Michigan Law Review

Volume 61 | Issue 6

1963

Foreign Investment Protection: A Reasoned Approach

Earl Snyder

Member of the District of Columbia Bar

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Banking and Finance Law Commons](#), [Comparative and Foreign Law Commons](#), [Insurance Law Commons](#), [Law and Economics Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Earl Snyder, *Foreign Investment Protection: A Reasoned Approach*, 61 MICH. L. REV. 1087 (1963).

Available at: <https://repository.law.umich.edu/mlr/vol61/iss6/21>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

FOREIGN INVESTMENT PROTECTION: A REASONED APPROACH

*Earl Snyder**

THE main purpose in protecting private foreign investment is to encourage capital to move to newly developing nations in spite of serious, existing non-business risks. These risks are (1) the political risk (outright and "creeping" expropriation), (2) the transfer risk (currency controls and inconvertibility of funds), and (3) the calamity risk (insurrection, revolution, war, etc.). But why encourage this?¹ Why should an affluent, powerful nation seek, in effect, to transport overseas some of its affluence and power? Why—in the case of the United States—should encouragement be given to that which may, according to some, tend to tip still more unfavorably the balance of payments?

There are two reasons: humanitarianism and self-interest.

The humanitarian reasons are these: first, there is a moral challenge. Industrially developed nations cannot go their way oblivious of the fact that millions of people in other nations are hungry, ill-clothed and ill-housed.² Second, there is an appalling gap between the standard of living of the industrially developed nations (United States, Canada, Australia, New Zealand and the countries of northwestern and west central Europe) and the newly developing nations. Approximately two-thirds of the people of the world live at or below a subsistence level.³ Third, if the capitalist-democratic ideals of relative political freedom and human dignity do not take root in newly developing nations, these desirable human values will almost certainly disappear from civilization.⁴

The self-interest reasons are these: first, progress of industrially developed nations will not continue if a significant portion

* Member of the District of Columbia Bar; Barrister-at-Law, Gray's Inn, London.—Ed.

¹ For the view that private foreign investment should not be encouraged presently because of world conditions, see Drucker's comment in *THE ENCOURAGEMENT AND PROTECTION OF INVESTMENT IN DEVELOPING COUNTRIES*, INT'L & COMP. L.Q. SUPP. PUB. NO. 3, at 15-17 (1962): "It appears to me that encouragement and protection of investment in the developing countries are, at present, two contradictory aims, one excluding the other. Since no long-term investment in a developing country can—in present circumstances—be effectively protected, a call for an increase of such investments should, with few exceptions, be disregarded for the time being." *Id.* at 15.

² Address by Assistant Secretary for International Organization Affairs, U.S. Department of State, Wayne State University Conference on the Prospects for Democracy in the Underdeveloped Areas, Detroit, Mich., May 1, 1959.

³ STALEY, *THE FUTURE OF UNDERDEVELOPED COUNTRIES* 13-17 (rev. ed. 1961). Basing his calculations on United Nations' documents, Staley indicates that the average per capita income of these people is less than \$150. *Id.* at 17.

⁴ *Id.* at 3.

of the world remains stagnant. Industrially developed nations need raw materials as well as markets for their manufactured goods and other products.⁵ Moreover, experience indicates that they acquire lasting markets in nations they have helped to develop. Second, ill-clothed, hungry, ill-housed people are discontented and restless. They not infrequently resort to insurrection and armed revolution. A large, long-term, economically unproductive arms expenditure to provide "police protection" is more expensive than aiding underdeveloped nations to industrialize. Third, there is a "specific challenge of communism." Communist ideology seeks, of course, to develop underdeveloped nations in its image. If the communists are successful in accomplishing this, the human values of western civilization will doubtless be crushed.⁶ Fourth, non-communist nations are aided in keeping united and strong by foreign trade ties. Indeed, one reason for the failure of the communist bloc to draw some newly developing nations into its orbit has been the not insignificant trade of these nations with industrially developed western nations.⁷

But one should be clear on two points: first, private capital moves because it believes it can make a profit. If there is not sufficient profit potential, private capital will not go abroad—no matter how well protected it may be when it gets there—unless, of course, there is strong governmental encouragement. (This usually involves assurance of reasonable profit initially—along with, perhaps, subtle exhortation to patriotism—and an independent business judgment that a profitable venture will ultimately exist in its own right.) Specifically, private investment will not *normally* go abroad unless there are (1) ample market prospects (including the prospect of protecting a market already supplied from another base, or the more economical supplying of a market in a nearby country); (2) ample labor (in being or trainable without prohibitive expense); (3) management and technicians (in being, trainable without prohibitive expense or importable); (4) reasonably good transportation and communication facilities; and (5) a "favorable investment climate" (this includes a multitude of intangibles difficult to delineate precisely; their presence or absence, nonetheless, is readily apparent to any businessman or any businessman's lawyer).

Second, private foreign investment—even in conjunction with

⁵ STALEY, *op. cit. supra* note 3, at 2; Address, *supra* note 2.

⁶ STALEY, *op. cit. supra* note 3, at 3. This is simply the practical aspect of the third humanitarian reason. See text at note 4 *supra*.

⁷ Address, *supra* note 2.

ample public foreign investment to provide the infrastructure (*i.e.*, transportation, communication, health, education, governmental, etc., facilities)—is not alone sufficient to advance newly developing nations economically. Newly developing nations must be strongly motivated toward economic development.⁸ There is every indication, however, that this motivation exists.⁹

If there is, then, adequate profit potential on the one hand and strong motivation on the other, the failure of sufficient private investment to move to newly developing nations¹⁰ is due largely to political and other non-business risks.¹¹ An important task, therefore, is to find a means of protecting investment in newly developing nations acceptable to both newly developing and capital-exporting nations (as well as, of course, foreign investors). In seeking a basis for common agreement, it may be useful to examine past attempts in this area and the progress that has been made. After that examination, the writer intends to suggest what he believes to be a reasoned approach to protection of private foreign investment.

I. A HISTORICAL CONSPECTUS

A. *Protective Measures by Capital-Exporting Nations*

What steps are capital-exporting nations taking to protect private foreign investment against political and other non-business

⁸ Wright, *Closing the Production Gap*, in PRIVATE INVESTMENT: THE KEY TO INTERNATIONAL INDUSTRIAL DEVELOPMENT 39, 43 (Daniel ed. 1957): Economic growth is "almost a spiritual problem"; Galbraith, *Conditions for Economic Change in Underdeveloped Countries*, 33 J. FARM ECONOMICS 689, 694 (1951): "A strong and effectively expressed desire for change" is a necessary element of economic development. Compare STALEY, *op. cit. supra* note 3, at 203, quoting Robert L. Garner, formerly vice-president, International Bank for Reconstruction and Development and president, International Finance Corporation: "Development is a state of mind. People have to develop themselves before they can change their physical environment and this is a slow process. . . . It involves changes in relations between classes and races. It requires improvement of governmental organization and operations; the extension of social institutions, schools, courts, and health services. These things take much longer than the building of factories and railroads and dams." See also FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 11-28 (1962).

⁹ Snyder, *Foreign Investment: The Other Side*, 22 FED. B.J. 16, 24 (1962).

¹⁰ Brandon, *Survey of Current Approaches to the Problem*, in THE ENCOURAGEMENT AND PROTECTION OF INVESTMENT IN DEVELOPING COUNTRIES, INT'L & COMP. L.Q. SUPP. PUB. NO. 3, at 1 (1962); Snyder, *Protection of Private Foreign Investment: Examination and Appraisal*, 10 INT'L & COMP. L.Q. 469, 471 (1961).

¹¹ Fatouros, *Obstacles to Private Foreign Investment in Underdeveloped Countries*, in CURRENT LAW AND SOCIAL PROBLEMS 194, 202-03, 205-10 (1961); Address of Lord Shawcross, director of the Association Internationale d'Études pour la Promotion et la Protection des Investissements Privés en Territoires Étrangers (APPI), before the Société Royale d'Économie Politique de Belgique, Dec. 15, 1959, in Brussels, published in COMPTES RENDUS DES TRAVAUX DE LA SOCIÉTÉ ROYALE D'ÉCONOMIE POLITIQUE DE BELGIQUE No. 266, at 14 (English), 30 (French) (1960); Brandon, *supra* note 10, at 1-2; Snyder, *supra* note 10, at 472.

risks? The United States, the United Kingdom, Germany and Japan—alone among major capital-exporting nations—have negotiated bilateral agreements with a number of newly developing nations.¹²

The United States vehicle for this protection is its friendship, commerce and navigation treaties. Eleven of these treaties were concluded prior to 1939. Twenty-one have been concluded since 1946, and fifteen of these are currently in force. These treaties contain provisions (applicable in the territory of each party) permitting establishment of enterprises by nationals of each country in the territory of the other and protecting these enterprises against expropriation without payment of compensation.¹³ In general, they provide that property of a national of one country situated in the territory of the other may be taken only on payment of "prompt, adequate and effective" compensation. There are provisions, as well, for repatriation of profits and invested capital, and for arbitration of disputes arising out of investments made under the aegis of a treaty.¹⁴

The United Kingdom has embarked on a similar program. The first treaty (called a treaty of commerce, establishment and navigation) was concluded with Iran on March 11, 1959.¹⁵ Provisions allowing establishment of enterprises by nationals of one country in the territory of the other, providing for expropriation only with compensation and repatriation of capital and profits, and requiring arbitration of disputes are contained in this agreement. Germany has concluded eight agreements of this nature with Argentina, the Dominican Republic, Greece, Iran, Malaya, Morocco, Pakistan, and Togo.¹⁶ Generally, the same sort of provisions that appear in the treaties of the United States and the United Kingdom appear in the German treaties. Japan has concluded two agreements, containing provisions generally similar to those in the United States, United Kingdom and German treaties, with Pakistan and the Philippines.¹⁷

These bilateral agreements afford reasonably good—but not

¹² Brandon, *supra* note 10, at 4-5; Snyder, *supra* note 10, at 477.

¹³ The difficulty with these treaties is that only one is with a Latin American country, one with an African country and none with an Arab country. See address of Lord Shawcross, "The Problems of Foreign Investment in International Law," in HAGUE ACADEMY OF INTERNATIONAL LAW, 102 RECUEIL DES COURS 335 (1961).

¹⁴ WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 147-55, 331-34 (1960).

¹⁵ Treaty Between the United Kingdom and Iran on Commerce, Establishment and Navigation, March 11, 1959, Tehran, Iran, No. 1, CMD. No. 698.

¹⁶ Brandon, *supra* note 10, at 5.

¹⁷ *Ibid.*

completely adequate—protection in countries where they are in force. But the major difficulty with them is that they do not cover many newly developing nations where political risks of expropriation are great and where investors are reluctant to enter, in the absence of adequate protection.¹⁸

B. *Protective Measures by Newly Developing Nations*

What steps are newly developing nations taking to protect private foreign investment against political and other non-business risks? A not inconsequential number have (1) enacted special legislation; (2) promulgated written government policy statements; or (3) limited expropriation constitutionally.¹⁹

Some special legislation guarantees investment against expropriation for a minimum period. For example, expropriation is prohibited in Cambodia for from ten to thirty years and in Indonesia for from twenty to thirty years (depending upon the type of investment).²⁰ On the other hand, the Approved Enterprises (Concessions) Act of Sudan secures fair and equitable compensation and its transfer out of Sudan.²¹ Other newly developing nations' laws promise non-discriminatory treatment of foreign investors: for example, the Iranian and Jordanian laws encouraging and protecting private foreign investment.²² The agreement India consummated with the Standard-Vacuum Oil Company, providing for construction of an oil refinery in India, assures that this refinery will not be expropriated for at least twenty-five years, and thereafter only on payment of "reasonable compensation."²³

These protections provide real advantages for potential foreign investors. *But there are disadvantages as well:* a country may quickly and retroactively change its written policy (particularly if there is a change in the governing faction); laws may also be changed quickly and retroactively; tautly drawn contracts not infrequently invite controversy, breach, and litigation; and, if the stakes are high enough, newly developing nations may even change constitutions with unseemly rapidity.

