RECIPIENTS' RIGHTS UNDER AN INTERNATIONAL INVESTMENT CODE

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Rather than undertake a point-by-point critique of the Draft Convention on Investments Abroad, this comment will concentrate on one major issue: the problem of balancing the rights of investors and recipients.

The principal flaw in the Draft Convention is its one-sidedness. In form it is evenhanded. That is, at every point the rights it confers and the duties it exacts apply identically to "each party." In the same way, as Anatole France pointed out, the law forbids both the rich man and the poor man to sleep in the park.

In substance, however, the entire concern of the Convention is the protection of the rights of the investor. There are no provisions motivated by concern for the rights of the host country. The Draft Convention shares this flaw with practically all the other draft conventions on the subject that have been generally discussed.

There has been a notable exception to this one-sided approach, one which has not had sufficient attention. This was the proposal by the Prime Minister of Malaya made at a speech opening the meeting of the Economic Commission for Asia and the Far East in Malaya on March 5, 1958. The substance of his proposal has been accorded the support of a large number of newly-developing countries in the United Nations. In his speech, the Prime Minister first dealt with the need for governmental economic aid and governmental development plans. He then went on to say:

But I doubt whether international government aid, vital though it is, will ever be sufficient to meet all our needs. For this reason I suggest that more consideration be given to the promotion of the flow of private capital into Asian countries from more advanced countries in other parts of the world. I am aware that many countries represented here already attach importance to creating the right conditions to attract such private capital and that this subject has been discussed on many occasions sponsored by this Economic Commission. His Majesty's Government here in this country has certainly always made its stand clear on this subject, but I wonder whether we should not all go further than these individual statements and purely national measures.

I wonder whether it would not be a powerful incentive to the attraction of private capital to Asia if those countries, which decided as a matter of public policy that they wished to attract such capital, were to come together through channels provided by the United Nations economic organisations such as this, and were

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to draw up, in consultation with representatives of potential lender countries, an International Charter by which they would agree to regulate their treatment of foreign private capital. I will not attempt to elaborate this morning the details of such a Charter. As I see it, it would have the object of assuring potential lenders that their just rights and interests would be fully respected and protected; it might also indicate to them the part they would be expected to play in promoting the development of both the human and natural resources in the receiving country; and last, but by no means least, it would remove any fears that private foreign investment might interfere with the sovereignty and true national interests of the receiving country. Such a Charter would, of course, be a purely voluntary one open to signature by any country interested in promoting the international flow of private capital. But I should hope that our neighbouring countries in South East Asia in particular would be willing to take a lead in this matter. For as I have said before: we and our neighbours in South East Asia have so many common problems that if we are to progress we must work together ever more closely—perhaps even through the aegis of some special committee or working party established by this Commission.

But if, as I believe to be the case, we need more capital both public and private I cannot help but think that if some Charter such as that which I have suggested could be drawn up, it would constitute a powerful inducement to private enterprise in other countries of the world to lend to those less developed countries which they knew had publicly subscribed to it.¹

A convention on international investment is obviously meaningless unless it is agreed to by the host country as well as the investing country. It is therefore difficult to understand why so little attention has been given to the desires and attitudes of the recipient countries, in spite of the promising lead provided by the Malayan Prime Minister. As one looks at the present Draft Convention and the other draft proposals that have been made, one cannot help wondering how they must appear from the point of view of the capital-receiving countries. These drafts take great pains to protect the interests of the investor against various kinds of expropriation and discrimination, and buttress these protective devices by provisions on enforcement which often have a faintly menacing tone. The provisions may all be perfectly reasonable, but how do they appear to the newly developing countries? To them it may seem that the rich and strong nations of the world are “ganging up” to protect their own self-interest and to impose their will upon the smaller nations.

