

ORGANISATION FOR ECONOMIC  
CO-OPERATION AND DEVELOPMENT

RESTRICTED

Paris, 23rd July, 1962.

C(62)133

Scale 1

Or. Engl.

(COUNCIL)

DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY

(Report by the Committee for Invisible Transactions)

Introduction

1. The Committee for Invisible Transactions submits for the consideration of the Council the draft of a Convention on the Protection of Foreign Property. This draft was prepared over a period of just over two years during which the Committee met on numerous occasions as a plenary body attended by Delegates of sixteen Member States (1) and by representatives of the International Monetary Fund, and co-operated closely with legal experts from capitals. In accordance with the mandate representatives of the International Bank for Reconstruction and Development were invited to all discussions and were currently supplied with documents. The Bank has taken note of the work of the Committee but has not so far made any observations thereon. A Delegate for the United States attended the Committee's meetings but did not participate in the drafting of the text of the Convention.

2. The Greek Delegation is obliged formally to reserve its position on the present report and on the draft Convention prepared by the Committee for Invisible Transactions. (2) The Greek Delegation moreover reserves its position in particular on Article 14 of the draft Convention. It considers that this Convention can only be concluded within the O.E.C.D. if it should be basically a convention among O.E.C.D. countries, extended subsequently to third countries. If it were to be a broader world-wide convention, the Greek Delegation believes that the O.E.C.D. is not the right forum for its negotiation because in that case it would take the form of a treaty imposed on third countries.

(1) Canada, Iceland, Ireland and Luxembourg were not represented.

(2) The reasons for this formal reservation are set out in the Summary Record of the 9th Session of the Committee for Invisible Transactions TIR/M(62)6, Part I7.

C(62)133

- 2 -

### The Mandate

3. In April 1960 the Council considered a report by the Committee for Invisible Transactions on 'Protection of Foreign Investments' (1) and instructed that Committee "to prepare ... an international convention for the protection of foreign investments open for adherence by non-member countries". The drafting was to be the responsibility of the Committee, a restricted body which was instructed to invite the full co-operation of representatives of any Member which wished to participate, and to consult with the International Bank for Reconstruction and Development as appropriate. The Council decided, moreover, that the establishment of agreed rules for the further protection of foreign investments was in principle a desirable aim but that the mandate could not be taken as committing any Member Government in advance either with regard to the scope or form of the rules or the degree of endorsement which they must receive. (2) (3)

4. Eight months later, in December 1960, Ministers approved the Report of the Preparatory Committee which says in its paragraph 87 that "it was agreed that the question of a multi-lateral Convention for the protection of foreign investments should continue to be studied by the O.E.C.D.". The Council, without renewing the old mandate, agreed that the Committee's work should continue.

### Subject-matter of the Draft Convention

5. The Convention which the Committee for Invisible Transactions has drafted reaffirms recognised fundamental principles relating to the protection of foreign property, and provides for rules designed to render the application of these principles effective. Furthermore, it provides for machinery for the determination of disputes. Altogether its rules are designed to protect property internationally. It is not a treaty of establishment.

6. The mandate of April 1960 refers to the protection of "investments". In the title of the draft Convention proposed by the Committee the term "investments" has been replaced by "property"; treatment of foreign property is also the subject of Article 1 and other Articles. This choice is deliberate and the result of extensive discussions which took place in 1961 and in the course of which the use of either term was advocated. (4) Agreement was reached on "property" as

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- (1) C(59)289.
  - (2) C/M(60)9, item 66.
  - (3) For a historical background of the mandate see Annex I to the present paper.
  - (4) For details of the arguments see Annex II to the present paper.

defined in Article 9 (c) because in international law the basic protective rules apply to property, and because, being the wider concept, property was held to be the more suitable object of protection. Moreover, there is no agreed definition of the notion "investments" in general international law.

