Protection of Private Foreign Investments In Less Developed Countries - Its Reality and Effectiveness

Henry Landau
PROTECTION OF PRIVATE FOREIGN INVESTMENTS IN LESS DEVELOPED COUNTRIES—ITS REALITY AND EFFECTIVENESS

HENRY LANDAU*

INTRODUCTION

In pursuit of their policies to promote the economic development of less developed countries the United States¹ and other free enterprise countries encourage private investment in Latin American countries and the developing countries in Asia and Africa.

While the private investor has been made aware that he has a role to play in the economic development of less developed countries, his decision to invest will be based essentially on business considerations. The probability of profit, although important, will be only one of such considerations. The businessman also wants to be assured that he will be able to withdraw the foreign profits during the life of the enterprise and repatriate his invested capital, that there will be no interference with the management and control of his foreign enterprise, that his property will not be expropriated, and if this should occur, that he will receive what he considers adequate compensation.

Although the contemplated host country promises fair treatment of foreign investment, the potential investor not irrationally fears changes in the political and economic climate which may deprive him of his property or its use notwithstanding assurances to the contrary.

The investor is aware that he will find some protection in bilateral treaty provisions, in assurances embodied in the host country's investment encouragement programs, in its constitution and statutes;² and in

* Of the New York Bar; Associate, Simpson, Thacher & Bartlett, New York City.


2. Since 1945 more than forty-five countries have entered into bilateral treaties with one or more countries (principally West Germany and Switzerland), some of which are not yet in force. For list of treaties, investment laws and constitutions see Committee on International Law, Ass’n Bar, City New York. The Compensation Requirement in the Taking of Alien Property, 22 RECORD of A.B.C.N.Y. apps. III, IV and V, 217, 221, 222 (1967). For list of constitutional and statutory provisions, investment laws and/or official statements, bilateral treaties and excerpts therefrom see Appendix to American Bar Association Brief in Banco Nacional de Cuba v. Farr compiled by G. W. Haight in 1 INT'L L. 233 (1967). See also Investment Laws and Regulations in Africa, U.N. PUBL. SALES No. 1965 II K.
the probability of his country's intervention should the host country's acts violate its international obligations. He is also aware that facilities are in existence for settling of investment disputes between the investor and the host country. What answers will he get should he ask: How real and effective is this protection?

**Bilateral Treaties**

After the conclusion of World War II the United States concluded bilateral treaties with only ten capital importing countries (one of which is not in force) which, though not identical, affirm an agreed standard of state responsibility to the nationals of the contracting states. The treaties generally provide for the nationals' right of establishment and afford a measure of protection against the contracting states taking unreasonable or discriminatory action that would impair the foreign nationals' legally acquired property rights and interests. The treaties protect against expropriation of property except for a public purpose, and in the event of such taking, compensation is required and sometimes the rights of control and management are preserved. Additional provisions contain assurances on remission of earnings and repatriation of capital, which, however, are related to the states' needs for foreign exchange. They also contain provisions for submission of disputes to the International Court of Justice.

Even if the United States should succeed in negotiating treaties with additional capital importing countries, the foreign investor will receive only limited protection from the existing and such future treaties. The property protection clauses are couched in broad language susceptible

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4. China and Ethiopia—prompt payment of just and effective compensation; Iran, in addition to the foregoing, "in effective realizable form which will represent the full equivalent value of the property taken"; Korea, Nicaragua and Pakistan, with the further addition, "and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof"; Vietnam same as Korea, Pakistan and Nicaragua except that "without unnecessary delay" is used in lieu of "prompt."
to varying interpretations. The effectiveness of some treaty provisions is limited, due to the presence of escape clauses.

A treaty is an agreement between states which are parties thereto. An act of one of the contracting states contrary to its treaty undertaking is a breach of that state's obligation to the other contracting state, and confers no direct right upon the national of such state. The investor cannot compel his government to present a claim to the International Court of Justice or to any other tribunal as provided in the treaty, and in the event of its presentation he cannot be certain that satisfactory compensation will be awarded.