¹⁸ Cf. U.N. Doc. No. E/3325, at 71 (1960).

¹⁹ U.N. Doc. No. E/3325, Annex II (1960). This annex contains a "Selected List of Laws and Official Texts Concerning Foreign Private Investment in Under-developed Countries." These laws and texts contain legislative or executive prohibitions against appropriation.

²⁰ U.N. Doc. No. E/3325, at 64 (1960).

²¹ *Id.* at 64-65.

²² U.N. Doc. No. E/3325, Annex II, at 5-6 (1960).

²³ U.N. Doc. No. E/3325, at 65 (1960).

C. *Investment Guarantee Programs*

Guarantee (or insurance) programs have been in force in the United States since 1948 (though initially with regard only to currency inconvertibility for new investments in Europe); in Japan since 1956; and in Germany since 1959.

The program of the United States was broadened in 1950 to include protection against expropriation or confiscation. In 1951, it was again broadened to make guarantees available in all countries which then received financial assistance from the United States. In 1956, protection against loss caused by war was included in the program. As a result of a major change in philosophy underlying the program, guarantees were restricted to investments in underdeveloped countries in 1959.²⁴ Finally, the program (divided between the International Cooperation Administration—with regard to “specific risk” coverage, and the Development Loan Fund—with regard to “all risk” coverage) was consolidated in 1961. The program is now administered by the Agency for International Development.²⁵ It covers investments only in nations with which the United States has agreed to institute this program.

There are—as indicated above—two types of guarantees: (1) so-called “specific risk” guarantees against loss due to expropriation, currency inconvertibility, war, revolution or insurrection, and (2) “all risk” guarantees which insure loan investments against risks of every nature and equity investments against risks other than “normal business-type risks.”²⁶

The convertibility protection covers not only absolute exchange blockage, but also (1) a prolonged failure by the newly developing nation to act upon an application for transfer, and (2) discriminatory changes in rates of exchange. The protection does not, however, extend to devaluation of a currency or general depreciation. Generally speaking, the coverage permits an investor to repatriate the equivalent of ninety-five percent of his insured local currency receipts.

The expropriation guarantee protects against (1) governmental action preventing a foreign investor from controlling or disposing of his investment, and (2) abrogation, repudiation or impairment of a foreign government's contract with an investor—providing

²⁴ See THE PROTECTION OF PRIVATE PROPERTY INVESTED ABROAD 24-25 (1963), a report by the Committee on International Trade and Investment, Section of International and Comparative Law, American Bar Association.

²⁵ International Development Act of 1961, §§ 221-24, 75 Stat. 429-32, 22 U.S.C. §§ 2181-84 (Supp. III, 1961).

²⁶ Mutual Security Act of 1954, ch. 937, § 101, as amended, 71 Stat. 357 (1957).

neither is due to an investor's fault or misconduct.²⁷ (In case of a loan investment, however, expropriation will be considered to have taken place *only* if payment of principal or interest is prevented.) A regulatory or revenue-producing measure adopted by a government with intent to divest the investor of his investment is covered by the expropriation guarantee, if, in fact, it does divest him of control or disposition. The amount paid an investor under an expropriation guarantee is the unrepatriated amount of the original investment increased or decreased by profit or loss accrued since the investment was made. Reinvested profits (not to exceed an amount equal to the original investment) are generally covered. All right, title and interest in the expropriated investment vests in the United States Government when it pays a claim under the expropriation guarantee.

War risk protection (available since 1956), along with protection against risk of revolution and insurrection (available only since September 4, 1961, the date of approval of the Act for International Development of 1961), covers damage to physical property up to ninety percent of the value of the investment.

The all-risk guarantee covers a portion (usually not more than fifty percent in the case of an equity investment, and never more than seventy-five percent in either a loan or equity investment) of a loss incurred by a foreign investor for any reason other than the investor's fraud or misconduct or loss from a normally insurable risk. This guarantee is normally available only for "economic development projects furthering social progress and the development of small independent business enterprises."²⁸

These guarantees are available only to United States citizens and to business entities organized in the United States and substantially owned (legally or beneficially or both) by United States citizens. Only a new investment, or expansion of an existing investment, may be covered. The coverage may not extend beyond twenty years. Generally, the premium is one-fourth of one percent per annum (of the coverage) for each type of coverage granted, *i.e.*, expropriation, convertibility, war risk. There is provision for an additional "stand-by" fee of one-fourth of one percent in some instances.

Unlike the United States program, the Japanese investment insurance program may extend to any country where a national

²⁷ International Development Act of 1961, § 223(b), 75 Stat. 431, 22 U.S.C. § 2183(b) (Supp. III, 1961).

²⁸ International Development Act of 1961, § 221(b)(2), 75 Stat. 429, 22 U.S.C. § 2181(b)(2) (Supp. III, 1961).

of Japan has an investment.²⁹ (There is a requirement, however, that the investment must aid in strengthening Japan's balance of payments situation.) Neither a loan nor an investment to establish a foreign subsidiary is insurable. Equity investments may be insured against loss of principal because of (1) expropriation or nationalization; (2) war, revolution, riot (or similar disturbance) or governmental action interfering with property, patents or mineral rights essential to operation of an investment; and (3) suspension of operation for six months or more because of an action in (2) above resulting in the investor disposing of his investment. Profits may be insured against loss because of inability to remit them for two years or more due to (1) exchange restrictions, (2) suspension of exchange transactions, or (3) freezing or confiscation of profits. The premium is normally approximately three-fourths of one percent per annum of the coverage, but a greater premium may be charged for principal risks, if the risks appear unusually high. The amount of damage to be paid is computed by deducting the *larger* of either one-half the dividends received or one-half the dividends expected by the investor when he purchased insurance, from the *smaller* of either the value of the original investment or the liquidation value of the investment. Only seventy-five percent of the loss is compensable; the remaining twenty-five percent must be borne by the investor. Like the United States guarantee program, this program vests all right, title and interest in the government of Japan upon payment of the loss.³⁰

The German investment guarantee program—as the United States one—is applicable only to countries which have entered into bilateral agreements with Germany or, temporarily, those countries which are determined by Germany to protect foreign investment adequately through general legislation or similar means, *e.g.*, an assurance applicable to a particular investment.³¹ For *new* investments strengthening Germany's relations with newly developing nations, guarantees may be purchased by German nationals and by companies whose *siège social* is in Germany. Protection is afforded to equity as well as to loan investments (including an investment in a foreign subsidiary of a German company). Earnings from insured investments may be covered.

²⁹ STAFF REPORT, INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, MULTILATERAL INVESTMENT INSURANCE 27 (1962).

³⁰ *Ibid.*

³¹ *Id.* at 28. As of January 1, 1962, Germany had entered into bilateral agreements with Pakistan, Malaya, Greece, Togo, Morocco, Liberia, and Thailand. Negotiations were in progress with a number of other countries, however.

Coverage is extended to loss resulting from (1) outright and "creeping" expropriation; (2) war, revolution or insurrection; (3) inability to convert or transfer funds; or (4) blockage of payments or moratoria.³² It is limited to the original book value of the investment plus additional investment resulting in expansion of the original undertaking. Normally, coverage is automatically reduced at the end of the third year of the guarantee (and at the end of each year thereafter), by an amount stipulated in the guarantee agreement. Coverage is also proportionately reduced by a reduction in the original investment, *e.g.*, by a repatriation of capital. Earnings may be covered in an amount not to exceed twenty-four percent of the original book value of the investment and not more than eight percent in any one year. Normally, fifteen years is the maximum duration of coverage, but in exceptional cases the coverage may be extended to twenty years. The premium charged for twenty-year coverage is one and one-half percent per annum of the coverage applicable at the beginning of a particular year (for fifteen years' coverage, it is one and one-fourth percent, and for ten and five-year coverage, it is one percent and three-fourths of one percent per annum, respectively). In addition, a processing fee of one DM (*Deutschmark*, about twenty-five cents) per 1,000 for the first ten million DMs of guarantee and one-half DM per 1,000 for the remainder, is charged. This processing fee may not exceed 20,000 DMs. Not more than eighty percent of the loss is insurable, and upon payment of the loss the government of the Federal Republic of Germany acquires all right, title and interest in the expropriated investment. The amount of loss compensable is based on the value of the investment at the time the loss occurred. If there is a partial loss, the amount compensable is based on the difference between the value of the investment immediately before and immediately after the loss occurs. Where there is a loss of earnings, the amount compensable is based on the unpaid amount of earnings distributed during the term of the guarantee.³³

The disadvantages of these programs are evident. In all three, for example, only nationals and "national" investments are protected. Under the United States and German programs, protection is afforded in specific countries with which the United States and Germany have consummated apposite bilateral agreements. Moreover, guarantees are available only for certain specific invest-

³² *Ibid.*

³³ *Id.* at 29.

ments: in the United States, only for new investments (including additions to existing investments) in underdeveloped countries which further the development of the economic resources and productive capacity of the country;³⁴ in Japan, only for investments strengthening Japan's balance of payments;³⁵ in Germany, only for new investments promoting economic relations with underdeveloped nations, generally.³⁶ The premium cost is considered high in all three programs. In the case of the United States program it is even considered *prohibitive* for some investors.³⁷ Indeed, the United States program is not considered by some investors to be worth the time and effort it takes on the part of the investor to obtain the guarantee.³⁸ This is particularly true—some investors maintain—where the investment is in a highly competitive field requiring them to move quickly. German and Japanese investors object to the provision requiring self-insurance up to twenty-five percent of the loss incurred.³⁹ Another disadvantage is that guarantee or insurance programs of this type skirt the necessity of developing legal principles and arbitral (or, perhaps, juridical) machinery for solving problems and disputes caused by investment in a foreign country. A final practical disadvantage is that a multilateral project, such as the aluminum project in Guinea (which involves companies from a number of countries), cannot be uniformly insured under several diverse insurance systems.⁴⁰

II. MULTILATERAL PROPOSALS

A. *Transnational Arbitration*

The view that there may be a way of protecting private foreign investment, so that disputes and controversies between foreign in-

³⁴ *Id.* at 24. Compare the finding that only about "one-quarter of the 54 respondents from the United States considered the U.S. program effective as a stimulant to new investment in the less developed countries. About 37% cited particular weaknesses." *Id.* at 39.

³⁵ *Id.* at 27. Compare the finding that "eighty per cent of the 22 respondents from Japan considered the Japanese program effective, to a greater or lesser extent, in stimulating overseas investment. About 20% described it as ineffective." *Id.* at 39.

³⁶ *Id.* at 28. Compare the finding that "none of the 22 respondents from Germany characterized the German program as effective; six (about half of those who replied) said it was inadequate, and the others noted particular provisions which they considered unsatisfactory." *Id.* at 39.

³⁷ *Id.* at 40; DEP'T OF COMMERCE, FACTORS LIMITING U.S. INVESTMENTS ABROAD pt. 2, at 26 (1954). Compare COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY DOC. NO. 1419, REPORT ON THE PROTECTION OF PRIVATE FOREIGN INVESTMENTS IN DEVELOPING COUNTRIES 12 (1962).

³⁸ DEP'T OF COMMERCE, *op. cit. supra* note 37.

³⁹ STAFF REPORT, *op. cit. supra* note 29, at 39; Snyder, *supra* note 10, at 478.