7. The draft covers, in particular, the following points :

- (i) Foreign property must be accorded :
  - (a) fair and equitable treatment ;
  - (b) most constant protection and security ; and
  - (c) the exercise of certain rights relating to such property shall not be impaired by unreasonable or discriminatory measures (Article 1).
- (ii) The principle of the maintenance of the pledged word is affirmed and given specific content - pacta sunt servanda (Article 2).
- (iii) Property of aliens may be taken only
  - (a) if this is in the public interest ;
  - (b) under due process of law ;
  - (c) without discrimination ;
  - (d) if just and effective compensation is paid without delay (Article 3).
- (iv) The principle of the freedom of transfer of current income from and liquidation proceeds of property is recognised and there is a recommendation that such transfers should be authorised (Article 4).
- (v) Full reparation must be made in cases of a breach of the Convention and regard must be had to the principle of non-recognition of measures in conflict therewith, even if taken by third States (Article 5).
- (vi) Derogations from the rules of the Convention are admissible only in cases of public emergency of a nationwide character, threats to essential security or in compliance with acts of the United Nations relating to the maintenance or restoration of international peace and security (Article 6).
- (vii) Compulsory arbitration in cases of disputes without, however, excluding judicial determination. In certain circumstances nationals (as opposed to

C(62)133

- 4 -

States, but of course including companies) may institute proceedings (Article 7). Again in certain circumstances the interest of a shareholder in his company is protected. There are detailed provisions regarding the establishment and procedure of an arbitral tribunal (Annex).

8. It should be noted that the Convention would apply to all property, i.e. to property acquired before as well as after the agreement comes into force. It would not have retroactive effect, however, in so far as measures taken by Parties before it comes into force would not be affected by the Convention as such [Article 13 (c)].

9. It is envisaged that the Convention should be open for signature by any State which is a Member of the United Nations or one of its Specialised Agencies or a Party to the Statute of the International Court of Justice until a certain date yet to be fixed and thereafter for accession by any such State which has not signed the Convention (Article 14). Instruments of ratification would be deposited with an organisation or government which would notify the other Signatories and acceding States of each deposit (Article 10). The Convention would come into force when a certain number - still to be determined by the Council - of instruments of ratification or accession has been deposited and would after that take effect for each ratifying or acceding State on the date of deposit of its instrument of ratification or accession (Article 12).

#### Notes and Comments

10. The draft Convention is accompanied by explanatory Notes and Comments on each of the Articles (1). These do not represent a formally agreed legal text, are not intended to have binding force and need therefore not be approved by the Council. As they reflect what the authors of the Convention had in mind when it was drafted, the Committee feels, however, that it would be desirable to bring them to the attention of all States which were considering ratification of or accession to the Convention. Consequently the Committee suggests that these Notes and Comments would in due course be made available to the public.

#### Concluding Remark

11. In accordance with its mandate, the Committee for Invisible Transactions has tried to draft agreed rules for the protection of foreign property, an essentially technical task. Questions of a non-technical nature and possible other approaches to the subject are not being dealt with in the present report because they are outside the mandate given by the Council.

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(1) For the full text see Annex III to the present paper which is being issued separately.

DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY

DESIROUS of strengthening international economic co-operation on a basis of international law and mutual confidence;

RECOGNISING the importance of promoting the flow of capital for economic activity and development;

CONSIDERING the contribution which will be made towards this end by a clear statement of recognised principles relating to the protection of foreign property, combined with rules designed to render more effective the application of those principles within the territories of the Parties to this Convention; and

DESIROUS that other States will join them in this endeavour by acceding to this Convention;

The STATES signatory to this Convention HAVE AGREED as follows :

C(62)133

- 6 -

## Article 1

### Treatment of Foreign Property

(a) Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures. The fact that certain nationals of any State are accorded treatment more favourable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter.

(b) The provisions of this Convention shall not affect the right of any Party to allow or prohibit the acquisition of property or the investment of capital within its territory by nationals of another Party.

## Article 2

### Observance of Undertakings

Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.

## Article 3

### Taking of Property

No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with :

- (i) The measures are taken in the public interest and under due process of law ;
- (ii) The measures are not discriminatory or contrary to any undertaking which the former Party may have given; and
- (iii) The measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto.

Article 4

Recommendation on Transfers

Each Party recognises, with respect to property in its territory owned by a national of another Party, the principle of the freedom of transfer of the current income from and proceeds upon liquidation of such property, to such national of a Party as is entitled to them. While this Recommendation does not contain any obligation in this respect, each Party will endeavour to grant the necessary authorisations for such transfers to the country of the residence of that national and in the currency thereof.