Of the twenty-five less developed countries which accepted compulsory jurisdiction under Article 36 of the Statute of the Court (TS 993), twenty-three did so with reservations. If the treaty does not contain a provision for settlement of disputes by conciliation or arbitration, or for their submission to the International Court of Justice, no international tribunal may be available to which the dispute may be submitted for adjudication, and the diplomatic efforts of the investor's government will be the sole means whereby the national who sustained injury from the acts of a state in violation of its treaty obligations may obtain compensation. The investor has no legal right to demand that his government espouse his cause. Once he makes the request and the claim is espoused his request cannot be withdrawn. Furthermore, before requesting the espousal he must have exhausted the local administrative and judicial remedies available to him in the offending state unless he can demonstrate either that no effective remedies are available to him or that he would not obtain substantial redress by resorting to them. The pursuit of local remedies will consume a considerable length of time and will be costly. The State Department may not espouse his claim and should it do so political and other considerations will dictate the vigor with which the claim will be pressed and the amount of compensation that the State Department will agree to accept.

The United States treaties provide for "just" compensation representing "equivalent value." "Equivalent value" is an imprecise standard in

5. Without reservations: Nicaragua, Uruguay. With reservations: Cambodia, China (Taiwan), Colombia, Dominican Republic, El Salvador, Gambia, Haiti, Honduras, India, Israel, Kenya, Liberia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, Somali Republic, South Africa, Sudan, Uganda, United Arab Republic.


7. See Hyde, 1 International Law, Chiefly as Applied by the United States 273 (1947).
absence of any agreement as to how the value of the taken property is to be established. The investors's views of what constitute just and adequate compensation will often differ with those of his government and virtually always with those of the offending government. His claim may be settled by an agreement to pay a lump sum over a period of time and his consent thereto will not be required. If this lump sum represents compensation for injuries to several investors, his government will decide to what extent each investor will share therein.

The treaties do not specifically refer to abrogation of a state's agreements with nationals of the other contracting state. It may be difficult to determine whether the measures taken by a state are in derogation of a treaty provision ensuring that the nationals of the other contracting state shall have the right to enjoyment of continued management and control of their property, or whether such measures are a legitimate and justifiable exercise of the state's sovereign prerogatives. In the event that the host government unjustifiably denies the investor foreign exchange or takes other measures short of expropriation (viz., interference with management or control of the local enterprise) the foreign investor may have difficulty in persuading his government to intervene and obtain compensation for the resulting injury.

**INTERNATIONAL LAW ASIDE FROM TREATIES**

If the host state's act causing the injury was in violation of international law, the investor's government may claim indemnification for injury to its national, even though its treaty with the state causing the injury does not contain the protective provisions found in the treaties which came into force within the last decade. The post World War II treaties incorporate the view of the capital exporting countries that rules of customary international law require any taking by a state of a foreign national's property to be for a public purpose, that such taking must not be discriminatory, that the foreign national whose property is taken receive compensation which shall represent the full value of the taken property, and that the compensation shall be paid without undue or unjustifiable delay in convertible currency, freely withdrawable, regardless of the treatment accorded by the taking state to its own nationals. This, the traditional view, is supported by international judicial and arbitral decisions and is consistent with the view of a substantial number of commentators.8

8. See, e.g., Becker (core principle), *Just Compensation Cases: Decline and Partial Recovery*, 40 DEPT. STATE BULL. 784 (1964); Anderson (firmly embedded), *Basis of*
Some capital importing countries challenge specific traditional principles and rules while other countries, or their representatives, challenge generally the traditional norms of a state's international responsibility to a foreign national. Several writers support these views to a varying degree.

In the widely criticized Banco Nacional de Cuba v. Sabbitino, Mr. Justice Harlan noted the divergent views of the capital exporting countries and the newly independent and underdeveloped nations. Conceding that there is considerable authority for the view "that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate and effective compensation," he stated that there are areas in which consensus as to the relevant international standard is greater than in others, without identifying such areas or the rules which lack a consensus.

