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Intergovernmental Agreements under the U. S. Investment Guaranty Programs

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NOTES

INTERGOVERNMENTAL AGREEMENTS UNDER THE UNITED STATES INVESTMENT GUARANTY PROGRAM

The United States Investment Guaranty Program furnishes American private enterprise investing in developing countries with a means through which such investments can be insured against the political risks of expropriation, inconvertibility, and damage due to war, revolution, and insurrection. Because the program by its nature does not produce immediate, noteworthy results and because Congress has shown insufficient interests in conducting the program effectively, it is a relatively unknown and non-controversial element of the American foreign aid scheme. The Investment Guaranty Program is designed to encourage American private enterprise to assist in providing the great resources necessary for the development of the Latin American, African and Asian states; these resources cannot possibly be provided solely, or even principally, through direct foreign aid. In doing this the United States Government also hopes to encourage the development of a strong private sector in the economies of these countries, thus offsetting a tendency in such countries to leave economic development solely in the hands of the public sector.

HISTORICAL BACKGROUND

The Investment Guaranty Program originated in 1948 as part of the European Recovery Program to aid in the reconstruction of Europe. The executive department was authorized by the Economic Cooperation Act of 1948 to insure U.S. investors in participating countries against inability to convert profits and capital from the foreign currency into

1. In the program's early days, critics complained that the guaranties shifted the burden of fulfilling the capital-importing states' obligations to the capital-exporting states, tending to encourage the capital-importing states in the wrong direction. But the actual operation of the program has shown these fears to be groundless. A. Fatouros, Government Guarantees to Foreign Investors 117-18 (1962) [hereinafter cited as Fatouros]. The real critics of the program currently are those who contend that it has been restricted too much by legislative and executive inertia. See R. Lillich, The Protection of Foreign Investment: Six Procedural Studies 161 (1965) [hereinafter cited as Lillich]; Clubb & Vance, Incentives to Private U.S. Investment Abroad Under the Foreign Assistance Program, 72 Yale L.J. 475, 487-502 (1963); Goekjian, A Critical Appraisal of United States Investment Guaranty Programs, in International Financing and Investment 127 (McDaniels ed. 1964) [hereinafter cited as Goekjian].


3. Ch. 169, § 111(b) (3), 62 Stat. 144.
U.S. dollars. In 1950 the authorization was broadened to include the issuance of guaranties against the risk of expropriation of the investor's property by the foreign government,4 and in the following year the geographical scope of the Investment Guaranty Program was extended to include developing countries.5 The administration of the program was delegated in 1955 to the International Cooperation Administration (ICA), a newly-established semi-autonomous agency within the State Department. Overcoming previous resistance, especially in the Senate, Congress in 1956 authorized a third type of "specific risk" guaranty, insuring investors against the risk of direct losses resulting from war in the country of investment.6 Three years later, consistent with the purposes of the program, participation was limited to "economically underdeveloped areas."7

In 1961 the Investment Guaranty Program basically completed its evolution into its present form. The war risk guaranty was broadened to include losses resulting from revolution or insurrection and a new extended risk guaranty was authorized. The extended risk guaranty would insure an investor against any loss, including business losses, not attributable to the fraud or misconduct of the investor.8 This guaranty is limited, however, to investments of significant economic importance which would not have otherwise been made.9 In the same year administration of the program was placed under the direction of the Agency for International Development (AID), a newly-established agency within the State Department. AID is presently the administrator of the Investment Guaranty Program.

LEGISLATIVE BACKGROUND OF INVESTMENT GUARANTY AGREEMENTS

The Economic Cooperation Act of 1948 did not include a specific requirement that an inter-governmental agreement precede the granting of guaranties for investments in a country. It is certainly not self-evident

9. Eight such guaranties have been authorized through December 31, 1966. Hearings on H.R. 7099 Before the House Committee on Foreign Affairs, 90th Cong., 1st Sess. 306 (1967). Extended risk guaranties are also available, under section 224 of the Act, for housing projects in Latin-American states. However, no bilateral agreement is required for the implementation of section 224 guaranties. Foreign Assistance Act of 1965, § 224, 79 Stat. 655, 22 U.S.C. § 2184. This inconsistency would seem to add weight to the argument of several critics who do not feel that such agreements are necessary to the program. See notes 118 and 119 and accompanying text infra.
that such an agreement is necessary, since the program manifestly involves only United States investors and the United States Government. Nevertheless the executive department interpreted the legislative history to require such a bilateral agreement between the United States and the capital-recipient country.¹⁰

The Mutual Security Act of 1954 specifically mentioned the bilateral agreements in stating that the ICA could guarantee investments "in any nation with which the United States has agreed to institute the guaranty program."¹¹ But Congress established no guidelines relating to the content of the agreement. Meanwhile the executive department maintained its presumption that this continued congressional silence meant that the legislative branch approved of the agreements as developed in the early days of the program. Thus the ICA, adopting an overly-conservative position, did not feel authorized to experiment extensively with the substance of the agreements. So, prior to 1962, all of the bilateral agreements signed were virtually identical.

By 1961 it had become apparent that this rigid agreement requirement was helping to stifle the expansion of the program. As of January 1 of that year only thirty-five developing countries had signed Investment Guaranty Agreements with the United States. Many developing countries, particularly major Latin American states such as Argentina, Brazil, Chile, Mexico, Peru, Uruguay, and Venezuela, objected to certain provisions in the required agreement which they felt would infringe upon their sovereignty.¹² Resistance was almost inevitable in the Latin American states because they were the only states whose constitutions required that international agreements of this type be ratified by their legislatures.¹³ Yet it was in this region that wider institution of the Investment Guaranty Program was most essential. Direct U.S. private investment in Latin America, which had exceeded 300 million dollars in 1958 and 400 million dollars in 1959, had dropped to only about 100 million dollars in 1960 as a result of the Castro revolution.¹⁴

In response to the proposal of the Kennedy administration, Congress in 1961 changed the statutory language which had been interpreted to require a rigid form of agreement. The Foreign Assistance Act of 1961 provided that the "President is authorized to issue guaranties... in any

¹⁰ See Goekjian 135.
¹² See, e.g., text accompanying notes 78 and 90 infra.
¹³ Hearings on S. 2996 Before the Senate Committee on Foreign Relations, 87th Cong., 2d Sess. 607 (1962).
¹⁴ Hearings on S. 198 Before the Senate Committee on Foreign Relations, 87th Cong., 1st Sess. 262 (1961). None of the U.S. investments expropriated by the Cuban Government were insured under the Investment Guaranty Program.
friendly country or area with the government of which the President has agreed to institute the guaranty program.”¹⁵ However the:

President shall make suitable arrangements for protecting the interests of the United States Government in connection with any guaranty issued . . . including arrangements with respect to the ownership, use, and disposition of the currency, credits, assets, or investment on account of which payment under such guaranty is to be made, and any right, title, claim, or cause of action existing in connection therewith.¹⁶

This language was susceptible to a restrictive interpretation which might have led to a continued rigid agreement requirement such as existed before. However the new administration, advocating a considerable expansion of the Investment Guaranty Program, made use of the legislative history in justifying a somewhat more liberal interpretation of the agreement requirement. Mr. Frank M. Coffin, then chairman of the Group on Program Development of the President’s Task Force on Foreign Economic Assistance, had made the following statement during the hearings on the bill before the Senate Committee on Foreign Relations:

the new legislation retains the need for agreements to institute the program, but the requirements of such agreements, especially with respect to the protection of U.S. Government financial interests, have been made more flexible.

Four cases can be distinguished under this approach:

(a) In all instances, concerted efforts will be made to reach agreements regarding the operation of the guaranty program which are substantially like those signed in the past, including explicitly recognized rights of the U.S. Government to subrogation and to ownership of assets underlying guarantee claims paid off.

(b) There are some cases, mainly in Latin America, where the present requirement for a turnover of property to the U.S. Government in the event a guarantee is paid off presents constitutional problems when it concerns land. The new, more flexible, language will make it possible to explore provisions

that will protect U.S. Government interests adequately in such matters, while speeding agreements.

(c) Many foreign governments interpret their constitutional provisions to require such agreements to be ratified by their legislatures. In a number of instances this occasions delays, sometimes of many months, even though there may be little serious doubt at any time that the agreement will eventually come into force.

In cases where a responsible finding is reached that substantial progress in good faith is being made toward reaching such an agreement and placing it in force within a reasonable time (say, a year), the new language would permit instituting the guarantee program on the basis of a simple exchange of notes agreeing to institute the program.

