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

A. A. FATOUROS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I

The idea of a multilateral instrument calculated to provide protection to foreign investors is relatively recent.¹¹ A few uncertain and generally fruitless attempts in this direction were first made during the interwar period by some League of Nations agencies.¹² Immediately after the Second World War, increased consciousness of international economic problems along with a widespread optimistic trend in favour of international organization led to the formation of a movement for the general adoption of such a code. This movement found support among scholars¹³ as well as businessmen¹⁴ and was favourably discussed by governments and international agencies, but without any concrete result. After some years of comparative neglect, the idea was recently revived with considerable force.

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹*Ibid.*, art. 12(2)(a)(i).

²¹*Ibid.*, art. 12(2)(b).

¹⁸*Ibid.*, art. 11(1)(b).

²⁰*Ibid.*, art. 12(2)(a)(ii).

²²*Ibid.*, art. 12(1)(c).

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

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

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

Another multilateral international instrument dealing in part with the protection of private international investment is the Economic Agreement of Bogota, signed at the Ninth International Conference of American States, on May 2, 1948.²⁷ The relevant provisions, which constitute chapter iv of the Agreement (articles 22-7), are rather similar to those in the I.T.O. Charter, though more elaborate and positive. The importance of foreign investment is again emphasized and a general guarantee of "equitable treatment," especially non-discrimination, is given.²⁸ The desirability of employing foreign skilled personnel is recognized, the signatory states undertaking not to hinder unduly such employment.²⁹ They also undertake to lighten the tax burden when excessive,³⁰ and to "impose no unjustifiable restrictions" on the transfer of earnings and capital outside the capital-receiving state.³¹ Expropriation of property, when effected in accordance with local legislation and when non-discriminatory, is authorized; it is unequivocally stated, however, that "any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner."³² These provisions lose much of their importance through the constant use of indefinite terms such as "appropriate," "unjustifiable," "just," or "equitable." Furthermore, several states attached at the time of signature express reservations on the scope and effects of the relevant articles, especially the article dealing with expropriation. The Bogota Agreement, like the I.T.O. Charter, has never become legally effective.³³

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

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

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

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

²⁸*Ibid.*, art. 22.

²⁹*Ibid.*, art. 23(3).

³¹*Ibid.*, art. 22(4).

³⁰*Ibid.*, art. 27.

³²*Ibid.*, art. 25.

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

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

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

In 1947, the Economic and Employment Commission of the Economic and Social Council of the United Nations instructed its Sub-Commission on Economic Development "To commence a study . . . with the view to making recommendations regarding the need for an international code relating to foreign investment which will cover among other things the protection of economic and social interests of the countries in which investments are to be made, as well as the protection of investors, both public and private. . . ."³⁴ The topic was discussed in the Council's next session³⁵ and it was mentioned occasionally in the meetings of the Commission and Sub-Commission during the next few months.³⁶ It was altogether dropped after the signature of the I.T.O. Charter.

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

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

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

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

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

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

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

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

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

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

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

Of greater importance, though as yet of dubious effectiveness, are the discussions within the Consultative Assembly of the Council of Europe. A 1957 report of a study group, dealing with the problems of the co-operation between European and African states for the latter's economic development, mentioned the possibility of preparing an Investment Statute "defining the rights and duties of investors and borrowers" and providing for certain other matters.⁴³ The idea was adopted by the Assembly's Economic Committee⁴⁴ and by the Consultative Assembly itself, which recommended to the Committee of Ministers the convocation of a conference of European

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

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

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

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

and African states to deal with these questions.⁴⁵ The Committee of Ministers having deferred its action, the Assembly instructed its Economic Committee to present detailed proposals.⁴⁶ The resulting report⁴⁷ did not contain a draft text but dealt in some detail with the problems and possible content of an investment code. In its subsequent recommendations,⁴⁸ the Assembly admits the possibility that an Investment Statute might not be adopted within a short time. Considering the subject as one eminently suitable for joint European-African discussion, it insists on the convocation of a conference⁴⁹ and requests the governments of the Council of Europe's member states to prepare drafts for the proposed statute, on the lines set out in the aforementioned report.

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

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

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

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

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

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

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

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

⁵²*Ibid.*, pp. 17-18.

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

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

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

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

⁵⁴Cf. *infra*, pp. 86-8.

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

investors and prohibits all restrictions on the ownership and personnel of private enterprises, allowing an exception only in the case of "enterprises directly concerned with national defense."⁵⁶ Foreign investors are to be granted full freedom in the transfer of their profits, capital, and any other related funds outside the capital-importing state⁵⁷ and they are to be fully compensated in the event of their property's expropriation.⁵⁸ The code also contains provisions on the adjudication of disputes arising over its application before a proposed international court of arbitration.⁵⁹ Though first proposed more than ten years ago and repeatedly mentioned by successive I.C.C. congresses since then,⁶⁰ the Code of Fair Treatment has received no official support or recognition as yet.