⁴⁰ STAFF REPORT, *op. cit. supra* note 29, at 20, 48; Brandon, *supra* note 10, at 7.

vestors and newly developing nations are obviated, is simply a pathological belief in the impossible. Disputes of this nature will inevitably arise. Indeed, if it were otherwise, some of our professional brethren would have to find new vineyards in which to labor. Some peaceful method, other than diplomacy, mediation and conciliation, for solving these disputes is a necessity.⁴¹ Is it unreasonable to conclude that the certainty of impartial, just and expeditious settlement of foreign investment disputes would encourage newly developing nations to be more thoughtful in their treatment of foreign investment? Is this not one of the goals of "protection of private foreign investment"? As a corollary, would not this sort of settlement of foreign investment disputes aid in encouraging foreign investors to invest in newly developing nations?

It is commonplace to say that a foreign investor is hesitant to allow adjustment of his grievance before a tribunal of the state allegedly causing the grievance—or in which the grievance arises. Similarly, a state which is a party to a grievance is hesitant about having its rights adjudicated by a tribunal of the state of which a complaining foreign investor is a national.⁴² This tends to persuade one that settlement of foreign investor disputes "under a tribunal or system of tribunals which will command general confidence as to the fairness of their judgment and whose procedure will be supported by a public opinion which will not tolerate a departure from them" is wise.⁴³ The concept has a respectable

⁴¹ Snyder, *Foreign Investment Protection: Is Institutional Arbitration an Answer?*, 40 N.C.L. REV. 665, 666 (1962); cf. Snyder, *Foreign Investment Protection: A Proposed Arbitration Convention*, 11 J. PUB. L. 191 (1962); COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY DOC. NO. 1419, *op. cit. supra* note 37, at 19, 21, 30.

⁴² See, e.g., INT'L LAW ASS'N, REP. OF 40TH CONFERENCE 174-75 (Amsterdam 1938): "Experience has taught that . . . the indispensable objectivity and impartiality [of national courts] are sometimes jeopardized by considerations of national interest; this occurs especially in cases in which considerable interests are at stake." Compare *Jordan Inv., Ltd. v. V. O. Sojuzneftexport*, Moscow Foreign Trade Arbitration Commission, award of July 3, 1958, File No. 16/1957 [a translation appears in 53 AM. J. INT'L L. 800-06 (1959)]. Compare judgment of Bremen Court of Appeal (Oberlandesgericht), Aug. 21, 1959, I U 159-201/1959, affirming a decision of the Landgericht, Bremen, April 21, 1959, 7 Q 12-13/1959, denying an application for a preliminary injunction in an action by former Dutch lessors of Indonesian tobacco plantations against a German corporation which had purchased the tobacco, *with* *Senembah Maatschappij N. V. v. Republik Indonesia Bank of Indonesia*, No. 21/59, a decision of June 4, 1959, by the Appellate Court (Hof) of Amsterdam, affirming a decision of the District Court (Rechtbank) of Amsterdam, Dec. 22, 1958, a strikingly similar case which arrived at a substantially opposite result from the German case.

⁴³ Address by Herbert Brownell, Jr., then U.S. Attorney General, American Bar Association Convention, London, July 24-31, 1957, *Time*, Aug. 5, 1957, p. 8. Compare address by Lord Shawcross before the Société Royale d'Économie Politique de Belgique, Dec. 15, 1959, published in COMPTES RENDUS DES TRAVAUX DE LA SOCIÉTÉ ROYALE D'ÉCONOMIE POLITIQUE DE BELGIQUE No. 266, at 2-23 (English), 24-40 (French) (1960). *But cf.*

history.⁴⁴ Thus, a not inconsequential body of informed current opinion hypothesizes that transnational arbitration⁴⁵ is *part* of a reasoned approach to protection of private foreign investment.⁴⁶

Kopelmanas, *The Settlement of Disputes in International Trade*, 61 COLUM. L. REV. 384 (1961): "An exaggerated idea of the relative importance of authoritative procedure in the settlement of disputes has encouraged the position that the progress of international law depends mainly on establishing such international procedure. The recent evolution of international society shows, however, that better organization of international relations is more readily and efficiently obtained through concerted action by the subjects of international law. An effort to impose on them a supranational system for the settlement of disputes would, in the present inorganic stage of the international society, be premature." *Id.* at 384.

⁴⁴ See, e.g., Sohn, *Proposals for the Establishment of a System of International Tribunals*, in INTERNATIONAL TRADE ARBITRATION 63 (Domke ed. 1958).

⁴⁵ The writer prefers "transnational" arbitration to "international" arbitration. See JESSUP, TRANSNATIONAL LAW 32 (1956): "A Chile or an Indonesia feels poor for want of capital to develop its internal economy. The problem arising from these current yearnings or demands of the underdeveloped countries must be described as transnational rather than international, since they involve the relations of, say, Indonesia not only to the United States for example but also to the private sources of American capital and to such intergovernmental organizations as the International Bank for Reconstruction and Development." See also *id.* at 13-14, 78.

⁴⁶ See, e.g., U.N. Doc. No. E/3325, at 76-81 (1960). This report states: "This dilemma [an investor's reluctance to rely either on foreign courts or the support of his own government] has led to the suggestion that alternative recourse be provided for such disputes before an international arbitral body. Arbitration has increasingly become a favoured method for resolving disputes arising in business relations." *Id.* at 77. See also AM. SOC'Y INT'L LAW, REP. OF N.Y. REGIONAL MEETING 9-10 (1961), where Professor Louis B. Sohn states: "It is in the general interest of the international community to have clear standards, generally accepted standards, and to have them applied impartially by an impartial tribunal. If underdeveloped countries are not willing to accept impartial tribunals and international standards they are going to discover that there is not going to be investment in them, and as a result, their development is going to suffer"; BRITISH PARLIAMENTARY GROUP FOR WORLD GOVERNMENT, A WORLD INVESTMENT CONVENTION? 18 (1959): "Every participating State would bind itself to accept recourse to an Arbitration Tribunal, if a dispute should arise out of the Convention"; U.N. Doc. No. E/AC.6/SR. 282, at 5 (1960) (statement of undersecretary, Mr. de Seynes, Department of Economic and Social Affairs, U.N., to Economic Committee, ECOSOC: "[D]espite some reservations and hesitations, there was a clear trend in favour of some means of arbitration to deal with possible disputes between public authorities and foreign investors"); *id.* at 8 (statement of representative, International Chamber of Commerce); *id.* at 9 (statement of Netherlands' delegate to Economic Committee, ECOSOC); *id.* at 14 (statement of Afghanistan's delegate to Economic Committee, ECOSOC); *id.* at 20 (statement of U.K.'s delegate to Economic Committee, ECOSOC); *contra, id.* at 11 (statement of U.S.S.R.'s delegate to Economic Committee, ECOSOC); for the formless, equivocal view of the U.S. delegate, see *id.* at 19: "The question of an international convention on arbitration of disputes posed . . . difficulties. . . . [A]nd the extension of arbitration procedures to disputes arising between private investors and Governments raised still more complex questions."

The APPI has prepared, as part of its draft international investment protection code, an annex providing for an arbitral tribunal [See 9 J. PUB. L. 118 (1960)]; the International Bar Association, at both its seventh conference at Cologne, July 1958, and its eighth conference at Salzburg, July 1960, passed resolutions to consider establishing new international institutions to settle disputes concerning property rights and interests of aliens. At its 1962 conference in Edinburgh, July 1962, a committee on international arbitration procedure for the protection of investments abroad recommended that the Council of the International Bar Association "assume the task of giving final shape to the Association's views and convictions [on transnational arbitration] for the purpose of speedy adoption and implementation by the International Bar Association"; the Inter-

Indeed, provisions for arbitration are contained in current proposals for a multilateral investment protection convention.⁴⁷

The International Court of Justice is not available for solution of foreign investor-newly developing nation disputes; only states can be parties to litigation before it.⁴⁸ The same difficulty exists with regard to the Permanent Court of Arbitration (a misnomer, since it is simply a panel of arbitrators—four of whom are selected by each signatory state—from which *ad hoc* arbitral tribunals may be formed).⁴⁹ Consideration has been given to restructuring the International Court of Justice or the Permanent Court of Arbitration (or both) so that non-state litigants can be parties to disputes before them. There are both practical and doctrinal reasons, however, why this has not been done—and why it does not appear probable that it will be done in the foreseeable future. Another solution to this problem must be sought.

The United Nations has attempted to deal with this problem at some length and with considerable thoroughness through its Economic and Social Council (ECOSOC).⁵⁰ ECOSOC tends to favor “a special arbitration tribunal or panel, of outstanding neutrality and expertise, perhaps under the United Nations auspices, . . . on a regional basis.”⁵¹ ECOSOC suggests that an arbitral tribunal for solution of investment disputes should be open to individuals—actual and legal—as litigants and not require that the investor’s claim be espoused by its state of nationality. This

national Law Association is working on the problem through its committee on juridical aspects of nationalization and foreign property. Compare Legislative Decree 2687 of Oct. 31, 1953, art. 12, Greece, regarding Investment and Protection of Foreign Capital; IBRD, Loan Regs. 3, 4, §§ 7.03-04 (1961); INTER-PARLIAMENTARY UNION, 47TH INTER-PARLIAMENTARY CONFERENCE resolution II, at 45-47 (1958).

⁴⁷ See text *infra* at 1110 and note 46 *supra*. See also Snyder, *Foreign Investment Protection: A Proposed Arbitration Convention*, 11 J. PUB. L. 191 (1962).

⁴⁸ STAT. INT’L CT. JUST. art. 34, para. 1.

⁴⁹ However, article 47 of the Hague Convention for the Pacific Settlement of International Disputes, 36 Stat. 2224 (1907), authorizes the Permanent Court of Arbitration to make its staff and premises available to any state signatory to that convention. [See Circular Note of the Secretary General, Permanent Court of Arbitration, March 3, 1960, with an unofficial translation of this circular note at 54 AM. J. INT’L L. 933 (1960).] This has been interpreted as allowing use of the staff and premises for resolution of disputes in which an individual—actual or legal—is a disputant. This provides only physical facilities, however. Rules for conducting arbitration and conciliation have now been promulgated by the Bureau of the Permanent Court of Arbitration. See 57 AM. J. INT’L L. 500 (1963).

⁵⁰ U.N. Doc. No. E/3325, at 63-81 (1960). Both ECAFE (Economic Commission for Asia and the Far East) and ECE (Economic Commission for Europe) are concerning themselves with arbitration of trade disputes. See, e.g., Snyder, *supra* note 10, at 483-85. These agencies could, of course, extend their inquiries to arbitration of investment disputes with little additional effort; there is no indication, however, that they intend to do so.

