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Investment Statute and a Guarantee Fund against political risks

Report
Committee on Economic Affairs and Development
Rapporteur: Mr Philippe Le HODEY, Belgium

A. I . Draft Recommendation

The Assembly,

1. Recalling Recommendation 159 of 2nd May 1958 in which it recommended to the Committee of Ministers, inter alia, that it should convene, under the joint auspices of t h e Council of Europe, t h e Organisation for Europe an Economic Co-operation and the Commission for Technical Co-operation in Africa South of the Sahara,a conference to be attended on a footing of equality by all the member countries of those organisations and all the African countries willing to take part, for the purpose of implementing the proposals for action for mulated in there port by the Study Group for the Development of Africa, namel y :

a. the drafting of an Investment Statute;

b. the establishment of a Guarantee and Financial Assistance Fund (or possibly two separate Funds);

c. the expansion of technical assistance by the European countries, in particular through the Commission for Technical Co-operation in Africa South of t h e Sahara (C.C.T.A.) whose c mpetence and means of action should be correspondingly enlarged; and

d. the setting in motion of adequate machinery forco-operation;

2. Noting that its Economic Committee has , to begin with , examined the questions of an Investment Statute and a Guarantee Fund and that it will, at a later stage, make detailed proposals regarding the other questions mentioned in Order 124;

3. Thanking the various international bodies, governmental and non-governmental, which gave their assistance in the preparation of the Economic Committee's present report c o v e r i n g proposals for an Investment Statute and Guarantee Fund;

4. Expressing the hope that this further report will help Member Governments to reconsider the Assembly's original proposals in Recommendation 159 and enable them to take action thereon in the near future;

5. Reminding the Committee of Ministers that the year which they have allowed to pass without examining the substance of the Assembly's proposals, on African development has seen a continuing evolution in relations between Africa and t h e rest of t h e free world in a direction which makes it ever more imperative to put collaboration between the two areas on a proper footing of friendly co-operation;

6. Considering t h a t proposals such as those made in the Economic Committee's Report , Doc. 1027, for an Investment Statute and a Guarantee Fund are examples of initiatives which, to be fully effective, should be worked out in collaboration between the countries providing funds for investment and those receiving such funds;

7. Considering that , even if it should appear that an Investment Statute cannot be adopted within a short time , a Guarantee F u nd would help to establish co-operation between Africa and European States on a sound basis, and would help to speed up the development of new countries;

8. Considering that such proposals are therefore eminently suitable for consideration at a Conference such as that proposed b y t he Assembly in its Recommendation 159,

9. Recommends to the Committee of Ministers :

that it should re-examine the proposals contained in Recommendation 159 and consider how the Conference proposed there can most rapidly and effectively be convened;

that Member Governments should prepare, on the lines set out in the Economic Committee's Report (Doc. 1027), drafts for the proposed Investment Statute and Guarantee Fund t o be examined at the Conference;

that it should report back to the assembly by its next part-Session on action taken or planned in accordance with this Recommendation.

B. I I . Explanatory Memorandum by M. LE HODEY

1. I. Introduction

1.1. A. Order 124 of the Consultative Assembly

1. In adopting the conclusions of the report of the Group of independent Experts on the Development of Africa, the Consultative Assembly, in its Recommendation 159, suggested t h a t Governments hold a European - African Conference with a view to setting up co-operation machinery in which the Europe an a n d African countries concerned would take part on a footing of equality.The Committee of Ministers having post poned its decision on this proposal, the Consultative Assembly adopted its Order 124, which reads as follows :

" The Assembly;

Having noted the views expressed by t h e Committee of Ministers in the Supplementary Report to their Ninth Report to the Consultative Assembly with regard to Recommendation 159 on the Development of Africa;

Considering that the postponement of a decision by the Committee of Ministers concerning the Europe an African Conference proposed in Recommendation 159 should not hold, up the further elaboration of the practical proposals outlined in that text,

Instructs its Economic Committee to present detailed proposals, prepared in collaboration with other international organisations concerned and members of the Group of Experts set up under Order 105, concerning :

an Investment Statute;

a Guarantee and Financial Assistance Fund (or possibly two separate funds);

the expansion of technical assistance by the European countries ".

2. In deciding to examine those proposals in detail, as laid down in its Order 124, the Consultative Assembly did not have in mind that they should be considered solely as technical methods of encouraging the movement of capital and expansion of technical assistance but as instruments of a policy of co-operation between European and African countries determined t o engage in a joint effort for t h e economic and social development of Africa.

Carrying out of Order 124

3. Upon being seized of Order 124, t he Economic Committee instructed its Sub-committee No.4 on the Development of Africa to prepare detailed proposals. For practical reasons not all aspects of t h e work could be dealt with simultaneously.The Sub-committee first of all considered questions relating to the creation and maintenance of an atmosphere likely to stimulate investment and, in particular, to facilitate:

the drafting of an Investment Statute;

the setting up of an International Guarantee Fund to protect investments against political risks.

4. Reports will be drawn up later on the other points (financial assistance and the expansion of technical assistance) ; but it appeared desirable that the preparation and submission of this report on an Investment Statute and a Guarantee Fund should not be delayed.

5. After taking note of the various information documents prepared by the Secretariat, reviewing the work undertaken by public and private organisations to protect and guarantee private investments abroad , the Economic Committee's Sub-committee No. 4 first of all adopted in January 1959 a number of principles and considerations on which its report should be based. It instructed the Secretariat:

to consult, in pursuance of Order 124, th international organisations concerned and former members of the Group of Experts on the Development of Africa set up under Order 105, and

subsequently to prepare a draft report for discussion at a meeting to be held in the early summer.