Some commentators, Latin American nations, and representatives of newly independent nations maintain generally, without identifying the particular rule which they consider unacceptable, that rules of international law which were conceived and formulated in other times by


9. 376 U.S. 398 (1964). The Court held that the Act of State Doctrine precluded its determination whether Cuba's seizure of American owned property was in violation of customary international law and indicated that its decision was influenced by a lack of consensus in respect to expropriation.

10. Id. at 429.

11. Id. at 430 n. 34.
The Great Western Powers to serve their interest do not reflect today’s conditions, are inappropriate to circumstances of emerging nations, and do not extend automatically to the newly independent states. The Latin American and newly independent nations do not reject all the traditional rules which establish the international standard governing a state’s responsibility for the treatment of aliens. It is generally agreed that an alien’s property may be taken only for a public purpose. There is considerable support for the rule that the taking must not be discriminatory as a measure of political reprisal. The rule requiring compensation of aliens in accordance with the international standard, even though under the laws of the expropriating state its nationals are not entitled thereto, clashes with the Calvo Doctrine, which denies privileged status to foreign nationals. The Latin American nations have consistently maintained that a foreign investor is entitled to national treatment and no more. Representatives of other capital importing countries expressed a similar view.


16. At the 1954 meeting of the Commission on Human Rights representatives of India, Lebanon and Egypt took the position that right to property is subject to local law.
There is also a lack of agreement with respect to the amount, form and time of payment of compensation in case of a general as distinguished from a limited or individual expropriation, pursuant to a far-reaching program of social or economic reform. In 1945, fifty-four nations comprised the United Nations. The United Nations' membership has more than doubled and it includes many new nations which came into existence after the formulation of the traditional rules of a state's international responsibility to the property of an alien. Many of the ideologies and political and economic philosophies of the newer members differ from those of the major capital exporting nations. It is this change in the complexion of the international community that caused the questioning of the relevant rule governing compensation upon a general expropriation.17

The view of most traditionalists is that even in the case of a general expropriation the international standard of a state's responsibility requires prompt, effective and full compensation, without regard to the expropriating nation's ability to make the payment.18 This view is challenged by others, who state that in a general expropriation less than the full equivalent of the taken property, or payment of compensation within a reasonable time, will satisfy the international standard, since otherwise a state will be precluded from effecting economic or social reforms.19

17. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 190 Reporters Note 2; Dawson and Weston, Prompt, Adequate and Effective: A Universal Standard of Compensation? 30 FORDHAM L.REV. 727 (1962); Doman, Post War Nationalization of Foreign Property in Europe, 48 Col. L. Rev. 1125, 1128 (1948) (sui generis, demands new criteria), FRIEDMAN, supra note 13, at 206-210 (absence of positive rule of international law that payment be obligatory); Baade, Indonesian Nationalization Before Foreign Courts—A Reply, 54 A.M. J. Int'l L. 801, 804 and notes 25 and 26 (1960) (doubtful that there is a governing rule of international law requiring prompt payment in transferable currency).


19. Dunn, International Law and Private Property Rights, 28 Col. L. Rev. 166, 178 (1928) (a compromise in the method of compensation is not a compromise of principal international law principles); De Nova, Voelkerrechtliche Betrachtungen ueber Konfiskation und Enteignung, 52 DIE FREIDENSWARTE 116 (1953/1955) (adequate does not always mean full); Kuhn, Nationalization of Foreign Property and its Impact on International Law, 45 Am. J. Int'l L. 709 (1951) (ability to pay); LAUTERPACHT, 1 OPPENHEIM: INTERNATIONAL LAW 352 (8th Ed., Lauterpacht 1955) (rule modified by permitting partial payment). Art. 10 of Convention on International Responsibility of
The foreign investor may be told that the adoption of the United Nations General Assembly Resolution of December 14, 1962, affirms a general acceptance of the international standard of compensation to an alien in case of nationalization or expropriation. So that he may be fully informed, the investor should also be advised that the Resolution's provision for "appropriate" compensation is open to different interpretations. The nations which cast affirmative votes in favor of the Resolution may not concede that by their so doing they agreed to equate "appropriate" with "adequate, prompt and effective" or to recognize the supremacy of international law over their constitutions and national laws and rules. In this regard it is doubtful that the Latin American nations abandoned the Calvo Doctrine. While a number of capital im-