If at any time it no longer appeared that agreement would be reached within such a period, the issuance of new guarantees would be discontinued. Such action would, of course, have no effect on guarantees that might already have been issued.

(d) In a few instances, political or other practical difficulties may render impossible or impractical a detailed agreement with respect to U.S. turnover and subrogation rights, while at the same time the constitutional and statutory provisions of the country and its record of judicial processes and international relations might leave little doubt as to its ability and willingness to protect the interests of the U.S. Government in regard to guarantee claims.

Based on a responsible determination of the facts in such cases, it should be possible to issue guarantees on the basis of an exchange of notes simply agreeing to institute the program.¹⁷

None of the Committee members made any strong objections to this interpretation of the legislation. Thus since 1961 AID has used this statement as a basis for its general approach in negotiating Investment Guaranty Agreements.¹⁸

The number of agreements with developing countries reached seventy-eight as of July 1967¹⁹ and some of the new agreements

¹⁹. See appendix A.
resulted directly from AID's more flexible approach. Argentina, which had agreed in 1959 to allow convertibility guaranties to be issued to U.S. investors in Argentina, now agreed through a 1963 amendment, to have the full range of guaranties made available in that country. Although this amendment has never received the required ratification by the Argentina legislature, AID has issued numerous guaranties of each type to U.S. investors in Argentina. Even more important, an agreement was signed with Brazil in 1965. This agreement varies significantly from any other Investment Guaranty Agreement the United States has made. Despite occasional negotiations, Brazil had formerly refused to commit itself to the program. AID's new flexibility helped the United States and Brazil to reach an agreement. Agreements substantially indentical to each other were reached with Venezuela and Columbia in 1962. Each merely provides that the capital-recipient country and the United States will consult concerning investments to be guaranteed and that the capital-recipient country must approve an investment before it can be guaranteed.

Most of the agreements signed since 1961 continue to follow the same form as prior agreements but there is one important difference. AID, unlike its predecessor, the ICA, has assumed the authority to experiment with the substance of the standard agreement. Consistent with the movement toward flexibility exemplified by the Coffin testimony, AID has occasionally revised the standard agreement to make its provisions more acceptable to the developing countries, especially the Latin American states.

21. This has apparently been justified in accordance with subparagraph (c) of the Coffin testimony, see note 17 supra. If so, AID has in this case interpreted a "reasonable time" to be much longer than one year. The Amendment was concluded on June 5, 1963. Titled "The Protocol to the Agreement Between the United States of America and the Republic of Argentina Signed December 22, 1959," it may be found in 2 INT'L LEGAL MAT. 776 (1963). Its provisions, which are in some instances unique, are considered further below. See text accompanying note 69 infra.
22. 4 INT'L LEGAL MAT. 296 (1965).
23. See text accompanying note 71 infra.
24. N.Y. Times, July 29, 1964, at 43, col. 2; id. at 48, col. 2.
25. The justification for these abbreviated agreements apparently was subparagraph (d) of the Coffin testimony, see note 17 supra. The AID Administrator made a special finding that the record of these two governments toward foreign private investment had been such that suitable arrangements for the protection of such investment already existed. AID Letter, supra note 18. Investment Guaranties Agreement with Venezuela, November 29, 1962, [1963] 14 U.S.T. 374, T.I.A.S. No. 5326; Investment Guaranties Agreement with Colombia, October 5, 1962, [1962] 13 U.S.T. 2465, T.I.A.S. No. 5210. A full agreement was concluded with Colombia on December 2, 1963. However it has never been ratified and thus is not presently in effect.
EVOLUTION OF THE STANDARD AGREEMENT PROVISIONS

Prior to 1962 most of the agreements contained the following provisions:

(1) an agreement between the two governments to consult concerning proposed guaranties;

(2) a requirement that the host government (the government of the developing country) approve each investment to be guaranteed;

(3) subrogation of the United States Government to the rights of an investor whom it reimburses under a guaranty;

(4) treatment by the host government of amounts in local currency acquired by the United States Government pursuant to guaranties no less favorable than that given to funds of private United States nationals engaged in transactions comparable to those covered by such guaranties and availability of such amounts for use by the United States Government for administrative expenses in the host state;

(5) provision for direct negotiation of claims against the host government to which the United States Government becomes subrogated, followed by arbitration by a single arbitrator selected by mutual agreement (or failing this, then by the President of the International Court of Justice) if the claim is not settled within a reasonable period; and

(6) provision for national and most-favored-nation treatment of U.S. investors who are insured against war risks with respect to compensation or reparations paid for losses incurred by reason of war, provision for subrogation of the United States Government to these rights if it pays the investor under a war risk guaranty, and provision for non-application of the negotiation and arbitration provision (5) to this provision.²⁶

²⁶. Agreements with the following countries took this form: Afghanistan, Ivory Coast, Korea, Liberia, Morocco, Nepal, Nicaragua, Niger, Panama, Sierra Leone, Sudan, Togo, and Vietnam.

Several other pre-1962 agreements took this form, except that they did not extend to war risk guaranties and thus omitted provision (6). Those agreements were concluded with Bolivia, Republic of China, Costa Rica, Ecuador, Ghana, Greece, Haiti, Honduras, Iran, Israel, Jordan, Malaysia, Pakistan, Paraguay, Philippines, Portugal, Spain, Thailand, and Turkey.

Republic of China, Israel and Thailand in 1957 and Jordan in 1958 amended their agreements with the United States to include war risk guaranties and thus added provision (6).

Bolivia, Costa Rica, Ecuador, Greece, Honduras, Malaysia, Paraguay, Philippines, and Turkey also later agreed to allow war risk guaranties for investments in their territories. However these amendments were all concluded after AID eliminated
Nevertheless several governments insisted, as a prerequisite to entering an agreement, that modifications, usually minor, be made in the standard text.

Certain of these modifications amounted simply to additions of clauses which did not affect the substance of the agreements but merely dictated procedures which, it is reasonable to assume, the governments would have followed even though not expressed. Such a clause was the provision in the 1959 Tunisian agreement that, before the United States Government pays an investor pursuant to a guaranty, it must consult with the Government of the Republic of Tunisia. 27 Apparently this could not be construed to mean that the Government of Tunisia must approve such payment. Two countries, Guatemala and El Salvador, agreed in 1960 to recognize the subrogation of the United States Government to the reimbursed investor's claims only if the host government has been notified promptly after the guaranty was invoked. 28 Of course, it seems very unlikely that the United States Government would not promptly notify the host government if the former became subrogated to an investor's claim against the latter. Guatemala also desired an understanding that the transfer and subrogation to which the present paragraph refers

shall terminate automatically upon payment by the Government of Guatemala which is accepted by the Government of the United States of America as the appropriate indemnity as a result of direct negotiation, or upon payment by the Government of Guatemala pursuant to an arbitral award. 29

This result seems self-evident and in accord with accepted international law doctrine. Of greater utility is a provision in the agreement concluded with Nigeria in 1962 relating to the replacement of arbitrators who resign, die, or become incapacitated: a successor is to be appointed in the provision (6) from its standard text in 1962. Thus these amendments did not add any new provisions to the basic agreements.

An Investment Guaranty Agreement was concluded with Uruguay in 1961 covering convertibility and expropriation guaranties. However, the agreement was never ratified by the Uruguayan legislature and is not in effect. Because of this, the agreement has not been published and the writer is unaware of its contents.

same manner as the arbitrator he replaces was appointed. But it is probably assumed in the other agreements which do not contain this provision that the same procedure for replacement would be followed.

Other modifications have related to matters not mentioned or implied in the standard agreement. Generally such provisions were included to furnish additional safeguards which the host government considered essential. This was plainly the situation in the case of the 1952 agreement signed with Yugoslavia which provided in the introductory paragraph that the agreement did not extend to guaranties relating to the export of printed matter and films to Yugoslavia. Of greater significance is the provision in the agreements signed with Peru in 1955 and with Chile in 1960 to the effect that nothing in the agreement gives the United States Government any greater rights than those available to the investor to whose claims the Government becomes subrogated. This provision is meant to eliminate an ambiguity in the pre-1962 standard text. Apparently the modification would require the United States Government to pursue local remedies before bringing a claim in its sovereign capacity. A similar provision is included in the current standard text. Concerning the handling of currency acquired by the United States Government pursuant to a guaranty, the Tunisian and Nigerian agreements provided that "the two governments shall consult with a view to assuring the utilization of these funds in such manner as to avoid any prejudice to the interests of either country." This provision is apparently intended to help protect the host government against the possibility that the United States Government will press for conversion at a time when the host country is experiencing monetary difficulties. Going even further in this direction is the agreement with Dahomey which states that "so long as such [U.S.] nationals are unable to effect the exchange of such private funds into U.S. dollars these assets in currency shall be entered in a

30. Investment Guaranties Agreement with Nigeria, December 24, 1962, [1962] 13 U.S.T. 2657, T.I.A.S. No. 5237. The Nigeria agreement did not include war risk guaranties and thus did not include provision (6) above. Although the agreement was signed after the standard text was changed in 1962, that agreement conformed most closely to the original standard text.

