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NOTES

A MODERN *LEX MERCATORIA*: POLITICAL RHETORIC OR SUBSTANTIVE PROGRESS?

INTRODUCTION

Some years ago, Dr. Clive Schmitthoff¹ suggested the formulation of a new *lex mercatoria* by setting forth this challenge:

The evolution of an autonomous law of international trade founded on universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those of civil law and common law, and those of fully developed and developing economy, which would enable them to co-operate in the perfection of the legal mechanism of international trade.²

This statement provided added impetus to the already existent desire of businessmen and international lawyers to see a new law merchant developed. It gave focus to a colloquium of legal scholars assembled to begin the task of removing “artificial legal barriers impeding the flow of trade between the nations.”³ It led in a somewhat indirect way to the formation of the United Nations Commission on International Trade Law⁴ [hereinafter referred to as UNCITRAL or Commission].

1. Lecturer in Law, the City of London College; General Reporter to the London Colloquium on the New Sources of the Law of International Trade.

2. Schmitthoff, *The Law of International Trade, Its Growth, Formulation and Operation*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 5 (C. Schmitthoff ed. 1964) (compilation of articles, reports, and summaries of discussions, all of which were part of the proceedings of the London Colloquium on the New Sources of the Law of International Trade held in 1962).

3. Schmitthoff, *Introduction* to INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, THE SOURCES OF THE LAW OF INTERNATIONAL TRADE at x (C. Schmitthoff ed. 1964).

4. Honnold, *Memoire In Honour of Clive M. Schmitthoff*, in LAW AND INTERNATIONAL TRADE 10 (F. Fabricius ed. 1973).

In 1966 the General Assembly created the United Nations Commission on International Trade Law (UNCITRAL); this new Commission of twenty-nine States, representing each of the great regions of the world, is moving strongly forward with its task of clearing away legal impediments to world trade. . . . Dr. Schmitthoff's writings had helped produce the climate of opinion that made this step possible.

Id.

Now, an important economic imperative lends impetus to the development of a new framework of law for commercial enterprise. As the movement toward the unification or harmonization of a new law merchant has progressed, the capital gap between developing and developed countries has increased. The need of developing nations to insure the influx of capital, technology, and skilled managerial personnel from other countries in order to achieve economic growth⁵ looms ever more important. It is apparent that such investment will not pass from developed to developing nations unless the requisite conditions of trust and security exist. As one writer suggests, "in a clearly unstable climate, capital will not be ventured regardless of the country's stage of development."⁶ Thus, investment and commercial intercourse are impossible except within a framework of law, and the more complex the economic ties which unite us, the more comprehensive must be the law which governs that intercourse. Trade and economic links which span national boundaries must engender a body of law which is equally transnational. "Nations as well as men are becoming ever more dependent on one another for the common needs of daily life. The logic of this movement towards one world is *one law* in those areas wherein uniformity is necessary and convenient."⁷

This note will discuss some of the efforts toward development of a new *lex mercatoria* that have followed those words of high purpose spoken at the London Colloquium some fifteen years ago. It will endeavor to assess the work of UNCITRAL—the organization especially created to speed this task toward completion—and of The International Institute for the Unification of Private Law [hereinafter referred to as UNIDROIT]. These efforts will be viewed against the backdrop of economic problems which should add an increasing sense of urgency to these endeavors.

I. HISTORY OF THE LEX MERCATORIA

At one time in the history of Europe, merchants were governed to a remarkable extent by laws which they had developed

5. J. BASCHE, JR. & M. DUERR, *INTERNATIONAL TRANSFER OF TECHNOLOGY* 19 (1975) (National Industrial Conference Board publication).

6. K. BIVENS, *THE CAPITAL GAP BETWEEN DEVELOPED AND DEVELOPING COUNTRIES* 9 (1970) (National Industrial Conference Board publication).

7. Graveson, *Foreword* to *INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* at v (C. Schmitthoff ed. 1964) (emphasis added).

in the course of their customary dealings with one another.⁸ Disputes between merchants and those who dealt with merchants were adjudicated in special courts in which judge and jury were also merchants.⁹ This mercantile law or law merchant¹⁰ enjoyed a fair degree of uniformity from town to town, fair to fair, and country to country, and in that sense became a sort of international law of commerce.

The beginning of the medieval law merchant can be traced to the maritime cities of Italy. These cities expanded the Rhodian Sea Law of the seventh or eighth century¹¹ and the laws of the later Roman Empire to create a "maritime law [which] tended to become a law common to all nations and peoples,"¹² and which was evolved "to meet changing, growing requirements of international commerce."¹³

In England, Germany, and northern France, trade was conducted largely at fairs,¹⁴ and the law merchant developed through

8. Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 70 (C. Schmitthoff ed. 1964).

9. F. SANBORN, ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW 197 (1930).

10. Gerard Malynes, a merchant, recorded the general practices adhered to in mercantile dealings in 1622. He selected the term *lex mercatoria* to encompass rules governing maritime and commercial activities:

I have Intitled the Book according to the Ancient name of Lex Mercatoria, and not Jus Mercatorium; because it is a customary Law, approved by the Authority of all Kingdoms and Commonwealths, and not a Law established by the Sovereignty of any Prince, either in the first foundation or by continuance of Time.

G. MALYNES, *CONSUETUDO VEL LEX MERCATORIA: OR THE ANCIENT LAW MERCHANT* at a (London 1685).

11. An even earlier code called *Lex Rodia de Jactu* was instituted by both Greece and Rome as early as third or second century B.C. F. SANBORN, *supra* note 9, at 5.

12. *Id.* at 40.

13. *Id.* at 127, citing 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 60 (3d ed. 1922) (footnote omitted). Law governing commercial transactions and mercantile activities also developed in the guilds within these city-states. These became uniform over a period of time. A merchant expelled from a guild in one city could go to another city and resume his mercantile activities; eventually, to prevent this practice, the guild from which the merchant was expelled would request guilds in other city-states to place him under an interdict. Thus the guilds grew closer together, shared rules common to all, and came to be referred to collectively as the Mercanzia. *Id.* at 143. Later Florentine law recognized these entities as State courts for handling arbitration and debt collection cases. *Id.* at 145.