6. In order to avoid undul y prolonging the preparatory work, consultation had to be limited to talks with the organisations and persons given below, with whom it was possible to discuss matters before mid-April 1959. These talks took place with members of the following organisations, some of whom have sent in written comments :

1. International Bank for Reconstruction and Development,
2. International Chamber of Commerce,
3. The Commission of the European Economic Community,
4. The NATO P rliamentarians' Conference,
5. European League for Economic Cooperation,
6. Organisation for European Economic Co-operation,
7. International Credit Insurance Association (Berne Union),
8. Interparliamentary Union, and M. L. Bourcier de Carbon, M. C. Carbonnelle and Mr. A. Gaitskell, former members of the Group of Experts on t h e Development of Africa.

7. Bearing in mind the principles adopte by the Economic Committee's Sub-committee No. 4 in January 1959 and the observations made by the persons and organisations consulted , the Secretariat drew up a draft report which was discussed at a meeting held in Paris on 23rd June 1959 a n d a t t e n d e d b y all t he p e r s o n s who had been previously consulted either in their personal capacity or as representatives of an organisation.[1] The persons attending that meeting freely expressed their points of view, w ithout , however, committing the organisations (if any) t o which they belonged. While, therefore, the Economic Committee's Sub-committee No. 4 bears sole responsibilty for this report , the Sub-co mmittee wishes to pay particular tribute to t h e most valuable help given by the m in this way.

1.2. B. General remarks

8. The points of view expressed by the parties consulted differ somewhat with regard to the role assigned t o an investment statute and a guarantee fund against political risks. This is, however, not surprising since the p a r t i e s in question are primarily concerned w i t h different aspects of the problem. It is, therefore , at this stage necessary to give a few preliminary explanations in order, as far as possible, to avoid any misunderstanding with regard to the scope of this report.

9. As already pointed out in paragraph 2 above, Sub-committee No. 4 has, in accordance with the terms of reference given to it by the Consultative Assembly, tried to draw up detailed proposals for an Investment Statute and a G arantee Fund which are conceived as a part of a system of co-operation in the development of Africa, embracing on a footing of equality the European and African countries concerned. In this context , both the Statute and the Fund may be looked upon as instruments of a policy of economic and technical co-operation among the participating countries of Europe and Africa.

10. This conception of the Investment Statute and the Guarantee Fund has guided t h e work of Sub-committee No. 4 and has led it to conclusions whose technical features, however important they may be, are overridden by political considerations which will, as necessary, be brought out in the course of this report . It is a conception which differs from that of most projects envisaged by other organisations, having regard to the fact t h a t these l a t t e r projects are either i n s t r u m e n t s of an essentially technical nature or have not the same geographical limits.

11. Various opinions h a v e been expressed on the practical possibilities of putting into operation an Investment Statute and a Guarantee Fund as instruments of European-Afric an co-operation.In some quarters it is considered essential t h a t European and African countries should first agree to make a joint effort and only l a t e r consider what action to take in the fields of trade, development, finance and technical assistance. Others think that the creation and maintenance of a favourable atmosphere for Europe an investments in Africa does not inevitably entail accession to an Investment Statute or member ship of an international Guarantee Fund, but depends primarily upon the Governments concerned (political and economic stability, internal legislation ensuring equitable treatment of foreign interests, etc.). Others dwell upon the need to improve international relations beforehand by virtue of countries adhering to a foreign investments code in order to intensify international co-operation and make it more effective. Still others take the view that setting up a Guarantee Fund against political risks, administered by African and European countries on a footing of

1. A brief report of this meeting is in the course of preparation.

equality , would, without there being a n y need t o accede first of all t o a formal convention on the status of private in vestments abroad, of itself engender and m aintain an atmosphere of mutual trust and be tantamount to the countries concerned in both Africa and Europ e engaging in a joint effort for the economic development of Africa.

12. Though Sub-committee No. 4 has concerned itself with the system of European-African co-operation suggested by the Group of Experts on the Development of Africa and in Recommendation 159, i t should be borne in mind that this proposal has not yet been formally agreed to by the African and European countries in question; it would, therefore, be premature to prejudge that agreement and its content.Sub-committee No. 4 has accordingly tried to formulate its proposals in such a way that, in the absence of a general agreement on the system of co-operation advocated in Recommendation 159, African and European countries may be associated in a joint enterprise(Statute or Fund) which, however limited it might be, would serve as the thin end of the wedge in instituting a broad policy of economic co-operation between Africa and Europe. It is for this reason, too, t h a t it was deemed more opportune to present a report embodying detailed proposals rather than legally worded draft conventions.

2. II. Investment Statute

2.1. 1 . PURPOSE OF THE STATUTE RELATING TO FOREIGN PRIVATE INVESTMENTS

13. The extent to which private owners of capital are prepared to invest their money abroad depends not only on how attractive the investments are in themselves, but also upon the confidence inspired by the political, economic, financial and social development of the debtor country and upon local conditions governing foreign investments.If, therefore, a country wishes to receive foreign enterprises and investments, it must take steps to ensure that any misgivings the would-be investors may have in this connection are dispelled and, in particular, foreign enterprises dealt with in an equitable manner and allowed to operate normally under appropriate laws and regulations.

14. On the other hand, debtor countries a r e somewhat apprehensive of foreign investments , lest these lead t o political interference i n domestic affairs, inadequate integration of foreign enterprises in the national economy and exploitation of local resources for the benefit of foreign interests,. etc.

15. Lastly, it is clear that both investors and debtors have legitimate rights which should be respected and are under an obligation to create and maintain a climate likely to stimulate foreign private investment and the development of a spirit of co-operation between national and foreign interests.

16. These reciprocal rights and obligations, stemming as they do from a few generally accepted major principles to which all the countries concerned must be prepared to subscribe, must normally be embodied in nationa law and regulations and in the terms of t he contracts entered into with the foreign investors. Unfortunately, however, these major principles are not always adequately respected by the parties concerned and it would therefore appear to be desirable to re-establish mutual trust by inviting the countries t o affirm those principles and define their scope in a convention governing the status of foreign investments. Various proposals have been worked out to this end in recent years and, where they have not been formally adopted, they have had considerable influence upon the municipal law of many countries.