31. Economic Cooperation Agreement with Yugoslavia, January 8, 1952, [1952] 3 U.S.T. 5052, T.I.A.S. No. 2688. Since war risk guaranties were not then available, the agreement also did not include provision (6) above.


33. See current standard agreement, Art. 4, appendix B.

34. See provision (4) of standard agreement, text accompanying note 26 supra.

special account opened in a bank in Dahomey. Such a provision is especially beneficial to the host country, since it allows the currency to remain in circulation during the period in which that country is experiencing monetary difficulties. Finally, the agreement with Guatemala is unique in that it established the bases for arbitration, should that be necessary. It provides:

(a) The Arbitration Tribunal shall set a period of three months for filing the claim, and the defendant shall be given a like period for answering;

(b) The parties shall submit their evidence together with the claim and the reply;

(c) In order to better decide the case, the Arbitration Tribunal may request any documents it deems necessary, or order any steps taken which it considers appropriate; for this purpose it shall fix a maximum period of three months;

(d) The decision of the Arbitration Tribunal shall be final and non-appealable.

Without this provision the Tribunal would apparently establish its own procedures. This is provided for in the current standard text.

In addition a few governments were willing to conclude agreements only if certain terms of the standard text were substantially revised or eliminated. Thus the agreement with Chile provided that the subrogation provision shall not be applicable to "... the physical or real property comprising an investment for which guaranties have been issued by the Government of the United States of America pursuant to this Agreement." This provision was apparently included to assure that the United States Government would not succeed to the ownership of tangible property in Chile under the Investment Guaranty Program. A provision in the current standard text would accomplish the same result in a manner more satisfactory to the interests of the United States Government if such ownership is prohibited by the laws of the host country.

Certain of the agreements concluded did not even contain negotiation and arbitration provisions. These include the agreements

36. Investment Guaranties Agreement with Dahomey, March 13, 1965, [1965] 16 U.S.T. 976, T.I.A.S. No. 5837. Although this is a recent agreement it is discussed here because, for some unknown reason, it most closely resembles the original standard text.
38. See Appendix B, Article 6 of current standard agreement.
39. Investment Guaranties Agreement with Chile, supra note 32.
40. See text accompanying note 65 infra.
with Peru, India, Argentina, and Chile. However, India added such a provision two years after it signed the original agreement. Without the arbitration provision much of the value of the investment guaranty agreements is eliminated because enforcement of the substantive provisions is then left to depend primarily on the good faith of the governments involved. The agreements with India, Guatemala, El Salvador, and Nigeria stipulated that a three-man tribunal, not a sole arbitrator, should resolve any disputes which might arise under the agreement. Each country would appoint one arbitrator and those two would appoint the third. This provision was adopted in the standard text in 1965.

The first important changes in the standard text were made in 1962. AID eliminated the clause which provided for subrogation of the United States Government to the investor's rights under the war risk guaranty and for non-application of the negotiation and arbitration clause to disputes arising under that guaranty. Beneficial to the United States was the revised provision which stipulated that it might use currency acquired pursuant to a guaranty in meeting all of its expenditures in the host state, not just administrative expenses. This form of the standard text was embodied in the guaranty agreement with Guinea, except that a gratuitous provision was also included to the effect that the United States would encourage investments of capital in Guinea by United States nationals and companies. Guinea, in return, would permit these invest-

41. Guaranty of Private Investments Agreement with Peru, supra note 32; Guaranty of Private Investments Agreement with India, September 19, 1957, [1957] 8 U.S.T. 1442, T.I.A.S. No. 3900; Guaranty of Private Investments Agreement with Argentina, supra note 20; Investment Guaranties Agreement with Chile, supra note 32. The Indian and Argentine agreements also did not extend to war risk guaranties and thus did not include provision (6) of the standard text above. However, in 1963, Argentina and, in 1966, India agreed to the full range of guaranties. Protocol to Argentine Agreement, supra note 21; Amendment to Agreement with India, February 2, 1966 (unpublished).


43. Agreement with India, supra note 42 (first two arbitrators appointed within two months after request for arbitration, the third within two months after the first arbitrators appointed); Guaranty of Private Investments Agreement with Guatemala, supra note 28 (same as above, except that third arbitrator is appointed within one month after the first arbitrators appointed); Guaranty of Private Investments Agreement with El Salvador, supra note 28 (all three arbitrators to be appointed within two months); Investment Guaranties Agreement with Nigeria, supra note 30 (first two arbitrators appointed within three months, the third within three months after the first arbitrators appointed).

44. See text accompanying note 67 infra.

45. See provision (6) of standard agreement, text accompanying note 26 supra.

46. See provision (4) of standard agreement, text accompanying note 26 supra. Thus such local currency acquired might be used by the United States Government for foreign aid expenditures.

This revised standard text was adopted in the agreements concluded in 1962 with the Congo (Brazzaville) and with the Dominican Republic.
ments, in conformity with its legislation, and would favorably consider the granting of the necessary authorizations. Guinea appears to have desired the inclusion of this special invitation to American capital to reassure investors who might understandably be hesitant about risking their money in that totalitarian state. The Ethiopian agreement, like several mentioned above, included a provision for a three-arbitrator tribunal instead of a sole arbitrator. More remarkable is a deviation in that agreement which results in the United States Government receiving better treatment than it would under the language of the standard agreement. Currency acquired by the United States Government pursuant to guaranties is to receive treatment not less favorable than the most favorable treatment accorded, in like circumstances, to nationals of Ethiopia or nationals of any other country, with reference to any reimbursement, compensation, indemnification, or any other payment that the Imperial Ethiopian Government may make or pay for loss due to invertibility, expropriation, and such other risks as may be mutually agreed upon.

Under the standard agreement the United States Government is only entitled to treatment equal to that given private United States nationals.

Later in 1962 AID made more extensive alterations in the standard text. The agency was persuaded that the investment guaranty agreement should only require of the host that it reaffirm its obligations under international law. Thus the provision for national and most-favored-nation treatment by the host state of investors guaranteed against war risks was entirely eliminated, since it required more of the host state than did international law. In addition notable clarifications were made of the negotiation and arbitration provision, which was made applicable to disputes concerning interpretation or application of the agreement, in addition to those concerning claims to which the United States Government succeeds. Furthermore, a party was permitted to request arbitration after three months of ineffective negotiations instead

48. See text accompanying note 43 supra. The time limits for selection of arbitrators are the same as those in the Indian Agreement, supra note 43. Investment Guaranties Agreement with Ethiopia, August 3, 1962 [1962] 13 U.S.T. 1856, T.I.A.S. No. 5134. The agreement with Ethiopia also did not extend to war risk guaranties and thus did not include provision (6) of the original standard agreement above.
49. Investment Guaranties Agreement with Ethiopia, note 48 supra.
50. See provision (4) of the standard agreement, text accompanying note 26 supra.
51. See provision (6) of the standard agreement, text accompanying note 26 supra.
52. AID Letter, supra, note 18.
53. See provision (5) of the standard agreement, text accompanying note 26 supra.
of after a "reasonable period," as was formerly provided.64 Finally, the new standard text provided that the arbitrator's decision should be made "in accordance with the applicable principles and rules of public international law."65 Previously the agreements did not designate the standards which the arbitrator should apply in reaching a decision. Under such circumstances the outcome of the arbitration would not be sufficiently predictable because, without a specific command to do so, the arbitrator would not necessarily apply international law. The addition of this clause is consistent with AID's belief that the guaranty agreements should require of a state only that which is required by international law.66

Several developing states signed agreements incorporating this revised standard text, although a few inevitably insisted on various modifications. As a rule these modifications were similar to those allowed in earlier agreements. As in the agreement with Guinea, the United States Government agreed in 1965 with Chad to make special efforts to encourage American private investment in Chad.67 Like the earlier agreements concluded with Guatemala and El Salvador, the 1963 agreement with the Malagasy Republic and the 1967 agreement with Cameroon included a provision for prompt notification of the host government should the United States reimburse an investor under a guaranty.68 The important qualification in the agreements with Peru and Chile, that nothing in the agreement gives the United States Government any greater rights than those available to the investor to whose claims the government becomes subrogated, reappears in the Cameroon agreement and in the agreement signed with Uganda in 1965.69 And the 1963 agreement with the United Arab Republic, like several earlier agreements, specified an arbitral tribunal of three members instead of a sole arbitrator.60