14. *Id.* at 134. A town would hold its fair at a regular time each year. Merchants would come from near and far to sell their wares. In each street of a fair, some special trade was conducted, e.g., ironmongery, wool, cloth, leather, books, commodities. W. BEWES, THE ROMANCE OF THE LAW MERCHANT 94 (1923). In the earliest years, permission to hold a fair in a specific town was often given by the church, and the fairs had a charitable or quasi-

that medium.¹⁵ In England, the rise to prominence of the fairs and their courts came somewhat later than on the Continent.¹⁶ The great fairs were the centers of medieval English trade. Permission to hold a fair was extended by royal grant, and the time during which the fair was to be held was specified.¹⁷ The right to hold a fair brought with it the right to hold what was known as a "piepowder court"¹⁸ before which disputes arising in connection with or during the time of the fair were resolved. Markets were more local than the fairs, drawing roughly from a six-mile radius.¹⁹ They also had their own courts²⁰ with jurisdiction to administer justice for commercial injuries and minor offenses done at that market.²¹ These courts were held before a mayor or bailiff if the market or fair were conducted in a borough, or before a steward if the market belonged to a lord.²² In these courts, juries were comprised of merchants.²³ The jurisdiction of such courts was

charitable motive. But in France, under the Carolingians, royal prerogatives began to be asserted over the designation and management of the fairs. The King undertook to guarantee safe conduct to merchants travelling to and from the fairs. A knight and a merchant were generally appointed to administer the fairs, and the administrative officer of the fair also became an "officer of justice." Disputes were settled by these officers of justice by applying those laws which had evolved as customs among the merchants. F. SANBORN, *supra* note 9, at 134-38. An historian writing of this period said that "the merchants were a class distinguished from the rest of the community by legal privileges that gave them a protection which others did not share, while market and fair formed a separate judicial unit which no royal judge could enter." W. MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* 25-26 (1904), *cited in* F. SANBORN, *supra* note 9, at 137 n.79.

15. F. SANBORN, *supra* note 9, at 127.

16. Nevertheless, by the time of the Norman Conquest, England was already engaged in trade with the Continent, e.g., shipping embroidery to Italy. *Id.* at 329. Ideas of special laws to protect merchants had been expressed even earlier. Ethelred the Redeless had declared during his reign in the late tenth and early eleventh century that merchant ships coming from the high seas into any port shall be "at peace." *Id.* at 328.

17. *Id.* at 333-34. If the fairs extended beyond their appointed time, penalties were assessed. Any goods sold after the time of the fair were fined double the value of the goods. *Id.*

18. Honnold, *supra* note 8, at 70. There have been various explanations of the origins of the term "piepowder." One possibility is that it is derived from the word *pes pulvericatus*, or dusty feet, descriptive of the feet of the men who wandered from fair to fair; another is that it is derived from the old French *pied pulderaux*, the term for peddler. Coke and Blackstone believed that the term was descriptive of the swiftness of justice in these courts, i.e., that justice was done before dust could fall from the feet of those before the court. F. SANBORN, *supra* note 9, at 335 n.91.

19. *Id.* at 332.

20. *Id.* at 335-36. Some courts were organized in those towns in which a single commodity was traded. These were known as "staple" courts. *Id.* at 393-94; *see* Honnold, *supra* note 8, at 70-71.

21. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 536 (3d ed. 1922).

22. F. SANBORN, *supra* note 9, at 339.

23. *Id.*

limited to the time of the fair or market, but extended to all civil cases except those having to do with land, and to criminal cases as well, since the courts were responsible for the maintenance of order during that period.²⁴ These laws of the fair, born of the "peace of commerce,"²⁵ grew "out of the necessities and customs of trade."²⁶

Although legal authorities may have exaggerated the uniformity of rules in England from fair to fair or city to city,²⁷ it appears likely that the compelling reasons for the existence of a *lex mercatoria* to settle disputes between merchants with fairness and dispatch led fairs and markets to develop compatible laws:

For the maintenance of Traffick and Commerce is so pleasant, amiable, and acceptable unto all Princes and Potentates, that Kings have been and at this day are of the Society of Merchants: And many times, notwithstanding their particular differences and quarrels, they do nevertheless agree in this course of Trade, because Riches is the bright Star, whose height Traffick takes to direct it self by, whereby Kingdoms and Commonwealths do flourish; Merchants being the means and instruments to perform the same, to the Glory, Illustration, and benefit of their Monarchies and States.²⁸

The decline of these special courts in England began in the fourteenth century.²⁹ The power of merchants to influence decisions and determine the laws used therein diminished, and the Statute of 1477³⁰ narrowed jurisdiction of the courts to the area within the market or fair grounds.³¹ In the seventeenth century, Lord Chief Justice Sir Edward Coke brought all law under the domination of the common law courts.³² In some respects, how-

24. *Id.* at 336-37. For decisions in some of these early cases, see SELDEN SOCIETY, SELECT CASES CONCERNING THE LAW MERCHANT (1908).

25. W. BEWES, THE ROMANCE OF THE LAW MERCHANT 138 (1923).

26. *Id.* at vii. For a fascinating discussion of the trading towns and activities and rules of the guilds, see Adler, *Labor, Capital & Business at Common Law*, 29 HARV. L. REV. 241, 246-48 (1916).

27. Honnold, *supra* note 8, at 71.

28. G. MALYNES, *supra* note 10, at a.

29. F. SANBORN, *supra* note 9, at 354.

30. 17 Edw. 4, c.2.

31. F. SANBORN, *supra* note 9, at 337. Part of the impetus for diminishing the power of the courts came as a backlash to the concessions given the Hanseatic League under Edward I and Edward II. The League was given extraordinary privileges and put beyond the reach of local laws. Dislike of the Hanseatics seems to have led to a general dislike of all foreign merchants. *Id.* at 364-66, 374.

32. Honnold, *supra* note 8, at 71.

ever, the mercantile law continued to have an independent existence. In *Woodward v. Rowe*,³³ the court stated that "the law of merchants is the law of the land, and the custome is good enough generally for any man, without naming him merchant."³⁴ But the marriage of mercantile law to the common law did not proceed smoothly, and, more often than not, merchants settled differences between themselves rather than submitting their disputes to what they felt to be hostile and ignorant judges and juries.³⁵

After William Murray, Lord Mansfield, was made Chief Justice of the King's Bench in 1756, he effected a happy melding of commercial custom and common law by creating special juries of merchants who were familiar with commercial practices. These juries also heard testimony about custom of the trade, and, under the guidance of Lord Mansfield, they not only decided the case at bar, but also issued special verdicts on questions of generally accepted commercial practice.³⁶ They became a "personal liaison between law and commerce."³⁷ In this way custom and usage of the trade were clarified in several important areas such as insurance, negotiable instruments, and shipping.³⁸ The synthesis of commercial law and the common law had not been long accomplished before the "law's delay"³⁹ engendered a desire to create a new international law merchant.