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

The German Society's first major move was its proposal for the adoption of a "magna charta" of foreign investment, made at the International Industrial Development Conference held in San Francisco in 1957.⁶³ The proposal had a favourable reception in business circles and received considerable publicity.⁶⁴ Although the original text of a draft convention, as proposed in 1957,⁶⁵ has been amended on many important points subsequently,

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

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

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

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

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

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

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

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

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

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

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

Two of the convention's provisions are of special interest at this point. Not only the states parties to the convention but their nationals as well are to be directly entitled to the rights thereunder. The convention's stipulations are to be directly binding on the courts and other government instrumentalities of the party states and they will prevail over national legislation in these states.⁶⁸ The investors therefore do not depend on their state's espousal of their claims in order to enforce their rights. The draft convention gives also a list of possible sanctions against states violating its provisions⁶⁹ and provides for the creation of an international court of claims.⁷⁰ The second interesting novelty is a provision stating that the states party to the convention "undertake to apply the stipulations of the Convention *mutatis mutandis* in the case of unlawful measures adopted against the property, rights and interests of nationals of the High Contracting Parties by States which are not parties to the Convention."⁷¹ This provision may in all fairness be understood as proposing the formation of a coalition of capital-exporting states with the object of keeping in line the capital-importing states.

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

⁶⁶1957 *Draft Convention*, arts. iv and v. The fields mentioned are public utilities, public transport, utilization of nuclear energy, and production of war material.

⁶⁷*Ibid.*, arts. vi and vii. Cf. *infra* pp. 94-5.

⁶⁸*Ibid.*, art. ix.

⁶⁹*Ibid.*, art. xi(5)(3) and appendix.

⁷⁰*Ibid.*, arts. x and xi. Cf. *infra* p. 97.

⁷¹*Ibid.*, art. xii.

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

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

⁷⁴Cf. *infra* p. 95.

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

The above draft convention and the one proposed by the German Society to Advance the Protection of Foreign Investment were ultimately combined in a new draft which, after repeated amendments, reached in May, 1959, its present form.⁷⁶ This draft is now under consideration by the Organization for European Economic Co-operation⁷⁷ and has been extensively discussed among jurists.⁷⁸ The proposed convention would provide for the equitable treatment of the property of aliens⁷⁹ and for the obligation of states to observe strictly "any undertakings which [they] may have given in relation to investments made by nationals of any other Party."⁸⁰ Expropriation of foreign property is to be allowed only under certain conditions.⁸¹ Disputes relating to the convention are to be submitted to an arbitration tribunal,⁸² to which nationals of the states party to it may also have access.⁸³ The draft convention provides for measures to be taken by states, individually or collectively, in cases of breach of the convention⁸⁴ or of non-compliance with the tribunal's award.⁸⁵ It is to be noted that the 1957 Draft Convention's provision on measures to be taken against states not party to the convention⁸⁶ has been dropped. The new draft's authors, however, seem still to favour the initial adoption of the convention by a limited number of (chiefly capital-exporting) states, probably those of Western Europe.⁸⁷

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

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

⁷⁷Cf. *supra*, p. 85.

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

⁷⁹1959 *Draft Convention*, art. i.

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

⁸¹1959 *Draft Convention*, art. iii.

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

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

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

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

⁸⁶Cf. *supra* fn. 71.

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

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

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

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

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

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

⁹¹*Ibid.*, at p. 17.

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

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

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

⁹⁵*Ibid.*, pp. 16, 20, 25-6.

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

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

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

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

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

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

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

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

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

¹⁰¹*Ibid.*, pp. 13-14.

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

¹⁰³*Ibid.*, pp. 14-15.

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

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

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

A number of international private groups have expressed in general terms their support of the adoption of an international investment code, stating, on occasion, certain general principles whose inclusion in the code they favour. Such support is expressed in a resolution proposed at the 1958 Conference of the International Bar Association,¹¹⁰ a resolution adopted by the 1958 Conference of the Inter-Parliamentary Union,¹¹¹ and the first resolution of the International Association for the Promotion and Protection of Private Foreign Investments.¹¹² The idea has also found support in the statements of several jurists, both in Europe and in the United States.¹¹³ The reports and studies on the international law of state responsibility by the Harvard Law School¹¹⁴ and by the International Law Commission¹¹⁵ should also be mentioned here, for they are relevant, even though they are not directly related to the question of an investment code of the type here discussed.

¹⁰⁶Cf. *ibid.*, pp. 10-12, 15.

