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PRIVATE FOREIGN INVESTMENT AND INTERNATIONAL ORGANIZATION*

Oscar Schachter†

The activities of international organization generally are remote from the problems of the private lawyer; but in one area—that of private foreign investment—the “bread and butter” interests of the practitioner intersect with the objectives of world organization. This has been evident, for some time, to some of the more specialized members of the Bar, but relatively few lawyers appear to be aware of the extent to which the United Nations, the International Bank for Reconstruction and Development, and their related organizations, have concerned themselves with legal and economic problems of interest to the private investor. The present paper will attempt to survey this area of international activity with the aim of indicating the extent to which international mechanisms and laws are being used and developed in regard to the promotion and protection of private foreign investment. This subject will be viewed primarily from the standpoint of the issues and problems which have arisen in the United Nations and its related organizations.

It should perhaps be made clear at the outset that private foreign investment, while considered desirable by most members of the United Nations, is not the principal focus of their efforts in the field of economic development. Their primary objective has been the provision of public funds for development purposes, either by way of liberal loans or grants-in-aid. This is not a matter of theory or dogma; the experience of the last decade has shown that private funds cannot be expected to flow to under-developed countries on any substantial scale (except in the field of petroleum and other mineral resources) until basic economic, social and administrative conditions are stabilized, or at least considerably improved.¹ It has been repeatedly pointed out that under-development

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† See Contributors' Section, Masthead, p. 558, for biographical data.

¹ United Nations reports have indicated that there are a number of countries which remain unable to attract any form of private foreign investment in significant amounts. These reports have distinguished four categories of capital-importing countries:

(a) Advanced industrial countries which offer to each other large markets and investment opportunities. Capital movements among these countries account for a large part of the international flow of entrepreneurial capital and for the bulk of portfolio investments;

(b) Rapidly expanding countries with a substantial industrial sector. This category, which includes Australia, Canada and the Union of South Africa and such developing countries as Brazil and Mexico, is small but quantitatively very important. Most foreign investment in these countries takes place through the establishment of branches and subsidiaries which reinvest a large part of their profits. Portfolio investment in Australia and Canada is also substantial;

is itself the major obstacle to private investment, and that to overcome under-development, it is essential that there be a large number of projects which are non-self-liquidating, "low-yielding and slow-yielding," to pave the way for other investments.² This fact is recognized by not only the under-developed countries seeking financial assistance, but by the capital exporting countries interested in private investment abroad. The United States International Development Advisory Board has concluded that private capital is not likely to play a major role in the development of either Asia or Africa. The real need in these areas, the Board felt, is for capital in "social overhead"—power, communications, transportation, and educational facilities.³ These are not fields into which private capital can be expected to flow. For this reason, large scale public investment is a prerequisite to a substantial increase in the flow of private capital. Consequently, the various international arrangements for providing governmental funds to the under-developed countries must be regarded as high on the list of international mechanisms which both promote and (in a sense) protect private foreign investment. This point has been stressed in proposals to increase the resources of the International Bank for Reconstruction and Development and the International Monetary Fund, and even more emphatically in connection with the forthcoming establishment of the International Development Association.⁴ Similarly, new regional investment agencies, such as the Inter-American Bank, the European Investment Bank, and the Development Fund for the Overseas Countries, should be viewed as part of international efforts being made to provide the infra-structure which is a condition precedent for private investment.⁵

The Mobilization of Private Development Capital Through International Institutions

Although international financial institutions are generally thought of as principally providing public funds, it should not be overlooked that they, too, are mechanisms for funnelling private capital to the under-

(c) Low-income countries which possess natural resources, mostly in the form of oil and non-ferrous metals. Nearly all foreign investments in these countries are made by large international companies and are concentrated in developing these resources;

(d) Low-income countries which have neither important natural resources nor domestic markets for absorbing the production of large enterprises. These countries, which include the poorest countries in Asia, continue to receive little private capital. (1959) "The International Flow of Private Capital, 1956-1958," U.N. Doc. No. E/3249, p. 11 (U.N. Pub. Sales No. 59 IID 2).

² Report of the United Nations Subcommission on Economic Development—Fourth Session—U.N. Doc. E/CN.1/80, p. 21 (1950).

³ Report of the International Development Advisory Board to the President 13 (1957).

⁴ President Eisenhower's address to the Colombo Plan Meeting on November 10, 1958, reported in N.Y. Times, Nov. 11, 1958, p. 14. See U.N. Doc. No. E/3528 (1959).