17. In any event, it is certain that if countries are to co-operate with each other in the economic field and, in particular, t o foster private enterprise, they must be prepared to trust each other, which in turn implies that they must agree on what rights should be respected and what obligations assumed both b y themselves and their respective nationals.

18. Sub-committee No. 4 has accordingly made a point of proposing as an instrument of co-operation between both African and European countries for the investment of private capital not a system of equitable treatment or a convention on the protection of the rights of ownership and the interests of foreigners— which would imply that the problem be broached mainly from the point of view of foreign investors—but a convention on the status of foreign private investments which shall take into account the matters of concern to the various European and African countries involved.

2.2. 2. NATURE OF THE STATUTE GOVERNING FOREIGN PRIVATE INVESTMENTS

19. Views on the nature of this statute reveal three main schools of thought, to the effect that:

the statute must be a convention embodying detailed provisions;

the statute must be a short convention laying down basic rules for which t he methods of application would be specified in separate contracts;

the statute must consist of a simple statement of principles.

20. The first requirement, though eminently desirable, is likely to be difficult to fulfil. The more one goes into detail, the more difficult it becomes to reach agreement and it is,as a rule, more realistic to proceed by stages, while bearing in mind those principles upon which agreement can be reached and gradually forging ahead as opportunities afford.

This is the main reason for the growing success o f the second stipulation, namely that the statute shall be a convention confined to laying down general rules[2]. This latter formula leaves it to separate contracts to specify the methods of applying the basic rules, thereby imparting a certain amount of flexibility to relations between investors and borrowers; such flexibility is, indeed, virtually essential in view of t h e political and economic situation of the European and African countries concerned, which form a group comprising :

countries which have reached widely different stages of economic development;

metropolitan countries and former colonies ;

countries with amore or less liberal or directed policy.

21 . Some people think it would suffice to draw up a simple statement of principles; but this could hardly be looked upon as a true statute governing foreign private investments.If the countries concerned are prepared initially t o agree on a statement of principles, they must at least be prepared to accept certain legal implications and, eventually, to accede to a convention.

22. In the last analysis, therefore, it would appear to be the second formula which should be adopted. The Statute governing foreign private investments should be drawn up under a relatively simple convention containing the basic rules, the provisions of which should be sufficiently precise t o be clearly interpreted in the event of disputes. The method for the settlement of disputes, which constitutes one of the governing ideas of this Statute, should form the subject of a protocol of conciliation and arbitration to the convention.

2.3. 3. CONTENTS OF THE CONVENTION

2.3.1. (a) Preamble

23. The preamble should begin by stating that all the European and African countries concerned intend to co-operate with one an other in the development of Africa, whether it be in the commercial, financial or technical field, and that to this end they wish to strengthen and increase the flow of private capital. The preamble should embody the declarations of principle t o which the signatory countries subscribe in respect of foreign private investments.

24. The statement s of principle would lay down in general terms the right s and obligations of the Contracting Parties [3]. In particular, they would mention the right of sovereign States to lay down :

to what e x t e n t and in what conditions foreign private investments are authorised;

the rules governing the ownership of past and future investments; and

the rules relating to the administration of investments and the activities of persons in enterprises;

and would stipulate that the Contracting Parties have the obligation :

to lay down equitable rules for existing and future foreign private investments and to ensure that the economic activities of the foreign persons and enterprises are governed by reasonable conditions;

to carry out in good faith the obligations arising out of the convention on the investments statut e and to afford future investments reasonable protection against worsening of the conditions prevailing at the time the investment is made, when those conditions are laid down by the law and administrative or other regulations and when the deteriorating situation is such as to jeopardise the investment.

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2. The most recent projects have taken this simple form, which has, moreover, the backing of some supporters and authors of detailed proposals.
3. See Article 12 of the Havana Charter.

25. Conjointly, the declarations of principles would make it clear that in return for the right to equitable treatment, foreign private investments and the parties making them and putting them into operation have obligations, including those to respect national laws and customs, abstain from political interference, integrate activities in the domestic economy, collaborate with the nationals of the country concerned and co-operate in the technical field.

2.3.2. (b) The Contracting Parties

26. The Contracting Parties would be the Governments of the countries of Europe and Africa prepared to assume the obligations set down in t h e Convention. However, such a Convention would be worth while only if a larg e enough numbe r of African and European countries acceded to it.

2.3.3. (c) Nationals

27. The " nationals " of the contracting countries may take advantage of the provisions of the Statute. Since it is necessary t o define " nationals ", i t would appear desirable, having regard to the spirit with which the general system of European-African co-operation must be imbued, to adopt a fairly broad definition. For instance, the following might be regarded as nationals:

physical persons possessing the nationality of one of the contracting countries;

companies constitute d in accordance with the civil or commercial l aw of the contracting country and other moral persons subject to the public or private law of a contracting country, provided that they have their statutory headquarters , central administration and main premises in one of the contracting countries;

other associations of persons, provided that they are directly or indirectly under the control and authority of nationals of the contracting countries.

28. The definition of " nationals " should, in any event, be the same as those which would or might be adopted in any agreements relating to the right of establishment and dual taxation , since these questions are closely bound up with each other [4].

2.3.4. (d) Private investments covered by the Statute

29. As a rule draft investment statutes or codes are designed to protect the property, rights and interests of all kinds directly or indirectly held b y foreign nationals. This solution appears, in present circumstances, to be both inadequate and too ambitious; inadequate in th e sense that it is mainly aimed at protecting foreign interests, without sufficient regard to the fact that the interests and preoccupations of foreign potential investors are not always t h e same as those of the debtor countries; too ambitious, since it tend s to give uniform protection t o all foreign interests without taking account of de facto or de jure circumstances which may preclude some Governmen t s from committing themselves in such a general manner.

