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THE QUEST FOR LEGAL SECURITY OF FOREIGN INVESTMENTS—LATEST DEVELOPMENTS

A. A. Fatouros*

During the past few years increasing attention has been focused on the problems of the security of foreign investments in the underdeveloped areas. Efforts have been made to devise or develop legal means by which their security would be assured and protected. The major capital-exporting countries have placed new emphasis on their programs of encouragement of such investments, sometimes introducing considerable reforms in these programs to increase their effectiveness. The capital-importing countries, on their part, have continued to offer assurances of fair and often privileged treatment to foreign investors. There have been several suggestions for the institution of multilateral schemes designed to provide protection and to thereby encourage investors. An earlier study has dealt in detail with the forms, problems and legal effects of the assurances given to foreign investors in order to encourage them to invest in underdeveloped areas. The present article is devoted to an examination of the latest developments in this field and to an assessment of their importance and probable effects.

I. UNITED STATES PROGRAMS AND POLICIES

In its policy of encouragement of private investment abroad in the last fifteen years, the United States government has been using two main tools: the conclusion of bilateral investment treaties and the issuance of guarantees against specified business risks. These are still its basic tools, even though other means have often been suggested and on occasion employed.

No major development has taken place with regard to the treaty program of the United States. Its pace continues to be slow; since the beginning of 1960, three new treaties of friendship, commerce and navigation (FCN) have been concluded, only one of them with an underdeveloped country. During this period five more treaties (one of them a supplementary agreement importing investment provisions

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1. See Fatouros, Government Guarantees to Foreign Investors (1962) [hereinafter cited as GUARANTEES], covering developments up to about the spring of 1961.
into an FCN treaty concluded in the early postwar years) have entered into force, all of which had been signed earlier, some of them as long as ten years before their entry in force. Only two of these involved less developed countries. In all, fifteen FCN treaties have entered into force since 1949, and only eight or nine of them were entered into with countries that can be considered less developed.

It does not seem that the small number of treaties in force is due to any lack of interest on the part of the United States government. Indeed, in a statement submitted to the Committee on Foreign Relations of the United States Senate, the Department of State revealed that, since the beginning of the investment treaty program, formal treaty proposals have been made to, or discussions on the matter initiated with, all but three of the Latin American republics. The outcome of this activity up to the time of writing has been that one treaty (with Nicaragua) is now in force, three others (with Colombia, Haiti and Uruguay) have been signed but have not entered into force, and two others are under serious consideration by two unidentified Latin American governments. While stating its determination to press forward with treaty projects and proposals, the Department of State attributed the program’s lack of success to “deep-seated opposition by officials and the public in many of the countries to commitments of the type contained in our treaties. Such treaties are regarded as tending to infringe upon the sovereignty and independence of individual countries.”

In its subsequent report to the Senate, the Committee on Foreign Relations expressed disappointment and perplexity over the program's failure in Latin America. There is no indication that any important changes are contemplated in the content of these treaties.

It is in connection with the United States investment guarantee program that important developments have taken place within the past year. Under the Foreign Assistance Act of 1961, the administration of...
the program was transferred to the Agency for International Development (AID), and the rules regulating the issuance of guarantees under the program were amended in several important respects. In addition to the guarantees against the specific risks of nonconvertibility, expropriation and war losses, AID is now empowered to issue guarantees covering risks of any kind, with the single exception of losses brought about by reason of fraud or misconduct on the part of the investor. Such guarantees were formerly issued by the Development Loan Fund, but they were limited to non-business risks. The new legislation has removed this restriction with a view to eliminating the element of uncertainty that the distinction between business and non-business risks involves. Guarantees of this sort are now available to both equity and loan investments, though with certain limitations as to the extent of the coverage. No more than seventy-five percent of the total value of any specific investment can be covered; in the case of equity investments, no more than fifty percent will as a rule be covered. Moreover, no such guarantee may exceed the amount of ten million dollars. All-risks guarantees are intended to cover investments occupying a high priority position in the development plan of the country of investment. According to official statements, the projects to which such guarantees will be issued will generally be of such importance that they would also qualify for intergovernmental loans. The Agency for International Development has already made known some of the criteria which are to be taken into account in deciding on an application. These include the probable role of the project with respect to the development of economic resources or expansion of production capacities, the “extent to which the recipient country is showing a responsiveness to the vital economic, political, and social concerns of its people, and demonstrating a clear determination to take effective self-help measures,” and the possible effects of the project on the United States economy.

Apart from the issuance of all-risks guarantees, the program has been amended in other important respects. The Foreign Assistance Act of 1961 requires only that “suitable arrangements” be made with the host government with respect to the institution of a guarantee program. This language provides more flexibility to the program, of yet uncertain
extent, with respect to the specific content of the agreements which are concluded with each country of investment prior to its inclusion in the guarantee program. Guarantees may now be issued in exceptional cases even before the conclusion of an international agreement with the country of investment. With respect to expropriation guarantees, the new legislation establishes that a breach of contract by the government of the country of investment is equivalent to expropriation of the alien's contract with that government. This appears to have been the construction applied by the issuing agency even before the Foreign Assistance Act of 1961, and the Act confirms its validity. The war-risk guarantee has been extended by the addition of guarantees against losses due to revolution or insurrection in the host country, both of which were specifically excluded from the guarantees formerly issued. Finally, guarantees covering investment in pilot or demonstration housing projects in Latin America may now be issued under certain conditions. The first such guarantee has already been issued.\footnote{11}

It is as yet too early for any assessment of the results of the recent changes in the investment guarantee program. These changes correspond largely to suggestions and proposals which had been made during the previous operation of the program, but their effectiveness remains to be seen. No all-risks guarantees have been issued by AID as of June 30, 1962, although three such guarantees, for a total of just under sixty million dollars, had been issued before the recent amendments by the Development Loan Fund and are still outstanding.

Apart from its two main programs of assistance to nationals investing abroad, the United States government has been active in support and promotion of foreign investment in various other ways. Its lending agencies, such as the Export-Import Bank and the Development Loan Fund, have continued to play an important role.\footnote{12} Both the Department of Commerce and the AID are active in providing information and advice to prospective investors. The Foreign Assistance Act of 1961 authorized the AID to provide assistance to private firms seeking to conduct surveys of investment opportunities in underdeveloped countries.\footnote{18} Another category of measures, those relating to tax policies as manifested in domestic legislation and in tax treaties, is examined elsewhere in this symposium.\footnote{14}


\footnote{12} For a recent study of their function and operation, see Mikesell, in U.S. \textit{PRIVATE AND GOVERNMENT INVESTMENT ABROAD} 273–406, 459–82 (Mikesell ed., 1962).

\footnote{13} The U.S. Government may share up to 50 percent of the cost of such surveys. It acquires full title to the survey report, if the private firm decides not to proceed with the investment. For comments, see Hearings on S. 1983 Before the Senate Committee on Foreign Relations, 87th Cong., 1st Sess. 266–67 (1961).

tious and reserved in its attitude toward proposals for an international investment convention; it seems to be pessimistic as to their chances of success under present conditions. Its attitude toward the more recent suggestions for an international investment insurance scheme seems somewhat less negative, though still non-committal.

Finally, another recent legislative measure should be noted. In the Foreign Assistance Act of 1962, Congress has added a provision intended to give further protection to American firms investing abroad. Foreign assistance to a country may now be suspended if that country has expropriated, directly or indirectly, the property of United States nationals and has failed to take, within six months from the date of its action, remedial measures deemed appropriate by the President of the United States. Such measures must include (apart, presumably, from the rather improbable offer of restitution of the property) either prompt compensation "in convertible foreign exchange" or arrangements, with the consent of the parties concerned, for submission of the matter to arbitration.

In his oral statement before the Senate Committee on Foreign Relations, Secretary of State Rusk opposed the proposed amendment of the act. He pointed out, among other things, that the expropriation may be effected by local rather than central authorities (as in the case of the recent expropriations of public utilities in Brazil) and that if American policy were to be tied to private foreign investments to such an extent, it might become necessary for the United States government to interfere extensively with the operations of private firms in order to protect its own interests. In a further statement of the Department of State, it was argued that while this amendment would offer little help to the investors, it might injure "the vital U. S. national interests which the foreign assistance program is designed to further." The need for flexibility was stressed, and it was pointed out that such an amendment would tend to place the aid program at the mercy of any unreasonable foreign official or any intransigent American investor, might retard the land and other reforms which the United States was asking the Latin American countries to undertake, and would lend force to the communist allegation that the aid programs are "tools of U. S. capital." It remains to be seen whether and how this provision will be given effect.

II. THE GERMAN TREATY AND GUARANTEE PROGRAM

The role of the German Federal Republic in international trade and investment has acquired increasing importance in recent years. The

15. See text accompanying note 98 infra.
19. Id. at 557-58.
West German government is now engaged in providing development assistance (in the form of both capital aid and technical assistance) to underdeveloped countries, and it actively encourages the investment of capital by its nationals in such countries. To the latter end, it has concluded a number of treaties of friendship, commerce and navigation (FCN) and it insures its nationals against certain non-business risks.

The FCN treaties concluded in the last few years by the Federal Republic of Germany follow in their general lines the model of the postwar FCN treaties of the United States; like the latter, they include important provisions relating to the protection of investors. It would seem, however, that only two of the recent German treaties have been concluded with countries which may be called "less developed": the treaty of friendship, commerce and navigation with the Dominican Republic (signed, December 23, 1957) and the treaty of establishment and navigation with Greece (signed, March 18, 1961). Denmark, Italy and the United States, with whom FCN treaties have also been concluded in the last eight years, are not economically underdeveloped.20

The two treaties mentioned above seem to follow a common pattern, although with important differences in their provisions. A comparison of some of these provisions is of sufficient interest to warrant a more extensive discussion, even though it is not yet possible to draw any general conclusions.

Generally speaking, the provisions of the treaty with Greece are more detailed than those of the treaty with the Dominican Republic; they spell out with more precision the particulars of the protection to be granted to nationals of each party in the territory of the other, and thus limit more extensively the freedom of action of the signatory states and decrease the probability of disputes over the application and interpretation of the treaty. For instance, the treaty with the Dominican Republic provides that matters of admission, residence and expulsion of nationals of each party in and from the territory of the other will be regulated by the latter in accordance with the provisions of its own law; the parties only undertake to apply such provisions with "good will" and to permit notification of the nearest consular representative in cases of expulsion.21 The relevant provisions of the treaty with Greece,22 on the other hand, start with a general undertaking on the part of each party to "facilitate" the admission and residence of

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20. Certain earlier FCN treaties dating since before the Second World War and still in effect (e.g., with Iran, signed in 1929; with Thailand, signed in 1937) are not dealt with in this paper.


nationals of the other party within its territory. The legal provisions in force remain applicable, but it is stated that the length of residence of a national will not be limited except for reasons of public order, security, health or morals. The same criteria are to be applied with respect to matters of expulsion or renewal of residence permits. It is further provided that nationals of one of the contracting parties, residing in the territory of the other, cannot be expelled without being allowed to present their case against such expulsion and to appeal before the competent authorities. Finally, long-time residents cannot be expelled except for reasons of public security, or if particularly grave reasons of public order or morals obtain.