20. U.N.G.A. Res. 1803 (XVII). 17 U.N.G.A.O.R. U.N. Doc. A/C.2/SR-850; § 4, "Nationalization, expropriation or requisition shall be based on grounds or reasons of public utility, security or other national interest, which are recognized as overriding purely individual or private interest, both domestic and foreign. In such case the owner shall be paid appropriate compensation in accordance with rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law." The resolution was adopted by the affirmative vote of 87 nations, including many Latin American, African and Asian nations, Burma and Ghana abstaining. Schwebel, The Story of U.N. Declaration on Permanent Sovereignty over Natural Wealth and Resources, 49 A.B.A.J. 463 (1963); Gess, Permanent Sovereignty over Natural Resources, 13 INT'L & COMP. L.Q. 398 (1964).

21. Several amendments were offered to obtain a more precise definition of the standard of compensation, including an amendment by the United States that "appropriate" be followed by "prompt, adequate and effective," one by Afghanistan to provide for adequate compensation when and where appropriate, and a proposal by Madagascar that the financial situation of the state concerned should be considered and that the state be given time to make the payment (U.N. Doc. A/C.2/L.654 at 4-6); all the amendments were withdrawn.

22. The Resolution explicitly subordinates the individual and private interests to those of the state and fails to state that payment of compensation shall be subject to international law. In the 1966 Special Committee on Principles of International Law Concerning Relationship and Cooperation Among States, while some nations recognized the supremacy of international law, agreement could not be obtained on the United States' and the United Kingdom's proposal that the right of each state to dispose freely of its national wealth and natural resources be in conformity with and subject to supremacy of international law. Haight, Principles of International Law Concerning Friendly Relations and Cooperation Among States (1966) 1 INT'L LAWYER 101-104 (1966).

23. "The influence of the Calvo Doctrine remains strong. It has been so persuasive in constitution, codes and legal writings in Latin America that it can be expected to
porting nations entered into treaties with the United States, Germany, Switzerland and other capital exporting nations providing for adequate, prompt and effective compensation, no Latin American nation, other than Nicaragua, did so.

The quantum of protection accorded to the foreign investor under international law will depend on the degree of the capital importing country’s acceptance of the traditional standard as the norm of international law governing expropriation. The extent of the acceptance of this norm by many capital importing countries is uncertain. So long as this uncertainty exists, the investor cannot be sure of the quantum of protection that his property and property rights will receive.

**Investment Programs and Investment Agreements**

A breach of a state’s undertaking embraced in its statute or policy statement relating to the regulation and protection of foreign investments, or contained in a bilateral investment agreement, in reliance on which the investor established an enterprise and brought his property into the State, presents the investor with the same problem of national versus international treatment as well as the additional problems of the availability of remedies and their effectiveness, and the lack of impartial tribunals competent to decide his disputes with the state.

The abrogation or alteration of rights conferred by an investment agreement may give rise to a claim against the offending state which is required to be adjudicated by the courts of that state. The local courts may not be independent judicial tribunals. Moreover, their decisions may be influenced by their approval of the government’s policy or by a sympathetic attitude toward its objectives. A denial of justice by the local courts, or a refusal of a state either to proceed with arbitration to which it agreed or to comply with an arbitral award rendered against it, is a breach of that state’s international obligation. Such a breach permits the investor to request diplomatic protection from his


25. Cameroon, Congo, Brazzaville, Guinea, India, Ivory Coast, Morocco, Niger, Senegal, Sierra Leone, Sudan, Togo, Tunisia, United Republic of Tanzania. A treaty is of course not a general acceptance of the principle but a voluntary assumption of an obligation to a particular country.

