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## The Development Agreement: An Essential Legal Tool For Securing Direct Investments In The Developing World Against Non-Commercial Risks

The call for a "New Economic World Order"<sup>1</sup> and the widening economic gap between the developing and the developed countries<sup>2</sup> have brought pressure upon both foreign direct investors and receiving countries to reevaluate their traditional modes of operation.<sup>3</sup> While international organizations and national aid programs provide a supply of investment capital, development experts and public officials alike recognize the potential benefits to be derived from private investments.<sup>4</sup> Recognizing that direct foreign investment if properly applied can benefit both the investor and the host country, legal analysts have been pressed to overcome the barriers to such investment created by non-commercial risks.

As an element of the legal regime available to both investors and host countries, the development agreement provides a means to stimulate the flow of private capital necessary to further economic development in the Third World. As such, the development agreement,<sup>5</sup> the product of direct negotiations between the foreign investor and the host country, should be given more consideration as a means to stimulate foreign direct investment since it offers both a format upon which the parties can negotiate mutually advantageous terms, and a contract which enhances the legal status and stability of foreign investment transactions.

While this comment addresses the benefits of the development agreement from the perspective of an American investor, the analysis

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<sup>1</sup> THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES, REPORT OF THE SECOND COMMITTEE, U.N. Doc. A/9946 at 28; Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 275 (1975); White, *New International Economic Order*, 24 INT'L & COMP. L.Q. 542 (1975).

<sup>2</sup> G.A. Res. 2626, 25 U.N. GAOR, Supp. 28, at 39, U.N. Doc. A/8028 at Preamble (1970); UNCTAD, HANDBOOK OF INTERNATIONAL TRADE AND DEVELOPMENT STATISTICS 155, table 5.5 (1969).

<sup>3</sup> See generally Kahn, *The Standard Investment Agreement: Text and Comments*, 4 GA. J. OF INT'L & COMP. L. 39 (1974).

<sup>4</sup> See generally THE PROMOTION OF THE INTERNATIONAL FLOW OF PRIVATE CAPITAL, U.N. Doc. E/3325, Feb. 26, 1960, U.N. Doc. E/3492, May 18, 1961; see also Advisory Committee on Private Enterprise in Foreign Aid, U.S. Agency for Int'l Dev., *Report on Foreign Aid through Private Initiative* (1965).

<sup>5</sup> Commentators have used several terms to refer to contracts between a state and a foreign investor. See generally G. CHESHIRE, *INTERNATIONAL CONTRACTS* (1948); A. FATOUROS, *GOVERNMENT GUARANTEES TO FOREIGN INVESTORS* (1962); Carlston, *International Rule of Concession Agreements*, 52 NW. U.L. REV. 618 (1957); Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156 (1961); Lalive, *Contracts between a State or a State Agency and a Foreign Company*, 13 INT'L & COMP. L.Q. 987 (1964); Olmstead, *Economic Development Agreements Part II - Agreements between States and Aliens*; *Choice of Law and Remedy*, 49 CALIF. L. REV. 504 (1961); Verdross, *Quasi-International Agreements and International Economic Transactions*, 18 Y.B. WORLD AFF. 230 (1964).

which follows argues equally for the adoption of these agreements by developing countries as a tactic to stimulate beneficial long term private foreign investments. This comment will focus on the manner in which the development agreement may reduce the risks and uncertainties associated with investments sensitive to changes in host government policies. It is intended to aid the lawyer representing the investor in two ways: first, to identify and evaluate the risks confronting an investment proposal, and secondly, to establish the most secure legal position consistent with the investor's objectives.<sup>6</sup> Commentators differ as to the adequacy of the various measures designed to protect and stimulate desired foreign investment; but most agree that the legal security of international transactions is problematic and unsettled. Some argue that while many of the gaps in the protective legal framework have been filled, many other important ones remain.<sup>7</sup> As a negotiating and legal tool the development agreement is a practical, and possibly essential, device for bridging these gaps in the initiation and securing of foreign direct investments.

*Present Trends in The Investment Climate: The Quest for Mutual Advantage*

The people of the developing world continue to demand an improved standard of living. From political necessity, national leaders have responded to these demands and have turned to governmental regulation and control of the economy as a means of bringing together sufficient capital resources to ward off, through economic development, the "grinding heel" of poverty.<sup>8</sup> Those who would modernize are hindered from achieving these economic and social development goals by the shortage of capital resources, modern equipment, and technological and managerial skills.<sup>9</sup> To resolve the problem these limitations present, private, national and international bodies have given great attention to the role that private foreign capital can play in assisting developing countries to improve their standard of living.<sup>10</sup> They understand the basic problem: that the developing world needs considerable amounts of capital—capital which must flow from foreign sources for an indefinite period.<sup>11</sup>

A pervasive assumption of the late 1950's, deriving from the limited supply of investment capital, placed the burden on the capital-

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<sup>6</sup> Pugh, *Legal Protection of International Transactions Against Non-Commercial Risks*, in JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, *A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS* 301 (W. Surrey & C. Show eds. 1963) [Hereinafter cited as Pugh].

<sup>7</sup> *Id.* at 357; see generally Fatouros, *Legal Security for International Investment*, in LEGAL ASPECTS OF FOREIGN INVESTMENT 699 (W. Friedmann & R. Pugh eds. 1959).

<sup>8</sup> Harvey, *The Challenge of the Rule of Law*, 59 MICH. L. REV. 603, 612 (1961).

<sup>9</sup> See Landau, *Direct Foreign Investments in Developing Countries*, 4 J.L. & ECON. DEV. 182 (1969).

<sup>10</sup> J. HENDERSON, *FOREIGN INVESTMENT LAWS AND AGRICULTURE* 1 (1970).