II. THE NEED FOR A NEW LAW MERCHANT

For at least the last 150 years, the development of a new mercantile law or a return to the old law merchant which handled commercial disputes with singular swiftness and fairness, has been an express goal of merchants and legal scholars. In a speech delivered to the Brussels Free Trade Congress of 1856, the English representative made a plea for a new law merchant and separate commercial courts to apply it. "[C]onsidering that Commercial Courts judge commercial affairs with less delay, less expense, and a more perfect knowledge of commercial usages than the ordinary tribunals, the Committee is of the opinion that it is desirable they

33. 84 Eng. Rep. 84, 2 Keble 133 (K.B. 1666).

34. *Id.*

35. C. FIFOOT, *ENGLISH LAW AND ITS BACKGROUND* 105-32 (1932).

36. Honnold, *supra* note 8, at 72.

37. W. YOUNG, *LAW OF INSURANCE* 110 (1971). Of Lord Mansfield, Samuel Johnson said: "[N]ot a mere lawyer; he drank champagne with the wits." *Id.* at n.2.

38. Honnold, *supra* note 8, at 72.

39. W. SHAKESPEARE, *HAMLET*, act III, scene 1, line 72 (Kittredge ed. 1939).

should be established throughout Europe."⁴⁰ As trade between nations increased and ideas of nationalism began to interfere with that trade, the cry for a return to a mercantile law governing only commercial dealings between nations was carried in this century by other voices. According to F.A. Mann, "the need for a commercial law of nations can no longer be denied. We are witnessing the growth of activities which occur in what to a considerable extent is a legal vacuum and for which the law remains to be found."⁴¹

In 1962, the International Association of Legal Science, with the financial support of the United Nations Economic, Social and Cultural Organization, assembled a brilliant array of legal scholars and reporters⁴² from East and West at the London Colloquium on the New Sources of the Law of International Trade. The participants in this colloquium cooperatively explored "those sources from which the law of international trade might be derived."⁴³

A. UNCITRAL

As a result of this growing interest in the development of a new law merchant, the United Nations, on December 20, 1965, adopted a resolution proposed by the People's Republic of Hungary.⁴⁴ This resolution urged the United Nations to foster further cooperation between the groups working toward development of a law of commerce and to commit itself to a goal of progressive unification of international trade law.⁴⁵

40. H. HUTTON, *COMMERCIAL COURTS: RESOLUTION AND EXPLANATORY STATEMENT SUBMITTED TO THE BRUSSELS FREE TRADE CONGRESS OF 1856*, at 4 (Dublin 1857).

41. Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B. INT'L L. 20 (1975). See generally Gal, *The Commercial Law of Nations and the Law of International Trade*, 6 CORNELL INT'L L.J. 55 (1972); Graveson, *supra* note 7, at v.

42. Among those attending the colloquium were: Ernest Boka, Ernst von Caemmerer, Aleksandar Goldstajn, John Honnold, Trajan Ionasco, Viktor Knapp, Gunnar Lagergren, Antonion Malintoppi, Ion Nestor, D.F. Ramzaitsev, David A. Godwin-Sarre, Denis Tallon, and Henryk Trammer. For a complete listing of participants, including their credentials, see INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* at xiii-xv (D. Schmitthoff ed. 1964).

43. Schmitthoff, *Introduction to INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* at ix. See note 2 *supra*.

44. G.A. Res. 2102, 20 U.N. GAOR, Supp. (No. 14) 91, U.N. Doc. A/6014 (1965).

45. *Id.* The Resolution stated, *inter alia*:

The General Assembly,

Recalling that it is one of the purposes of the United Nations to be a centre for harmonizing the actions of nations in the attainment of such common order as the achievement of international co-operation in solving, *inter alia*, international economic problems,

Convinced that it is desirable to further co-operation among the agencies

In response to this resolution, the Secretary-General presented a report based upon a preliminary study by Dr. Schmitt-hoff.⁴⁶ The study surveyed efforts toward the harmonization and unification of the law of international trade beginning with the work of the Hague Conference on Private International Law⁴⁷ in 1893.⁴⁸ The Secretary-General concluded by recommending that the General Assembly "consider the possibility of establishing a new commission which might be called the 'United Nations Commission on International Trade Law.'"⁴⁹ Such a commission would endeavor to coordinate the work of myriad conventions, councils, and commissions⁵⁰ already at work, to broaden support among additional nations, and ultimately to promote adoption by all nations of one set of rules governing commerce among nations.⁵¹

Prior to the formation of UNCITRAL, several different approaches were employed by various groups to make some limited efforts toward building a body of international commercial law. One approach was to join "geographically contiguous countries," as in the development of rules governing the Nordic Council⁵² and the European Economic Community.⁵³ Another method has been

active in this field and to explore the need for other measures for the progressive unification and harmonization of the law of international trade,

1. *Requests* the Secretary-General to submit to the General Assembly at its twenty-first session a comprehensive report including:

(a) A survey of the work in the field of unification and harmonization of the law of international trade;

(b) An analysis of the methods and approaches suitable for the unification and harmonization of the various topics including the question whether particular topics are suitable for regional, interregional or world-wide action;

(c) Consideration of the United Nations organs and other agencies which might be given responsibilities with a view to furthering co-operation in the development of the law of international trade and to promoting its progressive unification and harmonization.

Id.

46. Report of the Secretary-General, 21 U.N. GAOR, 3 Annexes (Agenda Item 88) 2, U.N. Doc. A/6396 (1966).

47. The objective of the Hague Conference on Private International Law is to work for the "progressive unification of the rules of private international law." *Id.* at 6. It prepares draft conventions to be adopted by member States, and in addition promotes their incorporation into the municipal laws of each State. The Conference has had a cooperative arrangement with the United Nations since 1958. *Id.* at 6-7.

48. *Id.* at 5-20.

49. *Id.* at 24.

50. *Id.* at 20.

51. *Id.* at 24-25.

52. 1 THE EUROPA YEAR BOOK 1976: A WORLD SURVEY 244-47 (1976).