26. Peru’s treaty with Japan provides for payment of compensation in accordance with the constitution and legislative provisions.

government under the international principle that injury to a foreign national is a breach of duty to his state.

There is divergence of views as to (a) whether traditional concession agreements and the investment agreements between governments and private individuals are international or private agreements, (b) what laws apply to the rights and obligations thereunder, (c) whether the investor has the right to the promised performance or whether the contracting state has the right to abrogate or to alter the rights granted in the agreement, and (d) whether there is any difference between a breach of a bilateral agreement and a unilateral promise. One group of writers contends that the government of the contracting state, being responsible for the welfare of its people, may not commit the state irrevocably, that whenever changed social, economic or political conditions require the withdrawal of its commitments and the termination or modification of an agreement it may do so upon payment of compensation, and that this right, which is an essential attribute of sovereign power, must be read into the contracts. Another group argues that the state's commitments induced the investor to invest within the state, that the state, as any other contracting party, is obligated to carry out its part of the bargain, that when it concludes a contract with a private investor it accepts the same limitations on its sovereignty as when it enters into a treaty, and that the doctrine of *pacta sunt servanda* precludes the repudiation of those commitments.

A 1962 United Nations Resolution endorsed the principle that agreements freely entered into by sovereign states shall be observed in good faith. There can be no doubt that the Resolution includes investment agreements entered into with private investors, but it leaves unresolved the question whether concession and investment agreements between

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28. Schwebel, Verdross, Domke and Schwarzenberger regard them as international contracts. Friedman's position is that they are governed by private law, and McNair and Fatouros view them as of mixed legal characters. Friedman sees no distinction between a bilateral and unilateral promise. Friedman *supra* note 13, at 220-21.


31. *Supra* note 20.—§ 8—“Foreign investment agreements freely entered into by, or between sovereign states shall be observed in good faith.”
states and private investors should be regarded as private contracts subject to the rule of private law, or as public contracts governed by international public law.

When the agreement contains a choice of law clause there should be no question as to what law is applicable. However, if the agreement is devoid of any provision as to the applicable law, judicial tribunals will be confronted with the problem of what law to apply.

Latin American states insist that investment agreements to which they are parties contain the Calvo Clause, which obligate the investor to claim redress solely through local administrative and judicial channels and renounce his right to appeal to his own government for diplomatic protection or to submit his claim to any international tribunal.32

The United States does not feel bound by its national's agreement to refrain from presenting his claim to his government. Its position is that an act of any state in derogation of any treaty provision or of what it regards as customary international law, or a denial of justice to its national, is a breach of an international obligation to the United States.

Notwithstanding maintenance of their doctrinal position, some Latin American countries, having experienced a diminution of needed foreign investments because of their expropriationary measures, agreed to pay fairly satisfactory compensation for previously expropriated property.33

Other developing nations, though not all, do not share the view of the preponderance of Latin American nations that investment disputes must be adjudicated by local courts. Their investment laws and agreements with private investors provide for settlement of disputes through arbitration. Some Asian and African governments participated in arbitration proceedings before the International Chamber of Commerce Arbitration Tribunals, and only one government refused to give effect to the arbitral award.34

Arbitration

Recognizing the private investor's need for the presentation of claims arising out of his investment agreement with a state and for obtaining adjudication by an impartial tribunal, organizations and groups interested in promoting the flow of private investment to developing nations have long advocated the formulation and adoption of a convention

32. DeVries and Rodríguez Nova, supra note 12, at 100.
33. See infra note 69.
providing for conciliation and arbitration of such disputes by an international organ. This came about when on October 14, 1966, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (World Bank Convention) entered into force. The Convention confers on a private investor the right to seek and to obtain an adjudication of his claim arising out of a breach by any of the adhering states of its obligation to him without interference by his own state.