Article 5

Breaches of the Convention

(a) Any breach of this Convention shall entail the obligation of the Party responsible therefor to make full reparation.

(b) Each Party shall have regard to the principle that any measures taken by any State, whether or not a Party to this Convention, which are in conflict with the provisions of Article 2 or 3 thereof should not be recognised within the territory of that Party as valid.

Article 6

Derogations

A Party may take measures in derogation of this Convention only if :

- (i) involved in war, hostilities or other grave public emergency of a nation-wide character due to force majeure or provoked by unforeseen circumstances or threatening its essential security interests; or
- (ii) taken pursuant to decisions of the Security Council of the United Nations or to recommendations of the Security Council or General Assembly of the United Nations relating to the maintenance or restoration of international peace and security.

Any such measures shall be provisional in character and shall be limited in extent and duration to those strictly required by the exigencies of the situation.

0(62)133

- 8 -

Article 7

Disputes

(a) Any dispute between Parties as to the interpretation or application of this Convention may be submitted by agreement between them either to an Arbitral Tribunal established in accordance with the provisions of the Annex to this Convention, which shall form an integral part thereof, or to any other international tribunal. If no agreement is reached for this purpose between the Parties within a period of sixty days from the date on which written notice of intention to institute proceedings is given, it is hereby agreed that an Arbitral Tribunal established in accordance with that Annex shall have jurisdiction.

(b) A national of a Party claiming that he has been injured by measures in breach of this Convention may institute proceedings against any other Party responsible for such measures before the Arbitral Tribunal referred to in paragraph (a), provided that :

- (i) the Party against which the claim is made has accepted the jurisdiction of that Arbitral Tribunal by a declaration which covers that claim; and
- (ii) the Party of which he is a national has indicated that it will not institute proceedings under paragraph (a) or, within six months of receiving a written request from its national for the institution of such proceedings, has not instituted them.

(c) The declaration referred to in paragraph (b)(i), whether general or particular, may be made or revoked at any time. In respect of claims arising out of or in connection with rights acquired during the period of the validity of such declaration, it shall continue to apply for a period of five years after its revocation.

(d) At any time after the expiry of the period of six months referred to in paragraph (b)(ii), the Party concerned may institute proceedings in accordance with paragraph (a). In this case proceedings instituted in accordance with paragraph (b) shall be suspended until the proceedings instituted in accordance with paragraph (a) are terminated.

Article 8

Other International Agreements

Where a matter is covered both by the provisions of this Convention and any other international agreement, nothing in this Convention shall prevent a national of one Party who holds property in the territory of another Party, from benefiting by the provisions that are most favourable to him.

Article 9

Definitions

For the purposes of this Convention :

(a) "National" includes both natural persons and companies. It does not, however, include nationals of a Party who belong to any territory to which this Convention may be extended pursuant to Article 11 but has not been so extended.

(b) "Company" means any entity which, under the law of a Party, either is recognised as a legal person or, as an entity or through its members, has the capacity to dispose of property or to institute legal proceedings.

(c) "Property" means all property, rights and interests, whether held directly or indirectly, including the interest which a member of a company is deemed to have in the property of the company. However, no claim shall be made under this Convention in respect of the interest of a member of a company:

- (i) if the company is a national of a Party other than the Party which has taken the measures affecting the property of the company; or
- (ii) in the case of a company which is a national of a Party by whose measures its property is affected, if the interest of the member of the company does not arise out of and, at the time of such measures, does not represent either an investment of foreign funds made by him or his predecessor in title or an investment of compensation or damages paid in accordance with this Convention.

C(62)133

- 10 -

Article 10

Ratification

This Convention shall be subject to ratification by the signatory States. Instruments of ratification shall be deposited with the depository Organisation/depository Government, which shall notify the (other) signatory States and all acceding States of each deposit.

Article 11

Territorial Application

Any State may at the time of signature, ratification or accession to this Convention or at any time thereafter declare by notification given to the depository Organisation / depository Government that the Convention shall extend to any of the territories for whose international relations it is responsible, and the Convention shall, from the date of the receipt of the notification or the date on which the Convention takes effect for the notifying State - whichever is the later - extend to the territories named therein.