53. Report of the Secretary-General, *supra* note 46, at 21.

to join States of similar socio-economic systems. The Council for Mutual Economic Assistance, for example, is composed of nine countries of centrally-planned economies;⁵⁴ these countries have developed a set of normative regulations which are to be included as part of any treaty between two or more member States.⁵⁵ A third approach has been the joining of countries which are in a comparable stage of economic development.⁵⁶ The Model Law for Developing Countries on Inventions developed by the United International Bureaux for the Protection of Intellectual Property is an example.⁵⁷ Of course, in countries similar with respect to all three criteria—*i.e.*, geographical location, form of government, and stage of economic development—a large degree of economic cooperation and unification of laws can be effected in a short period of time, as has occurred with the Scandinavian countries in the Nordic Council.⁵⁸

Each of the approaches contains built-in limitations. Efforts to expand acceptance of the rules set forth by such nucleus groups to other countries frequently fail, so the progress toward a single law merchant is "slow in relation to the amount of time and effort expended on it."⁵⁹ Work done by more diverse groupings of States is often never completed; model laws are abandoned before adoption into municipal laws; and conventions painstakingly formulated are ratified by only a small percent of the member nations.⁶⁰

The primary work of UNCITRAL is to remedy this state of affairs by coordinating the work of various organizations and encouraging cooperation among them. UNCITRAL was envisioned not as a codifier of law, but as an organization that would, through communication and cooperation, piece together the many fragments into a mosaic which would emerge as a new law merchant.⁶¹ In its efforts at coordination, the Commission⁶² has

54. 1 THE EUROPA YEAR BOOK 1976: A WORLD SURVEY 144-49 (1976).

55. Report of the Secretary-General, *supra* note 46, at 21.

56. *Id.*

57. *Id.*

58. *Id.*

59. G.A. Res. 2102, 20 U.N. GAOR, Supp. (No. 14) 22, U.N. Doc. A/6014 (1965).

60. *Id.* at 21.

61. *Id.* at 24-25. UNCITRAL was to remedy the current fragmented situation in international commercial law by:

- (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- (b) Promoting wider participation in existing international conventions, and wider acceptance of existing model and uniform laws;

ample opportunity to publicize its findings and make its resolutions known to all member States of the United Nations since all UNCITRAL reports are presented to the General Assembly and become a part of its official records. In addition, United Nations agencies, intergovernmental organizations, and international non-governmental organizations send observers to UNCITRAL meetings.⁶³

As yet, however, it is nearly impossible to discern any progress by UNCITRAL in meeting the concern expressed by Professor H.C. Gutteridge:

The most urgent problem of all, however, is that of the waste of effort and confusion that has, at times, been caused by the existence of competing agencies engaged in the work of unification. The remedy for this state of affairs would seem to lie in the establishment of a rallying ground for unificatory activity—a kind of international clearing house—which would co-ordinate and supervise activities of this nature⁶⁴

Instead, at its first meetings, UNCITRAL decided that four major areas would be given priority—international sale of goods, international payments, international commercial arbitration,⁶⁵

(c) Preparing, and promoting the adoption of, new international conventions, model laws and uniform laws, and the codification and wider acceptance of international trade terms, provisions, customs and practices;

(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

(e) Collecting and disseminating information on national legislation and model legal developments in the field of the law of international trade;

(f) Maintaining liaison with UNCTAD, the Economic and Social Council and other United Nations organs and specialized agencies concerned with international trade;

(g) Taking any other action as it may deem useful to achieve its purposes.

Id.

62. The Commission was originally organized with a membership of twenty-nine nations with each member serving a six-year term. One-third of the group is elected every two years. G.A. Res. 2205, 21 U.N. GAOR, Supp. (No. 16) 99, U.N. Doc. A/6316 (1966). In 1973, the Commission membership was increased to thirty-six. G.A. Res. 3108, 28 U.N. GAOR, Supp. (No. 30) 146, U.N. Doc. A/9030 (1973).

63. See, e.g., Report of the United Nations Commission on International Trade Law, 31 U.N. GAOR, Supp. (No. 17) 22, U.N. Doc. A/31/17 (1976) (report on the work of its ninth session) for a listing of observers.

64. H. GUTTERIDGE, *COMPARATIVE LAW* 183-84 (2d ed. 1949), cited in Report of the Secretary-General, *supra* note 46, at 22.

65. Report of the United Nations Commission on International Trade Law, 23 U.N. GAOR, Supp. (No. 16) 13, U.N. Doc. A/7216 (1968).

and international shipping legislation.⁶⁶ Thus, UNCITRAL seemed to turn aside from its major purpose of coordinating the work of other groups and to adopt its own building-block approach to the problem of creating an edifice of commercial international law. It established for itself goals which seem modest in relation to the task to be accomplished, but the progress toward even these limited goals has been slow.

Working groups in two of the four areas—shipping and arbitration—have formulated and submitted to the Commission draft proposals on the carriage of goods by sea, and on international arbitration.⁶⁷ The Draft Convention on the Carriage of Goods by Sea was approved by the Commission at its ninth session and is now being submitted to governments and interested international organizations for comments and proposals.⁶⁸ The UNCITRAL Arbitration Rules were adopted at the Commission's ninth session,⁶⁹ and the General Assembly has been invited to recommend their use in the "settlement of disputes arising in the context of international commercial relations."⁷⁰ The working group concerning itself with international payments has not yet completed its work on negotiable instruments to present to the Commission.⁷¹ In 1972, the Commission approved a Draft Convention from the working group dealing with international sale of goods.⁷² This was the first Draft Convention to be adopted by UNCITRAL. A conference of plenipotentiaries was assembled to revise and accept the Convention in 1974, and the Convention on Prescription (Limitation) in the International Sale of Goods⁷³ was opened for signature June 14, 1974. At this writing, the Convention has received only one of the ten signatures required to become effective. Meanwhile the working group formulating rules for the international sale of goods is preparing Conventions dealing with some other sub-topic of this area.⁷⁴

66. Report of the United Nations Commission on International Trade Law, 24 U.N. GAOR, Supp. (No. 18) 32-33, U.N. Doc. A/7618 (1969).

67. Report of the United Nations Commission on International Trade Law, 31 U.N. GAOR, Supp. (No. 17) 4, U.N. Doc. A/31/17 (1976).

68. *Id.* at 16.

69. *Id.* at 34.

70. *Id.*

71. *Id.* at 11.