Thus, in the New York Times of April 23, 1959, it is reported that the

Pakistan delegate to the International Chamber of Commerce, in the course of discussion of the Chamber's International Investment Code, criticized private enterprise for laying too much emphasis on profit and too little on social responsibilities, such as support for education and health projects.²

It is not the purpose of this comment to make specific proposals for clauses in a draft convention addressed to the rights of the host country. These proposals must emanate from the host countries themselves. What the writer would like to propose (and has been proposing for some time past) is a full-scale research project to find out exactly what the capital-receiving countries believe they should have in the way of protection and assurances in an international investment code. There have been some general clues, but much more work has to be done to find out specifically what they have in mind. Several broad themes keep recurring in their comments. One of them is that any such code must concern itself with the protection of the independence and sovereign rights of the recipient country. Another recurring theme has to do with the right of any nation to reserve control over its natural resources in the interests of its own people. Still another theme is the need for investors and investing countries to take a greater interest in the social and economic and human needs of the people of the recipient country.

A thorough job of research on this topic, followed by the kind of conference proposed by the Malayan Prime Minister, might well produce a detailed and reliable set of proposals whose inclusion in an investment convention would multiply its chances of general acceptance.

There are those who say that, while this is all perfectly true, the purpose of an investment code is frankly to protect the investor, and that therefore its one-sided character is justifiable. Whether this is so as a matter of abstract logic is not the question. The question is whether the host countries agree with this one-sided approach, for if they do not, any convention, however unassailable its intrinsic excellence, will remain a futile exercise in draftsmanship.

It may be that a leaf may be borrowed here, as in so many other international matters, from experience in labor negotiation and labor legislation. A skillfully drawn labor bill or contract will often go to great pains to balance out a provision on employer rights and duties with a corresponding provision on employee rights and duties, and vice versa, thus preserving an impartial impression. One may recall here the vigorous insistence by unions that the non-Communist affidavits for labor union leaders in the National Labor Relations Act be balanced by a requirement that all employers also take a non-Communist oath. The reason for this

insistence was probably not that the unions seriously believed that communism among American business executives was a problem requiring legislative solution. Rather, the reason was that, until the provision relating to union officers was balanced by one relating to corporate officers, the legislation contained a sort of implication which the labor movement regarded as insulting and discriminatory. This is not to imply that the provisions concerned with the interests of the host countries should be meaningless, face-saving makeweights inserted solely for their antiphonal effect. There will be many significant matters of substance in this category. At the same time, the investing countries should realize that provisions which may seem either insignificant or superfluous to them may seem important to the host country. For example, the host country may want to include assertions of sovereign rights which are self-evident and undisputed in international law. If the recipient countries want such pronouncements included for reasons of their own, it would be the height of ineptitude for the investing countries to prejudice the acceptance of the convention by raising objections on the ground of alleged redundancy.

The general point of view here suggested is not altogether without precedent. In the Foreign Economic Assistance Act of 1950, for instance, there was the following passage in Title IV of the Act for International Development, in section 402(c):

In the case of investment this involves confidence on the part of the people of the underdeveloped areas that investors will conserve as well as develop local resources, will bear a fair share of local taxes and observe local laws, and will provide adequate wages and working conditions for local labor.  

In conclusion: the recommendation of this comment is that the efforts now being applied to the problem of the protection of investment take a new direction and a new emphasis. One cannot help being impressed by the amount of energy that is being devoted to this problem, in the form of formation of associations, drafting and discussion of possible treaties, writing of books and articles, conduct of special research projects, and holding of conferences. The suggestion here is that if a considerable fraction of the resources and effort now devoted to this issue could be focused upon understanding and effectuating the legitimate wishes of the recipient countries, we might bring much nearer the day when we shall see a convention on international investments which is both workable and acceptable.

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3 64 Stat. 204 (1950).
INTERNATIONAL MEASURES FOR THE PROMOTION AND PROTECTION OF FOREIGN INVESTMENT*

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THE PRINCIPAL CHALLENGE to students of international law today, according to a recent article by Professors Myres S. McDougal and Harold D. Lasswell, is: "[to make] continuous reappraisal of the circumstances in which specific institutional combinations can make the greatest . . . contribution to our overarching [goals]."¹ I have been asked to take up this challenge by reappraising existing and proposed international institutions for the protection and promotion of private foreign investment.