⁵¹ U.N. Doc. No. E/3325, at 81 (1960).

appears to be an excellent idea with considerable persuasive support.⁵²

In May 1961 the United Nations issued a report which indicates considerable interest on the part of various governments in implementing effective transnational arbitration. There are two reasons for this support: (1) it is believed that effective transnational arbitration will improve the investment climate in newly developing nations and avoid disputes (to a degree, at least), and (2) it will allow expert, impartial solution for disputes not avoided.⁵³ The United Nations, however, is attacking this problem with pristine caution. It intends merely to encourage the use of existing arbitral systems and to further *ad hoc* solution of disputes by establishing a panel of expert arbitrators from which *ad hoc* tribunals might be formed. In addition, it intends to draft model arbitration clauses for insertion in foreign investment contracts, treaties and similar documents.⁵⁴ ECOSOC has approved a resolution which requests the United Nations Secretariat to continue its work in attempting to provide transnational arbitration of investment disputes in cooperation with the International Bank for Reconstruction and Development (The World Bank).⁵⁵

At a meeting of the board of governors of the World Bank in Vienna on September 19, 1961, Mr. Eugene R. Black, president, said:

“[O]ur experience has confirmed my belief that a very useful contribution could be made by some sort of special forum for the conciliation or arbitration of these [investment] disputes. . . . The fact that governments and private interests have turned to the Bank to provide this assistance indicates the lack of any other specific machinery for conciliation and arbitration which is regarded as adequate by investors and governments alike. I therefore intend to explore with other institutions, and with our member governments, whether

⁵² *Id.* at 79-81. See also RALSTON, A QUEST FOR INTERNATIONAL ORDER 44 (1941); Sohn, *supra* note 44, at 65-73. Compare JESSUP, A MODERN LAW OF NATIONS 15 & *passim* (1948); LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 10-11 & *passim* (1950); U.N. Doc. No. A/CH.4/96, at 51, 58 (1956) (International Law Commission, Report on International Responsibility, by F. V. Garcia-Amador, Special Reporter): “The alien . . . is a true subject of international rights”; Domke, *The Settlement of International Investment Disputes*, 12 BUS. LAW. 264, 267 (1957); INT’L LAW ASS’N, REP. OF 38TH CONFERENCE 75 (Budapest 1934).

⁵³ U.N. Doc. No. E/3492 (1961).

⁵⁴ Brandon, *supra* note 10, at 13.

⁵⁵ Resolution 836 (XXXII), Aug. 3, 1961. The role of the World Bank in settling investment disputes is well known. It aided in settling the dispute arising out of the nationalization of the Suez Canal, as well as the dispute between the city of Tokyo and bondholders of the French Tranche, which had made a loan to Tokyo in 1912.

something might not be done to promote the establishment of machinery of this kind.”⁵⁶

The International Institute for the Unification of Private Law has prepared a draft of a uniform law on arbitration with respect to private international law, *i.e.*, conflict of laws.⁵⁷ This has been revised by the Council of Europe; the revised draft is being utilized as the basis for a draft law by a committee of experts named by the Council.⁵⁸ The International Bar Association (IBA), the British Parliamentary Group for World Government (BPGWG), the International Law Association (ILA) and the Association Internationale d'Études pour la Promotion et la Protection des Investissements Privés en Territoires Étrangers (APPI)—organizations with some standing and influence in the international arena—have either suggested or prepared draft conventions for transnational arbitration of foreign investment disputes.⁵⁹ The writer has previously set out in some detail his specific suggestions for transnational arbitration.⁶⁰ These will be succinctly covered later in this article.⁶¹

B. Multilateral Insurance Programs

The most comprehensive study extant of a multilateral investment insurance program has been made by the World Bank.⁶² The study points out several advantages (as well as some disadvantages) in such a program. One advantage is the relative simplicity (for both a newly developing and a capital-exporting nation) of participation in one multilateral program as opposed to participation in a number of bilateral programs. A second advantage is a saving of money by nations, as a result of having to negotiate and administer only one multilateral program. A third

⁵⁶ INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, SUMMARY OF PROCEEDINGS, 1961 ANNUAL MEETING OF THE BOARD OF GOVERNORS 9 (1961).

⁵⁷ INTERNATIONAL INSTITUTE FOR UNIFICATION OF PRIVATE LAW, UNIFORM LAW ON ARBITRATION IN RESPECT OF INTERNATIONAL RELATIONS OF PRIVATE LAW, DRAFT III (1954).

⁵⁸ Letter to the writer, dated July 11, 1961, from the Secretary-General, Council of Europe. The Council of Europe has more recently been urged to take a firm stand in favor of compulsory arbitration of foreign investment disputes. See COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY Doc. No. 1419, *op. cit. supra* note 37, at 3 (this is a draft recommendation presented by the legal committee and the Assembly to the Committee of Ministers which has apparently taken no action on the recommendation to date); COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY Doc. No. 1429, OPINION ON THE REPORT OF THE LEGAL COMMITTEE 2 (1962) (this is an opinion of the economic committee supporting the legal committee's draft recommendation).

⁵⁹ Snyder, *Foreign Investment Protection: Is Institutional Arbitration an Answer?*, 40 N.C.L. REV. 665, 668-69 & n.16 (1962).

⁶⁰ Snyder, *supra* note 47.

⁶¹ See text *infra* at 1117.

⁶² STAFF REPORT, *op. cit. supra* note 29.

advantage is that one multilateral program would tend to develop a more uniform set of rules for investment protection than would a number of bilateral programs.⁶³ Still another advantage lies in the fact that there would be uniformity of protection of investments by international consortia or similar groupings of investors of different nationalities.⁶⁴ A fifth advantage is that risks under a multilateral insurance program would be spread over a greater number of premium-payers. This should result in a decrease of premium cost. There are caveats here, however: (1) since there is no initial actuarial basis for determination of premium cost, it might not initially be less costly than under bilateral programs—where premium cost is also determined arbitrarily; (2) unless premium cost is based on the total amount of foreign investment exported by a particular capital-exporting country and the total amount received by a particular newly developing nation, premiums might not necessarily be proportionately lower for a particular investor in a particular country; (3) if the risk is to be spread between both capital-exporting and newly developing nations, premium cost of the latter will obviously increase, since, under present bilateral insurance programs, newly developing nations are not required to pay premiums. A sixth advantage results from the possibility that the chances of achieving a meaningful multilateral protection convention may be enhanced by virtue of the existence of a multilateral insurance program. Some countries—hesitant to undertake obligations concerning foreign investment in the “isolated context of an investment protection” convention—might not find it so onerous when the investment protection convention is combined with a multilateral insurance program. This may be true, because—other things being equal—investors might be less hesitant about investing in countries covered by the insurance program than in countries not covered. This, in turn, may be an incentive to newly developing countries to participate in the program. If their participation involves adherence to a meaningful investment protection convention, it seems possible they may be willing to subscribe to such a convention.⁶⁵

Yet another advantage is that a multilateral insurance program

⁶³ *Id.* at 19-20.

⁶⁴ *Id.* at 20.

⁶⁵ *Id.* at 21. On the other hand, political obstacles to subscribing to a multilateral investment protection convention confronting some newly developing nations should not be overlooked. Moreover, experience has proved that there may be substantial difficulty in securing agreement on rules of conduct to be incorporated into such a convention.

may be a substantial deterrent to discriminatory action (with regard to foreign investments) on the part of newly developing nations. Even if a newly developing nation were not a participant in the program, it might well be hesitant to discriminate against an investment insured by a multilateral insurance program, and, similarly, a multilateral organization might not be reluctant to proceed against it, whereas a particular capital-exporting nation, acting alone, might be quite reluctant because of overwhelming political considerations. Of course, if a newly developing nation were a participant in a multilateral insurance program, the deterrent effect might be even greater for three reasons: (1) the feeling of "belonging to a club," in conjunction with the pragmatic consideration that participation financially obligates a newly developing nation if foreign investments are expropriated; (2) precipitant action by a newly developing nation would antagonize not only the nation of the investor's nationality against which action was taken, but, as well, other participating capital-exporting and newly developing nations; (3) a multilateral organization may be less reluctant to move positively and expeditiously to preclude unacceptable behavior on the part of a participating newly developing nation than a particular capital-exporting nation—because of political considerations a particular capital-exporting nation might have to weigh.⁶⁶ A final advantage is that some investors feel that under a multilateral program they might enjoy greater impartiality and more freedom from political pressure generally than that enjoyed by capital-exporting countries which are parties to bilateral insurance programs.⁶⁷

There are, of course, disadvantages. One is immediately obvious: agreement on a multilateral insurance program (with whatever concomitant rules of conduct are necessary) is said by some to be more difficult and complex than agreement between only two countries.⁶⁸ Moreover, where only one capital-exporting country is attempting to recoup a loss, that country has a variety of ways available to it, through diplomatic bargaining, to recoup the loss; a multilateral organization would seem to be virtually limited to recoupment in the form of adequate and prompt mone-

⁶⁶ *Id.* at 21-22.

⁶⁷ *Id.* at 22.

⁶⁸ As an example of a striking paradox in this area, however, the International Chamber of Commerce conjectures: "Is it not also possible that a number of countries, which may have certain political reservations on entering into bilateral treaty relationships, might be ready to set aside such reservations when dealing collectively with a number of partners?" INTERNATIONAL CHAMBER OF COMMERCE Doc. No. 111/112, 28.III, at 3 (1962).

tary compensation in a convertible currency.⁶⁹ Finally, a multilateral program may be procedurally more cumbersome, less flexible and more impersonal than a bilateral one.⁷⁰

The World Bank study of the feasibility of a multilateral insurance program reveals that there are currently in existence twelve proposals by various organizations and individuals for such a program.⁷¹ These proposals appear to be carefully prepared and comprehensive. They consider: (1) scope of protection to be offered; (2) criteria for eligibility of an investment; (3) investigation of eligibility of an investment; (4) application of the insurance to an existing (as opposed to a new) investment; (5) duration of the insurance; (6) amount and method of assessment of premiums; (7) proportion of loss to be covered; (8) maximum coverage permitted for a particular investment; (9) participants in the program; (10) organization and administration of the program; (11) capital contributions of participants; (12) distribution of liability for losses; (13) arrangements for compensating an investor; (14) arrangements by which a defaulting country reimburses the insurance fund; (15) relationship of the program to any existing national insurance program; and (16) relationship of the program to any multilateral investment protection agreement.⁷²

The establishment of an effective multilateral insurance program depends on a number of variable and complex factors. The World Bank takes the position that it can do little more in this regard than prepare the comprehensive study it has prepared. It points out that it must preserve its position as an impartial banking-lending agency serving both capital-exporting and newly developing nations. Moreover, the World Bank has not been able to establish to its satisfaction that private foreign investment would be encouraged to move to newly developing nations by institution of a multilateral insurance program. For that reason, it questions the wisdom of financial commitments necessary to establish the program.

In the final analysis, establishment of such a program—assuming it is justified on practical grounds—would seem to depend on the willingness and ability of capital-exporting and newly developing nations to provide the impetus to establish the program.

⁶⁹ STAFF REPORT, *op. cit.* *supra* note 29, at 22-23.

⁷⁰ *Id.* at 22.

⁷¹ *Id.* at 30-37. These proposals are (1) APPI proposal, (2) Council of Europe proposal, (3) Hood proposal, (4) Jalan proposal, (5) Maffry proposal, (6) Osborne proposal, (7) Pontzen proposal, (8) Reyre proposal, (9) Straus proposal, (10) Tilney-Bagnall proposal, (11) Van Eeghen proposal, and (12) Zolotas proposal.

⁷² *Ibid.*

This involves the rather difficult—sometimes intractable—mechanical processes of setting up the necessary administrative machinery, no less than the fundamentally important acquisition of adequate financial backing from participating nations—private investors are not able to finance an undertaking of this sort.⁷³ In addition, nations are going to have to be willing to accept risks and compensate for losses resulting from sometimes ill-advised acts that are neither theirs nor controllable by them. They must, in short, be ready to accept the burdens of living in a civilized, economic and (to a degree, at least) political international community. There is presently no firm indication that a significant number of nations are ready to accept these burdens; one cannot, therefore, be sanguine about agreement on a multilateral insurance program in the foreseeable future.