Article 12

Coming into Force

- (a) This Convention shall come into force on the date of the deposit of the Xth instrument of ratification or accession.
- (b) The Convention shall thereafter take effect for each ratifying or acceding State on the date of the deposit of its instrument of ratification or accession.
- (c) Any measure taken by a Party before the date of the coming into force of this Convention for it, shall not be affected by the Convention as such. The provisions of this Convention shall apply to measures taken after such date, whether in pursuance of legislative or administrative authority existing before such date or otherwise.

Article 13

Termination

Any Party may terminate the application of this Convention to itself or to any territory to which it has extended the Convention by notification pursuant to Article 11 by giving notice to this effect to the [depository Organisation / depository Government] which shall notify the other Parties thereof. The termination shall take effect one year after such notice has been received by [the depository Organisation / depository Government]. In respect of property acquired or investments made before the date on which the termination takes effect, the provisions of Articles 1 to 12 of this Convention shall continue to apply for a further period of 15 years from that date.

Article 14

Signature and Accession

(a) This Convention shall be open for signature by any State which is a Member of the United Nations or of one of its Specialised Agencies or a Party to the Statute of the International Court of Justice until [a specific date]. After that date it shall be open for accession by any such State which has not signed this Convention.

(b) Accession shall be effected by the deposit of an instrument of accession with the [depository Organisation / depository Government] which shall notify the signatory States and all other acceding States of each deposit.

[Final Clause]

C(62)133

- 12 -

ANNEX (to the Draft Convention)

RELATING TO THE STATUTE OF THE ARBITRAL TRIBUNAL

1. The Arbitral Tribunal referred to in Article 7 of the Convention shall consist of three persons appointed as follows: one arbitrator shall be appointed by each party to the arbitration proceedings and a third arbitrator, who shall also act as Chairman of the Tribunal (hereinafter sometime called the "Chairman of the Tribunal"), shall be appointed by agreement of the parties.
2. Arbitration proceedings shall be instituted upon notice by the party instituting such proceedings (whether a Party to the Convention or a national of a Party to the Convention, as the case may be) to the other party. Such notice shall contain a statement setting forth in summary form the grounds of the claim, the nature of the relief sought, and the name of the arbitrator appointed by the party instituting such proceedings. Within 30 days after the giving of such notice, the respondent party shall notify the party instituting proceedings of the name of the arbitrator appointed by the respondent party.
3. If, within 60 days after the giving of notice instituting the arbitration proceedings, the parties shall not have agreed upon a Chairman of the Tribunal, either party may request the President of the International Court of Justice, or if he is unable to act, the Vice-President of the International Court of Justice, to make the appointment. If either of the parties shall fail to appoint an arbitrator, such arbitrator shall be appointed by the Chairman of the Tribunal.
4. In case any arbitrator appointed as provided in this Annex shall resign, die, or otherwise become unable to act, a successor arbitrator shall be appointed in the same manner as herein prescribed for the appointment of the original arbitrator and his successor shall have all the powers and duties of the original arbitrators.
5. The Arbitral Tribunal shall convene at such times and places as shall be fixed by the Chairman of the Tribunal. Thereafter, the Tribunal shall determine where and when it shall sit.
6. (a) The Arbitral Tribunal shall decide all questions relating to its competence and shall, taking into consideration any agreement of the parties, determine its procedure and all questions relating to costs.

(b) In particular, the Arbitral Tribunal may :

(i) permit intervention by a Party which considers that it has an interest of a legal nature which may be affected by the decision in the case ;

(ii) consolidate pending proceedings with the agreement, where necessary, of any other Arbitral Tribunal established in accordance with this Annex; and

(iii) provided that no objection is made by any Party to such proceedings, stay proceedings if other proceedings arising out of the same facts and raising substantially the same issues are pending before any other international Tribunal or Commission.

(c) The Arbitral Tribunal may also, in the case of proceedings instituted by a national of a Party to the Convention and upon preliminary application by the respondent :

(i) order that national to give security for costs; or

(ii) dismiss the claim if, from the statements made by that national to the Tribunal, the institution of the proceedings appears frivolous or vexatious.

(d) Decisions of the Arbitral Tribunal may be made by a majority vote.