54. Id.
55. See Article 6 of the current standard agreement, Appendix B.
56. This significantly revised standard text was wholly adopted in agreements concluded with the following countries between 1962 and 1965: Central African Republic, Congo (Leopoldville), Cyprus, Jamaica, Gabon, Kenya, Laos, Mali, Mauritania, Senegal, Somali Republic (Somalia), Tanganyika (Tanzania), and Upper Volta.
60. See text accompanying notes 43 and 48 supra. Under the U.A.R. provision the first arbitrators must be appointed within two months and the third arbitrator within
However, certain of the agreements included additional clauses not found in earlier agreements. The agreement with Cameroon specifically requires the exhaustion of that country's judicial process before the commencement of arbitration and the U.A.R. agreement stipulates that, before an investor may transfer property to the United States Government, he must exhaust "all other channels of settlement or conversion." This clause accomplishes the same result as the clause specifying that the United States Government has no greater rights than the investor to whose claims it becomes subrogated. Less justifiable is a provision in the U.A.R. agreement stating that currency acquired by the United States Government pursuant to a guaranty is subject to "foreign exchange regulations applicable in the United Arab Republic." This provision would appear to minimize the reasonable conversion rights allowed the United States Government elsewhere in the agreement. Another provision, inserted in the agreements with the United Arab Republic, and with Trinidad and Tobago, stipulated that the host government agreed to recognize the transfer of property from an investor to the United States Government if done in a manner conforming with the laws of the host state. Apparently this provision was required because of laws in the host states prohibiting foreign governments from owning certain types of property.

The standard text currently being utilized by AID was adopted in the latter part of 1965. It comes closer than any previous standard text to preserving the interests of the United States and the developing countries alike. The most laudable new provision eliminates difficulties arising from laws of certain developing countries which prohibit foreign governments from acquiring title to real property. AID's solution, formulated from its experience in negotiating with certain Latin American countries, notably Venezuela and Panama, was to provide for an escrow arrangement in these countries. Under such an arrangement, should the United States Government succeed to the title to real property under a guaranty, its interests would be held by an entity permitted to own such interests under the laws of the host state. This escrow arrange-

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61. Investment Guaranties Agreement with the United Arab Republic, supra note 60.
62. Investment Guaranties Agreement with Cameroon, supra note 58.
63. Specifically, those given by provision (4) of the standard agreement, text accompanying note 26 supra.
64. Investment Guaranties Agreement with the United Arab Republic, supra note 59.
65. See Appendix B.
66. AID Letter, supra note 18.
The investment originally appeared in the agreement negotiated with Brazil in early 1965. The negotiation and arbitration provision was the object of the other alterations made in 1965; the concept of an arbitral tribunal gained favor and was incorporated into the standard text. Three arbitrators are to decide a dispute instead of one, apparently on the theory that a larger number would be more likely to decide the dispute properly and because both governments would then be assured of having their interests properly represented. Each government is to appoint one arbitrator within two months of the request for arbitration and these two arbitrators are to appoint, within three months of the request, a president who must be a citizen of a third state. The President of the International Court of Justice may be requested to make any appointments which a government fails to make within the allotted time. New standards, not much more enlightening than the old, were established to be applied by the arbitrators in deciding a dispute. If the dispute relates to interpretation of the agreement, settlement is to be made “in accordance with the applicable principles and rules of public international law.” If the dispute relates to a claim, the tribunal is to rely “exclusively on the applicable principles and rules of public international law.” The difference in wording appears to have little significance. But if a claim is involved the tribunal must decide first, according to the current standard text, whether or not such claim presents a question of international law for only then does the tribunal have jurisdiction. It is not clear under the earlier agreements who is to decide the question of jurisdiction. One party might argue that the tribunal has jurisdiction only when both parties agree that it has such—a situation which would defeat the purpose of the agreements; the other party might argue that the tribunal has jurisdiction whenever either party makes a claim—a situation which could involve the tribunal in the affairs of a state although no question of international law was involved. Another desirable addition to the standard text was a provision for termination of the agreement. The agreement is to remain in force for six months after one government informs the other that it no longer intends to be a party to it. The agreement remains in force, however, as to guaranties already issued, for the duration of those guaranties, which is limited to twenty years. The provision is beneficial to the interests of both the United States and the developing countries. Earlier agreements did not

67. 4 INT'L LEGAL MAT. 296 (1965).
68. Earlier agreements adopting this approach are listed in notes 43, 48, and 60 supra.
69. See Article 6(a) of the current standard agreement, Appendix B.
70. See Article 6(b) of the current standard agreement, Appendix B.
spell out the rights of the parties to cancel nor the method of cancellation.\textsuperscript{71}

Two agreements, with Argentina in 1963 and Brazil in 1965, resist classification under any of the standard texts. Each adopts the same general approach as the standard texts but presents distinctive problems; they are both the result of considerable negotiation. The Argentine agreement was actually an amendment extending an earlier agreement so that expropriation, war risk, and extended risk guaranties are included in addition to convertibility guaranties.\textsuperscript{72} The rights of both parties under the agreement are carefully recorded. The United States Government may not request negotiation of a claim until local remedies have been exhausted and

neither questions under the Constitution and the laws of the Argentine Republic as to motive, occasion for or legitimacy of an expropriation nor the final decision reached in the Argentine judicial process on any question of the Argentine Constitution and laws may be reviewed by the Arbitral Tribunal, since these are matters within the internal jurisdiction of the Argentine Republic.\textsuperscript{73}

Strangely, the three arbitrator tribunal is expressly deprived by the agreement of jurisdiction over disputes arising under a convertibility guaranty. The 1959 agreement did not include an arbitration provision, and the provision in the 1963 agreement is limited to disputes arising under the expropriation and war risk guaranties. However the substance of the 1963 agreement does not present immediate problems since that agreement has never received the required ratification from the Argentine legislature. As a result the only sections of that agreement which are presently in force are those granting the United States the right to issue expropriation, war risk, and extended risk guaranties for investments in Argentina. No negotiation and arbitration provision is now in effect between the two countries.

The Brazil agreement, concluded in 1965 after several unsuccessful attempts, was in many respects the forerunner of the current standard agreement.\textsuperscript{74} Nevertheless there are some interesting differences. The agreement, unlike any other, is reciprocal. Thus the United States also

\textsuperscript{71} The current standard text has been adopted in agreements with the following countries: British Guiana (Guyana), British Honduras, Ceylon, Indonesia, Lesotho, Malta, Rwanda, Singapore, and Zambia.
\textsuperscript{72} Protocol to the Agreement Between the United States of America and the Republic of Argentina signed December 22, 1959, 2 INT'L LEGAL MAT. 776 (1963).
\textsuperscript{73} Id.
\textsuperscript{74} The Brazil Agreement is reproduced at 4 INT'L LEGAL MAT. 296 (1965).
agreed to allow the Brazilian Government to guarantee investments by Brazilian investors in the United States. (The desire of Brazil to retain its pride is evident.) Currency acquired by the United States Government pursuant to a guaranty is to be held in a mutually-agreeable financial institution "whenever economic circumstances indicate" such to be advisable. Presumably this would be a Brazilian bank. However the most unusual provision of the Brazilian agreement is the negotiation and arbitration provision. Six months of ineffective negotiations is to precede arbitration instead of the standard three. Claims arising from expropriation of property are not subject to arbitration until local remedies have been exhausted and denial of justice remains. The monetary amount of a claim submitted to arbitration may not exceed the amount paid by the United States Government to the investor under a guaranty. Further, the arbitration tribunal is selected by a distinctive method. Article VI (4) of the agreement provides that the tribunal is to be selected in accordance with the General Inter-American Arbitration Treaty signed in Washington on January 5, 1929. Under that treaty the tribunal would consist of five members. Each party is to nominate two arbitrators, of whom only one may be either a national of the party or a person whom the party has designated as a member of the Permanent Court of Arbitration at the Hague. The other member may be of any other American nationality. These arbitrators select a fifth arbitrator who becomes president of the tribunal. Preferably the president is also to be American. The arbitrators have a definite period within which to draw up a written instrument establishing the procedures to be followed by the tribunal. But possibly unknown to the drafters of the Brazilian agreement, the United States made a reservation to the 1929 treaty to the effect that two-thirds of the Senate must advise and consent to the written instrument relating to tribunal procedure before it is effective. This reservation could defeat the very purpose of the agreement, which is to insure expeditious and amicable settlement of disputes. Finally, the Brazilian agreement stipulates that if either party should prefer to join a multilateral guaranty program, should one come into existence, it may seek the immediate termination of the bilateral agreement. This provision is unique.