<sup>11</sup> See generally G. MYRDALL, *THE CHALLENGE OF WORLD POVERTY, A WORLD ANTI-POVERTY PROGRAM IN OUTLINE* (1970).

importing nation to construct an environment for investment that favored the foreign investor at the expense of domestic goals. National leaders were willing to make concessions to investors in order to attract their capital.<sup>12</sup> Accepting the view that developing nations were not in a position to command the terms of foreign investment, the General Assembly of the United Nations passed a resolution encouraging these nations to "re-examine, wherever necessary, domestic policies, legislation and administrative practices with a view to improving the investment climate."<sup>13</sup>

While the condition of limited capital has not been significantly altered, the burden of compromise necessary to provide the environment for investment must, however, now be shared by the investor. The political independence of former colonies and the concomitant rise of nationalism have altered the financial market positions of investor and host country. While the developing countries need a considerable amount of capital to insure the survival and progress of their peoples, they are now more likely to demand that investments contribute to their economic development. They will thus judge the investment proposals of foreign capitalists in the light of their own national development plans in order to further economic growth and maintain national sovereignty.

The initial expression of the developing nations' right to self-determination was set forth in 1962 in the United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources. The General Assembly recognized that foreign capital should be used to advance the freely determined goals of the developing nations<sup>14</sup> but also emphasized that traditional concepts of international law were still in force: "[i]n cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law."<sup>15</sup>

The Charter of Economic Rights and Duties of States passed by the United Nations General Assembly in 1974 goes beyond the statements of the 1962 Resolution. The Charter recognizes the state's right:

[t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and

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<sup>12</sup> See, e.g., *President's Speech on Foreign Capital and Ghana's Economic Policy*, GHANA HANDBOOK ON COMMERCE AND INDUSTRY (Oct. 1960).

<sup>13</sup> G.A. Res. 824, 5 U.N. GAOR 128 (1954).

<sup>14</sup> G.A. Res. 1803, § 2, 9 U.N. GAOR 107 (1962).

<sup>15</sup> *Id.* § 3.

mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States . . . .<sup>16</sup>

Commentators argue that the provisions of the 1974 Charter depart from the traditional sanctity of contract as governed by principles of international law. While the United States and other developed countries have rejected the argument that the Charter is legally binding,<sup>17</sup> it has been argued that the new consensus which is supported by 104 states accepts a new international legal standard which rejects the requirement of just compensation as a precondition to the legality of any expropriation.<sup>18</sup> The uncertainty surrounding this debate over the applicability of traditional notions of international law has contributed to a worsening of the climate for direct private investments. As a result, investors have been giving greater weight to non-commercial risks in their decisions whether to commit private capital in the Third World.

### *The Importance of Non-Commercial Risks on Foreign Investment*

International business transactions in the developing world are of course subject to significant degrees of non-commercial risks. These risks vary from country to country according to the degree of political, economic and social change threatening the status quo. Because of these risks, direct investment in developing countries is subject to a set of problems largely different from those experienced in the industrialized world.

In his study, Yair Aharoni<sup>19</sup> found that American investors rely upon foreign government concessions to neutralize obstacles to the implementation of a project. He identified those concessions which reduced the impact of risk and uncertainty as being the most important.

A nation's framework of economic legislation is a controlling and essential factor in the creation of a stable investment climate which will attract desirable foreign investment.<sup>20</sup> In constructing the framework, the capital-importing nation must weigh the fears of the investor that changes in government policy will cause low returns and an inability to remit capital and profits against its own fears of foreign domination and exploitation. The key to a successful resolution of this conflict is

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<sup>16</sup> THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES, REPORT OF THE SECOND COMMITTEE, U.N. Doc. A/9946.

<sup>17</sup> White, *supra* note 1, at 546.

<sup>18</sup> *Id.* at 547.

<sup>19</sup> Y. AHARONI, *THE FOREIGN INVESTMENT DECISION PROCESS* 171 (1966).

<sup>20</sup> FOREIGN INVESTMENT IN DEVELOPING COUNTRIES, 28 U.N. Doc. E/446 (1968); *see also* Gess, *Permanent Sovereignty over Natural Resources*, 13 INT'L & COMP. L.Q. 398 (1964); Schwabel, *Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A.J. 463 (1963).

not only the accommodation of essential terms but also the creation of an investment climate characterized by certainty and stability.

The present climate is not one of certainty and stability. "Today, there is no longer any general agreement on the degree of protection to be accorded to private property and the rights connected with it."<sup>21</sup> Thus the overwhelmingly important issues of expropriation and compensation remain without general solution.<sup>22</sup> The fear of outright taking is, however, only one of many issues affecting foreign investments. Short of being expropriated, the investor may be subjected to regulations which do not in themselves constitute expropriation but whose effect may be to render an enterprise unprofitable.

[Property] can be taken indirectly by exchange controls, export and import regulations, taxation, labor regulations, limitations on the ownership and control of enterprises, price controls, even by run-away inflation. Indeed, the prospect of these indirect takings provides much more of a deterrent to private foreign investment in under-developed countries than the prospect of a direct taking via confiscation or expropriation.<sup>23</sup>

Referred to as "creeping expropriation,"<sup>24</sup> these conditions impair the existence of a conducive investment climate in the developing nations.

#### *The Role of the Development Agreement*

Contracts governing the investment of foreign nations in developing countries have been given many different labels depending upon the nature of the parties and the interests incorporated into the document.<sup>25</sup> For the purposes of this discussion, the term *development agreement* is adopted in recognition of the influence that economic development plans and policies exert upon the terms contained in the contract. In the final analysis the duration of profitable business activity will depend upon the degree to which the investment complements the economic development goals of the host country.

In the past, investors have attempted to minimize the effects of political risks where possible by structuring investment projects to maximize short-term profits. This investment strategy begs for government reprisals, contributes to an unstable business environment, and discourages the selection of projects most compatible with development goals. The development agreements can reduce political risk by creating an investment framework which governs the long-term business relationship between the foreign investor and the receiving country. By allowing for contribution to development goals,

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<sup>21</sup> FOREIGN INVESTMENT IN DEVELOPING COUNTRIES, *supra* note 20, at 28.

<sup>22</sup> A. FATOUROS, *supra* note 5, at 249.

<sup>23</sup> W. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 865-66 (3d ed. 1971).

<sup>24</sup> *Id.* at 865, citing 53 PROC. AM. SOC'Y INT'L L. 255, 262 (1959).

<sup>25</sup> For a general introduction to development agreements see note 5, *supra*.

the agreement creates a measure of economic protection for the investor. By allowing the host country to offer the best investment terms possible in light of the particular nature of a proposal, the arrangement enhances a nation's attractiveness to desired investors. The development agreement can thus be highly responsive to the unique nature of each investment proposal and can be used to supplement broad policy statements and statutes governing the treatment of foreign investments.