This is quite a large exercise. Since the short time available does not permit a comprehensive historical or analytical survey of the subject, I shall make a highly personal evaluation in the form of six propositions. Some of these propositions will undoubtedly prove controversial; but they will serve at least to define the issues.

My six propositions are as follows:

1. A satisfactory rate of economic growth of the free world is an essential precondition to the achievement of our basic objectives.

Our basic objectives may be defined in shorthand form as security, prosperity, and freedom, both for ourselves and for the other peoples of the non-Communist world. Currently the most dramatic way of demonstrating the relation between these objectives and free world economic growth is to emphasize the "Communist economic challenge." At the Twenty-first Communist Party Congress in Moscow, Mr. Khrushchev boasted that the world balance of economic power was turning in favor of the Communists. He predicted that by 1970 the Soviet Union would be outproducing the United States and that the Communist bloc would be outproducing the free world. He concluded that Communist victory in the production race would "attract millions of new adherents and bring about tremendous changes not only in our own country, but in the whole world."

Khrushchev's challenge is real and it is well for us to be concerned about it. But surely we can state our interest in economic growth in a more affirmative way. Even if the Communists were not around, we would need to have a satisfactory rate of economic growth, not only for its own sake, but also because it is a prerequisite to the attainment of our non-
material ends. To be sure, economic development is not the panacea some people have claimed it to be. But in a world swept by the "revolution of rising expectations," it is clearly an essential basis for progress toward security and freedom.\(^1\)

2. **Free world economic growth of the kind necessary to promote our objectives is heavily dependent on foreign investment by the industrialized West.**

Economic development requires capital. For the underdeveloped countries, there are three possible sources of capital: domestic, Communist, and Western. The relative emphasis which underdeveloped countries place on these alternative sources will profoundly affect their economic and political evolution and consequently our pursuit of security, prosperity, and freedom.

A good part of the capital needs of the underdeveloped countries can and must be supplied from domestic sources. But for most of these countries, existing production is barely sufficient to cover current consumption needs. Only a small margin of production can be channeled into the formation of capital. If these countries despair of obtaining sufficient capital from abroad, they will be forced to adopt totalitarian measures at home. They will seek development by ruthlessly suppressing consumption and by forcibly mobilizing capital and labor. They may withdraw into militant, embittered nationalism. For them, development will create a climate in which freedom cannot survive. For us, it will mean the loss of vital raw materials and markets, a vast erosion of our world power, and the end of an opportunity to further the cause of human freedom.

The second source of capital for the underdeveloped countries is the Communist world. The Communist leaders use trade and aid as political weapons. Even though their assistance may be unaccompanied by formal political conditions, the spread of their capital, technology, and manpower throughout the underdeveloped countries cannot fail to have a political effect.

We need not fear Communist investment in these countries as long as it is relatively small in comparison with investment by the West. But when the Communist bloc becomes the main source of foreign capital for an underdeveloped country, it will use the influence thus gained to detach the country from the free world. Should this strategy prove successful in the case of some of the larger underdeveloped countries like India and Indonesia, the Communists would profoundly alter in their favor the balance of political and economic power. We cannot afford to let this happen.

\(^1\) For more detailed argument in support of this and the following two propositions, see Gardner, New Directions in U. S. Foreign Economic Policy (Foreign Policy Association Headline Series, Booklet No. 133, 1959).
The third and last source of capital is the industrialized West—primarily the United States. This means that our investment represents the only chance for the underdeveloped countries to achieve a tolerable rate of economic development without sacrificing human values and without joining the Communist bloc. Beyond this, our investment provides an excellent channel—perhaps the only effective one—through which we can influence the institutions of the underdeveloped countries and transmit to them our most important human values.

3. The present flow of Western investment—private and public—is far below the level necessary to promote the economic growth essential to the achievement of our objectives.

More than two thirds of the free world's people live in the underdeveloped countries of Asia, the Middle East, Africa, and Latin America. According to United Nations statistics, per capita income in these countries averages about $100 a year, compared with $2,000 in the United States and $1,000 in other developed parts of the free world. The people in these countries have a life expectancy of only thirty-six years, about half as long as the life expectancy in the rest of the free world.