The World Bank Convention established the International Centre for Settlement of Investment Disputes, an international legal institution. It does not deal with substantive rules applicable to foreign investments but establishes facilities for conciliation by "Conciliation Commissions" and arbitration by "Arbitral Tribunals" on a voluntary basis. The subject of arbitration or conciliation procedures may be "any legal dispute arising directly out of an investment." Parties to the dispute may be a contracting state or any of its subdivisions or agencies, natural persons who are nationals of another contracting state, or juridical persons, which have the nationality of the contracting state party to the dispute, but which because of foreign control are regarded as nationals of another contracting state.

A ratification of the Convention is not an assumption of an obligation to conciliate and arbitrate all investment disputes with nationals of states which acceded to the Convention. The contracting state will be bound to submit such disputes only if it and the investor have consented in writing to the submission of existing or of existing and future investment disputes. Once given the consent is binding and may not be withdrawn unilaterally. However, in its consent a contracting party may require the other party to the dispute to first exhaust local administrative and judicial remedies. Except for the aforesaid reservation or an express reservation by either party of the right to have recourse to other remedies, the consent to arbitration constitutes a renunciation of all other remedies. The Convention expressly prohibits the state of which a private party is a national from giving diplomatic protection or bringing an international claim based on the dispute submitted to

36. Art. 25(1).
37. Art. 24(4).
38. Art. 25(1).
arbitration unless the state party to the dispute fails to honor the award rendered in that dispute.\footnote{Art. 27.}

The Arbitral Tribunal may render an award notwithstanding either party's failure to appear or to participate in the arbitral proceedings. The Conciliation Commission may recommend terms of settlement to the parties and the parties are obligated to "give . . . their most serious consideration to the recommendation."

The parties may stipulate the applicable municipal law in whole or in part. In the absence of such stipulation the Arbitral Tribunal will apply the law of the contracting state, including its rules on the conflict of laws and the applicable rule of international law.\footnote{Art. 42.} In the report of the Executive Directors on the World Bank Convention it is stated: "The term 'international law' as used in this context should be understood in the sense given to it by Article 38(1)\footnote{Article 38(1) of the Statute of the International Court of Justice reads as follows:}
of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes."

The arbitral award must be in writing, must "deal with every question submitted to the Tribunal, and must state the reason upon which it is based."\footnote{Art. 48 (2) (3).} If the award omits the decision of any question, either party may request that it be supplemented.\footnote{Art. 49.} Both parties are bound by the award which is not subject to appeal or to any other remedy except the aforementioned request that it be supplemented, or a request that it be revised on the ground of newly discovered fact "of such a nature as decisively to affect the award."\footnote{Art. 51.} Also, it may be annulled on the ground that the Tribunal was not properly constituted, that it manifestly exceeded its powers, that there was corruption on the part of a member of the Tribunal, that there had been a serious departure in
the fundamental rule of procedure, or that the award had failed to state the reason on which it is based. The request for annulment will be submitted for decision to an ad hoc committee appointed by the president of the World Bank from the Panel of Arbitrators. A request may also be made for interpretation of the award, if any dispute should arise as to its meaning or scope.

Unless the enforcement of an award is stayed in connection with any of the aforementioned proceedings the parties are obliged to abide by and comply with the award. Under the provisions of the Convention the pecuniary obligations imposed by the award may be enforced as if it were the final decision of a domestic court. The Convention requires all other contracting states to recognize the award but preserves to the state which was a party to the dispute the immunity from execution which it may have under international law.

The Convention confers on the International Court of Justice limited jurisdiction over disputes between contracting states. It does not empower the Court to review the decision or the competence of a Conciliation Commission or Arbitral Tribunal. It empowers a state to institute proceedings before the Court if a state party to the dispute has failed to abide and comply with the award, or if there is a dispute regarding the interpretation or application of the Convention, but no other proceedings are authorized.