Beyond its administrative advantages, the development agreement may have a legal effect contributing to investment security. While the law of development agreements is newly forming, the investor and the host country may look to this document as a means of giving legal force to specific terms essential to a viable investment climate. Within the context of national and international legal treatment of foreign investment today, the development agreement can thus contribute to the reduction of political risks which deter essential foreign investments in the developing world.

#### *Investment Procedures Of Host Countries*

To obtain the means necessary to achieve a higher standard of living, developing countries adopt development plans, policy statements, laws and regulations in order to attract, direct and control foreign investment.<sup>26</sup> In the aggregate these governmental directives create a set of rules which govern foreign investment and contribute substantially to the creation of the investment climate.<sup>27</sup> In a large number of developing countries special investment codes have been adopted to attract private foreign capital.<sup>28</sup> These codes provide a comprehensive legal framework within which the foreign investor must function if he is to invest in the country or qualify for the incentives provided by the legislation.<sup>29</sup>

In many countries, the prospective investor is required by law to negotiate with an investment board or committee which is the administrative and regulatory arm of the government. While their functions vary, the investment boards perform any combination of the following tasks: (1) receive and process investment applications; (2) circulate applications with recommendations to appropriate ministries; (3) in-

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<sup>26</sup> Increased foreign investment, if properly structured, can help a developing nation to: introduce new technology; increase domestic production; stimulate import substitution; earn foreign exchange by expanding the export sector; create increased employment and higher income levels; provide opportunities for skilled labor and management development; and contribute to the basic infrastructure of the economy. See Landau, *supra* note 9.

<sup>27</sup> J. HENDERSON, *supra* note 10, at 7. The reader is cautioned to note that the citations in the notes following to the domestic laws of various developing nations are intended to serve as examples of the kinds of approaches which *have been* taken, and not as assertions of the present state of the law in those countries.

<sup>28</sup> See generally J. HENDERSON, *supra* note 10, at 179-98.

<sup>29</sup> *Id.*

initiate investment proposals; (4) provide investment data to the prospective investor; (5) assist the investor in shaping the investment proposal to correspond with national development objectives; (6) represent the investor in obtaining special investment incentives; and (7) grant approval of foreign investments and related special benefits as provided by the appropriate legislation.<sup>30</sup>

Qualification for investment incentives normally depends upon the satisfaction of application procedures established by statute or the investment board. While the procedures are not required in all countries, the investor must be aware that formal requirements may exist as an absolute condition to the enjoyment of preferential treatment. For example, the Indonesian Foreign Capital Investment Law<sup>31</sup> provides the only avenue by which foreign investors may initiate activity and qualify for established incentives. In Chile, on the other hand, the investor has three alternatives, one of which requires no formalities and offers no special benefits.<sup>32</sup>

Approval of the application will take various forms, again depending upon the requirements established by the governing legislation. The simplest procedural pattern will include the following steps: the investment board will accept the application, review the document internally, circulate for desired comments, and accept or reject the proposal on the basis of the gathered information. As an illustration, Afghanistan's Investment Committee issues a preliminary acknowledgment to the applicant within three months of the initiation of the application process. This acknowledgment states whether the proposed investment is within the scope of the investment law, recommends any changes the Committee wishes to propose, and asks for additional information if necessary. The Committee gives final approval in writing as soon as possible but not within a specified time limit.<sup>33</sup>

Other approval procedures are more complex. The government of Kenya, for example, requires the issuance of certificates of approval.<sup>34</sup> Another approach requires the investor to enter into a formal contract with a government authority which specifies the regulations and benefits applicable to the particular investment.<sup>35</sup> An investor may also

<sup>30</sup> See Capital Investment Act, 1963, Section 2 (as amended) (Ghana); Decree-Law No. 07366 of 20 October 1965, The Investment Law, art. 24 (Bolivia); Royal Decree No. 420-67 of December, 1967 (Morocco).

<sup>31</sup> Law No. 1, The Foreign Capital Investment Law, Jan. 10, 1967 (Indonesia); see INVESTMENT IN INDONESIA TODAY, GOVERNMENT OF INDONESIA (2d ed. 1968).

<sup>32</sup> Decree No. 1272, Sept. 7, 1961, The Export, Import and Foreign Exchange Decree (Chile).

<sup>33</sup> Foreign and Domestic Private Investment Law, art. 22 (Afghanistan).

<sup>34</sup> Rules of Procedure for Granting a "Certificate of Approved Enterprise", *pub'd with* The Foreign Investment Protection Act, 1964 (Kenya).

<sup>35</sup> Promotion of Industrial Investment Act BE 2505 (1962) *as amended* Section 16, 1965 (Thailand).



be required, in the alternative, to obtain some form of official approval from a ministry<sup>36</sup> or a decree from the chief executive of the country.<sup>37</sup> Where the proposals concern unique types of investment initiatives, countries such as Afghanistan<sup>38</sup> and Saudi Arabia<sup>39</sup> have adopted legislation providing for individual agreements.

Investment proposals will raise a broad range of issues as the following list illustrates:

- a. Nature and scope of tax liability;
- b. Repatriation of capital and profits;
- c. Protection from foreign competition by import control and tariff protection;
- d. Scope of property rights;
- e. Employment and staffing;
- f. Penalties and the settlement of disputes.<sup>40</sup>

The application, negotiation, and approval process is a critical period in establishing the best investment climate for attracting private capital which will further development objectives. Depending on the exact procedures available, the nature of the investment, and the development needs of the country, the parties to the proposal will demand certain conditions relating to the issues listed above. The degree to which the broad language of regulatory statutes and policies may be particularized to meet such demands in the context of a specific project plays an integral role in determining the actual investment climate of a country.