It is not sufficiently understood that the gap in living standards within the free world is actually widening, not decreasing. In some of the less developed countries, population growth is causing an absolute decline in per capita income. In most others, whatever increase has taken place has been far less than increases in per capita income in the industrialized countries. This wide and growing gap in living standards is a time bomb which ticks ominously beneath the surface of contemporary affairs.

The record of economic development in the free world is particularly inadequate when compared with the record of the Communist bloc. We have only to contrast the growth of India with the growth of China. In 1952, the steel production of these countries was approximately equal, about one million tons. Today, Indian steel production is up to about two million tons, while Communist China's steel production is over nine million tons. This disparity in rates of growth cannot help but influence the judgment of many leaders in underdeveloped countries concerning the relative merits of the Communist and free systems for the solution of their own problems.

The unsatisfactory rate of economic growth in the underdeveloped countries of the free world may seem strange in view of the extent of foreign investment by the industrialized West. The statistics for private investment are particularly impressive, revealing in recent years an extraordinary increase in foreign direct and portfolio investment by the United States and a real revival in such investment by Western Europe. The difficulty, of course, is that this investment is very unequally distributed among the countries of the free world.
Although gaps and inconsistencies in the available data make it impossible to give precise figures, it is possible to give a rough idea of the present pattern of capital flow. Figures available for the three years 1956-1958 indicate that United States private foreign investment is running at about four billion dollars a year. This is a gross figure which includes reinvestment by branches and subsidiaries abroad and does not deduct the return flow of capital and earnings. Of this four billion, about two billion dollars are being invested in the underdeveloped countries. Total foreign investment by the rest of the industrialized West (primarily the United Kingdom, France, West Germany, Canada, Switzerland, The Netherlands, and Belgium) is running at an annual rate of about two billion dollars, of which two thirds to three quarters of a billion are flowing to the underdeveloped countries. But only about 200 million dollars of gross annual United States private investment in underdeveloped countries are going to the non-oil-producing countries of Asia, the Middle East, and Africa. Only about 300 million dollars of the gross annual private investment of the other Western industrial powers are going to these countries—and even these 300 million dollars are mostly concentrated in their overseas commonwealths. To this meager 500 million dollar total, we should add about 250 million dollars of additional private funds being invested in these countries each year through the International Bank for Reconstruction and Development.³

To be sure, the economically advanced countries of the West have embarked on substantial programs of government investment overseas. But these programs are also very unevenly distributed throughout the free world. According to the United Nations, about two billion dollars a year of public capital have been flowing to underdeveloped countries.⁴ This estimate embraces all government programs of economic assistance—bilateral and multilateral. The United States accounts for most of the two-billion-dollar figure, largely through “defense support” aid to countries with which it has military assistance agreements—Nationalist China, South Korea, South Vietnam, Pakistan, and Turkey. Only about 400 million dollars of United States aid have been available each year for the uncommitted countries of Asia and Africa. The public aid programs of the other Western countries in Asia, Africa, and the Middle East amount to another 200-300 million dollars, and once again this is concentrated in their overseas commonwealths.

When we add the total of 600-700 million dollars in public assistance

³ The figures cited above are the author’s estimates based on analysis of the United States Office of Business Economics, Dep’t of Commerce periodical, Survey of Current Business, and The International Flow of Private Capital 1956-1958, U.N. Doc. No. E/3249 (1959). The lack of data on capital movements in many countries and the incomparability of much of the data that is available make it necessary to emphasize that the figures given above are only rough estimates.

to the approximately 750 million dollars of private investment, we get a total annual capital flow of something under one and one-half billion dollars to the uncommitted, non-oil-producing, underdeveloped areas of Asia, the Middle East, and Africa. This volume of capital flow to areas containing nearly one billion of the world's people amounts to about $1.50 per capita and is clearly inadequate to support the rate of growth essential to the achievement of our basic objectives.