Both treaties provide that the nationals of each contracting party will be accorded national treatment within the territory of the other with respect to their protection and personal security. In addition, the Dominican treaty guarantees treatment no less favorable than that of the nationals of any third state or that recognized by international law, while the treaty with Greece specifically provides for lack of discrimination. The provisions concerning protection of the property of aliens present considerable differences. In the treaty with the Dominican Republic it is provided that the property of nationals and companies of each contracting party will enjoy “protection and security” within the territory of the other. Any entry or search in the premises of such nationals is to be conducted in accordance with the laws in force and with all consideration for the persons living or working therein. The treaty with Greece provides for national treatment with respect to the same matters. Again, considerable differences are apparent in the two treaties’ provisions regarding expropriation of foreign-owned property. The treaty with the Dominican Republic provides that nationals and companies of each contracting party will enjoy the right of property in accordance with the relevant constitutional provisions. Property may be expropriated only for justified purposes of public utility or social interest and with payment of just compensation. The legality of the measures and the amount of compensation are to be subject to judicial proceedings. The relevant provisions of the treaty with Greece follow closely the model of the United States treaties, although probably going somewhat further in their assurances to foreign investors. Again, expropriation of foreign-owned property is allowed only for reasons of public utility and with compensation. The latter must correspond to the value of the expro-

23. D.R., art. 4.
24. Greece, art. 3.
25. D.R., arts. 6(1), (2).
26. Greece, art. 5(1).
27. D.R., art. 6(4).
28. Greece, art. 5(3).
29. A Protocol attached to the treaty at the time of signature states (para. 6) that
appropriated property, be in effectively realizable form and be paid without unnecessary delay.\textsuperscript{30} The measures relating to the determination and payment of compensation must have been effected, at the latest, by the date of the taking. The validity of the expropriation and the amount of compensation are to be subject to the regular legal procedures. Finally, the compensation can be freely repatriated up to the amount of the capital originally invested and the profits which could be repatriated at the time of expropriation in accordance with the domestic legislation in force.\textsuperscript{31}

Both the treaties here examined grant national treatment to nationals of the contracting parties with respect to access to courts and executive authorities.\textsuperscript{32} Their respective provisions on the regulation of economic and commercial activities of aliens are also similar.\textsuperscript{33} Nationals and companies of each contracting party are to be accorded national treatment with respect to exercising such activities, founding companies or acquiring interests in existing ones. In both treaties, each party reserves the right not to grant national treatment to aliens with respect to certain industries, trades and occupations.\textsuperscript{34}

The two treaties also differ considerably in their provisions on employment of nationals of a contracting party within the territory of the other. The Dominican treaty contains only a general basic provision,\textsuperscript{35} while the treaty with Greece regulates at length and in great detail various aspects of the question.\textsuperscript{36} Another interesting point on which the two treaties differ is the matter of exchange restrictions. The treaty with the Dominican Republic provides in some detail for the situations in which such restrictions may be imposed,\textsuperscript{37} while the Greek treaty does not even mention the subject.\textsuperscript{38} Both treaties contain certain other provisions, such as those relating to navigation, which are

\begin{itemize}
\item the term "expropriation" is understood to refer to any deprivation or limitation of a property right.
\item \textsuperscript{31} Greece, art. 5(4).
\item \textsuperscript{32} D.R. art. 7; Greece, art. 6.
\item \textsuperscript{33} D.R. art. 8; Greece, art. 7.
\item \textsuperscript{34} D.R. arts. 7(3), (4); Greece, art. 7(5), and Protocol, para. 11. The lists of industries and occupations in the two treaties are not identical.
\item \textsuperscript{35} D.R., art. 10.
\item \textsuperscript{36} Greece, arts. 7(2), (3) and 8; and Protocol, para. 9–14.
\item \textsuperscript{37} D.R., art. 15; cf. GUARANTEES 155–57.
\item \textsuperscript{38} Apart from the provision relating to repatriation of the compensation for expropriated property, already mentioned. Provisions relating to exchange restrictions may have been included in the Treaty for the Promotion and Protection of Investments, signed on March 27, 1961, which is not yet in force and whose text was not available to the writer. It is very probable that this treaty has followed the model of the similar treaty with Pakistan, discussed infra, which includes provisions on exchange restrictions.
\end{itemize}
of no special interest to the present discussion. Any dispute regarding
the interpretation or application of the treaties is to be submitted
to arbitration. The treaty with Greece provides in detail for the con-
stitution and operation of the arbitral tribunal but, unlike the
treaty with the Dominican Republic, it does not contain any provision
for the submission of the dispute to the International Court of Justice in
the case where such a tribunal is not constituted, nor for the constitu-
tion, at the request of either party, of a Mixed Commission to act as
conciliator in case of dispute.

As was stated at the very outset, it is not possible to draw any general
conclusions from the comparison of the two treaties. It cannot be said,
at this point, that the treaty with Greece, having been executed more
than three years subsequent to that with the Dominican Republic, is
necessarily indicative of the present approach of the German govern-
ment and that, therefore, future treaties with less developed countries
should be expected to be as detailed and to provide as extensive protec-
tion to foreign investors. The special conditions which obtain in the
case of the treaty with Greece may be sufficient to account for these
differences. Thus, the provisions on admission, residence, expulsion
and employment of aliens involve reciprocal advantages for the two
countries relating to the investment of capital, on the one side, and to
the emigration of available excess labor, on the other. As to the
provisions on the protection of foreign-owned property, they appear to
be somewhat more strict than those already included in the treaty of
friendship, commerce and navigation of 1951 between the United
States and Greece, but not basically different. In the absence of further
evidence, then, the comparison between the two treaties can only serve
to indicate that the Federal Republic of Germany is willing and able
to take full advantage of the flexibility of the FCN treaty as a means
for the protection of foreign investment.

In addition to its program of FCN treaties, the German government

39. Greece, art. 28.
40. It is true, however, that the treaty with the Dominican Republic provides
only for the constitution of an arbitral tribunal by the parties within three months
after receipt of the relevant request. It does not contain any details as to the pro-
cedure to be followed, and, therefore, it leaves open the possibility that one of the
parties will refuse to cooperate and thus make the constitution of the tribunal im-
possible. The Greek treaty provides more specifically for the appointment of one
arbiter by each party and an umpire by mutual agreement. It also provides that, if
one of the parties does not appoint its arbiter or no agreement is reached as to the
person of the umpire, the President (and, in some cases, the Vice-President or senior
member) of the International Court of Justice will appoint the missing arbiter or
umpire, as the case may be. The arbitral tribunal can thus be constituted even if one
of the parties refuses to cooperate.
41. D.R., arts. 23, 24; and see Guarantees 185.
42. It should also be pointed out that this is a treaty of establishment and not of
friendship, commerce and navigation as is the treaty with the Dominican Republic.
It does not appear, however, that the name of the treaty is of major importance,
and the United States, at least, employs these appellations interchangeably.
is actively engaged in promoting foreign investment in other ways. Together with the Swiss government, it is at the time of writing the only government that has shown at least some official interest in the adoption of a code for the protection of foreign investment. To that end, it has submitted to the Organization of European Economic Cooperation (now the Organization for Economic Cooperation and Development) a draft text which has been under consideration for the last three years. The German government has also inaugurated a program for insuring the investments of its nationals in underdeveloped countries against non-business risks. This program has been described in some detail elsewhere; the present discussion will deal only with certain international aspects of its operation.

The legislative provision establishing the program stated that such insurance would be available to German nationals and companies investing in countries which have concluded related agreements with the Federal Republic of Germany, countries whose legal order affords sufficient assurance as to the treatment of foreign investors, or countries which give such assurances by means of actions or instruments other than an international treaty. Most of the guarantees issued up to now cover investments in countries which have concluded no special agreement with the German Federal Republic. However, it appears that this is considered as a transitional stage of the program and that the creation of a network of special intergovernmental agreements is envisaged. A distinct type of instrument has already been developed, entitled “treaty for the promotion and protection of investments.” Eight such agreements with less developed countries have already been concluded.

The first treaty of this type, and the only one in force at the time of writing, was concluded with Pakistan. Subsequent agreements are said to follow its model. This agreement provides that the investments by nationals and companies of one party in the territory of the other shall not be subjected to discriminatory treatment by reason of their foreign ownership “unless legislation and rules and regulations framed thereunder existing at the time of coming into force of this Treaty provide otherwise.” Another clause provides that the investment and other business activities carried on by nationals of either party in the territory of the other will not be discriminated against “unless specific stipulations are made in the documents of admission of an invest-

43. See text accompanying note 91 infra.
44. See GUARANTEES 112-14; INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, MULTILATERAL INVESTMENT INSURANCE 28-29 (1962).
46. German Treaty For Promotion and Protection of Investments With Pakistan, (1959) art. 1(2) [hereinafter cited Pakistan].
ment." 47 In the Protocol attached to the treaty are listed certain types of measures which are to be considered discriminatory. The list is not exhaustive; it includes,

Restricting the purchase of raw or auxiliary materials, of power or fuel, or of means of production or operation of any kind, impeding the marketing of products within or outside the country, as well as any other measures not applied to the same extent either to persons residing within the country and to nationals of third states or to investments of such person.48

The agreement further provides for the "protection and security" to be enjoyed by investments and for the conditions under which property of the nationals of either party may be expropriated in the territory of the other. The relevant provision closely resembles the corresponding clause of the FCN treaty with Greece described above. It is further stated in the Protocol to the treaty that the term "expropriation" includes "acts of sovereign power which are tantamount to expropriation, as well as measures of nationalization." 49 The treaty provides also for the grant of national treatment to foreign investors with respect to compensation for any losses arising out of war or other armed conflict.50 The agreement in question contains strong provisions relating to the repatriation of the invested capital and its earnings. It is unequivocally stated in article 4 that, "Either Party shall in respect of all investments guarantee to nationals or companies of the other Party the transfer of the invested capital, of the returns therefrom and in the event of liquidation, the proceeds of such liquidation." Other articles regulate in detail the modalities of such transfer as well as the eventual subrogation of the signatory governments to the claims of their nationals.51 Both in the main text of the treaty 52 and in notes exchanged at the time of signing, it is expressly stated that the provisions of the treaty do not affect in any manner the promises of special or privileged treatment which have been granted in the past and may be granted in the future to specific investments by the host country's government. Detailed provision is made for the settlement of any related dispute by consultation between the parties or, if that is not successful, by arbitration.53

Two other provisions of the treaty for the promotion and protection

47. Pakistan, art. 2.
48. Protocol, para. 2. It is further provided that measures taken for reasons of public order, security, health or morality will not be deemed discriminatory.
49. Protocol, para. 3.
50. A similar provision is usually included in the agreements of the United States with underdeveloped countries which relate to the U.S. investment guaranty program. See Guarantees 106 n. 159.
51. Pakistan, arts. 5, 6.
52. Pakistan, art. 7.
53. Pakistan, art. 11; its text is almost identical with that of article 28 of the FCN treaty with Greece; see text accompanying note 39 supra.
of investments are worth noting. Its first article contains a general declaration of favorable consideration of capital investments by one party in the territory of the other. The parties undertake to “give sympathetic consideration to requests for the grant of necessary permissions.” It is further provided, at this point, that “in the case of Pakistan such permissions shall be given with due regard also to their published plans and policies.” By this unmistakable reference to the Pakistani government’s statements of industrial policy or of policies regarding foreign investment, these statements are in effect incorporated into the treaty by a process usually reserved to legislative enactments.

Secondly, the treaty under discussion will be applicable not only to new investments, but also to investments made before its entry into force, provided they were made before September 1, 1954. Such a provision extending the undertakings under the treaty to investments made even before the institution of the guarantee program is not to be found in the related agreements concluded by the United States in connection with the operation of its own investment insurance program.

The contents of this type of agreement add considerable significance to the conclusion during the past year of a relatively high number of similar agreements between the Federal Republic of Germany and less developed countries. They would seem to be a sufficient substitute for the FCN treaties as far as the provisions on expropriation and exchange restrictions are concerned, although certainly not with respect to matters of admission and residence of aliens, their engaging in business activities and the possible employment of personnel of foreign nationality. In fact, the Protocol to the treaty with Pakistan expressly declares the intention of the parties to enter into negotiations regarding the conclusion of a treaty of establishment which would deal with these and related matters. It is significant that within the past few years eight agreements on the promotion and protection of investments but only two FCN treaties were concluded with less developed countries. This may be construed as an indication that at least some of the underdeveloped countries are prepared to give binding assurances with respect to a limited number of subjects when a reasonably clear and certain quid pro quo (participation in the insurance program) is involved. The same countries may not be willing to grant broader assurances in the abstract, by means of an establishment treaty. The evolution of the German program in the next few years will show whether such a conclusion is justified.

III. Measures by Capital-Importing Countries

In the past few years, a great number of statutes relating to the regulation and encouragement of foreign investment have come into effect.