C. *Multilateral Protection Convention*

There is a considerable amount of activity in the direction of the formulation of a multilateral investment protection convention. On the other hand, a body of respectable opinion questions the acceptability of a multilateral protection convention on a significantly broad basis in the foreseeable future.⁷⁴ This body of opinion hypothesizes that any multilateral convention that gains reasonably widespread acceptance among both capital-exporting and newly developing nations will have to be so watered down that it will be virtually meaningless. In short, the common denominator of such a convention would necessarily be so common that it would not be helpful to either newly developing nations or foreign investors. The suggestion is that the only workable approach to this problem is a binational one.⁷⁵

But whatever the chances for reasonably widespread acceptance in the foreseeable future of a multilateral protection con-

⁷³ Brandon, *Survey of Current Approaches to the Problem*, in *THE ENCOURAGEMENT AND PROTECTION OF INVESTMENT IN DEVELOPING COUNTRIES*, INT'L & COMP. L.Q. SUPP. PUB. NO. 3, at 9 (1962).

⁷⁴ See, e.g., FATOUROS, *GOVERNMENT GUARANTEES TO FOREIGN INVESTORS* 69-189 (1962); RUBIN, *PRIVATE FOREIGN INVESTMENT* 82-83 (1956); Metzger, *Multilateral Conventions for the Protection of Private Foreign Investment*, 9 J. PUB. L. 133-34 (1960); Miller, *Protection of Private Foreign Investment by Multilateral Convention*, 53 AM. J. INT'L L. 371, 376-78 (1959); Proehl, *Private Investments Abroad*, 9 J. PUB. L. 362, 372 (1960). Compare Larson, *Recipients' Rights Under an International Investment Code*, 9 J. PUB. L. 172 (1960); Young, *Remedies of Private Claimants Against Foreign States*, in *SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF THE INSTITUTE ON PRIVATE INVESTMENTS ABROAD* 45, 84-87 (1961). *Contra*, BRITISH PARLIAMENTARY GROUP FOR WORLD GOVERNMENT, *A WORLD INVESTMENT CONVENTION?* 7-8 (1959); Snyder, *Protection of Private Foreign Investment: Examination and Appraisal*, 10 INT'L & COMP. L.Q. 469, 490-94 (1961).

⁷⁵ Metzger, *supra* note 74, at 143-46. See text *supra* at 1089-90.

vention, one cannot conduct even a cursory survey of problems surrounding encouragement and protection of foreign investment without considering the following major proposals for such a convention.

First: The British Parliamentary Group for World Government—composed of knowledgeable, interested members of the British House of Commons, of all political parties—established a commission on a world investment convention in March 1958 with this goal:

“To attempt to formulate a World Investment Code in order to develop greater international confidence conducive to investment on the basis that both investors and investees, whether they represent government finance or private enterprise, will benefit from their rights and obligations being mutually agreed and assured, and to examine the conditions under which such a Code could be legally enforceable, and for this purpose to consider the availability of capital in different parts of the world and the disparity between developed and under-developed countries.”⁷⁶

This commission published a useful report on the feasibility of a multilateral investment protection convention.⁷⁷ The report indicates that the convention it visualizes would broadly enunciate only “a very few general rules”; it would formulate objectives and procedures for protection of private foreign investment.⁷⁸ The report also thoughtfully considers the fundamental question: is formulation of a convention of this sort—acceptable to both capital-exporting and newly developing nations—possible in the foreseeable future? It hints that success may not be impossible.⁷⁹ More recently, however, “in so far as thought has developed [in the British Parliamentary Group for World Government] on this whole question, it is that taken alone, the idea of a world investment convention does not seem to be enough to engender a political will to see that it occurs. We have, therefore, noted with satisfaction the work which the World Bank has been putting into study of multilateral investment insurance. Perhaps taken together, these two ideas could better effect a break-through than can either by itself.”⁸⁰

⁷⁶ BRITISH PARLIAMENTARY GROUP FOR WORLD GOVERNMENT, *op. cit. supra* note 74, at 5.

⁷⁷ *Ibid.* The report referred to is Document PGWG 590715.196C, published in July 1959. It suggests a “World Investment Convention, backed by a Secretariat to administer it and an Arbitration Tribunal to deal with disputes.” *Id.* at 6.

⁷⁸ *Id.* at 15.

⁷⁹ *Id.* at 7-8.

⁸⁰ Letter to the writer, dated July 9, 1962, from Patrick Armstrong, clerk to the British Parliamentary Group for World Government.

Second: The Swiss government has prepared a draft convention on guarantees. Its principal concern, however, is with repatriation of an investment and its profits, compensation for "creeping" or outright expropriation, and currency convertibility. This draft convention was submitted to the Organization for European Economic Cooperation (OEEC) in 1959 (now the Organization for Economic Cooperation and Development, OECD).⁸¹

Third: The Council of Europe has had under consideration since 1958 a proposed regional investment convention applying only to African countries.⁸² This convention proposes (1) an investment statute; (2) a guarantee and financial assistance fund; and (3) expansion of technical assistance. The Consultative Assembly of the Council, in 1958, recommended the convening of a conference to be held, if possible, in Africa. Attendance would be open to (1) all member countries of the Council; (2) all interested African countries; and (3) all competent international organizations.⁸³

This conference would have the task of preparing a draft investment statute, establishing a guarantee fund and presumably laying a foundation for establishment of a financial assistance fund and technical assistance program. No action was taken on this 1958 recommendation; the Assembly repeated the recommendation in its 1959 and 1960 sessions. Nonetheless, such a conference has not yet been held. The thoughtful and comprehensive work of the Council, however, has been valuable as a stimulant. More recently, the Council of Europe has been urged by its legal committee:

"With regard to a multilateral investment convention:

- (a) that the member Governments should actively support the work of OECD for the preparation and conclusion of an international convention reaffirming 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;

"With regard to an International Guarantee Fund:

- (b) that it should appoint a committee of experts with in-

⁸¹ Brandon, *supra* note 73, at 10.

⁸² See, e.g., COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY DOC. NO. 1027, REPORT ON AN INVESTMENT STATUTE AND A GUARANTEE FUND AGAINST POLITICAL RISKS (1959); COUNCIL OF EUROPEAN CONSULTATIVE ASSEMBLY DOC. NO. AS/JUR(12), POSSIBILITY OF CONCLUDING AN INTERNATIONAL CODE FOR THE PROTECTION OF FOREIGN INVESTMENT IN UNDER-DEVELOPED COUNTRIES (1960).

⁸³ *Ibid.*

structions to examine urgently the proposal already made by the Assembly for the institution of an international guarantee fund against non-commercial risks and consider and report whether a second convention should be prepared which could later serve as a basis for discussion with regional groupings of interested countries, not merely in Africa, as proposed earlier by the Assembly, but, where appropriate, in other parts of the world.

"With regard to compulsory arbitration:

- (c) that both conventions should contain a clause providing for compulsory arbitration in the event of disputes or for their settlement by other judicial means;
- (d) that similar provisions for compulsory arbitration should be included in future bilateral treaties, such as those concluded in recent years by the Governments of the United States of America and the Federal Republic of Germany, and in contracts made between investors and capital-receiving governments;

"Finally:

- (e) that the long-term objective should be a worldwide investment convention; the conclusion of such an instrument, that is to say a generally acceptable convention probably stemming from the OECD Convention and providing for compulsory arbitration in the event of disputes arising over the treatment accorded to foreign property would, if feasible, constitute a valuable step forward."⁸⁴

This urging by the legal committee has been strongly supported by the Council's economic committee:

"The Economic Committee:

1. Supports the proposal that the Committee of Ministers urgently re-examine Recommendation 211 on the institution of an International Guarantee Fund against political risks with a view to preparing a Convention to implement this idea; in this connection it should be stressed that the Economic Committee believes that the regional approach in the frame-work of groupings of countries with common interests advocated in Recommendation 211 offers the best prospect of success;
2. Supports the proposal that member Governments should actively press on with the work carried on within the

⁸⁴ COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY DOC. NO. 1419, REPORT ON THE PROTECTION OF PRIVATE FOREIGN INVESTMENTS IN DEVELOPING COUNTRIES 2-3 (1962).

OECD for the conclusion of a multilateral convention for the protection of foreign property;

3. Supports the proposal that both these conventions should contain provisions for compulsory arbitration in the event of disputes and that similar provisions be included in future bilateral investment treaties.”⁸⁵

Fourth: The International Chamber of Commerce prepared a proposed International Code of Fair Treatment for Foreign Investment,⁸⁶ which was approved by its Quebec congress in June 1949. The proposed code provides for protection of foreign investment against risks of discrimination, nationalization and currency restrictions. It also provides for arbitration of disputes. In December 1960—going a step farther—the International Chamber of Commerce convened a useful and unique international businessmen’s conference in Karachi, Pakistan. This conference, December 5-8, 1960, was held primarily to obtain the views of business leaders in both capital-exporting and newly developing nations on provisions that should be contained in a convention for protection of private foreign investment. The first of its kind held in Asia, it was attended by businessmen from twenty-eight nations vitally concerned in promoting economic development, both internationally and in their respective countries. Representatives of a number of nations normally classed as less developed were present: Burma, Ceylon, India, Iran, Korea, Pakistan, the Philippines, Thailand, Tunisia, Turkey, United Arab Republic (then composed of both Egypt and Syria), Vietnam and Yugoslavia. A “Statement of Conclusions” was unanimously approved by the conference.⁸⁷ This statement says in part, “Nationalization—if applied at all—should be non-discriminatory and accompanied by prompt, effective and adequate compensation.”⁸⁸ Moreover, it asserts that old as well as new investment should be afforded this protection. The conference concluded that the International Chamber of Commerce’s International Code of Fair Treatment for Foreign Investment “should be reviewed by the ICC in the light of the opinions expressed at the Karachi conference and by

⁸⁵ COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY DOC. NO. 1429, OPINION ON THE REPORT OF THE LEGAL COMMITTEE 1-2 (1962).

⁸⁶ INTERNATIONAL CHAMBER OF COMMERCE BROCHURE NO. 200, ATTRACTING FOREIGN INVESTMENT 9-12 (1960).

⁸⁷ INTERNATIONAL CHAMBER OF COMMERCE DOC. NO. IBC/129, *Statement of Conclusions* (1960) (Statement of the International Businessmen’s Conference at the 9th Session of the Commission on Asian and Far Eastern Affairs of the ICC).

⁸⁸ *Id.* at 2.

various national committees of the ICC."⁸⁹ The trend of thought of the International Chamber of Commerce today, however, appears to be toward a multilateral insurance program *combined with* some sort of multilateral protection convention.⁹⁰

Fifth: There is the Abs/Shawcross draft convention on investments abroad, of April 1959.⁹¹ This draft convention evolved out of two earlier draft conventions. One was prepared by the Society to Advance the Protection of Foreign Investments (a group of German bankers, lawyers and economists); the other was prepared by a group of English and continental lawyers under the chairmanship of Lord Shawcross, a director of the APPI. Succinctly, three general principles of international law are embodied in this draft convention: (1) non-discrimination and its corollary—fair and equitable treatment of investments; (2) *pacta sunt servanda*; and (3) prompt, adequate and effective compensation in the event of expropriation ("creeping" or outright) or nationalization of an investment. Moreover, an annex proposes establishment of an arbitral tribunal.⁹² This draft convention was submitted by the German Government to the OEEC in 1959,⁹³ and was carefully considered by that organization's committees. When the OECD came into being on September 30, 1961, the drafting of a multilateral protection convention was one of the items carried over from the OEEC. The legal adviser to the OEEC (and to the present OECD) prepared a number of successive draft conventions with notes and comments. These drafts have been discussed by a working group of legal experts, as well as by the committee for invisible transactions.⁹⁴ It is significant to note that United States representatives at the OECD have not

⁸⁹ *Id.* at 4.

