des investisseurs contre lesdits Etats. En fait, certaines dispositions, telles que celles relatives à l'exécution de sentences arbitrales, revêtent une importance particulière lorsqu'un Etat intente une action contre un investisseur et obtient gain de cause.

Deuxièmement, la Convention prévoit aussi bien des procédures de conciliation que d'arbitrage. Etant donné que l'arbitrage pose des problèmes juridiques complexes, tandis que la conciliation est beaucoup plus simple, il est évident que l'attention converge plutôt vers l'arbitrage. Cela ne signifie pas néanmoins que nous attachions moins d'importance à la conciliation. L'expérience a prouvé la valeur de cette dernière méthode et il est fort possible qu'une fois la Convention en vigueur, les procédures de conciliation sous les auspices du Centre soient plus importantes que les procédures arbitrales.

En guise de conclusion, permettez-moi de souligner que la Convention laisse les Etats et les investisseurs entièrement libres d'établir leurs relations sur la base qu'ils jugeront la meilleure. Je rélèverai encore une fois qu'en devenant partie à la Convention, aucun Etat ne s'engage à soumettre un litige à la conciliation ou à l'arbitrage. La véritable signification de la Convention réside dans le fait qu'elle assure un plein effet à l'accord des deux parties qui auront convenu de recourir à un tribunal international. Je pense qu'un élément de confiance sera ainsi créé qui, à son tour, contribuera à établir un climat plus sain dans le domaine des investissements. Pour modeste que soit notre contribution, notre enthousiasme ne devrait pas s'en trouver diminué.

J'aime à penser que tous ceux d'entre nous qui se consacrent aux problèmes du développement, sont des réalistes. Nous avons nos idéaux mais nous savons aussi que la voie qui mène au succès est sinueuse. Riches de cette connaissance, nous devons être prêts à explorer toutes les voies possibles et à étudier toutes les idées nouvelles avec un esprit ouvert et uniquement préoccupés de déterminer si elles sont susceptibles de contribuer à nos objectifs communs. J'espère que c'est animés de cet esprit que nous examinerons ensemble les propositions en question.