LEGAL STATUS OF THE UNITED STATES GOVERNMENT UNDER THE CURRENT STANDARD AGREEMENT

Each type of guaranty available presents unique questions relative to the legal status of the United States Government under the agreements.

75. *Id.* 298.
77. 49 Stat. 3153, T.S. No. 886.
Since recoveries under the Investment Guaranty Program have been so few,⁷⁹ interpretation of the provisions of the agreements is lacking. Therefore, delineating the position of the United States Government necessarily involves a large element of prediction and speculation.

The Convertibility Guaranty

Under the convertibility guaranty AID contracts with the investor that if the latter encounters, for a period of thirty consecutive days, substantive transfer difficulties not existing at the time of the original investment, AID will compensate him.⁸⁰ However, since reasonably necessary currency control by a state does not violate international law, especially if the regulations enacted are not discriminatory against the nationals of any country,⁸¹ investors receive greater benefits under the guaranty than they would have under international law.

Under the pre-1962 standard agreement this preferential treatment might be at the expense of the developing states. The agreement provided that currency amounts acquired by the Government of the United States of America pursuant to such guaranties shall be accorded treatment not less favorable than that accorded to private funds arising from transactions of United States nationals which are comparable to the transactions covered by such guaranties.⁸²

This language would not prevent the United States Government from resorting directly to the negotiation and arbitration provision after reimbursing an investor even though the currency restriction imposed by the host state was nondiscriminatory and did not otherwise violate international law. Whether or not the United States Government actually would do so is immaterial. It is this type of provision to which certain states, particularly in Latin America, objected.

⁷⁹. Prior to 1966 the only claim paid under the specific risk guaranties was for inconvertibility of loan installments. No loss was suffered by the United States since AID sold the currency received from the investor to another governmental agency needing that currency. Hearings on H.R. 12449 and 12450 Before the House Committee on Foreign Affairs, 89th Cong., 2d Sess. 565 (1965). However four specific risk claims totaling $217,358 were paid during 1966. Seven claims, including several in the Dominican Republic, were pending as of December 31, 1966 for about $1.5 million. Nevertheless, accumulated net fee income paid by investors for specific risk insurance amounted to about $40 million as of December 31, 1966. Hearings on H.R. 7099 Before the House Committee on Foreign Affairs, 90th Cong., 1st Sess. 304 (1967).


⁸¹. See, e.g., Restatement (Second) Foreign Relations Law of the United States § 198 (1965) : “Conduct attributable to a state and causing damage to an alien does not depart from the international law standard of justice . . . if it is reasonably necessary in order to control the value of the currency or to protect the foreign exchange resources of the state.”

⁸². (Emphasis added.) See Provision (4) of the standard agreement, text accompanying note 26 supra.
Under the current bilateral agreement AID would usually have no basis to resort to the negotiation and arbitration provision, since its remedies are tied to those existing under international law. Thus the agreement states that currency acquired by the United States Government "shall be accorded treatment neither less nor more favorable than that accorded to funds of nationals of the [United States] . . . deriving from investment activities like those in which the investor has been engaged." So if convertibility restrictions are uniform, the United States Government has no right to demand conversion of the host state's currency which it might acquire pursuant to a guaranty until private United States investors engaged in activities similar to those of the reimbursed investor can again effect conversion. Meanwhile the United States Government would be forced to hold onto the currency, using it whenever possible for expenditures in the host state. However a question of international law allowing reversion by the United States Government to the arbitration provision might arise if the host government continued the restrictions for an unusual length of time, especially if valid reasons for the restrictions no longer remained.

The War, Revolution, and Insurrection Guaranty

Under the war, revolution, and insurrection guaranty, AID agrees to pay the investor for direct losses resulting from war, revolution, or insurrection.

However, a government is not liable under international law for acts of insurgents unless it has failed in a positive duty of protection nor is it liable for acts committed by revolutionaries. In addition there is some doubt whether or not a government is liable for damage caused by military operations or preventive destruction.

Although under the pre-1962 standard agreement the negotiation and arbitration provision is expressly made non-applicable to United States Government claims arising in relation to the war, revolution, and insurrection guaranty, that agreement did provide for national and most-favored-nation treatment of U.S. investors who are insured against such risks with respect to compensation or reparations paid for losses incurred. In addition it provided for subrogation of the United States Government to these rights if it reimbursed the investor under a guaranty. Since the arbitration provision was not available to protect these rights, their

83. (Emphasis added.) See Article 5 of the current standard agreement, Appendix B.
84. Id.
85. HANDBOOK 23.
86. W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 665-68 (2d ed. 1962).
88. See provision (6) of standard agreement, text accompanying note 26 supra.
value would depend somewhat on the good faith of the host government. Nevertheless the special treatment provided under the agreement for United States investors exceeds what is required by international law. So the provision was eliminated in 1962 as part of the effort to make the agreements more acceptable in the developing countries.

Under the current standard agreement the negotiation and arbitration provision could rarely be restorted to by the United States Government in relation to a war risk guaranty because a question of international law would not ordinarily be involved. Thus AID would ordinarily recoup little, if any, of the compensation it paid an investor pursuant to a war risk guaranty. Even so, if the investor's enterprise were destroyed as a going concern and the United States Government or its nominee succeeded to the title of whatever property might be salvageable, the Government could liquidate this property and recover some of the compensation paid the investor.

Although the United States Government has less opportunity for recoupment under this guaranty than under the convertibility and expropriation guaranties, there is also less likelihood that compensation of investors will be necessary, or as large as under the other two specific risk guaranties. This is particularly true since compensation is limited to damage to physical property which is the direct result of hostilities. So the risk that the United States Government will suffer extensive losses under the war risk guaranty is not great.

The Extended Risk Guaranty

If AID reimburses an investor for business losses under an extended risk guaranty, normally it would be able to recoup none of the loss from the host government since no question of state responsibility is necessarily involved. Such guaranties are difficult to obtain since they are limited to sound economic development projects which further social progress and the development of small independent business enterprises.

The Expropriation Guaranty

If a host state nationalized the guaranteed investor's enterprise, the latter would be required under his contract with AID to take all reasonable

89. This is indicated by the fact that investors are apparently not as concerned about the possibility of loss due to war, revolution or insurrection, since this guaranty is far less popular than the other two specific risk guaranties. However this guaranty has only been available since 1956 (1961 for revolution and insurrection), and is available in fewer countries. See table in Collins & Etra, Policy, Politics, International Law and the United States Investment Guaranty Program, 4 Colum. J. of Transnat'l L. 240, 293-94 (1966).

90. Id. 280.

measures available including judicial as well as administrative remedies, to pursue and preserve his claims against the expropriating government. If, for a period of one year, the expropriating government prevented the investor from exercising “substantial control over the investment property,” then the investor would be reimbursed for his losses by AID and the United States Government would become subrogated to the investor’s claim.

Under the pre-1962 standard agreement there was no provision that the United States Government should exhaust any remaining local remedies after it reimbursed an investor. Instead the host government would be immediately obligated to negotiate and arbitrate the subrogated claim. Thus the judgment of the United States Government concerning the propriety of the expropriating government’s act might be decisive. Furthermore, since the agreement did not expressly require the arbitrator to apply international law to the dispute, the arbitrator might apply standards more favorable to the United States Government’s position. This is the type of approach to which developing states, especially those of Latin America, understandably objected.

AID silenced many of the complaints of the developing states by limiting the United States Government to its international law rights under the current standard agreement. Nevertheless, complex difficulties remain under the expropriation guaranty, primarily due to the unsettled condition of international law. According to the current standard intergovernmental agreement, the United States

shall assert no greater rights than those of the transferring investor under the laws of the Host Government with respect to any interests transferred or succeeded to . . . . [The United States] . . . Government does, however, reserve its rights to assert a claim in its sovereign capacity in the eventuality of a denial of justice or other question of state responsibility as defined in international law.