⁵ U.N. Gen. Ass. Off. Rec. 13th Sess., 2d Comm., 559th Meeting (1958); Report of U.N. Secretary-General in U.N. Doc. No. E/3258 (1959).

developed areas. The International Bank, by borrowing private money in the capital markets of North America and Western Europe is, in a sense, a large investment fund through which private capital is utilized in the under-developed countries. New borrowings by the Bank in 1958 reached a gross total of 650 million dollars; there has, moreover, been a significant broadening of the market for World Bank bonds, and at the end of the 1958-1959 fiscal year, it was estimated that almost half of the Bank's total obligations were held by investors outside of the United States.⁶

In addition, the International Bank offers opportunities for private participation in bank lending operations; in the last year such participation took place in the majority of the Bank's loans.⁷ The private investors, in these cases, take the short-term and medium-term maturities and receive the protection which results from the Bank's retention of the long-term obligations. The Bank also joins with the market in investment operations by making loans simultaneously with the floating of bonds by the borrowing government.⁸ These techniques are interesting examples of the way a public international organization has contributed to the mobilization of private capital for foreign investment.

The International Finance Corporation, like the International Bank, has authority to borrow funds by selling its own obligations on the world market. However, at the present stage, it does not use this authority, but has available for investment purposes public funds plus its own earnings. Its function is to provide venture capital to private investors without government guarantees of repayment.⁹ Ordinarily, the private investor will be required to supply more than half the capital needed for a project; management is left largely to the private entrepreneur. This international mechanism thus provides capital which enables private investors to undertake promising projects otherwise held back for lack of sufficient funds. It also directs private investors to profitable opportunities abroad, and furnishes an incentive to them to enter the field by an offer of financial partnership. The organization has laid stress on the multiplying effect of the I.F.C.'s attracting larger amounts of private capital, suggesting a ratio of \$3.50 of private funds for every dollar invested by the I.F.C.¹⁰ It may be noted that the I.F.C. is barred

⁶ Fourteenth Annual Report of the International Bank for Reconstruction and Development 13-14 (1958-59).

⁷ *Id.* at 14.

⁸ *Id.* at 15. The Bank has broad authority to guarantee loan investments against non-payment, but in actual fact little use has been made of this authority. See I.B.R.D., *The World Bank: Policies and Operations* 92 (1957).

⁹ See First Annual Report of the International Finance Corp. 5 (1956-57). Also Note, 71 *Harv. L. Rev.* 1102, 1109 (1958).

¹⁰ Address of the President at the 2nd Annual Meeting of the Board of Governors of

from holding common or preferred stock, apparently on the ground that such capital stock would involve it in management responsibilities inconsistent with the private character of the businesses it would assist.¹¹

These institutional schemes for funnelling private funds to the underdeveloped countries have only met a small part of the need, and ideas for further programs of this kind have been suggested. Recently, for example, the World Federation of United Nations Associations (WFUNA) has proposed to the Economic and Social Council the establishment of a new international fund for which capital would be raised by issuing bonds or certificates of small denominations which would be sold to individual investors or to institutions.¹² The funds would then be invested through loans or equity investment in underdeveloped countries. It is far from evident that marketing of small-denomination bonds would augment significantly the flow of private capital, and it may be that this proposal should be viewed more as a means of demonstrating public support for economic development of the less-developed countries than as a means of financial assistance.

International "Intelligence" and Advice

Development capital, the President of the International Bank has noted, is not just money—"It is money applied effectively to the stimulation of economic growth. That means that it is money welded into an amalgam with a very special set of attitudes, institutions and technology."¹³ In line with this, the United Nations and its related organizations have performed what might be characterized as an international "intelligence" function, by providing in a lengthy series of reports and studies the facts which are essential for an understanding of the ways to increase the flow of private capital.¹⁴ These reports and studies have shown how complex and subtle is the process required to create a favorable investment climate. They have dealt with the varied, almost unlimited, range

the International Finance Corp., October 8, 1958, reported in U.N. Press Release IB/803. See, also, Third Annual Report of the International Finance Corp. 10-11 (1958-59).

¹¹ See Tenth Annual Report of the International Bank 27 (1954-55) (relating to the establishment of the International Finance Corp.).

¹² U.N. EcoSoc Council Off. Rec. 26th Sess., 1037th meeting, 17 July 1958, ¶ 42 (Statement of Mr. Adrian Pelt).

¹³ International Financial News Survey 131 (October 17, 1958).

¹⁴ See, for example, U.N. Secretariat, "The International Flow of Private Capital (1946-52)," U.N. Doc. No. E/2531 (1954); "Survey of Policies Affecting Private Foreign Investment," U.N. Doc. No. E/1614/Rev. 1 (1950); "International Flow of Private Capital for the Economic Development of Underdeveloped Countries," U.N. Doc. No. E/2546 (1954); "Recent Governmental Measures Affecting the International Flow of Private Capital," U.N. Doc. No. E/2766 (1955); "The International Flow of Private Capital, 1957," U.N. Doc. No. E/3128 (1958); "The International Flow of Private Capital 1956-1958," U.N. Doc. No. E/3249 (1959).

of factors which bear upon the flow of private capital—and if they have done nothing else, they have shown how futile it is to single out one element as the key to private investment.