#### *The Legal Status Of Development Agreements*

The development agreement provides a legal formula which permits the establishment of a *normal regime* which fixes the status and rights of a desired investment and resulting business enterprise in circumstances short of nationalization.<sup>41</sup> Many foreign investors enter into commitments with little more than a vague understanding of their legal positions in the event of expropriation. The development agreement provides a vehicle to deal with this and the more frequent problems of "creeping expropriation."<sup>42</sup> This tailored approach provides the means whereby the investor may acquire the additional guarantees and understanding of specific matters necessary to establish the adequate investment security. By utilizing development

<sup>36</sup> See Capital Investment Act, 1963, § 2(1)(b) (Ghana); Policy Statement on Investment in Agriculture by the Indonesian Minister of Agriculture, Djakarta, Feb. 10, 1960.

<sup>37</sup> J. HENDERSON, *supra* note 10, at 65.

<sup>38</sup> Foreign and Domestic Private Investment Law, art. 26, Feb. 22, 1966 (Afghanistan).

<sup>39</sup> Foreign Capital Investment Code, art. 10(b), 1964 (Saudi Arabia).

<sup>40</sup> J. HENDERSON, *supra* note 10, table of contents.

<sup>41</sup> Kahn, *supra* note 3, at 41.

<sup>42</sup> See text accompanying notes 23 and 24, *supra*.

agreements the host country may improve its investment attractiveness without compromising the essential policies of its development program.

Ghana is a good example of a country in which a foreign investor has been able to commit financial resources under the terms of an investment agreement. According to the provisions of the old Capital Investment Act, the Capital Investment Board administered the investment proposal and insured that the investment will satisfy the requirements of the Act. Final approval is formalized by an agreement between the responsible minister and the applicant which sets out the benefits and conditions governing the enterprise.<sup>43</sup>

The use of development agreements between a capital-importing country and a foreign national has been well documented.<sup>44</sup> While the scope of the contracts may vary, theoretically the state may enter into a private agreement to eliminate entirely all non-commercial investment risks arising from the exercise of its unrestrained sovereignty. In effect the agreement grants the foreign national a range of commercial rights which may exempt his investment from the municipal law and normal governmental controls in exchange for the payment of prescribed royalties and taxes, the investment of capital, or the provision of technical, managerial, and marketing assistance. However, as applied, the primary focus of most incentive programs for the attraction of foreign capital has been on expropriation, taxation and exchange restrictions. Investment incentives have failed to define in detail what governmental actions would actually constitute a taking of property. As a result government assurances "are likely to be of limited protection against creeping impairments of property rights that fall short of an outright and permanent taking."<sup>45</sup>

The character of the contracting parties gives development agreements a quasi-international nature. Not falling clearly within the scope of either international agreements or private contracts, these agreements may draw upon both public and private law. Schwarzenberger classifies them as quasi-international, because they are concluded between a state and a foreign national *inter pares*.<sup>46</sup> "[T]hese agreements form a *third group of agreements*, characterized by the fact that the private rights established by them are governed by a *new legal order*, created by the concurring wills of the parties, *i.e.*, the agreed *lex*

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<sup>43</sup> Note that final approval does not take the form of administrative action. Capital Investment Act, 1963, Section 2 (Ghana).

<sup>44</sup> See generally INTERNATIONAL AND COMPARATIVE LAW CENTER, SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS (1964).

<sup>45</sup> See Pugh, *supra* note 6, at 306-08.

<sup>46</sup> Verdross, *The Status of Foreign Private Investment Interests Stemming from Economic Development Agreements with Arbitration Clauses*, in SELECTED READINGS, *supra* note 44, at 117-21.

*contractus*."<sup>47</sup> Thus, the instrument takes the form of autonomous "canon" law governing the actions of both parties.<sup>48</sup>

A comparison of the development agreement with normal administrative contracts further illustrates the distinct nature of agreements between a state and a foreign national. While both may create rights in personam and in rem, they differ as to the nature of the law governing their respective provisions. The administrative contract is subject to the municipal law of the contracting state. The quasi-international agreement is subject to the principle *pacta sunt servanda* and other general principles of law which the parties may recognize as binding.<sup>49</sup> To enter into an administrative contract is to subject the parties to contract interpretation and application according to the legal order of the contracting state. In contrast, the *lex contractus*, created by the development agreement, exists as an independent legal order totally regulating the relationship between the parties. In controlling the mutual rights and duties of the parties, the parties may adopt, for the purpose of interpretation or general application, the laws of the forum of their choice, including international law. By its nature the administrative contract is necessarily subject to municipal law, while the *lex contractus* character of the economic development agreement provides for mutual selection of the law governing its terms.<sup>50</sup>

Commentators suggest that the body of the development agreement, because of its nature and comprehensive character, should provide the fundamental source of the law governing the contract.<sup>51</sup> Other writers have taken a more extreme view asserting that the *lex contractus*, created as it is by a quasi-international agreement, defines the nature of the agreement and provides the source of the obligation irrespective of other legal orders.<sup>52</sup> Laline, citing the Saudi Arabia-Aramco arbitration award, rejected this extreme view as artificial and

<sup>47</sup> *Id.*

<sup>48</sup> Fatouros and Cattan join other writers who argue that development agreements combine elements of private and public law that cannot constitute either public international law or municipal law, and that therefore such agreements are *sui generis*. See Z. KRONFOL, PROTECTION OF FOREIGN INVESTMENT 70 (1972).

<sup>49</sup> Verdross, *Protection of Private Property under Quasi-International Agreements*, in VARIA JURIS GENTIUM, (Liber Amicorum to J.P.A. François) 355-56, 358 (1959); A. FATOUROS, *supra* note 5, at 262-71, 285-301. "A state cannot unilaterally abrogate its treaties with other states without violating international law, and there is no real difference in this respect between a treaty and a concession, except that the latter is an agreement, not between two states, but between a state and a person of private law." O'Connell, *Legal Issues in the Persian Oil Dispute*, 28 N.Z.L.J. 57, 58 (1952); see also Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 786 (1959).

<sup>50</sup> Verdross, *supra* note 46, at 125-27.

<sup>51</sup> Carlston, *International Rule of Concession Agreements*, 52 NW. U.L. REV. 20 (1957). The complex and mixed nature of these contracts has been emphasized in several leading articles. See McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1 (1957); Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT'L L. 260 (1958).