54. Pakistan, art. 9.
55. Protocol, para. 1. The provision includes a detailed list of subjects.
Many newly founded states have enacted such statutes within the first
two or three years of their independence. A recent list of investment
laws (including both laws directed specifically to foreign investment
and laws addressed to all investors, foreign and domestic) gives a total
of over fifty-five statutes or amendments of statutes of various forms
which have been enacted since 1950. This figure does not include about
ten statements of policy concerning investment which had been issued
during the same period. Of the fifty-five statutes, about fifteen were
enacted before 1955, twenty between 1955 and 1959, and another
twenty in the two-year period 1959–1960. No generalization can be
made as to regional distribution. Measures to encourage foreign invest-
ment are in force in more than twelve African states, in virtually all the
Latin American states and in about fourteen Asian and eight Middle
Eastern states. The increased incidence of such statutes is an obvious
fact of today's international scene.

As to the form of these measures, it should be noted that while a
number of states continue to favor official policy statements rather than
formal statutes, the latter are now more in use than had been the case. A
definite trend in favor of such statutes, which incorporate the bulk of the
governmental measures designed to promote foreign investment in the
country issuing them, is now evident. This may be due in part to
accidental factors; thus, statutes rather than policy statements are issued
by most of the newly independent countries where a civil law system
prevails (such as the former French territories in Africa or Asia).

However, such factors are by no means sufficient to account for the
trend. Foreign investors, too, seem to favor statutes. It has been re-
ported, for instance, that prospective United States investors considered
insufficient the earlier Thai methods of regulating foreign investment
by means of the 1954 act supplemented by subsequent official state-
ments and declarations. The investors' preference for a more formal
and comprehensive investment statute was apparently a leading cause
for the enactment of the Industrial Investment Promotion Act. In
Burma, as well, an investment statute, enacted in 1959, has replaced
the statements of policy which were used before.

It cannot, however, be asserted that the importance of statements
of policy is definitely on the decline. Such statements still form the basis
of the relevant regulations in a number of countries, most notably in
Ceylon, India and Pakistan. Indeed, Pakistan's policy statements were
formally referred to in the text of the 1959 treaty for the promotion and
protection of investments between Pakistan and the Federal Republic

56. Annex IV to The Promotion of the International Flow of Private Capital,
of date, since several states enacted legislation of this type during 1961 and 1962.
57. B.E. 2503 (1960). See U.S. DEP'T OF COMMERCER, FOREIGN COMMERCE WEEKLY,
of Germany. This would seem to place them on an equal footing with legislative acts.

The more recent investment statutes do not differ radically, in their form or their content, from the statutes issued in the early postwar years. A distinction may still be made between statutes addressed specifically to foreign investors and statutes designed to encourage private investment from all sources, foreign as well as domestic. The former are of somewhat more recent origin and generally contain assurances on the repatriation of earnings and capital in addition to any other provisions. The latter are more traditional in their approach; they provide mainly for exemptions from various taxes to be granted to certain categories of enterprises. This distinction, however, is now losing whatever limited importance it had in the past. The existing trend is in favor of more comprehensive instruments, and a typical formula for an investment statute may be said to be emerging. Few of the recent investment laws deal solely with the lifting of exchange restrictions. Most of them provide for exemptions from income tax, customs, duties and other kinds of taxes, as well as for assurances for the free transfer abroad of the earnings or capital of the enterprise involved. Such exemptions or assurances are to be accorded to approved investments only. Guarantees of non-expropriation and non-discrimination are also often included. Investment statutes invariably provide for the administrative procedure which has to be followed by the investors who desire to place their investment under the statute. Generally, investors have to file an application which is considered by the appropriate governmental agency. If the application is approved, an instrument of approval is generally issued which sets out in detail the assurances and guarantees given to the investor as well as the promises and representations made by the investor himself regarding the enterprise he intends to establish.

The practice of issuing instruments of approval of this type seems to have prevailed over all other methods of signifying the investment's approval. It has been noted elsewhere that some of the statutes refer to these instruments as "contracts" or otherwise emphasize their contractual character, while in other statutes the instruments in question are treated as simple administrative acts. This observation remains valid for the more recent statutes, as well. The Chilean Decree-Law No. 258 of 1960 provides that the instrument of approval "will be in the nature of a contract;" the Costa Rican Law of Industrial Protection and Development of September 3, 1959, also refers to the relevant

58. See text accompanying note 54, supra.
59. See GUARANTEES 192–209, where the question of the legal character of instruments of approval is also dealt with.
instruments as "contracts." The Investment Code of the Ivory Coast refers to "establishment conventions" which state and guarantee the conditions of the establishment and functioning of the enterprises benefiting from the exemptions under the code. On the other hand, the Guatemalan Industrial Development Law, Decree No. 1317 of October 29, 1959, provides only for the issuance of a "government resolution" setting out in detail the assurances given by and to the investor. The Industrial Investment Promotion Act of Thailand provides for the issuance of "promotion certificates," while the Moroccan investment law contains no provision at all concerning the issuance of instruments of approval. The investor benefits from the guarantees and assurances provided for in the statute by virtue of his registration or of specific decisions of an Investment Commission.

It was noted at the beginning of this article that information concerning, among other things, the measures taken by capital-importing countries to attract foreign investment is now increasingly becoming available in the United States. Translations of many, though not all, relevant statutes are now in print, though not yet in an up-to-date collection. Comments on particular statutes or on the related law of specific countries appear more and more frequently in the reviews, and bibliographies of such writings have already been compiled. There is less information with respect to the application of the investment laws themselves, its problems and the methods followed for their solution. Without such information, the legal studies as to the validity and role of investment statutes or instruments of approval can be nothing more than guesswork. On the other hand, the lack of such information does indicate, if not that no problems have ever arisen in this connection, at least that major cases of violations of promises given through investment laws and instruments of approval have not been common in the last few years. It is still important, however, to study some of the everyday problems that have arisen and the way in which they have been resolved.

61. Art. 36; WTIS, Part 1, No. 59-79, p. 5. The same term is used in the Production Development Law of February 7/8, 1957, of Panama, arts. 8, 17, 22 and 23; WTIS, Part 1, No. 58-74, pp. 3-5. It is interesting to note that art. 7(k) of this law requires that "foreign enterprises formed partly or totally with foreign capital," will have to "renounce all diplomatic claims" in order to become eligible for such contracts. This last provision is not common in investment statutes.


63. Art. 21; WTIS, Part 1, No. 60-13, p. 8.

64. Supra note 57, §§ 16, 17; WTIS, Part 1, No. 51-57.


66. Several of the more recent texts are printed in WTIS. For an earlier, but still the only, collection of texts, now in part out of date, see BAADE, GESETZGEBUNG ZUR FÖRDERUNG AUSLÄNDISCHER KAPITALANLAGEN (1957).
As an illustration of the spirit in which at least some of the capital-importing countries understand their obligations under the statutes for the encouragement of foreign investment, we may here examine a series of cases decided by the Greek Council of State. This is the highest administrative tribunal of the Kingdom of Greece; it is fully judicial in character, and its function and operation correspond largely to (they are in fact modeled on) those of the French Conseil d'État. It has the power to annul any act of the executive which exceeds the authority granted to the particular executive organ involved or which is issued in breach of a statutory provision. The cases here discussed deal with requests for the annulment of administrative acts relating to the application of instruments of approval issued under the Greek investment law. The law in question has a peculiar constitutional position, by virtue of which it can only be amended by way of a constitutional amendment, the procedure for which is much stricter and more difficult than that for the amendment of an ordinary statute. Its constitutional position was not, however, involved in the cases at hand.

This is not the place for an extensive summary of the Greek investment statute, descriptions of which are already available. Only some of its features will be noted—those indispensable for the comprehension of the cases relating to it. The statute in question provides for the grant of certain assurances, relating chiefly to taxation, exchange control and non-expropriation, to approved foreign investments. Prospective investors are required to file an application with the competent authorities. If it is approved, a special instrument of approval is issued setting out in detail the obligations undertaken by the investor and the assurances and guarantees granted to him by the government. The instrument is in the form of a Royal Decree or of a joint decision of three ministers, depending on the importance of the investment. The statute provides expressly that this instrument shall be the government's guarantee to the investor and that it "shall be irrevocable with respect to the terms and conditions under which it is granted in each case." Modification of such terms is allowed only with the foreign investor's consent. The statute applies to long-term investments when

67. Legislative Decree 2687 of October 22/November 10, 1953, re: Investment and Protection of Foreign Capital. The text is printed in 7 REVUE HELLENIQUE DE DROIT INTERNATIONAL 251 (1954) and in WTIS, Part 1, No. 55-64.

68. Article 112 of the Greek Constitution of 1952 provides that "a law to be issued once and for all shall provide for the protection of funds imported from abroad for investment in the country." L.D. 2687/1953 was issued in implementation of this provision and cannot now be amended without the prior amendment of the constitutional provision.

69. For summaries of its content, see: Lambadarios, Protection accordée par le décret 2687/1953 aux investissements à longue échéance de capitaux venant de l'étranger, 7 REVUE HELLENIQUE DE DROIT INTERNATIONAL 219 (1954); Lambadarios, Greece, in LEGAL ASPECTS OF FOREIGN INVESTMENT 232, 244-47 (Friedmann and Pugh ed., 1959).
qualified as "productive investments" by the appropriate government authorities and, by virtue of special provisions, to ships rated at over 1,500 gross tons. The registration of such ships under the Greek flag is the equivalent of the importation of their value in foreign capital.

In an important early decision, the Council of State held that the provisions of the investment law concerning the issuance of instruments of approval override earlier statutes requiring certain permits for the establishment of industrial enterprises. The court pointed out that the minister competent for the issuance of such permits participates in the decision approving the importation of foreign capital. It stated further that the criteria laid down by the investment law for the approval of proposed investments are different and much broader than those provided for in the legislation on the establishment of industrial enterprises. The discretionary power of the ministers issuing the instrument of approval is correspondingly more extensive. In substance, the only requirement laid down by the law is that the investment should be productive and should contribute to the economic advancement of the country. The Council of State can, therefore, review their decision only in the extreme case where it is objectively clear that the investment is non-productive.

Other cases before the Council of State related to instruments of approval containing the terms and conditions under which certain ships were registered under the Greek flag. Their owners appear to have been of Greek nationality, but this does not affect in any way the application of the statute by the court since the protection of the statute extends to capital imported from abroad, regardless of the investors' nationality. In all instances, the Council of State upheld the binding character of the instruments of approval, striking down any subsequent administrative acts inconsistent with the assurances contained in the instruments. The court has insisted that, in view of the broad discretionary power which the statute gives to the competent ministers, strict compliance with the statutory provisions is indicated, both in the original instruments of approval and in any subsequent administrative act.