In some measure, the conclusions of these reports and studies have been enacted in resolutions of the General Assembly and the Economic and Social Council, setting forth in general terms the action that should be taken by national governments to further the flow of private capital.¹⁵ These resolutions, like their underlying studies, have no legislative effect; rather, they are proposals for governmental action to be taken in the discretion of governments.

What good, it may be asked, have they done for the private investor? To what extent has national action been influenced? Although we have no handy measuring rods, there are indications that the process has not all been in vain. For one thing, plain talking and sharp analysis have undoubtedly lead to greater understanding and sophistication. It has probably become clearer to the recipient countries that they are in a competitive market as buyers of capital, and that comparative risks, as well as prospective returns, are factors in determining the flow of funds to their countries. In this connection, one may compare the resolutions favoring private investment adopted by the United Nations in 1954¹⁶ to the 1952 resolutions on "sovereignty over natural resources" which caused concern in investing circles.¹⁷

In 1958 the General Assembly decided¹⁸ that the United Nations should undertake a more intensive and detailed inquiry into the conditions and opportunities for private investment. The Secretariat was requested to consult qualified persons regarding the fields of activity in which foreign private investment was needed and sought by under-developed countries, and the volume and forms in which such investment would be acceptable. The Secretariat was also asked to obtain the views of qualified persons concerning the types (and, where possible, specific examples) of projects which private foreign investors might, under suitable circumstances, be interested in financing or undertaking in under-developed countries. These inquiries were to be made by interviewing businessmen, government officials, and experts in both the capital-exporting and capital-importing countries. The Secretary-General was then to report concerning measures for the chaunelling of an

¹⁵ For example, U.N. Gen. Ass. Res. 824 (IX) (December 11, 1954); U.N. EcoSoc Council Res. 512 B (XVII) (April 30, 1954).

¹⁶ *Ibid.*

¹⁷ U.N. Gen. Ass. Res. 626 (VII) (December 21, 1952). See Hyde, "Permanent Sovereignty Over Natural Wealth and Resources," 50 *Am. J. Int'l L.* 854 (1956).

¹⁸ U.N. Gen. Ass. Res. 1318 (XIII) (1958).

increase in flow of private capital investment under mutually satisfactory arrangements.¹⁹

Another, and undoubtedly more significant, role of "intelligence" is carried out by the newly-established Special Fund of the United Nations. This organization, instituted by the General Assembly of the U.N. in 1958, has as one of its main objectives the acceleration of a country's capacity for absorbing investment capital.²⁰ One of its principal tasks is to obtain greater knowledge of the physical resources of less-developed countries: their mineral resources, river flow, soil content, and industrial potential. The Managing Director of the Special Fund, Mr. Paul Hoffman, has indicated that major emphasis will be placed upon projects that will demonstrate the wealth-producing potential of unsurveyed resources, and upon surveys leading to early investment.²¹

International organizations have also undertaken a great variety of "advisory services" which, in many cases, have a close relationship to the practical requirements of private investors. Governments have been given technical help on taxation, monetary, and banking matters, which have led to needed changes in their legal and administrative structure.²² A number of techniques and devices, *e.g.*, national development banks and joint venture arrangements, have been suggested for encouraging private investment. These techniques and devices have conformed to a trend toward arrangements whereby direct private investment is combined with public investment from national or international sources.

Two related areas are of particular interest to the private lawyer: the first concerns the various problems of tax incentives and the wider application of double taxation agreements. United Nations activity in this field has consisted not only of studies and reports²³ but also of direct assistance to Governments desiring to adopt suitable tax provisions.²⁴ The second area of special interest to the private lawyer may be described as the standardization of the provisions of legal instruments used in international investment transactions. It has been suggested that such provisions might be developed for use in mortgage and security instruments; there has also been an interest in having internationally approved

¹⁹ A progress report entitled "The Promotion of the International Flow of Private Capital" was issued by the Secretary-General on February 25, 1960. U.N. Doc. No. E/3325 (1960).

²⁰ U.N. Gen. Ass. Res. 1240 (XIII) (1958).

²¹ Hoffman, "Operation Breakthrough," 38 For. Aff. 31, 41 (1959).

²² Such services are provided by the International Bank, the International Monetary Fund and the United Nations. See Bloch, "The Fiscal Advisory Functions of United Nations Technical Assistance," 11 Int'l Org. 248 (1957).

²³ U.N. Secretariat, "The Effects of Taxation on Foreign Trade and Investment," (1950) (U.N. Pub. Sales No. 1950 XVI.1); "United States Income Taxation of Private United States Investment in Latin America," (1953) (U.N. Pub. Sales No. 1953 XVI.1). See also "International Tax Problems," U.N. Docs. No. E/3074 and addenda (1958).