30. Taking the view that a partial solution is better than no solution at all and that the loyal fulfilment of limited mutual obligations would f cilitate and expedite the solution of the outstanding problems, Sub-committee No. 4 took steps to find out and determine those points on which the African and Europe an countries might at the outset reach agreement in connection with a statute governing foreign private investments , in the hope that, as and when circumstances permitted, the agreement could be extended to cover foreign private investments as a whole. It ultimately became clear that the only foreign private investments concerning which, without any kind of controversy , African and European countries might assume reciprocal obligations would be those m a d e after the convention had been signed. In v i ew of the nature of the guarantees proposed for new investment s it may, however, be wondered whether it would not be possible, at the outset, t o extend these t o past investments. It seems, at any rate, difficult to refuse the application of the provisions concerning freedom of transfer and dispossession (see paras. 47 and 48 below).

3 1 . Assuming that, at the beginning, the Statute could only cover future and not past or current investments, the latter should not be ignored in the Convention. Until such t i me as their status can be settled in a precise manner, the Contracting Parties would be asked merely to affirm in the preamble (see paragraph 24 above)

4. Mention may be made of the work on this question in progress at the following organisations : Council of Europe : Committee of Experts on the treatment of Legal Persons; 0. E. E. C. : Fiscal Committee (on dual taxation).

the principale that such investments would receive equitable treatment. It should also be made clear that the expression « future foreign private investments » relates to the expansion of past investments whenever such expansion has taken place after the convention was signed.

32. There then remains the task of defining what is meant by investments. Everyone is agreed t o consider as an investment any contribution, what ever its nature, i. e. whether capital as such, capital equipment, patents, etc., which confers upon the contributor or investor, directly or indirectly, a right of ownership and/or control of an enterprise (this is what is commonly known as « direct private investments »).

33. The matter becomes some what controversial, however, as soon as it is a question not of contributions in the precise sense mentioned above, but of straight forward loans. It is generally agreed that straight forward long term loans may be considered as investments, whereas short-term loans are not as a rule looked upon as investments.This appears to be warranted, since the concept of investment contains an implication of duration.The difficulty lies in formulating the criterion of duration, in precise terms of years.Recent studies of the question by the United Nations and O . E. E. C. seem to show that a minimum duration of five years is being increasingly accepted as a criterion. However arbitrary this duration may be, there do not appear to be sufficiently convincing ground s for rejecting t his figure and proposing another and it is accordingly that adopted for the purposes of this report, as being the most suitable at the present time.

34. It is agreed that current commercial operations, such as the sale of goods, capital equipment and intangible rights, cannot be looked upon as investments; but difficulties arise as soon as we consider the granting of credits in payment of goods, capital equipment and rights as well as the concession of the use of rights against payment of rentsor perio dical dues.

35. Generally speaking, short-term credits in respect of current commercial operations are not considered as investments.W h a t , however, is the position in cases where such credits are for very long periods? They should presumably be comparable with the long-term loans referred to above; for when capital is sought to finance, for instance, the installation of equipment, the debtor may either have recourse to a lender or induce his suppliers to grant him credit. If the loan, in the case in point, is to be considered as an investment on account of its duration, it seems difficult to look upon credit for the same duration differently, in spite of being bound up with the supply of capital goods. It is the well-known question of untied loans (referred to above as straigh f orward loans) and of tied loans (of which credits are a particular feature) . For the purposes of this report, therefore , loans and credits granted for a period of more than a given minimum period which, in the present report, is fixed at five years, are considered as investments, or rather as operations which may be protected in t he same way as direct private investments properly so called. However, i t is understood that the minimum duration might be a different one, if there are valid reasons therefor. It may, by the way, be pointed out that the guaranteeing, against political risks, of credits bound u p with current commercial transactions is generally under taken in the various countries b y special i stitutions and that the Berne Union, embracing as it does a large number of such special institutions in a kind of club, has hitherto made a point of ensuring that a maximum duration of five years is observed for current transactions insured by its members.

36. The concession of the use of intangible rights against payment of royalties or periodical dues may be treated as a loan which is in a way tantamount to granting the use of capital against payment of interest.

37. Private investments protected by the Statute would, therefore, include the following categories of transactions carried out by foreign nationals:

contribution of capital, intangible rights, capital equipment and services (insofar as such services are bound up with the previous contributions) conferring upon the contributor, directly or indirectly , a right of ownership and control;

the granting of credits and loans (whethe r tied or untied) for periods of more than five years;

the concession of intangible rights against paymen t of dues for periods exceeding five years.

38. The foreign private investments in question may concern public or private parties in the debtor country, be direct (for instance, they may be used to enable foreigners to establish an enterprise) or take the form of security holdings (for instance , to enable private persons to subscribe t o public loans).

2.3.5. (c) Treatment of future foreign private investments

39. Insofar as foreign private investments are allowed, they must be treated equitably and the conditions to which foreign nationals are subject (whether persons or companies) in respect of the administration and protection of their interests must not be such as t o lead to unreasonable discrimination . The Convention should contain a clause determining the status of investments accordingly.

40. There are, however, spheres where the Convention should expressly stipulate that foreign investors must enjoy treatment not less favourable than that accorded to nationals of t h e borrowing country. This "minimum" treatment applies to :

the possession and exercise of civil rights in regard to both personal and succession rights;

full legal and judicial protection of individuals, property, rights and interests, which includes, inter alia, free access to judicial and admnistrative authorities, the right t o be assisted or represented, etc. ;

a x regulations governing foreign i n v e s t m e n t s .

41. The Convention should also stipulate that the signatory governments shall refrain from disturbing, through discrimination or abuses , the relatives stability of the regulations governing new foreign investments, insofar as such regulations have made the investment possible and any change in them would jeopardise it (a case in point is that of the effect of certain pricetaxes, trade restriction measures, taxes, etc.).