4. The existing flow of investment to the underdeveloped countries will not be materially increased by attempts to draft an intergovernmental code for the protection of private foreign investment.

In the early postwar years the United States government took the view that the negotiation of bilateral and multilateral treaties could provide a great stimulus to private foreign investment in underdeveloped countries. Thanks to recent experience, this view is not widely held in Washington today. But some lawyers and businessmen in the United States and Europe have recently revived the idea of drafting a multilateral investment code.\(^5\)

In essence, the proposed investment code would declare that a government may not legally take the property of aliens except for a public purpose and then only upon payment of prompt, adequate, and effective compensation. It would state that any taking of alien property not in accordance with these requirements is a violation of international law and, therefore, ineffective to pass title, so that the courts of other states would not recognize the title of the taking government in the event that the property found its way into their jurisdiction. Prompt compensation would be defined to mean the payment of compensation at the time of the taking or, at least, provision at the time of taking for the payment of compensation within a reasonable time thereafter; adequate compensation would be defined to mean the fair market value of the taken property (taking into account, in appropriate circumstances, the factor of loss of profit); and effective compensation would be defined to mean payment in the investor's currency or in a currency convertible into the investor's currency.

Quite apart from the question of whether all the principles summarized above can be said to represent international law as it now exists,\(^6\) there

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\(^5\) The most important efforts have been led by groups under the direction of Hermann Abs of Germany and Lord Shawcross of the United Kingdom. The summary which follows is based on the recent Draft Convention on Investments Abroad which appears to be the joint work of these groups. For more details on the Abs and Shawcross efforts, see Miller, Protection of Private Foreign Investment by Multilateral Convention, 53 Am. J. Int. L. 371 (1959), and Brandon, An International Investment Code: Current Plans, J. Business L. 7 (Jan., 1959).

\(^6\) The Preamble of the Draft Convention on Investments Abroad contains language suggesting that the Convention is a "restatement of principles." In several important respects it is clearly a good deal more than that. International law in its present state of development, for example, does not require that compensation for lawfully expropriated property be made in transferable form. Reference in the Comment to the Convention (p. 122) to the case of the S. S. Wimbledon, P.C.I.J., Ser. A, No. 1 (1923) is not in point. That case involved a distinctly different question—the currency in which to pay damages for an
is surely very little hope of achieving agreement between underdeveloped
and the industrially advanced countries on a code embodying such prin-
ciples. There are at least four reasons for pessimism on this score.

In the first place, it is doubtful whether the industrialized countries
themselves would be willing to accept all these propositions. Look, for
example, at the bilateral treaties of friendship, commerce, and navigation
which the United States has concluded with Germany and Japan. The
German treaty provides for payment of "just" compensation.7 Apparently,
under the basic law of the Federal Republic of Germany, just compensa-
tion takes into account the German public interest and may be compens-
sation considerably below the actual value of expropriated property.8
Neither the German nor the Japanese treaty contains an unqualified com-
mitment to pay compensation transferable into the investor's currency.
The German treaty specifies only "reasonable" facilities for transfer of
compensation,9 while the Japanese treaty specifies "reasonable" transfer
of compensation subject to whatever exchange controls may be neces-
sary to assure imports of goods and services essential to the welfare of
the Japanese people.10 It is unlikely that Germany and Japan would be
willing to sign a multilateral code of the kind suggested earlier contain-
ing commitments they were not prepared to accept in the bilateral treaties.
The same is true of other industrial countries—even Canada, which was not
prepared to accept such broad commitments when the charter of the In-
ternational Trade Organization (ITO) was being drafted in 1946-1948
and would probably be even less willing to accept them today.