Assuming that local remedies were available, if the guaranteed investor had not exhausted them within a one year period due to the typical delays in judicial and administrative processes, AID would be obligated to reimburse the investor. In such cases the United States Government,

93. Id. 18.
94. For example, the arbitrator might feel free to apply the principles of equity in deciding the dispute.
95. See Article 4 of current standard agreement, Appendix B.
96. If the nationalization decree is binding on the courts and no administrative remedies exist, there would be no local remedy to exhaust and the United States could immediately resort to the negotiation and arbitration provision.
as subrogee of the investor, would apparently be required by the above language to exhaust the investor's local judicial and administrative remedies before asserting a claim in its sovereign capacity. 97 This would be an exceptional situation where disputes between states are involved. But there would be no "denial of justice" if local remedies remained and the situation would, therefore, not appear to come within the vague exception involving some "other question of state responsibility as defined in international law." 98 However, if the two governments should disagree on whether or not the agreement requires exhaustion of local remedies by the United States Government, then it might be necessary to resort to the negotiation and arbitration provision to settle this preliminary question. 99

Assuming that local remedies must be and have been exhausted, should the United States Government consider that a "denial of justice" remains, it could then resort 100 to the negotiation and arbitration provision to resolve the question. 101 Settlement would be in accordance with the principles of international law.

Apart from the question of compensation, nondiscriminatory expro-

97. Nevertheless AID apparently feels that it would not be required to exhaust local remedies. According to AID, "The U.S. Government does obligate itself to utilize the judicial remedies available to the investor, but subject to the potentially important proviso that the subrogated claim may be asserted on an intergovernmental level in the event of a 'denial of justice' in the court system of the host country or in the event that there is involved some 'other question of state responsibility as defined in international law.' In the event of an expropriation claim, therefore, it is altogether probable that the U.S. Government would seek to assert the claim in its sovereign capacity." AID Letter, supra note 18.

98. See Article 4 of the current standard agreement, Appendix B.

99. "Differences between the two Governments concerning the interpretation of the provisions of this Agreement shall be settled . . . through negotiations between the two Governments. If such a difference cannot be resolved . . . it shall be submitted . . . to an ad hoc arbitral tribunal." See Article 6(a) of standard agreement, Appendix B.

100. An interesting problem might arise if the U.S. Government succeeded to the interest of an investor whose contract with a Latin American state included a Calvo clause, stipulating that the investor agreed to be treated as a national for purposes of the investment.

Under the current agreement (Appendix B, Article 4) it might be argued that the United States Government would be prohibited from resorting to the arbitration provision in such a case even if there were a denial of justice, since the U.S. Government stands in the place of the investor.

One answer is that Calvo clauses are probably not binding on a protecting state under international law. See J. BRÉBLY, THE LAW OF NATIONS 234-86 (6th ed. 1963). And the United States Government is in effect "wearing two hats" after subrogation. It is both the subrogee of the investor, and also the sovereign, protecting the state. This is made clear by the last sentence of Article 4.

101. "Any claim . . . against either of the two Governments, which in the opinion of the other, presents a question of public international law shall, at the request of the Government presenting the claim, be submitted to negotiation. If . . . the two Governments have not resolved the claim by mutual agreement, the claim, including the question of whether it presents a question of public international law, shall be submitted for settlement to an arbitral tribunal . . . ." Article 6(b) of standard agreement, Appendix B.
Expropriation does not violate international law if it is for a public purpose;\textsuperscript{102} most governmental takings comply at least nominally with this standard. However, international law is most unsettled on the question of compensation for expropriation.\textsuperscript{103} Most Latin American states maintain that no question of international law, \textit{i.e.}, no denial of justice, is present if compensation is paid for alien property taken to the same extent that nationals are compensated. But the traditional view of international lawyers and naturally the one espoused by the "have" nations is that aliens whose property has been expropriated are entitled to "just" compensation.\textsuperscript{104} Two arguments are prevalent among international lawyers from developing countries in reply to this position. A theoretical argument maintains that this is not really international law because the developing countries had no voice in establishing it; such a law was established for the benefit of developed nations to perpetuate the unjust colonial relationship.\textsuperscript{105} A more practical argument, and more defensible, maintains that in order for the developing countries to accomplish social reform on a broad scale, extensive nationalizations will be required for which they simply cannot afford to pay just compensations.\textsuperscript{106}

A compromise of these divergent views does not appear to be imminent. Thus if a dispute under an expropriation guaranty could not be resolved by negotiation, the arbitral tribunal would have a heavy burden. It would be faced with a problem which has worried the United Nations for years.\textsuperscript{107} Although several multilateral agreements for the protection of private foreign investment have been proposed, none has been acceptable to both capital-supplying and capital-receiving

\begin{itemize}
  \item \textsuperscript{102} See \textit{Restatement (Second) Foreign Relations Law of the United States} § 185 (1965).
  \item \textsuperscript{103} See \textit{Restatement (Second) Foreign Relations Law of the United States} §§ 185-89 (1965), including Comments and Reporter's Notes for a good summary of the various views on this question, although somewhat biased in favor of the United States position. \textit{See also} Dawson & Weston, "Prompt, Adequate and Effective": a \textit{Universal Standard of Compensation}? 30 \textit{Fordham L. Rev.} 727 (1962).
  \item \textsuperscript{104} A lengthy citation of proponents of this position is included in \textit{Banco Nacional De Cuba v. Sabbatino}, 307 F.2d 845, 863, nn. 11 & 12 (2d Cir. 1962).
  \item \textsuperscript{107} \textit{See ABA Committee Report} 10-18, which, although not completely objective, summarizes the efforts of the General Assembly. \textit{See also} Schachter, \textit{Private Foreign Investment and International Organization}, 45 Cornell L.Q. 415 (1960).
\end{itemize}
countries. But the arbitral tribunal would be required to come to a decision, so the presently small number of decisions by international tribunals on the question of compensation for expropriation would be enlarged. As a result the international law on the issue should become more definite.

Another difficulty for the United States Government arising under the expropriation guaranty involves drawing a line between expropriation and interference or harassment which does not amount to a "taking." Measures commonly labelled "creeping expropriation," e.g., discriminatory taxes, profit controls, management intervention, and labor regulations on foreign investment, probably do not violate international law unless they are confiscatory. Thus the international law standards for defining expropriation, although vague, are not very inclusive.

Neither Congress nor AID has established useful standards for ascertaining what actions are covered by the expropriation guaranty. According to the Act,

the term 'expropriation' includes but is not limited to any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor, where such abrogation, repudiation or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project.

A general definition of the term is lacking in the Act. Under the terms of the contract between AID and the investor no action is deemed expropriatory if it occurs as a result of

any law, decree, regulation, or administrative action . . . which is not by its express terms for the purpose of nationalization, confiscation, or expropriation . . . , is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities


109. This development may also be speeded by the World Bank's Convention on the Settlement of Investment Disputes, which entered into force on October 16, 1966 after being ratified by twenty states. This Convention establishes a mechanism through which disputes between a contracting state and a national of another contracting state may be negotiated and arbitrated directly. See Farley, Commentary: The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 5 Duquesne L. Rev. 19 (1966); Rodley, Some Aspects of the World Bank Convention on the Settlement of Investment Disputes, 4 Can. Yb. INT'L L. 43 (1966).

110. Fatauros 56; Collins & Etra, supra note 89, at 274.

to which it applies and does not violate generally accepted international law principles.\textsuperscript{112}

This limitation is not very helpful except in the easy cases, where the host government clearly does not intend creeping expropriation. Otherwise it is too vague to assist an investor in predicting the extent of his rights. AID in essence admits this by stating that it meets the test of expropriation on a case-by-case basis.\textsuperscript{113}

Even if AID construes the contract wording against the investor, the latter has more protection against creeping expropriation under the contract than he would have under international law. But such an adverse construction by the United States Government, in a situation where coverage could be reasonably expected, could have a serious effect on public confidence in the Investment Guaranty Program.\textsuperscript{114} A construction favoring the investor would be more in line with the program's purpose of inducing private overseas investment. With this in mind, AID is apparently willing to construe the expropriation guaranty to include creeping expropriation at least to some extent.\textsuperscript{115} Since the United States Government would not ordinarily be able to recoup anything under the bilateral agreement from the host government, the former would be assuming the prospective losses to the extent that it reimbursed investors for creeping expropriation or for any other expropriation which does not violate international law. This would be an indirect and conditional subsidy to American private persons investing abroad, justified by foreign policy considerations.\textsuperscript{116}

Finally, further complications are inevitable under the expropriation guaranty since Congress, angered by expropriations of United States investments in Brazil, added the Hickenlooper Amendment to the Foreign Assistance Act of 1962.\textsuperscript{117} It provides that

(1) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other act when the government of such country . . .