72. G.A. Res. 2929, 27 U.N. GAOR, Supp. (No. 30) 115, U.N. Doc. A/8730 (1972).

73. U.N. Doc. A/CONF.63/15 (1974). For a list of signatories and the single ratifying State, see MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS 259, U.N. Doc. ST/LEG/SER.D/9 (1975).

74. Report of the United Nations Commission on International Trade Law, 31 U.N.

Certainly the progress made seems minimal in relation to the time and effort expended. Attempts, however, to take procedural shortcuts and to speed the creation of a body of international commercial law appear only to split UNCITRAL into competing political groups.⁷⁵ In 1969, the UNCITRAL representative from France suggested a dramatic change in the method by which Conventions were adopted which would "reduce the gap between the slow pace of international legislation and the requirements of the modern world, especially in the field of international trade."⁷⁶ To that end, he suggested that States agree in advance to accept the rules which would be established by the Commission "as a common body of law."⁷⁷ All member States would be bound by this set of rules only in international transactions. In the event that a State wished to avoid the rules, it could do so only by setting forth in an affirmative manner a different set of rules which it found more acceptable.⁷⁸ This would reverse the normal procedure in international law whereby a set of proposals is created and then ratified and signed by each State. Under the proposal by the French representative, a State by taking no action with respect to a proposed set of rules would signal acceptance rather than rejection. This suggested acceleration of the process of development of a common law for international trade, offered to the Commission in detail at several meetings, has not received enthusiastic support from member nations.⁷⁹

GAOR, Supp. (No. 17) 6, 7, U.N. Doc. A/31/17 (1976).

75. Report of the United Nations Commission on International Trade Law, 24 U.N. GAOR, Supp. (No. 18) 46, U.N. Doc. A/7618 (1969). For a more complete presentation of the French representative's proposal, see [1968-1970] 1 Y.B. UNCITRAL 288, U.N. Doc. A/CN.9/SER.A/1970; [1971] 2 Y.B. UNCITRAL 139, U.N. Doc. A/CN.9/SER.A/1971.

76. Report of the United Nations Commission on International Trade Law, 24 U.N. GAOR, Supp. (No. 18) 46, U.N. Doc. A/7618 (1969).

77. *Id.*

78. *Id.*

79. Report of the United Nations Commission on International Trade Law, 25 U.N. GAOR, Supp. (No. 17) 49, U.N. Doc. A/8017 (1970). The representative from France has persisted in setting this idea before the Commission. His suggestion ripened into a more detailed proposal in the Third Session. Report of the United Nations Commission on International Trade Law, 25 U.N. GAOR, Supp. (No. 17) 49, U.N. Doc. A/8017 (1970). It became a preliminary draft before the Fourth Session. Report of the United Nations Commission on International Trade Law, 26 U.N. GAOR, Supp. (No. 17) 45, U.N. Doc. A/8417 (1971). For all these efforts, the Commission has shrunk from any practical steps to lay the groundwork for implementing this idea.

B. UNIDROIT

Prior to the creation of UNCITRAL, the work of coordination was carried on by the International Institute for the Unification of Private Law⁸⁰ [hereinafter referred to as UNIDROIT]. In examining the progress being made toward creation of a new law merchant, the earlier and ongoing initiatives of this organization must be considered.

UNIDROIT, headquartered in Rome, was established in 1926 under the auspices of the League of Nations.⁸¹ In 1939, UNIDROIT severed its affiliation with the League but continued its work financed by those States which chose to be members.⁸² This organization attempts to unify specific branches of substantive law of different countries. To accomplish this end, UNIDROIT prepares draft conventions for adoption by diplomatic conferences. Generally these draft conventions establish technical standards in specific areas of commercial dealings which are acceptable to the governments of its member States.⁸³ UNIDROIT functions also as a research and resource group—preparing reports, draft proposals, and preliminary documents for other groups, such as the United Nations Economic Commission for Europe.⁸⁴ UNIDROIT seeks to coordinate activities of organizations by assembling “round tables—to find common ground acceptable by the professions concerned.”⁸⁵ In this way it replicates to some extent the old mercantile law courts which assembled members of a profession in order to formulate rules for the governance of the commercial activities of that profession.⁸⁶ Although most of UNIDROIT's work is concerned with technical topics of

80. As of 1970, UNIDROIT had forty-five members: Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, Colombia, Cuba, Czechoslovakia, Denmark, Ecuador, Federal Republic of Germany, Finland, France, Great Britain, Greece, Hungary, India, Iran, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United States, Uruguay, Vatican City, Venezuela, and Yugoslavia. [1969] *ANNUAIRE L'UNIFICATION DU DROIT* 7 (Institute International Pour L'Unification du Droit Privé).

81. Report of the Secretary-General, 21 U.N. GAOR, 3 Annexes (Agenda Item 88) 5, U.N. Doc. A/6396 (1966).

82. 1 *UNIFORM L. REV.* 21 (1976).

83. [1970] *Y.B. UNIDROIT* 19.

84. For example, UNIDROIT prepared for that group the Draft Convention on the Contract for the International Carriage of Passengers and Luggage by Road. [1974] *id.* at 69 n.1. For the full text of the Draft Convention see *id.* at 69-101.

85. [1970] *id.* at 29.

86. See W. YOUNG, *supra* note 37.

international law, methods of unification and harmonization of law and methods of ensuring uniformity of interpretation of laws are also studied. In its efforts to coordinate the activities of various groups, UNIDROIT publishes several periodical materials.⁸⁷

Although any member State of the United Nations or its specialized agencies may become a party to UNIDROIT conventions, participating member States have been primarily the so-called "free enterprise" States.⁸⁸ It was undoubtedly this Western and free enterprise bias of UNIDROIT that influenced the United Nations representative from Hungary to initiate the activity which resulted in the creation of UNCITRAL.⁸⁹ In this light, it is not surprising that UNCITRAL and UNIDROIT, which to some extent perform the same coordinating function, enjoy a natural rivalry.⁹⁰

Evidence of this competition dates from UNCITRAL's creation. In a 1970 Report, UNIDROIT stated its intention to cooperate with UNCITRAL, but also expressed fears that the procedures of UNCITRAL might inhibit completion of work already done by UNIDROIT.⁹¹ In particular, UNIDROIT was concerned that both its Conventions—the Uniform Law on the International Sale of Goods (Corporeal Movables)⁹² and the Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movables),⁹³ referred to as the Hague Conventions of 1964—might not be ratified promptly by member States. UNIDROIT urged the implementation of the two Conventions without "waiting for further UNCITRAL studies as this might delay unnecessarily and for a long time the efforts toward unifica-

87. Its Yearbook, *Uniform Law Review* (prior to 1972 called *Unification of Law*), surveys work being done on unification of private commercial law. A quarterly, *Uniform Law Cases*, reviews decisions on conventions and uniform laws which have been reached in the courts of various countries. The looseleaf publication *Digest of Legal Activities of International Organizations and Other Institutions* gives an up-to-date sketch of the current areas of international commercial law in which each of thirty-three formulating groups and their various working parties are engaged.