Three of the cases arose over administrative acts relating to a single ship, registered under the Greek flag in 1959. One of the clauses of the

70. The statute also contains special provisions concerning short-term investments of foreign capital.
71. Greek Investment Statute, art. 13.
73. "In order to be protected, the capital to be invested in the country must be imported from abroad; according to both the constitutional language and the provisions of the statute, the source from which they originate is irrelevant; they may belong either to Greek subjects or to aliens, to residents of Greece or to persons residing abroad." Ibid.
original instrument of approval provided that the ship was not to carry passengers or freight between Greek ports. Another clause provided for a possible exception to this prohibition: the ship was to be allowed to carry passengers and freight between two or more Greek ports in cases of imperious traffic needs. It was provided that the existence of such needs was to be determined and the permission granted or refused, as the case may be, by a decision of the Minister of Merchant Marine. Such a decision was issued a few months later, and the ship in question was allowed to carry passengers and freight between certain Greek ports. This decision was attacked before the Council of State by the competing shipowning companies. The court held that, in view of the express provision of the statute as to the ways to which instruments of approval may be issued or amended (i.e., by Royal Decree or by joint decision of three ministers), the three ministers could not delegate their power to amend or regulate the application of the instrument of approval to a single minister. The decisions of the Minister of Merchant Marine were therefore annulled. After this decision, the shipowner involved petitioned the three competent ministers, requesting that they issue a decision on the matter. It appears that a decision permitting the ship to carry passengers between Greek ports was prepared and signed by two of the ministers, but the third delayed his signature for a considerable time. The shipowner concerned then applied to the Council of State for a declaration that the minister's omission to sign was illegal and a violation of a duty imposed by the statute. The court upheld the petitioner's request, holding that the minister should either sign the decision or issue, together with the other two ministers, a reasoned joint decision rejecting the application. Instead of such a decision, the three ministers issued a joint decision amending the related provisions of the instrument of approval. The shipowner again petitioned the court for annulment of the amending act. In its judgment, the Council of State pointed out that such an amendment constituted a modification of the terms and conditions under which the ship was registered under the Greek flag and was admitted as foreign capital investment. According to the express provision of the statute, such a modification was possible only with the investor's consent. In the absence of such consent, the amending administrative act was annulled. The irrevocable character of the instrument of approval was also

74. Judgment 217/1960. The court had already rendered a decision to the same effect in a previous case, involving similar facts: Judgment 880/1959. In subsequent judgments, the court stated that, in view of the illegality of the delegation of authority to a single minister, the permission to carry passengers and freight between Greek ports should be granted or refused by joint decision of the three ministers who had issued the original instrument of approval.
stressed in another decision of the Council of State relating to an application by a shipowning company for the annulment of one of the provisions of the instrument approving the registration of its ship under the Greek flag. The provision involved was again one precluding the routing of the ship in a particular line. The judgment of the court 77 dealt in some detail with the character of the instrument of approval. It pointed out that in view of the privileged status of the foreign capital imported under the statute, it could not be said that the instrument of approval concerning a specific investment was mandatory in character, imposing upon the investor the obligation to import his capital. Instead, it gave him an option to do so and thereby bring himself within the provisions of the statute and of the instrument of approval, or not to do so and thus avoid both the advantages and the obligations of these provisions. Since the petitioner, in full knowledge of the content of the instrument of approval, went ahead and registered its ship in accordance with the statute, thus freely accepting the provisions of the instrument of approval, it could not now be heard to attack the whole or part of the instrument. The request was accordingly rejected.

It is interesting to note that in none of these decisions does the court refer in express terms to the partly contractual character of the instrument of approval. It did not have to, of course, since it could reach the same result by applying the express provisions of the statute without more. All the relevant cases have related to acts of the executive and not of the legislature. In view of the constitutional character of the investment statute, however, it appears certain that any attempt of the legislature to amend the statute in violation of the express constitutional provision would be met with a declaration of the amendment's unconstitutionality by either the administrative or the regular courts.

IV. LATEST EFFORTS FOR AN INVESTMENT CODE

In the past few years, increased efforts have been made toward the creation of a multilateral system of protection of private foreign investments. They have taken three main directions, which are distinct even though related not only in their overall aims but also, possibly, in their implementation. First, the efforts for the adoption of a multilateral convention embodying a code of rules for the fair treatment of foreign investors have continued, the related suggestions being rather less numerous than in the immediately preceding years, but being considered on a more official level. Second, and in part, in connection with the code proposals, the possibility of instituting a multilateral system of investment insurance has received extensive study.

Third, detailed suggestions have been made with respect to the creation of an international claims tribunal or of a system of arbitral tribunals to deal with investment disputes. The practical value of all these proposals remains to be seen. However, the related discussions are useful for they tend increasingly to bring into the open the problems and salient issues of foreign investment. It is now becoming increasingly probable, though still by no means certain, that some multilateral action will be taken in this field, probably one going in the third of the directions mentioned above, namely, the creation of a judicial or semi-judicial procedure for the settlement of disputes between foreign investors and the governments of the countries of investment. Solutions must be found for a great number of problems, however, before any really effective action is undertaken.

Support for a multilateral convention for the protection of foreign investments has recently been reiterated by some private bodies which had supported the idea in the past. Thus, the International Chamber of Commerce, in a preliminary statement of views on multilateral investment insurance, expressed the opinion that such a system of insurance should be combined with a code containing the basic "broad principles governing international investment" which the parties participating in the insurance scheme should undertake to observe. It is interesting to note that the combination of the code and insurance schemes was supported by about 60 percent of the businessmen who answered a related questionnaire prepared jointly by the World Bank and the International Chamber of Commerce. About one-third of the respondents to the questionnaire gave a negative answer on the point.

In its statement, the International Chamber of Commerce did not specify the principles to which it was referring; it only stressed the need for study of the related problems and for the inclusion, in addition to any substantive rules, of some provision in any such code for the settlement of disputes by arbitration. Nor did it express any preference with respect to the form that the code should take, apart from pointing out that some of its members favored the conclusion of a convention, separate and distinct from the instrument establishing a multilateral investment insurance scheme, while others favored the incorporation of the principles in question into the basic agreement instituting the insurance scheme.

A recent statement of the International Association for the Promo-
tion and Protection of Private Foreign Investment (APPI) also gave strong support to the idea of an international investment code. The Association stressed unequivocally the direct causal relation which according to it exists between the lack of security of investments and the relative lag in the flow of private foreign capital to the underdeveloped areas. With reference to the need for the establishment of confidence in the security of investments, it stated: “It is because these conditions have been absent, and due to unfavourable political trends and other non-commercial risks encountered, that private capital has not moved sufficiently to those areas where it is most needed. . . .” The Association further expressed its conviction that confidence in the security of private foreign investments “would be most effectively promoted by the conclusion of a multilateral convention embodying on a basis of strict reciprocity generally accepted principles of conduct towards foreign property.” These principles were listed as being the right to just and non-discriminatory treatment, “the observance of contractual agreements entered into and of assurances made by States,” that expropriations should be carried out in accordance with due process of law, in the absence of contrary agreements or assurances, and with the prompt payment of effective and full compensation, and that any disputes relating to these principles should be resolved by arbitration or by an international tribunal.

The matter of a multilateral investment code was also considered recently by the Consultative Assembly of the Council of Europe. This body had dealt with these problems in the past and had recommended the initiation of discussions with a view to the conclusion of a convention between European and African states embodying an investment statute and establishing an investment guarantee fund. The Assembly’s recommendations were not acted upon by the Council of Ministers, which is the executive organ of the Council of Europe. In January 1962, a motion for a recommendation was tabled in the Consultative Assembly; the matter was then studied by the Assembly’s Legal Committee which issued a report containing the text of a draft recommendation and an explanatory memorandum by the Committee’s rapporteur. The memorandum, as well as the draft recommendation (which was later adopted by the Assembly with a few amendments), dealt not only with the proposals for an investment code, but


also with those relating to a multilateral investment guarantee fund and to the establishment of a system for the arbitration of investment disputes. The memorandum examined in some detail the existing means and programs for the promotion of foreign investment (bilateral treaties, investment guarantees and investment laws) as well as the various proposals for multilateral action. It then went on to suggest that a solution to the problem of investment protection should be sought by pursuing concurrently all three approaches: code, guarantee and compulsory arbitration. In his discussion of the problems of an investment code, the rapporteur showed himself to be fully aware of the difficulties involved; he pointed out, among other things, that while there may be some agreement on certain general principles regarding the treatment of foreign property, difficulties were bound to arise whenever these principles were to be applied to particular cases. He stated, however, that the establishment of a compulsory arbitration system would eliminate this difficulty. The precise conclusions of the memorandum on the question of an investment code are somewhat unclear. The memorandum quotes at length, with apparent approval, the detailed provisions on the taking of property of the most recent Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens. It further agrees with the view that an investment code should include provisions stating the rights—not only the obligations—of host countries. The Organization for Economic Cooperation and Development (OECD) Draft Convention is then summarized, without any extensive discussion of its contents. But the draft recommendation, which was later adopted by the Consultative Assembly, states unequivocally and without qualifications that,

the member Governments should actively support the work of OECD for the preparation and conclusion of an international convention for re-affirming the general rules of international law for the protection of foreign property and should seek to obtain the adherence to such a convention by both capital-supplying and capital-receiving states.

An interesting comment on the Legal Committee's report was offered by the Consultative Assembly's Economic Committee. This Committee expressed its support for a "regional" approach which would involve the creation of several separate systems, grouping "countries with common interests." The explanatory memorandum of the rapporteur of the Economic Committee expressed a rather negative attitude concerning the advisability or possibility of concluding a multilateral convention embodying rules of good conduct toward foreign investors, either in conjunction with a multilateral investment guaran-

88. Supra note 85.
tee scheme, or by itself. Nonetheless, the Economic Committee also supported the Legal Committee's recommendation to the member states.90

The most important of the recent efforts in support of a multilateral investment code—important both because of its official character and because of the concrete form it has taken—is the Draft Convention on the Protection of Foreign Property prepared under the auspices of the OECD. The initial proposal on the matter had come from the German and Swiss governments who had suggested to the European Payments Union that it examine the feasibility of such a convention and had submitted two draft texts.91 The matter was taken up by the Organization for European Economic Cooperation, the OECD's predecessor, late in 1957. Since that time, both the staff of the OECD and delegates from some of the member countries (chiefly, the Western European ones) have worked on the preparation of a final text. At the time of writing, this text had been prepared, though not made public. It was to be discussed at the fall session of the OECD's Council, and some action was expected to be taken.

The OECD Draft Convention appears to limit itself to the principles found in the recent APPI statement summarized above. The parties undertake not to discriminate against foreign investors, to abide by their agreements with or assurances to them, and to take expropriatory measures only in accordance with the "traditional" legal rules on the matter: in the public interest, without discrimination, and with full, prompt and effective compensation. These provisions do not appear to be qualified or limited in any manner, except by a general clause permitting temporary measures in derogation of the convention in cases of grave public emergency or in accordance with United Nations decisions and recommendations. While provisions concerning exchange control and restrictions were the core of the Swiss government's draft,92 the final text of the convention is reported to contain only a vague recommendation stating the desirability of freedom of transfer of the earnings from foreign investments and of the principal in case of liquidation of the enterprise. However, no specific undertaking is included. Neither are any specific undertakings included with regard to the absence of restrictions on the economic activities of aliens, whether on the acquisition of property, the establishment of enterprises or the employment of personnel of foreign nationality. The convention's only other major provision relates to the procedure to be followed in case of dispute as to the interpretation or application of

90. The parts of the reports and recommendation relating to the investment guarantee fund and to the establishment of an arbitration system are discussed infra.
91. Guarantees 78, 80–83.
92. Guarantees 78, 154.
the convention. This provision will be discussed again at a later point; for present purposes, we may note that such procedure would be open to private parties only by virtue of an optional (and revocable) declaration to that effect by each state party to the convention. The present proposals seem to envisage a convention which would be signed first by the member states of the OECD, but would be open to all other states.

It is difficult to assess the value of the proposed convention on the basis of the limited information available and in the absence of any final decision by the competent organs of the Organization. Only certain general observations, relating to this type of convention rather than to the particular draft itself, may be made.

When one compares the ground covered by the OECD Draft Convention with that covered by the other texts proposed in the past fourteen years commencing with the International Chamber of Commerce's Code of Fair Treatment for Foreign Investors, one is struck by the progressive limitation of the matters with which the convention is dealing. Apart from the question of settlement of disputes, the OECD Draft Convention is concerned with virtually a single aspect of the whole problem of the security of foreign investments: the taking of property, or cancellation of contracts, by measures amounting to expropriation, whether formally presented as such or not. The same trend toward elimination of "non-essentials" is apparent in the text of the provisions which now tend to state general rules with almost no qualifications or exceptions. These limitations on the proposed codes' subject matter are not, of course, accidental. They stem from a conviction that the inclusion of additional matters or details would tend to increase the difficulty of the adoption of the convention by a considerable number of states and would ultimately undermine its effectiveness.93 The validity of this point of view, however, is open to question, even if it is assumed that the feasibility and desirability of an investment code have been proved.94

It is not clear whether the proposed code is to be a restatement of existing international law rules or a statement of new, or partly new, principles designed to provide security to foreign investors.95 If it were to be the former, it may be argued that the inclusion of provisions on matters not settled by the already existing rules is not indicated. It is

93. See, e.g., Brandon, Recent Measures to Improve the International Investment Climate, 9 J. PUB. L. 125, 128 (1960); Brandon, Survey of Current Approaches to the Problem, in THE ENCOURAGEMENT AND PROTECTION OF INVESTMENT IN DEVELOPING COUNTRIES 1, 11 (1962); Lauterpacht, The Drafting of Treaties for the Protection of Investment, id. 18, 26–27.