⁹⁰ INTERNATIONAL CHAMBER OF COMMERCE DOC. NO. 111/114 (1962): "[A]lthough the ICC is not yet in a position to express a final opinion on all aspects of the extremely complex question treated here [the feasibility of a multilateral insurance program] it believes that the discussions and investigations it has so far conducted indicate clearly that the idea of a multilateral system of investment insurance deserves the most careful consideration from governments, . . . as a means of promoting the economic expansion of the developing countries through an increased flow of private investments from abroad." *Id.* at 5. "The broad consensus of opinion within the ICC is that it would be desirable to combine the insurance scheme with a [multilateral investment protection] code. . . . There are even many who strongly hold that unless this is done the whole insurance scheme should be dropped. Others would not go so far as this and would deprecate making the fate of the insurance scheme dependent upon agreement concerning rules of conduct." *Id.* at 3.

⁹¹ See 9 J. PUB. L. 116-18 (1960).

⁹² *Id.* at 118.

⁹³ Brandon, *supra* note 73, at 10.

⁹⁴ THE PROTECTION OF PRIVATE PROPERTY INVESTED ABROAD 20-21, 59 (1963), a report by the Committee on International Trade and Investment, Section of International and Comparative Law, American Bar Association.

taken an active part in consideration of this draft convention; indeed, there is some indication that the United States does not support the underlying principles of this convention.⁹⁵ It is believed that the committee for invisible transactions will shortly submit to the Council of the OECD a proposed draft multilateral protection convention. This will be an important step; it should aid in moving closer to the ultimate goal of an adequate, acceptable method of encouraging and protecting foreign investment.

Sixth: A useful, tangential work in this area is the Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School.⁹⁶ This comprehensive convention resulted from a suggestion by personnel of the United Nations Secretariat that the Harvard Law School could assist the United Nations by bringing up to date the Harvard draft convention of 1929 on this subject. The convention will be utilized by the International Law Commission in its further deliberations in the area of nationalization.⁹⁷ The value of the Harvard convention lies in its exhaustive, detailed, competent treatment of the entire problem of responsibility of states for injuries to aliens (it treats the broader area as its title indicates) in codified form. It will doubtless be an important reference work for anyone seriously and meticulously working in this area. It is submitted, however, that it is not the sort of convention that may achieve reasonably widespread acceptance among capital-exporting and newly developing nations in the foreseeable future.

Seventh: In addition to these not inconsiderable efforts, other organizations have registered support for some sort of protection for private foreign investment. Among these are (1) the International Parliamentary Union at its conferences in Rio de Janeiro in 1958 and Warsaw in 1959;⁹⁸ (2) the World Federation of United Nations Associations in 1958;⁹⁹ (3) the International Conference of Manufacturers at its conference in London in 1960;¹⁰⁰ (4) the International Bar Association at its conferences in Cologne in 1958, Salzburg in 1960 and Edinburgh in 1962;¹⁰¹ (5) the Inter-

⁹⁵ Letter to Hon. Dean Rusk, Secretary of State, dated Nov. 22, 1961, from working group on multinational guarantees of foreign investments (signed by G. M. Doppelt, chairman), Committee on International Trade and Investment, Section of International and Comparative Law, American Bar Association.

⁹⁶ See Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545 (1961).

⁹⁷ AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 107-98 (1960).

⁹⁸ Brandon, *supra* note 73, at 11.

⁹⁹ *Ibid.*

¹⁰⁰ Charlotte (N.C.) Observer, Oct. 7, 1960, p. 7-B, col. 3.

¹⁰¹ INT'L BAR ASS'N, REP. OF 7TH CONFERENCE (Cologne, July 1958); *id.*, REP. OF 8TH CONFERENCE (Salzburg, July 1960); *id.*, REP. OF 9TH CONFERENCE (Edinburgh, July 1962).

national Law Association at its conferences in New York in 1958, in Hamburg in 1960 and in Brussels in 1962;¹⁰² (6) the European League for Economic Cooperation in 1958;¹⁰³ (7) the European Federation of Industrial Organizations; (8) the Swiss Bankers' Association; (9) L'Institut Internationale d'Études Bancaires; and (10) the Chamber of Commerce of the United States.¹⁰⁴

III. A CRITIQUE

There is, unfortunately, a near fatal defect in the two most vigorously asserted multilateral protection conventions—*viz.*, the International Chamber of Commerce's Code of Fair Treatment for Foreign Investment and the Abs/Shawcross draft convention: these conventions read like "a statement of banker's terms sought to be elevated to the dignity of law."¹⁰⁵ For example, the Abs/Shawcross draft convention (from which has evolved the OECD draft convention) has evoked these specific, thoughtful words: "[I]t lacks expressions of mutuality, something which cannot be achieved merely by eliminating objectionable provisions from successive drafts, but only by balancing specifics against specifics."¹⁰⁶

The Abs/Shawcross draft convention—let it be said initially—is considerably less one-sided than its predecessor, the 1957 draft convention of the German Society to Advance the Protection of Foreign Investments. But its philosophy has been succinctly expressed by one of its authors, Lord Shawcross:

"[T]he *quid pro quo* for the borrowing States' undertakings is in fact, in the English vernacular the provision of the 'quids,' that the capital importing countries in return for agreeing to abide by the generally recognized procedures of International Law will receive more private investment and with the capital, the benefits of the technical and commercial skills which go with them, than would otherwise be the case."¹⁰⁷

¹⁰² INT'L LAW ASS'N, REP. OF 48TH CONFERENCE 343-74 (New York 1958); *id.*, REP. OF 49TH CONFERENCE (Hamburg 1960); *id.*, REP. OF 50TH CONFERENCE (Brussels 1962).

¹⁰³ U.N. DOC. NO. E/3325, at 74 n.1 (1960); COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY DOC. NO. AS/JUR(12)4, POSSIBILITY OF CONCLUDING AN INTERNATIONAL CODE FOR THE PROTECTION OF FOREIGN INVESTMENT IN UNDER-DEVELOPED COUNTRIES 3 (1960).

¹⁰⁴ POLICY DECLARATION ON WORLD AFFAIRS, ECONOMIC-POLITICAL 7-8, 26-29 (1960-1961) (adopted by the members of the Chamber of Commerce of the United States).

¹⁰⁵ Compare Proehl, *Private Investments Abroad*, 9 J. PUB. L. 362, 363 (1960).

¹⁰⁶ *Ibid.* See also COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY DOC. NO. 1419, *op. cit. supra* note 84, at 17-18; *id.*, Doc. No. 1429, *op. cit. supra* note 85, at 4.

¹⁰⁷ Address by Lord Shawcross before the Society To Advance the Protection of Foreign Investments, Dec. 7, 1959, in Cologne, Germany; address by Lord Shawcross before the Société Royale d'Économie Politique de Belgique, Dec. 15, 1959, in Brussels, Belgium. The former is contained in GESELLSCHAFT ZUR FÖRDERUNG DES SCHUTZES VON

If one can accurately unscramble Shawcross' scrambled syntax, one may venture that he meant that newly developing nations will get more capital and modern technology if they play the game according to traditional international law rules. Their getting this additional capital and technology is the *quid pro quo* for their assuming traditional international law obligations. The philosophy of this draft convention is supported by its drafters, moreover, on the basis that newly developing nations may set out their rights in legislation and impose obligations on investors by terms in contracts they make with these investors.¹⁰⁸ There is, of course, considerable merit in this position. But the plain fact is that there has been no great rush by newly developing nations to embrace this convention or its basic philosophy. There are a number of reasons for this reluctance; but the fact that this convention is not evenhanded—to use Professor Proehl's thought, it does not balance “specifics against specifics”—is a not inconsiderable factor for the reluctance, in the view of several learned writers.¹⁰⁹

A careful study of the OECD draft convention reveals that it is somewhat more evenhanded than the Abs/Shawcross convention. In the view of the writer, however, it is not sufficiently evenhanded to attract widespread acceptance among newly developing nations in Latin America, Africa and Asia.

As indicated above,¹¹⁰ several persons working in this area are not at all optimistic of achieving—within the foreseeable future—widespread acceptance of a multilateral investment protection convention.¹¹¹ What, then, do these persons suggest to encourage and protect private foreign investment? Some suggest that capital-exporting and newly developing nations enter into bilateral agreements. They point to the fact that the United States, the United Kingdom, Germany and Japan have negotiated bilateral agreements to accomplish this.¹¹² More and more, however, there is a turning toward a multilateral investment insurance or guarantee program.¹¹³ But is a multilateral insurance program, standing alone, sufficient? There is at least one knowledgeable, influential

AUSLANDSINVESTITIONEN e. V. Pub. 3, at 46-60; the latter is contained in COMPTES RENDUS DES TRAVAUX DE LA SOCIÉTÉ ROYALE D'ÉCONOMIE POLITIQUE DE BELGIQUE No. 266, at 2-23 (English), 24-40 (French) (1960).

¹⁰⁸ *Ibid.*

¹⁰⁹ Compare preceding materials cited in note 74 *supra*, with BRITISH PARLIAMENTARY GROUP FOR WORLD GOVERNMENT, *op. cit. supra* note 74, at 8.

¹¹⁰ See text *supra* at 1105.

¹¹¹ See materials cited in note 74 *supra*.

¹¹² See text at notes 12-18 *supra*.

¹¹³ See text at notes 62-73 *supra*. Compare COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY Doc. No. 1419, *op. cit. supra* note 84, at 16.

international organization which leans toward the position that a multilateral investment protection convention would be useful as an adjunct of an insurance program.¹¹⁴ Such a convention would delineate the legal and quasi-legal context in which the insurance program would operate.

There are defects in each of these approaches: the *bilateral* approach simply avoids the thorny problem of feasibility of some sort of multilateral approach; the *multilateral* approach does not come to grips with the equally thorny problem of an adequate, impartial, expeditious, widely acceptable means of resolving foreign investor-newly developing nation disputes. It is, of course, understandable that there are those who take the firm position that a multilateral program—either insurance or a convention for investment protection, or both—is not possible in the present world political and economic structure. The position is based, in part, on the past failure of attempts at multilateral investment protection conventions—ranging from 1929 to 1957.¹¹⁵ But the sober truth is that there has been no intensive, empirical attempt to discover whether this position is true today—to discover, for example, (1) what provisions newly developing nations consider acceptable in a multilateral investment protection convention, and (2) whether there may be a common meeting ground for agreement (on either a multilateral insurance program or an investment protection convention) between most newly developing and capital-exporting nations. Indeed, the multilateral insurance study of the World Bank took into account only the views of investors.

As was pointed out previously,¹¹⁶ blinking the need for an adequate, impartial, expeditious, widely acceptable means of resolving foreign investor-newly developing nation disputes is illusory and unrealistic. Through draft conventions now in existence (*e.g.*, the proposed International Chamber of Commerce

¹¹⁴ INTERNATIONAL CHAMBER OF COMMERCE DOC. NO. 111/114 (1962). Compare STAFF REPORT, INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, MULTILATERAL INVESTMENT INSURANCE 21 (1962); COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY DOC. NO. 1419, *op. cit. supra* note 84, at 16.

¹¹⁵ Snyder, *supra* note 74, at 472-75. The first proposed agreement was drafted by a League of Nations conference in 1929. It was not acceptable to nations as a standard of conduct. A second attempt was made at the Ninth International Conference of American States in 1948. Agreement could not be reached on crucial provisions of the proposed convention. A third attempt was made at the Economic Conference of the Organization of American States in 1957. The conference could not reach agreement on widely acceptable proposals.

¹¹⁶ See text *supra* at 1096-97. Compare Abdel-Wahab, *Economic Development Agreements and Nationalization*, 30 U. CING. L. REV. 418, 420 (1961); Dant, *The Unused Potential of the World Court*, 40 FOREIGN AFFAIRS 462, 467 (1962).