In the second place, whatever may be the prospect of achieving agree-
ment on the above principles between the industrialized countries, there
is surely little prospect of achieving agreement with the underdeveloped
countries. The United States today has commercial investment-protection

7 Treaty of Friendship, Commerce, and Navigation Between the United States of
No. 3593.
8 Rubin, Private Foreign Investment: Legal and Economic Realities 17, 77 (1956).
9 Treaty of Friendship, Commerce, and Navigation Between the United States of
America and the Federal Republic of Germany, supra note 7, at Art. XII(4).
10 Treaty of Friendship, Commerce, and Navigation Between the United States of
America and Japan, Art. XII(3), April 2, 1953, T.I.A.S. No. 2863.
treaties in effect (even with all their watered-down commitments) with only five countries in the "underdeveloped" category—Nicaragua, Taiwan, Ethiopia, Israel, and Iran. We have been unable to obtain the signature on such a treaty of any newly independent nation of Asia or Africa or any Arab state. Although we did succeed in negotiating such a treaty with Uruguay, it is not yet in effect, which means there is not even an investment-protection treaty in force with a country of South America. This experience gives us little reason to be optimistic about associating the principal underdeveloped countries of the non-Communist world in a multilateral investment code containing the strict investment-protection provisions summarized above.

In the third place, we do not even have to speculate about the possibility of drafting a successful multilateral investment treaty. Two attempts have already been made in the postwar period, both of them disastrous. In the case of the Bogota Agreement among the American states, the provisions of the agreement, already somewhat inadequate from the private investor's point of view, were rendered completely meaningless by reservations attached to the agreement by various Latin American countries subordinating the provisions of the treaty to their national laws. In the case of the ITO charter, the lengthy bargaining at Geneva and Havana resulted in the lowest common denominator of agreement, and the final provisions did more to affirm the right of underdeveloped countries to interfere with investments than the rights of the investors themselves. The unsatisfactory investment provisions were a principal reason for the failure of the charter to receive the endorsement of the major interested American business groups or the approval of the United States Congress.

If a conference of the free-world countries were held tomorrow to draft a multilateral investment treaty, would the result be any better? It is true that the last decade has brought a somewhat greater appreciation of the importance of private investment among leaders in some European and even in some underdeveloped countries; but there have also emerged a number of new independent underdeveloped countries. These and the other underdeveloped nations freed from colonial rule or Western influence after the Second World War are highly nationalistic. Political leaders in most of these countries would be keenly embarrassed if they were obliged to register public acceptance of the investment code described earlier, however much they might be privately sympathetic with its principles. Unexceptionable as it may seem to us, such a code is too easily associated with capitulations, colonialism, and the abuses of native capitalists and landlords. For this reason, it would be unwise to force another public, intergovernmental showdown on investment questions—particularly a showdown concerned with general principles rather than concrete problems. The underdeveloped countries would only insist, as they have in United Nations debates, on recognition of their sovereignty over their
natural resources, and on the need to qualify private property rights by public interests of an economic and social nature. The industrialized countries, or some of them, would espouse the proposed investment-protection principles summarized above. The final document would embody something of the slogans of both sides, with the result that it would be satisfactory to neither. The public confrontation of opposing doctrines would leave a legacy of bitterness. The only gainers would be the Communists.11

Recently an alternative suggestion has been made that the members of the Organization for European Economic Cooperation should themselves draft a treaty on this subject which might then be open for adherence by underdeveloped countries. Although the provisions of such a treaty would be more satisfactory from the point of view of private investors than the provisions of a treaty negotiated with underdeveloped countries, it is doubtful that such a treaty would go quite as far toward investor protection as the proposed code summarized earlier. Furthermore, adherence to a treaty negotiated among the former colonial powers of Western Europe would hardly commend itself to the leaders of the underdeveloped countries. The whole idea would look suspiciously like some form of collective imperialism.

One final problem with the proposal for a multilateral investment treaty is the impossibility of achieving a definition of a taking of private property broad enough to be of substantial practical value. Property rights can be effectively destroyed in many ways short of an actual confiscation or expropriation—they can be taken indirectly by exchange controls, export and import regulation, taxation, labor legislation, limitations on the ownership and control of enterprises, price controls, even by runaway inflation. Indeed, the prospect of these indirect takings provides much more of a deterrent to private foreign investment in underdeveloped countries than the prospect of a direct taking via confiscation or expropriation. No international agreement can satisfactorily protect against all these indirect forms of taking—certainly no agreement to which an underdeveloped country would willingly subscribe. In the last analysis, foreign investors place primary emphasis on a satisfactory "investment climate," a phrase used to describe a whole constellation of government policies and conditions which affect the security of investment and profit opportunities. This satisfactory investment climate is not something which can be created by drafting an investment code.12

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11 Even between countries which share as much of a consensus as the United States and Britain, premature attempts to draft detailed principles of international economic conduct have proved self-defeating. See Gardner, Sterling-Dollar Diplomacy (1956), especially Pts. 3 and 4.