<sup>52</sup> Verdross, *supra* note 5.

of limited utility. "A contract must be inserted in a pre-existing legal order and cannot remain in a vacuum. This order should be clearly defined or at least ascertainable by way of legal or judicial interpretation."<sup>53</sup> While there presently is no consensus as to whether a development agreement could be governed *solely* by its own terms, strong authority suggests that the terms provided and any choice of law specified should control.<sup>54</sup>

Given an allegation of breach of contract, the terms of the development agreement will greatly influence the means and manner of settlement. Initially the development agreement may be viewed as a means to define more narrowly the regulations governing the instrument. This tailored approach presents the opportunity to specify the rights and obligations of both parties and thereby allay the fears of potential investors as to injury arising from unilateral government actions. Through this detailed expression of the parties' intentions and the quasi-international nature of the contract, the development agreement provides the primary information by which to determine the existence of a breach.<sup>55</sup> In addition, the agreement provides a means of insuring that the hearing of any dispute can take place in a forum other than the host country's municipal courts, so that strict municipal law does not control.<sup>56</sup> The advantages of these two factors will be stressed in the materials that follow.

The choice of law question, for example, greatly influences the resulting effect of any dispute upon the contract, *i.e.*, whether the investor will experience performance or non-performance of essential terms. That choice will determine whether the injured party has a right to cancel the contract, to alter its terms, or to obtain reparation, and, if so, under what terms.<sup>57</sup> Should the investment be initiated under the terms of a development agreement, the arbitral tribunal must ascertain the law according to the intent of the parties as expressed by the *lex contractus*. The actual interpretation depends on the nature of the dispute and the presumed will of the parties in concluding an agreement *inter pares*.<sup>58</sup>

#### *Development Agreement: A Legal Device Able to Improve the Investment Climate*

The direct-foreign investor may obtain a measure of protection for his investment from a variety of sources. The municipal law of one or more states, bilateral treaties, international conventions, customary international law, and the quasi-international special investment ag-

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<sup>53</sup> Lalive, *supra* note 5, at 998.

<sup>54</sup> See generally note 51, *supra*.

<sup>55</sup> *Id.*

<sup>56</sup> See text accompanying note 72, *infra*.

<sup>57</sup> Lalive, *supra* note 5, at 992.

<sup>58</sup> Verdross, *supra* note 46, at 130.

reement all afford some security. The capital-importing country usually offers legal guarantees enforceable by municipal law. The United States government offers insurance against non-commercial risk as an incentive for the United States investor to invest in developing countries. The United States also enters into Friendship, Commerce, and Navigation (FCN) treaties for the purpose of protecting foreign investment of its nationals. The International Bank for Reconstruction and Development (IBRD) Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>59</sup> is a multilateral instrument affecting the rights of investor and host country. The investor may also partially rely upon the general principles of customary international law as we will see below. The final type of legal regime available, the development agreement, has the potential to complement the legal principles and devices mentioned above, and to enhance the legal position of the American foreign investor. This is so because each of the alternative protective devices has some vulnerable point at which protection breaks down.

The following discussion will illustrate the proper role of the development agreement in shoring up those weak points and providing the most advantageous investment climate possible in a given situation. It is instructive to illustrate the weak points of these various devices in the context of exchange controls, which are a major facet of the problem of creeping expropriation.

#### *A. Exchange Controls and the Problem of Investment Security*

The guarantee of the right to remove profits and capital from the host country is a condition essential to the investor's decision to initiate a project. Without adequate assurance of favorable transfer terms, forecasts of the necessary level of profits alone will be unable to attract those investors needed to stimulate economic development.<sup>60</sup> Exchange controls are of importance not only because they may operate to preclude the investor from obtaining in the host country the dollars necessary for the remittance of current earnings or royalties or the reparation of capital, but also because they may restrict the flow of currency necessary for acquisition of important material and equipment needed for the enterprise and for the payment of employee salaries.

Exchange controls are a necessary element of a developing country's economic program. Because of the shortage of particular currencies exchange controls may be imposed to assure that foreign exchange is available for purposes seen as essential by the host government.<sup>61</sup> Therefore exchange regulations are in force in most developing coun-

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<sup>59</sup> 575 U.N.T.S. 159 (1965).

<sup>60</sup> Pugh, *supra* note 6, at 200-206.

<sup>61</sup> J. HENDERSON, *supra* note 10, at 92.

tries, but the nature of the regulations usually varies in accordance with the country's balance of payments history. Tanzania allows for remittance of profits, principal, and interest only in approved currencies.<sup>62</sup> Nigeria conditions the privilege of transfer upon prior approval by the Federal Ministry of Finance.<sup>63</sup> The Algerian government only allows the free transfer of up to fifty per cent of both capital and profits per year.<sup>64</sup> Even for favored projects, the Somali Democratic Republic limits the free transfer of profits, income and revenue accruing from fixed assets on loan investments and the dividends and interest on shares and bonds to an amount not to exceed fifteen per cent of the capital invested.<sup>65</sup> Tunisia requires certain enterprises to remit less than eight per cent.<sup>66</sup> In some countries, such as the Libyan Arab Republic, the exchange controls applicable to a given enterprise are determined by individual decisions on the merits.<sup>67</sup> In Senegal an investment may enjoy more favorable exchange regulations if it is in accordance with the national economic development plan.<sup>68</sup>

*B. Security Based Solely Upon National Laws and Policies*

Protection against non-commercial risks are the lowest in circumstances where the foreign national makes an investment secured only by the laws and policy statements of the host state. The investor normally faces a situation where the state provides a special incentive program offering a qualified applicant a range of benefits including favorable terms for the transfer of capital and profits. The foreign national need not enter into a contract to acquire these benefits, since they are made available by right under statute, policy statement, or administrative authority. However, the rights of the investor are subject to changes arising from a shift in the policy of the host state. Given the many shortcomings of this type of investment foundation, foreign investors are well advised to obtain a separate agreement with the state as a supplement to the investment laws presently in force.<sup>69</sup>

To some extent the legal and constitutional system of a developing country may provide the foreign-direct investor some guarantees against public infringement of property and contract rights. For example, the country may have adopted statutory or constitutional provisions barring expropriation except for a public purpose subject to payment of prompt, adequate and effective compensation.<sup>70</sup> However,

<sup>62</sup> Act for Protection of Approved Foreign Investments, Sept. 20, 1963 (Tanzania).