88. See Report of the Secretary-General, *supra* note 46, at 21. Of the twenty-seven signatories of the Final Act of the Conference produced by the Hague Conventions of 1964, twenty-two were European countries. *Id.* at 5.

89. Farnsworth, *UNCITRAL—Why? What? How? When?*, 20 AM. J. COMP. L. 314, 315 (1972).

90. *Id.* at 316.

91. [1970] Y.B. UNIDROIT 19.

92. 1 REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 39 (1971).

93. *Id.* at 64. For a recent chart showing ratifications see 14 INT'L LEGAL MATS. 852-53 (1975). The Hague Convention entered into force in 1972.

tion, [and might] well jeopardize all the results achieved through the preparation of the two Conventions and at any rate postpone their entry into effect by a good number of years."⁹⁴

The rivalry continues. At its seventh session in 1974, UNCITRAL considered a request from UNIDROIT that UNCITRAL include in its program of work the "draft of a law for the unification of certain rules relating to the validity of contracts of international sale of goods" which had been adopted by the Governing Council of UNIDROIT.⁹⁵ The request was avoided rather than rejected by UNCITRAL's decision that it might be more desirable to deal with the validity and formulation of contracts in one document or, perhaps, to deal with the issue in a general manner without limiting it to those contracts concerned only with the sale of goods.⁹⁶

Despite the apparent initial reluctance of UNCITRAL to accept the work of UNIDROIT when proffered, there are signs of cooperation as well. At its second session, for example, UNCITRAL established a working group to attempt to modify the Uniform Law of the International Sale of Goods annexed to the Hague Conventions of 1964 in order to render it acceptable to countries with differing legal, social, and economic systems.⁹⁷ Although UNCITRAL's modification involved the creation of a new text, it was to be built on the framework of the old which had been created in large part by UNIDROIT. Over the years the efforts to achieve a common goal should diminish the rivalry and enhance cooperative endeavors.⁹⁸ Certainly the task is large enough to command the best efforts of both organizations working together, not at cross-purposes. Economic urgency may accelerate

94. [1970] Y.B. UNIDROIT 19.

95. Report of the United Nations Commission on International Trade Law, 31 U.N. GAOR, Supp. (No. 17) 8, U.N. Doc. A/31/17 (1976).

96. *Id.* at 8. It is interesting to note that UNCITRAL, at the end of its ninth session, unanimously adopted a decision defining more limited goals for the working committee concerned with the international sale of goods. The Commission instructed the working group to "confine its work . . . to contracts of the international sale of goods." *Id.* at 40.

97. *Id.* at 7.

98. Since 1958, UNIDROIT and the United Nations have had an arrangement by which they exchange information and documentation in order to "promote co-operation and co-ordination." E.S.C. Res. 678, 26 U.N. ESCOR, Supp. (No. 1) 22, U.N. Doc. E/3169 (1958). This cooperation and exchange continues with UNCITRAL, which is now an integral part of the United Nations. UNIDROIT often sends observers to UNCITRAL meetings and vice versa, although, it is interesting to note that UNIDROIT is not listed as an observer at the 1976 session. Report of the United Nations Commission on International Trade Law, 31 U.N. GAOR, Supp. (No. 17) 2-3, U.N. Doc. A/31/17 (1976).

the pace of cooperation between UNCITRAL and UNIDROIT, and the pace of accomplishment as well.

It is clear that UNIDROIT has accomplished more with respect to unification of international law over the past ten years than has UNCITRAL, and the reasons for this disparity are also clear. UNIDROIT represents a much less broad-based membership than UNCITRAL, and consequently consensus is more easily achieved. As efforts are made to bring together States of more diverse economic and social orientation, and to involve them in the process of formulating laws, as in UNCITRAL, the pace of accomplishment decreases accordingly.

III. INTERNATIONAL LAW AND ECONOMIC NECESSITY

The 1966 Report of the Secretary-General recommending the formation of UNCITRAL admonished that "it should be kept in mind that the unification process is desirable *per se* only when there is an economic need and when unifying measures would have a beneficial effect on the development of international trade."⁹⁹ Certainly, in the presence of an ever-widening capital gap between developed and developing countries, the economic necessity for creating a legal framework, espoused by all nations, within which investment and trade can flourish, is greater now than ever before. An international law study stated:

One of the dominating problems of today is to create a satisfactory and stable climate for the flow of private foreign investment. This is because the economic development of the developing countries depends to a large extent on private foreign capital, and because they may not move to the areas where they are most needed unless reasonable conditions for security exist.¹⁰⁰

The economic necessity to encourage direct foreign investment in developing countries is clear. The issue is how this goal is to be accomplished.

A survey of business leaders of capital-exporting nations sought the criteria employed by them in determining whether to invest large capital sums in particular countries. The results were revealing. High on the list of criteria was the stability of the government of the capital-importing country.¹⁰¹ Most executives

99. Report of the Secretary-General, *supra* note 46, at 21.

100. Z. KRONFOL, PROTECTION OF FOREIGN INVESTMENT 5 (1972).

101. K. BIVENS, *supra* note 6, at 57.

participating in the Eighth International Survey of Business Opinion and Experience felt that if an individual nation is unable to guarantee its own stability, investment can nevertheless be encouraged by "more inclusive networks of international conventions guaranteeing a free flow of goods and capital and protecting the property of private investors against political disasters."¹⁰²

Although bilateral and multilateral agreements can be made self-regulating in the sense of including within them commitments to submit disagreements to binding arbitration,¹⁰³ such provisions are likely to provide ineffective protection for private corporations in less stable countries. Since these nations tend to be those most in need of foreign capital, a vicious cycle begins: lack of capital and economic growth yields poverty, poverty causes discontent and political instability, and political instability creates a climate unfavorable for investment. This situation has been termed a "multifaceted complex phenomenon that cannot be tackled fractionally but must be faced by a systems approach."¹⁰⁴ For those countries unable to achieve domestic security, the establishment of an extranational or international law providing encouraging guarantees to foreign investors is crucial.