¹⁰⁷*Ibid.*, p. 13.

¹⁰⁸*Ibid.*, p. 12.

¹⁰⁹Cf. *ibid.*, pp. 18-20.

¹¹⁰International Bar Association, *Seventh Conference Report* (1958), p. 484.

¹¹¹As reported by M. Brandon, "An International Investment Code: Current Plans," 1959 *Journal of Business Law* 7, 16-17.

¹¹²Cf. M. Brandon, "Recent Measures to Improve the International Investment Climate" (1960), 9 *Journal of Public Law* 125, 126.

¹¹³Cf., for example, Mr. C. S. Rhyne's address, cited by Brandon, *supra* fn. 111, at p. 15; Mr. L. Hjerter's remarks at the I.L.A. conference, in *International Law Association, Report of the Forty-eighth Conference* (1958), pp. 167-70; G. W. Haight, "Activities of the International Chamber of Commerce and Other Business Groups" (1960), 54 *American Society of International Law Proceedings* 200, 203-5.

¹¹⁴Cf. the excerpts from the latest draft of the Draft Convention on International Responsibility of States for Injuries to Aliens, reported and discussed in (1960) 54 *American Society of International Law Proceedings* 102 *et seq.*

¹¹⁵Cf. the successive reports of the Commission's Special Rapporteur, Dr. Garcia-Amador, in 1956-II *Yearbook of the International Law Commission* 173, 1957-II *Yearbook of the International Law Commission* 104, and 1958-II *Yearbook of the International Law Commission* 47, and the related discussions among the members of the Commission, in 1956-I *Yearbook of the International Law Commission* 228 and 1957-I *Yearbook of the International Law Commission* 154.

II

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

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

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

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

¹¹⁶*Bogota Agreement*, art. 22(4).

¹¹⁷*I.C.C. Code*, art. 9.

¹¹⁸*Ibid.*, art. 10.

¹¹⁹*Ibid.*, art. 9(1).

¹²⁰1957 *Draft Convention*, art. iv(5); and compare art. iv(3)(e).

¹²¹Cf. 1959 *Draft Convention*, art. i. Freedom of transfer is stipulated only in the case of compensation for expropriated property; cf. *infra* fn. 142.

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

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

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

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

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

¹²²E.L.E.C., *op. cit. supra* fn. 88, at p. 19.

¹²³Consultative Assembly Document 1027, *supra* fn. 47, at pp. 17-18.

¹²⁴Parliamentary Group for World Government, *op. cit. supra* fn. 102, at p. 13.

¹²⁵*Havana Charter*, art. 11(1)(b).

¹²⁶*Ibid.*, art. 12(2)(a)(i).

¹²⁷See *supra* fn. 22.

¹²⁸*Bogota Agreement*, art. 25.

national legislation¹²⁹ and the appropriate legal procedures must be followed.¹³⁰ The compensation to be paid to the alien should be determined prior to the expropriation and should be paid in cash or in "readily marketable securities," freely transferable to the alien's currency.¹³¹ It is also provided that compensation should be "fair . . . according to international law."¹³²

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

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

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

¹²⁹*I.C.C. Code*, art. 11(b).

¹³⁰*Ibid.*, art. 11(a).

¹³¹*Ibid.*, art. 11(c) and (d).

¹³²*Ibid.*, art. 11(a).

¹³³*E.L.E.C.*, *op. cit. supra* fn. 88, at p. 19.

¹³⁴Consultative Assembly Document 1027, *supra* fn. 47, at p. 18.

¹³⁵Parliamentary Group for World Government, *op. cit. supra* fn. 102, at pp. 13-14.

¹³⁶*1957 Draft Convention*, art. vi(1).

¹³⁷*Ibid.*, art. vi(2). According to the comments to the convention, "the words used . . . are designed to stress the exceptional character of expropriation." *Ibid.*, pp. 54-5.

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

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

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

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

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

¹³⁸*Ibid.*, art. vii(1). Compensation is also to be granted in the case of restrictions on alien property; cf. *ibid.*, art. vii(2).

¹³⁹*Ibid.*, art. vii(3).

¹⁴⁰*Ibid.*

¹⁴¹Cf. Brandon, *supra* fn. 111, at p. 13.

¹⁴²1959 *Draft Convention*, art. iii. Cf. the cogent criticism of these provisions by Metzger, *supra* fn. 73, at pp. 139-43; and Schwarzenberger, *supra* fn. 78, at pp. 156-60.

¹⁴³On the virtual impossibility of defining with precision the meaning of "indirect" expropriation, see Metzger, *supra* fn. 73, at p. 157.

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

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

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

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

¹⁴⁴*Bogota Agreement*, art. 38.