7. The Arbitral Tribunal shall afford to all parties a fair hearing. It may render an award on the default of a party. Any award shall be rendered in writing, signed by a majority of the Arbitral Tribunal, and delivered publicly. A signed counterpart of the award shall be transmitted to each party. Any such award shall be final. Each party to the proceedings shall comply with any such award rendered by the Arbitral Tribunal.

C(62)133  
Annex I

- 14 -

ANNEX I

HISTORICAL BACKGROUND OF THE MANDATE OF THE COUNCIL TO  
THE COMMITTEE FOR INVISIBLE TRANSACTIONS, OF APRIL 1960, TO PREPARE  
AN INTERNATIONAL CONVENTION FOR THE PROTECTION OF FOREIGN  
INVESTMENTS

Dec. 1. In December 1957 the Managing Board of the E.P.U.  
1957 informed the Council of proposals made in a "Draft  
international convention concerning guarantees for the  
investment of foreign capital" and in a "Proposed  
international convention for the mutual protection of private  
property rights in foreign countries", which the Swiss and  
German members of the Board respectively had submitted (1).

May 2. The Council recognised "that these proposals were  
1958 designed to facilitate investments in foreign countries, to  
encourage capital movements and to help finance economic  
expansion", and instructed the Committee for Invisible  
Transactions to examine the two documents in detail and to  
report "what further provisions might be adopted by the  
Member countries of the O.E.E.C. to extend the protection  
afforded to investments from other Member countries" (2).

May 3. The Executive Committee had previously advised against  
1958 the inclusion in the mandate of the Committee for Invisible  
Transactions of the following sentence:

"The Committee's proposals should be such as to  
facilitate their possible application by Associated or non-  
Member countries" (3).

Opposition to this phrase had come chiefly from the  
Representative of the United States who felt that it would  
be extremely difficult for a study of this kind to produce  
provisions which could be applied by Associated or non-Member  
countries of the Organisation. He said that this was by no  
means the first time that similar efforts were being made  
both in regional organisations and others with a much wider  
membership. It was possible that an attempt by the C.E.E.C.  
might prove fruitful but before endorsing it his authorities  
would prefer to await the general results of the proposed  
study. The United States was very interested in the climate  
for international investments and it had been its firm policy  
to encourage private United States investments in other  
countries. However, attempts to provide international  
conventions had so far proved difficult and unsatisfactory.

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(1) C(57)264.

(2) C/M(58)15, Item 140.

(3) CE/M(58)14, Item 90.

4. The Representative of Canada at the Executive Committee said that his Government followed the general line of thinking of the United States, and was moreover not in principle favourably disposed towards international agreements in this field; their reaction thus went further than that of the United States. However, if the proposed study were decided upon, Canada would be prepared to participate in it but reserved her position insofar as subscribing to any convention was concerned. Because Canada was very doubtful as to the ultimate extent to which she could participate, the Representative of Canada was for the deletion of the above-mentioned sentence which might raise hopes which are likely to be unfounded, certainly as far as the Associated countries were concerned.

Dec.  
1959

5. In execution of the first mandate the Committee for Invisible Transactions submitted a report in December 1959 (1) in which it came to the conclusion that "provided they were generally accepted and fully respected," "further provisions of the Organisation to extend the protection of foreign investments would be useful" from an economic and financial point of view, "in that they would facilitate such investments, encourage capital movements and help to finance economic expansion." The Committee felt unable, however, to give definite advice on the desirability of such provisions from a political point of view and on the form which the provisions should take, the scope of their application and any remedies and other action to be envisaged in cases of violation.

Feb.  
1960

6. The Joint Committee examined the report by the Committee for Invisible Transactions (2). Delegates from a considerable number of Member countries were definitely in favour of concrete rules from the standpoint of general policy as distinct from the purely economic or financial point of view (Austria, Belgium, France, Germany, the Netherlands, Switzerland and the United Kingdom). Sweden was in principle in agreement with the idea and Denmark, Greece, Italy, Norway, Portugal and Turkey were in sympathy. The United States was sceptical about the feasibility of negotiation rules but sympathised with the objective. Regarding the form of such rules, many Delegates favoured an international convention (Austria, Belgium, France, Germany, the Netherlands, Switzerland and the United Kingdom). Denmark, Greece, Norway, Portugal and Sweden preferred a recommendation and Sweden also mentioned the possibility of a code of good conduct. As to the scope of application, the majority were of the opinion that any convention should be open for signature by non-Member countries (Austria, Belgium, France, Germany, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom). Non-discriminatory multilateral extension of the rules to investors from countries which did not subscribe was suggested. As far as remedies and other action are concerned, all delegates were opposed to go beyond a compulsory arbitration procedure.