94. It is submitted that they have not; for some related arguments, see GUARANTEES 87–92; Proehl, Private Investments Abroad, 9 J. PUB. L. 962 (1960).

obvious, however, that the need for a code arises precisely because the international law rules on the matter are not certain, so that any difference would be one of degree. Furthermore, it does not seem that the proposed codes limit themselves to statements of rules which can be considered as generally accepted. Thus, with respect to contractual undertakings, they seem to be going much further than any customary rule on the matter.96

Furthermore, it may be questioned whether a code limited to the statement of general rules concerning expropriation or cancellation of state contracts would really be an effective instrument for the protection of foreign investors. Assuming that such a convention is formally adopted by a considerable number of states, capital-importing as well as capital-exporting, is it to be expected that its existence will affect the incidence of expropriations or other similar measures? The convention will probably constitute a deterrent with respect to takings which are not related to radical changes in the host country's economic or political structure, takings which are manifestations of domestic political difficulties or impatient acts of governments too hasty to undertake long negotiations. However, the majority of takings of foreign property in the last fifty years have not been of this type. They have been closely connected with radical changes in a country's political regime or economic system; they have followed the achievement of national independence, the overthrow of a feudal or dictatorial regime, or the establishment of a communist regime. Would the existence of an investment convention have made an important difference in any of these cases? It seems more probable that specific diplomatic action by the states concerned, whether or not in concert, is a far more effective means for influencing the policies of new regimes. Such action can combine negative and positive elements by threatening economic or other sanctions and at the same time offering economic assistance; an investment code only confronts the government of the host country with an abstract negative rule.

These considerations would not apply with the same force to a convention including provisions on matters of exchange control, freedom of aliens to engage in economic activities, or employment of foreign personnel. The related measures are, in a sense, commonplace; they are not necessarily related to a radical change of economic structure (although, of course, they may be on occasion) and when taken individually, are generally not of a very high order of importance to the country concerned (although again they may be on occasion). Such measures can seriously affect the interests of foreign investors; they may cause serious detriment to them and serve to discourage investments in less developed countries. Moreover, from the viewpoint of public

96. See Lauterpacht, supra note 93, at 29.
international law, these matters fall unquestionably within the traditional field of domestic jurisdiction of a state. In the absence of special circumstances, therefore, a state is free to act in any way it sees fit. The foreign investor must submit to such measures with little possibility of seeking redress through the diplomatic intervention of his state of nationality. It would seem then, that with respect to such matters international regulation through a bilateral or multilateral convention would be useful, even though the conclusion of such a treaty is bound to be a difficult undertaking. In fact, it has been argued elsewhere that the provisions of the United States FCN treaties on these matters are far more useful and effective than those dealing with protection of property from expropriation. On these grounds, therefore, it is submitted that the limitation of the draft convention's subject matter serves to limit significantly the protection that it may offer to foreign investors. Moreover, it may well be argued that in their present form the proposed texts deal only with matters which are well established in the legal order of the developed countries, so that the existence or absence of a treaty commitment really makes no difference. Most commitments which might impose some obligation on, or limit to some extent, the freedom of action of the governments of such countries are avoided. The proposed texts would contain no commitments on exchange restriction with respect to which the developed countries prefer to keep their freedom of action (their interests—or prejudices—in this instance coinciding with those of the less developed nations). Nor would there be any provision on admission or employment of aliens which might conflict with established immigration or other policies.

Another limitation upon the effectiveness of a convention consisting of general rules regarding non-discrimination, expropriation and cancellation of contracts lies in the very generality of the rules and the lack of any delimitation of their application. It is evident that "prompt and effective compensation" cannot mean simply and in all cases cash payment in United States dollars. It is submitted that the effectiveness of a convention would be increased if the relevant provisions were more detailed and if it were clearly established under what conditions payment by instalments or by earmarking certain foreign currency receipts would be acceptable. It would help, too, if the rule that a state should respect its undertakings toward aliens were stated in detailed, precise and adequately qualified terms, making clear under what conditions it is applicable, under what conditions an undertaking might be varied and the possible effects of such action. Even more, a general prohibition of discriminatory treatment would have greater efficacy if it were followed by some explanatory provisions

and possibly an illustrative list of such measures. It is always difficult to decide how much detail should be included in a text such as this; surely, the excessive detail of a municipal statute should be avoided. But going to the other extreme results in a text which either is as rigid and incapable of adjustment to concrete necessities as it appears to be at first glance, or which will have to be broadly and freely construed when applied. In the latter case, however, the lack of certainty which was supposed to be eliminated would in fact persist.

Details and qualifications of the sort just mentioned would serve not only to clarify the meaning of the provisions of the convention, but also to help remove the suspicions of the governments of underdeveloped countries who would be confronted otherwise with a text stating their obligations without mentioning their rights or even the exact limits of these obligations. This defect is common to most of the proposed investment codes, although it is in no way a necessary feature of such instruments. It is difficult to understand why an investment code should not contain certain provisions stating the powers of the host country with respect to the regulation of foreign investment and the corresponding obligations of the foreign investors and perhaps of their country of nationality as well. It is true that to state the obligation of private persons (the investors) in an international instrument might not impose these obligations on them automatically (even though this is by no means certain). However, it would be easy to incorporate these terms in the particular instruments which may be concluded between governments and foreign investors. Even in the absence of such instruments, it seems more satisfactory to have each particular rule articulated in detail so that, for instance, the obligation of the state to respect its commitments is followed by a provision imposing on the investor in certain circumstances the duty to conduct negotiations (in accordance with certain procedures which would have to be laid down).

It remains to be seen whether a considerable number of states will ever agree on principle to adopt an investment code and, once such agreement is reached, whether they will accept a specific text. The OECD Draft Convention was prepared, it is true, at a more official level than any of the other drafts, but it has yet to achieve full acceptance, in principle and in detail, from all the member states of the OECD. The attitude of the United States government toward all efforts for the conclusion of a multilateral convention-code has been openly negative. This attitude is to be attributed in part to a traditional preference for pragmatic solutions of concrete problems as they arise, rather than for a priori statements of general rules. It is also due to a belief in the ultimate futility of efforts to achieve a consensus of opinion.

98. Such a list was included in the recent treaty between Pakistan and the Federal Republic of Germany; see text accompanying note 48, supra.
on matters relating to property and the treatment of aliens and a consequent apprehension that the inauguration of official discussions on such matters might lead to increased rigidity in the attitudes of other countries on such matters. There is no indication that the attitude of the United States on the matter, which seems to be shared by some other countries, such as Canada, has in any way changed. Despite the increased vitality and importance of the Western European countries today, it seems improbable that they would proceed to formally adopt a convention such as the one proposed by the OECD in the knowledge that the United States is not going to participate. It would appear, therefore, that in spite of the undeniable advance of the code idea in recent years, its general adoption is still uncertain.

V. Multilateral Investment Insurance

During the past year, much attention has been devoted to the possibility of the institution of a multilateral investment guarantee program. Suggestions to this effect had been made in the past by several agencies and individuals, but the idea came forcefully to public attention after the initiation last year of a study by the World Bank. The request for the study (which the Bank was already considering making) came from the Development Assistance Group (now the Development Assistance Committee) of the OECD in 1961. The World Bank agreed to undertake the study, and a staff report dealing with the problems of multilateral investment insurance was published in March, 1962. In it, the Bank expresses no opinion or preference concerning the creation or the form of such a program. The report carefully and impartially examines the pros and cons of each particular aspect of the problem, leaving it to the reader to draw his own conclusions.

Since the publication of the Bank’s report, two other documents issued by international bodies have dealt with the same subject and commented on the Bank report. In May, a committee of the International Chamber of Commerce issued a preliminary statement of views on the matter. The Consultative Assembly of the Council of Europe also considered the matter, and its Legal and Economic Committees

102. Supra note 78.
have issued reports discussing some of the related problems.\textsuperscript{103} Up to the time of writing, however, the OECD, whose Development Assistance Group had requested the report, has made no official comment.

The World Bank report is based on a study of the three national investment guarantee programs now in operation, the various proposals for a multilateral program, and the answers to a questionnaire prepared jointly by the World Bank and the International Chamber of Commerce and sent, through the latter's National Committees, to firms and business associations in both capital-importing and capital-exporting countries. However, a relatively small number of firms and associations sent back replies to the questionnaire, so that its results cannot be considered as necessarily expressing the views of the majority of businessmen.\textsuperscript{104}

The report examines first the incentive effect of investment insurance. It points out that the effect varies with the kind of investment involved: a firm which depends largely on availability of raw materials will have to invest abroad, whether insurance is available or not. This may not be true of a manufacturing concern which does not have to start operations abroad. The fact that an increasing number of firms are taking advantage of the existing national guarantee programs is in itself not sufficient to prove that these firms would not have invested if insurance was not available. Successive surveys of investor opinion have failed to show that a large number of investments would not have been made if insurance had not been available.\textsuperscript{105} An indication to the same effect can be drawn from the answers to the Bank's questionnaire, although the numbers involved are too small to permit any definite conclusions.\textsuperscript{106} The report points out further that the operation of a guarantee program may influence the direction of foreign investment away from the countries which do not participate in it, but without any increase in the overall total of foreign investment. Moreover, the availability of investment insurance may work to the advantage of countries pursuing inflationary policies. The investor would be able to derive high profits as a consequence of such policies without at the same time risking his initial investment, whose security or repatriation he has insured. The discussion in the report ends on a note of uncertainty: "That some further investment would be stimulated is surely likely; it cannot be said with assurance whether the volume would justify the undertaking."\textsuperscript{107} And further, "the soundness of the conclusion that an improvement in the investment climate..."
would follow [the institution of an investment insurance program] can be tested only pragmatically; it is not presently capable of demonstration." 108

In its comment on the World Bank report, the Commission on Foreign Investments and Economic Development of the International Chamber of Commerce (ICC) deals at some length with this aspect of the problem. It recognizes that "this is not a question upon which any factual evidence can be produced conclusively pointing one way or the other," but goes on to express its feeling "that a more positive reply can be given." 109 According to the Commission, the replies to the questionnaire show that "political risks," in a broad sense, "constitute if not the major, at any rate a major, obstacle to investment in the developing areas. Any method of protecting the investor effectively against such risks, including the method of insurance, must therefore have a substantial effect on the international movement of private capital." 110 As to the possibility that an insurance scheme might divert investments toward unstable but profitable economies, the Commission states that it "does not believe it to be in the least likely that reputable business firms would deliberately risk their properties" in such a manner, and it observes that apart from the availability of insurance, other factors are taken into account by the investing firms.111

The ICC comment also refers to the possibility that the insurance fund may be able to limit its commitments in such situations; however, this would in practice raise a number of problems which the World Bank report mentions with some apprehension.112

The ICC Commission's statement further supports the creation of a multilateral insurance program because of the need for establishing a broad system of cooperation between private investors and governments, of which the insurance program would be a "central element," and which would help in bringing about "the climate of confidence and understanding between developed and developing countries which is a sine qua non condition of peaceful progress." 113

The report of the Legal Committee of the Council of Europe Consultative Assembly did not deal with this aspect of the problem, apart from quoting a related statement from the World Bank's report.114 The Assembly's Economic Committee, however, examined the question further. The rapporteur noted the Bank's "pessimistic conclusion" but he disputed its validity in the case of a guarantee fund operating

108. Ibid. 6; and cf. Broches, supra note 101, at 85-86.
109. Supra note 78, para. 6-7.
110. Supra note 78, para. 7.
111. Ibid.
112. See IBRD Rep. 18-19.
113. Supra note 78, para. 8.
114. Cons. Ass. Doc. 1419 (rev.), May 29, 1962, para. 46(a) and appendix.
in the context of the "regional approach" which his report advocates.\textsuperscript{115} He, too, found the plan's justification resting on broader considerations:

Thus it is the problem as a whole which must be considered when judging the stimulating effect upon private investment and not its isolated elements no matter what their intrinsic value, because each member benefits from the effect of there being other members, and all contribute to the creation and improvement of a favourable climate for private investments.\textsuperscript{116}

The second main part of the World Bank's report deals with some of the specific problems of a multilateral investment insurance program. It discusses in detail the questions relating to the scope of protection—what risks are to be covered by the insurance scheme.\textsuperscript{117} It points out that different considerations apply to each of the three main risks covered today by the existing national guarantee programs. In the case of insurance against war or insurrection, the guarantee relates to action which does not depend (or depends to a very minor extent) on the host government's attitude or measures. In the case of convertibility insurance, some action by the host government is involved, but its taking would depend in the majority of cases on the general condition of the economy and of the country's foreign exchange resources; the action itself would, in most cases, be directed against all transfers and not only those of foreign investors. In the case of expropriation, on the other hand, the guarantee covers governmental action which is likely to be directed either against the investor himself or against foreign investors as a class. The role of investment insurance will, therefore, vary in accordance with the risk involved. With regard to the expropriation guarantee, insurance plays not only a compensatory function, but also a deterrent one: its existence may affect the host government's decision whether or not to expropriate the foreign investor's property. With regard to the convertibility guarantee, such deterrent function is almost non-existent, and it is certainly absent in the case of the war-risk guarantee.\textsuperscript{118}

Serious problems arise with respect to the scope of the guarantee against expropriation—the "political risk" in the World Bank's terms. Such a guarantee may conceivably cover a wide variety of governmental action which would result in the taking of the investor's property or the deprivation of substantial expected benefits. Discriminatory action would probably have to be covered, but disputes may well arise

\textsuperscript{115} See text accompanying notes 89–90 supra.
\textsuperscript{117} IBRD Rep. 7–13.
\textsuperscript{118} On the deterrent function of guarantees, see the observations in von Neumann Whitman, The United States Investment Guaranty Program and Private Foreign Investment 18–19 (Princeton Studies in International Finance, 1959).
as to what constitutes discrimination in a given situation. Too broad a definition of the risk would result in a high potential of successful claims and may also raise objections on the part of the capital-importing countries as involving a limitation of their freedom of action in domestic economic affairs. The existing national guarantee programs have resolved this problem in different ways. Under the United States program, the scope of the protection is defined neither in the international agreements instituting the program, nor in the basic legislative instruments to which such agreements refer. The only operative definition of "expropriation" is included in the contract between the insuring agency (now the AID) and the investor and, of course, is binding only as between the two parties.\footnote{119} In a multilateral insurance program, however, a definition would have to be agreed upon by all participating countries. Under the German investment guarantee program, definitions of the actions against which insurance is available are included in the text of the related intergovernmental agreements.\footnote{120} Such a method seems more appropriate to a multilateral program, although it is uncertain whether the participating countries can reach an agreement on the subject.

The preliminary statement of the International Chamber of Commerce deals briefly with these problems; it insists on the need for a guarantee covering all indirect methods of taking ("creeping expropriation"). As to the scope of protection of the other guarantees, it agrees with the World Bank report that currency devaluation should be excluded from the transfer guarantee, and natural calamities from the guarantee against war, insurrection and other man-made calamities.\footnote{121} Similar, though not as clear, views are found in the report of the Legal Committee of the Council of Europe's Consultative Assembly.\footnote{122} The relevant paragraphs are chiefly devoted to summaries of the main proposals on the matter; it is not clear whether the rapporteur favors the inclusion of currency devaluation under the transfer risk. The detailed earlier report of the Assembly's Economic Committee\footnote{123} had excluded both currency devaluation and natural calamities from the risks the guarantee fund would cover.

The World Bank report also examines the possibility of substituting a single new risk for all those covered by the existing national programs.\footnote{124} One of the proposals studied by the Bank had suggested that investors should be insured only against the failure of the host govern-

\footnotesize{\begin{itemize}
\item[119.] GUARANTEES 108-11.
\item[120.] See text accompanying notes 48, 49 and 51 supra.
\item[121.] Supra note 78, para. 20-22.
\item[122.] CONS. Ass. Doc. 1419 (rev.), May 23, 1962, para. 36-46.
\item[123.] Report on an Investment Statute and a Guarantee Fund against Political Risks, CONS. Ass. Doc. 1027, Sept. 8, 1959, pp. 24-27. The then proposed fund would include only European and African states; see GUARANTEES 115-16.
\item[124.] IBRD REP. 10-12.
\end{itemize}}
ment to arbitrate a dispute with the particular investor or to abide by the award of an arbitration tribunal. In this manner, no problems of general definitions of the risks would arise nor any dispute as to the interpretation of such definitions; each case could be dealt with on its merits by the arbitral tribunal. The only prerequisite would be that the countries participating in the insurance program bind themselves to submit disputes with private investors to arbitration. On the other hand, such a system would involve delays and uncertainties which would probably be absent if the risks were determined more specifically. And, of course, the difficulty remains that governments, up to now, have shown no eagerness to submit investment disputes to arbitration. If, however, this basic difficulty is eliminated and there is some progress toward a system of arbitration and conciliation of investment disputes, it may be necessary to reconsider the feasibility of a guarantee program along these lines. If some of the delays and uncertainties that it entails were eliminated or diminished, it might become more acceptable to prospective foreign investors.

Almost all of the related proposals, as well as at least two of the three national guarantee programs in operation, provide for insuring only new investments. The World Bank report examines the arguments for and against this practice, and it concludes that, aside from any theoretical argument, "a program whose benefits extended to existing investments would call for capital commitments of such magnitude as probably to be impracticable." The ICC's preliminary statement fully accepts the validity of this argument. While expressing regret that not all investments, old and new alike, can be insured, it finds that the inclusion of existing investments would be "totally impracticable" and would result in an "unbearable" burden of liability for the insuring body. In discussing the problems of the eligibility of investments, the Legal Committee of the Consultative Assembly of the Council of Europe suggested that the governing body of the proposed guarantee fund should be given some discretion to decide whether a particular investment should be guaranteed. To this end, certain general criteria should be laid down. The opposite course of action is strongly supported in the World Bank's report, according to which it is highly desirable that the issuance of insurance be made "as automatic and non-discretionary as possible." The report stresses the difficulties which the fund's

127. Supra note 78, para. 19, 25(d).
governing body would have to face if it had to make choices between investments, industries or countries.\textsuperscript{130} There is unanimous agreement, however, on the need for the consent of the country of investment as a prerequisite for the issuance of the guarantee.\textsuperscript{131}

The World Bank's report also discusses in some detail the proposed scope of membership of an international insurance program. Three distinct solutions are possible: first, a program in which both capital-importing and capital-exporting countries participate; second, a program instituted by all capital-exporting countries; and third, a program instituted, or at least initiated, by a group of capital-exporting countries. The Bank does not express a preference on the matter, but both the International Chamber of Commerce\textsuperscript{132} and the committees of the Consultative Assembly of the Council of Europe\textsuperscript{133} strongly support the first of these solutions. Indeed, the participation of capital-receiving countries in the program and their sharing the risk of loss are perhaps the most important considerations in favor of a multilateral investment insurance scheme. It is hoped that such participation in the risks as well as the advantages of the program will induce the governments of capital-receiving countries to avoid the very actions against which the guarantees are issued. Moreover, it may lead some of the capital-importing countries to exercise pressure on those of their number who might be inclined to take such action. On the other hand, as the World Bank's report points out,\textsuperscript{134} there is little incentive for the participation of capital-importing countries in such a program since under the existing national programs, these countries derive whatever benefits are to be derived from the programs' operation without sharing the risks. A multilateral program should, therefore, possess other considerable advantages in order to induce such countries to undertake to bear a share of the risk. The report stresses in this connection the need for more information on the attitude of the capital-receiving countries' governments. It should be noted, moreover, that the deterrent effect of a multilateral program is of some importance only with respect to the "political risk;" it is of little significance as regards the transfer risk, and probably of none in the case of the calamity risk.\textsuperscript{135}

The staff report of the World Bank concludes with a discussion of the advantages and disadvantages of a multilateral program. On the positive side should be mentioned the simplification in administration which a multilateral program would involve, the fact that such a program is

\textsuperscript{130} \textit{Id.} at 14, 18.
\textsuperscript{132} \textit{Supra} note 78, para. 8, 11, 12, 25(a).
\textsuperscript{134} IBRD REP. 15, 20–21.
\textsuperscript{135} See text accompanying note 118 \textit{supra}. 
more appropriate to joint investments by nationals of several countries
(a practice which is on the increase) and the wider distribution of the
risk of loss. On the negative side may be mentioned the difficulties in-
volved in the negotiation of an agreement instituting an insurance pro-
gram. Furthermore, difficult problems would arise where the multilat-
eral insurance agency has paid on a loss and attempts to recover the sums
paid from the host country involved. National investment guarantee
programs possess considerable advantages in such situations.

A much disputed point is whether the institution of a multilateral
investment insurance program should be linked with adoption by all
participating countries of a set of rules of conduct toward foreign invest-
ment. Business organizations strongly favor this course of action. The
International Chamber of Commerce goes so far as to state that, in the
view of some of its members, the entire insurance scheme should be
dropped if no code of treatment of investors is combined with it.\textsuperscript{138} Although this does not represent the general consensus of opinion of ICC
members, the inclusion of an investment code is still considered one of
the most desirable features of an effective investment insurance pro-
gram.\textsuperscript{137} Some indication of investor opinion may also be derived from
the replies to the questionnaire prepared by the World Bank and the
International Chamber of Commerce.\textsuperscript{138} It is interesting to note further
that of the twelve proposals for a multilateral investment insurance
program by individuals or organizations which the World Bank report
summarizes, only two consider the inclusion of a code of rules of con-
duct as a necessary feature of the program. Four of the proposals do
not deal with this matter at all, while the rest accept the desirability of
such a code in terms of varying strength.\textsuperscript{139}

The reports of the Legal and Economic Committees of the Council of
Europe Consultative Assembly are illustrative of existing differences of
opinion in approaching to the problem. The Legal Committee generally
favors the enactment of a code of good conduct, even though realizing
the difficulties involved.\textsuperscript{140} According to it, one of the advantages of a
multilateral investment insurance program is that it will make possible
the otherwise difficult conclusion of a convention embodying a code of
good conduct toward foreign investors.\textsuperscript{141} The Economic Committee,
on its part, does not dispute the desirability of such a code but, being
more impressed with the practical difficulties, suggests that the invest-
ment guarantee scheme be dissociated from the proposed code in order
to increase the former's chances of success.\textsuperscript{142}

\textsuperscript{136} Supra note 78, para. 15.
\textsuperscript{137} Id. at para. 15, 25(c).
\textsuperscript{138} See text accompanying note 79 supra.
\textsuperscript{139} IBRD REP. 36-37.
\textsuperscript{140} See text accompanying note 86 supra.
\textsuperscript{141} Cons. Ass. Doc. 1419 (rev.), May 23, 1962, para. 41.
The World Bank report clearly states the two points of view: on the one hand, it may well be that a capital-receiving country might be willing to accept an agreement on the treatment of foreign investors as the price for participating in the insurance program; on the other hand, and in view of the difficulties which the negotiation of such a code would involve, "it is certainly possible 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." 143

Most of the proposals considered by the World Bank in preparation of its report suggest that the administration of the multilateral insurance scheme to be adopted should be in the hands of the World Bank itself or of an affiliate of the Bank.144 The staff report itself does not discuss this question, but an important remark on it is contained in the short Preface to the report by the World Bank's president. He points out that a discussion of this matter would be premature, since certain other basic issues (such as the nature of the program, the scope of membership and, indeed, whether to go ahead with the program itself) would have to be decided. He goes on to state, however, that "any proposal that the Bank administer such a program 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." 145 This is a timely warning: the undeniable success of the Bank in its operations as a lending institution has led several commentators to suggest that it extend its activities to more and more fields, without considering that the Bank's success is certainly due in part to the limited and relatively non-political character of its activities. Increased responsibilities of a political character may well work a disservice on the Bank and deprive it of its present position as an impartial and independent body whose advisory or political activities are clearly subsidiary to its main role. It may be preferable to avoid burdening the Bank with additional administrative responsibilities so that it may retain its present position and thus be able to serve as an impartial conciliator of, rather than a party to, investment disputes.