<sup>63</sup> See INCENTIVES FOR INDUSTRIAL DEVELOPMENT IN NIGERIA (1958).

<sup>64</sup> Investment Code of 26 July 1963, Law No. 63-277 (Algeria).

<sup>65</sup> Law on Foreign Investments, Feb. 13, 1960 (Somali Dem. Rep.).

<sup>66</sup> Investment Decree, June 4, 1967 (Tunisia).

<sup>67</sup> LAW OF DEVELOPING NATIONAL INDUSTRIES, Sept. 23, 1956, Law No. 51; Foreign Capital Investment Act, Jan. 30, 1958 (Libyan Arab Rep.).

<sup>68</sup> Investment Code of March 22, 1962, Law No. 61-33 (Senegal).

<sup>69</sup> Pugh, *supra* note 6, at 327.

<sup>70</sup> See U.N. Doc. A/A.C. 97/5/Rev.1 (1960).

the unique nature of non-commercial risks, to which a foreign investment is most sensitive, renders the legal protections and guarantees mentioned above virtually without practical utility.<sup>71</sup>

The investor's preventive planning and evaluation cannot afford protection if the municipal courts refuse to grant the protection apparently offered on the face of local law. For many reasons the investor may have serious difficulties having rights recognized before local tribunals or agencies. The problems may arise from procedural barriers, from misunderstanding of the municipal law's substantive provisions, or even from the inherent biases of the forum court in favor of the state.<sup>72</sup>

The most substantial risk is a state's authority unilaterally to amend policy and statutory provisions. For example, the state is not barred from drastically altering its exchange requirements.<sup>73</sup> Often the incentives upon which the foreign nation depends are cast in general terms which allow the state to abrogate them solely by administrative action of the board with which he has been dealing informally. The continued availability of these advantages is also subject to the sovereign power of the state to reform controlling legislation for review of national welfare or crisis.<sup>74</sup>

### C. *The Programs of the Overseas Private Investment Corporation (OPIC)*

OPIC was created by the Congress for the purpose of mobilizing the participation of private capital and skills in the economic and social development of less developed friendly countries, thereby complementing the development assistance of the United States Government.<sup>75</sup> The programs offered by OPIC are grouped under two main headings: (1) insurance of U.S. private investment insurance against certain political risks in less developed countries and; (2) financing the investigation and development of projects of U.S. investors in those countries.<sup>76</sup> Specifically as to the insurance program OPIC is authorized to insure against: (1) inconvertibility of local currencies; (2) loss of investment due to expropriation, nationalization or confiscation by a foreign government; (3) loss due to war, revolution or insurrection.<sup>77</sup>

Focusing upon problems of inconvertibility, OPIC insurance protection of eligible American investors is designed to assure that both earnings and capital can continue to be transferred into dollars, as

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<sup>71</sup> Pugh, *supra* note 6, at 305.

<sup>72</sup> *Id.*

<sup>73</sup> See generally F. MANN, *THE LEGAL ASPECTS OF MONEY* (1953).

<sup>74</sup> C. FULDA & W. SCHWARTZ, *REGULATION OF INTERNATIONAL TRADE AND INVESTMENT* 699-700 n. 3 (1970).

<sup>75</sup> Foreign Assistance Act of 1969, 22 U.S.C. § 2191 *et seq.* (1970) (amended 1974).

<sup>76</sup> OVERSEAS PRIVATE INVESTMENT CORPORATION, *INVESTMENT INSURANCE HANDBOOK* (1976).

<sup>77</sup> *Id.* at 6.

determined by the degree of transferability allowed under exchange regulations and practices in force at the time the insurance was acquired. Events which trigger OPIC liability under the insurance policy include either active blockage by the exchange control authorities denying access to foreign exchange on the basis of new regulations, or passive blockage where the authorities fail to respond to an application for foreign exchange within a specified time period.<sup>78</sup> Thus the program protects the rights of the American investor which were secured from the host government at the time the investment was insured. The investor may rely upon either the host country's general exchange legislation in force at the time or upon a special agreement. Should the host country deviate from these terms and the investor not be able to transfer receipts into dollars as expected, then the investor would have a valid claim under the insurance contract.<sup>79</sup>

The OPIC insurance program is limited in geographic and substantive scope. The insurance is not available for investments in every developing country and it does not apply to alterations of a wide range of investment terms which are subject to unilateral government action. In addition, by an act of Congress passed in 1974, OPIC will not be able to insure investments against inconvertibility and other types of political risks as of 1980.<sup>80</sup> While OPIC provides a measure of protection, the insurance program is already limited and faces certain further reduction. Whether or not similar political risk insurance will be available from the private sector by 1980 is problematic.

*D. Protection Afforded By Treaties of Friendship, Commerce, and Navigation (FCN)*

The FCN bilateral treaty series offers limited protection from the imposition of significant exchange control restrictions.<sup>81</sup> The treaties operate to provide such protection by obligating the parties to accord national and most-favored-nation treatment as to payments, remittances and transfers of funds between contracting states and by imposing a prohibition against the use of "unnecessarily" or "arbitrarily discriminatory" controls.<sup>82</sup> While the treaties seem to provide for complete exchange freedom by barring the imposition of exchange restrictions, this obligation is rendered illusory by the existence of "except clauses" which allow a state to adopt such restrictions as are necessary to prevent its monetary reserves from falling to too low a level.<sup>83</sup>

<sup>78</sup> Pugh, *supra* note 6, at 339-41.

<sup>79</sup> *Id.*

<sup>80</sup> Pub. L. No. 93-390, 88 Stat. 763 (1974).

<sup>81</sup> See generally Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); Walker, *The Post-War Commercial Treaty Program of the United States*, 73 POLITICAL SCI. Q. 57 (1958).

<sup>82</sup> Pugh, *supra* note 6, at 323.