²⁴ See Bloch, *op. cit. supra* note 22.

standard clauses for construction and engineering contracts.²⁵ Until now, little has been done along these lines, although the Economic Commission for Europe has devised standard clauses for use in sales contracts drawn up in international trade between the European member countries.²⁶ There would appear to be advantages in seeking to develop standard contract clauses through international bodies or agreements; this could be achieved by bringing together experts representing both capital-exporting and capital-importing interests. Such meetings would involve a form of negotiation, through which compromise clauses might subsequently emerge. Although clauses would not be a substitute for specific contract negotiations, it seems almost certain that they would facilitate the task of reaching agreement in particular cases by providing models which have already received a measure of acceptance by a group of qualified persons representing the various interests concerned.

Investment Treaties and Codes

It has been suggested that the international mechanisms of the kind discussed above, while helpful to private investment, do not go far enough in providing the investor with the required security. What is needed, it is urged, is an internationally-accepted code in which governments would undertake, in reasonably specific terms, legal obligations to permit foreign capital to invest, and to assure equitable and non-discriminatory treatment of foreign nationals and property. A code of this kind would be expected to include guarantees to the investor that contracts and other commitments would be observed, that just compensation would be granted, and that adequate procedural remedies would be afforded. A code of this kind was suggested several years ago by the International Chamber of Commerce, and in recent years similar proposals have been made by unofficial groups.²⁷

Within the United Nations—and throughout its history—hopes have also been expressed that a legally binding international code—or “charter”—on foreign investment would be attained. At least in one case, the Havana Charter, an investment “code” was negotiated and

²⁵ See, Proceedings of First Int'l Investment Law Conf., (4th Sess.), p. 11 (1956) (remarks of N. A. Bogdan).

²⁶ Report of the Comm'n on the Development of Trade to the Economic Comm'n for Europe, 7th Session U.N. Doc. No. E/ECE/Trade/33 (1958).

²⁷ International Chamber of Commerce, Brochure No. 129 (1953), contains the proposed “International Code of Fair Treatment for Foreign Investments.” A draft code entitled “International Convention for the Mutual Protection of Private Property Rights on Foreign Countries” has been proposed by the Society to Advance the Protection of Foreign Investments, the headquarters of which are in Cologne, Germany. For discussions of these draft conventions, see Miller, “Protection of Private Foreign Investment by Multilateral Convention,” 53 Am. J. Int'l L. 371 (1959). See also Brandon, “An International Investment Code: Current Plans,” J. Bus. L. 7 (Jan. 1959).

drafted at a multilateral conference.²⁸ In the early years of the United Nations there was a good deal of interest in the proposed investment code, but after the demise of the Havana Charter, it was widely considered that the time was not ripe for a multilateral treaty.²⁹ In the last year or two, there has been a revival of interest of governments in such an accord, stimulated largely, perhaps, by activity on the part of private groups. At the United Nations Economic Commission for Asia and the Far East, the Prime Minister of the Federation of Malaya called for an international charter to safeguard the legitimate rights of foreign investors in the countries of Asia,³⁰ a proposal which stirred some hopes especially because it was made by a representative of an under-developed country.

Virtually no one disputes the value of an international investment code, if it could be attained in satisfactory terms. The significant questions concern the reasonable probability that this could be achieved and the means by which this end could be effected.

It cannot be said that past experience in the United Nations or elsewhere offers much encouragement. In both the case of the Havana Charter and the Bogota Economic Agreement of 1948, the proposals for the protection of investment were so whittled down in the negotiations and subjected to reservations that the provisions which emerged were vague and ambiguous, offering little security to either the private investor or the capital-exporting government. From this experience, many have concluded that it is futile—and perhaps even dangerous—to attempt a multilateral investment code.³¹ In large measure, this is attributable to the tendency of many capital-importing countries to counter assurances to private investment with broad declarations of sovereign rights over property in their territory. Even countries favorable to private investment have indicated their unwillingness to accept international commitments toward foreign investment without far-reaching reservations which would assure the supremacy of national interests and procedures.³² It has, moreover, come to be realized that the major capital-exporting countries might not be able to accept the same restrictions upon their authority in respect of foreign property that have been

²⁸ Havana Charter for an International Trade Organization, Ch. 3, Arts. 11 and 12. (1948).

²⁹ Asher, et al., *The United Nations and Promotion of the General Welfare* 333, 334 (1958). U.N. EcoSoc Council, Report of the 4th Sess. of Subcomm'n on Economic Development 10-11 (1950).

³⁰ Annual Report of the Economic Comm'n for Asia and the Far East (1957-58), U.N. EcoSoc Council Off. Rec. Supp. No. 2 at 24.

³¹ Rubin, *Private Foreign Investment: Legal and Economic Realities* 80 (1956); U.N. EcoSoc Council Off. Rec. 24th Sess. 200 (1957) (Statement of the Representative of the United States).