A. *The Problem of Nationalism*

Running counter to some extent to the efforts to attract capital into Third World or developing countries is the strong force of nationalism. Nationalistic concerns of developing countries as to the ownership of their natural resources and control of their economy resulted in the United Nations General Assembly's adoption of a Charter of Economic Rights and Duties of States.¹⁰⁵ This declaration, although purporting to affirm the goal of "cooperation in solving international problems in the economic and social fields,"¹⁰⁶ endorsed a new and militant nationalism. It stated, *inter alia*:

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources, and economic activities.

102. *Id.*

103. Report of the Secretary-General, *supra* note 46, at 10.

104. K. BIVENS, *supra* note 6, at 71.

105. Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 51, U.N. Doc. A/9631 (1974).

106. *Id.*

2. Each State has the right:

- (a) To regulate and exercise authority over Foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.¹⁰⁷

This declaration raised before enterprises seeking to invest in Third World countries the specter of expropriation¹⁰⁸ of investment properties. Yet without importation of technology and capital, the desire of developing nations to achieve for their peoples a share of the world's prosperity will never be realized. The First Executive Secretary of the United Nations Economic Commission for Latin America set forth a thesis which urges the establishment of industry in developing countries. "While the Third World relies solely on the export of raw materials and staple commodities, it is doomed because the export prices of such goods have been steadily falling over the years, while the prices of manufactured goods, the preserve of the developed world, have been rising. Aid and technical assistance are only palliatives as long as Latin America is not industrialized."¹⁰⁹

107. *Id.*

108. A heightened awareness of the effects of expropriation was experienced by United States investors in the 1960's with the rash of expropriations of American-owned enterprises in Cuba. At the time, the United States Department of State branded the action "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in essence discriminatory, arbitrary and confiscatory." State Dept. Note No. 397 to Cuban Ministry of Foreign Relations (Sept. 16, 1960). When the matter came before the Supreme Court, however, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Court declined to act or to apply principles of international law. *Id.* at 428-31. In a more recent expropriation case, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), four members of the Supreme Court set forth the idea that when a country is acting as a trader it cannot seek protection under either the sovereign immunity theory or the act of state doctrine, but should be subject to the customary laws which govern merchants in their dealings with one another. 425 U.S. at 695. Here, at least, lip service was paid the idea of a new law merchant, although a majority of the Court did not espouse it. See Case Comment, 3 BROOKLYN J. INT'L L. 77 (1976).

The so-called traditional view of expropriation had recognized the right of a country to expropriate for public purposes conditioned on the requirement of "adequate, effective, and prompt" compensation. Note from Sec'y of State Hull to Mexican Ambassador (Apr. 3, 1940) MS. Dep't of State, File No. 812.6363/6659A, noted in 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 663 (1942). This view was espoused by a majority of nations expressing an opinion circa 1940, but as Professor Friedmann noted in 1965: "We must remember that a generation ago there was a more or less homogeneous club of western nations, and that the question of protection of property in foreign investment was much more one-sided. We have to take some account of the views of over 75 under-developed nations." Domke, Friedmann, & Henkin, *Act of State: Sabbatino in the Courts and in Congress*, 3 COLUM. J. TRANSNAT'L L. 99, 106 (1965) (remarks of Wolfgang Friedmann).

109. L. TURNER, MULTINATIONAL COMPANIES AND THE THIRD WORLD 88 (1973).

Obviously the developing nations must temper a sense of national destiny with enlightened long-term self-interest. This may well necessitate the creation of a stable climate for investment by multinational enterprises—those same enterprises against which so much vituperative political rhetoric has been directed—in an effort to raise the standard of living in developing countries.

B. *Capital Outflow and Capital Generation*

An examination of the capital problems of developing countries which evidence a deteriorating rather than an improving economic situation reveals the urgency of creating as soon as possible a framework of commercial law within which capital, assured of safety, can seek out need and opportunity. The United States is the largest investor of capital abroad.¹¹⁰ In order to assess trends in capital investment in developing and developed countries, figures relating to United States foreign investment have been analyzed.

Careful study of the chart in Appendix A shows that during the decade 1966 through 1975, United States direct capital investment abroad increased 157%—from \$51.8 billion to \$133.2 billion. This increase in American investment has not varied significantly between developing and developed countries: 151% increase in developing countries and 158% increase in developed countries. Nevertheless, during this decade, only 48% of the increase in investment in developed countries represented new capital outflow from the United States, while 56% of the increase in underdeveloped countries represented American capital outflow. This differential in the source of funds for direct investment has been increasing in recent years. For instance, the greatest disparity occurred in 1975 when 36% of new direct investment in developed countries consisted of capital outflow from the United States while 56% of such investment in developing countries was

110. From 1967 to 1971 the book value of direct foreign investment undertaken by all investor nations increased from \$108.2 billion to \$165 billion. The United States investment grew from \$59.5 billion to \$86 billion. As of 1976, United States direct investment overseas was estimated at more than \$120 billion, three times that of any other nation. Even if, as expected, levels of added United States overseas investment begin to taper off in the late 1970's, it is estimated that not under \$7 billion annually of additional overseas inputs will be made. J. LAPALOMBARA & S. BLANK, *MULTINATIONAL CORPORATIONS AND NATIONAL ELITES: A STUDY IN TENSIONS* 6-7 (1976) (National Industrial Conference Board publication).

generated by United States capital outflow.

These statistics indicate that once an investment has been made in a developed country, undoubtedly because of the relative stability of the country, the enterprise making the investment will tend to accumulate capital and reinvest it in that same country. In the case of comparatively unstable developing countries, the tendency is not to accumulate and reinvest capital in that same country but to move it elsewhere. It is apparent that if this pattern is allowed to continue, the capital gap between developed and developing countries will grow ever wider.

This increasing gap may be explained by a number of factors. First, direct investment in developed countries is now three times the magnitude of direct investment in developing countries—\$91.1 billion compared to \$34.9 billion. The larger investment base naturally yields more dollars for reinvesting. Second, because companies seek a quicker return in developing countries where conditions are less certain, they invest in such a manner that their yield rate in developing countries is higher than that in developed countries in any given year. (See Appendix B.) Third, reinvestment of earnings in developed countries appears to be a common practice, while a desire to “take the money and run” seems to be characteristic of investors in the developing countries.