<sup>83</sup> *Id.*



In their usual form, FCN treaties contain no language limiting the regulation of foreign capital by the receiving country.<sup>84</sup> Protection afforded the foreign investors is limited to the treaty articles which prohibit the type of discriminatory exchange practices normally prevented under the rules of customary international law. The treaties are a "step toward stability and predictability for the foreign investor. . . . These means may be of little use in case of major crises or revolutionary changes, but they provide substantial legal protection in the majority of routine cases of unfair treatment."<sup>85</sup> Thus it would appear that the treaties do offer guarantees that go beyond the protection of customary international law by applying restrictions on the exercise of state sovereignty. However, as suggested by Pugh, the scope and flexibility of the qualifying exceptions to the requirement of free exchange "suggest quite compellingly that in a particular case the treaty obligations are likely to afford little real protection against losses resulting from the imposition of exchange controls."<sup>86</sup>

*E. The IBRD Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*

The IBRD Convention was designed to supplement the numerous investment treaties by providing for facilities to settle investment disputes between a state and a private investor by conciliation or by arbitration. It also sets out substantive rules governing arbitration and conciliation falling within its jurisdiction. The jurisdiction of a tribunal organized under the convention is, however, subject to the intent of the parties. As stated by the preamble to the convention,

No contracting state shall by the mere fact of its ratification, acceptance or approval of this convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.

Therefore, while the convention has been signed by sixty-four states and ratified by fifty-seven as of 1970, ratification alone does not create obligations of adherence.<sup>87</sup>

By the terms of the convention, disputes regarding agreements between foreign nationals and a state are subject to arbitration if the parties so consent. Once consent is given, the home state of the individual is deprived of any possibility of diplomatic intervention or subrogation.<sup>88</sup> While the convention provides for a reasonable means

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<sup>84</sup> Fatouros, *Legal Security for International Investment*, in *LEGAL ASPECTS OF FOREIGN GOVERNMENT* 706 (W. Friedmann & R. Pugh eds. 1959).

<sup>85</sup> *Id.* at 709.

<sup>86</sup> Pugh, *supra* note 6, at 324.

<sup>87</sup> I. DELUPIS, *FINANCE AND PROTECTION OF INVESTMENTS IN DEVELOPING COUNTRIES* 125 (1973).

<sup>88</sup> *Id.* at 126.

of dispute settlement should the parties concur, the convention is effective only as a means of enforcing a modification and restriction of the foreign state's broad sovereign power if the investor succeeds in establishing that such restraints are contained in the development agreement.<sup>89</sup> Without the establishment of specific terms as to rights of transfer (and any other issues), the IBRD Convention will not inhibit unilateral governmental reforms of investment legislation which would injure the foreign investor.

#### *F. Security Under Customary International Law*

Customary international law accords protection of questionable value to investors in a developing state. One cannot rely upon a well defined body of law since there is no general agreement on the degree of protection given private property and other rights by international law. Nor is the investor guaranteed that the United States will assert his claim before an international forum. Commitments made under private law of the receiving state or upon the approval of administrative authority place the investor in the most difficult position to establish a violation of international law. To improve the foreign national's legal status, transactions must be cast in the form of formal development agreements binding both the alien and the state.

There is a wide divergence among the views of the capital-exporting states, the communist bloc and the capital-importing countries of the developing world as to the extent of state responsibility for injuries to aliens. There is at present no agreement on the controlling substantive principles. No consensus exists as to what constitutes unlawful expropriation.<sup>90</sup> Nor is there agreement as to the extent to which a general change in local tax laws, exchange control laws or import controls, which has the effect of reducing the profits or the value of property, may be held to constitute a taking of property.<sup>91</sup> In this regard the United Nations Resolution on Permanent Sovereignty over Natural Resources which addresses the issues of nationalization, expropriation and inherent rights to natural resources has been typically criticized as being too equivocal and abstract in the general principles it enunciates to provide a very helpful contribution to the development of international law.<sup>92</sup>

The United States investor relying upon the protection of international law must also evaluate the likelihood that the federal government will assert his claim in the event of a dispute. As a general rule the Department of State will not assert the right, as the representative of a sovereign nation, to intervene in cases involving breach of contract

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<sup>89</sup> *Id.* at 127.

<sup>90</sup> A. FATOUROS, *supra* note 5, at 245.

<sup>91</sup> Pugh, *supra* note 6, at 316.

<sup>92</sup> 5 G. HACKWORTH, DIGEST OF INT'L LAW 611 (1943).

between a foreign state and a national of the United States in the absence of a showing of a denial of justice.<sup>93</sup> In order to raise a claim before an international forum the investor must thus establish that he has been unduly discriminated against or that he has been denied the means under local law through which reparations for injuries might be obtained.<sup>94</sup>

In any event, the investor must first establish that a claim actually exists. In the common case of an investor committing capital in accordance with the private law of the receiving state or under some administrative authority, a mere alteration of the exchange control laws governing such investments will not constitute a violation of international law.<sup>95</sup>

The principal objective of exchange control by developing countries is the protection of the balance-of-payments position by preventing the flight of capital and by limiting the effective demand for foreign exchange. In addition to this protective function, exchange controls serve also as key tools of economic policy, encouraging favored investment and necessary capital reinvestment.<sup>96</sup> These are, of course, valid public purposes sufficient to support national legislation drastically altering the terms of prior exchange control laws under which an investor originally committed capital. The continued availability of exchange terms provided by general legislation is also subject to emergency controls of other statutes and the sovereign powers of the state.<sup>97</sup>

Customary international law recognizes a state's right of control over its currency as a necessary attribute of sovereignty. Derived from this sovereign right is the power of the state to restrict the transfer of currency in the public interest.<sup>98</sup> Recognizing this power, the United States International Claims Commission has held that "so long as the exchange control measures are not discriminatory, no principle of international law is violated."<sup>99</sup> In reviewing the status of international law on this issue, the United States Department of State has reached a similar conclusion, and would seem, therefore, to be unwilling to espouse an aggrieved investor's cause absent a showing of discrimination.<sup>100</sup> Thus the only sanction against undue regulation is the likelihood that foreign entrepreneurs will abstain from future investments

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<sup>93</sup> A. FATOUROS, *supra* note 5, at 244.

<sup>94</sup> Pugh, *supra* note 6, at 319.

<sup>95</sup> A. FATOUROS, *supra* note 5, at 49.

<sup>96</sup> J. HENDERSON, *supra* note 10, at 95.

<sup>97</sup> F. MANN, *THE LEGAL ASPECTS OF MONEY* 419 (2d ed. 1953).