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(1) C(59)289.

(2) C(60)50.

C(62)133  
Annex I

- 16 -

Mar. 7. Most members of the Executive Committee expressed  
1960 themselves in favour of agreed rules being drafted in the form of an international convention open for adherence by non-Member countries (1). Others voiced a preference for a detailed recommendation of the Council, at any rate to begin with, partly because a convention might in some cases raise constitutional difficulties, partly because a recommendation would provide a more flexible and less formal instrument, reactions to which by capital importers among non-Member countries should be awaited. The majority of the Executive Committee felt strongly, however, that in the form of a recommendation of the O.E.E.C. the rules would lose their effectiveness and purpose because they would not inspire the essential confidence and also because non-Member countries would not be able to subscribe to them.

8. The Executive Committee also discussed whether a convention would necessarily have to be adhered to by all Member countries of the Organisation without exception and noted the views of the Committee for Invisible Transactions that this would be highly desirable. It was felt that general acceptance by all Member countries would undoubtedly be preferable; it was also said, however, that in the interest of the agreed objective it would be expedient to have a convention effectively protecting foreign investments even if certain Member countries were unable to adhere to it from the beginning. Universal acceptance need not be a *conditio sine qua non* as long as a substantial majority of Member countries were ready to accept the rules in the form of a convention, and this majority included those Member countries which are net importers of capital as well as those which are net exporters.

April 9. In April 1960 when the Council noted the report of the  
1960 Committee for Invisible Transactions and the observations of the Joint Committee and of the Executive Committee (2) and agreed on the mandate for the preparation of a draft convention the Chairman summarised the discussion by saying that there seemed to be general agreement to proceed with the studies of such a draft convention, it being understood that no Member country could adopt a final position until the result was available. He recalled that the Delegate for the Netherlands had stressed the importance of all countries adhering to the Convention in due course and that Denmark appeared to be the only country to have some considerable doubts about the proposed exercise.

10. Denmark had no intention of opposing the continuation of the work but her authorities were not really convinced

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(1) C(60)68.

(2) C/M(60)9, Item 66.

that this was a question of real importance in Europe where private capital exports were mostly from two or three Member countries to two or three other Member countries. They did not therefore see why a convention binding on all countries was needed. The Danish authorities were in agreement with the points stressed by the Delegate for Switzerland regarding the importance of helping under-developed countries at the present time. However, as the crucial problem was export of capital to non-European countries they were not convinced that the adoption of a convention between Member countries would in fact assist that particular effort which was an important one. As it might even have the reverse effect, Denmark felt that if a matter of this kind were to be taken up for international action it should not be dealt with by a regional organisation like the O.E.E.C. but by one with much wider membership.

C(62)133  
ANNEX II

- 18 -

ANNEX II

SUMMARY OF THE ARGUMENTS REGARDING THE OBJECT OF  
PROTECTION: "INVESTMENTS" OR "PROPERTY"

1. Those who favoured a limitation of the protection under the Convention to "investments" emphasized that the immediate aim of the Convention was, as the Preamble showed, the promotion of a flow of capital for economic activity and development and by no means a codification of legal rules relating to the protection of foreign property that were in force in all the countries. They were seriously concerned about the burden that would result for the Parties to the Convention if its provisions were to apply to all foreign property without regard to the part played by it in the national economy or to the time of its acquisition or if the transfer obligations under it were unreasonably extended. It was because of their fear of the undue financial strain of repayment obligations that some of them desired the protection to be limited to investments made after the coming into force of the Convention. Such a solution alone could "separate the past from the future" and, incidentally, prepare for the day when protection of all kinds of property would become acceptable to all. In the meantime, their Governments did not propose to embark on a poll of wholesale confiscation or expropriation with regard to aliens. But they felt that, limited to the protection of investments, the Convention stood a better chance of being accepted by a large number of developing countries. Finally, while they recognised that the U.S. Bilateral Treaties and the United Kingdom - Iranian Treaty referred to "property", they pointed out that the Agreements recently concluded by the German Federal Government with the Cameroons, Greece, Guinea, Liberia, Malaya, Morocco, Pakistan, Thailand, Togoland and Turkey applied to "investments". (The reason therefor, however, was - as was explained in the Committee, - that these Agreements had been concluded in pursuance of specific provisions of the German Budgetary Laws of 1959, 1960 and 1961, which gave the Minister of Finance the power, under certain conditions, to guarantee investments made by German nationals abroad.)