As long as the abovementioned factors are at work, it is apparent that it will be necessary to encourage the flow of new capital into developing countries at a much higher rate than into developed countries each year just to maintain the status quo. When one realizes that the long-term goal is to ensure that underdeveloped countries improve their position relative to developed countries, the problem begins to assume its proper dimensions.

CONCLUSION

A pressing need exists to persuade investors that their foreign investments will be safe, to create a climate which will encourage both the influx of new capital and reinvestment of profits from the old in developing countries, and to develop a framework of law governing all commercial activities which can be separated from nationalistic aspirations. Such actions are necessary so that problems common to all nations—poverty, disease, overpopulation, and hunger—can be fought effectively. Former Secretary of State Henry Kissinger has stated:

The need for a global structure has long been evident, but the gap between developed and developing countries—a constant challenge to tranquillity—has continued to widen. The growing reality of our interdependence is in constant tension with the compelling trends of separatism and intense nationalism. . . . We live today in a world of many centers of power and contending ideologies; a collection of some 150-odd nations sharing few agreed legal or moral assumptions; an international economic system in which the well-being of all peoples is inextricably intertwined; in short, a set of new historical realities in which the challenges of peace, prosperity, and justice have no terminal date and are unending.¹¹¹

Although trade with and investment of capital in underdeveloped nations will not solve all these problems, they represent at least an appropriate and practicable way to attack them. Yet it is clear that without the dependable framework of some sort of international commercial law to govern these activities, there is little hope even for a beginning. The disparity between the dream of the 1962 London Colloquium and the reality of accomplishment in 1977 is disheartening. But the “mills of the gods [do] grind slowly,”¹¹² and perhaps economic necessity will yet yield a new law merchant.

Louise Hertwig Hayes

111. Address by Henry Kissinger, National Press Club (Jan. 10, 1977), reprinted in 43 VITAL SPEECHES 9 (1977).

112. F. VON LAGAU, “Retribution” (Longfellow trans.).

APPENDIX A¹¹³

CAPITAL OUTFLOW AND REINVESTED EARNINGS (in billions)

<u>DEVELOPED COUNTRIES</u>	<u>1966</u>	<u>1970</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>1975</u>
Direct Total U.S. Investment (cumulative)	\$35.3	\$51.8	\$57.0	\$62.1	\$72.2	\$33.0	\$91.1
Capital Outflow	3.1	3.1	2.9	2.0	3.8	5.3	2.9
Reinvested earnings	1.2	2.1	2.5	3.7	6.2	5.5	5.1
TOTAL	4.3	5.2	5.4	5.7	10.0	10.8	8.0
CAPITAL SOURCE AS A PERCENTAGE							
Capital Outflow	72%	60%	54%	35%	38%	49%	36%
Reinvested Earnings	28%	40%	46%	65%	62%	51%	64%
<u>DEVELOPING COUNTRIES</u>							
Direct Total U.S. Investment (cumulative)	\$13.9	\$19.2	\$21.0	\$22.9	\$25.3	\$28.5	\$34.9
Capital Outflow	0.5	1.0	1.3	1.1	0.9	1.7	3.7
Reinvested Earnings	0.4	0.6	0.6	0.8	1.6	1.8	2.9
TOTAL	0.9	1.6	1.9	1.9	2.5	3.5	6.6
CAPITAL SOURCE AS A PERCENTAGE							
Capital Outflow	56%	63%	68%	58%	36%	49%	56%
Reinvested Earnings	44%	37%	32%	42%	64%	51%	44%
INTERNATIONAL AND UNALLOCATED							
	\$2.6	\$4.5	\$5.1	\$5.5	\$6.2	\$7.3	\$7.2
TOTAL ALL AREAS	\$51.3	\$75.5	\$83.0	\$90.5	\$103.7	\$118.8	\$133.2

113. BUREAU OF LABOR STATISTICS, SURVEY OF CURRENT BUSINESS, AUGUST 1976 (1976); BUREAU OF LABOR STATISTICS, SURVEY OF CURRENT BUSINESS, SEPTEMBER 1966 (1966). In each of the selected years over a ten-year period, the total of capital outflow (new capital) has been added to the amount of reinvested earnings to give the cumulative amount of direct United States investment for the following year. Capital outflow and reinvested earnings are expressed as a percentage of the total annual investment.

APPENDIX B¹¹⁴UNITED STATES DIRECT FOREIGN INVESTMENTS IN 1975
(in millions)

	<u>Investment 1975</u>	<u>Earnings</u>	<u>Per- centage</u>
ALL AREAS	\$133,168	\$ 17,473	13.1%
Petroleum	34,806	5,611	16.1
Manufacturing	56,039	6,232	11.1
Other	42,323	5,630	13.3
DEVELOPED COUNTRIES	91,139	9,683	10.6
Petroleum	20,336	1,620	8.0
Manufacturing	45,601	4,916	10.8
Other	25,203	3,146	12.5
Canada	31,155	3,399	10.9
Petroleum	6,209	865	13.9
Manufacturing	14,718	1,685	11.4
Other	10,228	850	8.3
Europe	49,621	5,164	10.4
Petroleum	11,381	502	4.4
Manufacturing	26,136	2,772	10.6
Other	12,104	1,890	15.6
Other	10,363	1,119	10.8
Petroleum	2,746	253	9.2
Manufacturing	4,747	460	9.7
Other	2,870	406	14.1
DEVELOPING COUNTRIES	34,874	7,382	21.1
Petroleum	11,147	3,912	35.1
Manufacturing	10,438	1,316	12.6
Other	13,290	2,153	16.2
Latin America	22,223	3,002	13.5
Petroleum	3,370	348	10.3
Manufacturing	8,553	1,117	13.1
Other	10,300	1,536	14.9
Other	12,651	4,380	34.6
Petroleum	7,776	3,564	45.8
Manufacturing	1,885	199	10.6
Other	2,989	617	20.6
INTERNATIONAL AND UNALLOCATED	\$ 7,155	\$ 408	5.7%

114. *Id.* Investment for 1975 is divided by earnings for that year to show the percentage return on investment. This percentage is higher in developing countries than in developed ones, both for each industry grouping and in total. This indicates that firms investing in developing countries attempt to earn their returns over a much shorter period of time because of the relative instability of those countries.