42. The Governments of the borrowing countries grant fairly often by means of legislation, regulations or contractually, guarantees of stability within the meaning of the preceding paragraph but experience has abundantly shown that it would be some what unrealistic to expect undertakings of unspecified or long duration to be indefinitely observed by the parties concerned, in spite of the pressure of events and changes affecting the political, economic and social life of all the peoples concerned. It there for eappears to be more realistic to assume that difficulties might arise and to set up appropriate procedure to enable undertakings to be amended and t o ensure tha t such procedure shall accord a minimum of satisfaction to the parties concerned. The Convention should therefore stipulate that when a Government wishes to reconsider such undertakings , it m u s t first enter into negotiations with those concerned and, in the event of a disagreement, have recourse to arbitration, in accordance with the procedure provided for in the Protocol to t h e Convention.

2.3.6. (f) Dual taxation

43. As dual taxation is a major obstacle t o the expansion of foreign investment, the Convention should contain an article in which the Contracting Parties undertake to conclude agreements designed to avoid such taxation [5].

2.3.7. (g) Freedom of transfer

44. Foreign nationals should normally expect to be able freely to transfer to their respective countries their profits and their earnings and, if the case arises, their capital. On the other hand, countries calling for foreign private ivestments for their development are clealy interested in seeing that such investments remain anchored in the national economy, that profits are as far as possible used where they are made and that control is exercised over capital exports which might upset the balance of payments of those countries.

45. It would be illusory to think that any country could guarantee any kind of transfer for an indefinite period; conversely, it would be vain to hope for foreign investments unless the possibility of transfer were guaranteed.In practice, one can hardly hope for more than a compromise solution, which might consist of distin ishing between current transactions (current payments, earnings, profits, interest s, fees, etc.) and the repatriation of capital invested.

46. Freedom of transfer in respect of current operations is necessary, since otherwise there would be a risk of external private sources of capital completely drying up. On the other hand, there patriation of invested capital may be subjected to certain limitations which, while they may to some extent affect the flow of foreign capital, would not result in the drying up of the sources of capital.

47. Political realism therefore urges that the Convention should include provisions stipulating, without any prejudice to the application of existing international agreements, such as that on the International Monetary Fund, which are designed to cope with circumstances which may render transfers difficult or impossible (such as an unfavourable balance of payments, for instance)—the principle of freedom of transfer in respect of current transactions and the principle of free repatriation of invested capital within a reasonable period.

5. In addition to the model conventions drown up under the auspices of the League of Nations and the United Nations, the Fiscal Committee of O. E. E. C. is at present drawing up texts on dual taxation (see Elimination of dual taxation, O. E. E. C, 1958).

2.3.8. (h) Dispossession (expropriation, nationalisation

48. I t would be vain to demand that any Government undertake never to dispossess holders, whether by way of expropriation or nationalisation, or not to do so for a very long tim e , but the Convention should at least expressly stipulate:

that the Contracting Parties may not effect dispossession without going through appropriate legal procedure and providing fair compensation;and

that steps should be taken, either prior to dispossession or at the time of dispossession, rapidly to determine compensation and ensure payment of it without undue delay or restricting the possibility of transfer.

2.3.9. (i) Infringements of the Convention

49. The Convention should embody two fundamental principles of international law :

the Contracting Parties must neither recognise nor take within their territory any measures contrary to the provisions of t he Convention;

any infringement of t h e Convention shall entail full compensation.

2.3.10. (j) Saving clause

The Convention shall be respected and no Contracting Party may waive any of its provisions, save in exceptional circumstances, such as those of war. It is therefore desirable that the Convention relating to the investment statute allow for such derogation in terms similar to those used m other recent conventions, such as the European Convention on Establishment (Article 25). The derogations in question should be confined to those necessary to meet the requirements of the prevailing situation.

2.3.11. (k) Settlement of disjmtes

51. The provisions for the settlement of disputes which may arise on how the terms of the Convention should be construed or applied are among the governing ideas of the Statute. Some proposals provide that disputes shall be referred only to an international court of justice; others provide for compulsory arbitration procedure, whilst still others provide for arbitration procedure if the Parties agree to this method of settling disputes, or failing such agreement, for submission of the disputes to an international court of justice.

52. Since the investment statute is intended to be a means of providing for economic co-operation between European and African countries, compulsory arbitration appears to be the best solution. Recourse to arbitration for the settlement of disputes should, moreover, be open to the nationals of Contracting Parties as well as to the Contracting Parties themselves. A protocol governing conciliation and arbitration procedure should, therefore, be annexed to the Convention; this report does not contain any other proposals on this subject since it is one which must be determined when the time comes.

53. The question of imposing sanctions arises in the event of one of the Contracting Par-ties not giving, or refusing to give, effect to an arbitral award against it. Frequent eitorts have been made to determine what sanctions might be taken, but it does not appear to be politically possible to envisage a list of sanctions which the arbitration commission might impose. The wisest course therefore appears to be to provide only that in the event of complete or partial non-fulfilment of the obligations placed upon a Party in pursuance of an arbitral award the other Parties shall join-tly examine the problem and thereupon take, either individually or collectively, such steps as may appear to be appropriate and opportune.

2.3.12. (l) Guarantees

54. Within the framework of a system of economic co-operation between African and liuropean countries it is conceivable that undertakings formally assumed by thé participating countries m accordance with the terms of the Convention on a statute governing foreign private investments be automatically guaranteed, jointly and severally, by all the participating countries. If such a solution is to be envisaged, however, an atmosphere of complete trust must prevail among all those countries and their solidarity be absolute. This, undoubtedly, is the aim which must be achieved ; in the meantime we must in the initial stage, be content with less ambitious solutions

55. This requirement would be met by setting up an international guarantee fund for private investments [6] designed to cover only political risks. In the event of the fund being set up conjointly with the institution of an investment statute, the text of the Convention on the Statute should stipulate

that the Contracting Parties severally undertake to establish a fund to insure their investments against any political risks that may affect them m an African country party to the Convention; and

that the scope and terms of this insurance will be laid down m a special Convention setting up a guarantee fund.