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

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

¹⁴⁷*Ibid.*, art. 14.

¹⁴⁸*I.C.C. Code*, art. 13.

¹⁴⁹*Supra* fn. 102, at pp. 18-19.

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

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

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

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

¹⁵⁰1957 *Draft Convention*, art. x(1); and cf. the comments to it, *ibid.*, pp. 59–61.

¹⁵¹*Ibid.*, art. xi; and cf. *infra* p. 98.

¹⁵²*Ibid.*, art. x(2), and comments to it at pp. 59–61.

¹⁵³Cf. *infra* pp. 98.

¹⁵⁴Cf. Brandon, *supra* fn. 111, at pp. 13–14.

¹⁵⁵1959 *Draft Convention*, art. vii and Annex.

¹⁵⁶E.L.E.C., *op. cit. supra* fn. 88, at pp. 25–7.

¹⁵⁷Such provision is not to be found in the I.T.O. Charter, the Bogota Economic Agreement, the I.C.C. Code of Fair Treatment, and the draft convention proposed to the O.E.E.C. by the Swiss government.

¹⁵⁸Cf. *supra* p. 96 and fn. 149.

¹⁵⁹Cf. Council of Europe Consultative Assembly Document 1027, *supra* fn. 47, at p. 19.

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

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

¹⁶⁰Cf. E.L.E.C., *op. cit. supra* fn. 88, at pp. 20, 26.

¹⁶¹1957 *Draft Convention*, art ix; cf. *supra* p. 86.

¹⁶²*Ibid.*, at p. 59.

¹⁶³1959 *Draft Convention*, art. vii(2). The Shawcross draft did not provide for the direct access of private parties to international judicial proceedings; cf. Brandon, *supra* fn. 111, at pp. 13-14.

¹⁶⁴Cf. the authors' comments, 9 *Journal of Public Law* 119, 121, and Professor Schwarzenberger's critical observations, *supra* fn. 78, at pp. 162-3.

¹⁶⁵*Supra*, pp. 89-90.

¹⁶⁶1957 *Draft Convention*, art. xi(2) and (4). The commentary to the convention, *ibid.* p. 64, made clear that private property of the nationals of the state at fault and property enjoying diplomatic immunity would be excluded from such measures.

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

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

III

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

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

¹⁶⁷*Ibid.*, art. xi(7).

¹⁶⁸1959 *Draft Convention*, art. viii.

¹⁶⁹*Supra* fn. 102, at p. 19.

¹⁷⁰Consultative Assembly Document 1027, *supra* fn. 47, at p. 19.

¹⁷¹*Ibid.* at p. 18.

¹⁷²For a critique of this assumption, see A. S. Miller, "Protection of Private Foreign Investment by Multilateral Convention" (1959), 53 *American Journal of International Law* 371, 375-6.

that, with regard to the various countries' immediate interests, no divergencies exist. Such divergencies are manifested not only in the commercial policies of developed and underdeveloped countries¹⁷³ but also in their conception of international relations and even of certain issues in international law. Matters regarding the taking of private property owned by aliens are well-known illustrations of such issues. It is difficult to see how the underdeveloped countries can be induced to accept the capital-exporting countries' views with respect to these questions. Their undeniable need for capital is unlikely to constitute by itself sufficient inducement, particularly when the present world political situation is taken into account. Underdeveloped countries depend only in part on private direct foreign investment and the lack of an investment code does not necessarily affect the existing other sources of capital, such as capital provided by governments or international financial agencies. The exercise of direct or indirect pressure on the part of capital-exporting states, by means, for instance, of the refusal to give public loans or grants, or the imposition of restrictions on export credits, seems improbable, under present conditions. Capital-exporting countries are not prepared today to jeopardize the political allegiance of underdeveloped countries in order to achieve their reluctant adhesion to a charter of doubtful effectiveness.¹⁷⁴

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

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

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

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

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

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

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

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

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

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

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

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

An alternative course might perhaps still be open. It has been suggested recently¹⁸⁰ that the staff of one of the international financial agencies dealing with international investment could draft a set of principles laying down the obligations as well as the rights of foreign investors in underdeveloped countries. Compliance with this charter would be required of all firms and governments seeking the institution's aid. In this manner, the disadvantages of negotiations between government representatives might be in part eliminated. The difficulties, however, which are inherent in the formulation of a widely acceptable set of principles would still persist. The advantage of this scheme lies in its institutional setting, which makes possible the application of such principles in a flexible and sophisticated manner and provides a number of ways for the settlement of disputes. From this standpoint, the proposal presents certain similarities with some other suggestions which stress the institutions charged with applying the charter rather than the charter itself.¹⁸¹

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

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

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