³² Rubin, *supra* note 31 at 20 and 81, citing particularly the difficulties Canada experienced.

proposed for less-developed countries. It may, for example, be questioned whether the United States would not encounter constitutional and political difficulties in the way of agreeing to such treaty restrictions on "eminent domain" and the police power as have been proposed in almost all of the suggested investment codes.³³

Although these—and other—obstacles are formidable, an entirely negative impression may not be warranted. One suggested line of approach would be to seek investment agreements among groups of States which are likely to respond favorably. The members of the OEEC, for example, may find a common basis of agreements on the lines of the bilateral agreements which several of them have already concluded with the United States.³⁴ Perhaps the Asian members of the Economic Commission for Asia and the Far East, or some of them, may be able to undertake preliminary discussions on the basis of the proposal of the Malayan Prime Minister in an effort to attain some agreement. It has also been suggested that the proposed International Development Association draft a group of general principles for private foreign investment which would not be legally binding, but which could serve as a standard of conduct.³⁵

The bilateral approach also offers certain advantages as demonstrated in several of the post-war treaties which the United States has concluded with capital-importing States and which contain reasonably specific commitments favorable to the foreign investor.³⁶ It may be hoped that the extension of such agreements would eventually contribute to the general acceptance of their principles and, thus, facilitate agreement upon a universal convention in the future. However, it is only realistic to note that the satisfactory bilateral treaties have been concluded with countries that have an already favorable attitude toward private investment, and that the treaty may be considered as *registering* that favorable climate rather than *creating* it. In countries where political tendencies have given rise to difficulties for private capital, effective bilateral agreements have not been concluded. For some of these countries, the multilateral approach may prove more acceptable, and carry fewer connotations of "capitulations," than bilateral treaties, especially if the machinery of the United Nations is used.

³³ See, e.g., *Lynch v. United States*, 292 U.S. 571 (1934); *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924); *Atlantic Coast Line v. City of Goldsboro*, 232 U.S. 548, 558 (1914).

³⁴ Professor Richard N. Gardner has observed that a treaty negotiated among the former colonial Powers "would hardly commend itself to the leaders of the underdeveloped countries" "International Measures for the Promotion and Protection of Foreign Investments," 53 *Proc. Am. Soc'y Int'l L.* 255, 262 (1959).

³⁵ *Id.* at 265.

³⁶ Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 *Am. J. Comp. L.* 229 (1956); Wilson, "Treaty-Investor Clauses in Commercial Treaties of the United States," 49 *Am. J. Int'l L.* 366 (1955).

Some observers have considered that there has been a growth in mutual understanding during the last decade; there is, therefore, more reason to hope that multilateral negotiation might focus upon the issues likely to produce agreement rather than upon political catch-phrases.³⁷ It may be that specific questions, such as the repatriation of capital and earnings, "joint ventures," and voluntary arbitral procedures, would be the subjects upon which fairly precise agreement could be attained.

The Law of State Responsibility

On some broad issues, it may be the better part of wisdom not to press for treaty commitments, but to seek clarification and greater precision through practice and "re-statements." This would be based on the body of customary international law which is pertinent to the rights of investors abroad—the law of State Responsibility for Injuries to Aliens. Probably more than any other area of international law, this subject is the product of case-law—of numerous decisions of claims tribunals and arbitral bodies which have applied international norms to the acts of governments affecting foreign nationals and their property. It is, for that reason, a rich source of precedents and principles which private investors and their governments can utilize in asserting claims for protection and compensation. On the other hand—and this is the heart of the problem—there is considerable uncertainty whether past precedents and ideas are effective in the light of altered conceptions of State control over national resources, particularly as manifested in the less-developed capital-importing countries.³⁸ To ignore these contemporary attitudes and merely to reiterate the maxims of the past would probably be a species of self-deception.

Is it possible to bridge the gap between what appear to be the profoundly different conceptions in this field? One attempt is being made by the United Nations, through its International Law Commission, in its projected codification of the law of International Responsibility, which has been under way for the last four years. The reports prepared by Dr. F. V. Garcia-Amador of Cuba, the Special Rapporteur for the subject, have constituted an interesting effort to take stock both of past precedents and the contemporary attitudes of governments, and to suggest in some cases new formulations intended to embrace conflicting principles.³⁹ He has, for example, sought to overcome the traditional

³⁷ See Asher, et al., *op. cit. supra* note 29. A more skeptical attitude is expressed by Miller, *op. cit. supra* note 27 at 375.

³⁸ 1 Y. B. Int'l L. Comm'n 154 (1957) (discussion relating to Mr. Garcia-Amador's Second Report on State Responsibility). See also, Hyde, *op. cit. supra* note 17.