on or after January 1, 1962—

\begin{itemize}
  \item \textsuperscript{112} AID, General Terms and Conditions § 1.15 proviso (1) (221/K/GT/11-65 rev.). § 1.15 also attempts a long and involved positive definition of "expropriatory action," mentioning specific situation. But the definition is of no assistance in meeting the difficult problems of "creeping expropriation."
  \item \textsuperscript{113} AID Letter, supra note 18.
  \item \textsuperscript{114} Armstrong, The United States Government's Investment Guaranty Program, 20 Bus. Law. 27, 29 (1964).
  \item \textsuperscript{115} Ray, Evolution, Scope and Utilization of Guaranties of Foreign Investment, 21 Bus. Law. 1051, 1057 (1966).
  \item \textsuperscript{116} FATOUBOS 111.
  \item \textsuperscript{117} Foreign Assistance Act of 1962, § 301(d) (3), 76 Stat. 260, as amended, 22 U.S.C. § 2370(e) (1964).
\end{itemize}
(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen . . . or
(B) has taken steps to repudiate or nullify existing contracts or agreements with any United States citizen . . . or
(C) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions,\(^{118}\) which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned, and such country . . . fails within a reasonable time (not more than six months . . .) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen . . ., including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law . . .; and no other provision in this chapter shall be construed to authorize the President to waive the provisions of this subsection.\(^{119}\)

The Hickenlooper Amendment does not apply directly to the Investment Guaranty Program because the latter does not constitute "assistance to the government of any country," unless the word "assistance" is construed broadly.\(^{119}\) Nevertheless the Amendment interferes with the program's approach.

The Investment Guaranty Program attempts to treat the host country as a sovereign equal to the United States. Thus there is provision for exhaustion of local remedies in the host country before the United States Government may bring a claim in its sovereign capacity, and the dispute is decided according to the principles of international law, as applied by an international tribunal.

However Congress had its own view—not shared by many inter-

\(^{118}\) The Senate Committee added the phrase "other actions" in 1963 to cover "creeping expropriation." S. REP. No. 588, 88th Cong., 1st Sess. (1963), 1963 U.S. CODE CONG. & AD. NEWS 1230.


\(^{120}\) A 1965 amendment would have made section 620(e) applicable to investment guaranties, but happily it was deleted by the conference committee. Collins & Etra, supra note 89, at 258. Nevertheless "AID has on past occasions ceased to issue guaranties for those countries to which assistance has been terminated under Section 620(e) or other of the Section 620 provisions." AID Letter, supra note 18. If this is true, then AID has lost sight of the purpose of the Guaranty Program. Ideally the availability of the expropriation guaranty would help prevent a mass exodus of capital from a developing country as the result of an isolated governmental taking. New investors might not come in unless their investments could be protected by the expropriation guaranty. Thus it would be self-defeating to stop issuing expropriation guaranties where 620(e) has been invoked due to isolated uncompensated expropriation.
national lawyers—of what is required by international law of an expropriating government. Thus the Hickenlooper Amendment requires compensation, in convertible foreign exchange, equal to the full value of the expropriated property; in some circumstances, this is clearly more than is required by international law.\(^{121}\) It requires compensation for creeping expropriation and does not impose on the investor a requirement that local remedies be exhausted.

Thus the approaches of the two congressional enactments are contradictory. A conflict is bound to arise if a guaranteed investor has his investment nationalized by a host government. Under his contract with AID the investor would be required to pursue his remedies in the host country for one year before becoming eligible for reimbursement under a guaranty. But the Hickenlooper Amendment does not give the host government more than six months to compensate the investor or to take appropriate steps in that direction. So before the United States Government even becomes subrogated to the claim under the Investment Guaranty Program it may be forced by the Hickenlooper Amendment to cut off direct aid to the expropriating country. The program’s procedures for amicable settlement of such disputes would thus be completely thwarted.

Suppose, however, that Hickenlooper Amendment is not invoked after six months and the claim is finally settled by arbitration under an investment guaranty agreement. Very probably, this decision of the arbitral tribunal would not meet the standards established by the Hickenlooper Amendment. Thus the President might be forced to end foreign aid to a country even if the dispute was finally settled. Congress could remedy this anomalous situation by repealing the Hickenlooper Amendment or by giving the President discretion in applying it.\(^{122}\)

**Conclusion**

The current standard bilateral agreement does not substantively obligate the host government under the Investment Guaranty Program any more than it is already obligated by international law. To the extent that the agreement did so in the past, such provisions have been eliminated. Consequently several critics advocate discontinuance of the agreement requirement so that the Investment Guaranty Program could be implemented in any developing country.\(^{123}\) As one states, it is self-

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122. The merits and demerits of section 620(e) are thoroughly discussed in **LILICH** 135-42. See also Comment, *Argentina and the Hickenlooper Amendment*, 54 CALIF. L. REV. 2078 (1966).

123. See Statement of Mr. Stanley de J. Osborne, President, Olin Mathieson Chemical Corp., *Hearings on S. 1983 Before the Senate Committee on Foreign Relations*, 87th Cong., 1st Sess. 1189 (1961); Goekjian 133-35; Pugh, *Legal*
evident under both domestic and international law that the United States would be subrogated to the rights of the investor in the event of payment under a guaranty and a special agreement with the recipient country to this effect is superfluous.\textsuperscript{124}

However the agreement is beneficial for several reasons. International law is of necessity not as definite or as uniformly recognized as municipal law.\textsuperscript{125} Thus, as AID points out, the agreement amounts to a "reaffirmation of these [international law] rights with respect to investment guaranties which may be issued by the [United States Government] . . . and . . . it thus improves the position of the [United States Government] . . . in case of dispute."\textsuperscript{126} The most significant reason for requiring the bilateral agreement is that it provides in advance orderly procedures, which do not otherwise exist under international law, for the handling of claims. This fact by itself justifies the agreement requirement. Furthermore, the conclusion of an agreement represents an assurance to United States investors that foreign private capital is welcomed or even encouraged in the particular country.\textsuperscript{127}

Finally, since the bilateral agreement provides that the host government must approve each investment to be guaranteed,\textsuperscript{128} the host government is less likely to be hostile to the investor after he comes in. The approval of the host government at least implies a moral commitment to fair treatment of the investment by that government.\textsuperscript{129}

In 1963 section 620(1) was added to the Foreign Assistance Act, which provided that all foreign aid would be ended to countries which refused to sign investment guaranty agreements relating to convertibility and expropriation guaranties by December 31, 1965.\textsuperscript{130} Like the Hicken-
looper Amendment, this represented another attempt to coerce the developing countries by threatening to cut off foreign aid. Unlike the Hickenlooper Amendment, section 620(1) was amended and made harmless. In 1965 the deadline was moved to December 31, 1966 and in 1966 Congress wisely amended section 620(1) to give the President discretion as to whether or not a country's aid should be stopped for failure to sign an agreement. Thus the probability of its invocation now seems remote, although AID maintains that it will continue to give serious consideration to this alternative. Had the amendment not been made, several states would have ceased to be eligible for foreign aid.

In summary, the current standard agreement appears satisfactorily to protect the interests of the United States Government under the Investment Guaranty Program without being objectionable to the developing states, even those of Latin America. Although such a project might not be justified by the time and trouble involved, AID might consider replacing the older bilateral agreements which are not as favorable to the developing states. This not only would equalize the obligations of the developing countries under the Guaranty Program but would also eliminate the vagueness concerning the rights of the parties which exists under the earlier agreements. Then, if a developing state really desires to obligate itself substantively to United States investors more than is required by international law, it can sign a friendship, commerce, and navigation treaty with the United States.