2.3.13. (m) Final provisions

56. The Convention on the Statute govern- ing foreign private investments should include a final clause on the subject of formalities relating to the implementation of the Convention : ratification, number of ratifications required (See para. 26) date of entry into force, deposit, denunciation, etc

3. II . International Guarantee Fund for the protection of foreign private investments against political risks

3.1. 1 . ITS PURPOSE

It is not proposed to reiterate here what was previously said concerning the features of a system of European-African eco nomic co-operation pursuant to an investment statute and a guarantee fund (see paragraphs 8 to 12 above)

Owners of capital making investments abroad expect not only to receive fair treatment, but also to be given guarantees or assurances that they will not, as a result of a debtor country failing to fulfil the obligations it has formally assumed or of curcumstances beyond the control of that government, have to bear non-commercial risks depriving them of the benefit of their investments.

This has given rise to the idea of setting up machinery which would relieve the private investor in a foreign country of the worry of non-commercial risks and strongly diminish the effect of such risks upon a decision to invest capital. It is, however, clear that the granting of suitable guarantees would meet with a number of objections, especially when it was a question of insuring against the possible failure of a debtor country to fulfil commitments it has formally assumed towards the investor whether contractually or by subscribing to an international investment statute. Countries importing capital would, it is said, perhaps have fewer scruples about interfering with foreign investments if they knew that the latter would in any event give rise to compensation; a guarantee system might therefore constitute an incentive in many cases not to fulfil obligations assumed.

60. This assuption is not wholly unfounded, but the granting of guarantees against political risks might be made subject to requirements likely to mitigate the objection mentioned above. Furthermore, the objection would fall to the ground, if not wholly, at least very largely, if the guarantee system were set up within the framework of an active policy of economic co-operation between Europe and Africa. When countries decide to make a joint effort of this kind, it is fundamentally essential that they trust each other and acknowledge in return that they must jointly share the responsililities they may severally incur.

3.2. 2. ITS NATURE

61. A system for the protection of foreign private investments against political risks may be of different kinds, depending mainly upon what it is intended that the purpose of the system shall be; the nature of the fund must depend upon whether it is intended that it shall be solely a technical means of insurance or an instrument of a national policy to promote private investment abroad or of an international policy of co-operation founded upon the solidarity of a group of countries. It was, of course, this last solution which the Consultative Assembly preferred when in its Recommendation 159 it urged that among other things a guarantee fund be set up and which served as a basis for the work of Subcommittee No. 4.

6. See Part III of this report.

62. Several important consequences follow from, such a system of guarantee and these are stated below in order that they may make clearer the meaning and scope of the proposals made later in this report :

as a means of implementing the policy of co-operation between European and African countries, the guarantee fund must be international and be binding upon each and all of the participating countries;

the international fund must be administered by the participating countries as a whole, on a footing of equality;

the international guarantee fund takes for granted that, generally speaking, the participating countries are agreed upon the rights and duties of investors and borrowers. Such agreement may be expressed either formally by virtue of the participating countries acceding to a statute on foreign private investments, or it may exist de facto.

63.The creation of an international gua- rantee fund having the above features does not, a priori, preclude lender countries from instituting national guarantee funds in pursuance of a national policy to promote private investment abroad; it is clear, however, that such national funds would be on a very different plane and meet different needs and that they should not prejudice the normal working of an international guarantee fund. In the event, however, of national guarantee funds being set up by the countries participating in the joint effort to promote the development of Africa, certain kinds of l i n k s [7]might he envisaged with the international fund to guarantee private investments Africa. This question, which it is not proposed to go into here, could be studied when the time was ripe to do so.

64. This report is therefore confined to a study of the contents of a Convention on the setting-up of an international guarantee fund to be concluded by the countries of Europe and Africa in order to stimulate European private investment in Africa. It will not be concerned with certain purely technical aspects of the question which should be studied at an appropriate time by experts.

3.3. 3. CONTENTS OF THE CONVENTION ON A INTERNATIONAL GUARANTEE FUND

3.3.1. (a) Preamble

65. The suggestions made in paragraphs 23-25 in respect of a preamble to the Convention relating to an investment statute also hold good for the guarantee fund. The declaration of principle should also include a statement by the Contracting Parties of their intention to insure European investments in Africa against political risks and to set up a guarantee fund for that purpose.

3.3.2. (b) Contracting Parties and nationals

66. What has been said in paragraphs 26 to 28 with regard to an investment statute also holds good for the guarantee fund. The Parties to the Convention on a guarantee fund should be the same as the Parties to the Convention on an investment statute.

3.3.3. (c) Protection of private investments

67. The definition of those private invest- ments which shall be guaranteed is exactly the same as that given in paragraphs 29 to 38 above in connection with the statute governing foreign private investments, except that it is not intended that the fund shall cover investments already made, but only investments currently negotiated at the time when the investor requests the fund to provide insurance. It will suffice to point out that in the following paragraphs, and having regard to the nature of the action which it is required that the fund shall take, a distinction will be made between subscriptions to public loans in African countries and other private investments in Africa.

3.3.4. (d) Risks to be covered in respect of private investments other than the subscription to public loans in African countries

68. The report of the Group of Experts on the Development of Africa suggested that political risks might be covered by an insurance scheme administered by an international fund and subscribed to optionally, in return for payment of a premium, by investors. In point of fact, political risks are not " insurable " risks in the technical

7. e.g. reinsurance by the international fund of certain guarantees provided by national funds; the use of national funds as agents of the international fund, etc.

sense of the word. It is for this reason that when guarantee schemes for protection against political risks are instituted (as, for instance, in the case of export credits), they operate for the account of the State or are directly operated by the State.

69. The political risks it is planned to cover are as follows:

lack of or delay in transfer facilities;

undue loss by the investor as a result of dispossession (nationalisation, expropriation) or complete or partial spoliation;

losses by the investor as a result of complete or partial destruction by act of war, insurrection, riot or civil war.