<sup>98</sup> *Id.*

<sup>99</sup> Tabor Claim (No. 3), 20 I.L.R. 242, 243 (Int'l Claims Commission, United States 1953).

<sup>100</sup> 2 G. HACKWORTH, *DIGEST OF INT'L LAW* 68 (1941).

— a counterproductive result for developing countries, but of no aid to committed investors.

The legal position of an investor may, however, be improved by dressing any guarantees secured from the foreign state in contractual garb.<sup>101</sup> In this new guise any guarantees as to currency convertibility given by the host nation could be given the protection of international law. Commentators assert that states should be considered guilty of internationally tortious acts whenever they violate their contracts with aliens.<sup>102</sup> Recognizing the evolving nature of the law on this matter and the difficulty of formulating a specific statement of applicable rules, legal theorists have offered the following position as a proper statement of international law:

[I]t seems reasonably clear that in order for a breach to constitute a violation of international law, it must constitute an exercise of governmental power that adversely affects the rights of the alien in a pronounced and manifestly unfair way, taking into account all relevant circumstances. . . . It has been suggested that general concepts of law such as unjust enrichment, estoppel and abuse of right may play a role in the development of principles to be applied to varying cases of contractual breach.

Thus, it would appear that in certain, although possibly quite limited, circumstances a violation by a foreign state of an assurance it has made in an agreement. . . would give rise to a claim under international law. . . .<sup>103</sup>

Further support for this proposition may be found in the Twelfth Harvard Draft.<sup>104</sup> These positions are consistent with a number of

<sup>101</sup> Pugh *supra* note 6, at 321.

<sup>102</sup> See, e.g., C. JENKS, *THE COMMON LAW OF MANKIND* 143-45 (1958); O'Connell, *Legal Issues in the Persian Oil Dispute* 28 N.Z.L.J. 57, 58 (1952); see also Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 786 (1959).

<sup>103</sup> Pugh, *supra* note 6, at 319.

<sup>104</sup> With respect to the circumstances under which a government act will be held a violation of international law, see Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545 (1961), with full text of the Twelfth Harvard Draft at 548 *et seq.* TWELFTH HARVARD DRAFT, Article 12, paragraph (1):

1. The violation through an arbitrary action of the State of a contract or concession to which the central government of that State and an alien are parties is wrongful. In determining whether the action of the State is arbitrary, it is relevant to consider whether the action constitutes:

(a) a clear and discriminatory departure from the proper law of the contract or concession as that law existed at the time of the alleged violation;

(b) a clear and discriminatory departure from the law of the State which is a party to the contract or concession as that law existed at the time of the making of the contract or concession, if that law is the proper law of the contract or concession;

(c) an unreasonable departure from the principles recognized by the principal legal systems of the world as applicable to governmental contracts or concessions of the same nature or category; or

(d) a violation by the State of a treaty.

authorities that apply the doctrine of *pacta sunt servanda* to an agreement between a state and an alien.<sup>105</sup>

The development agreement makes it easier for all parties concerned to understand exactly which actions will constitute a breach of the working relationship. As a quasi-international contract the agreement is not governed by municipal law alone, and therefore a breach of the contractual terms may constitute a violation of an obligation under international law. Thus, in our example, if an alteration of exchange terms greatly affects the very basis of the agreement, it may constitute a departure from the law of the contract and create grounds for legal remedy.

In addition, the formality of the agreement yields a further advantage for the foreign investor by virtue of its special legislative force. This is simply that the host government, if it is true to its own formal requirements, will have to take high-level legislative action if it wants to alter the terms of the agreement. Thus the danger of arbitrary administrative action at lower levels is somewhat reduced.<sup>106</sup>

### Conclusion

The American investor relies upon a variety of legal relationships to secure the rights and interests arising from capital commitments in a developing country. These legal devices are the product of efforts by the capital-exporting and host countries to provide the stability and reduce the risks necessary to stimulate desired foreign investment. The level of foreign-direct investment is, in turn, a function of the success of these efforts in creating a healthy investment climate within the limitations of existing socio-economic, political, and legal conditions. Focusing upon the legal factors, this comment has attempted to survey both the developmental investment process and the status of the foreign investor while suggesting the advantages — for both parties — of the development agreement.

The development plans, laws and regulations of the less developed nations make clear their policies and attitudes toward foreign investment. These official pronouncements are important to the American investor, for they specifically control the scope of investment opportunities by enumerating the types of investments open to foreign participation, the conditions for entry, and the regulations affecting the remission of profits and repatriation of capital, to mention only a few factors. The continuing availability of these investments is subject

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<sup>105</sup> Brandon, *Legal Aspects of Private Foreign Investments*, 18 FED. B.J. 298, 337-40 (1958); Domke, *Foreign Nationalizations*, 55 AM. J. INT'L L. 585, 597 (1961); Kissam & Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 FORDHAM L. REV. 177, 194-214 (1959); Ray, *Law Governing Contracts Between States and Foreign Nationals*, 2 INST. ON PRIVATE INVESTMENT ABROAD 5 (1960); Schweibel, *International Protection of Contractual Arrangements*, 53 PROC. AM. SOC'Y INT'L L. 266 (1959).

<sup>106</sup> Fatouros, *supra* note 84, at 724-25.

to the exercise of the sovereign powers of the state and thus represents an element of risk to the investor. Further problems exist with respect to the general nature of such terms, which by necessity are used to govern a wide range of direct foreign investments.

The degree of state responsibility under international law for injuries to alien investors as a result of unilateral alterations of investment terms is an unsettled issue. Giving foreign investments the protection of international law does not by itself settle the difficulty because international law has not yet succeeded in developing the necessary rules.

Since disputes may arise out of the interpretation and application of the host state's investment laws and policies, the parties are advised to enter into a development agreement specifying the investment terms. Many investments are initiated without an explicit statement of essential terms because of a desire on the part of the investor not to antagonize the host country during the delicate negotiations. Yet it is clearly in the interest of the private investor to address these issues, as they are essential to the protection of his interests against the danger of creeping expropriation. The development agreement provides a format which allows the investor to do just this while strengthening his legal position. At the same time it allows the host country to maintain maximum flexibility in meeting its economic development goals while creating an atmosphere of investment stability.

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