Jon H. Moll

APPENDIX A

DEVELOPING COUNTRIES WITH INVESTMENT GUARANTY AGREEMENTS

July 1, 1967

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133. AID Letter, supra note 18.
134. See, e.g., the Treaty of Friendship, Commerce and Navigation with Nicaragua, May 24, 1958, [1958] 9 U.S.T. 449, T.I.A.S. 4024, which, among other things provides for just (full, prompt, and effective) compensation in the event an American investor's property is expropriated, for national and most-favored-nation treatment with respect to transfers of funds between the two states, and for some protection against "creeping expropriation." However no FCN treaty is presently in effect between the United States and any other Latin-American state.
| 4. Brazil       | Brazil       | Brazil       | Brazil       |
| 5. British Honduras | British Honduras | British Honduras | British Honduras |
| 6. Cameroon     | Cameroon     | Cameroon     | Cameroon     |
| 8. Ceylon       | Ceylon       | Ceylon       | Ceylon       |
| 9. Chad         | Chad         | Chad         | Chad         |
| 10. Chile       | Chile        | China        | China        |
| 11. China, Republic of | Republic of | Republic of | Republic of |
| 12. Colombia    | Colombia     | Colombia     | Colombia     |
| 13. Congo (Brazzaville)** | Congo (Brazzaville)** | Congo (Brazzaville)** | Congo (Brazzaville)** |
| 15. Costa Rica  | Costa Rica   | Costa Rica   | Costa Rica   |
| 16. Cyprus      | Cyprus       | Cyprus       | Cyprus       |
| 17. Dahomey     | Dahomey      | Dahomey      | Dahomey      |
| 18. Dominican Republic | Dominican Republic | Dominican Republic | Dominican Republic |
| 19. Equador     | Equador      | Equador      | Equador      |
| 21. Ethiopia    | Ethiopia     | Ethiopia     | Ethiopia     |
| 22. Gabon       | Gabon        | Gabon        | Gabon        |
| 23. Ghana       | Ghana        | Ghana        | Ghana        |
| 24. Greece      | Greece       | Greece       | Greece       |
| 25. Guatemala** | Guatemala**  | Guatemala**  | Guatemala**  |
| 26. Guinea      | Guinea       | Guinea       | Guinea       |
| 27. Guyana      | Guyana       | Guyana       | Guyana       |
| 28. Haiti       | Haiti        | Haiti        | Haiti        |
| 29. Honduras    | Honduras     | Honduras     | Honduras     |
| 30. India       | India        | India        | India        |
| 31. Indonesia*  | Indonesia*   | Indonesia*   | Indonesia*   |
| 32. Iran        | Iran         | Iran         | Iran         |
| 33. Israel      | Israel       | Israel       | Israel       |
| 34. Ivory Coast | Ivory Coast  | Ivory Coast  | Ivory Coast  |
| 35. Jamaica     | Jamaica      | Jamaica      | Jamaica      |
| 36. Jordan      | Jordan       | Jordan       | Jordan       |
| 37. Kenya       | Kenya        | Kenya        | Kenya        |
| 38. Korea       | Korea        | Korea        | Korea        |
| 39. Laos        | Laos         | Laos         | Laos         |
| 40. Lesotho     | Lesotho      | Lesotho      | Lesotho      |
| 41. Liberia     | Liberia      | Liberia      | Liberia      |
| 42. Malagasy    | Malagasy     | Malagasy     | Malagasy     |
| 43. Malaysia    | Malaysia     | Malaysia     | Malaysia     |
| 44. Mali        | Mali         | Mali         | Mali         |
| 45. Malta       | Malta        | Malta        | Malta        |
| 46. Mauritania  | Mauritania   | Mauritania   | Mauritania   |
| 47. Morocco     | Morocco      | Morocco      | Morocco      |
| 48. Nepal       | Nepal        | Nepal        | Nepal        |
| 49. Nicaragua*  | Nicaragua*   | Nicaragua*   | Nicaragua*   |
| 50. Niger       | Niger        | Niger        | Niger        |
| 51. Nigeria     | Nigeria      | Nigeria      | Nigeria      |
| 52. Pakistan    | Pakistan     | Pakistan     | Pakistan     |
| 53. Panama      | Panama       | Panama       | Panama       |
| 54. Paraguay    | Paraguay     | Paraguay     | Paraguay     |
| 55. Peru        | Peru         | Peru         | Peru         |
| 56. Philippines | Philippines  | Philippines  | Philippines  |
| 57. Portugal    | Portugal     | Portugal     | Portugal     |
| 58. Rwanda      | Rwanda       | Rwanda       | Rwanda       |
| 59. Senegal     | Senegal      | Senegal      | Senegal      |
INVESTMENT GUARANTY PROGRAM

60. Sierra Leone  61. Singapore  62. Somalia  63. Spain
64. Sudan  65. Tanzania  66. Thailand  67. Togo
68. Trinidad-Tobago  69. Tunisia  70. Turkey  71. Uganda
76. Venezuela  77. Yugoslavia**  78. Zambia

Although applications will be accepted, guaranties cannot be processed until agreement is ratified by country’s legislative body and in force.

* Restricted availability.
** Not presently available.
*** Although agreement has not yet been ratified by country’s legislative body, guaranties are available under an interim agreement.

APPENDIX B

THE STANDARD FORM OF INVESTMENT GUARANTY AGREEMENT CURRENTLY IN USE 135

[The Guaranteeing Government and the Host Government] ...

Have agreed as follows:

1. When nationals of the Guaranteeing Government propose to invest with the assistance of guaranties issued pursuant to this Agreement in a project or activity within the territorial jurisdiction of the Host Government, the two Governments shall, upon the request of either, consult respecting the nature of the project or activity and its contribution to economic and social development of the Host Country.

2. The procedures set forth in this Agreement shall apply only with respect to guaranteed investments in projects or activities approved by the Host Government.

3. If the Guaranteeing Government makes payment to any investor under a guaranty issued pursuant to the present Agreement, the Host Government shall, subject to the provisions of the following paragraph, recognize the transfer to the Guaranteeing Government of any currency, credits, assets, or investment on account of which payment under such guaranty is made as well as the succession of the Guaranteeing Govern-

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ment to any right, title, claim, privilege, or cause of action existing, or which may arise, in connection therewith.

4. To the extent that the laws of the Host Government partially or wholly invalidate the acquisition of any interests in any property within its national territory by the Guaranteeing Government, the Host Government shall permit such investor and the Guaranteeing Government to make appropriate arrangements pursuant to which such interests are transferred to an entity permitted to own such interests under the laws of the Host Government. The Guaranteeing Government shall assert no greater rights than those of the transferring investor under the laws of the Host Government with respect to any interests transferred or succeeded to as contemplated in paragraph 3. The Guaranteeing Government does, however, reserve its rights to assert a claim in its sovereign capacity in the eventuality of a denial of justice or other question of state responsibility as defined in international law.

5. Amounts in the lawful currency of the Host Government and credits thereof acquired by the Guaranteeing Government under such guaranties shall be accorded treatment neither less nor more favorable than that accorded to funds of nationals of the Guaranteeing Government deriving from investment activities like those in which the investor has been engaged, and such amounts and credits shall be freely available to the Guaranteeing Government to meet its expenditures in the national territory of the Host Government.

6. (a) Differences between the two Governments concerning the interpretation of the provisions of this Agreement shall be settled, insofar as possible, through negotiations between the two Governments. If such a difference cannot be resolved within a period of three months following the request for such negotiations, it shall be submitted, at the request of either Government, to an ad hoc arbitral tribunal for settlement in accordance with the applicable principles and rules of public international law. The arbitral tribunal shall be established as follows: Each Government shall appoint one arbitrator; these two arbitrators shall designate a President by common agreement who shall be a citizen of a third State and be appointed by the two Governments. The arbitrators shall be appointed within two months and the President within three months of the date of receipt of either Government's request for arbitration. If the foregoing time limits are not met, either Government may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointment or appointments, and both Governments agree to accept such appointment or appointments. The arbitral tribunal shall decide by majority vote. Its decision shall be binding. Each of the Governments shall pay the expense of its member
and its representation in the proceedings before the arbitral tribunal; the expenses of the President and the other costs shall be paid in equal parts by the two Governments. The arbitral tribunal may adopt other regulations concerning the costs. In all other matters, the arbitral tribunal shall regulate its own procedures. [sic]

(b) Any claim, arising out of investments guaranteed in accordance with this Agreement, against either of the two Governments, which, in the opinion of the other, presents a question of public international law shall, at the request of the Government presenting the claim, be submitted to negotiation. If at the end of three months following the request for negotiations the two Governments have not resolved the claim by mutual agreement, the claim, including the question of whether it presents a question of public international law, shall be submitted for settlement to an arbitral tribunal selected in accordance with paragraph (a) above. The arbitral tribunal shall base its decision exclusively on the applicable principles and rules of public international law. Only the respective Governments may request the arbitral procedure and participate in it.

7. This Agreement shall continue in force until six months from the date of receipt of a Note by which one Government informs the other of an intent no longer to be a party to the Agreement. In such event, the provisions of the Agreement with respect to guarantees issued while the Agreement was in force shall remain in force for the duration of those guarantees, in no case longer than twenty years, after the denunciation of the agreement.

8. This Agreement shall enter into force on the date of the Note by which the Host Government communicates to the Guaranteeing Government that the Agreement has been approved in conformity with the Host Government's constitutional procedures.