Code of Fair Treatment and the Abs/Shawcross and OECD draft conventions) we have made considerable progress toward determining what *capital-exporting nations* consider to be acceptable provisions in a multilateral investment protection convention. On the other hand, there has been only one minor attempt to determine what provisions *newly developing nations* consider acceptable in such a convention. In 1959 a commission of the British Parliamentary Group for World Government (which was presumably hampered by lack of funds and time) attempted to determine this.¹¹⁷ It did it in two ways: (1) it invited the Hon. K. A. Gbedemah, then Minister of Finance in Ghana; Mr. Yusaf Ismail, then Minister-Counsellor of the Indonesian Embassy, London; H. E. Dr. Paz Estenssoro, then Bolivian Ambassador in London, previously President of Bolivia (1952-1956); and Mr. T. Swaminathan, then Minister (Economics) of the Indian High Commissioner's Office, London, to express their views;¹¹⁸ and (2) by drafting a proposed multilateral investment protection convention and circulating it to all Commonwealth finance ministers. The response to the latter was disappointing. "The reason was clearly that the sight of an official-looking document at once put them [Commonwealth finance ministers] into their official frame of mind and made them very cautious not to commit themselves."¹¹⁹

IV. A REASONED APPROACH

The writer suggests a two-fold approach to the problem of the protection of private foreign investment.

1. If foreign investors and capital-exporting nations are really serious in desiring to find out if a multilateral protection convention or insurance program (or both) is feasible, and what provisions are acceptable to newly developing nations, there are practical, commonsense, relatively inexpensive means of doing this. It may be done in either of two ways. First, approach officials of newly developing nations—these officials must, of course, be the ones vitally concerned in the economic development of these na-

¹¹⁷ See BRITISH PARLIAMENTARY GROUP FOR WORLD GOVERNMENT, *op. cit. supra* note 74.

¹¹⁸ *Id.* at 8. The number of persons who gave their views was so small as scarcely to be considered representative of the views of newly developing nations. The BPGWG commission discovered that the representatives interviewed agreed to a multilateral convention in principle (although one suggested that bargaining power of the newly developing nations was so weak he would prefer not entering into a permanent convention until it became stronger and more funds for investment in newly developing nations became available).

¹¹⁹ Letter to the writer, dated Aug. 16, 1962, from J. H. M. Pinder, formerly joint honorary secretary of the BPGWG commission, now director, International Operations, The Economist Intelligence Unit, London.

tions—to obtain their views on provisions newly developing nations consider acceptable in (a) a multilateral protection convention (encouraging and protecting foreign investment); (b) a multilateral insurance program; or (c) both in conjunction. This important task should be handled by able persons knowledgeable in the problems for which answers are sought. These persons must have no axe to grind; they must be impartial, objective, tactful and searching; their questions must be so framed and their interviews so conducted that they can keep officials from recriminations and diatribes on the one hand, and from wandering too far afield and presenting too diverse views, on the other. In short, they should seek *constructive* views on provisions newly developing nations consider acceptable in a multilateral convention. This is apparently *not* the approach the United States Department of State suggests.¹²⁰ But it *is*—to appropriate apposite words used in another context—“eminently pragmatic, and its recognition ultimately, if not immediately,”¹²¹ may prove helpful in furthering profits and ownership abroad.

Second, approach officials of newly developing nations with a draft multilateral protection convention and a draft multilateral insurance program in hand. The draft protection convention should contain provisions that are balanced, reciprocal and as specific as possible—at least, more than a set of bare principles—and should be utilized as a basis for discovering what alterations or additions newly developing nations desire in the draft convention. The draft insurance program should similarly be reasonably complete and should serve a purpose similar to that of the draft convention. Moreover, the convention should be drafted so that it could be used either in conjunction with the insurance program, or, alone, simply as an investment protection convention. If drafting a convention in this way is not possible, then it will doubtless be necessary either to (a) draft two conventions—one that will codify the legal and quasi-legal context in which a multilateral insurance program might operate, and one utilizable simply as a multilateral protection convention, or (b) determine whether to concentrate efforts on a multilateral insurance program and accompanying convention, or simply on a multilateral protection convention. In view of the experience of the British Parliamentary Group for World Government,¹²² the former approach set out may be preferable. But it should be made clear that the

¹²⁰ See Metzger, *supra* note 74, at 143-46.

¹²¹ Proehl, *supra* note 74, at 371.

¹²² See text at note 119 *supra*.

sort of work entailed in implementing either of the suggestions above is worthwhile *only* if nations and investors are quite serious in determining whether something on the order of a multilateral protection convention or insurance program is feasible. If, on the other hand, nations and investors are interested only in fencing and jockeying without a real attempt to arrive at a workable solution other than a series of *ad hoc* ones—though it is realized that this course may be necessary or wise under present circumstances—then the fruitfulness of this approach is highly doubtful.

If this approach is properly used, the writer feels that the result would be an accurate, concise picture of what newly developing and capital-exporting nations can hope to agree on in a meaningful multilateral investment protection convention or a multilateral insurance program, or both standing together. Implementation and successful conclusion of this suggestion may well be quite difficult. Indeed, many may be able to think of a number of reasons why this approach is not feasible. It would be helpful if they would recall the words of Lord Denning: some lawyers find difficulties for every solution; other lawyers find solutions for every difficulty. It is submitted that no one will ever really know if this approach is feasible unless it is tried. Before it is written off as impractical, serious consideration should be given to it.

2. The second part of the writer's suggested two-fold approach seeks to answer the question of how disputes between newly developing nations and foreign investors can be impartially, expeditiously and practicably solved. The writer's suggestion is that there be transnational arbitration of these disputes.¹²³

A single arbitral tribunal to settle foreign investment disputes arising anywhere in the world seems neither sufficient nor feasible. Its permanent administrative machinery and procedure would need to be so all-encompassing as to be virtually unmanageable, if it were to be representative of all capital-exporting and newly developing nations and sufficiently large to handle the expected volume of business. Its functioning would be neither economical nor efficient. Moreover, sensitively sovereign nations, it is submitted, would not be content with a single tribunal which was necessarily both psychologically and physically distant from the problems of most of those nations; and indeed, capital-exporting nations and foreign investors would be disquieted. For this reason, the writer suggests a series of regional arbitral tribunals, with

¹²³ See Snyder, *Foreign Investment Protection: Is Institutional Arbitration an Answer?*, 40 N.C.L. REV. 665, 670-72, 685-89 (1962); Snyder, *Foreign Investment Protection: A Proposed Arbitration Convention*, 11 J. PUB. L. 191, 194-95 (1962).

perhaps a Supreme Appellate Arbitral Tribunal. Individuals—that is, investors, whether business entities or persons—should have direct access to these regional tribunals (access to the appellate tribunal will be covered later);¹²⁴ their claims should not have to be espoused by their governments. Each regional tribunal should be staffed by a permanent secretariat composed entirely of nationals of the countries of the region. This should aid in giving these nations the feeling that their disputes are being administered by those who best know their problems and aspirations. The tribunals should be *ad hoc*—not permanent—ones. This, it is submitted, would have at least four advantages: (1) it would presumably be less expensive; (2) it would give disputants an opportunity to have some voice in selecting those arbitrating their disputes; (3) it would avoid the possibility of “freezing” in office arbitrators who may prove ultimately to be not particularly well fitted (temperamentally, professionally, or otherwise) for their duties; and (4) it would permit nations to have impartial, transnational arbitration while yielding relatively little sovereignty. There should be three arbitrators on each *ad hoc* tribunal. Each of the two disputants may choose one arbitrator. These two arbitrators then would select the presiding arbitrator. (If there is more than one disputant on each side of the dispute, then all disputants on one side together select one arbitrator; in no case will there be more than three arbitrators.) There must, of course, be provision for appointment of these arbitrators if a disputant fails to appoint his arbitrator or if the two arbitrators selected fail to agree on the presiding arbitrator. Otherwise the arbitration procedure would become a mockery should a disputant seek to make it so.¹²⁵ Selection of these arbitrators should not be confined to a preconstituted panel. There are, it is submitted, at least two reasons for this: (1) this—like utilization of *ad hoc* rather than permanent tribunals—would tend to require less relinquishment of sovereignty (or at least it would have the appearance of less relinquishment of sovereignty); (2) if there were a preconstituted panel from which a disputant had to select an arbitrator, a disputant from outside the region would normally have to choose an arbitrator from a country within the region. (Experience indicates that arbitrators selected for the preconstituted panel would have to come from within the region; pragmatically, another system might pose

¹²⁴ See text *infra* at 1123.

¹²⁵ See Snyder, *Foreign Investment Protection: A Proposed Arbitration Convention*, 11 J. PUB. L. 191, 202-05 (1962).

too many difficulties.) In most cases, this would be unacceptable to the disputant from outside the region.

Delineation of geographical areas to be served by regional tribunals poses some difficulties. The writer believes, where possible, that geographic and ethnic lines should be followed. On this basis, seven regions are suggested: (1) Turkey, Iran, Morocco, Algeria, Tunisia, Libya, United Arab Republic, Iraq, Syria, Saudi Arabia; (2) the remainder of Africa; (3) Afghanistan, Pakistan, Nepal, Ceylon, Burma, Thailand, Cambodia, Laos, South Vietnam, Malaya, Indonesia, the Philippines, Taiwan, Japan; (4) Australia, New Zealand, Australasia; (5) Europe, Greece, Ireland, Israel; (6) Latin America; (7) the North American continent.¹²⁶

Reflection and further study—indeed, perhaps tentative testing—may lead to the conclusion that these proposed regions are not workable. If so, then others should be constituted. The important points should be: (1) to follow geographic and ethnic lines where feasible in order to form reasonably compatible groups of states; (2) to form groups of states having a modicum of economic, political and cultural ties; and (3) to give a component state a feeling of basic confidence in the fairness with which its disputes will be approached. The writer eschews inflexibility in this approach. Rather, this approach—along with criticisms of it—should be carefully weighed, so that a widely acceptable, practicable solution may be found. Above all, to paraphrase Lord Keynes in another context: when a doctrinaire proceeds to action, so to speak, forget the doctrine; for if he tries to follow doctrine literally he will not accomplish action.

A thoughtful alternate proposal for resolving investment disputes (having the virtue of being less elaborate and expensive than the writer's, in all probability) has been suggested by one of the writer's colleagues working this area. He suggests:

“[O]ne international tribunal at the top, . . . and a number of regional, institutionalized reference panels. When a dispute arose, it would be addressed to the full tribunal. But the tribunal could then refer it for findings of fact to a panel composed of referees from each region involved in the dis-

¹²⁶ A vexing problem is that of determining what is to be done in case of “regional crossovers” or “where more than one regional body might reasonably have jurisdiction.” This is provided for in article 2(1)(b) of the draft convention (Snyder, *supra* note 125, at 202). Succinctly, it provides that venue will be laid in the region of the respondent. If there is more than one claimant or respondent, venue will be laid in the region of the “first respondent to receive a notice against which (or whom) a claimant asserts a claim.” Thus, when there is more than one respondent, a claimant has some choice as to where he will bring his arbitral action.

pute. The regional referees would not render an opinion, but would together develop and document (as 'friends of the court') the facts of the dispute as they found them. Documented dissents on the facts could issue where desired . . . [and] a great deal of the decision would have already been rendered by the time the facts were decided. But the controlling decision (on the basis of these facts) would come from a single arbitral board."¹²⁷

Careful consideration should be given to this suggestion. It may well point toward a more economical, less cumbersome solution than the writer's.

Because the need in this area, in the writer's view, is for a specific, reasonably detailed proposal—there have been too many generalities—to *serve as basis for discussion*, the writer has drafted a model convention to establish a foreign investment arbitral tribunal.¹²⁸ It attempts to deal comprehensively and specifically with the suggested need for a workable means of transnational arbitration.