The staff report of the World Bank on multilateral investment insurance is a document of considerable importance. Although the report does not draw any conclusions as to the advisability of attempting to create a program of this sort, the reader is struck by the number and importance of the difficulties that the creation of such a program in-

143. IBRD REP. 21.
144. See, e.g., IBRD REP. 34-35. In its preliminary statement of views, the International Chamber of Commerce Commission on Foreign Investments and Economic Development reiterates "its own firmly held view" that the administration of the proposed guarantee fund should be "in the hands either of the World Bank itself, should this prove compatible with its other functions, or of some specially created international institution operating under its aegis." Supra note 78, para. 26.
145. IBRD REP., Preface.
volved. Not only is the participation of the capital-importing countries in such a program quite doubtful, but even the initial agreement and continuing cooperation of capital-exporting countries cannot be taken as granted. A high degree of agreement on foreign investment policies between the major capital-exporting countries is a prerequisite for the institution and orderly operation of a multilateral investment insurance program. Although these countries share certain common interests in the security and expansion of private international investment and in the development of the less developed countries within the framework of a (more or less) democratic system of government, it is surely an oversimplification to say that in no case is there any opposition between their respective economic and political interests. This question will have to be resolved before any effort is made to convince the capital-receiving countries of the need for a multilateral program of investment insurance.

VI. AN INTERNATIONAL COURT FOR INVESTMENT DISPUTES?

The third method of multilateral action for the protection of private foreign investment which is currently being explored is that of the creation of international machinery for the settlement of investment disputes. Much attention has been given recently to the possibilities of this method. Provision for the settlement of disputes forms an integral part of virtually all investment code proposals; in at least one case, the establishment of an arbitration system is at the heart of a proposed investment insurance scheme. In many cases, the proposed procedure stands by itself, with no code of rules of treatment attached to it. Indeed, a certain evolution may be noted in some proposals from the investment code approach to the investment court approach or, in more technical terms, from the statement of substantive rules of law to the statement of adjective rules establishing remedial procedures.

The argument in favor of this course of action is simple. A major


\[147.\] See, e.g., the discussion on the OECD Draft Convention and cf. text accompanying note 157 infra.

\[148.\] See text accompanying note 125 supra.

\[149.\] There is in most cases, however, some provision on the applicable law, which may be expanded to include such rules; see, e.g., text accompanying note 161 infra.
cause of the investors' insecurity is the lack of an impartial judicial body competent to decide disputes between investors and governments. The municipal courts of the host state are not always trusted by the investors and, at any rate, are generally limited in their ability to pass judgment over the acts of their government. Direct recourse to the International Court of Justice is not possible, as long as the dispute is confined to the investor and the state of investment, since that tribunal deals only with disputes between states.\textsuperscript{150} Apart from this fact, even if the investor's state of nationality espouses his claim, the submission of the dispute to the International Court of Justice may not be possible or may involve long delays. For these reasons, most proposals provide for the establishment of new judicial machinery by means of an international convention to be adopted by both capital-exporting and capital-importing states. Such a convention will lay down the procedures to be followed whenever a dispute arises between a state and a foreign investor.

The recent proposals do not suggest that a permanent body be established, but rather that disputes should be judged by \textit{ad hoc} tribunals. The procedures for determining the composition of these tribunals generally follow traditional international law lines. The parties to a dispute appoint an equal number of members of the tribunal, and these members appoint by common agreement an additional member who usually presides over the tribunal. Provision is made for the appointment of members of the tribunal by officials of an impartial international body, such as the International Court of Justice, in the cases where a party fails to appoint its member or members or where no agreement is reached among the members appointed by the parties on the person of the additional member. A variation of this method consists in choosing beforehand a panel of arbitrators from whose number must be chosen the members of the tribunal. A related method is provided by the Rules of Arbitration recently promulgated by the Hague Permanent Court of Arbitration.\textsuperscript{151}

\textsuperscript{150} Professor Roger Fisher of Harvard has suggested an ingenious method of getting around this difficulty: states might pass domestic legislation, allowing some of their citizens to present claims before the ICJ as their "agents," subject to certain conditions assuring the states' ultimate control. See Sohn, \textit{The Role of International Institutions as Conflict-Adjusting Agencies}, 28 U. Chi. L. Rev. 205, 218-19 (1961).

\textsuperscript{151} If the parties cannot agree on the choice of the arbitrators, either of them may apply to the Bureau [of the Court] in order to solicit its co-operation in that behalf.

In that case the Bureau shall submit to both parties an identical list containing the names of persons whose number must be twice that of the arbitrators to be appointed by the Bureau.

The parties shall return that list, indicating the names of those they would be willing to accept and enumerating them in sequence of their preference.

On the basis of these lists the Bureau shall constitute the tribunal, selecting persons whom both parties have deemed acceptable.

\textsuperscript{15} Rules 1962, § I, art. 5.
A minor departure from the traditional methods of public international law is the mention in some proposals of the need for a specialized body of arbitrators, expert in international commercial and business affairs. The emphasis placed on this point varies; its importance would seem to be limited as long as the prevailing views on the applicable law and the purely judicial function of the tribunal are accepted. Another far more important departure from traditional principles is the insistence on procedures whereby not only states, but the investors as well (who, as individuals, would have no standing in traditional international law), are accorded access to the proposed tribunals. It has already been noted that this is one of the chief reasons for considering the available remedies before the International Court of Justice as insufficient and ill-adapted to investment disputes. In some proposals, the arbitration proceedings will not be open to private persons unless the states concerned (both the state of investment and the state of nationality) have consented by means of a previously filed optional declaration. Such a procedure would probably facilitate the accession of a considerable number of states to the proposed convention. Still, it should be kept in mind that one of the essential justifications for the conclusion of such a convention is that it would afford to private persons access to the tribunals to be established. In the absence of this feature, it would be somewhat more difficult to justify the creation of new arbitral machinery.

The provisions of the recent proposals vary widely with respect to the determination of the law to be applied by the proposed tribunals. The Rules of 1962 of the Permanent Court of Arbitration repeat the formula found in the Hague Conventions for the Pacific Settlement of Disputes, according to which the tribunal "will decide on the basis of respect for law" unless the parties agree to request a decision ex aequo et bono. The Draft Statutes of the Arbitral Tribunal for Foreign Investments submitted to the Brussels Conference of the International Law Association by its Committee on the Juridical Aspects

The Rules further provide for appointment of the members of the tribunal by the Secretary-General of the Court if no agreement between the parties is reached. For the text of the Rules, see ARBITRALE RECHTSPRAAK No. 497, at 135 (1962) [hereinafter cited as Rules 1962].


154. See 2 Scott, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 89 (art. 15 of the 1899 convention), 325 (art. 37 of the 1907 Convention) (1909).

of Nationalization and Foreign Property provide that the tribunal "shall apply in the determination of the claim the proper law of the contract as determined by the generally recognized principles of private international law relating to choice of law in contract cases, unless the parties request it to decide *ex aequo et bono.*" 156 The report of the Legal Committee of the Council of Europe Consultative Assembly refers in this connection to the principles to be established by the Investment Statute whose adoption it supports.157 It also expresses the hope that case law on the matter will be developed "interpreting the general rules as applied to specific cases." It then goes on to state: "Where no general rules exist and where the Parties specifically agree, the tribunal would have to decide *ex aequo et bono* or on 'the general principles of law recognised by civilised nations'. . . ." 158 The report further "reaffirms" certain "basic principles" applicable to such disputes: equitable treatment of aliens; observance of undertakings given to foreign investors and full reparation for any breach thereof; that all expropriations should be in the public interest, without discrimination and subject to just and effective compensation; and finally, that returns, proceeds or compensation should be freely transferable abroad, subject to agreed derogations.159 The draft resolution submitted to the 1962 Conference of the International Bar Association by its Committee for Court and Court Procedure for the Protection of Investments Abroad is more precise. It provides that:

The tribunal shall apply, in so far as questions of international law are to be decided in a dispute, the recognized principles of international law including those which were confirmed at the Cologne Conference as existing principles of international law.160 In the case of disputes arising out of contracts concluded between a convention state and a national of another convention state, the tribunal must base its decision on principles, amongst others, that the contract is the law of the parties and *pacta sunt servanda.*161

The diversity of the provisions in the various proposals is an indication of the importance and, at the same time, the difficulty of the ques-

156. *Supra* note 153, art. 4(a)(b).
157. See text accompanying note 86 *supra.*
160. The principles referred to were included in a proposed resolution submitted by the IBA's Committee on Protection of Investments Abroad in Time of Peace (K. Ehlers, rapporteur) to the 1958 Cologne Conference of the IBA. See *International Bar Association, Seventh Conference Cologne 1958*, at 485 (1958). The principles were that municipal law is subject to international law, that takings of private property are internationally lawful when effected "by due process in conformity with the general principles of law recognized by civilized nations and without discrimination" and against prompt, adequate and effective compensation, and that "international law recognizes that the principle *pacta sunt servanda* applies to the specific engagements of States towards other States or the Nationals of other States and that in consequence a taking of private property in violation of a specific state contract is contrary to international law."
tion. In the case of investment disputes, it is not only a set of adjective law rules or a competent judicial organ that are lacking. The substantive rules of law, as well, are unclear and difficult to determine, if not in some instances lacking. The rules of public international law are not sufficient to solve the related problems; in many cases they seem hardly relevant. Public international law may usefully provide a basic framework and determine which actions are so extreme as to be considered internationally unlawful. But it cannot provide the rules for the solution of everyday problems, of disputes relating to the construction of a contractual provision, the legitimacy and force of a request for renegotiation or the effect of unforeseen changes on the continuing operation of a particular enterprise. The references to the contract as the law of the parties or to the principle pacta sunt servanda go nearer to the heart of the problem, but cannot be considered fully appropriate or sufficient. Disputes are likely to arise involving situations not provided for in the contract or with respect to which the contractual provisions are held by one of the parties not to apply. There may be no contract directly in issue, as in the case of measures which affect indirectly the operation of an enterprise but which do not reach the point where they constitute an outright taking. Some further clarification of the applicable rules—the manner in which the contract is to be construed or performed—is needed. The reference to the general principles of law again seems relevant but lacking in precision. It is submitted that it would be more useful to refer to rules or principles applicable to situations closely resembling those likely to arise between investors and host governments.

The latest Harvard Draft Convention on state responsibility refers, with respect to state contracts, to the "principles recognized by the principal legal systems of the world as applicable to governmental contracts or concessions." Such a provision constitutes a useful starting point. It does not, of course, fully solve the existing problems. It does not make the specific rules of law which are applicable in particular situations clear, precise and certain. All it does, in fact, is point to a certain direction. It has to be acknowledged that at the present moment there are no certain and clear legal rules on the matter. They will have to be created slowly, from case to case, in the same manner in which the corresponding municipal law principles, concerning state contracts or eminent domain, have developed over the years. The existence of such municipal law rules and principles is, of course, helpful; but it cannot be expected that these principles will necessarily fit, without any change, the needs and conditions of the less developed countries or of the relations between the governments of these countries and foreign nationals. A considerable margin of uncertainty is therefore inevitable.