It is not proposed to cover other non-commercial risks such as exchange losses upon transfer or natural disasters.

3.3.4.1. (i) Lack of or delay in transfer facilities

70. T he transfer facilities referred to here are those denned in paragraphs 46 and 47. It then remains to be settled whether the transfer guarantee should be limited in amount and duration and at what moment the guarantee may be invoked. These questions are indeed common to all guaranteed risks and invariably call for similar replies, subject to modifications of detail due to the particular nature of the risks involved. The subject matter dealt with in paragraphs 71 to 73 will not therefore be considered in respect of other risks.

71 . In order to take account of objections made in certain quarters with regard to a guarantee scheme (see paragraphs 60 and 61), it is generally admitted that the guarantee must cover only part of the amount to be transferred and that for the balance the investor shall remain his own insurer. Having regard to the features of the scheme, it is proposed that the guaranteed portion be fixed at a relatively high percentage (say between 80 and 90 %). With regard to the amount on which the percentage is based, the principle should be laid down that it be stipulated in the insurance contract signed by the investor, within the maximum limit of the amounts whose transfer is guaranteed under the investment statute, where such a statute is in force, or, in the absence of such a statute, under the Convention setting' up the international guarantee fund. In any event, there should be provisions of a technical nature governing the application of the Convention, laying down the method of calculation in pursuance of the undertaking subscribed to by the Contracting Parties (see paragraphs 64 and 89).

72. The duration of the guarantee contract raises a number of questions : must the duration of the contract for a given operation be limited, and, if so, to what extent? The answer to this question may differ according to the nature of the sums transferred. Thus, for earnings, profits, royalties and other revenue, limitation of the insurance period hardly appears to be warranted, at least so long as the parties concerned remain Parties to the agreements on co-operation between Europe and Africa. With regard to the repatriation of invested capital, it appears wise to set reasonable limits which shall take account of both the amount of the initial investment and profits [8]and redeemed portions actually transferred. The Convention would merely lay down this prin-ciple whose scope should be defined in the provisions governing application (see paragraphs 64 and 89).

73.Lastly, with regard to the time at which the guarantee may be invoked, the Convention might stipulate a reasonable period after the date on which the transfer was requested in respect of sums actually paid in local currency to the insured national invoking the guarantee. The provisions governing application should, of course, state the nature of the proofs of justification to be furnished and when the lack of transfer facilities or of the alleged delay in transfer may be said to exist (see paragraphs 64 and 89).

3.3.4.2. (ii) Undue losses by an investor as a result of dispossession (nationalisation or expropriation) or complete or partial spoliation

74.In the event of dispossession the investor shall be entitled to fair compensation, which shall be wholly transferable and paid without undue delay. Bearing in mind that transfer has already been dealt with above, the risk guaranteed here is that of complete spoliation (confiscation, non-compensation in the event of expropriation), or partial spoliation (inadequacy of currency transfer, inadequate compensation, etc.), or undue

8. It is sometimes pointed out that profits of an unusually high rate in relation to the amounts invested must be considered as including a part of the redeemed capital so far as that part of such profits is concerned which exceeds the rate considered as normal.

delay in the payment of compensation. The guarantee shall not, of course, apply to complete or partial confiscation ordered in punishment of a minor or major criminal offence nor trade losses or financial default by a private debtor.

75.The Convention must contain a special provision assimilating to complete and partial dispossession certain Government measures likely to result in :

partially or wholly preventing the investment from operating in the conditions originally prevailing; such measures may include price regulation, taxation, unwarranted withdrawal of import or manufacturing permits, etc. (see paragraph 41) ; or in

preventing the investor from managing his affairs and interests.

76. Also assimilated to spoliation must be governmental measures (such as moratoria) preventing the settlement at due date of monies due to a national of another Contracting Party, providing that a given period, say a year, has expired since the date on which payment should have been made (payment of interest on loans, royalties in respect of patents, repayment of the principal of a loan or credit at agreed dates, etc.).

3.3.4.3. (iii) Losses by an investor as a result of complete or partial destruction of the investment by act of war, insurrection, riot or civil war

77. Generally speaking, it is held that the risk in question should be guaranteed to the extent that such risk is abnormal for foreign investors. For this reason it seems that the risk arising out of a world war or a war involving many count'ies, including the investor s own country, cannot be guaranteed. The provisions of the Convention should therefore be confined to the possibility of guaranteeing risks of destruction by act of foreign war, when such war concerns countries which do not include that of the investor, or by act of insurrection, riot, or civil war in the debtor country.

3.3.4.4. (iv) Nature of coverage of risk

78. Non-automatic nature of the guarantee

The guaranteeing of political risks would not be automatic; it would have to be requested by the investor or the borrowing country. In the event of it being requested by the investor, the latter would first of all be required to give proof of the agreement of the borrowing country in order to ensure that the guarantee shall be given only to investments authorised by the Governments directly concerned which are Parties to the Convention on the guarantee fund, since, as already pointed out, the fund is intended to be a means of promoting a policy of economic co-operation between Europe and Africa. The investor might insure himself against one or more risks or against the risks enumerated in paragraph 69 above. The insurance might be taken out for a definite period, the premiums being paid annually.

79. Limitation of guarantee

In any event, as stated in paragraph 71, the guarantee fund would cover only part of the confirmed loss incurred by the investor, it being proposed that the proportion covered be fixed at between 80 % and 90 % of that loss. The investor, who would have the option of taking out insurance with the fund, should, however, have the possibility of covering himself, as he sees fit, for only a part of his investment, remaining his own insurer in respect of the remainder.

80. Determination of the amount of loss

As regards the amount of loss to be covered by the Fund, the basis of calculation should be determined by the Governing Body of the Fund, with particular reference to the method employed in the U. S. A. for the American system of investment guarantees administered by the Export- Import Bank in Washington (see also paragraph 71).