³⁹ Reports of Mr. Garcia-Amador to the Int'l Law Comm'n: (1) "International Responsibility," U.N. Doc. No. A/CN.4/96 (20 January 1956). (2) "Responsibility of the State for

conflict between the "international standard of justice" and the principle of "national treatment" by integrating both concepts under the more general principle of human rights and fundamental freedoms.⁴⁰ Accordingly, protection of the alien against arbitrary action by the state would rest upon recognized human rights with respect to which "customary international law makes no distinction between nationals and aliens, and necessarily implies a regime of equality in the use and enjoyment of such rights and freedoms."⁴¹ In line with this general approach, the Special Rapporteur has proposed reliance on certain general principles of municipal law as a basis for determining the elements of international responsibility, particularly in cases concerning expropriation of property. The three main principles suggested in this connection are the obligation to respect acquired rights, the doctrine of unjust enrichment, and the concept of abuse of rights (or "arbitrariness").⁴²

With regard to contractual obligations, he has gone beyond the traditional view by suggesting that some contracts between states and individuals may be genuinely "international" in character, in the sense that non-fulfillment of their clauses would directly give rise to the international responsibility of the state.⁴³ In his view, such "internationalized" contracts would comprise first, contracts which contain a stipulation that the instrument be governed by public international law or by "general principles of law," and second, those contracts which contain arbitration clauses which contemplate the settlement of disputes by means of international arbitration. This suggestion rests on the premise that a state which has contracted in this manner has, in effect, conferred upon the individual a measure of "international personality and capacity."⁴⁴ It must be emphasized that, while these ideas are not entirely novel,⁴⁵ they are far from being generally accepted; within the International Law Commission they have thus far received only preliminary consideration.

It may be asked why a proposed code of international responsibility

Injuries caused in its Territory to the Person or Property of Aliens—Pt. 1: Acts and Omissions," U.N. Doc. No. A/CN.4/106 (15 February 1957). (3) "Responsibility of the State for Injuries caused in its Territory to the Person or Property of Aliens—Pt. 2: The International Claim," U.N. Doc. No. A/CN.4/111 (2 January 1958). (4) "Responsibility of the State for Injuries caused in its Territory to the Person or Property of Aliens—Measures affecting Acquired Rights," U.N. Doc. No. A/CN.4/119 (26 February 1959).

⁴⁰ Garcia-Amador, 2d Report, U.N. Doc. No. A/CN.4/106, pp. 24-33 (1957).

⁴¹ Garcia-Amador, 4th Report, U.N. Doc. No. A/CN.4/119, p. 20 (1959).

⁴² *Id.* at 6-21. For a similar approach see, Fatouros, "Legal Security for Int'l Investment," *Legal Aspects of Foreign Investment* 699-733 (Friedmann ed. 1959).

⁴³ Garcia-Amador, 4th Report, *op. cit.* supra note 41 at 76, 83.

⁴⁴ *Id.* at 87.

⁴⁵ Schwebel, "International Protection of Contractual Arrangements," 53 *Proc. Am. Soc'y Int'l L.* 266 (1959); Carlston, "Concession Agreements and Nationalization," 52 *Am. J. Int'l L.* 260 (1958), 69 *Harv. L. Rev.* 802-03 (1956).

would be more realistic than an investment treaty—would not the same basic conflicts lead to a stalemate or to ineffectual generalities? This may well be so if an attempt is made, within the next few years, to convert an International Law Commission draft into a treaty. The alternative would be for the Commission to treat the draft—and the underlying studies—as the framework for a long-range effort to find common elements of agreement, without calling on governments to adopt binding commitments at the present time. It is not unrealistic to expect that the process of study and discussion will itself result in some clarification of basic issues, and that the elaboration of international standards by a widely-representative group will tend to influence the application of those standards in concrete cases. True, such international standards will not be the same as those which a purely capital-exporting group would adopt. But they are likely to be more acceptable in those under-developed areas which were represented in the preparatory process and which, therefore, will not consider them as the product of the creditor States alone.

Nor should it be disappointing if the drafts produced by an international process appear to be an amalgam of opposing principles from which either side in a particular controversy could draw support for its claims. This would be not only a consequence of compromise; it would express the important truth that in a complex matter, each of two opposing general principles will have elements of validity, and that joined together they will provide a more rational guide than either principle standing by itself. Paul Freund, in discussing a similar approach in American constitutional law, has eloquently expressed this notion of polarity:

These abstractions, arrayed in intransigent hostility like robot sentinels facing each other across a border, can become useful guardians on either hand in the climb to truth if they can be made to march together. Somehow the lifeblood of the concrete problem tempers the mechanical arrogance of abstractions.⁴⁶

This, of course, raises the question of who is to make the opposing abstractions march together in the concrete case—who will perform the judicial or arbitral function of balancing the conflicting claims and principles? In the absence of a widely-accepted system of international jurisdiction, agreement on substantive rules of international responsibility will fall short of providing the remedies that practical lawyers consider necessary. Diplomatic protection may provide some means of recourse,

⁴⁶ 69 Harv. L. Rev. 803. Myres McDougal has also expressed this conception in his writings on international law. See, e.g., his *Hague Academy Lectures on International Law, Power, and Policy* (1953).

but its highly political character and heightened sensibilities about its use have made it, in most circumstances, an uncertain and dubious instrument for the protection of foreign investments.⁴⁷ Proposals for international claims tribunals—on a general or regional basis—have often been advanced, but have found little response among governments.⁴⁸ A suggestion was made in the United Nations for machinery through which particular controversies of an economic character would be dealt with in a manner analogous to political controversies, as by using mediators and observers—and perhaps “collective measures”.⁴⁹ It is too soon to say whether this proposal is likely to bear fruit in the future.