The measure of protection which the World Bank Convention will afford to the investor will in the long run depend upon the integrity and the good faith of the adhering nations. The investor trusts that by adhering to the Convention the contracting state evidenced its willingness to consent to the arbitration of its disputes with him. He hopes that it will abide by the award and will neither resort to requests for interpretation, revision or annulment of awards solely for the purpose of delaying compliance therewith, nor postpone payment until directed to do so by the International Court of Justice. Should the state refuse to comply with an award rendered against it the investor will get little solace from the Convention's provision requiring the other contracting states to enforce pecuniary obligations imposed by the award, since the doctrine of sovereign immunity may prevent his obtaining a satisfaction of the state's obligation.

46. Art. 52.
47. Art. 50.
48. Art. 55.
49. Art. 64.
The coming into force of the World Bank Convention is a substantial step forward in affording greater protection to the foreign investor. Unfortunately, it was rejected by the Latin American nations and as of early 1967 it was signed and ratified by several African and only one major Asian nation.

MULTILATERAL CONVENTIONS

The conflict of views of capital exporting and capital importing countries gave rise to a desire for a multinational convention to affirm the responsibility of a state to foreign investors. The International Chamber of Commerce prepared an International Code for Fair Treatment of Foreign Investments. The Organization for Economic Cooperation and Development (O.E.C.D.) prepared a Draft Convention on the Protection of Foreign Property. The International Law Commission had for some time given consideration to a draft code dealing with the state's responsibility to aliens. To assist the International Law Commission the Harvard Law School prepared a Draft Convention on The International Responsibility of States for Injuries to Aliens.

The O.E.C.D. and the Harvard draft deal with states' unilateral abrogation of investment agreements, with measures which amount to

50. The reason given by the Latin American Governors of the World Bank for rejecting the Convention is that "to give the foreign investor the right (to institute arbitration proceedings) against a sovereign state outside its national territory . . . would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority."


55. No Draft Convention has been prepared as yet, nor is one expected for some time to come.

"creeping" as well as actual expropriation, and with compensation to the injured alien if either takes place. Both drafts reject the view that adverse economic circumstances or a national policy may justify a taking of property or extinguishment of rights without compensation, but each sets up different standards for payment of compensation. The Harvard draft sets up more precise standards and provides that a state which is unable to assume the burden of immediate compensatory payment may make a substantial immediate payment and pay the balance in the form of interest-bearing bonds payable over a reasonable period of time, the maturity of the bonds to be accelerated upon failure to pay interest.\(^57\) It also provides that any damages or compensation shall be payable in the currency of the injured alien's country and that the payments shall not be taxed locally.\(^58\)

The World Bank Convention illustrates the difficulty of obtaining an acceptance of a multilateral convention by a substantial number of capital importing countries. The Draft World Bank Convention gave consideration to desires of both capital exporting and capital importing countries and to regional viewpoints and traditions. It was discussed by experts representing member governments of the World Bank at four regional meetings, and yet the capital importing countries which ratified it are mostly within one area of the world.\(^59\)

The prospect is dim that any multinational convention or code acceptable to capital exporting and capital importing countries will come into force in the near future.

**National Investment Guarantees**

A modicum of protection for a foreign investment may be obtained by a United States investor under the foreign investment guarantee program administered by the Agency for International Cooperation (AID).\(^60\) The investment guarantees may be obtained with respect to new investments or additions to existing investments within countries which entered into bilateral agreements with the United States.\(^61\)

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57. Arts. 10, 32, 34.
58. Arts. 39, 40.
61. As of January 1967 the following countries entered into investment guarantee
investments must further the economic development of the host country and must be approved by it and the United States. Guarantees may be purchased to protect the investor against loss (a) caused by the inability to convert foreign currency representing earnings or liquidation of capital into dollars, (b) caused by expropriation or confiscation, including abrogation, repudiation or impairment by the foreign government of its contract with the investor, where not caused by his fault, which materially and adversely affects the continued operation of his project (excluding consequential damages), or (c) resulting from damage to physical assets by reason of war, revolution or insurrection. Protection is not available against loss by reason of devaluation. Investment guarantees are not available in developing countries which did not enter into the bilateral agreement. West Germany and Japan have somewhat similar guarantee programs. 62