8 1 . Right to invoke the Guarantee Fund in respect of loss incurred by lengthy delay

The Convention should stipulate that non-execution of the transfer, payment, etc., within a given period shall entitle the insured creditor to invoke the guarantee under the Fund.

82. Delegation to the Fund of a creditor's rights

In all cases in which a creditor has invoked the insurance guarantee and received due compensation from the Fund, the Fund should automatically take over the rights of the creditor in respect of the debtor's liability. The Convention should contain a clause expressly stipulating such delegation of rights.

83. Financing of the Fund

The Fund might be financed in the following manner :

an initial endowment contributed by all the participating countries, on the basis of a scale to be determined, of which only a part need be paid in at the outset;

the annual premiums paid in respect of insured transactions (see paragraphs 84 and 85.)

possibly, contrinutions from African coun- tries to special reserve accounts (see para- graph 86) ;

any other contributions that might foe paid into the Fund.

84. Insurance premiums

Smce political risks are not, technically speaking, insurable, the fixing of premiums in respect of their coverage is necessarily arbitrary. All that can be expected is that, over a very long period, equilibrium can be maintained as a result of periods, in the normal course of events, of large surpluses and, occasionally, of considerable deficits. It is accordingly suggested that the Convention stipulate that the rate of premium shall be fixed by the Governing Body of the Fund and may be revised periodically. The rate of premium would be uniform for all participating countries, since it would be hardly desirable to introduce any discrimination within the framework of a European-African policy of co-operation.

85. In their report on the development of Africa, the experts suggested payment of an annual premium by the investor in accordance with normal insurance procedure. Having regard to the fact that the guarantee fund should be a means of carrying out a policy of co-operation between Europe and Africa and that it guarantees that the commitments of the participating countries shall be carried out, it has been suggested that payment of the premium shall be shared by the investor and the borrowing country.

86. Reserve account of borrowing countries

Instead of this solution, preference might be given to that of setting up a special reserve account comprising contributions from borrowing countries in proportion to the amount of the investments effected in their territory and guaranteed by the Fund. The conditions governing payment of such contributions would then be fixed by the Governing Body of the Fund.

87. Compensation for loss due to disaster

Duly ascertained loss due to disaster could be settled by the Fund in accordance with the terms of the provisions governing application (see paragraph 89) and charged in the following order :

1. in the first place, against any reserve account of the borrowing country referred to in the previous paragraph;
2. against the general reserve consisting of paid up premiums ;
3. against t h e general reserve consisting of p a i d up p r e m i u m s;
4. against the reserve accounts of the other participating countries; against the balance of the pro rata contribution ;
5. in the event of such pro rata contribution being inadequate, recourse would be had to the joint guarantee of the participating countries for the purpose of completing compensation and reconstituting the initial amount contributed.

88. Recovery of debts by the Fund from debtor countries

Debts recovered by the Fund by virtue of rights delegated to it by a creditor who has received compensation from the Fund should be assigned to the various accounts of the Fund in the reverse order of that set forth in the previous paragraph. Rules of application should state how this should be done..

89. Application of the principles laid down in the Convention for the coverage of risks

The Convention should stipulate that the method of applying the principles would be laid down by the Governing Body of the Fund on the basis, if necessary, of proposals by ad hoc committees (see paragraph 64) and that they might be revised from time to time. The Governing Body would also be required to fix, in respect of each risk, the minimum value of the investments eligible for guarantee in the event of it being deemed desirable to limit operations by the Fund to private investments of an already considerable amount :

3.3.5. (e) Covering of risks attaching to African public loans

90.In their report on the development of Africa, the experts suggested a joint guarantee by participating countries to cover loans by African countries raised on the money markets or obtained from international credit institutions and a guarantee by non-African participating countries to subscribe to loans raised by African participating countries". Furthermore, the Economic Committee's report on the development of Africa (Rapporteur : M. Le Hodey) laid, with regard to the Guarantee Fund, particular emphasis on an international guarantee scheme for governmental loans.

91- It is, above all, a question of providing securities issued by Governments, local authorities and public institutions with a collective guarantee by participating countries as a whole, so as to overcome the misgivings and hesitancy of potential investors and to include these securities among those which, in each participating country, enjoy certain privilèges and may go to make up the portfolio of controlled institutions such as those administering savings, insurance and pension funds.

92. The collective guarantee would be given by the governing body of the Fund upon application by the borrowing Government. The guarantee would apply without limitation to the payment, on agreed terms, of annual instalments, interests and amortisations as well as to the transfer of the relevant capital in the currency stipulated at the time of issue.

93. The ffnancial cover afforded by the guarantee would not be insured by the payment of premiums, but by the initial endowment of the Fund, or in the event of such endowment being inadequate, by recourse to the guarantee of the participating countries in order to complete compensation and reconstitute the original endowment.

3.3.6. (f) The Guarantee Fund Statute

A protocol annexed to the Convention on the guarantee fund should lay down the Fund's statute, stating :

the composition and duties of the governing body and advisory committees (the management of the Fund would necessarily entail action by political, ffnancial and technical departments of the participating countries) ;

the secretariat of the Fund ;

examination procedure and decision in respect of applications for guarantee;

extent of the commitments of participating countries (basis of their respective contributions) ;

initial endowment (paid up portion of the initial endowment, contributions of each participating country, payment currency) ;

receipts and expenditure of the Fund (insurance section covering direct investments, guarantee section in respect of public loans, currency of account, reserve accounts, etc.).

95.This report does not contain detailed provisions concerning the Guarantee Fund Statute. It is felt that the political, legal, financial and technical aspects of the statute should be studied by an cid hoc group consisting of qualified representatives of the participating countries and appointed at an appropriate time. Experience gained, particularly in European countries, by institutions providing insurance against political risks in respect of export credits (members of the Berne Union) would be most valuable and should be put to good use by the above-mentioned ad hoc group .