Arbitration Between Governments and Investors

Whatever may be the obstacles to reaching agreement in general terms on procedural remedies, experience has shown that satisfactory provisions for settling disputes have been agreed upon in bilateral negotiations between foreign investing companies and governments. Such provisions take the form of arbitration clauses providing either for institutional arbitration or for *ad hoc* arbitration, generally with third party designation of a neutral arbitrator. Arbitration clauses of this kind, which are found in many oil and mining agreements, usually reflect situations in which the governments are sufficiently desirous of foreign capital in the particular case that they are prepared to waive the usual requirement of submission to local courts. It has often been urged that similar arbitration agreements be introduced in other types of contracts made for foreign investment. Experienced lawyers, such as Lord Shawcross, Martin Domke, and G. W. Haight, have persuasively argued that arbitration clauses in investment agreements would be of considerable mutual advantage to both the capital-importing country and the investor.⁵⁰ While it cannot be demonstrated that the absence of arbitration procedures constitutes a decisive obstacle to the flow of investment generally, there is reason to believe that many enterprises, especially those operating on a large scale, will be concerned about the risk of a government relying on its “sovereign” power to over-ride or cancel contractual

⁴⁷ De Visscher, *Theory and Reality in Public International Law*, p. 269 (Corbett transl. 1957).

⁴⁸ See, e.g., Cowles, “Review of the United Nations Charter and the Adjudication of International Claims,” 48 *Am. J. Int’l L.* 460 (1954).

⁴⁹ Mr. Luns (Netherlands), U.N. Gen. Ass. Off. Rec. 13th Sess. at 26 (1958). See also, Metzger, “Settlement of International Disputes by Non-Judicial Methods,” 48 *Am. J. Int’l L.* 408 (1954).

⁵⁰ Domke, “The Settlement of International Investment Disputes,” 12 *Bus. Law.* 264 (1957) and “Arbitration in Inter-Governmental Economic Relations,” 7 *Arb. J. (n.s.)* 73 (1952); Haight, “American Foreign Trade and Investment Disputes,” 14 *Arb. J. (n.s.)* 73 (1959).

arrangements. For such firms, the willingness of a government to contract for neutral arbitration in case of dispute is itself a significant symptom that the investment climate is favorable, and may be an important element in deciding to proceed with the investment.

From this point of view, the measures which various United Nations bodies have taken to further arbitration in disputes of a private law character should, at least in the long run, have a beneficial effect on the flow of investment capital to under-developed countries.

The Economic and Social Council, and the Regional Economic Commission for Europe and for Asia and the Far East, have adopted resolutions intended to have a practical effect in furthering arbitration in international transactions. In 1959 the Council adopted a resolution which proposed ways in which interested governments and organizations might make practical contributions toward the more effective use of arbitration.⁵¹ These measures had originally been proposed by the Secretary-General of the United Nations and approved by the Conference on International Commercial Arbitration held in 1958. Emphasis was placed upon the importance of educational activities, particularly in promoting among members of the business community knowledge about arbitration facilities, and encouraging the inclusion of arbitration clauses in contracts. Governments were asked to consider improving their arbitral legislation and institutions and, where appropriate, to develop new arbitration facilities. The Secretariat of the United Nations was requested to assist governments and private organizations in their efforts to improve arbitral legislation, practice and institutions, principally by helping them to obtain technical advice and by providing guidance in coordinating their progress and promoting arbitration in international trade and investment.⁵²

In the Economic Commission for Europe an *ad hoc* working group on arbitration composed of government experts has, for some years, studied possible solutions of problems created by differences in national legislation concerning arbitration, and has attempted to devise machinery for the appointment of a neutral arbitrator or the designation of a neutral place of arbitration in cases where the parties themselves cannot reach agreement.⁵³ In Asia and the Far East, the Economic Commission for Asia and the Far East has requested the U. N. Secretariat to study

⁵¹ EcoSoc Council Res. 708 (XXVII) (April 17, 1959).

⁵² See U.N. Secretary-General, Annual Report on the Work of the Organization for 1958-59, p. 97.