12 This point is well developed in Rubin, supra note 8.
5. An indispensable means of stimulating the flow of private capital to the underdeveloped countries is an expanded program of public investment.

The main deterrent to private investment in most underdeveloped countries is the very fact of their underdevelopment. Because of this underdevelopment, the United States International Development Advisory Board has pointed out, private capital in the near future "is not likely to play a major role in the development of either Asia or Africa." As the Board puts it:

The immediate primary need for capital in these areas is in "social overhead"—power, communications, transportation, and educational facilities—and it is improbable that U. S. private capital will find this a profitable field for investment.\(^{13}\)

If a satisfactory rate of economic growth of the underdeveloped countries is to be achieved, it is clear that an increased program of public investment in social overhead will have to pave the way.

For nearly a decade, the question of establishing a new international agency to provide public capital for economic development was debated in the United Nations in connection with the proposed Special United Nations Fund for Economic Development (SUNFED). The United States took the position in these debates that such an ambitious program of economic development should be deferred until such time as the countries of the world could reduce their arms burdens as part of a plan of enforced disarmament. Privately, our government expressed reluctance to put large amounts of American money in an institution likely to be dominated by the recipients of aid. It also feared the prospect of Communist-bloc participation in any such United Nations sponsored arrangement.

The long stalemate on this subject came to an end in 1958. Attention was dramatically shifted to a stage outside the United Nations when Senator A. S. Mike Monroney made his proposal for an International Development Association (IDA) to be operated as an affiliate of the World Bank.\(^{14}\) From the point of view of the United States, the Monroney proposal would avoid the difficulties of the SUNFED plan by placing development funds in the hands of a responsible financial institution in which the United States and its industrial allies have voting control and in which Communist-bloc countries do not participate. The creation of an IDA could greatly aid the cause of Western freedom. The problem of financing such an institution can be solved. The IDA could start with a comparatively modest capital, for example, one billion dollars. The United States could contribute about one-third of this sum and have a corresponding amount of voting power. Provision should be made for continuous injec-

\(^{13}\) International Development Advisory Board, A New Emphasis on Economic Development Abroad, A Report to the President 13 (1957).

tions of dollar capital in succeeding years without the need for annual congressional appropriations. One attractive solution to this problem would be for the United States to assign to IDA the repayments due it on Marshall Plan loans and other major postwar credits.

6. **New measures for the protection and promotion of private investment should be combined with an expanded program of public investment in underdeveloped countries.**

The debate about methods of financing the economic development of underdeveloped countries has been plagued too long by an argument between those who think that private investment alone should do the job and those who think that public investment alone should do the job. In fact, what we need is both.

The importance of private investment in foreign economic development deserves constant emphasis. In the United States and most of the industrial societies of the West, the bulk of capital and skills is in private hands. Public investment, as noted earlier, must necessarily play the dominant role in the "take-off" stage of economic development. But the burden of financing economic development would become intolerable for the taxpayers of Western nations if private investment were not utilized increasingly as economic development gained momentum. Even in the early stages of development, there are functions which private capital can perform with equal or greater success than public capital. There is no inconsistency, therefore, between a program of public investment in the underdeveloped countries and measures to protect and promote private investment. Those who are concerned with the latter should not oppose the former. Instead, they should consider ways in which an expanded public investment program could be made to enlarge opportunities for private investment.