Bases for decisions by a regional arbitral tribunal are an important part of any suggestion for transnational arbitration. It is the writer's belief that newly developing nations are going to be quite hesitant about subscribing to an arbitral system which bases awards *solely* on an international law which many of them assert, though perhaps inaccurately, they had no part in shaping.¹²⁹ Moreover, it is unfortunately true that principles of international law are indistinct in some areas and non-existent in others.¹³⁰

¹²⁷ G. M. Doppelt, who is vice-chairman of the American Bar Association's Committee on International Trade and Investment, and was formerly chairman of that committee's working group on multinational conventions. The suggestion is contained in a letter to the writer, dated Sept. 19, 1961.

¹²⁸ Snyder, *supra* note 125, at 201-35.

¹²⁹ See, e.g., Anand, *Role of the New Asian-African Countries in the Present International Legal Order*, 56 AM. J. INT'L L. 383, 384-90 (1962); BRIERLY, *THE LAW OF NATIONS* 42 (5th ed. 1955): "The law of nations had its origin among a few kindred nations of western Europe." See also remarks of Dr. Jorge Castaneda, legal adviser, Permanent Mission of Mexico to the U.N. at American Society of International Law, New York Regional Meeting, March 2, 1961, pp. 11-12: "There is another interesting aspect to this problem. . . . Most underdeveloped countries would rather tend to feel, I think, that the concept of the minimum standard was created by the practice of the highly industrialized nations in the past in their relations with the under-developed countries, in situations of great inequality, especially in the last century and the beginning of this century." Compare Domke, *Foreign Nationalization*, 55 AM. J. INT'L L. 585 (1961): "International law, far from being an outgrowth of only Western concepts, is indeed an expression of fundamental principles embodied in long established legal systems throughout the world. Islamic Law, for instance, which is of real significance for one sixth of the world population, in the Middle East, Pakistan, Southeast Asia and parts of Africa, clearly embodies the universal maxim of the protection of acquired rights." *Id.* at 585.

¹³⁰ Cf. Lauterpacht, *The Drafting of Treaties for the Protection of Investments*, in

These and similar reasons, then, impel the writer to suggest arbitral awards based on: (1) tenets agreed upon by the disputants at the time the dispute is submitted to arbitration; (2) *ex aequo et bono*, in the absence of agreement; and (3) traditional international law, if a disputant alleges breach of that law. Moreover, a tribunal basing an award *ex aequo et bono* should be guided—although not necessarily bound—by investment and trade customs; private international law rules; and principles of justice recognized by the principal legal systems of the world.¹³¹ There is no gainsaying the difficulties inherent in basing an arbitral award *ex aequo et bono*.¹³² Moreover, colleagues of the writer believe it an improper basis for arbitral awards in investment disputes.¹³³ These views are not without force. It is the writer's

THE ENCOURAGEMENT AND PROTECTION OF INVESTMENT IN DEVELOPING COUNTRIES, INT'L & COMP. L.Q. SUPP. PUB. NO. 3, at 18, 19, 23 (1962).

¹³¹ Compare COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY DOC. NO. 1419, *op. cit. supra* note 84, at 30-31.

¹³² The real difficulty here is that there is no "international moral consensus" by which disputes not entirely legal (but rather largely a conflict between *status quo* and desire for change) can be solved by a dispute-solving tribunal. The writer realizes it is unrealistic to authorize such a tribunal to utilize standards *ex aequo et bono* if the standards simply do not exist. See, e.g., MORGENTHAU, *POLITICS AMONG NATIONS* 439-40 (3d ed. 1961). Cf. BRIERLY, *op. cit. supra* note 129, at 292: "[A] power to decide *ex aequo et bono* is a power to abrogate or modify existing legal rights, and essentially that is a power to legislate. However urgent it may be to create a procedure for the orderly modification of international legal rights in proper cases, it is inconceivable that the solution will be found in the simple plan of handing over to arbitral tribunals, responsible for their decisions only to their own consciences, a function which states are not yet prepared to concede to an international legislature." The best answer to this difficult—admittedly short of a completely satisfactory one, however—is given in the text in the concluding sentences of the paragraph in which this footnote appears.

¹³³ E.g., George W. Ray, Jr., formerly general counsel, Arabian-American Oil Company, and a member of the International Bar Association's Committee on Arbitration Procedure for Protection of Investments Abroad, in a letter to the writer, dated Jan. 30, 1962: "I doubt the advisability of giving the tribunal guides but no binding principles"; G. M. Doppelt, *supra* note 126: "I do not think, however, that I would endorse the idea of arbitration *ex aequo et bono*. I agree that it would be better to have arbitration *ex aequo et bono* than to have no arbitration at all. But, the main reason for attempting to set forth bases upon which a substantive convention would be adopted is to provide the legal standards upon which the arbitrators would have to proceed. The legal standards should be flexible, leaving a good deal to the arbitrators"; Lord Shawcross, a director of the APPI, in a letter to the writer, dated Sept. 11, 1961: "I think that the particular value of a tribunal of this kind [to settle foreign investment disputes] would be for it to reaffirm certain basic principles of international law, which a number of people in various countries are at present trying hard to undermine. If this process is carried any further, investors are going to be increasingly unwilling to put their capital into those countries, which are often the countries which most badly need it. Unlike you, I believe that these principles may often be at issue in an investment dispute and that particular emphasis should therefore be given to them. . . ." Compare Prof. Dr. I. Seidl-Hohenveldern, rapporteur, International Law Association Committee on Juridical Aspects of Nationalization and Foreign Property, in a letter to the writer, dated March 17, 1961: "I'm not at all shocked by the idea to give the arbitrators power to decide *ex aequo et bono*. As there seems to be quite some disagreement as to what is actually the law in respect to foreign investment, this seems a sensible way out. However, the choice of arbitrators

view, however, that his draft convention meets the criticisms in three ways—insofar as they can be met: (1) disputants may agree on bases for an arbitral award; (2) if a breach of international law is alleged, the question is decided on the basis of international law; (3) guidelines for an award based *ex aequo et bono* are provided. In addition, in the limited sphere of transnational investment there may be sufficient outlines of an “international moral consensus” to permit *ex aequo et bono* as one standard for dispute solving.

There is a stark problem of *enforcement of an award*. It does little good—indeed, the net effect is harmful—for a disputant to obtain a satisfying award and then be unable to enforce it. Because there is no effective world legal order, enforcement of an arbitral award is immeasurably less certain than enforcement of a judgment in a mature, municipal juridical system. While it is true that the problem of enforcement has not often presented itself, this may be due largely to the fact that, on the one hand, the *res* out of which enforcement of the award could be made was available for enforcement at the time the award was made, and, on the other, arbitration has not been resorted to where there was more than inconsequential doubt about successful enforcement. But the plain fact is that enforcement of a transnational arbitral award would be, at best, tortuous and time-consuming, and, at worst, impossible. Moreover, acceptance of an adequate transnational enforcement procedure for arbitral awards does not appear possible on any substantial scale in the foreseeable future. With this in mind, one of two approaches may be useful: first, it may be possible to incorporate specific enforcement provisions in a draft convention dealing with arbitration of investment disputes.¹³⁴ Second, it may be possible to incorporate the so-called New York Convention on Recognition and Enforcement of Foreign Arbitral Awards¹³⁵ into this draft convention.¹³⁶ If all coun-

will not be made any easier by such provisions, nor, indeed, will it increase the readiness of States to submit such cases to arbitration at all.” In a letter to the writer, dated Jan. 7, 1962, Seidl-Hohenveldern seemed to change his position: “As for your suggestion to submit judgments *ex aequo et bono*, I am somewhat more hesitant. The more liberty you leave to the arbitrators the more difficult it will become to reach agreement on the then really all-decisive person of the third neutral arbitrator.”

¹³⁴ *E.g.*, Snyder, *supra* note 125, at 222-24 (arts. 33-36).

¹³⁵ Set out in INTERNATIONAL CHAMBER OF COMMERCE BROCHURE No. 60-1, INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONVENTION OF NEW YORK 11-16 (1960).

¹³⁶ A caveat applies here, however; not inconsequential shortcomings in this convention are enunciated in Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961). These should be explored carefully before verbatim incorporation is sanctioned.

tries were to sign or accede to the New York Convention, arbitral awards would normally be enforceable without resort to either of these two methods. In any event, to implement transnational arbitration of investment disputes effectively, it is necessary to assure enforcement of awards; if it were otherwise, it is not unreasonable to believe that no one—or virtually no one—would utilize arbitration to solve an investment dispute.

Finally, in the writer's view, establishment of a Supreme Appellate Arbitral Tribunal would be eminently wise on three counts: (1) to allow correction of errors of regional arbitral tribunals; (2) to help in building a well-rounded, uniform "arbitral jurisprudence"; and (3) as a practical matter, to provide means by which an unsuccessful disputant can unburden himself of pent-up emotions following his unsuccessful quest.¹³⁷ In certain enumerated instances, an unsuccessful disputant should be allowed a *right* of appeal. In all other instances, he should be given a *privilege* of appeal at the discretion either of (1) the regional tribunal making the original award; (2) the Supreme Appellate Arbitral Tribunal; or (3) an impartial agency related in some way to the Supreme Appellate Arbitral Tribunal. There should be, moreover, a method by which a question of law might be certified to the appellate tribunal by a regional arbitral tribunal. This procedure would be analogous to an advisory opinion of the International Court of Justice, except that it would be binding. An acceptable system for lodging and perfecting appeals should not present intractable difficulty. The system of appeals used in non-criminal cases in any mature, municipal juridical system could be utilized as a basis. The system finally evolved must, of course, be acceptable to the majority of capital-exporting and newly developing nations. Conceivably it could be modeled on the system by which appeal lies in non-criminal cases to the House of Lords in the United Kingdom, the Cour de Cassation in France, or the United States Supreme Court. An appellate tribunal of this sort is unacceptable to some of the writer's colleagues.¹³⁸ These views deserve respect, of course; nonetheless, the writer is of the opinion that if there is more than one arbitral tribunal with original jurisdiction of foreign investment disputes, an appellate arbitral tribunal is exceedingly wise—perhaps even necessary.

¹³⁷ Snyder, *supra* note 125, at 199.

¹³⁸ Lord Shawcross, *supra* note 133: "I note that you provide for an Appellate Tribunal, but I fear that the existence of such a body might drag out proceedings for an unnecessarily long time and give rise to other complications"; Prof. Dr. I. Seidl-Hohenveldern, *supra* note 133: "[T]he statutes of international tribunals have hardly ever provided for means of appeal. . . ."

Conceding agreement upon the desirability of impartial transnational arbitration, some would nevertheless ask how, as a practical matter, conventions to establish regional arbitral tribunals might be drafted. The answer is that it seems not unreasonable to hope that the Secretary-General of the United Nations might suggest a meeting of states to consider drafting a convention, for example, in one of the regions suggested above¹³⁹ where a considerable amount of foreign investment is being made. If a sufficient number of responsible governments—of both capital-exporting and newly developing nations—and organizations representing potential investors (for example, the International Chamber of Commerce, the APPI or similar organizations in the United States and other industrially developed nations) were to ask, it might be possible to persuade the Secretary General to offer his “good offices” in selecting the site for such a meeting, making necessary arrangements and providing the personnel required to conduct a conference. True, this is only a possibility. But if nations and investors (and organizations representing them) are quite serious in desiring some sort of impartial transnational arbitration for their investment disputes, it is a possibility worth exploring.

But one should bear this in mind: the writer’s suggestions, and, indeed, his draft model convention,¹⁴⁰ do not contain “final answers” to the complex and difficult problems encountered in attempting to encourage and protect private foreign investment; one can hope they contain “final beginnings.”

¹³⁹ See text *supra* at 1119.

¹⁴⁰ Snyder, *supra* note 125, at 201-35.