MULTILATERAL INVESTMENT GUARANTEES

For some time the International Chamber of Commerce (I.C.C.), the O.E.C.D., the Inter-Parliamentary Union and other organizations and private individuals advanced ideas for a multilateral insurance or a guarantee program.63 Pursuant to a request of the Development Assistance Committee of O.E.C.D., the World Bank staff prepared a study on multilateral investment insurance based in part on replies to questionnaires prepared by I.C.C. In March 1962 the World Bank published a report which contained an analysis of the replies as well as of twelve multilateral insurance schemes put forth by organizations and individuals. The report discusses, but takes no position on the type of eligible investment, the criteria of eligibility, the kind of risk to be covered, the scope of membership, the capitalization and allocation of loss liability, or the feasibility of multilateral investment insurance.64

In 1964 the first United Nations Conference on Trade and Development requested the World Bank "to expedite its studies on investment insurance, in consultation with governments in both developing and developed countries" and to submit a report by September 1965.65 Pursuant to the request of the Development Assistance Committee of O.E.C.D. the Secretary-General of the O.E.C.D. consulted with member governments and prepared draft articles of agreement for a multilateral program. On June 18, 1965, the Deputy Secretary-General of O.E.C.D. transmitted to the World Bank a Report on the Establishment of a Multilateral Investment Guarantee Corporation. The World Bank transmitted copies of the report to each of its member governments without taking any position with respect thereto and requested a preliminary expression of their views. From the report of the staff of the World Bank dated September 20, 1965, it is evident that although there is no opposition to the World Bank exploring the potential of a multilateral insurance scheme, the major capital exporting countries are not presently willing to participate therein.66

64. International Bank for Reconstruction and Development, Multilateral Investment Insurance, A Staff Report.
A multilateral investment guarantee will not be available to the foreign investor in the foreseeable future.

CONCLUSION

Despite the many efforts in that direction the protection available to a foreign investor is far from adequate. Greater efforts and new approaches are required to obtain a satisfactory agreement on a well defined standard of responsibility of a state to a foreign investor which will safeguard a foreign investment. At the present time it does not appear possible to obtain a general consensus on this subject among the capital importing nations, but perhaps it will be possible to obtain a general agreement in some areas of the world.

The foreign investor cannot expect an ideal solution. An acceptable solution calls for the development of a greater understanding on the part of the capital importing countries of the problems of the foreign investor, and, on the part of the capital exporting countries, of the political and economic problems which face the governments of some capital importing countries. The capital importing countries need to be convinced that to obtain the needed inflow of foreign investment they will have to accept some limitation on their sovereignty. They should be made to see that it is in their interest to agree on a standard of compensation in the event of an expropriation that will be acceptable to capital exporting nations, and to consent to the settlement of investment disputes through other than national channels. Their support should be enlisted for the broadening of the jurisdiction of the International Court of Justice to include disputes between states and private investors.

There is some indication of a realization by capital importing countries that to obtain foreign investments they must recognize and protect the rights and property of the foreign investor. Confronted by a substantial decrease of urgently needed new foreign investments as a result of their unilateral abrogation of investment agreements with foreign controlled enterprises, Argentina and Brazil found it necessary to negotiate settlements providing for substantial compensation to the injured parties. Recently Indonesia reversed its investment policy, agreeing to return expropriated foreign property to its former owners and set up the Interdepartmental Committee for Settlement on Foreign Property Matters. The Foreign Capital Investment Law adopted by the

Parliament of Indonesia and signed by its president on January 10, 1967, contains guarantees against nationalization unless Parliament should decree that it is in the interest of the state to take the property. In that event, the law provides that the Government is under the obligation to pay compensation, the amount, type, and payment procedure to be agreed upon by both parties in conformity with the principles of international law, and that in absence of such agreement the matter shall be submitted to binding arbitration.⁶⁸

The recently announced foreign investment law of Yugoslavia is an augury that times and views are changing and that doctrinaire concepts will bend and yield to a country's need for foreign investments.