Public and private measures for promoting economic development should be combined in one institution. The charter of the proposed IDA (or whatever the agency is called which is to supply additional public investment) should contain the following provisions with respect to private investment:

First, the participating countries should agree to make maximum use of private capital—foreign and domestic—in their economic development efforts, so far as is consistent with their economic and social systems. This last qualification would exempt from the obligation a country whose economy was entirely socialist. Naturally such a qualification would limit somewhat the scope of the private investment obligation. But we cannot very well force private enterprise on countries which have entirely rejected it.

Second, the participating countries should agree to consult periodically with the staff of the IDA on the measures they are taking to create a favorable investment climate. The periodic consultations would be modeled
after the system developed under Article XIV of the International Monetary Fund Agreement, by which Fund members maintaining exchange controls on current transactions are obliged to consult annually about their domestic and external financial policies. The Fund's informal consultative machinery has done much more to achieve changes in national policies than could possibly have been done by attempts to draft a treaty with specific commitments about domestic and external financial policy.

Third, the charter should provide for studies on how private investment is being used and could be used to promote the economic development of member countries. The members would be obliged to take part in such studies and give full publicity to their conclusions. In this way a consensus might be slowly developed on the appropriate role of private investment where no consensus presently exists. Many leaders of opinion in underdeveloped countries still believe that there is an incompatibility between the profit-making interest of a foreign corporation and the interest of the country in which it operates. Numerous studies already published in the United States (such as those of the National Planning Association on United States business performance abroad) have amply demonstrated that this is not the case. These studies are either not known to people in most underdeveloped countries or are regarded by them with an understandable amount of skepticism. Surely it would be useful to associate leaders from the underdeveloped countries in the conduct of studies of a similar kind.

Fourth, the charter of the IDA should provide for the orderly settlement of disputes between private investors and governments. It could specify procedures for the mediation of such disputes by the president of the agency, drawing on the encouraging experience in the mediation of the controversy between Egypt and the Suez Canal Company by President Eugene Black of the International Bank. In the event that mediation fails, the charter should provide for the settlement of investment disputes by members of a permanent panel of arbitrators composed of outstanding citizens of industrial and underdeveloped countries.

Fifth, the charter could also authorize the drafting of a set of general principles concerning private foreign investment. The investment principles might be drafted either by the staff of the agency, by the panel of arbitrators, or by a group of experts chosen specially for the purpose. This set of investment principles would differ from the proposed investment treaty in that (a) it would not be negotiated by government representatives; (b) it would not be formally binding upon governments; and (c) it would specify the obligations as well as the rights of foreign investors in underdeveloped countries. These three features would make the investment principles much more palatable to the underdeveloped countries, as would the fact that the industrial countries were committed to a long-term pro-

15 Articles of Agreement of the International Monetary Fund, supra note 6.
gram of development assistance. The principles could be used as a standard in the conduct of the periodic investment consultations and in the arbitration of specific disputes.

Sixth, the IDA and its associated agencies (the International Bank for Reconstruction and Development [IBRD], the International Monetary Fund, [IMF], the International Finance Corporation [IFC]) might be obliged, in their decisions on applications for aid from underdeveloped countries and private investors, to consider the extent to which those seeking assistance were performing the various obligations outlined above. The ultimate sanction for refusal to consult, participate in studies, and submit disputes to mediation and arbitration in a manner found satisfactory by the governing board of the agency would be a declaration that the country or investor in question was ineligible to use the resources of the international lending agencies. This would be a formidable sanction in view of the magnitude of lending operations by the IBRD, the IMF, the IFC, and the IDA. Satisfaction of unpaid judgments rendered pursuant to arbitration might even be had out of a country's paid-in subscription.\(^\text{16}\)

This is but a tentative and illustrative outline of an institution for promoting and protecting private investment in underdeveloped countries. Undoubtedly it requires substantial additions and modifications. But at this point, it is obviously premature to argue very much over details. The pressing need is to recognize that verbal formulas cannot camouflage the present lack of consensus. Let us get on with the job of building a consensus over the years through institutions in which men of good will can work together in the common interest.

\(^{16}\) The proposals in this paragraph would, of course, require amendments to the Articles of Agreement of the IMF, IBRD, and IFC.