⁵³ See Kopelmanas, "Quelques Problèmes Récents De L'arbitrage Commercial International," *Revue Trimestrielle de Droit Commercial* 879-911 (1957, No. 4). See also, U.N. Doc. No. ECE/TRADE/WP.1/33, 34 (1959).

existing law and practice and to formulate recommendations to further the use of arbitration in that region.⁵⁴

One aspect of international arbitration—the problem of assuring recognition and enforcement of arbitral awards—has been dealt with by multilateral treaty. As a result of the initiative taken by the International Chamber of Commerce,⁵⁵ a United Nations Conference of States, held in 1958, adopted a United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁵⁶ This Convention was designed to facilitate the carrying out of arbitral awards made in the territory or under the law of a state other than the state in which recognition and enforcement of such awards are sought. The Convention provides for the recognition of the validity of arbitral agreements and for simplification of the conditions for obtaining recognition and enforcement in a foreign country. It is of interest, in the present context, because it may be applied to the enforcement of arbitral awards arising out of contracts between an individual and a foreign government. The Convention contains no express provision on this point, but its scope extends to awards arising out of differences “between persons, whether physical or legal”. The records of the drafting Conference of 1958 indicate an intention to cover cases in which a state or public body has entered into arbitral agreement in its capacity as an entity having rights and duties under private law.⁵⁷ In this connection it may be noted that the Convention has been signed by a number of governments which normally conduct their foreign trade through state agencies. A reasonable interpretation, therefore, is that while no state is compelled to arbitrate, the Convention would apply to awards rendered against a state party to the Convention in arbitration proceedings relating to transactions having a private law character.

Although the Convention deals with the secondary problem of enforcing awards where arbitration has been used, it also has served to focus attention on the primary problem of obtaining agreement on using arbitration in the first instance. It has been urged by some that a multi-

⁵⁴ Report of the Committee on Trade to the Economic Comm'n for Asia and the Far East, 15th Sess., U.N. Doc. No. E/CN.11/497. ¶ 47-49 (Feb. 19, 1959).

⁵⁵ International Chamber of Commerce, Brochure 174 (1953). The I.C.C. representatives, Mr. Morris Rosenthal and Mrs. Roberta Lussardi, had a significant role in stimulating action by the United Nations.

⁵⁶ U.N. Pub. Sales No. 58 V 6. See also Sanders, “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” 6 *Neth. Int'l Law Review* 43 (1959); Contini, “International Commercial Arbitration,” 8 *Am. J. Comp. L.* 283 (1959).

⁵⁷ See Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Summary Analysis of Record of U.N. Conference 5-7 (1958). See also Comments of Mr. Leo M. Drachsler, 53 *Proc. Am. Soc'y Int'l L.* 284-5 (1959); Contini, *op. cit. supra* note 56 at 294. For a general discussion of measures that may be taken to enforce awards against States, see Schachter, “The Enforcement of International Judicial and Arbitral Decisions,” 54 *Am. J. Int'l L.* 1 (1960).

lateral treaty might also be adopted to achieve obligatory arbitration by states in disputes arising out of investment contracts.⁵⁸ Although some Asian countries (notably, the Federation of Malaya) have been favorably disposed to such a suggestion, it seems improbable that many capital-importing countries will accept compulsory provisions of a general character for third-party arbitration, even though they may be agreeable to such arbitration provisions in specific contracts. A somewhat different approach, which may be more acceptable to some governments, would be the establishment of regional arbitration centers, under the aegis of the regional economic commission of the United Nations. The centers would extend services and facilities to the governments and business communities; they would advise on arbitration clauses and procedures; they would stimulate knowledge of arbitration and where appropriate, advise on legislative and institutional changes. They might also, if called upon by the parties, designate institutions to appoint neutral arbitrators or, perhaps, make such appointments themselves. Such centers would be entirely voluntary, but as they would be established by the governments of the underdeveloped countries in cooperation with the business community, they are likely to have the confidence of those governments and consequently more influence than a purely private organization or one outside of the particular region.

An institutional development on these lines, a kind of "joint venture" of governments and business, would, in the present circumstances, appear to be a more practical objective for the United Nations than more ambitious plans for multilateral compulsory arbitration agreements.

Conclusion

The foregoing survey, while not exhaustive, has been sufficient to indicate the variety of activities undertaken by the United Nations and its related organs in promoting and protecting private foreign investment. What merits emphasis is the wide and flexible range of techniques that can be carried out through international organizations, and the machinery that such organizations provide for continuity of effort.⁵⁹ For it is evident that the creation of a hospitable investment atmosphere cannot be a one-shot affair or the result of any single approach. It is also suggested that, at the present time, more probably can be accomplished by the providing of facilities and services by international organization than by the elaboration of precise rules of law in treaty form. But

⁵⁸ See U.N. Secretary-General, "The Promotion of the International Flow of Private Capital," U.N. Doc. No. E/3325, pp. 78, 79 (1960).

⁵⁹ See address by U.N. Secretary-General to the American Banker's Association, March 23, 1960. U.N. Press Release SG/904.

this does not mean that efforts to attain legal security should be abandoned; rather, expectations and objectives should not be set too high. In this respect, international organizations have done much to demonstrate the complexity of the problems and their difficulties; at the same time they have clarified to a considerable degree the common interest shared both by the investor and the country of investment. In the final analysis, it is only on the basis of recognition of such common interest that an adequate legal order can be firmly established.