2. Those who were in favour of the use of the term "property" felt that the principal aim of the Convention was, as the Preamble predicated, to restate the generally recognised principles of international law which did not distinguish between the protection of foreign investments and that of other property rights, and to combine them with rules designed to render these principles more effective. They doubted whether a distinction between "property" and "investments" could always be drawn: certain "investments" might subsequently - e.g. by succession - acquire the character of property or lose their productive function. Should this entail loss of protection? - In law, the notion of "investment" was not precise; its definitions couched in terms of economics could not always be used for legal purposes. A limitation of protection to "investments" would mean that in practice the decision as to what would be covered by the Convention would lie

with the borrowing countries and be made according to the different definitions contained in their national legislation (1) or to different national administrative policies (2). As a result, a common standard would be lacking; there would be a factual inequality of obligations of the Parties - not alone as between the capital exporting and capital importing countries, but as between the capital importing countries themselves owing to the differences in their legislation or policies. Moreover, such a limitation would make it appear that a lower standard of treatment was admissible with regard to property other than "productive investments"; this would introduce discrimination unjustified in international law. Altogether, in their view the true purpose of the Convention - the creation and maintenance of a favourable "investment climate" - could best be served if its provisions were based on the most comprehensive definition of the object of protection that is consistent with the recognised principles of international law.

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- (1) Thus, protection under the Greek Law of 31st October, 1953, applies to "productive" investments, approved as such by an administrative act: Official Gazette of the Greek Government No. 317, Part I, 10th November, 1953.
- (2) In some of its bilateral treaties the German Federal Republic agreed that the provisions regarding German investments should apply only to such investments as had been expressly "approved" by the competent authorities of the other Party concerned.

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA.

NUMBERED LETTER

TO: THE UNDER-SECRETARY OF STATE FOR  
EXTERNAL AFFAIRS, OTTAWA, CANADA.

Security: RESTRICTED

FROM: The Canadian Delegation to the  
OECD, Paris

No: 0-361

Date: December 17, 1962

Reference: Your Telegram No. E-2240 of  
November 14

Enclosures:

Air or Surface Mail: Air

Subject: Draft Convention on the  
Protection of Foreign Property

Post File No.: 14-5-2

Ottawa File No.

References

Dept. of  
Finance

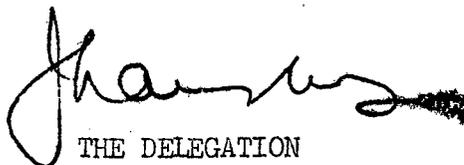
Dept. of  
Trade &  
Commerce

At its meeting of December 11 the Council adopted the entry in its Minutes contained in CES/62.78 (1st Revision). This means that the draft Convention (Annex III of C(62)133 subject to the deletion of Article 14) may now be made available by Member countries and the Secretary General to governments of non-Member states and other interested circles. We understand that Britain and France intend to pass the document to the governments of some LDCs with which they have close relations and that the Secretary General will provide copies to BIAC, TUAC and the Council of Europe. We would be most interested to know whether you intend to pass copies to any interested institutions in Canada (e.g. the International Law Association) - we assume that reprints of the document will shortly be available for this purpose.

2. We have the impression that the positions of the British and United States delegations, previously among the most hesitant when any question of follow-up action in OECD on the draft Convention has arisen, have been shifting significantly during the discussions of the past few months in the Executive Committee and Council. Much will depend on the reactions (if any) of the LDCs consulted but we may find that, if these reactions are favorable, the opposition to the draft Convention has dropped sharply when it comes before the Council for discussion in March, 1963. We will canvass the opinion of other delegations nearer to that time.

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