163. For a related discussion, see Guarantees 295-96.
The realization of this fact of contemporary international life raises another related consideration. The proposals we are examining share an emphasis on the judicial character of the organs whose establishment they advocate. But it is open to question whether purely judicial bodies are what is needed today for the solution of investment disputes. In the absence of well-established legal rules, the task of such judicial bodies will be extremely difficult. No doubt, they could overcome these difficulties and, if given the chance, could proceed to the construction of a body of case law. It may be doubted, however, whether the states and investors concerned will be willing to give them this chance, in full realization of the fact that the law to be applied is so uncertain and imprecise as it is today. It has to be borne in mind that the subject matter of the related disputes is often of vital concern to both parties. It is doubtful whether either of the parties can afford to leave the decision as to such matters to a purely judicial organ, whose task will be to render a decision based on legal considerations, to the exclusion of political or economic factors. Basically, the problems involved are not legal; they relate to a demand for the change of existing conditions, not to the “proper construction” of the terms of an arrangement. In municipal law this would be a field for legislation; in the absence of an international legislative organ it will have to be the domain of compromise rather than clear-cut solutions for or against, of variations between shades of gray rather than contrast between black and white. In the traditional language of international law, what is chiefly (although not exclusively) needed is a procedure for conciliation, rather than for judicial settlement.

Of the proposals here discussed, some do mention conciliation procedures, although without placing great emphasis on them. One private proposal goes further in this respect and suggests the creation of a system of regional arbitral tribunals which are to decide cases ex aequo et bono, as a rule, and only exceptionally in accordance with strict law. It is submitted that once the necessity for a decision not based on strict legal grounds is accepted, it is preferable not to retain the form of arbitration but to adopt instead that of conciliation. It appears that in the field of commercial arbitration (between private parties), as well, more and more attention is being paid to conciliation “as a necessary and valuable adjunct to arbitration.” It may be that with respect to international investment disputes conciliation procedures are more appropriate and, especially, more easily acceptable by the parties, so that arbitration becomes the “valuable adjunct” to conciliation. However that may be, it is evident that the possibilities of setting up certain procedures for conciliation are well worth further exploration.

164. Snyder, supra note 152, at 684-85, 688.
The main difference between conciliation and arbitration *ex aequo et bono* is that in the latter case the arbitrators' decision is binding on the parties, while in the former case it is not. In both cases the third party's decision is not necessarily based on strict legal considerations and may consist in a compromise between differing positions. It is evident that such compromise will probably be founded on an appreciation of the political, economic and other factors that may be involved. In view of the non-binding character of the conciliators' "recommendations," it seems probable that a multilateral convention providing for mandatory conciliation procedures in case of investment disputes may well be acceptable to several states that might not be prepared to accept compulsory arbitration. Provision for arbitration, perhaps not on a compulsory basis, may also be included in such an instrument.

It is submitted that such a convention would be both feasible and desirable. It would provide a minimum of order by assuring that the parties to a dispute will be brought together and that an impartial third party would be given the opportunity to study the situation, define the issues in dispute and suggest mutually profitable arrangements. It is probable that not all disputes will be susceptible of settlement in such a manner; some will currently admit of no solution, while others may be resolved by arbitration. But even in these cases, the proceedings of conciliation may help in clarifying the issues and, perhaps, narrowing the area of dispute. Another reason for the desirability of such an arrangement is that it will help indirectly in the creation of appropriate rules and principles governing the relations between foreign investors and host governments. Since these rules will be embodied in *ad hoc* arrangements or suggestions (whose secrecy is at this point irrelevant, for secret or not, they will affect the policies and methods of governments and investors), they will lack the authority and precision of a judicially established rule. On the other hand, they will presumably be based on a realistic appreciation of conditions and, to some extent, on principles acceptable to both governments and investors. They have every chance, therefore, of being effective and forming a solid basis for the development of legal rules and principles.

No draft convention relating to conciliation in disputes between governments and private firms has been suggested, but a valuable text which might serve as a basis for such a convention was issued a few months ago by the International Bureau of the Permanent Court of Arbitration. The second section of the Rules 1962 of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One Is A State\(^\text{166}\) deals with the constitution and operation of conciliation commissions. The Rules provide for the constitution of three-member commissions at the request of the parties

\(^{166}\) *Supra* note 151.
to the dispute and in accordance with a procedure similar to that provided for the constitution of arbitral tribunals. The parties to the dispute undertake to pay their share of the expenses, to facilitate the work of the commission “and particularly to furnish it to the greatest possible extent with all relevant documents and information.” The commission’s task is described as follows:

The task of the Commission shall be to elucidate the questions in dispute, to collect with that object all useful information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after examining the case, inform the parties of the terms which seem suitable to it. The parties undertake to study with the utmost good will the recommendations submitted to them by the Commission.

The commission will conduct its inquiry in accordance with its own rules of procedure. It must hear both parties, who will be represented by agents and, if need be, counsel and experts. When it reaches its conclusions, the commission “shall inform the agents, orally or in writing, of the terms of a draft arrangement which it deems fit to recommend . . . inviting them to declare their intentions within a fixed time-limit. It shall point out to the agents, . . . the arguments which seem to work in favour of that acceptation.” Of particular importance are the provisions which stress the confidential character of the commission’s work: the recommended terms whether accepted or not, are to remain secret, unless the parties decide otherwise, and the same is true of most of the documents submitted to or issued by the commission. At the same time, with the exception of “elements of proof possibly resulting from either survey reports or constats made on the sites or interrogatories of witnesses,” any proceedings before the commission will not affect the rights of the parties in later arbitral or judicial proceedings.

It seems probable that the non-binding character of the commission’s decision, its extra-legal character, as well as the assurances as to the

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167. See supra note 151.
168. Sec. II, arts. 7, 8, 10.
169. Sec. II, art. 9.
172. Rules 1962, supra note 151, Sec. II, art. 18. Sec. III of the Rules, which deals with conciliation and arbitration, further provides (art. 3) that “the members of the Conciliation Commission may not be members of the arbitral Tribunal.” For a strong statement to the same effect at the Bangkok Conference on Commercial Arbitration, see Domke, supra note 165, at 30.
secrecy of the proceedings will reassure those governments or investors who might be unwilling to bind themselves irrevocably for the future. A possible addition to the rules summarized above would be a provision for the participation in the conciliation commissions of industrial, financial or business experts rather than jurists. Such experts could be recruited from the staff of the major international agencies, such as the World Bank, the International Monetary Fund or the Special Fund. It may also be advisable to have such agencies, rather than, for instance, the Permanent Court of Arbitration, administer the convention. This may emphasize the technical character of the proceedings, and since it would involve no major political responsibilities, it may be deemed compatible with the main functions of these agencies.

The establishment of certain procedures for the settlement of disputes between foreign investors and host governments is, despite the difficulties involved, the most hopeful of the three directions which are being explored today in the search for a multilateral system of protection of foreign investment. This course of action is not only more feasible than the others, but also perhaps the most useful since it provides flexibility as well as the prospect of the development of a case law more suitable to the problems of the present day. Further developments in this direction should be expected soon. Of special interest in this connection should be the results of the study currently pursued by the staff of the World Bank.\textsuperscript{173}

VII. Concluding Observations

It is clear that in recent years, governments, international agencies and private persons and associations have made great efforts to devise means by which the security of private foreign investment in underdeveloped countries could be enhanced. At this stage, it is not possible to assess the results of these efforts. To begin with, much remains to be done: several schemes are still at the proposal stage; others have been in operation for a very short time. More generally, the whole complex of methods and means discussed in this article is of quite recent origin. Even with respect to those methods and means that have been in use for some time (at most about a decade), it is not easy to isolate the effects of the factors relating to the security of investment from those of the other factors. This is true both in the cases where certain positive effects have been noted and in those where no effects at all can be discerned. In most if not all cases, the conclusion of a bilateral investment treaty or the enactment of an investment law did not bring about an immediate increase in the amount of foreign capital invested.\textsuperscript{174}

\textsuperscript{173} See United Nations, Dep't of Economic and Social Affairs, The United Nations Development Decade Proposals for Action 96 (1962).

This is no indication of the failure or uselessness of such assurances. It is, however, an indication that there are limitations to the extent to which the legal methods here discussed can encourage the investment of foreign capital in less developed areas. An awareness of these limitations is necessary before any concrete plans can be formulated or implemented.

The assumption underlying the efforts now under discussion is that an increase in the amount of capital invested in the less developed countries can be brought about by the provision of assurances regarding the security of investments.\(^{175}\) Although there is a considerable element of truth in this assertion, its validity is far from absolute. In the first place, it is highly uncertain that there exists a direct causal link between the lack of legal security and the unavailability of foreign capital. The security of the investment is only one of several factors which the investor takes into consideration and probably is not the most important. It is not sufficient to induce the investor to bring his capital in a particular country, in the absence of other favorable factors, while, at the same time, it may stop him from venturing into a country. It is difficult to determine the importance of the factor of security with any precision. Existing surveys do not appear to indicate that the investors themselves ascribe a very high order of importance to considerations of security when considering possible new investments.\(^{176}\) In the second place, to the extent that lack of security is a factor, no legal guarantee or scheme can eliminate it fully. The insecurity of foreign investments is due largely, though not solely, to certain objective conditions (such as political and economic instability) over which the governments of the less developed countries have limited control, and it is at these governments that most guarantees are aimed, in the sense that they are intended to affect these governments' actions concerning foreign investors.\(^{177}\)

The considerations summarized above do not amount to a denial of the usefulness of and necessity for legal assurances and guarantees; they only serve to qualify their potential role and their present importance. It cannot be contested that the present situation is not satisfactory. The foreign investors and their spokesmen are fully justified in pointing this out and in stressing the need for more security for their investments. The situation is hardly more satisfactory to the governments of the majority of less developed countries. Faced with a shortage of foreign private capital, they are in many cases prepared to offer extensive inducements and guarantees. But they are not prepared

\(^{175}\) See, e.g., text following note 81 supra.

\(^{176}\) See Behrman, \emph{op. cit.} supra note 174, at 184, 188; cf. text accompanying note 105 supra; \textit{Guarantees} 54.

\(^{177}\) Compare text accompanying notes 118 and 135 supra.
to guarantee the continuation *ad infinitum* of the present *status quo*. They cannot bind themselves to refrain from taking any measures designed to promote their economic development whenever the interests of foreign investors happen to be adversely affected by them. Indeed, even if assurances to this effect were offered, prospective investors might well question their effectiveness. Guarantees which promise too much are likely to be violated when they become obviously unsuited to existing conditions. It is of the essence of good diplomacy not to make the grant of such assurances a condition for the acceptance of less extensive, but more effective, promises, lest the effectiveness of the latter be impaired by their association with the former.

It is certainly a difficult situation, but it is not an impasse, or at least it should not be allowed to become an impasse. What is needed, first of all, is a change of approach. The pressing problem today is not the extent of the protection of private foreign investment, nor the upholding of the so-called "sovereign rights" of states and governments. It is the promotion and, ultimately, the achievement of international economic development. Developed as well as underdeveloped countries have accepted this as a primary aim of national and international policy. The process of economic development necessarily involves a high degree of change—social, political and cultural as well as economic—and it is by encouraging, not by opposing, change that we can affect the form and direction of this process.

The encouragement of private international investment is one aspect of the larger problem—one means of promoting economic development. Seen from this point of view, the need for security of investments does not lose its importance. The protection sought is desirable both on the basis of considerations of justice and equity and as a necessary (if not adequate) condition for any increase in private foreign investment in the less developed countries. At the same time, the need for flexibility becomes apparent and qualifies in important manners the form and extent of assurances of security. This is not the time for stating general rules and formulating comprehensive and consistent legal systems. We shall have to be content with compromises and solutions of specific problems, hopeful that such solutions will give rise eventually to a body of rules. For the time being, it is important to make sure that the problems and disputes which are likely to arise in the relations between foreign investors and the host governments are resolved at an

178. A good case can be made that the term "economic development" is a misnomer. This term is used to refer to a vast process of change which is economic only in part. It is by no means certain that the purely economic aspect is the basic or the most important one. The complexity of the process of economic development is of course acknowledged by economists and other social scientists, but the continued use of the term is sometimes misleading.
early stage and in an orderly manner. What is needed is a legal frame-
work for orderly change, but this framework may differ in several
important respects from that found in municipal law. It may be largely
of a non-judicial character and may involve bargaining and perhaps
the rewriting of contracts, rather than the more or less mechanical (or
apparently mechanical) application of pre-existing rules. In the majority
of cases, the methods used and the solutions given may be sufficient for
practical purposes, and this is all we can ask for at present.